Justice Mustafa Kamal

‘’Judicial Settlement and Mediation in Bangladesh’’

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Mr. Chairperson, Hon’ble Mr. Justice Y.V. Chandrachud, respected former Chief Justice of India. Hon'ble Judges of the Supreme Court of India, Hon'ble Chief Justice of Bombay High Court Mr. Justice Dalveer Bhandari and Hon'ble Judges of Bombay High Court, Hon'ble Dr. H.R. Bhardwaj, Union Minister for Law & Justice and Shri B.S. Saluja, Chairman and Secretary-General respectively of the International Centre for Alternative Dispute Resolution, New Delhi. Mr. Steve Mayo, Executive Director, Institute for the Study and Development of Legal Systems, District Judges of Maharashtra. Ladies and gentlemen.

I begin by thanking the sponsors of this Conference for inviting me to make a presentation on Judicial Settlement and Mediation in Bangladesh. I am deeply grateful to you for having given me this opportunity to share my humble experiences with you.

Non-formal settlement of legal and judicial disputes outside the formal judicial system is as old as dispute itself in the Indo-Pak-Bangladesh sub-continent. But a court-sponsored alternative dispute resolution mechanism functioning within the formal judicial system is a recent phenomenon. As societies in this region gradually shed off their basically agrarian character and transform themselves into industrialized, semi-industrialized and commercial societies, pressures mount on the traditional courts for a formal adjudication of a variety of disputes hitherto uncommon. Courts are either unprepared or poorly prepared to meet the challenges of a horrendous litigation explosion. Procedural laws, not getting any the simpler, become more fat and complex. Inevitably the result is a case jam. backlog of cases, more delays, more expenses, more frustrations and a more bitter look at the justice delivery system by the common man. An exclusively adversarial system had long outlived its utility, but the alternative method of consensual dispute resolution has not yet widely crossed the minds of Judges. lawyers and the litigant public. Alternative dispute resolution by way of mediation, arbitration or conciliation is not a panacea of all evils. It is not a substitute for formal adjudication of disputes by the courts. It is an alternative route to a more speedy and less expensive mode of settlement of disputes. It is not a compulsory method of settlement, as trial of a case is, but a voluntary and willing way out of the impasse. India, Pakistan and Bangladesh, by amending their

respective Codes of Civil Procedure, have been obliged by circumstances to give ADR the recognition it deserves, namely, a place in the formal judicial system itself.

In Bangladesh ADR started moving its feet only 4 years back. I retired as the Chief Justice of Bangladesh on the 1st January, 2000 when I came into contact with Mr. Steve Mayo, Executive Director of the Institute for the Study and Development of Legal Systems (ISDLS). He explained to me the ba~.1L features of ADR in his home town San Francisco of California. He also said that ISDLS was then operating in a dozen countries outside the U.S.A. to help implement the ADR in harmony with the legal and judicial systems prevalent in each country. If Bangladesh was interested, ISDLS could help.

As a first step, he suggested, a small Legal Study Group (LSG) may be formed. I lost no time in forming a 5-man Legal Study Group with myself as the Chairman. At the invitation of ISDLS we all five visited San Francisco in February, 2000 and gained a firsthand insight into the working of ADR in all tiers of courts in San Francisco and San Jose. A large team of Judges and attorneys associated with ISDLS made a return visit to Bangladesh in April 2000. The Ministry of Law and the Supreme Court arranged a day-long meet and sessions of discussions. Apart from our distinguished visitors, the then Minister of Law, the then Chief Justice of Bangladesh, all Judges of both the Appellate and High Court Divisions of the Supreme Court, members of the Legal Study Group and an assortment of Assistant Judges. the lowest tier of subordinate judiciary, took part in the meet and discussions. The American Centre of Dhaka provided all the logistics. The ISDLS team explained in great details the actual working of ADR. The consensus that emerged out of the discussion was that it was premature to introduce ADR in Bangladesh at that stage by either enacting a new legislation or by amending an existing statute. Without preparing and sensitizing the Judges, lawyers and the litigant public in relation to the utility and usefulness of ADR, a legislation imposed from above will only create hostility and an unwanted controversy at the very start. We found that since 1985 the Family Courts Ordinance had given jurisdiction to the trial Judge to effect reconciliation between the parties both before and after trial. This Ordinance dealt with divorce, restitution of conjugal rights, dower, maintenance and custody of children. All Assistant Judges were ex officio Family Court Judges. For 15 years this Ordinance was in the statute book, but when we asked the Assistant Judges how much reconciliation actually took place, they drew a blank. Some of them said that they had effected reconciliation only in a few cases out of their own initiative. Some of them pointed out that they did not feel encouraged to undertake these departures from judicial work, because all reconciliations end up in a compromise decree for which they do not get any credit. They get a credit only when they complete a trial. It was then decided that as a first step three Pilot Family Courts would be set up at Dhaka Judgeship. Those Courts would exclusively effect reconciliation between the parties. The Chief Justice agreed that all Assistant Judges, irrespective of whether they are pilot courts or not, would get the credit of two trials for one successful mediation and the credit of one trial for two unsuccessful mediations.

That being decided, our next problem was the training of Assistant Judges as mediators. Judges are trained for conducting trials, not to effect reconciliation. These two functions require somewhat conflicting skills and aptitude. We took good advantage of the situation that we were not doing anything new or innovative, but were only activating some dormant provisions of a long-existing law.

A Project Implementation Committee was formed with Justice K.M.Hasan as Chairman. He later became the Chief Justice of Bangladesh and is now a former Chief

Justice. ISDLS then arranged an experienced Mediator of the Ninth Federal Circuit Court of the U.S.A Mr. William C. Rack to visit Dhaka and impart training on the principles and techniques of mediation to 30 Assistant Judges selected from all over Bangladesh, some lawyers and NGOs. The American Centre of Dhaka, the Ministry of Law and the Supreme Court provided all assistance. During the training for 3 days some members of the Legal Study Group. including myself, watched from the beginning to the end, what the subject matter of the training was, how it was imparted, what impact it made and how effective the training programme was. I also translated into Bangla from time to time the presentations of Mr. Rack. A number of role playing gave the trainees a real feel of the work. We selected 3 Assistant Judges from among the trainees to man the three Pilot Family Courts at Dhaka Judgeship. One of those selected came to me after the selection and told me, "Sir, you have damaged my career. I know the litigant people of my country. They will fight to the end. I shall sit in the Court without work. There will not be any mediation, nor shall I have the opportunity to conduct trial. My career is doomed." I gave him a bewildered chuckle and a pat on his back. The first two Pilot Family Courts at Dhaka Judgeship started functioning from the 1St June, 2000 while the next one started functioning from the 1st January, 2001. The Legal Study Group constantly monitored the performances of these Courts. We were getting instant and gratifying results.

We then felt that the Pilot Courts need to be extended outside Dhaka. There are 65 administrative districts and 65 corresponding District Judgeships in Bangladesh. All the contiguous districts are grouped together under 6 administrative Divisions. We decided to extend the training of Assistant Judges and we planned to bring them at each Divisional Headquarters for a day or two and impart to them whatever training we ourselves were capable of imparting to them. We visited each of the 6 Divisional Headquarters and assembled the Assistant Judges of each Division to receive mediation training from us, including role playing. We extended this training to 2 individual districts as well. With each training completed, we selected the appropriate Court and the appropriate Assistant Judge to be the Pilot Family Court and the Pilot Family Court Judge. Soon there were 16 Pilot Family Courts in 14 districts of Bangladesh.

All these efforts of ours were purely voluntary. Without of course the support and assistance of the American Centre at Dhaka, the Ministry of Law and the Supreme Court we could not have taken a single step to realize our action plan.

After a year of operation of the Pilot Family Courts, I convened a Conference of Pilot Family Court Judges of Dhaka, family court legal practitioners of Dhaka and the Legal Study Group at the Dhaka Judgeship. Some senior lawyers reported that they lost some part of their income because of speedy disposal of family cases by mediation, but they made it up by their income from other jurisdictions. A new group of young lawyers, both male and female, gave a hearty welcome to this venture and reported that their income had actually increased. It does not require the print or electronic media to spread the positive developments in the courts. The wind carries the news. Hapless women, receiving their dower and maintenance speedily after mediation told other women similarly situated about the speedy and less costly outcome of their litigation with their former husbands. The others rushed to the Court and these young lawyers told me that while a section of their case racks got empty very quickly without gathering dust, the other section got quickly filled up. Resurrected faith in the justice delivery system has done the trick. I called my recalcitrant Assistant Judge and asked him how deep was the damage I caused to his career. He gave me a regretful smile and said, `Sir, people make a bee-line before my

Court seeking mediation from me." That young Assistant Judge turned out to be one of the best mediators. I was told of other strange happenings. Presiding Judges of other adjoining courts of higher jurisdiction flocked to the Pilot Family Court Judges and asked them how their disposal was so phenomenal. When they explained they requested them to convey to me that they too would like to have similar powers with assurance that the disposal will be much quicker.

After about 2 years of the functioning of the Pilot Family Courts, we took a stock of the situation. In 2 years, all the family pilot courts had disposed of 83% at the highest and 35% at the lowest rate of all pending family cases. In total 1322 family cases had been disposed of by mediation. An amount of Bangladesh Taka 4,85,00,309/- had been realised from the defendants and made over to the plaintiffs. Through execution cases after decree these 14 district courts had realised in all non-family cases. in the corresponding period not more than Taka 30 lakhs

The new Minister of Law simply could not believe his eyes. ISDLS invited him to San Francisco to see for himself the working of ADR. He visited San Francisco with me in May 2002 and on October 30. 2002 he convened a day-long grand Conference of all District Judges, Presidents and Secretaries of all District Bar Associations, all past Chief Justices, the Chief Justice and all Judges of both the Divisions of the Supreme Court, all prominent lawyers of the country. all representatives of donor organizations and all lawyer ministers. ADR was the subject matter of discussion. I read the keynote paper. The whole assembly spoke almost in one voice about the need of introducing ADR in non-family disputes as well. An humble experiment with family courts for only 2 years had brought about a sea change in
attitude of all and sundry.

Then followed two epoch-making legislations, (1) The Code of Civil Procedure (Amendment) act, 2003,
enacted on the 27th February, 2003 and given effect to from the 1st July, 2003 and (2) Artha Rin Adalat
Am, 2003 (Money Loan Recovery Act, 2003). effective from the 1st May, 2003.

The Code of Civil Procedure was amended to introduce, through sections 89A and 89B, as in India and Pakistan, ADR through mediation or arbitration in all kinds of non-family litigations. Any time after a written statement is filed, if all the contesting parties are in attendance in the court in person or by their respective lawyers, (a) the court may mediate the dispute (b) or refer the dispute to the engaged lawyers of the parties (c) or to the parties themselves where no lawyer has been engaged (d) or to a mediator from a panel prepared by the District Judge in consultation with the President of the District Bar Association. If the dispute is referred to the respective lawyers, they may with the consent of their clients, appoint another lawyer not engaged by the parties, or a retired judge. or a panel mediator referred to earlier or any other person whom they seem to be suitable to act as a mediator. Mediation shall mean flexible, informal, non-binding, confidential, non-adversarial and consensual dispute resolution process in which the mediator shall facilitate compromise of disputes without directing or dictating the terms of such compromise. If the mediation results in a compromise decree both the plaintiff and the defendants will get back the money they spent on court fee. Failure of mediation within a stated or extended period will bring the case back to the trial Judge for trial. If the court itself was the mediator when the mediation failed, the trial will be held by another Judge of co-equal jurisdiction. Whatever transpires in the mediation proceedings is not receivable in evidence at the trial of the case in question or at the trial of any other case between the parties.

In the Money Loan Recovery Act. 2003 the mechanism of ADR selected is a Settlement Conference to be presided over by the trial Judge and to be held in camera. The Court Fees paid by the parties will be refunded if the Settlement Conference results in a compromise decree. The Conference and its proceedings are confidential. If the Conference is not successful the case will be tried by another Judge of co-equal jurisdiction, provided the Settlement Conference Judge has not been transferred in the meanwhile.

To enact legislation is one thing and to put it into lively practice is another. Except the Assistant Judges. Judges of the higher tiers, lawyers of all categories, other interested persons in mediation had no practical training on mediation. Again it fell on me to travel throughout the nook and corner of Bangladesh and to hold training sessions on mediation for Judges of higher tiers, lawyers and other interested persons. It took me several months to complete the process. There are about 40 Judges who have exclusive jurisdiction to try Money Loan Recovery Cases. 1 trained them all at Dhaka at the Judicial Administration Training Institute (JATI).

The civil courts started mediation in non-family disputes since the 1st July, 2003. As of 31st July, 2004 3.432 non-family litigations have been disposed of by mediation. In Money Loan Recovery Cases, the Loan Courts have disposed of 13,157 cases from the 1st May, 2003 to 31st July, 2004 and have realized Taka 996 crores and 5 lakhs from the defendants and handed over the same to the plaintiffs who are principally banks and financial institutions. The realization is 10 times higher than the realization by execution cases over the last 10 years. I am neither impressed nor depressed by these figures. I remain optimistic that the wind is blowing in the right direction. ADR is catching up the people's imagination. It is a real phenomenon in the law courts now and not just a figment of imagination.

I am not contented, however, with the state of training in the art and technique of mediation in Bangladesh. Only a handful of persons have so far been brought into the training net. The area of operation has to be extended, more and more lawyers have to be brought into the training net, Judges should be disengaged altogether from mediation work as early as possible and Training Institute for Mediators should be established. No one should be appointed a mediator unless he/she has a certificate from the Institute. You can see that we have a lot of grounds to cover. We have just made a beginning of the beginning.

I shall conclude by making a couple of observations.

First, like all innovative exercises, ADR needs a motivator or an army of motivators throughout the country. For practical reasons, it is not possible for a sitting Judge to spare the time, energy and effort to assume this role. Retired Judges who are respected by both the Bar and the Bench should come forward to give leadership. That will be paying back to the Bar and the Bench a small part of the debt they owe to the Bar and the Bench for the honour given to them during their working life. The same goes for elderly senior lawyers. Nothing can take root by a sporadic effort of a few years. At least two or three generations of lawyers and Judges must give their sustained labour to make ADR an integral part of their judicial system.

Secondly, a well thought-out action plan is necessary to make ADR a success. It is not desirable that an avalanche of mediation should descend upon the Courts all at a time. The Courts should refer relatively simple cases first to the mediators. A simple case is one that requires the least judicial effort to adjudicate upon facts and law. A relatively complex case is one that requires a little more judicial effort to discover the facts and law. A complex case is one that requires the maximum judicial effort to ascertain facts and law. Following this criterion, simple cases should be referred first. With

experiences gained, relatively complex cases can be referred to mediation. All countries can wait before complex cases can be referred to mediation. It should not be the aim of any one to achieve anything overnight.

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