

ALTERNATIVE DISPUTE RESOLUTION



**Community-based mediation as an auxiliary to formal justice
in Bangladesh: the Madaripur Model of Mediation (MMM)**



Penal Reform International

M e d i a t i o n

**is a way of addressing disputes that is
voluntary,
informal,
cost-effective, participatory,
compromise-based,
local
and
empowering.**

Why Are People Denied access To Justice?

Everyone has a right to access formal state justice. Equal access to justice is one of our most basic rights. However, many people are denied or cannot access the formal system on an equal level with others for reasons including:

- Geographical distance from a court;
- Costs involved in taking a case to court;
- Inability to secure adequate legal representation;
- Backlog in cases at the courts which leads to long delays and thus, time away from home and work;
- Lack of information or exposure to the law;
- Social taboos and stigma surrounding certain crimes and social alienation which results when cases are publicized;
- Trepidation and fear of the complexity of the criminal justice system and of its agents;
- Non-availability of translators and lack of communication resulting from language differences;
- Uncertainty about mechanisms of the justice machinery which are seen as alien;
- Blatant and subtle discrimination against women, minorities and the poor amongst agents of the justice system.

Thus, even as the inherent value of the principle of the rule of law and equality before the law is proclaimed in the justice system, alternative dispute resolution (ADR) mechanisms such as mediation are seen as being of immense benefit for those who cannot access the formal system or simply want to avoid the complexities of the formal process for reasons given below:

- They are less officious, less time consuming and less expensive;
- They are less daunting than the formal justice system;
- They are founded on locally-based principles and values;
- They are participatory and empowering;
- They are non-confrontational and non-judgmental;
- They are locally-based and mutually beneficial;
- They seek to restore community ties and relationships.

Alternative Dispute Resolution in Questions

Q Do ADR mechanisms such as mediation undermine or replace the formal system?

A No, because both the formal and informal systems should work collaboratively. For example, if a dispute cannot be resolved by or through mediation, the parties can take the issue to court.

Indeed, in many parts of the world, courts are advocating that litigants and disputants seek to resolve their disputes outside the court through methods such as mediation and conciliation and to take their case to court only if mediation fails. On the other hand, as many disputes are resolved through ADR methods, the existence of non-formal mechanisms reduces the burden on the already congested courts.

Q Is ADR second best justice for those who cannot afford formal justice?

A ADR mechanisms including mediation are based on the principle that parties should reach a mutually acceptable solution rather than spend time, energy and money on a court case. The principles applied in the formal system including equality, non-discrimination and neutrality are also applied by ADR mechanisms so that it is not second best.

Informal justice should never be seen as a means of excluding the poor or most vulnerable from the formal system on the basis of their lack of knowledge or awareness of the court system.

Ideally, both the formal and informal structure should exist within one justice system in order that everyone can access both structures regardless of education, class, ethnicity, gender or caste. At the same time, education and awareness raising are vital to ensure that the poor and illiterate are aware of their rights and can confidently access the formal system.

Q How can I be sure that a Mediator has the competence to deal with my case like a lawyer does in court?

A All Mediators are trained in the law and in human rights as well as how to mediate in a dispute. They are also supervised and provided with ongoing support to ensure that they apply the law, explain legislation in a meaningful way and encourage disputants to resolve their conflict in accordance with the principle of equality before the law and human rights standards.

Q Why would women access ADR?

A Lack of exposure to and awareness of the processes of formal justice coupled with illiteracy and an inability to comprehend the documentation required by the formal legal system has resulted in few women accessing the formal justice system.

Moreover, many women suffer injustice and abuse in silence for reasons of shame, fear of social isolation and an inability to be heard. ADR provides women with the opportunity to take their case to a locally based body that respects and understands their concerns and helps to resolve disputes in a non-discriminatory, simple and clear manner.



Q Can all disputes be resolved through ADR mechanisms including mediation?

A No some offences cannot be dealt with through ADR. These offences include serious human rights violations, grave criminal offences and offences involving public policy.

Q So what types of offences are suitable for mediation?

A Locally based disputes such as family, land or business disputes. Petty criminal disputes can also be dealt with through mediation.



The Madaripur Model of Mediation

Let us consider the experiment with accessible justice undertaken in Bangladesh by the **Madaripur Legal Aid Association** (MLAA) for over a decade. The successes of the **Madaripur Model of Mediation** (MMM) developed by the MLAA has led many legal aid NGOs in Bangladesh to adapt the Madaripur model or apply its principles in work with the poor.

The Context

In common with many other countries around the world, the legal system of Bangladesh is extremely formal, complex, urban based, time consuming and financially draining. Consequently, for many Bangladeshis, particularly the poor, illiterate and disadvantaged living in rural areas, the inability to enforce their own rights through the formal justice system has ensured that many suffer injustice in silence. Conversely, the level of community awareness of legal rights and how they might be enforced is extremely limited particularly in rural areas. However, an auxiliary to the formal system exists in some countries in the South Asia region including Bangladesh.

Shalish is an age-old, traditionally based system of mediation and dispute resolution in rural Bangladesh in which disputants, community members and village elders gather locally to mediate a conflict and arrive at a resolution agreeable to all involved parties. Historically, village elders and elites along with men of high standing in the community were voluntary third-party mediators of local disputes. Over time, the authority to conduct shalish was transferred to local government bodies such as the Union Council or Union Parishad.

Originally, Shalish was an effective means of resolving local disputes in an amicable, cost-effective manner whereby fractured relationships were restored.

However, gradually the shalish system was subject to exploitation at the hands of the powerful elite who used their positions to enforce discriminatory practices to maintain the status quo and local patronage system. Shalish mediators or *shalishkars* imposed decisions rather than negotiated agreements between disputants and local communities lost confidence in the shalish system and declined to take their grievance to the body.

People were subsequently left with two options - using the expensive and time-consuming courts or to putting up with their grievances.

While the ideal was still being able to take their cases to court where they would be assured equality before the law, the challenge was to develop non-formal locally accessible mechanisms in support of the courts where international principles of equality, fairness and non-discrimination would be upheld.

Finding a Solution

The Madaripur Legal Aid Association was established by a group of volunteers from Madaripur in 1978 to provide legal aid to the rural poor and disadvantaged people who were otherwise unable to access the formal system of justice to enforce their rights for reasons of lack of resources and legal representation. While providing legal aid, the organization became aware that provision of such services had a limited impact in ensuring justice for the poor. In seeking a more sustainable and cost-effective approach, the organization shifted focus from legal assistance to the development of ADR mechanisms that would assist the poor and those most vulnerable to abuse and exploitation to secure justice for themselves. Rather than import and impose a new model, the volunteers agreed to revitalize, develop and reform the traditional mechanism of shalish based on the principles of fairness, equality and non-discrimination in accordance with international human rights standards and voluntary service.

Implementing the Solution

In order to make shalish a success, rural people had to be convinced of the value and effectiveness of a revitalized shalish model. To work in a concentrated and intensive manner with local communities, Madaripur and Shariatpur Districts as well as a part of Gopalganj District were selected as focus areas. In utilising local people, MLAA gained the confidence of communities by encouraging local contact persons to disseminate information on mediation as a viable auxiliary to the court system and through the gradual formation of locally based mediation committees whose members attended courses on human rights and the law. Given the reality that women were subject to greater social and economic injustice in rural areas than men, the selection of the traditionally male-dominated shalish changed over time with the preferred selection of women taking on a heightened importance.

All members of local mediation committees are volunteers. They are not paid by the organization for their services as mediators. Mediation committees exist at the two lowest local levels of local government administration:

At village level, there are 450 Mediation Committees. Each committee is made up of seven to ten members with a total of 1,164 women village-level members and 3,282 male village-level members. At the second level of union (in which one union comprises up to twenty villages), there are nine mediation committees each with a membership of between eight to fifteen members each. A representative of each union committee is a member of a central or apex union committee. There are 50 apex union committees with a total membership of 658 persons including Mediation Workers.

An MLAA appointed Mediation Worker provides the necessary administrative and technical support to the union mediation committees. They are responsible to:

1. Receive applications for mediation
2. Send letters to the involved parties
3. Arrange mediation sessions

4. Supervise mediation sessions

5. Follow-up and monitor the solution agreed at and report to head office.

At the thana level (representing between five to fifteen unions), a thana Mediation Supervisor is responsible to support and supervise all union Mediation Workers. Thana-level Mediation Supervisors work with the head office-based Mediation Coordinator to ensure consistency in application of mediation support. An MLAA monitoring, evaluation and research cell maintains updated information on mediation procedures and data on sessions and outcomes. To date, approximately 50,000 disputes have been resolved successfully through local level mediation in these three districts since 1978.

Finding Resources

MMLAA realized that the successful development of a local-level mediation system required both financial and non-financial resources. Donor and support agencies were approached including Penal Reform International (PRI), which collaboratively trained 1,500 mediation committee members in 1999-2000, with the support of the British Government Department for International Development (DFID). Other support agencies included The Asia Foundation, Christian Aid, Royal Norwegian Embassy, Royal Danish Embassy and NETZ Germany. Over time, the organization strengthened and its model of mediation has drawn interest from both NGOs and government officials.

Training Mediators and Raising Public Awareness

To ensure that mediation committees observe international human rights standards and maintain a high level of professionalism in mediating disputes, the MLAA facilitates several training sessions each year. Materials including handbooks and two training manuals (one in Bangla and one in English) are used to train and orient mediators.

Training focuses on the mediation process, techniques of mediation, understanding relevant laws including the laws relating to family (Muslim Family laws), land and property and related issues including the Village Court Ordinance. As all mediation agreements must strictly abide by the relevant laws, committee members must have a good working understanding of all applicable legislation in order to ensure that they do not breach or transcend legal provisions. Human rights standards in relation to each issue are incorporated into the training.

To raise public awareness of mediation and citizens' rights, the MLAA organizes workshops on a yearly basis to discuss human rights issues with focus on the rights of women, children and workers.

The MLAA established a Training and Resource Center (TARC) in Madaripur which has become a national center for mediation, human rights and legal training.

Running the System

The system of mediation practiced by the MLAA emphasizes the importance of local communities resolving local disputes. Women are subject to various forms of discrimination which limits their social participation and denies them access to engage fully in all forms of economic and political life. Mediation committees face a challenge of seeking to ensure that all levels of discrimination against women and other vulnerable groups such as the elderly are not reflected in the mediation process while at the same time ensuring that the process is not abstract from the realities of daily life in rural communities.



Given the long history of male domination of shalish which often perpetuated rather than challenged injustices faced by women, the MLAA sought to ensure the full participation of women in shalish both as committee members and disputants. Currently, women make up over one quarter of the village-level mediation committee membership. Of 49,151 disputes MLAA mediated from inception to June 2002, 29,982 or 61 percent of disputants were women.

Women disputants approached the MLAA for assistance to resolve conflict of which:

- 45 % were about dowry
- 28 % were about family matters such as marriage and divorce, household maintenance or spousal disagreement
- 10 % dealt with minor assault
- 5 % revolved around land ownership and rights claims
- 5 % involved dispute over finances
- 3 % focused on community-level disputes
- 2% focused on a second marriage of husbands

Monitoring

With a view to ensuring the transparency, accountability and efficiency of mediation activists, the MLAA devised a system of supervision, monitoring and evaluation under a monitoring and evaluation cell. The cell operates at two specific levels:

- Monitoring through random sample review of mediation workers and supervisors monthly activity reports.
- Specific monitoring and evaluation of committees recognized as requiring additional support and assistance. The cell is required to produce a report to management on the performance of the committee for further action.

The whole procedure works like this:

1. Mediation Workers send monthly reports on their respective mediation committee to thana-level Supervisors.
2. Thana-level Supervisors review and evaluate the reports of all Mediation Workers and submit a report to the Mediation Coordinator.
3. The Mediation Coordinator monitors the activities of all mediation committees through the Supervisors' reports and sends a compilation report to the Chief Coordinator.
4. The Chief Coordinator is responsible to identify any problems or weaknesses in the work of the mediation committees and where support provided by Mediation Workers or thana-level Supervisors is not adequate, requests the Monitoring and Evaluation Cell to conduct an assessment of the committee or procedure in question with recommendations for action or follow-up.

What Does a Mediator Do?

A Mediator facilitates dialogue and discussion between two parties to a dispute to encourage recognition of the root cause of the dispute and ways to resolve it. During the course of a mediation session a mediator will act as a:

Referee who is neutral and guides the parties through the process in accordance with rules on mediation and within the boundaries of the law.

Moderator who must address any power imbalance between the disputing parties in order to uphold the principle of equality before the law without undermining the position of the stronger, more powerful party to the dispute.

Communicator who listens to both parties and directs them towards identifying ways to address their grievances which takes into consideration and respects the opposing party's views.

Diplomat who is neutral, non-confrontational, non-judgmental and encourages compromise.

Role Model who promotes principles including equality before the law, respect for others and equal opportunities to have one's views heard regardless of cast, race, religion, occupation, gender, political opinion, age or sex.

Negotiator who identifies layers of misunderstanding between disputants, peripheral issues or events involved in the dispute and encourages both parties to recognize the benefit of re-establishing talks and addressing all levels of grievance and misunderstanding.

Manager responsible to ensure that both parties are fully aware of their obligations under any mutual agreement and are satisfied with the outcome and willing to fully abide by it.



Advantages

Mediation enables a community to deal with its own problems in a culturally appropriate manner rather than pass on responsibility to an unfamiliar court.

Economic losses such as court costs and loss of earnings are not as severe as that for a court case as mediation is free and disputants are less likely to suffer a considerable loss of time in having a dispute mediated.

Disputants are active participants of the process who must ultimately agree on a solution rather than suffer the imposition and enforcement of a judgment.

Interaction in the mediation process has raised public awareness of and interest in human rights and questioning of discriminatory customs and traditions otherwise accepted and adhered to.

Adversaries can take their case to court if they are not satisfied with the mediation procedure or are unable to agree on a solution to the dispute.

Testimonies of disputants are not subject to judgment but are respected as the experience of the disputants that must be addressed to reach a solution.

Impartial Mediators encourage disputants and the communities in which they live to apply human rights principles in their daily lives.

Outcomes reached through mediation amount to permanent resolution of conflict.

Non-discriminatory procedures apply the principle of equality before the law and promote the involvement of women in securing their own rights and participating actively in community matters which affect them.

Each year, up to 5,000 local level disputes are resolved through mediation. Most of the disputes focus on around family and issues of scarce resources particularly land. In 2001-2002, 4,711 disputes were mediated of which:

- 36% were about family matters such as marriage and divorce, household maintenance or spousal disagreement
- 26% involved discord over the giving and receiving of dowry or bride price
- 13% focused on community-level disputes
- 11% revolved around land ownership and rights claims
- 10.5% were financial disputes involving goods and services

...High Attendance Rate

In 2001-2002, the MLAA dealt with 7,175 applications for mediation. Of these, 4,711 or 66% were resolved amicably through mediation, 562 (or 8%) were referred for litigation and in 1,902 (26%) cases, applications were dropped due to the absence of the disputing party or remained pending at the end of the year.

The high number of applications and indeed high rate of resolution demonstrates the acceptability, credibility and popularity of the model within its operation areas.



...Public Benefit

The impact of accessible justice on people's lives has been positive. Beneficiaries of the organization received Taka 19,568,864 (equivalent of US \$ 343,263) over the last four years in cash and kind through mediation of different disputes related to maintenance, dowry, finance and land. Recent studies on the impact of MLAA activities reveal the following benefits and positive developments that have taken place:

- People recognize the benefit of approaching the MLAA to resolve their disputes through the MMM.
- As the poor and powerless are able to obtain redress through mediation and restore their rights, they have become more aware of their rights and the remedies available to them.
- The ability to address various forms of discrimination through mediation and reform of the traditional male-bias system of shalish has encouraged a general questioning of unjust practices which has seen a reduction in the number of incidents of family disputes relating to marriage, divorce and polygamy.

Recourse to the Courts

In rural Bangladesh, people can choose to take their dispute to a local-level mediation committee or to the courts. Parties are free to institute litigation at any time during and after the mediation process if they are not satisfied with the process or the mediated outcomes. Mediation does not replace the courts and can never be considered as a substitute to the formal system. As the objective is to secure equal access to the rule of law, mediation must serve as an auxiliary to the formal justice system and should not be promoted as a substitute system for the poor and marginalised who have an equal right to access the formal system.

In some cases, a mediation committee will refer their case to the courts. While there is no specific legislation to enable the family courts to refer cases to the mediation committees, initiatives have been taken to introduce mediation in the family courts. In Bangladesh, as in many countries in South Asia, some family court judges are now directed by the Chief Justice to mediate family disputes.

While striving to ensure that everyone gains equal access to the courts and indeed equality before the courts, initiatives such as the MMM provide the poor and marginalised with a viable cost-effective opportunity to access justice.

Penal Reform International South Asia

PRI has been working in South Asia on penal reform and access to justice issues with local non-government organizations, relevant government institutions and key actors in the criminal justice system since 1994. A milestone South Asia regional conference was held in November 1999 in Kathmandu. The PRI South Asia Regional Office (SARO) was opened in Kathmandu in November 2001. The office aims to strengthen links between penal reform and criminal justice practitioners and stakeholders across the region, collaborating on initiatives for reform with local partner organisations. A second Regional Conference on Access to Justice and Penal Reform was held in Dhaka in 2002. With focus on under-trial prisoners, women and juveniles, representatives from the region identified regional and country-specific solutions with focus on the respective role of the police, courts, prison administration and civil society.

Currently, PRI's work in South Asia in Pakistan, Nepal, Bangladesh, Sri Lanka and India is focused on penal reform and access to justice initiatives including:

- Strengthening criminal justice system agencies and supporting penal reformers;
- Training of key criminal justice stakeholders including the police and prison officials on good practices and the application of international standards;
- Alternative dispute resolution methods with focus on community mediation;
- Mental health care for women and children and advocacy on recognition of the right to health care for such vulnerable prisoners;
- Legal aid to vulnerable prisoners;
- Work on mechanisms to divert juveniles away from the criminal justice system in accordance with international standards regarding juvenile justice;
- Mobile teams of trainers and regional training of trainers;
- Study tours, information exchange, research and publications on penal reform and access to justice issues in countries of the region.

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P E N A L R E F O R M I N T E R N A T I O N A L

PRI Offices

PRI South Asia Regional Office

GPO Box: 11424
Bansbari-3
Kathmandu - Nepal
Tel: +977 1 370 460 / 376 528
Fax: +977 1 376 528
Email: prikathmandu@penalreform.org

PRI London Office

Unit 450, The Bon Marche Centre
241-251 Ferndale Road
London SW9 8BJ - United Kingdom
Tel.: +44 (0) 20 7924 9575
Fax.: +44 (0) 20 7924 9697
Email: headofsecretariat@penalreform.org

Bangladesh Legal Aid and Services Trust (BLAST)

141/1 Segunbagicha
Dhaka-1000 - Bangladesh
Tel.: 0088 02 9349126/8317185
Fax: 0088 02 9347107
Email: blast@bangla.net

Madaripur Legal Aid Association (MLAA)

New Town, Madaripur - 7900
P O Box: 09 - Bangladesh
Tel: 00 880 661 55518/55618
Fax: 00 880 661 55192
Email: mlaa@bangla.net

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