

# **2013**

## **Legal Alert 2013**

### ***ENSURING ACCESS TO JUSTICE***

Access to justice has been defined as the right of individuals and groups to obtain a quick, effective and fair response to protect their rights, prevent or solve disputes and control the abuse of power, through a transparent and efficient process, in which mechanisms are available, affordable and accountable. [UNDP Justice System Programme]

In the ACCESS TO JUSTICE Final Report Lord Woolf observed access to justice position with regard to UK as follows: “The defects I identified in our present system were that it is **too expensive** in that the costs often exceed the value of the claim; **too slow in bringing cases to a conclusion and too unequal**: there is a **lack of equality** between the powerful, wealthy litigant and the under resourced litigant. **It is too uncertain**: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; And it is incomprehensible to many litigants. Above all it is too fragmented in the way it is organised since there is **no one with clear overall responsibility for the administration of civil justice**; and **too adversarial** as cases are run by the parties, not by the courts and the **rules of court, all too often, are ignored by the parties and not enforced by the court.**”

In UNDP Justice System Programme, Access to Justice Concept Note the following factors are identified as linked with ensuring access to justice:

#### **1. Substantive Legal and Rights Framework**

The establishment and/or existence of an adequate and appropriate national legal framework which guarantees citizens certain rights, as represented by both domestic and international legal documents;

#### **2. Institutions, Human Resources and Infrastructure**

Ensuring the necessary physical, supply and existence of justice institutions, including human resources, infrastructure and the practical functioning of such institutions, to effectively uphold guaranteed rights; and

#### **3. Knowledge and Attitudes**

Socializing laws and increasing knowledge and understanding of existing legal rights and relevant justice institutions, and building the concomitant cultural attitude underpinning demand for them.

Ensuring Access to justice is a never ending process, demanding constant supervision, and monitoring. As from the above observation of Right Honourable the Lord Woolf, it is clear that

courtiers like the UK are even trying to improve the access to justice situation. In Bangladeshi context, it is needless to say that substantial works are required in this area.

The country's justice system suffers from lack of Institutions, Human Resources and Infrastructure. The need for a separate secretariat with skilled manpower, which will ultimately be responsible for the administration of justice in consultation with the Hon'ble Chief Justice, Justices and Judges as applicable, is deeply felt by the insiders e.g. lawyers, judges and litigants etc. to the justice system.

Everyday, hundreds of new cases are filed. The present legal infrastructure is not adequate to dispose of the cases without causing substantial delay in most cases. In the context of the UK, as Lord Woolf states "There is a lack of equality between the powerful, wealthy litigant and the under resourced litigant." Wealthy litigants hires imminent lawyers who earned trust and respect over the years from hon'ble courts. This put them in an advantageousness position while presenting the case to the court. The same is true for most third world countries.

Denial from access to justice not only deters the litigant from enforcing his rights through court, it also deteriorates the rule of law situation and is also responsible for increasing illegal activities in any country. Much attention and allocation of resources are required.

**Ref:**

- 1. UNDP Justice System Programme, Access to Justice Concept Note**
- 2. ACCESS TO JUSTICE Final Report by the Right Honourable the Lord Woolf, Master of the Rolls published in July 1996**

## ***BENEFITS OF CHOOSING MEDIATION AS OPPOSED TO COURT IN BANGLADESH***

**Mediation**, as used in law, is a form of [alternative dispute resolution](#) (ADR), a way of resolving disputes between two or more parties with concrete effects. Generally an expert mediator assists the parties to [negotiate](#) a settlement. Parties may mediate disputes in a variety of matters, such as commercial, industrial, trade, investment, civil and family matters.

The term "mediation" means any instance in which a third party helps others to reach an agreement. More specifically, mediation has a structure, timetable and dynamics that "ordinary" negotiation lacks. The process is private and confidential, possibly enforced by law. Participation is always voluntary. The mediator acts as a neutral third party and facilitates settlement rather than directs the process.

An expert Mediator uses various techniques to open, or improve [dialogue](#) between disputants, aiming to help the parties to reach an agreement. Much depends on the mediator's skill and training.

### **The benefits of mediation include:**

**Cost** While a mediator may charge a fee comparable to that of a lawyer, the mediation process generally takes much less time than moving a case through standard legal channels. Taking less time means expending less money on professional fees and costs.

**Confidentiality** While court hearings are public, mediation remains strictly confidential. No one but the parties to the dispute and the mediator(s) know what happened. Confidentiality in mediation has such importance that in most cases the legal system cannot force a mediator to testify in court as to the content or progress of mediation. Many mediators destroy their notes taken during a mediation once that mediation has finished. Such confidentiality, however, has limited application as tactfully decided by the parties in case of the final settlement agreement.

**Control** Mediation increases the control the parties have over the resolution. In a court case, the parties obtain a resolution, but control resides with the judge and advocates, even often with the peskar, bench officers etc. Thus, mediation is more likely to produce a result that is mutually agreeable for the parties.

**Compliance** Because the result is attained by the parties working together and is mutually agreeable, compliance with the mediated agreement is usually high. This further reduces costs, because the parties do not have to employ a barrister/advocate to file execution proceedings. Besides, in case either party do not comply, the final settlement agreement is, however, fully enforceable in a court of law.

**Support** Mediators are trained in working with difficult situations. An expert mediator acts as a neutral facilitator and guides the parties through the process. The mediator helps the parties with practical information, shares experiences and indicates possible result in court; indicate different possible solutions to the dispute etc.

In addition to dispute resolution, mediation can function as a means of dispute prevention, such as facilitating the process of contract negotiation. Governments can use mediation to inform and to seek input from stakeholders in formulation or fact-seeking aspects of policy-making. Mediation is applicable to disputes in many areas:

Family [Prenuptial/Premarital agreements](#), Separation, [Divorce](#), Family [businesses](#), Estates; Workplace [Wrongful termination](#), [Discrimination](#), [Harassment](#), [Grievances](#), [Labor management](#); Commercial Landlord/tenant, Homeowners' associations, Builders/contractors/realtors/homeowners, [Contracts](#), [Partnerships](#).

The choice to go to mediation rests with the parties, all of whom must agree to attend. The parties must mutually select a mediator, either through referrals or directly. The mediation agreement should be drafted, laying out a number of critical items, including, but not limited to: the logistics of the mediation, the cost-sharing arrangement (normally 50/50), the mandate of the mediator, a provision for a written agreement if the dispute is resolved, acknowledgement of responsibility of the parties, whether the mediation will be confidential or of public record, how disclosure would operate — in advance or as required by mediator, the use of subsequent

processes if mediation is unsuccessful, the possibility of co-mediation and remuneration for the mediator.

During mediation, both the parties and the mediator have certain responsibilities. The parties must attend, as requested, all mediation sessions and participate in the process in good faith. The mediator should remain dispassionate and avoid becoming partial to one party or view.

While mediation cannot guarantee specific results, there are trends that are characteristic of mediation. Irrespective of country, jurisdiction, locality etc., mediation generally produces or promotes: Economical Decisions, Rapid Settlements, Mutually Satisfactory Outcomes, High Rate of Compliance, and Preservation of an Ongoing Relationship or Termination of a Relationship in a More Amicable Way, Workable and Implementable Decisions etc. These factors are very much true in Bangladeshi context. Hence, much attention should be given on mediation.

**Sources:** part of the information were taken from 1. [Wikipedia](#), the [free encyclopedia](#); 2. free dictionary by Farlex and other sources.