Gender Power and Mediation: Evaluative Mediation to Challenge the Power of Social Discourses

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DEDICATED TO

My dearly loved parents:
Saleh Ahmed Chowdhury, my father
Jahanara Begum, my mother
&
My benign, compassionate husband *Mohammod Lutful Kabir*

TABLE OF CONTENTS

LIST OF ACRONYMS

ABS	Australian Bureau of Statistics
ACAS	Advisory Conciliation and Arbitration Service
ADB	Asian Development Bank
ADR	Alternative Dispute Resolution
AG-AGD	Australian Government-Attorney General's Department
ASK	*Ain o Shalish Kendra*
BBS	Bangladesh Bureau of Statistics
BDT	Bangladesh Taka (currency)
BLAST	Bangladesh Legal Aid and Services Trust
BNWLA	Bangladesh National Women Lawyers' Association
BRAC	Bangladesh Rural Advancement Committee
CPC	Code of Civil Procedure
DLR	*Dhaka* Law Report
DMC	*Delhi* Mediation Centre
FCO	Family Courts Ordinance
FLA	Family Law Act
GOB	Government of Bangladesh
ICDDR, B	International Centre for Diarrheal Diseases Research, Bangladesh
ISDLS	Institute for Study and Development of Legal Systems
IVAWS	International Violence against Women Survey
IWRAW	International Women Rights Action Watch
LCB	Law Commission of Bangladesh
LJCBP	Legal and Judicial Capacity Building Project
MFLO	Muslim Family Laws Ordinance
MLAA	*Madaripur* Legal Aid Association
MMC	Malaysian Mediation Centre
NADRAC	National Alternative Dispute Resolution Advisory Committee
NAVSS	National Association of Victim Support Schemes
NCBPF	NGO Committee of Beijing plus Five
NFCC	National Family Conciliation Council
NFM	National Family Mediation
NGO	Non-Governmental Organisation

NMAS	National Mediation Accreditation System
PDI	Power Distance Index
PMC	People's Mediation Committee
PML	People's Mediation Law
PRC	People's Republic of China
PSA	Personal Safety Australia
RAM	Reformed ADR Movement
SMC	Singapore Mediation Centre
UK	United Kingdom
UNDP	United Nations Development Programme
USA	United States of America
WHO	World Health Organisation
WSA	Women's Safety Australia
WSS	Women's Safety Survey

LIST OF STATUTES

Name of Statutes **Country**

LIST OF TABLES

LIST OF BOXES

LIST OF FIGURES

PREFACE

The book is an excerpt of my PhD thesis, which was undertaken at Sydney Law School, the University of Sydney, Australia. The PhD degree was awarded in 2011 and no emendation of the thesis was required. The text deals with the practice of family mediation and some of the challenges that may hinder its effective use by marginalised groups in a society. Those challenges include gendered power disparity and family violence, especially towards women, and the discussion extends to how the challenges can be overcome through a practice of evaluative mediation to provide fair outcomes for women.

While other contemporary texts on mediation focus on Western style facilitative mediation and its limitations in attaining fair justice for women suffering gendered power disparity and family violence, this text emphasises an evaluative mediation style that is embedded in Eastern social practices. Instead of focusing on gendered power disparity and family violence as limitations on the practice of facilitative mediation, this book will detail the practice of evaluative mediation which can provide fair justice to women despite the presence of gendered power disparity and family violence in a society.

This single authored book has some unique features that distinguishes it from, and makes it complementary to, other books on mediation in the market. One of the book's most distinctive features is that unlike other conventional books, which focus on Western style facilitative mediation, this book pays particular attention to evaluative mediation and its practice that may solve many unresolved challenges for facilitative mediation. Also unlike other contemporary books on mediation, this book not only discusses different theories of power and equity in mediation, it also includes a number of verbatim quotes from different mediation sessions to demonstrate how those theories are operationalised in a real life context. This is in sharp contrast with other available books on mediation in the market, which are written in the context of Western industrial societies.

Though not explicit from its title, this book deals with the issues in the context of Eastern developing countries, particularly in Bangladesh. The

material relates not only to Bangladesh but also other Eastern developing countries where the practice of facilitative mediation is criticised or even opposed by many scholars on the grounds of gendered power disparity and family violence. Thus, this book could serve as a core text in many developing countries' law school graduate courses on family dispute resolution. Some of its chapters could also serve as important reference material on the evolution and development of mediation in many developed and developing countries.

It would be my immense pleasure if the book can satisfy the need for students, scholars, and practitioners concerned in the effective use of evaluative mediation as a means to promote access to justice for marginalised groups in our society, especially for women.

Dr. Jamila A. Chowdhury

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CHAPTER ONE

INTRODUCTION: ACCESS TO JUSTICE, MEDIATION AND ITS FUNDAMENTALS

1.1 Understanding Access to Justice and Mediation

Justice delayed is justice denied. Justice should not only be speedy, "but above all things, [it should be] cheap" (Estey 1985, 1076). The decisive factors for effective justice are those which "make justice easier to access, simpler to comprehend, quicker to deliver, and more certain" (Atkinson 2004, 6).[1] Because of delays in justice, the system affords those who are "economically stronger retain[ing] possession of the subject of the dispute over a longer period of time," who are "least liable to injustice" and denies the rights of those who are "most exposed to oppression" (Estey 1985, 1072–76). In fact, "[t]o render the expense of legal process exorbitant, is not delaying—it is absolutely denying justice to all but the rich" (Estey 1985, 1076). Therefore, access to justice should be expeditious and less expensive to be inclusive of the economically disadvantaged.

Access to justice, in its narrower sense, means access to formal adjudicative process in the court system or access to litigation (AG-AGD 2009, 5). The problem of access to justice through adjudicative process or litigation was identified in the extract of *The Black Book* as early as 1820. But "things seem to have changed little since [then] in relation to the speed to which the litigation process can resolve civil disputes" (Fulton 1989, 40). Further, access to justice, in its narrower sense, echoes the doctrine of "social exclusion" in the society, which has been defined as "limited

[1] See also, Wilfried Scha'rf, *Report on the Proceedings of the Consultative Group Meeting on Access to Justice and Penal Reform in Africa*, 18–20 March 1999.

access to the full range of social citizenship rights, which precludes the poor from exercise of such rights" (Sommerlad 2004, 349). As revealed through the criteria of Atkinson (2004), it is not necessary that accessible justice is delivered only through formal adjudicative process. In its broader sense, access to justice, therefore, may be enhanced through some informal non-adjudicative processes. That is to say, access to justice includes justice delivered to all, especially the poor, through formal or informal non-adjudicative processes (Zander 2000, 5; AG-AGD 2009, 3). As is discussed throughout this book, there are different alternative modes of justice, as complementary for the existing formal adjudicative process that can be used to accelerate access to justice to those who would otherwise be deprived of it through formal judiciary due to their economic vulnerability.

The next question inevitably arises regarding the purpose of access to justice. Though scholars have defined "justice" from different viewpoints (Kelsen 2000), justice generally has the inherent meaning of being "fair." Therefore, access to justice is served when it satisfies mainly the following two purposes:

- ensuring that people have physical access to the existing justice delivery system (AG-AGD 2009, 3), such as court, tribunal, or any other informal forums delivering justice; and

- equally importantly, ensuring that the justice delivery system accessed by people provides a fair justice (Boulle 1996, 55). If the justice delivery system is not fair, mere physical access to court, tribunal or any other justice mechanisms may not ensure "real" access to justice.

However, there are two contesting views regarding the fairness of justice. While many scholars are concerned about "procedural" fairness or fairness in the grievance handling process (Landis & Goodstein 1986; Tyler 1988; Carney 1989), others are concerned about the "quality" of the outcome (Beauchamp 1980; Buttram, Folger & Sheppard 1995). Those who support procedural fairness argue that fairness in a grievance handling process leads to a greater satisfaction for the aggrieved person and also a fair outcome. Nevertheless, supporters of the latter view show their concern that a fair process may not end up with a fair outcome (Menkel-Meadow 1991, 220).

The idea of all these different views on access to justice has been categorically compiled by Lord Woolf (1995) in his *General Principles to Access to Justice* report. According to him, to ensure access to justice in a civil justice system, the system should:

- be fair and be seen to be so by:

  ensuring that litigants have an equal opportunity regardless of their resources to assert or defend their legal rights

  providing every litigant with an adequate opportunity to state his or her own case and answer his or her opponents

- be just in its outcome

- deal with cases with reasonable speed

- be understandable to those who use it

- provide as much certainty as the nature of particular cases allows, and

- involve procedures and cost that are proportionate to the nature of the issue.

Throughout this book, these criteria will be used to determine and compare access to justice delivered by different modes of justice with particular reference to mediation and litigation. However, before moving on to a detailed discussion on access to justice through mediation, the next section elaborates on the barriers to access justice through formal adjudicative process or litigation. Subsequently, this chapter answers whether mediation can be used as a better alternative means to fill the vacuum of litigation and uphold the notion of access to justice.

1.1.1 Barriers to Access to Justice

Available means of justice may not ensure its accessibility. To make a clear distinction between “availability” and “accessibility,” Hutchinson (1990, 181) rightly linked availability “to the question of whether a service exists” and access “to the question of whether a service is actually secured.” Therefore, the mere availability of justice carries only a little

meaning to justice seekers if it is not accessible to them. In other words, even when justice is made available in state courts, people may not have required access to it. Hutchinson (1990, 181) argues that "[t]he difference between availability and access is caused by 'barriers'," which Rhode (2000–01, 1787) calls "procedural hurdles" that "may prevent the have-nots from translating formal rights into legal judgment."

Scholars have identified various factors as "barriers" to access to justice through litigation. When discussing barriers to access to justice, Macdonald (1990, 298–300) broadly identified two different types of barriers: "subjective barriers" and "objective barriers." Subjective barriers relate to intellectual and physiological barriers including "age, physical or intellectual deficiency … the attitude of state functionaries such as the police, lawyer and judges" (Macdonald 1990, 300). The "objective barrier" relates to "purely physical barriers" including geographic dispersion of courts, availability of claims officers and lawyers etc., while other objective barriers are "cost of obtaining legal redress," "delay in legal proceedings" and "structural complexity of the legal system" (Macdonald 1990, 300). According to Macdonald (1990, 299–300):

> Because psychological and intellectual barriers go to the very substance of what we mean by justice, the metaphor of barriers is inapt to describe them … For obvious reasons, it is these objective barriers, which most conveniently fit the instrumental metaphor of barrier, and hence are on the agenda of reformers.

Others scholars also identify the most important objective barriers as delay and cost (Tate 1979; Dickson 1989; Rhode 2003–04). The predominant problem of delay in litigation vividly persists in many developing countries (Chowdhury 2005; Agarwal 2009). The "existing judicial system cannot ensure justice for the poor; many people are never produced before the court because of their poverty and the loopholes in [the judicial] system"[2] (Asian Development Bank 2003). As women are the poorest section of many developing countries, they have particular problems of

[2] The Minister of Law Justice and Parliamentary Affairs, Bangladesh, Barrister Moudud Ahmed addressed as chief guest at the inaugural function of a division-level training workshop on "Mediation techniques: Alternative Dispute Resolution (ADR) in the civil justice delivery system in Bangladesh" held at a city hotel on July 24, 2003.

access because of their reduced ability to bear the costs of justice (Golub 2003, 6; Asian Development Bank 2004; Meene & Rooij 2008, 16). Therefore, "the formal legal system has no attraction for the people especially women" (USAID 1995). The following sub-sections discuss in more detail the objective barriers which limit access to justice through a system of trial.

(a) Backlog of Cases and Delay in Disposal

The trial system takes a long time to make final settlement of disputes (Pearson & Thoennes 1984, 498). Access of the poor and disadvantaged to the formal justice and legal entitlements in courts is limited in many developing countries because of a huge backlog of cases, consequent delays in the disposal of cases, and high litigation costs (Asian Development Bank 2002; Ameen 2005a; Agarwal 2009). For example, in 2006 only 148,563 cases were disposed of from a total of 617,059 placed before the district courts of Bangladesh and therefore 468,496 cases were left pending for disposal at the end of the year (Supreme Court of Bangladesh 2008, 85). Similarly, in 2010, 31 million cases were pending in different Indian courts, amounting to a case load of 2,147 cases for each of the 14,576 judges available in the Indian judiciary at that time (Russo & Katzel 2010, 87). The backlog situation is even more serious in other developing countries. For instance, as reported by Calleros (2009, 172), the volume of total case backlog in Brazil once reached an unmanageable level of 4,850 cases per judge. The situation was even worse in Egypt where nearly 8,000 cases were pending per judge in 2000. Due to such a high case load, clearance rate of pending cases was only 36 percent in Egypt, compared with 80 to 100 percent attained by other developed countries (Ikram 2009, 299). Similar problems of case backlog also exist in Tanzania, Pakistan, Sri Lanka, and many other developing countries (Cheema 2005, 171; International Monetary Fund 2010, 158; Freedom House 2010, 577; Rios-Figueroa 2011, 313). If the current rate of disposal through a system of trial continues, many developing countries cannot expect to mitigate this backlog and resulting delays.

Delays in litigation not only retard justice to those in the trial process, but such delays even discourage two-thirds of the plaintiffs from entering the formal court process (UNDP 2002, 9). In some developing countries, delay in the trial process "[h]as reached a point where it has become a factor of injustice, a violation of human rights. Praying for justice, the parties become part of a long protracted and torturing process, not

knowing when it will end" (Alam 2000). Sometimes delay in courts is coupled with uncertainty. Of those interviewed in a survey conducted by Transparency International, Bangladesh (2004), 53.9 percent of plaintiffs/defendants were uncertain about when their cases might be resolved. As stated by a former Chief Justice of the Supreme Court of Bangladesh:

> Our legal system has thus been rendered uncaring, non-accountable and formalistic. It delivers formal justice and it is oblivious to the sufferings and woes of the litigants, of their waste of money, time and energy and of their engagement in unproductive activities, sometimes for decades. (Kamal 2005b, 137)

Delay may also have an impact on outcome. When people are finally granted a hearing, the end result may not be just because "the longer the period from the time of the events which are the subject matter of the action to the time of the trial, the harder it may become to prove the facts of the case" (Astor & Chinkin 1992, 33). Therefore, due to delay, the existing trial systems in many developing countries fail to provide justice to their citizens within a reasonable range of time and quality of outcome.

(b) Exorbitant Cost and Exclusion of the Poor

Apart from case backlog and delay, the high-cost of litigation also restrains access justice for the poor (Tate 1979; Dickson 1989; Asian Development Bank 2002; Rhode 2003–04). As the disposal of cases is delayed in many developed countries, total charges paid to the lawyers increase with consecutive court appearances (Chowdhury 2011). As indicated by Bergoglio (2003, 49), there is a negative relationship between judicial costs and rates for eviction in Argentina. The extent of such negative relationship is higher for cases where a large number of litigants represent the ordinary people of the society (Bergogilio 2003). All these judicial costs pose an additional burden and may cause economic hardship to the poor. As cited by Khan (2006, 64):

> The high cost of litigation is a challenge, which judiciary has made attempts to meet without any spectacular success. Even after decades of independence, the poor, backward and weaker members of society feel that they do not have equal opportunities for securing justice because of their socio-economic conditions.

Sometimes, the cost of litigation is further increased by the cost of bribes. For instance, in Bangladesh, most parties (63 percent) have no option but

to bribe court officials to accelerate the disposal of their cases (Hasan 2002, paragraph 7; Huq 2005, 102–03; Transparency International 2007, 181). During interviews conducted by Transparency International in Bangladesh, 88.55 percent of respondents agreed that it was almost impossible to get quick access to justice from the courts without using financial incentives or some other forms of pressure (Hasan 2002, paragraph 10). In fact, particularly in developing countries "increasing expenses of litigation, delay in disposal of cases and huge backlogs" in the legal system may have "virtually shaken the confidence of people in the judiciary" (Hasan 2008a). Therefore, even if formal judiciary is literally open for every citizen who may seek justice, a hidden barrier of exorbitant cost may keep the access to formal justice out-of-reach for the poor and disadvantaged section of the society.

(c) Inadequate Availability of the Formal Justice-Providers

Though many of the developing countries struggle against an acute backlog of cases and a delay in the delivery of justice, poor financial capabilities may limit their ability to engage more judges to clear such backlogs. For example, at present, there are only 77 Supreme Court [justices], and 750 other judges to dispense justice to a population of nearly 150 million people in Bangladesh (Transparency International 2007, 181). Therefore, only 5.5 judges in the lower judiciary serve a million people. This is still below the rate attained by other neighbouring countries like India. In 2008, India had fourteen judges per one million people. In 2001, the number of judges per one million people was 0.6 in Peru, 0.5 in Chile and 0.36 in Brazil (Calleros 2009, 170). The scarcity can be better understood if we compare the figure with the judges to head of population ratio of some other developed countries like Australia, the UK, and the USA. For example, the USA and the UK have 160 and 110 judges per one million of population respectively (Singh 2002, 155). Therefore, the situation of under-staffing in many developing countries is severely restricting ordinary citizens from accessing justice from their formal judiciary.

(d) Procedural Complexities and Large Contingent of Illiterates

Among the barriers to access to justice identified by scholars, sometimes the complexity of the legal process gets special mention (Macdonald 1990). Literature shows that litigation follows a much more complex procedure than mediation (Ruth 2006). The complexity of the formal court

system makes its procedure most difficult to comprehend for poorly educated, illiterate women who are ignorant of this system due to their lack of experience beyond the four walls of their home. It has been shown that women in many developing countries do not understand what is happening inside the courtroom and therefore do what their lawyers tell them to do (Roger 1990; Wisconsin Lawyers 2009).

For instance, in Bangladesh, procedural complexity in dealing with civil disputes severely affects a large number of plaintiffs who do not have sufficient literacy to have the minimum understanding of this process (Chowdhury 2005). Complexity in litigation goes one-step further because witnesses are sometimes hired to fabricate cases. In one survey conducted by Transparency International, Bangladesh,[3] hiring of witnesses was reported by 19.8 percent of the respondents involved in litigation. The 28.6 percent of urban households who reported about hired witness was markedly higher than the 18.9 percent of rural households. This type of fabricated witness can destroy any remnant of faith and honour remaining between the parties. The primary objective appears to be simply to champion their opponent rather than making any amicable or fair settlement of their dispute.

The extent of the complexity extends even further when litigants have to go back and forth to different courts to settle different facets of a single dispute. For instance, in Kenya, cases on the distribution of marital property is dealt with by High courts and Magistrate courts for Christian marriage, by High and Islamic courts for Muslim marriage, and by District Magistrate courts for conventional marriages (Ellis 2007, 65). These complexities may lead to further delay and promote a high cost of legal

[3] "Survey on Corruption in Bangladesh" conducted for the Transparency International Bangladesh by the Survey and Research System, *Dhaka*, Bangladesh, with the assistance of the Asia Foundation, Bangladesh. The survey was divided into two phases: Phase I consisted of a "pilot study" to ascertain the nature, extent and intensity, wherever possible, of corruption, and the places where corruption occurs. In the pilot study, a small-scale national household survey was undertaken to obtain information on public delivery services and their corruption in providing those services. This study was performed in six different public sectors among which the judiciary deserve a particular mention. Phase II was a large-scale survey to provide baseline information on corruption in a sample of 2,500 households.

representation, without which it becomes virtually impossible for ordinary people to afford court processes.

(e) Limited Access to Legal Aid

Legal aid can help to resolve disproportionate access to justice based on economic power (Tate 1979; Mayer 1987; Dickson 1989; Neumann 1992; Mack 1995; Rhode 2000–01). The practice of government legal aid programmes dates back to fourteenth century Europe when Henry VII waived court fees for poor litigants, and empowered courts to provide "legal representation" by appointing lawyers for poor clients (Johnson 1994). In 1960, the United States of America experienced a new concept of legal aid funding which included not only provision of legal advice and legal representation in the court but also provision of legal information and education to make people more informed about their rights. Similar concepts were later introduced in Australia, Canada and other parts of Europe (Blankenburg 1997). Whatever form a legal aid may take, its availability affects the ability of poor people to access justice through litigation (Tate 1979, 906; Dickson 1989, 3). Further, adequacy of legal aid is also important because otherwise many litigants who are theoretically entitled to service from state appointed lawyers, may not get quality service or suffer long delays if "court appointments are [considered as] a financial loss for lawyers" (Mansnrus 2001, 102). Thus, availability of adequate legal aid may help to relieve a part of the cost burden from the shoulders of the poor by enabling them to get free services from lawyers and subsidies to cover other court charges (Mayer 1987; Neumann 1992; Mack 1995).

However, the main problem relating to legal aid remains in its limited access to the poor due to its scarcity, and the ignorance of the poor about its availability. Such scarcity of legal aid funding from many developing country governments make access to justice extremely difficult for the poor (UNDP 2002, 43; Siddiqua 2005, 71). Though the situation and the nature of cases dealt with vary in different countries, the situation is worse in most of the developing world. For example, in 2005 the Chinese government funded legal aid was sufficient to serve, at best, only one-third of the total population who were in need of it (Hualing 2010, 172). In Bangladesh, only 5 percent of the family cases have access to government provided legal aid (Chowdhury 2011). Similarly, the demand for legal aid far outweighs its supply in many developing countries like Brazil, Vietnam and other Central Asian countries (Mariner, Cavallaro & HRW

1998, 67, Joseph & Najmabadi 2003, 373). Scarce legal aid may substantially increase the number of unrepresented litigants at courts or cause that "some people suspected of committing serious criminal offences may not face trial" (Aldous 2008, 403). Therefore, in many developing countries, formal courts remain only as a means to ensure justice for the affluent members of society.

As formal court procedures remain inaccessible to many poor and disadvantaged people of the developing world, they could easily be deprived of justice altogether. Thus, the need to find alternatives which provide access to fair justice for the economically vulnerable is evident. Given all the major limitations of the formal court system, mediation could be a good "complementary method" for ensuring access to justice in poor developing world countries which commonly face huge backlogs in their judiciaries and can only provide limited access to legal aid. The following section elaborates on how scholars observed the importance of mediation over trial in dispensing justice and why they have argued for mediation as a better alternative for access to justice by the poor and disadvantaged.

1.1.2 Mediation: An Efficacious Means of Access to Justice

Mediation is an alternative dispute resolution method adopted in many jurisdictions in which an impartial third party helps individuals to resolve their disputes, without having any power to impose a binding solution (LeBaron 2001, 121). One of the benefits of mediation is that it addresses court backlogs by providing cheap and accessible methods of dispute resolution for the poor (Folberg 2004, 20; Stockdale & Ropp 2007, 37; Gold 2009, 224). "It is estimated that one dollar spent on mediation will cost three for arbitration and fifteen for litigation," thus, "[a] consensus base[d] process is proving to be cost effective" (Hoffman 1993, 12). Mediation in community dispute centres may even be provided free of cost (Folberg 2004, 20; Chowdhury 2011, 229). This is in sharp contrast with the barrier to access to justice in terms of the high cost of litigation. Other scholars have also demonstrated the cost advantage of mediation in terms of litigation (Crosby, Stockdale & Ropp 2007, 37). As shown in Table 1.1, a survey of 1,884 mediation clients of Singapore Mediation Centre (SMC) indicated that mediation provides substantial cost and time savings in comparison with litigation (Lee and Hwee 2009, 15).