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From Rule of Law to Legal Empowerment for the Poor in Bangladesh

1. Introduction

After discovering the route to America, Columbus felt even the sky was not beyond his reach. An angry courtesan once asked him whether he truly believed that he was capable of doing anything. When Columbus gave him a positive nod, the courtesan dramatically presented an egg and told him, "Fine, place this egg on the table but remember one thing, it must stand straight!" Columbus took the egg, broke the lower part of the shell and with a smile placed it on the table.

The present legal system of most developing countries have become like this broken eggshell. Following Western models, we have established our legal system and our main emphasis is on maintaining the formal structure based on a top-down approach. However, if the eggshell is broken, the yolk is bound to come out and that, actually, is what is happening in Bangladesh at present. With too much formalistic an approach and too much emphasis on the normative part of the law itself, the poor are left with virtually no access to formal justice and legal aid. The systemic and procedural problems of the formal legal systems worsen the situation.

In last few decades, "Rule of Law", which is defined as equal treatment for every citizen under the law, equal legal protection and accessible justice has become an integral element of Good Governance (World Bank, 2002, p.1). The establishment of a society based on 'rule of law' demands a set of strategies or ideas and in order to support these ideologies and strategies, the concept of "rule of law orthodoxy" has been introduced. It is an instrument, an institution, a tool "…geared toward bringing about the rule of law" (Golub, 2003, p. 7).

However, the present "Rule of Law orthodoxy" suffers from many problems when it comes to the access to justice for the poor. First, based on a top-down approach, it solely concentrates on state-dependent legal institutions- building or rebuilding courthouses, constituting legal reforms, training of judges, lawyers etc. As a result, though the supply side of the 'access to justice' may be well equipped, the demand side is often not even touched. Second, it is based on the assumption that the eradication of poverty depends on the smooth functioning of market mechanisms and legal reforms should be aimed at to create such an environment which will help the smooth functioning of the market in a society. Thus, the poverty alleviation method may be compared with the "trickle down" approach, which has failed a long time ago (ibid, pp. 7-14). Thirdly, by emphasizing on foreign expertise and methods, developing countries are following strategies without considering whether it would suit their context or not. The situation becomes worse when it accommodates too much formalism. De Soto noted that this situation actually forced most of the citizens to "…run into Fernand Brudel's bell jar, that invisible structure in the past of the West that reserved capitalism for a very small sector of the society" (De Soto, 2006, p. 153). Fourthly, the present legal system, every now and then, considers law according to its 'normative aspect' and thus denies 'the real-world components and 'societal context' (Cappeeletti, 1993, p. 282). As a result, the present context of rule of law fails to ensure the access to justice for all, to consider a primary element –"the people, with all their cultural, economic and psychological features" (ibid, p. 283), to bring the judiciary to the poor, to meet their needs.

Legal empowerment has come up as a response to these problems. It deals with the people who are left out of the Columbus' eggshell. It aims to arm them with legitimate instruments like legal aid or consciousness, to help them take control of their life. It moves out of the usual domain of law (in its normative sense) and emphasizes on empowerment. Its primary focus is on eradication of poverty through steps taken by the government to "…give all citizens, especially the poor, a legitimate stake in the economy, thus making it the right of all citizens, and not the privilege of a few, to have access to user and property rights and other legal protections" (CLEP, 2006, p.). Legal empowerment is not contrary to rule of law rather it "…both advances and transcends the rule of law" (Golub, 2003, p.7). It demands a holistic approach to include the poor through both formal and informal legal systems (Harrold and Hasan, 2006, p. 1). Usually the formal system is trapped in the hand of the minorities, the majority of the population is not affected by it (Golub, 2003). Legal Empowerment, thus, is both a process and a goal to let the majority use the law to take control of their life (ADB, 2001). In other words, the goal of Legal Empowerment is "…to increase disadvantaged populations' control over their lives" and the process is- "the use of legal services and related development activities" (Golub, 2003). Metaphorically speaking, it is about rebuilding the Columbus' eggshell where the yolk would not come out of it.

Legal empowerment advocates for increasing and effective participation of the civil society to ensure the participation of the poor in the legal procedure. Taking into consideration the need of the poor, issues and strategies depend on the necessity of the poor and the top-down approach is converted into a bottom-up one. Moreover, the informal justice sector is given due consideration (Golub, 2006, pp. 25-26). Within this theoretical and empirical context, this article describes the state of both formal and informal justice systems in Bangladesh and their problems in ensuring access to justice for the poor. It then recommends an integrated and interconnected model of legal institutions working towards legally empowering the poor.

2. From Legal Empowerment to Access to Justice

People cannot be legally empowered unless legal services are accessible to them. Access to justice by the poor can empower them and that is what a market-based ideology may not always be able to provide. The ideas and institutions brought by capitalism may not ensure access to justice. Instead, it may be "…a myth, factually false, politically conservative and deliberately fostered by the most visible embodiments of law" (Abel, 1990, p. 686).

In other words, if a legal system depends only on the formal structure and ignores "…counseling, mediation, negotiation and other forms of non judicial representation" (Golub, 2003, p. 26), the door to justice may be locked for many. Formal system must work hand in hand with the informal sector in a comprehensive manner and to make it work a close look at both of them is necessary.

3. Formal and Informal Legal Systems in Bangladesh

Taking into consideration the informal ways of dispute resolutions, we can divide the overall justice sector into two parts- the formal justice sector and the informal justice sector. From the highest tier, i.e., the Supreme Court to the lowest one, i.e., the village court have been included in the formal justice sector. On the other hand, the informal

sector includes *shalish* (informal justice conference) and NGO-organized *shalish*/mediation (EC, 2005).

Part VI of the constitution of the people's republic of Bangladesh deals with the formal justice sector. According to the constitution, the Supreme Court of Bangladesh is the highest court. It has two divisions- the high court division and the appellate division (GoB, 1972). The district and session courts lie below the Supreme Court. Headed by a district judge, a district court deals with civil matters whereas a session court, headed by a session judge, deals with criminal matters. The next tier is the magistrate's court, which deals with only criminal matters. In case of civil matters, the bottom most court is the court of an assistant judge. The village court lies beneath the magistrates court (criminal matter) and court of assistant judge (civil matter) (EC, 2005, p. 27-28). Besides this, there are also courts of – a. district magistrate and b. additional district magistrate. Appointed by the government, the deputy commissioner performs the duties of a district magistrate and additional deputy commissioner acts as an additional district magistrate. Following the Village Court Ordinance of 1976, the Union *Parishad* conducts the village court that deals with petty and non-compounding disputes.

Except the magistracy and village courts, all other judges are members of the judicial service "which is controlled and supervised by the Ministry of Law, Justice, and Parliamentary Affairs and Supreme Court" (ibid, p. 28). The magistrates are the members of the administrative service and their control lies in the hand of the executive branch through Ministry of Establishment and the Cabinet Division.

In the informal sector, the two well known justice procedures are-traditional *shalish* (justice conference) and NGO-sponsored mediation and justice conferences. *Shalish* actually means- "the practice of gathering village elders for the resolution of local disputes" (The Asia Foundation, 2002, p. 6). *Shalish* can be conducted in various forms- it can be arbitrary or mediatory or a blend of the two (Golub, 2003). Traditional *shalish* is usually conducted by the village elders and influentials. As they are considered as respected or powerful members of the society, their decisions always carry a great weight (Khair et al., pp.8-9). With a glorious past, in a case of a dispute resolution, at present, this particular system either had "completely broken down" or had "become largely inoperative" (Siddiqui, 2000, p. 148).

Relying on the basic principles of *shalish*, i.e., being prompt in problem solution and providing equitable justice, NGOs are using it to ensure access to justice for the poor (ibid, p. 149). Developmental and legal NGOs in Bangladesh are contributing to modernize the *shalish* process to make it more acceptable and equitable. They "…have conducted training and offered advice and assistance to *shalish* members including training in law, providing legal advices and providing legal aid where recourse to the formal system was required (EC, 2005, p. 61)." Thus, the NGO-coordinated *shalish*, also known as Alternate Dispute Resolution (ADR), is actually a redefinition of the traditional *shalish* which adds "…specialized training, the appointment of women mediators or the convening of mediation panels with specialty knowledge of women's rights or other

issues" (ibid). Thus, the NGOs are trying to provide a high-breed justice to the poor that aims to utilize the 'bests' of both the formal and informal justice institutions.

4. Barriers to Access to Justice (Formal Rule of Law) for the Poor

Despite the working of a fully structured formal justice systems, traditional informal systems and NGO-sponsored modified systems, there are numerous problems that impede access to justice for the poor. The problems related to access to justice in formal systems has two dimensions. The first one is to identify the hurdles that hinder the access to court (Hasle, p. 3). In this paper, we tried to identify these problems under the title 'procedural and systematic problems of formal court'. The amount of literature about this particular dimension is quite huge as well as the number of identified problems. However, the second dimension is rarely touched. Anderson put it in this way-"access to justice required more than being able to present a grievance in front of a court, .. or before a mediation panel, crucially provided your claim is recognized as legitimate, access includes an effective remedy whereby your right is translated into reality" (Anderson, 2003, p. 2). Thus, the problem lies in "translating right into reality".

The formal system often fails to find the effective remedy or in other words, remedy to the court is often unacceptable to common people. The very word "justice' has different meanings- rather than going by the book, the poor often prefer justice to be either realistic or harmonistic. We have divided the discussion on this second dimension into two parts- the first part deals with the theoretical dilemma concerning the idea of justice and the second part deals with the mindset of the rural poor.

4.1 Systemic and Procedural Barriers Related to Formal Legal Systems

After securing the first position as being the most corrupt country of the world, finally in 2006 Bangladesh moved to the third position. The judicial sector, the hope for combating corruption, most ironically "…comes second only to the police as the most corrupt institution in the country" (EC, 2005). Beside corruption, there are numerous procedural and systemic problems that formal legal systems in Bangladesh suffer from. The important problems are discussed below.

4.1.1 Justice delayed, justice denied: In any literature on the legal system of Bangladesh, delay in dispensing justice is considered as the number one problem that hinders the access to justice. "There are some civil cases which were filed during the Pakistani regime and are still under trial," lamented one bureaucrat in an interview. Too much time often results into too much money. There are many reasons behind this delay. First, leakage of civil and criminal procedure codes allows the cases to be lengthy. Lawyers in some cases also play their part in delay because more delay will ensure more earning for them (Osman, 2006). Second, the lack of a sufficient number of judges and courts force a judge to deal with five to six thousand cases in a year. Thirdly, even after justice is delivered, it cannot be enforced until the confrontational parties receive a written copy of the judgment. A researcher found out, "in some cases, the judges ordered

immediate issuance of the court order and signed it at once but in most cases, this whole process took a lot of time" (ibid).

Fourthly, criminal cases are delayed due to two reasons: the delay in submission of police report and the delay in court. Police takes long to submit an investigation report due to shortage of manpower and excessive workload as well as existence of corruption in a police station. When a final charge sheet is submitted to the court, it becomes the place where justice is stuck. "In one year, 40% to 60% of the cases are charge sheeted but only 25% of these cases are put on trial. Following this rate every year cases are accumulated causing a huge backlog", informed a police official (Jahan and Kashem, 2006). Fifthly, dissolution of a bench stops the procedure of the cases of that bench. Later, when that particular bench gains its jurisdiction again, the suspended cases are re-opened from the very first stage. As a result, justice is not delivered in time and a backlog is created. Up to 2003, 3,500 petitions for leave to appeal and 700 appeals were pending at the appellate division (EC, 2005). In high court division, 150,000 cases are pending (ADB, 2001). The situation is even more severe in lower courts.

4.1.2 Outdated Laws and Lack of Indigenization of the Judiciary: In the case of criminal court, some of the primary legislations are almost 150 years old. The British heritage still plays an important role and the judiciary still follows some penal statute "…the sole purpose of which is to restrict the movement of the poor" (Hoque, 2003, p. 81)". Ignoring the dynamicity of law is placing it in a static position where laws are not keeping pace with the changing pattern of crime.

We have so far failed to indigenize the judiciary. Instead, it is still operating on the basis of British laws and systems. For instance, given the huge backlogs of cases mainly due to shortage of judges, three months vacation in the high court is quite ridiculous. "In fact, during the colonial days, judges coming from European countries needed three months' yearly holiday to visit home, but in the present scenario these long holidays are unnecessary and it only undercuts the performance of justice sector further", observed a politician. During these three months vacation witnesses may forget the case, evidence may be distorted, judges may die or many other unpredictable things may happen (Osman, 2006).

4.1.3 Politicization of the Legal Sector: Legal sector has usually been considered as the utmost source of accountability. However, in recent years, the particular phenomenon-politicization has touched this very sector. Even, the high court and the Appellate divisions are not beyond its reach. In its "State of Governance Report 2006", Center for Governance Studies has described the recent incident in which the decision taken by the chief justice regarding writ petitions filed challenging the president's assumption of the head of caretaker government and resulting violence as "unnecessary entanglement of the judiciary in political controversy". It seems that the very concept of the Caretaker Government has opened a floodgate for politicization where the ruling parties are playing their part to ensure that the last retired Chief Justice is someone who would be in their side when he/she becomes the Head of the Caretaker government (CGS, BRAC University and RED, BRAC, 2006).

Judiciary also suffers from a lack of operational independence as the appointment, posting, promotion to the higher courts remain under the control of the executive (EC, 2005). Failing to separate the judiciary from the executive forces a judge, while dealing with a case, consciously or unconsciously to think about his appointing authority, which ultimately affect the judgment.

For adversarial system to work, efficient and qualified lawyers are an essential precondition. We have observed that public prosecutors are often appointed on political consideration without considering their educational background and training received. However, "political appointments of public prosecutors are unavoidable, but such appointment will not work if the appointees don't know the law," opined a public prosecutor (Osman, 2006; EC, 2005). In addition, renowned lawyers are reluctant in taking up the job of judges, as it would limit their income.

4.1.4 Shortage of Manpower: With the increase of the population of the country, the number of litigations has increased as well. However, the number of courts and judges and other personnel involved in the system has not been increased sufficiently. It is found that almost about 10,000 cases are filed everyday. Under the circumstance, it necessitates to enhance the number of court and judges for speedy disposal of the cases filed everyday.

Also, in Bangladesh, a judge has to perform both the administrative duties and the normal work of justice (Osman, 2006). Lack of a systematic delegation of authority in court management makes the judges overburdened. There is no database about the number and status of cases dealt by a court.

4.1.5 Ineffective Law Enforcement Authority: There are many flaws in the law enforcement mechanism of criminal justice system. In the criminal cases, police reports are the foundation of criminal justice. The police arrests, frames the case, investigates and submits charge sheet to the court inspector. Police does all the preliminary work of justice, based on which judgment is delivered from the court. As the police are the framer, investigator and reporter of the case, there is huge scope for manipulation (EC, 2005). In some cases, charge sheet depends on the amount of the bribe. Sometimes they even manipulate a murder case by tampering evidence. "Justice is affected due to corrupt practices of police. They make weak charge sheets with an attempt to weaken the case as they get bribes from the offenders" (Jahan and Kashem, 2006). Moreover, police personnel are often used by the ruling political party. The ruling party also appoints police personnel from the party cadre. As such, police normally cannot work independently. Thus, corruption of police seriously affects criminal justice (Hasle, p. 7-8).

In terms of capacity, police has many limitations too. Geographical area of a police station/*thana* is too big compared to its manpower. "…the average police people ratio is 1:1400 while in Singapore it is 1:250" (Jahan and Kashem, 2006).

4.2 Theoretical Dilemma

As mentioned earlier, access to formal justice institutions for the poor is not hampered only by the systemic and procedural problems of the systems. Instead, the deeper problems lie in the 'perception of justice' by the poor. This section takes into account two different dichotomies related to the 'philosophical perception of justice'. One of them is retributive versus restorative justice and the other one is distributive versus commutative justice.

4.2.1 Retributive versus Restorative Justice

In the formal legal system, justice follows the retributive principle where the liability is vested upon the State to "…fix the legal guilt, not the factual guilt." Any crime is considered against the state and the state, after being sure that the very person is legally guilty and liable under the law, takes necessary arrangement to ensure that "…the [legally] guilty must get just deserts" (Christie, 1977). This particular model emphasizes on the process and makes sure of causing the similar pain in return of pain. On the other hand, restorative justice emphasizes on restoration of the harmony that the particular crime had disturbed. According to Zehr, "It creates obligations to make things right. Justice involves the victim, the offender, and the community in the search for solutions which promote repair, reconciliation and reassurance" (Zehr, 1990). So the basic difference between retributive and restorative justice is whereas the former demands the punishment of an offender and considers it as the only way of preventing further crime, the latter tries to heal the wound and bringing back the harmony by allowing the offender in taking part of the healing process (Jahan, 2005) .

For instance, let us consider a case. In a village, once an unmarried woman became pregnant. The man who allegedly had a physical relationship with that woman admitted the guilt but denied to marry her. Now, the retributive justice would say, the court will take necessary action against the man once the guilt is proven. The action may include an imprisonment, compensation etc. However, it could have created certain problems, which the formal system would fail to address. First, taking into account the social background, the girl might never get married. After getting out of jail, the man may take revenge etc. On the other hand, in this case, restorative justice would try to reestablish the harmony. Following a restorative principle, the man may be ordered to marry the mother of his child if the woman wishes or he can be fined with ample amount of money so that the woman will not face any financial trouble in future. Interestingly, our several field research projects have found that most people of the rural part of Bangladesh prefer the restorative justice and as the formal system does not allow it, they tend to depend more on the informal system like *shalish* (Jahan, 2005; Ali and Alim, 2005; BRAC-RED Justice Sector research, 2006).

4.2.2 Distributive versus Commutative Justice

According to this dichotomy, commutative justice tries to ensure restorative justice within legal bindings. At the one end, it tends to follow the law and on the other hand, it

ensures equal exchange in all cases in order to restore the status quo. It means, "The party who has lost resources to another has a claim for the amount necessary to restore his original position" (Sadurski, 1984, p. 335). However, distributive justice is more radical than commutative justice. Pointing out that the legal bindings may often fail to ensure equal exchange, it emphasizes on defining what is just according to social standing of an individual. Based on the principle that profit or loss in case of seeking justice may depend on the relative power of an individual, it demands that while delivering justice, it must take into consideration the impact it will create on an individual's life (Sadurski, 1984, p. 335-337).

For the case that has been mentioned in the previous section, commutative justice may as well fail like retributive justice as due to legal bindings, it will not consider the impact of the justice imposed on the unmarried mother of a child. Distributive justice on the other hand will consider the social status and outcome of that particular incident on the individuals concerned. If both the man and woman share an equal responsibility in that particular relationship, justice should distribute the burden of restoration equally on both. Therefore, either they will marry each other or the father of the child will provide allowance for his unborn child until he/she becomes 18 years old.

The outcome of the analysis of these two dichotomies is as formal legal systems depend on legal bindings solely and emphasize on law in its normative sense, they often ignore the meaning of justice as reflected by the society or by the individuals living in the society. People have repeatedly expressed in our field level focus group discussions and in-depth interviews that this so-called justice- be it retributive or commutative, does not match with their own understandings of justice. In case of getting justice, their primary concerns include not punishment but the restoration of harmony and compensation to the victims (BRAC-RED Justice Sector research, 2006).

4.3 Psychological Barriers

It is often argued that poor people tend to use informal systems in Bangladesh because the access to justice through formal legal system is troublesome and faulty. Several recent studies have also indicated that majority of rural people get access to justice through the non-formal systems (Siddiqui 2004; Harrold and Hassan 2006). But, in fact, the failure of the formal legal systems to understand the mismatch between the peoples' perception of justice and the justice as offered by the formal rule of law may well be forcing the poor to move towards the informal legal system. The poor may confront a psychological barrier to go to the formal court. For further illustration of this point, let us consider a situation where the formal system is functioning smoothly. Systemic and procedural problems like bribes, corruption, years of backlog and delays have finally been eradicated. What will happen in terms of access to justice for the poor in this 'ideal' or 'perfect' rule-of-law situation? Will the disadvantaged or the poor people rely on the formal system more? We argue that the answer to the last question will be a "NO" because of formal systems' adherence to formalistic and retributive principles.

A recent research revealed an important point. According to the preliminary findings of this research, even when the situation is ideal, i.e., the formal legal system is working without any flaw and existence of any political or economic barrier, the majority of the rural people will still seek justice from the informal systems. To most people, formal legal systems are unfamiliar as they are not the "son of the soil", but brought in and imposed by the foreign rulers mainly to serve their purposes and thus they act against the people of this country. Because of this alien feature, the poor perceive formal courts as elitist institutions. Besides, the laws, their procedures, arrangements, and people associated with the formal systems are unknown to majority of the common people. This alien feature of the formal legal system make the formal courts as elitist institutions to the poor. In fact, their perception is not all *only* 'perceived' as after the colonial period very little was done to make formal justice institutions people-oriented. The elites resumed the role of colonial rulers and retained the rigid nature of the system that *de jure* excludes marginalized people from it. This particular psychological barrier will be difficult to address even if the formal legal system promises a fair trial for the poor (BRAC-RED Justice Sector research, 2006).

"People's participation" (which can be defined as the people's way of understanding about justice, crime, punishment etc.) in the legal system is what the rural people demand and that is exactly what the formal legal system defies. They do not have any say about how the problems are to be solved, who will solve it, and what will be the outcome. Instead, all formal court procedures are ordained in a manner that goes against their understandings. The point is, many of the procedures, (i.e., from addressing the problem of the rural people to deliver the verdict), followed by the court is either unacceptable or beyond understanding of the poor even when the procedures are followed with utmost fairness.

Thus, the gap in what is delivered and how the deliverables are perceived by the poor act as a psychological barrier for the poor to access the formal justice. This particular psychological barrier has two dimensions- (a) the mismatch between the way justice is served in formal legal systems and the way people think it should be done and (b) the lack of control they are able to exercise upon this system. Moreover, in Bangladeshi context, the systemic and procedural problems of the formal legal systems exacerbate the situation for the poor. For example, due to its rules and lack of resources, the court considers some problems while leaving the others out. The nature of the problems of rural people guarantee that majority of these will be left out by the court. So, at the very first step they are rejected from getting access to formal legal system because of the apparent pettiness of their problems, which create the notion that court is not for them and ultimately leads to the first step to keep a distance from the court (UNDP, 2002, p. 92). The next section describes the systemic and procedural problems that formal justice systems suffer from which in turn limit the access to justice for the poor.

The philosophical, psychological, systemic and procedural barriers together create a negative attitude and reservations towards formal courts for the poor. The suspicion and distrust about the formal legal system is colossal. This negative attitude has been translated through the cultural system, and it is now a matter of disgrace to go to a formal

court. As a saying goes, only those people go to a court who are bad and dangerous. Another says, in *shalish* you have no other way but to speak the truth, and in court you have no other way but to tell lies. Therefore, it is a matter of shame and dishonor to go to a formal court, which a few are prepared to embrace. In some extreme cases, the same attitude goes even further and to protect the honor of the village, all the villagers are prohibited or even barred from going to court.

5. Dependence of the Poor on Informal Justice Systems

We have observed that the poor face systemic and procedural as well as philosophical problems in accessing formal justice systems and tend to use informal systems. Apart from serious crimes like murder, rape and acid violence, which are less frequent, majority of the problems that the poor experience consist of family matters, petty disputes, petty theft, sexual abuse etc. Usually a formal court does not consider these cases because of the insignificance of their nature and the enormity of their amount of more serious cases. Often, these petty cases, if filed in a formal court, are redirected to the Village Court (VC). However, a particular characteristic of these apparently insignificant problems is that from being insignificant they can gain significance and may potentially cause probable injury to the people involved. If resolved earlier through village court or informal systems then the bigger problems (severe injury, violence etc.) could have been averted if they were nipped in the bud. The opinion of the rural people is unanimous here- problems should be forestalled at the first sign of it, not after the damage is done. According to them, court only considers problems when they reach the extreme, whereas the extreme stage can be prevented if addressed properly in the primary stages through local level institutions (Ali and Alim, 2005; BRAC-RED Justice Sector research, 2006). However, the local level informal justice institutions and processes are not free of problems. The next section describes the constraints that the poor face when they try to access justice through informal institutions.

5.1 Problems of Informal Justice Sector

As stated earlier, the informal legal system consists of mainly two institutions- traditional *shalish* and NGO-sponsored mediation and shalish. Whereas in the past, traditional *shalish* had been considered as the most effective means to resolve disputes, in recent times, the significance, importance and effectiveness of *shalish* are declining. There are many reasons behind this lowered status of *shalish*. The problems faced by the informal systems are:

5.1.1 Bias and Corruption: Traditional *shalish* emphasizes heavily on the existing social structure and the inherent inequality in the power structure creates an impediment to ensure justice for the poor. People who belong to the upper strata of the society can easily exercise their economic influence in traditional *shalish* and if their confronting side is poor, justice may be easily denied. Besides, many a times, the *shalishkers* (*shalish* conductors) help the rich or the elites to receive some future benefits in return. Political consideration is also reflected in *shalish*. In fact, political affiliation of the person seeking justice has become an important point of consideration and the just resolution is not

delivered as the *shalishkers* have started to consider the consequence of their resolution on their vote bank (Ali and Alim, 2005). *Shalish* is also a subject to manipulation by corrupt touts and local musclemen who are hired to intimidate the entire process (Golub, 2003). Hashmi, in this case presented a model of "member-matbar-mulla' triumvirate that takes control over the traditional shalish-

> "The members of the Union Parishad (the lowest electoral unit) are elected officials, in charge of the disbursement of public goods and relief materials among the poor villagers, are the most powerful in the triumvirate. They are often connected with the ruling political party of other influential power brokers in the neighboring towns or groups of villages. The matbars (matabbars) or village elders, who also sit on the shalish are next in the hierarchy, having vested interests in the village economy as rentiers and moneylenders. They often get shares in misappropriated relief goods along with government officials and members-chairmen of the Union Parishad. The mulla, associated with the local mosques and maktabs (elementary religious schools) are sometimes quite influential as they endorse the activities of village elders albeit in the name of Islamic or Sharia law. They often sit on the shalish and issue fatwa in support of their patrons, the village elders (Hashmi, 2000, p. 137)

NGOs are trying hard to minimize the problem of biasness in informal systems. We have found that people generally tend to rely more on NGO-organized mediation. To one villager- "justice can be ensured only through NGOs as biasness is completely absent there". However, we have also found that in some cases, they failed to stand beside the poor (BRAC-RED Justice Sector Research, 2006).

In case of combating corruption, NGOs are playing a significant role. In a number of cases, they have succeeded to force the *shalishkers* to make a just judgment. In a particular case, when the *shalishkers* took Tk. 10,000 out of 15,000 as compensation for conducting *shalish* saying that "We have spent the whole night ensuring that you will get justice, now give us our share", the NGOs stood beside the poor and for their constant pressure, the *shalishkers* were forced to give back the money (Ibid).

5.1.2 Gender Discrimination: One of the main reasons behind the success of traditional *shalish* is its support towards traditional values, customs and power structure. On the other hand, this traditional outlook supports patriarchy and thus prevents women from getting justice (Haque et al., 2002, p. 22). Women cannot enjoy the opportunity to participate or express opinion in a traditional *shalish*. In some instances, women are not considered even as witnesses (Halim, p. 6-7).

For instance, an Asia Foundation report describes a case in which a victim's husband's dowry demands led to beating her and casting out of the home. She asked for help from a *shalish* but it was quite fruitless as "…I could not speak up…I didn't have the chance to say anything" (Haque et al., 2002, p. 22)

5.1.3 Lack of Legal Awareness: Still today, most people of rural Bangladesh are unaware of their legal rights. Dowry is a common phenomenon in villages and the villagers just do not know that giving or receiving dowry is prohibited by the law. Every now and then, women come to the NGO legal aid offices to file charge against their husbands for battering. In almost all cases, the reason is, failing to pay dowry (BRAC-

RED Justice Sector Research, 2006). Also, the actual meaning of "*Denmohor*" (dower) is not yet understood by women and most of them failed to collect it in time (ibid). For its patriarchal nature, traditional *shalish* fails to provide justice in these cases and NGOs cannot provide legal help in case of dowry related incidents until they renamed it as "*Bhoronposhon"* (maintenance) (ibid). Thus, with a case of different nature, legal aid is provided but the problem of dowry does not end.

5.1.4 Declining Social Acceptance of Justice Delivered and Changing Social Norms: The acceptance of the outcome of *shalish* is declining as we observe a declining trend in terms of social values which is ultimately loosening the social fabric. The social norms, customs and context that helped to endure *shalish* as an effective dispute resolution mechanism for long, has started to fall apart. In the past, one of the main reasons behind the effectiveness of *shalish* was the social importance the elders/*shalishkers* carried and the overwhelming acceptability of them. (BRAC-RED Justice Sector Research, 2006). However, this norm is becoming non-functional day by day. Time has changed and many citizens now belong to a new generation. Unlike their predecessors, they do not show the same respect or obedience towards elderly and the social acceptance of *shalish* is thus declining.

Moreover, in the past, the word *'shalish'* was almost synonymous to "law" and everyone was bound to follow it. But, at present, the formal law of the country has made a distinction between "*shalishable"* (shalishworthy) and "*nonshalishable"* (nonshalishworthy) crimes and disputes. As a result, unlike the past, people are reluctant to seek help of a *shalish*. Finally, the spread of education is creating an impact on the quality of *shalishkers*. In the past, when the number of educated people was limited, their judgment was accepted by all. However, in recent days, the spread of education has put everyone in the same height and no one is likely to consider another person who can be trusted in case of *shalish*. In our focus group discussions, we have found an interesting but common comment: "you think he is learned, so what are we *Mofij* (Fool) (ibid)?

However, the declining status of traditional *shalish* and changing social norms may be in fact the key to legal empowerment and access to justice for the poor. In the past, *shalish* was the only institution and people did not have any alternatives to choose from. But, at present, formal law and legal system, which in the previous era was somewhat alien to the rural people, is not beyond their reach. Even the rural Bangladesh is not keeping itself away from the flow of information. Besides, a number of organizations are working in villages to provide legal aid to the people. Access to media has also been a positive phenomenon for the poor. As a result, *shalish* is losing its importance. But, this low status of traditional *shalish* does not necessarily legally empower the poor as formal systems have numerous problems.

6. Consequences of the Barriers in Justice and Social Systems and Access to Justice

Access to justice includes certain stages, which starts with the right to bring the grievances before the court/*shalish* and end up with enforcement of the remedy achieved.

Anderson (2003) suggests five stages of access to justice and they are- naming, blaming, claiming, winning and enforcing.

Table 1: Stages of access to justice (Anderson, 2003, p. 2)

Naming	Identifying a grievance as a legal problem
Blaming	Identifying a culprit
Claiming	Staking a formal legal claim
Winning	Getting rights and legitimate interests recognized
Enforcing	Translating rights into reality

The barriers of the formal legal system that have been identified before play its part to make sure that access to justice is denied at every stage. As shown in Table 1, stage 1 demands the identification of a grievance and the filing of it as a legal problem. Two things create problem in Bangladesh in doing so. First, certain grievances of rural poor are not even recognized by the court. For instance, laws related to marital rape, domestic violence are non-existent. The Children and Women repression act is also faulty. In most cases, instead of favoring women, it is abused by the husband's families. Second, technicality of law is another problem. Language of law is not understandable and thus access to justice is denied.

Even when the problems related to the first stage is overcome; it only paves way to the problems related to the second stage. It demands the identification of the criminal. The ineffectiveness of law enforcement bodies and unbridled corruption create hindrance in this stage and thus to access to justice.

If fortunately, someone becomes successful to overcome this hurdle, he has to deal with staking a legal claim. However, the existence of anti-poor laws in the formal legal systems, negative attitude to the poor among many engaged in legal process and excessive bureaucracy create unwanted delay in processing a legal claim (Hasle, p. 7)

Conquering those particular problems does not always present a success story. In case of the next step, which demands the recognition of legitimate interest, problems like delayed and derailed justice procedure, failure of the poor in countering the fake witnesses often does not bring the desired outcome.

The luckiest of the poor can reach up to final stage, which requires translating his/her right into a reality. However, barriers like corruption, lack of judicial independence and 'abuse of political authority vis-à-vis law enforcing agencies' can undermine the surety of implementation of justice delivered (ibid).

Thus, following Anderson's stages, the access to justice for the poor is denied in Bangladesh as mentioned below:

Table 2: Access to Justice through Formal Legal System: Bangladesh Scenario

Stages	Problems faced in Bangladesh
Identifying a grievance as a legal problem	Inadequate laws, too much technicality
Identifying a culprit	Ineffective law enforcement bodies, corruption
Staking a formal legal claim	Ant-poor laws, negative attitude, excessive bureaucracy
Getting rights and legitimate interests recognized	Delayed justice procedure, corruption
Translating rights into reality	Corruption, abuse of political power

For the poor in Bangladesh, the formal legal systems, from 100-meter sprint, turns into a 100 meter hurdles. The poor are not expected to finish the race without injuring themselves. This injury or fear of injury denies access to justice and forces them to move to the informal legal system.

Until pretty recently and in some cases, still today, to the rural poor, in informal legal system, the most important dispute resolution center is the traditional *shalish* (TS). However, the aforementioned barriers concerning informal legal system are basically due to change in mode of production. The control over TS has changed hand and so has its acceptability. In the past, a council of elders played the role of moral arbiters and settled dispute through *shalish* (Westergaard et al., 2002, p. 212). As land was the only source of production, until some thirty years ago, the landowners were the most powerful and influential people and they constituted this council of elders. Societal relationships were patron-client based, in which, being in the higher socio-economic status, the landowners provided general support and assistance to people of lower socio-economic status (Khan, 2002, p. 386). They were few in number and enjoyed landslide respect and command. The class structure was simpler and land based, consisting of only four- rich peasants, middle peasants, small peasants and landless (Khan et al., 1996, p. 16).

However, the post-80's villages of Bangladesh had to go through changes. The upgrading of *Thana* into *upazilla* (sub-district) resulted in an "…emergent service sector, including trade and transportation" (Westergaard et al., 2002, pp. 212-213). By the 90s, due to capitalist investment, land has become more insignificant as a means of production. The number and nature of both the patrons and the clients have changed. The new power lords, now in one way or another, are involved in either local legislation or trade (Umar, 1998, p. 152). Now, the rural power holders are:

"1. Matbars (village headmen) controlling the informal institutions like *Samaj* (society), Shalish and owning most of the land.

2. Union Parishad leaders controlling formal administrative institutions at local level.

3. Rural political elites representing different political parties at the grassroots level.

4. Government employees at the rural levels.

5. Economic elites controlling economic organizations like cooperatives, deep tube-well management committees, shallow tube-wells, ration shops, fertilizer shops, etc." (Rahman, 2002, p.42)

As a result, vested interests of both patron and client have changed. The "post" of *shalishkers* now can be achieved through money, political affiliation or involvement with the government. This trend has increased the factionalism between the villagers and decreased the acceptability of the patrons. Westergaard and Hussain in an analysis of rural power structure pointed out that in a particular village, whereas pre-independence period saw only one *"Samaj"* and one acceptable leader, the number of *"Samaj"* and leaders have increased to ten in the 90s (Westergaard et al., 2002, p. 214). This is affecting the access to justice through TS in two ways. First, as the number of influential persons is increasing, the universal acceptability that they enjoyed previously is declining. Second, each influential person or a patron now has certain groups to please and certain interests to preserve- be it political or economic. The stages of access to justice can look like this:

Table 3: Access to Justice through TS: Bangladesh Scenario

Stages	**Problems faced in Bangladesh**
Identifying a grievance	None
Identifying a culprit	None
Staking a formal claim	None
Getting rights and legitimate interests recognized	Bias, corruption, declining acceptability of the patrons
Translating rights into reality	Acceptability of decision taken

Here informality plays positive role in first three stages but last two stages again are locking the door to justice for the poor.

Despite, problems with *shalish*, a large number of rural people still consider *shalish* as the most effective way of getting justice. According to rural people, justice can only be delivered by people who live in that particular village. "How can someone who does not know us deliver justice? A judge should be some one whom both the confronting parties know. As he lives with us, he can realize what actually happened" (BRAC-RED Justice Sector Research, 2006). This idea goes directly against the idea of justice present in the formal legal system, where to ensure objectivity and fair trial the judge should be an anonymous person to both the parties. But according to rural people, it is impossible to give a fair verdict by an anonymous person based only on the narratives of the incident and without knowing the personalities of the parties involved, and who is telling lies and who is not.

When asked about the biasness of the adjudicator of he/she knows the parties, the rural poor suggest that there is a very little possibility of being biased in a village *shalish* because the status of the *shalishkers* (mediators/adjudicators) in the present context is unlike the past. Now, their status as good *shaliskers* has to be achieved not to be ascribed as happened in the past. Being biased will not help them in the long run to maintain their status. Therefore, not only do they have to gain the faith of the villagers but also have to maintain their objectivity throughout their lives because villagers have the liberty to choose *shalishkers*. Therefore, villagers feel that they have more control here in comparison with the formal court where they have to obey the orders of a judge whom they did not have the right to choose. But, as mentioned above, the existing literature and our field-level research do not exactly depict this all-so-good picture of the *shalish.*

Another reason responsible for people not being at ease with the formal legal system is the lack of control they have on the procedures and processes of the court. In Bangladesh, the legal system is adversarial, i.e., it requires victims to prove the offence with all evidence instead of offenders. A victim has to present the witnesses in front of court, which is arduous and expensive (Osman, 2006). On the other hand, in a *shalish*, a complainant has no such pressure.

Witness plays an important part in the formal legal system. In formal legal systems, a witness is under the oath to speak the truth and perjured him or herself when truth is not spoken. But the very idea of taking an oath is quite meaningless to the rural people as they do not consider it as effective. To them, the setting or arrangements in a traditional *shalish* is far more efficient because they think that it is not possible for one to lie in front of all villagers. Moreover, in most of the cases those who are present in *shalish* are themselves eyewitnesses of the disputed incident (BRAC-RED Justice Sector Research, 2006). These types of differences coupled with the problems of language, settings and norms led people to drift further away from the formal legal systems.

Moreover, when a verdict is delivered in a formal court, there is no scope to take the opinions of the parties about the solution to be given. But in the local system, parties are generally asked about the best possible solution according to their views. The very idea of "justice" is similar with "mutual understanding' to most rural people. One male mediator puts it this way- "justice means to deliver a resolution after taking consent of both the confronting parties" (ibid). To them, it should be a participatory process where everyone involved will reach into a consensus.

In the eye of the law or to be specific, the formal legal system, all citizens are equal. But living in a stratified society, where social status still plays an important role, this concept of 'equality' is unacceptable to the rural people. Therefore, whereas in a formal court the degree of punishment will depend on only the crime itself, in *shalish* the resolution will be different for different people based on their social background or status. For instance- "if a problem arises between a father and a son and if it turns out that the fault lies with the father, still, the *shalish* will rebuke the son for his misconduct. Behind the scene, the father will be told, 'look, its your fault don't let it happen again.' Thus, both parties will go home happily" (ibid).

These particular issues are beyond the understanding of the formal court. Undoubtedly, for its elitist outlook and negligence to the norms or values deeply rooted in rural areas, in distant future, even if it is possible to eradicate other barriers such as the economic or political ones, these psychological barriers will remain as significant obstacles, keeping the access to justice through formal system as an elusive dream. All in all, these common problems regarding formal justice sector, getting mixed with the inertia or apathy on the part of the rural poor have started to withdraw them towards the informal system, where too, they have to face a lot of problems but at least the meaning of justice at informal system does not contradict their idea.

The NGOs have come forward to solve the problems that a traditional *shalish* faces. The role of NGOs in this case is quite praiseworthy. They have effectively campaigned for women's empowerment as well as legal rights and awareness. They are achieving success in a slow but steady pace. To date, their success has been two-fold. First, through providing financial aid, they are helping women to have a voice and in NGO-sponsored *shalish*, they are allowing participation of women. However, what the NGOs sometimes lack is the acceptability of their action. In a particular case, after getting legal aid from BRAC, a woman was named as *"BRACer Beti" (BRAC's daughter).* In some cases, getting legal aid from NGOs is considered rather insulting (Ali and Alim, 2005).

In this situation, we argue that if we can develop an integrated approach to access to justice, many of the problems mentioned above may be eradicated or at least may be minimized.

7. The Integrated Approach to Access to Justice for the Poor

We have started our discussion with Columbus's broken eggshell and how it deprives the poor from access to justice. In our overall discussions, we have pointed out a number of institutions that should, can or may glue up this broken eggshell. The formal legal system should do this job but they are the one that is keeping the poor outside the eggshell. For it's mostly Westernized individualistic outlook and emphasis on legal guilt, it remains far from the reach of the people. For poor, the 'glue' could be the traditional *shalish* which has an entirely Eastern outlook but at the same time, their importance and effectiveness are declining. If the informal system fails to fill in the gap created by the formal system, the situation may become quite dire. However, the positive indication is that the NGOs have come into existence to build a bridge between these formal and informal systems.

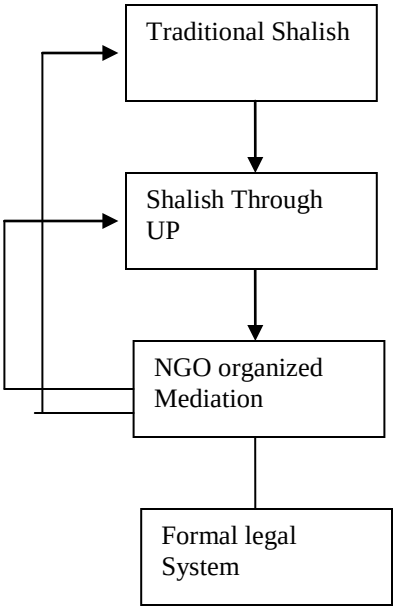
In order to ensure the effective functioning of the legal sector, no one can deny the importance of formal sector. Some reform efforts have already been taken place and they should be accelerated. Thus, if the bridge is built, the formal sector should assure access for the people living on the other side. For this, first of all, laws should be modernized. To reform criminal justice, Code of Criminal Procedure should be revised, to streamline criminal justice; separate Criminal Investigation Department like FBI could be established. Second, the ridiculous three months winter vacation should be shortened. Thirdly, introduction of modern technology is needed in areas of case management. Tape

recording machines for recording, computer and photocopier for composing and photocopying evidence are essential. Fourthly, it must be ensured that once justice is delivered the copy of that is issued immediately. Fifthly, the salary benefit of the judges should be increased, as the bright, young lawyers are interested in joining the judicial service. Sixthly, separation of judiciary is necessary. In order to free the judicial service from the executive control and to let it remain above the domain of political domination, it is a must.

In parallel to formal systems reform, in order to ensure access to justice, the equal emphasis should be given on the informal sector and this sector needs to be strengthened. Now the basic problem is how to make informal systems free of problems of biasness and anti-poor and anti-women attitudes by not compromising the basic human rights of the poor?

So far, the main problems of the informal sector are: it is not structured; it is biased and; it lacks accountability. People actually do not know where to go in case of seeking justice. They either go to the UP chairman and as the village court is not functioning, the very best a UP chairman can provide is a traditional *shalish* which for many reasons may fail to deliver justice. People, on the other hand, can seek legal aid from NGOs and *shalish* is also arranged/conducted by them and its outcome may either be accepted or not. Within this context, we propose an integrated structure of justice institutions which will start with the traditional *shalish*. It will be the lower most tier of the informal sector. The justice system will be restorative and mediation will take place of arbitration. The shalishkers will be the respected or accepted persons and they will receive legal training through NGOs and/or local government. If they fail to resolve a dispute, parties may seek justice from the UP. The UP chairman can follow the Village Court Ordinance, 1976 in case of a dispute resolution or can appoint someone as mediator. If a person fails to get justice here too, he will move to the next level. In this level, the mediation and/or *shalish* will be conducted by the NGOs. As they are already providing a parallel system of mediation that refines the basic *shalish* model, it is only the recognition that they need. The mediators in this case may be the trained mediators or the women mediators or the NGOs can convene a panel of mediators, which will consist of people with knowledge of women's rights or other areas (EC, 2005). Besides, NGOs will do certain other duties. They will keep a close look on the two tiers situated below them; they will provide legal assistance to these tiers. Besides, they will also provide the link between the informal and formal system. If an NGO fails to provide justice or if the crime is nonshalishworthy, then the NGO will help a victim to process the case in a formal court.

The integrated model may look like this:



Conclusion

Ideas are not raw materials that after importation they can be used in setting up various institutions. Every idea, strategy or issue taken to implement rule of law must be in line with the political, social or economic context of a certain country. That is the basic principle of legal empowerment and that is what can glue up the eggshell with the yolk inside. The basic idea of access to justice for the poor in Bangladesh case will depend on how the Eastern values and systems (traditional system) integrate with the modern Western individual human rights based systems (formal legal System). Reforms and innovations are required in formal systems by recognizing and entertaining the rights of the poor. The formal systems have to see disputes from a restorative perspective, not a monarchical or colonial retributive perspective. The objective of the justice systems should not be inflicting pain, rather to restore and harmonize the society. On the other hand the indigenous informal systems must get rid of power-imbalance and must become gender-sensitive. The community legal services NGOs may help both formal and informal systems as well as the poor to overcome all the problems and access justice. Thus, by introducing the above mentioned integrated approach to access to justice, the egg can stand straight. And NGOs must play the role of the glue here. And then the access to justice may be translated into reality from rights for the poor.

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