

NON- STATE JUDICIAL SYSTEM BANGLADESH: SHALISH SYSTEM

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ABSTRACT

Non-state justice systems (NSJS) are community-level organizations or procedures that use customary laws to resolve disputes on behalf of religious, ethnic, or indigenous groups inside a state or territory.¹ The majority of disputes are resolved through various non-state, traditional, customary, religious, and informal institutions, as well as alternative dispute resolution systems, in many different nations. According to estimates, in many poor nations, these techniques are used to resolve about 80% of cases.² Over the past few decades, there has been a need to research the balance between state and non-state legal systems. Due to the perceived shortcomings or inaction of the state justice delivery systems, non-state justice systems—such as jirgas, shuras, shalish, panchayat, etc.—have become sought-after methods of dispute resolution. In order to remove impunity and advance long-term peace and stability, it is important to cooperate with both formal and non-state justice systems while developing the legal and judicial sector in post-conflict environments. In developing justice responses, it is crucial to consider and address the expressed needs of survivors. In some cases, survivors may want to access non-formal justice structures, but it is crucial that these structures are made in a way that minimizes the risk of stigmatization and/or harm to survivors.

This paper aims to conduct a brief study of Non-State Justice System, particularly focusing on the Bangladeshi system of Shalish. The objective is to conduct an in dept study about the Shalish system of justice and its relevance in today's time.

Keywords: Non state judicial system, Bangladesh, Shalish, Justice structure.

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- 1 Non -State Justice System Programming, USAID, June 2019, Guide-to-NSJS-Jun-19.pdf (usaid.gov)
 - 2 Non-state justice system, UN Women, July 3, 2013, <https://www.endvawnow.org/en/articles/1585-non-state-justice-systems.html>

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NON- STATE JUSTICE SYSTEMS

Non-state justice systems (NSJS) are community-level organisations or procedures that use customary laws to resolve disputes on behalf of religious, ethnic, or indigenous groups inside a state or territory.³

Many non-state, traditional, customary, religious, and informal procedures, as well as alternative dispute resolution processes, are used to settle conflicts in many different countries. According to estimates⁴, these methods are used to settle almost 80% of cases in many developing nations. In order to remove impunity and advance long-term peace and stability, it is important to cooperate with both formal and non-state justice systems while developing the legal and judicial sector in post-conflict environments. There are many ways that NSJS systems and the state are related.

Systems can be established by the state outside of the formal justice system for a specific purpose, by non-governmental organizations (NGOs), or by communities that are relatively cut off from the state. In developing justice responses, it is crucial to consider and address the expressed needs of survivors. In some cases, survivors may want to access non-formal justice structures, but it is crucial that these structures are made in a way that minimizes the risk of stigmatization and/or harm to survivors. These non-state justice systems frequently take place at the local level and are governed by local institutions and social organizations. They apply whenever a wrong of any kind that disturbs the community's social order is committed, and they are not always specific to criminal or civil wrongs. Decisions are made by leaders who are constrained by religious, cultural, and/or tribal customs.

Non-State Justice Systems (NSJS) are widely used for several compelling reasons. Some of the reasons for their extensive use include that they are economical, practical, easily accessible, culturally relevant, and sensitive to the needs of underprivileged

communities. Fast resolution procedures are made possible by the NSJS's simplified design, which does away with the bureaucratic bottlenecks that are sometimes present in formal legal systems. For those who would find the cost burden of regular justice procedures to be too great, this makes it a financially feasible alternative.

It is crucial to recognize that non-state judicial systems do have certain inherent disadvantages. The integrity of these systems may be compromised by problems with corruption and the misuse of power, among other noteworthy difficulties. Events of misconduct inside NSJS have the potential to undermine the same values they purport to defend, undermining faith in their ability to do their jobs well.

Moreover, concerns arise regarding the adherence to international human rights norms within the ambit of non-state justice. Without the protections offered by well-established legal frameworks, instances of discrimination or cruel and inhumane treatment may occur, raising concerns about the moral basis of these institutions.

The lack of accountability measures in the NSJS landscape is a key gap. Unchecked power dynamics run the risk of exacerbating the lack of institutional control, which could result in injustices. The absence of accountability is a significant obstacle to guaranteeing the impartiality, openness, and compliance of non-state justice systems with internationally accepted legal norms.

In the field of National Security and Justice Systems (NSJS), decision-makers must make a wide range of strategic decisions to successfully negotiate the intricate terrain. The best course of action depends on a careful assessment of the system's intrinsic qualities and a precise knowledge of the objectives that are meant to be achieved.

A wise course of action always includes encouraging positive cooperation with the NSJS. Such a path of action makes sense since it acknowledges that complex and multidimensional problems require collaborative and synergistic efforts. Through the use of a collaborative framework, stakeholders can use one another's perspectives, resources, and expertise, strengthening the NSJS as a whole.

This collaborative mentality emphasizes the

3 Non -State Justice System Programming, USAID, June 2019, Guide-to-NSJS-Jun-19.pdf (usaid.gov)

4 UN Rule of Law website and Governance and Social Development Resource Centre (GSDRC) "Non-state justice and security systems"

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value of building partnerships that cross conventional boundaries and constructive discussion, going beyond simple cooperation. By adopting a cooperative perspective, decision-makers can proactively tackle systemic problems, strengthen the NSJS's resilience, and promote a shared responsibility environment.

Furthermore, this collaborative paradigm makes it possible to respond dynamically and adaptively to changing problems and threats. Understanding that the security environment is ever-changing, collaboration allows for the prompt sharing of knowledge, intelligence, and best practices, which helps the NSJS adapt to new challenges.

Choosing the best approach for NSJS requires careful analysis of the unique goals being pursued as well as the features of the system. Policymakers may effectively utilize the combined strength of stakeholders by placing a high priority on constructive collaboration. This will enable the National Security and Justice System to be flexible, responsive, and robust, enabling it to effectively tackle modern-day issues.

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The Family Court Ordinance of 1985's Sections 10(3) and 13(1), which provide for compromise or reconciliation even before the entry of judgement, are where the notion of ADR was first introduced in Bangladesh. There is no formal procedure that governs the informal justice delivery system in Bangladesh. As huge populations and groups within the village structure in the area where Bangladesh is located were progressively crammed into small spaces and obliged to share scarce resources, the incidence of localized disagreements and altercations continued to rise. As a result, on the one hand, the village identity solidified and, on the other, there were more neighborhoods. The village-based shalish also or alternatively replaced the neighborhood-based shalish. Inter-village shalish was also done during this time. Shalish is intended to serve as a forum for the out-of-court resolution of minor disputes or disagreements in rural life.

A long-standing democratic process that is

ingrained in rural Bangladeshi culture, shalish is a kind of informal social governance that was created to settle small legal and criminal problems. This system depends on the knowledge and power of respected community members, such as shalishkars (adjudicators) or matbars (leaders), who are essential to the adjudicatory procedure.

Rural Bangladesh has experienced two different types of adjudication over the course of history: the traditional shalish and the progressive incursion of the state's judicial system into these hinterlands through the enactment of special legislation. The way these systems are compared highlights how conflict resolution has evolved in a sophisticated way within the socio-legal context of the area.

As a pillar of communal harmony, Shalish is a prime example of a collaborative and community-focused strategy to resolving disputes. In this paradigm, adjudicators are usually those who have a thorough awareness of the customs and norms of the area, such as matbars or shalishkars. Their well-known status in the community lends the procedure a feeling of comfort and confidence, creating an atmosphere that is favorable to the peaceful resolution of both civil and criminal cases.

In contrast, the state's judicial branch's extension into rural areas as a result of legislative interventions highlights a divergent trend in the development of conflict resolution. Certain statutes, designed to tackle the difficulties faced by rural communities, define the authority and processes by which state-approved courts handle cases that are customarily settled through shalish.

By bringing traditional customs and formal legal systems into harmony, this legal assimilation aims to provide a dual-track system that can help negotiate the challenges of delivering justice in rural areas.

In rural Bangladesh, the cohabitation of shalish and the state's judicial growth reflects a dynamic interaction between formal legal frameworks, community-based resolution, and tradition and modernity. Policymakers and legal scholars alike must comprehend this complex web to strike a balance between upholding the rule of law and protecting cultural heritage in the dynamic field of dispute resolution.

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I. PROCEDURE

Shalish is a comprehensive conflict resolution system that handles a wide range of civil cases, many of which have subtleties related to criminal activity. With a strong focus on gender and family-related issues, this comprehensive framework excels at resolving complex challenges. These include but are not restricted to inheritance issues, dowry disputes, polygamy cases, divorce cases, and cases of abuse against women.

The Shalish system's effectiveness stems from its capacity to handle these intricate issues from an all-encompassing perspective, acknowledging the interdependence of many legal and social aspects. When it comes to inheritance, Shalish is an important channel for ensuring that assets are distributed fairly while maintaining the values of justice and family unity. The Shalish system takes great care to settle disputes involving dowers, which are a common cause of conflict, in a way that upholds the dignity of all parties concerned.

Another level of complication arises in polygamous situations, as Shalish tries to balance the legal issues with the interpersonal factors involved. The system takes a sophisticated approach to divorce proceedings, acknowledging the delicate nature of these cases and working to promote cooperative solutions that put the interests of all parties first.

The parties' agreement to follow the board's decision is a need for conducting the Shalish. The village chief will occasionally request Shalish when a conflict arises out of a desire to reduce social tension. The public also asks questions during Shalish. Here, the audience serves as an impartial yet powerful advocate. To reveal the truth, they pose several inquiries. The key point is that the Shalish board members truly attempt to assess the primary circumstance. The board has delivered its final decision.

There are typically two sides involved in a conflict. Shalish's location is filled with presentations from both sides. The board members first carefully heard the complainant's full list of grievances. The accused then can make a defense. If both sides make the same kind of statement, such as if the

accused admits to the allegations and concurs with the Shalish board members' judgments, the board members will request formal approval from each side. Finally, a decision was reached and recorded in writing.

In that written document of judgement, all the audiences in attendance also provide judgmental indicators. In general, the Shalish board chairman should keep the paper safe. The paper may be presented to the court or Thana if necessary. If anybody files a lawsuit, there have initially been some attempts to resolve the issue without litigation. Throughout this process, the Shalish is performed by both parties. And following the Shalish, the paperwork to withdraw the case is given to the police station's official in charge.

II. HISTORY

This traditional kind of mediation has a long history in Bangladesh's humanities, culture, and history. It depends on either shalish panel arbitration or mediation, where the shalishkars assist the parties in reaching an understanding.

The village Shalish, which is historically a local committee of officials that is exclusively made in the traditional form and provides dispute resolution apart from the state, is most frequently included in the legal structure of Bangladesh. The village Shalish is traditionally a local committee of officials that is exclusively made in the traditional form. Active NGOs have all established their Shalishs as the fairer alternative for local Shalish in order to improve access to justice. It's interesting to observe that different institutions are consulted by citizens. Sessions take place in the captain's home or a temporary office with community members frequently present, and Shalish frequently creates physical access to these spaces.

People have historically turned to the Shalish in Bangladesh to seek justice since it is believed that the formal judicial system is plagued by corruption, delays, difficult processes, high costs, class bias, and gender bias that favors males over women. cases can aggravate the already challenging circumstances faced by female plaintiffs. Here, Shalish appears as a different arena for resolving disputes. However, the

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village Shalish is customarily a male-only committee or official body. More hybrid Shalish forms led by local elected leaders have replaced the classic Shalish. Additional NGO interventions have assisted in the establishment of alternate Shalish in an effort to divert people's attention to new structures made to be more inclusive of women. Despite the concision effect to include women in the interventions to provide justice, people continue to go to traditional Shalish as the community and religious sanctions are strong.⁵

Despite major advancements, the Shalish frequently subjected the women to the same social pressures and gender biases as the formal courts, demonstrating that the Shalish was more detrimental to the female party than beneficial.⁶ According to the same report, donor-funded NGOs connect bar associations to make it simpler for people to access the legal system, particularly in cases of violence against women.

Another initiative (Banchte Shekha) started an all-female paralegal programme to train village women in Muslim family law, teaching them about topics like dowry, marriage, divorce, and inheritance so they may help villagers without having to hire a lawyer. The status of women in Shalish, who were previously unable to have any representation even in high-risk scenarios, has significantly improved because to these volunteer paralegals who assist in the Shalish process.

III. TYPES OF SHALISH

Three types of shalish exist: traditional shalish, shalish facilitated by the government, and shalish facilitated by non-governmental organisations.

a. Traditional Shalish

It entails the assembly of male village elders and concerned individuals to resolve local conflicts. Even though some of the decisions are unfair and unjust, they still have a lot of value because they are made by reputable and recognized members of the society. Women, however, are vulnerable to

severe punishments through the issuance of fatwas, or legal judgements, made by recognized religious authority of Islam, given that they are only governed by high-level males. In order to keep control over these judicial systems and uphold cultural norms and biases, corruption is frequently used.

b. Government Facilitated Shalish

The Union Parishad (UP), the lowest level of local elected government, participates in it by serving as session chairmen and moderators and by considering the rules intended to control the penalties imposed out. However, it is widely reported that the dynamics and organisational structure of this type of shalish are very similar to the traditional form in that local patronage systems have a significant impact on the selection of candidates and the rights of women and vulnerable groups are largely disregarded. However, there is an increasing tendency toward women joining Union Parishad.

c. NGO Facilitated Shalish

It offers shalish and community members training and instruction in gender and social justice, supports session planning, and introduces record-keeping procedures. The Madaripur Legal Aid Association (MLAA), which has also taught numerous other NGOs in the subject, has been the most major actor in spreading this framework and lobbying for the modification of gender and class prejudices in these proceedings.

IV. CURRENT STATUS

Legal processes are cumbersome and expensive in Bangladesh, as they are in many other nations. The legal system is out of reach for the majority of people. People look for local remedies like the traditional alternative dispute settlement method, generally known as shalish, to avoid expensive and drawn-out court proceedings.

In Bangladesh, shalish sessions are frequently used to address matters such as marital conflict, desertion, oral divorce, etc. Shalish is currently mired

⁵ Lugo and Searing (2014)

⁶ Goresh (2009)

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in a complex web of issues in Bangladesh. Huq⁷ cited research on rural informal shalish led by the Union Parishad as a method of pervasive corruption of its administrators. In informal shalish incidents, there is a propensity to ignore or give the institutional laws and accepted justice principles an improper amount of respect. The outcome of the majority of shalish procedures is frequently influenced by orthodox religious beliefs, wealth, nepotism, political dominance, and the social position of persons from the upper class.

There is evidence that some of the splashes were used in various regions of the country to carry out perverted “fatwas”⁸ against women. It was actually a quiet revolution that altered the social climate of rural Bangladesh. In earlier times, this would have been unimaginable. As a result, the Mahajan class and the clergy retaliated by systematically abusing women through fatwas and attacks on NGOs, NGOs’ employees, etc. Fatwas against women have almost always been issued, condemning them to inhumane, brutal, and degrading treatment in the name of Islam through a Shalish.

Therefore, in addition to being “anti-women,” the fatwabaj are also “anti-development.” Due to her judgement protecting a fatwa victim who was pregnant and ordering the authorities to take necessary action against the concerned fatwabaz, even the Supreme Court’s first lady judge has not been immune to these fatwas. As a result, the fatwas have been consistently employed as a means of oppression and violence against women.

It is also clear that the rural power structure is undergoing periodic adjustments. All aspects of rural life are affected by these developments, which weakens the Gram Panchayet system’s historical appeal. Bangladesh’s Gram Panchayet is now a severely dysfunctional and ineffective mechanism for resolving local conflicts. The panchayets’ original emergence was a spontaneous phenomenon created to address social demands, and they exhibited a high degree of autonomy in their operations. Almost all disputes that arose in the village community fell under the purview of the panchayet. The existing village

panchayet was essentially preserved despite the Muslim rulers later creating their own judicial system that was at odds with the established structure.

Intense factional rivalries and infighting in the villages, according to recent studies, have caused the village-based shalish to experience serious functional difficulties. Localized minor disputes are increasingly being referred to the union parishad (UP) chairmen/members for mediation instead of the formal village courts. These findings also point to rampant corruption in the informal shalish carried out by local officials or UP employees, including erroneous consideration of pertinent legal requirements or accepted standards of justice. Inequality in Shalish is mostly caused by pressure from the wealthy, the influence of money or special favors, fear of local terrorists, and dominance of traditional religious beliefs. When a minor disagreement is settled through shalish, money is frequently exchanged. Family and land disputes, which are more amenable to peaceful remedies, are the root of many crimes. Although it is preferable to avoid being vengeful and seek a solution to the conflict in minor criminal cases, litigation is generally the preferred course of action. However, litigation ultimately does not lead to a resolution and instead simply fosters further hostility and division among the disputants specifically as well as within the community as a whole. Anyone interested in the continuation of shalish in Bangladesh today will find it extremely difficult to bring the traditional shalish back and shape it in a way that reflects the people’s spirit and aspirations. But it appears to be exceedingly challenging to reach an equitable agreement between the disputing parties because of enduring structural- functional issues and the absence of peace and amity within the rural social structure. The fact that certain Non-Governmental Organizations (NGOs) have recently stepped forward to reform the conventional shalish system, however, appears to be a beneficial trend. They are aware that the main goals of the mediation process should be to achieve neutrality, non-imposition, and a “win-win situation.”

7 1998

8 Religious verdict

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IMPERICAL DETAILS ABOUT SHALISH

1. Number of Cases

Village Court paves the way for accessing to justice for the huge amount of vulnerable communities. One report (LGD, 2013) shows that over 90,000 people, especially those from vulnerable communities have extended direct access to localized justice through shalish. In 2013 a total of 18,348 cases were reported of which 15,276 were resolved and 13,174 of these decisions of resolved cases have been implemented in the 350 shalish. Since the formal court is overburden with huge number of cases, these activities of shalish reduce the loads of court. From July 2017 to February 2018, District Courts has transferred of 2210 cases to the shalish.

2. Gender

Women have always been excluded from taking part in community conflict resolution in rural Bangladesh. Women seldom ever even show up for their own hearings in traditional community justice systems in rural Bangladesh (shalish), much less serve as mediators.

The government, NGOs, and women leaders have really been striving to improve the situation. NGOs have used historic concepts to construct their own community dispute forums that give women's voices a platform. The village courts, a quasi-state justice venue, now have at least one woman on each case involving women and kids in development areas.

Women's participation in and influence over these forums is still limited. The ability to advance is constrained by the domination of elite (mostly male) interests in decisions affecting politics, society, and the economy in both public and private settings. Women's participation in communal conflict resolution, for instance, is typically limited to "women's matters," which excludes disputes over land and property.

Women are now having more opportunity to engage in public decision-making due to institutional and legal reform. Quotas for women's participation in direct elections were part of the 1997 reforms to local

government, ensuring their numerical (though not substantive) involvement in local politics. The Village Court Act was amended in 2013 to require the presence of a woman in matters involving women and kids. Due to procedural requirements, these same politicians frequently serve as judges in village courts, which increases their level of involvement in the community.

Mahbuba, a woman leader who was mentioned in focus groups held in the neighborhood, said: *"My father-in-law had been the chair of this union for a long 25 years and the people would abide by his words like the blind [...] After his judgement nobody needed to go to the village court."*⁹

The majority of the women participating in conflict resolution that we spoke with made it apparent that women's participation in these forums – as both disputants and mediators – had traditionally been and frequently still is limited.

A few years ago, a woman who had recently come into the community after getting married said, "If we want to talk in the community-level shalish, then older members of the community say: "You are women, you are young, we have more experience, and you only came from your parent's village only a couple of years ago – how can you talk about the community? We know more about the community than you, so you stop it"¹⁰

A larger body of research shows how shalish have become more open to women, yet they rarely take part as shalishkars. Instead, they occasionally attend sessions as witnesses or observers.

CRITICAL ANALYSIS

Despite the fact that everyone in Bangladesh has equal access to the legal system under the country's constitution, the reality differs greatly from the ideal. The citizens of Bangladesh, particularly those from rural areas and indigenous tribes, rarely

9 Craig Valters and Ferdous Jahan, Women and Power: Mediating community justice in rural Bangladesh, February 2016, <http://cdn-odi-production.s3-website-eu-west-1.amazonaws.com/media/documents/10291.pdf>

10 *Id*

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experience the full potential of their rights due to prices, case backlogs, and shortages of resources and expertise. As a result, informal and regional dispute resolution processes like the Shalish are still applicable in Bangladeshi society. Due to the informal nature of these mechanisms, disputants are able to address their issues more quickly, for little to no money, and in a fashion that allows them to express themselves freely. Additionally, this forum for resolving neighborhood problems can successfully stop the increase of aggression in these regions.¹¹

Although, shalish proves to be a good system, it comes with a lot of drawbacks. Shalish's biggest problem or hindrance is politics. Shalish system aristocracy is destroyed by party-centered politics. The main challenge in this situation is politics. There is a good possibility that the victim won't receive justice if they don't have family members who support the government or if they have relatives who support the opposition. Conflicts of a minor kind are promptly brought before Shalish. However, significant and delicate issues are first brought up in court, but if they are not resolved or are pending for an extended period of time, they resort to Shalish. One restriction, though, is that the Shalish board is only permitted to issue monetary fines and cannot make any major judgments or punishments.

The Shalish board cannot enforce the decision if someone disobeys it. One of the primary difficulties facing the Shalish system is animosity between various influential members of society. Some powerful individuals outside of the Shalish board, who have strained relationships with its members, attempt to persuade one of the parties to violate the agreement or reject the Shalish board. Conflicts can occasionally suit someone's interests. They might not want the conflict to be resolved. That is why they make various attempts to obstruct the reconciliation process. But there is no problem with security in the village.

It can happen that one of the parties is unwilling to participate in a Shalish for a specific individual. Shalish's lack of power is the key issue. The board

has no authority to take action if one or more parties violate the rules. The conventional Shalish system is currently on the verge of extinction. They are not armed in any way. Another reason for the disaster of Shalish is that sometimes the members themselves may be involved in favoritism, which may turn out very injurious for the procedure. They occasionally receive bribes from the parties.

CONCLUSION AND RECOMMENDATION

The Shalish system is an essential institution that is deeply ingrained in Bangladeshi rural culture and is still relied upon by most villagers. Two main processes—the top-down and bottom-up approaches—define this social structure. Each provides a different viewpoint on how Shalish proceedings are initiated and carried out.

According to the top-down theory, Shalish discussions could have started with the village chiefs, indicating a hierarchical framework in which commands and decisions trickle down from greater authority to the lowest tier of the organisation. On the other hand, the bottom-up approach highlights the possibility of initiating Shalish procedures from the recipient's end, highlighting the community members' agency and involvement in igniting the conflict resolution process.

Amazingly, there are no strict rules or guidelines attached to the position of a Shalish board member—a characteristic that reflects the system's organic structure. The fact that there are no set requirements for board participation highlights how inclusive the Shalish structure is, enabling people with a variety of experiences and backgrounds to actively engage in the settlement of conflicts within the community.

To put it simply, the Shalish system continues to function as a dynamic and flexible organisation in which the interaction between top-down and bottom-up procedures promotes a collective strategy for resolving disputes. The adaptable character of Shalish board membership serves as an additional illustration of the democratic spirit ingrained in this age-old system, underscoring its durability and applicability in the dynamic context of rural Bangladeshi culture.

¹¹ Akram S. A Critical Analysis of Access to Justice in Bangladesh. *International Journal of Humanities and Social Science Invention*. 2017

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However, family conflicts, land disputes, acts of violence like arson, theft or robbery, etc. are the disputes that Shalish is most frequently called upon to settle. The system has faced numerous difficulties, including political influence, a lack of documentation, and a lack of legal support. The local Shalish system, however, is extremely helpful in resolving disputes and supporting the broader judicial system. Through all available means, the entire system should be promoted and preserved as a piece of cultural heritage and a powerful tool for resolving disputes.

The following suggestions can be considered for good shalish implementation:

- Politics should be less intrusive in the shalish system. Building societal awareness is necessary in this situation.
- The shalish session's proper paperwork should be kept up to date. In this situation, management should at the very least oversee the documenting of the problem.
- To assess the actual shalish system scenario, more research should be done. It is essential for the system to be well promoted.
- Funding should be set aside in a certain amount for the procedure.

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