

**ALTERNATIVE DISPUTE RESOLUTION PROCESS IN FAMILY MATTERS  
UNDER LEGAL FRAMEWORK OF BANGLADESH: CHALLENGES AND WAYS OUT**

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**Abstract:** Bangladesh, historically, inherits informal dispute settlement processes including Panchayet/ Salish at grassroots or village level. Due to the large volume of suits, unbearable sufferings, inerasable stigmatizing and burdensome costs, our formal court system has been losing its popularity. In contrast, the system of resolving the dispute alternatively (which called as Alternative Dispute Resolution or ADR) has been gaining its grounds to subdue shortcomings of our formal judicial system. The nature and characteristics of most of the family disputes, if not all, justify locating such disputes under the umbrella of ADR. Reasonably, our policymakers have searched for possible alternatives and emphasized in incorporating ADR mechanisms in different legislations to settle family disputes. However, ADR mechanisms in relation to family matters have yet to result in desirable outcomes because of some statutory limitations and practical challenges. Different actors associated with the family dispute resolution process have often been blaming or shifting responsibilities to each other for existing loopholes in settling family dispute alternatively. It is, however, to be submitted unequivocally that the challenges of ADR in family matters under the legal framework of Bangladesh are not unconquerable, but we need to find out feasible ways out to overcome those challenges. In this paper, after analysing of the relevant legal provisions, an attempt would be made to identify challenges within our legal framework and to explore the possible ways out so that our legal system may accommodate better mechanisms for resolving family disputes in an alternative way.

**Keywords:** ADR, Legal Framework, Family Matters, Bangladesh

**Research Area:** Law

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## 1. INTRODUCTION

Human conflicts and differences of opinion within or beyond the family affairs are the historical reality that we cannot either completely refuse or ignore. Disputes among the people are equally concomitant so long human society and civilization exist. It is perhaps a utopian concept to imagine a human society without conflict or dispute. The scale and length of such human dispute result in serious setbacks and multiple impacts when they are related to family issues. States are relentlessly trying to shape new policies and to adopt measures through which they may resolve the disputes beyond traditional courts system. Ideally, Alternative Dispute Resolutions (ADR) process has become popular which aims at resolving disputes within the minimum level of possible costs and resources can be spared for constructive pursuits.<sup>1</sup> Due to stigmatizing, premature rush to court along with costs and sensitiveness of family issues, ADR mechanisms suit with the settlement of family disputes.

Bangladesh has a historical legacy of settling dispute alternatively through panchayat/Salish at the village level. The traditional informal systems of dispute settlement have been incorporated in various legislative provisions pertaining to family affairs with a view to obtaining quick and amicable dispute resolution. Perhaps, it would be no exaggeration to argue that the ADR system in family issues has not produced the outcomes up to the expectations. Logically, the reasons and challenges of such failure are the subject matters of investigations by the different stakeholders. Thus, challenges of ADR in family matters that Bangladesh is currently confronting would be ventilated in this paper. The paper would then step further to put forward possible ways out to subdue or reduce existing challenges on settling dispute alternatively in family matters.

## **2. HISTORICAL ANALYSIS OF ADR ON FAMILY MATTERS IN BANGLADESH**

Bangladesh has a notable long history in the resolution of dispute alternatively. Because of the deficiency of historical evidence, it is difficult to pinpoint the exact era when the concept of different traditional modes of informal justice, such as village panchayat/ Salish, was first initiated in this region.<sup>2</sup> Like any other civilized societies, Bangladesh has also some informal justice systems like negotiation and *Salish* and this traditional *Salish*, a dispute resolution process, which is prevalent mostly in the village area.<sup>3</sup> Formal or statutory ADR in Bangladesh is a very recent origin/addition whereas *Salish* has been adopted as a mechanism of informal justice delivery. During the British period, the panchayat system was introduced as an amicable measure to manage and confirm the collection of land revenue without any formal litigation<sup>4</sup>. Thus, the Panchayat system was used to resolve the minor disputes within their area, and the major disputes were forwarded for legal procedures. In the word of Martin C.J “...to refer matters to panchayat was one of the natural ways of deciding many disputes in India”.<sup>5</sup>

In Pakistan period the military government promulgated Muslim Family Laws Ordinance (MFLO), 1961. MFLO made an arrangement to settle family disputes among couples through quasi-formal local bodies called ‘Arbitration Council’. However, the system that exists in our country is basically based on the adversarial system, a claimant has to wait a long time and much money had to be spent to have the dispute settled in the court. In giving a decree, the court had to face many problems in Bangladesh because of less effective mechanisms and primitiveness of the trial procedure in the existing legal system to resolve a dispute timely and diligently. At last, a light was seen on the other side of the tunnel when a time demanding initiative was taken in 1999 by then Justice Mr. Mustafa Kamal. Bangladesh Legal Study Group (BLSG) was formed under the leadership of Justice Mustafa Kamal along with other renowned jurists of the country.<sup>6</sup>

In its reports, the BLSG identified lack of accountability, the absence of discipline and fragmentation in the litigation process and the absence of resourceful alternatives to full trial as the most pressing problems for the delay and denial of efficient and proper justice. The report recommended to initiate an immediate pilot project on the mediation, a non-mandatory consensual dispute resolution system, in the family court of Dhaka and to expand it to other courts as well. The reason for focusing the family court in the pilot project was that it was not

necessary to enact any new legislation to adopt this measure. The family court Ordinance 1985 itself contains the provision of conciliation whereas inclusion of other courts under this project at that stage needed new legislation or amendment of the Civil Procedure code, 1908. The Ordinance empowers the trial judge to impose and facilitate the reconciliation between the parties both in the pre-proceedings stage and in trial stage even after trial. The Ordinance further provides that all assistant judges of the subordinate civil court are *ex officio* as Family Court Judge.<sup>7</sup>

In the pilot project, statistics show that the total realization of the money from disputes settled through mediation was far higher and better than the total realization of money through execution of decrees in family suits disposed of by the regular trail.<sup>8</sup> The paramount success of the ADR, it changed the mental attitude of the judges, lawyers, litigants and even the general public who were doubtful about the success of ADR. It is worthwhile to mention the remarks of Justice Mr. K. M. Hassan on the prospects of ADR in Bangladesh, 'the success of mediation in the family court is not an end. We look forward to the day when the introduction of ADR mechanism in other courts, like Commercial Courts will be achieved'.<sup>9</sup> The experience of the family courts has provided a strong foundation upon which a favourable environment to introduce ADR in any type of cases has been grounded.<sup>10</sup>

### **3. CONCEPTUAL ANALYSIS OF ADR**

Alternative Dispute Resolution (ADR) is a process of dispute settlement outside the formal judicial system where the parties represent themselves personally or through their representatives and try to resolve the dispute through a process of mutual compromise and agreement. ADR is also delineated as 'appropriate dispute resolution processes. In true sense, ADR is 'the process of resolving the dispute without going through the assessment of the court, which may bring bad publicity, acrimony, high cost, and high technicality'.<sup>11</sup> In words of Mostofa Kamal, J, "...it is an informal settlement of legal and judicial disputes through a process of mutual compromise".<sup>12</sup> He also added that ADR is not a panacea for all evils but an alternative route to a speedier and less expensive mode of settlement of disputes. Thus, ADR is an attempt to design machinery which should be capable of providing an alternative solution to the conventional methods of resolving disputes. An alternative means to the privilege of choosing one of two similar things or courses offered at one's choice. It does not mean the choice of an alternative court but something which is an alternative to court procedures or something which can operate as the court-annexed procedure.<sup>13</sup> Because of the special characteristics, "ADR is considered to be the mode in which the dispute resolution process is qualitatively distinct from the judicial process".<sup>14</sup> It is mostly a non-judicial means or procedures for the settlement of disputes amicably rather than adversarial means. The search for a simple, quick, flexible and accessible dispute resolution system has resulted in the adoption of 'Alternative Dispute Resolution' mechanisms. The primary object of the ADR system is the avoidance of vexation, complexity, expense and delay, and the promotion of the idea of "access to justice".<sup>15</sup>

Based on the techniques, ADR mainly consists of negotiation, conciliation, mediation, arbitration and a series of hybrid procedures. Arbitration is adjudicatory and the result is binding, whereas conciliation is consensual and very helpful in making the parties in setting their disputes mutually with the help of a neutral third person. The success of conciliation depends on the mental attitude of the parties, the skill of the conciliator and creation of a proper environment which is most essential in matrimonial disputes. Negotiation is a non-binding procedure resorted to by the parties for arriving at a negotiated settlement. Willingness to resolve the dispute and objectivity necessarily becomes essential to arrive at a negotiated settlement. Mediation is a decision-making process in which the parties are assisted by a third party, the mediator. The mediator attempts to improve the process of decision making and to assist the parties' reach an outcome to which each of them can consent.<sup>16</sup> Most ADR processes are based on an integrative approach. They are more cooperative and less competitive than adversarial court-based methods like litigation. Due to this aspect, ADR tends to generate less escalation and ill-will between parties. This is a key advantage in a situation where the parties can continue to interact after the settlement is reached.<sup>17</sup> Regarding simplicity, speediness, flexibility, and accessibility of the dispute resolution system 'Alternative Dispute Resolution' mechanisms are more suitable than the existing judicial system. Putting it in simple terms, Alternative Dispute Resolution denotes all forms of dispute resolution other than litigation and adjudication through courts.<sup>18</sup>

#### 4. JUSTIFICATIONS OF ADR ON FAMILY MATTERS

Alternative Dispute Resolution in the family matters has been justified from the various perspectives. It justifies its suitability and necessity in family matters due to the peculiar character and nature of the dispute that requires a special type of dispute settlement process other than formal dispute settlement. It is worthwhile to quote K.M Hasan, CJ, who rightly pointed out the suitability of ADR in family affairs in the context of Bangladesh by the following words:

"In a conservative country like Bangladesh Mediation provides a great opportunity for an aggrieved person who is a woman to directly participate in the dispute resolution process and voice her grievance. Given the traditional mindset, the female aggrieved parties in the society are not prone to expose themselves to the public eye by going to court. Mediation by the family court removes the risk of such exposure and allows to participate in their affairs and to settle the dispute in without being condemned by critical eyes. Direct participation of female aggrieved parties to the dispute has thus to great extent facilities and contributed the success of the program".<sup>19</sup>

**Firstly**, access to justice is the prime concern for ensuring justice in the society/country. Because of the high costs of any dispute resolution system or mechanism may restrain disputant's ability to access justice. In case of family matters this problem is very acute because many women in Bangladesh are housewives, they do not earn money and they often live in distant villages, the distance to formal court mostly affects accessibility to formal courts system

to women from the poorer section of the society.<sup>20</sup> Additionally, the cost of burden of long-distance travel, people may have to bear the cost of meals and accommodation plus court fees, lawyer's fees and the costs of collecting evidence.<sup>21</sup> On the other hand, in case of out of court mediation and NGO mediation people may not have to bear such costs. Moreover, most of the NGO providing mediation services in Bangladesh are not charging their clients any fees,<sup>22</sup> for example, Bangladesh Legal Aid and Services Trust (BLAST), Ain O Shalish Kendra (ASK) conducting mediation free of cost, and Bangladesh Lawyers Association (BNWLA) takes registration cost of the only amount of 20 BDT.<sup>23</sup> It is rightly pointed out by Khair, Sumaya 'the most tangible gain from mediation services is the lesser cost of disposing of the disputes'.<sup>24</sup> Considering the above points it can be said that the ADR mechanism is not only desirable but also effective in family matters.

**Secondly**, As most ADR system is 'fact and act oriented' and a good ADR mechanism is 'person oriented'<sup>25</sup> therefore, no complex procedural or evidentiary rules which strictly be followed by the facilitators of ADR in family matters.<sup>26</sup> The primary reason for less cost in ADR is because of the simplicity of the system and lack of need for legal representation, compared with the extreme complexity of the formal court system and requirement of expensive representation. Moreover, practices of ADR minimize the probability to delay in disposing of cases.<sup>27</sup> As a result, most of the mediation resolution may be concluded within 30-60 days.<sup>28</sup> Thus, in Family matters, ADR always allows for flexible solutions and settlements between the parties. Except this any settlement arrived at through mutual compromise is necessarily agreed to voluntarily by both parties, obligations under the agreement are more likely to be fulfilled than obligations imposed by a court.<sup>29</sup>

**Thirdly**, ADR program in family matters may ultimately ensure justice for a disadvantaged group.<sup>30</sup> ADR initiatives have made a considerable change in protecting women's rights in the family and outside.<sup>31</sup> It helps to obtain justice for the poor and other disadvantaged people who don't have enough money for which they cannot go to the court. As a result, they are devoid of getting justice. As ADR is cheap and easy, they can move to dissolve any disputed issue with a nominal cost that they can afford. Alternative dispute resolution has initiated a shift in the attitude of men who have come to accept that women have to treat equitably.<sup>32</sup>

**Fourthly**, in a rural area, going to court is a taboo, especially for women and appearing in formal court often offends family tradition and prestige.<sup>33</sup> As court proceedings are conducted in public so the press is admitted and it is possible for the case to be reported in the local or national newspaper. Moreover, in practice, the court process is open and often does not respect people's privacy. In a family dispute, privacy is more important.<sup>34</sup> Thus, ADR mechanisms may effectively ensure the privacy of the disputants of family matters.

**Fifthly**, ADR is overwhelmingly informal which turns it as a unique character. It can be solved in any place and the parties are free at liberty to choose the procedure that results in it more informal. Most of the cases the mechanisms that practiced in Bangladesh are flexible and the parties have the autonomy to settle their disputes.<sup>35</sup> The formal complex procedures are

not followed to reconcile a dispute between the disputants. Thus, ADR mechanisms of settling the dispute are habitually less stressful for the parties than the litigation in the court. Family disputes are so delicate that pose huge stress on the parties, therefore, by ADR mechanisms it could be lessened to some extent.

**Sixthly**, The ADR proceedings increase the peace and harmony in the society because the win-win outcome is important in case of successful ADR process. In family matters, settlement of the dispute through ADR brings more harmony in the society. It helps to resolute the dispute in a nonviolent way. It removes the enmity among the parties. To evaporate the disputes the parties, select the decision makers and proceedings.<sup>36</sup> Unlike the adversarial trial, one party of ADR is not vanquished, but both may settle with a win-win strategy. Thus, the resolution of the dispute through ADR helps parties to continue their relationship in harmony.<sup>37</sup> In that point of view, ADR allows the parties to work together with the neutral mediator to determine the dispute and draw closer to a mutually suitable outcome.

## **5. REFLECTIONS OF ADR IN FAMILY MATTERS UNDER LEGAL FRAMEWORK OF BANGLADESH**

ADR in family affairs is a suitable dispute settlement system that aims to avoid the formal complexities, time consumption and cumbersome procedures so that the dispute of delicate nature can be resolved effectively. Dispute settlement under the legal system of Bangladesh is time-consuming, costly alongside the complicated procedures which often place justice beyond the reach of poor and mass people.<sup>38</sup> Thus, an alternative system of settling the dispute is overwhelmingly required for ensuring effective and desired outcomes of a particular issue, especially, in the delicate family affairs. Bangladeshi legal framework has been tried to accommodate the mechanisms of ADR in family affairs.

### **5.1 Muslim Family Laws Ordinance, (MFLO) 1961**

Muslim Family Laws Ordinance, (MFLO), 1961 covers issues pertaining to personal laws including inheritance, polygamy, divorce, dowry and maintenance of the wives and children. The Ordinance was promulgated by the president of Pakistan in order to bring about changes in some significant issues of Muslim personal law.<sup>39</sup> This law has been severely criticized by the different Islamist groups on the contention that it contradicts with sharia law on many aspects. Despite the criticisms and protests, it is a matter of fact that MFLO was enforced during the Pakistani period and still is law in effect in Bangladesh. MFLO has incorporated some provisions relating to alternative dispute resolution in deciding the family matters.

- Islamic Way of Reconciliation and Arbitration Council under MFLO
- Islamic way of thought recognizes the reconciliation process for resolving family disputes between husband and wife in case of any discontent between them. The Holy Quran prescribes the conciliation between the husband and wife in the following words...

"And if you fear a breach between the couple, then appoint a judge (representative of husband) from his people and a judge (representative of

husband) from her people. If they both desire agreement, Allah will effect harmony between them; Verily Allah is knowing, All-Aware."<sup>40</sup>

Under the aforesaid verse of the Quran suggests a way of settling the dispute between husband and wife in an alternative way. The same provision has been reflected in the MFLO. Thus, MFLO envisages settlement of disputes alternatively, for that end, an 'Arbitration Council' consisting of the Chairman and the representatives of each the parties to be established. In the cases, where any party fails to nominate a representative within the prescribed time, the body formed without such representative shall be the Arbitration Council.<sup>41</sup> The council comprises three members with the chairman of local Pourasabha/ Union Parishad (municipal) as the head to resolve the disputes in the family issues.<sup>42</sup> Thus, the whole scheme of resolution of family dispute alternatively as reflected in our statutory provisions like MFLO has incorporated the Quranic prescription of settling the dispute between husband and wife.

## **5.2 ADR Provisions On Polygamy Under MFLO**

Polygamy in Islamic law is a qualified right by which a Muslim man is permitted to marry up to four wives at a time upon the fulfilment of Quranic conditions. In Islam polygamy is permitted on the account of some valid justifications. In this respect, the Quran states that...

"And if you fear that you cannot act equitably towards the orphans, then marry such women as seem good to you, two, three and four; but if you fear that you will not do justice (between them) then marry only one"<sup>43</sup>.

Polygamy is, therefore, allowed as a special case and hence it should not be generalized. If a husband fears that he cannot act justly between or among his wives, he should be satisfied with one wife only at a time, because it is not possible for him to maintain just and equitable treatment to wives in all respects<sup>44</sup>. On this aspect the Holy Quran declares...

"You will never manage to deal equitably with your wives, no matter how eager you may be so, yet do not turn completely aside from one so that you may leave another in suspense. If you maintain proper conduct and do your duty, Allah will be forgiving, merciful"<sup>45</sup>.

Under special consideration and due to unavoidable circumstances, a man is permitted to marry more than wife but no more than four at a time. According to the above verses, the husband having more wives at a time must try to maintain equity and justice among them with all sincerities. Only then the Quran does not impose any more restrictions on polygamy other than those stated in the above verses. MFLO imposes a restriction if not ban on polygamy<sup>46</sup> by stating that a man, without the previous permission of the Salish council in writing shall not contract another marriage having already a wife or wives living, and such marriage contracted without such permission shall not also be registered.<sup>47</sup> An application for such permission shall be submitted to the chairman of the arbitration council in the prescribed manner, together with the prescribed fee, and shall state the reasons and urgency for the proposed marriage, and whether the consent of the existing wife or wives has been obtained thereto.<sup>48</sup>

In response to an application, the chairman shall ask the applicant and his existing wife/wives each to nominate representative, and the arbitration council so constitutes may, if satisfied that the another proposed marriage is, just and necessary during the continuance of an existing marriage grant the permission applied for.<sup>49</sup> In deciding the application the arbitration council shall regard to circumstances such as sterility, physical infirmity, physical unfitness for the conjugal relation, willful avoidance of decree for restitution of conjugal rights or insanity on the part of the existing wife and the record its reason for the decision.<sup>50</sup> Any party not satisfied with the decision of arbitration council may, on the prescribed manner within the prescribed time period prefer an application for revision to assistant judge court and the decision of such court shall be final, and cannot be put in question in any court.<sup>51</sup> The also prescribes punishments for any person who contravenes the provisions of MFLO, the punishment may include (a) payment of entire amount of dower, if due to any existing wife/wives, and on proving beyond doubt the accused shall be punishable with simple imprisonment which may extend to one year, or with fine which may extend to ten thousand taka, or with both.<sup>52</sup>

### **5.3 ADR Mechanisms in Divorce (Talaq) Under MFLO**

Under classical Islamic Law, as far as divorce (talaq) is concerned, only the husband has unrestricted right to divorce his wife.<sup>53</sup> The wife may have this right if at the time of marriage the husband agrees to give it to her, however, the wife has to take shelter of the court and like husband cannot unilaterally give divorce.<sup>54</sup> MFLO somehow tried to mitigate the issue and bring under control the power of man to divorce their wives arbitrarily. It, thus, introduced a system of arbitration in divorce matter as well. Persons on pronouncing the divorce must send a notice of it to the local Union Parishad Chairman and supply a copy of the notice for her knowledge to his wife.<sup>55</sup> On such notice, the chairman shall constitute an Arbitration Council within thirty days to try and reconcile the aggrieved couple.<sup>56</sup> If the attempt is successful, the divorce is avoided, otherwise after 90 days from the chairman receiving the divorce notice; if the wife is pregnant at the time of pronouncement of talaq, talaq shall not be effective until the expiration of 90 days or the end of the pregnancy period, whichever occurs later.<sup>57</sup> MFLO also postulates the punishment with simple imprisonment for a period not exceeding one year or with fine which may extend to ten thousand taka or with both for violating section 7(1),<sup>58</sup> thus, not serving notice to the chairman and a copy to wife. In case of delegated right of divorce possessed by and her willingness to exercise that right, or in other ways dissolving divorce the marriage otherwise than by talaq, the provisions of section 7 shall be applicable with necessary change.<sup>59</sup>

### **5.4 Maintenance of Wife and ADR Process Under MFLO**

Under Islamic precepts, the husband is bound to provide maintenance to his wife subjected to a provision that the wife has to follow the reasonable instructions of the husband. Irrespective of the financial capacity, the wife is entitled to get maintenance from the husband or from the husband's property. As per MFLO, if the dispute arises about the maintenance the wife can inform the matter to the Chairman.<sup>60</sup> In circumstances where husband fails to maintain

his wife adequately, or in case of more wives than one, fails to maintain them equitably, the wife, or all or any of the wives, may in addition to seeking any other legal recourse, apply to the chairman. The chairman is under obligations to constitute arbitration council to settle the issue. Concomitantly, arbitration council may issue a certificate specifying the amount, which shall be paid as maintenance by the husband. Any party aggrieved may within the prescribed period prefer an application for revision of the certificate to assistant judge court, the decision of such court shall be finally called and cannot be called in question in any court.

### **5.5 ADR Mechanisms Under Family Courts Ordinance, (FCO) 1985**

The establishment of the family courts in Bangladesh under Family Courts Ordinance, (FCO) 1985 is a landmark decision of the government. Prior to the establishment of FCO, all litigations relating to family matter were adjudicated by the normal courts. Consequently, there was a delay in the disposal of suits and hence frustrates the very purpose of establishment of the courts. Thus, many would have been deprived of justice due to delay, illiteracy and ignorance of the law. Moreover, MFLO was only applicable to Muslim communities, thus, all the ADR procedures were attached to the citizens with the Islamic religion, not others. And since the disputants had to face a long delay in the formal court process, a separate law was required to deal with family disputes in a uniform manner irrespective of religion.<sup>61</sup> The FCO, 1985 which seeks to peruse effective resolution of disputes related to family affairs has incorporated some key subject matters of family disputes. Under section 5 FCO, 1985 family courts have jurisdiction over five issues, namely, dissolution of marriage, restitution of conjugal rights, dower, maintenance, and finally guardianship and custody of children.

### **5.6 Reflection of Pre-trial Mediation in FCO**

The Family Courts Ordinance precisely contains the provisions of ADR in the form of mediation as outlined in section 10 and 13 of the Ordinance. Section 10 envisages pre-trial mediation whereas section 13 enjoins pre-judgment mediation in the family matter dispute. When the written statement is filed by the defendant, the family court shall fix a date ordinarily of not more than 30 days for pre-trial hearing of the suit.<sup>62</sup> As farther elaborated<sup>63</sup> on the date fixed for a pre-trial hearing, the court shall examine the plaint, the written statement and documents filed by the parties and shall also, if it so deems fit hear the parties. The provision of ADR was effectively mentioned in section 10(3) of FCO 1985, under which, at the pre-trial hearing, the courts shall ascertain the point at issue between the parties and attempt to effect a compromise or reconciliation.<sup>64</sup> If the parties agree to mediate the presiding judge usually meet them in his chamber. Lawyers may or may not be allowed to stay, however as observed by Chowdhury<sup>65</sup> in most of the cases, the family court judges do not allow lawyers to stay in the mediation session. If the parties are not able to reach a settlement in a single session Judges may attend several mediation sessions.<sup>66</sup>

### **5.7 Pre-Judgment Mediation Provisions Under FCO**

The provision of pre-judgment mediation is prescribed under section 13 of Family Court Ordinance 1985. If a pre-trial mediation fails, a second option is given to the parties after completing the trial process and before pronouncing judgment. At this stage prior to judgment,

the judge shall ask parties regarding their intention to solve the dispute through mediation. The judge shall try to reach the compromise between the parties at this stage before the pronouncement of the judgment. The significant feature of family court mediation is that the mode of mediation practiced in family court is mandatory both under sections 10 and 13, thus, in terms of pre-trial mediation and pre-judgment mediation.

## **6. STATUTORY LIMITATIONS AND PRACTICES IN LEGAL FRAMEWORK OF BANGLADESH**

It is always imperative to explore the limitations-inbuilt or otherwise- in a system to make it workable in practical terms and justifiable in the theoretical aspect. From a practical aspect, we should think that how we can make alignment of statutory provisions and procedures in a way so that it “transforms a family court system from one that disrupts and tears apart families to one that helps heal them”.<sup>67</sup> In this section, exploration would be made to identify the statutory limitations on the ADR system in family matters under the current legal framework of Bangladesh. And how those drawbacks, if any, have their impacts on the justice dispensation process in family matters would also be ventilated?

### **6.1 Statutory Provisions and Practices Under MFLO, 1961**

The Muslim Family Laws Ordinance, (MFLO) 1961 has brought some remarkable statutory changes in the Muslim family laws. It has set some statutory requirements to be followed in terms of polygamy, maintenance and divorce amongst the others. Since the statutory changes were brought to ensure qualitative improvements in the social fabric and landscape of family disputed family matters, thus, it is always desirable to investigate the limitations of such legal provisions, if any, and to assess the existing practices thereof.

### **6.2 Statutory Drawbacks and Existing Practices in Polygamy**

The legal consequence of polygamy without abiding by the statutory requirements as enshrined in MFLO is that it is just a punishable offence and it does not vitiate the marriage itself.<sup>68</sup> In practice, the small scale of punishment does not deter the husband from contracting polygamous marriage by contravening the legal provisions of MFLO. It is to be remembered that provision for arbitration council has been incorporated to ensure the reconciliation between the parties in one hand and allowing the genuine need of polygamous marriage were necessary on the other. However, MFLO does not have any explicit provisions where chairman fails or neglects to form arbitration council or if a representative of either side particularly from the husband’s side does not cooperate with the arbitration council. In practice, the husband by-pass the arbitration council and legal provisions are not strictly enforced in many cases due to our state practice and social reality. Another practical aspect of ADR mechanism under section 6 of MFLO may be that in polygamous marriage there will be no scope of defrauding the second wife. In other words, by constituting arbitration council there is every possibility that existing wife/wives may communicate the facts to the proposed wife or proposed wife may be informed in the course of events of arbitration. In this process, the second wife will know the fact of previous marriage and the status of existing wife. In reality, although MFLO put the polygamy under penal provisions, if not fulfil the statutory requirements, however, failed to cover the

right of the second wife to know about existing marriage. The penal provision on concealment of earlier marriage from the other party is covered by sections 494 and 495 of the Penal Code, 1960. The said sections are not applicable in the polygamous marriage of a Muslim husband.<sup>69</sup> Because the said sections are only attracted when the subsequent marriage is otherwise valid but turns void for the existence of earlier spouse.<sup>70</sup> Under Islamic Law, a male can marry as much as four wives concurrently, thus, section 494 and 495 are not applicable in Muslim polygamous case unless number exceeds more than four at a time.

### **6.3 Statutory Limitations and Existing Practices in Divorce**

It is palatable that non-compliance with provisions of MFLO renders the activities of husband punishable. However, there is the scope of casting doubts about the status of divorce which does not fulfil the provisions of MFLO. The basic purpose of statutory reforms in MFLO may be summarized *inter-alia* to reduce the hasty dissolution of marriage by husband out of his unilateral power at the same time to reconciliation between the parties by arbitration council. In this context, it is important to explore the legal consequence if the husband does not serve any notice to the chairman and wife. Where notice has been served if the chairman does not constitute an arbitration council and no steps are taken in order to have reconciliation then what will be status of such divorce. There are some conflicting judicial decisions on the non-service of notice and validity of divorce thereof. It was decided in *Abdul Aziz vs. Rezia Khatoon*<sup>71</sup> that non-service of notice renders the divorce ineffective and even if it is pronounced by the husband but the talaq will not be effective in the eyes of law. On the other hand, in *Sirajul Islam vs. Helena Begum and others*<sup>72</sup>, it was held that mere non-service of notice does not render the talaq ineffective. The reasoning behind such a conclusion is that non-fulfilment of MFLO procedures makes husband's activities punishable but does not vitiate the talaq. This opinion is overwhelmingly accepted in the judicial approach of Bangladesh. Thus, the Arbitration Council cannot prevent the talaq by the husband even if it is highly arbitrary and unjust however can delay the divorce with the hope that reconciliation might take place between the parties.<sup>73</sup>

It has been a matter of great concern that often the purpose of reconciliation between the parties under section 7(4) has been frustrated because of statutory limitations and practices thereof. The MFLO imposes a duty upon the chairman to constitute an arbitration council but without containing any explicit provisions as to what will happen if the chairman does constitute that willfully or otherwise. The whole scheme of arbitration council has been turned into optional one rather than mandatory.<sup>74</sup> Even if the arbitration council is constituted which does not take any effective steps or no step at all to bring about reconciliation, nowhere in the MFLO remedy is provided in such case.<sup>75</sup> In a situation where the notice is served to the chairman on a particular date and the opposite party may be notified later on then the divorce will be effective after 90 days from the date of serving notice to the chairman.<sup>76</sup> Husband may intentionally delay the serving of notice to the wife. Thus, this type of procedural defect and statutory limitation may hinder the reconciliation between the parties. As it is stated earlier that statutory requirements under section 7 of MFLO are to put some restrictions on the arbitrary exercise of husband's unilateral power of divorce at the same time reconciliation between the

parties. However, if the husband gives divorce and does not abide by the procedure of MFLO still he can register such divorce under Muslim Marriages and Divorces (Registration) Act, 1974. If the talaq is not in compliance with the MFLO, even then Nikah Registrar registers the talaq in Bangladesh.<sup>77</sup> This sort of practices may hamper the reconciliation process in one hand and the arbitrary exercise of the husband's power of divorce on the other. Furthermore, the absence of specific statutory rules on the status of talaq where no notice has been served, no arbitration council has been formed, and thus, no reconciliation has been attempted has provided the scope of interpreting the legal provisions differently.

#### **6.4 Statutory Shortcomings and Practices in Maintenance**

MFLO enjoins the provisions for alternative dispute resolution by way of arbitration council consisting of chairman and representative of parties. It is stipulated that any husband if fails to maintain his wife adequately, or in case of more than one wives, fails to maintain them equitably, the wife, or all or any of the wives, may in addition to seeking, any other legal remedy apply to the Chairman of Union Parishad who shall constitute an Arbitration Council to determine the matter, and the Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband.<sup>78</sup> Any party aggrieved by the decision of the arbitration council may prefer a petition to assistant judge court for the revision of such certificate, the decision of assistant judge court shall be final.<sup>79</sup> The process of arbitration on maintenance is not that much effective because of unwillingness, ignorance of the parties in one hand and existing practices on the other. In the context of the social reality of Bangladesh, chairmen of Union Parishad do not play a neutrally good role in discharging their duties in the reconciliation process. Moreover, during the subsistence of marriage wife or wives are not willing to file any complaint against the husband because they may fear of divorce by the husband in consequence of such complaint.

#### **6.5 Setbacks in ADR Process under Family Courts Ordinance (FCO), 1985**

The Family Courts have exclusive jurisdiction over the five subject matters, namely dissolution of marriage, restitution of conjugal rights, dower, maintenance, guardianship and custody of children, as stipulated by the section 5 of The Family Courts Ordinance (FCO), 1985. Although there were some confusions and ambiguities on the applicability of FCO, 1985 based on religion, however, the confusions have been removed by the judicial decisions. At the outset, it was claimed that FCO is only applicable to Muslims not to other religions. In *Krisnapada Talukder vs. Geetasree Talukder*,<sup>80</sup> the question arose whether a Hindu female can claim maintenance under FCO. It was held in the High Court Division that FCO is only applicable to the people who belong to the Islamic religion, thus, people from other religion cannot claim any remedy under FCO. The view of the court has been changed later on in *Pochon Rikssi Das Vs Khuku Rani Dasi and others*<sup>81</sup> by removing all the confusions. It was held that The Family Court Ordinance has not taken away any personal right of any litigant of any faith and it is applicable to all litigants irrespective of their religions. Thus, Family Courts have jurisdiction over all citizens if it is covered by section 5 of FCO, 1985.

Family Courts also empowered to resolve the dispute alternatively to the conventional process of the court. The provisions for ADR in the form of mediation have been incorporated in The Family Courts Ordinance (FCO), 1985. Section 10 provides the provision for mediation in pre-trial hearing where an attempt would be made to reach compromise between the parties. If no reconciliation has been achieved the court shall proceed with its ordinary proceeding.<sup>82</sup> Under section 13, at the pre-judgment stage, the court shall make another effort to reach compromise between the parties. If any conciliation is agreed the court shall pronounce a compromise decree otherwise it shall proceed with its judgment.<sup>83</sup> Under FCO, the courts shall ascertain the point of issue between the parties and attempt to effect a compromise or reconciliation at two times.<sup>84</sup> If the parties agree to mediate the presiding judge usually meet them in his chamber, the lawyers of each party may or may not be allowed to stay. However, it has been observed in most of the cases, the family court judges do not allow lawyers to stay in the mediation session.<sup>85</sup> The main purpose of mediation is that parties should be able to express their grievances and in the process by their active participation would be able to reach reconciliation. However, in many cases, parties cannot do so because of the time constraint, the unwillingness of advocates even non-facilitation from the judges. Despite the satisfactory legal provisions for mediation at FCO still, the outcomes are not good enough due to the existing practices at ground level.

## **7. CHALLENGES OF ADR IN THE FAMILY MATTERS UNDER LEGAL FRAMEWORK OF BANGLADESH**

Despite the huge expectation that settlement of family dispute alternatively will bring significant changes in the landscape of dispute settlement in Bangladesh, however, ADR is yet to produce the expected result due to some of the common obstacles and challenges.

### **Reflections of Family Court’s Judges on Current Scenario of ADR <sup>86</sup>**

<b>Questions</b>	<b>Number of Respondents</b>	<b>Yes</b>	<b>No</b>	<b>No Comment</b>
Do ADR Mechanisms necessary for settling the family dispute in Bangladesh?	11	11	00	00
Do ADR Mechanisms empower Wives/Women?	11	07	04	00
Does our system effectively use ADR Mechanisms in family matters?	11	09	02	00

It has been a matter of fact that all the eleven judges of family courts from different districts of Bangladesh have unanimously endorsed the necessity of ADR in family matters. Regarding the empowerment of women by the ADR process, they are bit divided although lion share of them agreed that ADR mechanisms are not being effectively followed in our country. It has been a matter of investigation for researchers and stakeholders why our systems cannot efficiently reap the benefits of alternative dispute resolution. There must be some intrinsic and extrinsic challenges or setbacks for which we cannot make the best use of ADR in family matters.

The challenges of the ADR process in family affairs may be summarized in followings. It is generally argued that non-cooperation from the part of lawyers is the prime cause of ineffectiveness of ADR. The lawyer's community is always against the ADR process because they feel that it will eat their share of the pie.<sup>87</sup> Furthermore, the leading cause of delay in the disposal of suits lies in dilatory tactics played by the lawyers by way of seeking repeated time petitions.<sup>88</sup> However, it is somehow becoming a blame game where judges generally blame the lawyers and lawyers shift the responsibilities to the courts and overall systems. The paucity of public awareness in Bangladesh is another reason of unsuccessful working of ADR, especially the people who work in the rural area most of them don't know much about ADR that's why litigants have to rely on their pleaders. Our people do not aware of their benefits of settling the dispute through ADR. Most of the cases Arbitration councils as the lowest possible unit of ADR are not fully functional<sup>89</sup> and so people have to take recourse to the family courts to resolve their disputes. Sometimes arbitration council may become politically biased and do not provide fair justice to concerned parties, especially the women folks often become sufferers.<sup>90</sup> The at length procedure of conducting arbitration is not specified under the MFLO 1961. Thus, it is more discretionary in nature which often being misused by the influential section of the society.<sup>91</sup> It is also worthwhile to mention that there is no option for judicial review to oversee the fairness of decisions made by an arbitration council until the matter taken into court.<sup>92</sup>

#### **Some Common Challenges Identified by Family Court's Judges<sup>93</sup>**

1. Lack of awareness among the parties, particularly in the litigants/ common people.
2. Lack of interests of the lawyers and at times of the judges.
3. Lack of resources and infrastructures including well-trained mediators and arbitrators.
4. Lengthy procedures in doing ADR as well.
5. Lack of compromising attitudes among the litigants.

#### **Some Individual Feedbacks by Family Court's Judges<sup>94</sup>**

1. Advocates are mainly responsible for the ineffective use of ADR in family matters, they discourage the parties.
2. Unreasonable and political interference of local Union Parishad Members and Chairmen.
3. Initiation of fake criminal cases along with civil litigations by the parties.
4. Legal provisions of ADR in family matters were not made by taking consideration of the socio-economic condition of the parties.

The judges of family courts in Bangladesh need to deal with ADR issues while the dispute is under their jurisdictions. It is understandably appropriate to say that they have better insights about the shortcomings and challenges within family affairs ADR in Bangladesh. Following charts demonstrate the perceptions of some judges of family courts on challenges of the ADR process. The charts show that they have added some new and interesting challenges along with the setbacks that are already known in the existing literature. The judges' community overwhelmingly put a finger at the lawyers for ineffectiveness of ADR in a family dispute. They also believe that lack of compromising attitudes of litigants coupled with lack of well-trained mediators or arbitrators are hindering the process. Like every other political issue interference in Arbitration Council or dealing the dispute politically have been causing serious havoc. Most often, fake suits or cases have been instituted in order to bind other parties to make a compromise. It is a serious misuse of the ADR process which ultimately vitiates the whole scheme of ADR in family matters. Our learned judges also opined that ADR provisions in family matters have not been made after due consideration of the socio-economic condition of parties, especially the women segment who usually do not have economic and other associated powers to make effective negotiation. In consequence, they have been forced to compromise in compliance with the sweet wills of the dominant male section of the society.

### **7.1 Possible Ways Out to Subdue Roadblocks**

The existing challenges within the family affairs ADR may be lessened if not totally removed by adopting the appropriate policy and practical measures.

#### **Suggested Ways Out by the Family Court's Judges<sup>95</sup>**

1. Building awareness among all stakeholders who are associated with the ADR process in family matters in Bangladesh.
2. An active role by the lawyers to pursue the parties regarding the advantages of ADR.
3. Appointment of well-trained mediators to discharge the ADR mechanisms in family matters.
4. Cooperation between Bar and Bench in the ADR process.
5. Active involvement of the legal aid office.

More transparent and visible provisions for ADR when the dispute comes to the court.

The personnel associated with the ADR process must be impartial so that they can ensure the best possible outcomes. Since decisions reached by ADR are bindings on the parties so higher slandered of transparency should be ensured. Moreover, the family disputes that are settled by ADR are more sensitive and complicated for which more impartiality and neutrality is required. Because it is not only settling a dispute rather saving a family or destroying it. Thus, dispute resolution personnel should have enough skills and training to fulfil the function in a satisfactory manner. In family disputes, the Arbitration Council settles the dispute between the parties. Most of the cases, members of Arbitration Council do not have enough knowledge

and skills regarding the settlement of disputes through ADR. Thus, members of the Arbitration Council should be trained up properly so that it can result in best possible results. Public awareness should be built by various initiatives of the governments and other stakeholders. Most of the people in our country live in the village area and they are aware of the importance of ADR. Thus, they frequently go to court to resolve their disputes rather than doing this through alternative dispute resolution. Using modern technology and other resources in the ADR process would be another way forward. Institutional arrangements with necessary resources should be established. It is perhaps not inaccurate that lawyers should play active and significant roles to facilitate the ADR in the family dispute. They should encourage the parties to go ADR by showing the advantages of doing it. If they follow the noble path of the profession not going for earning money at the costs of destroying a family only then it is possible. In this process, mutual co-operation between bars and benches are highly required.

## **8. CONCLUSION**

The idea of settling dispute alternatively with respect to family issues is of great significance. Bangladesh has been trying to make fruition of ADR mechanisms on family disputes through different legislative provisions. Thus, we have incorporated ADR mechanisms from Muslim Family Laws Ordinance, 1961 to Family Courts Ordinance, 1985 with a view to achieving quick disposal of family disputes in an amicable manner. Perhaps it would not be incorrect to state that Bangladesh has already got some sorts of good outcomes on family dispute ADR, however, it is yet to utilize benefits of the system in expected scale. Because of some challenges that are associated with our system we are not on the board properly. The statutory limitations, existing practices, the unwillingness of lawyers in some case of judges, ignorance of parties along with systematic mismanagements have been obstructing the ADR mechanisms on family issues in Bangladesh.

The concerned parties are generally shifting the responsibilities to lawyers for pursuing properly about the ADR process and its benefits. Judges of the family court to some extent are concomitant with the prevalent opinion that lawyers are mainly responsible for the unpopularity of ADR on family matters. In contrast, the lawyers also cast the blame to courts in general, especially our system. It is perhaps not untrue to say that such a blame game will not result in good outcomes. Thus, all the stakeholders including policymakers, implementing authorities, lawyers and judges should play a holistic role in order to subdue the existing challenges of ADR mechanisms in family matters. Our judiciary should introduce a credit-based approach for settling dispute alternatively by a judge. Our family court judges are under an obligation to dispose of certain number of suits within a deadline. If credit is given for ADR in any family dispute, then judges will be encouraged to go for it. However, the lawyer's interests and conflict of interests should also be given some kind of due attention. Our lawyers' communities should consider that earning money alone is not the goal of this noble profession. Even within the ADR system of family matters, they might become the ADR experts through which they might be able to live their dignified professional life. It is the duty of the government to undertake some advocacy and circulation programs to make the mass people aware about ADR mechanisms.

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