

Legitimacy of Mediators' Power and Techniques of Intervention in Out-of-Court Family Mediation: An Empirical Observation Using the Riskin's Grid on Mediation

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Introduction

The existence of informal justice system in Bangladesh is perpetual. It is said that 'village self-government in the sub-continent is as old as the villages themselves'.¹ From time immemorial, various forms of informal justice systems were related to village administration and have been governed by the religious and cultural norms of the society.² Informal mechanisms of resolving local disputes were popularly known as *panchayet* or *shalish*, though the term varies in different localities.³ This paper looks at the historical roots of the community dispute resolution system in Bangladesh and its link with the current practice of out-of-court family mediation in Bangladesh. It is argued that while the tradition of an informal justice system in the form of *panchayet/shalish* has a long history, it has gone through major changes over the years and has become corrupt, inequitable and unprincipled, suppressing the poor and disadvantaged, especially the women in society. To highlight these changes, this paper first details how informal justice operated in different historical periods and how the rulers at different times tried to change this informal justice system.

It then considers the current situation including the development of out-of-court mediation in the resolution of family disputes in Bangladesh. Since contemporary literatures do not describe the mode of mediation being practised in out-of-court mediations in Bangladesh, the nature of the mediation process is observed using the Riskin's grid on mediation.⁴

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¹ Siddiqui, Kamal. 2005. *Local Government in Bangladesh*. Dhaka: The University Press Limited, at p. 29.

² *Ibid.*, at p. 30. See further, Chief Justice Kamal, Mustafa. 2002. "Introducing ADR in Bangladesh: Practical Model", paper presented at the *Seminar on Alternative Dispute Resolution: In Quest of a New Dimension in Civil Justice System in Bangladesh*. Dhaka.

³ *Ibid.*, at p. 31.

⁴ Riskin, Leonard L. 1996. "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed", Vol. 1, No. 7 *Harvard Negotiation Law Review*, pp. 7-51, at p. 40.

Based on the observation of mediation sessions and interviews with mediators, this paper confirms the use of law to legitimize mediators' power in mediation and demonstrates that *evaluative* mediation with the directive intervention of mediators informed by law is currently practiced in Bangladesh. At the end, it will be argued that because of its nature and its reliance on law, *evaluative* mediation has the potential to attain fair outcomes for women despite the existence of gendered power disparity and family violence in the society. However, a detailed analysis of the impact of power disparity, family violence and how mediators attempt to minimize these impacts to ensure fair outcomes are out of the purview of this paper.

The History of Out-of-Court Mediation in Bangladesh – An Archaic Glory of Our Past

As mentioned earlier, the informal justice system—*panchayet/shalish* has prevailed in the Indian sub-continent for almost as far back as history is known. In the absence of any historical evidence, it is difficult to pinpoint when the concept of different traditional modes of informal justice, such as village *panchayet/shalish*, were first initiated in the region. Rig Vedas, the oldest Hindu religious script, dating from 1200 BC; mentions the existence of village self-governance in India.⁵ Some historical basis for the resolution of disputes by the heads of neighbourhoods is also found in the work of Sen who claims the existence of dispute resolution at the village level during the period of the *Dharmashastra*.⁶

It is generally assumed that this kind of local government was the basic form of government until the 6th century BC when large kingdoms began to emerge and the role of local government become subject to the central authority.⁷ During the period 1500 BC to 1206 AD, when Hindu rulers governed the sub-continent, the king was considered the '*fountain of justice*' and was the highest authority in the Court of Appeal in the state.⁸ Government officials ran other courts and tribunals to administer justice under the authority of a king.⁹ But the central authority left local people to resolve civil and petty criminal matters by their local village

⁵ Siddiqi, Dina. 2006. *Shalish and the Quest for Gender Justice: An Assessment of Strategic Interventions in Bangladesh*. Dhaka: Research Initiative Bangladesh, at p. 12.

⁶ Sen, Amartya K. 1984. *Resources, Values and Development*. Oxford: Basil Blackwell, at p. 346.

⁷ See Siddiqi, above note 1, at p. 29.

⁸ Halim, Mohammad A. 2008. *The Legal System of Bangladesh*. 3rd edn. Dhaka: CCB Foundation, at p. 34.

⁹ *Ibid.*

council i.e. *panchayet*.¹⁰ Later, Muslim rulers began to expand their kingdoms in the sub-continent. Muslim rule in the sub-continent can be broadly divided into two parts: the *Saltanate* period (1206-1526 AD) and the *Mughal* period (1526-1757 AD). During the *Saltanate* period, the *Sultans* (Kings) of Delhi maintained the *panchayet* system as the lowest tier of adjudication. Though *Kazi's* courts, a part of the state's court formed to decide on civil and criminal cases, were interspersed throughout the sub-continent during the *Mughal* rule from 1526 to 1757, the number of cases brought before *Kazi's* courts was low as village *panchayets* settled most of the disputes.¹¹ Considering their deep-rooted nature in their respective locality, throughout Muslim rule, the central administration usually did not interfere with the decisions of the village administration.¹²

Village *panchayets* were made up of a council of village headmen; the composition varying depending on the economic and social structure of the villages being governed. As noted by Siddiqui,¹³ *panchayets* resolved different forms of disputes. Sometimes they were formed to ensure that the members of a caste adhere to the religious and social norms of their caste and to settle disputes among members. *Panchayets* also maintained public order and inter-caste relationships among the villagers. Additionally, *panchayets* served to resolve labour disputes such as those among servants and farmers or among the servants of different farmers. Village *panchayets* were also responsible for resolving civil disputes within the area.¹⁴ According to Islam, 'the *panchayet* served civil and policing functions, coordinating rent given etc., while the *shalish* was a village *Sabha* or council that was called on to settle moral and ethical issues'. Therefore, *shalish* can be perceived as a variation of *panchayet* that resolved civil issues among local habitants. The term *shalish* is derived from the Arabic word '*shalish*' meaning 'three'. It conveys the sense 'middle' – middle man – the third party helper in a conflict resolution. In traditional villages, *shalish* was generally conducted by a group of the persons of the village, including village headmen and other local elites. The central government body did not interfere with the decisions even when they contravened the central administrative laws,

¹⁰ See Siddiqui, above note 1, at p. 38.

¹¹ Jain, Mahabir P. 1999. *Outline of Indian Legal History*. Bombay: Tripathy, at p. 31.

¹² See Siddiqui, above note 5, at p. 12.

¹³ See Siddiqui, above note 1, at pp. 31-2.

¹⁴ Rahman, Gazi S. 1997. *Bangladesher Ainer Itihash* [Legal History of Bangladesh]. Dhaka, at p. 47. See further, Ameen, Nusrat. 2005. "Dispensing Justice to the Poor: The Village Court, Arbitration council *vis-à-vis* NGO", Vol. 16, No. 2 *The Dhaka University Studies Part F*, pp. 103-22, at p. 110.

and no appeal could be preferred against the decision of the *panchayets/shalishs*.

As *panchayets* were the local bodies for resolving disputes among people in a locality, justice administered by this indigenous system was very much influenced by the custom and religion of that locality.

As Siddiqui observed:

*Custom and religion made the panchayets so important that they often had an almost sacred status—although they could hardly be described as unbiased and objective. The panchayets never made their decisions by voting, but by consensus arrived at by the upper caste members of the panchayet, and this was generally accepted by the lower castes. This method well suited the purpose of the conservative village leadership, which wanted to maintain the status quo in society.*¹⁵

As observed by Jain:

*These panchayets fulfilled the judicial functions very effectively and it is only rarely that their decisions gave dissatisfaction to the village people. The members of the panchayets were deterred from committing an injustice by fear of public opinion in whose midst they lived.*¹⁶

The system of *panchayet* to administer justice, however, was drastically curtailed by the advent of the British in the sub-continent. The East India Company started to intervene in the administration of justice in British India under a Royal Charter in 1726.¹⁷ Later, with the decline in *Mughal* rule (1526 to 1757), the East India Company controlled the administration of Bengal province. Initially, the company adopted a new *Zamindari* system to administer justice by curbing the authority of the deep-rooted indigenous *panchayet* system.¹⁸ However, the *Zamindari* system proved inefficient as the *Zamindars* (landlords) were usually biased, oppressive and concerned with profit.¹⁹ Realizing the importance of the long adopted *panchayet* system, the British revived this indigenous system of administering justice by promulgating the *Chowkidari Act 1870*.

¹⁵ See Siddiqui, above note 1, at p. 33.

¹⁶ See Jain, above note 11, at p. 61.

¹⁷ See Halim, above note 8.

¹⁸ See Siddiqui, above note 1, p. 39.

¹⁹ See Jain, above note 11, p. 31.

This Act provided for the appointment by the District Magistrate of a village *panchayet* consisting of five members. This body was created to maintain law and order in the village with the help of *Chowkidars* (village guards) employed by the nominated *panchayet*. This constituted the first formal local body to administer justice in the sub-continent. However, the enactment of this formal authority failed to restore the essence of *panchayet* governed *shalish* that general people enjoyed in the pre-British era as *Zamindars* and their nominees continued to influence local *shalish*. The influence of *Zamindars* evaporated gradually with the enactment of the *East Bengal State Acquisition and Tenancy Act 1950* (Act XXVIII of 1951), under which every family or body was restricted to hold a title of land up to a pre-determined maximum limit of 33 acres.²⁰

Even after the collapse of the British regime (1757-1947) in the sub-continent, the local justice system of *shalish* continued throughout the Pakistan era (1947-1971). However, as the institutionalization of the local justice system continued during the Pakistan era, local *shalish* gradually came under the influence of narrow political interest of sitting governments and failed to provide justice in an unbiased manner.²¹ After the independence war of Bangladesh in 1971, this system of local justice was institutionalized again by enacting the *Village Court Ordinance 1976* (Ordinance LXI of 1976). This law conferred adjudicative power on a local body to administer local disputes. However, the traditional administration of *shalish* by older and respected leaders changed, as younger people and those interested in using *shalish* for political ends came to power.²² Therefore, changes occurred in the composition of the people administering *shalish* and its probable outcome. Because of their strong political ties, along with the influence of their money and political affiliation, newly emerged leaders superseded the traditional respect towards the age, reputation and lineage of the elderly leaders who prefer to uphold moral conduct than narrow political and personal interests.²³

Under the changed structure of *shalish*, it can be easily presumed that women will be the most vulnerable of all. As most of the different political leaders' allies are men, women have few ties with politics compared to their male counterparts and are subject to many vagaries in traditional *shalish* conducted by the new politically motivated leaders. As expressed by a local woman in a study workshop conducted by Siddiqi:

²⁰ Islam, Sirajul (ed.). 2003. *Banglapedia: National Encyclopedia of Bangladesh*. Dhaka: Asiatic Society Bangladesh.

²¹ See Siddiqi, above note 1, at p. 292.

²² See Siddiqi, above note 5.

²³ *Ibid.*, at p. 15.

A pre-Independence *shalish* (before 1971) consisted of 7 or 8 *Matobbers* [lit. village heads] getting together to ensure that there would be a just solution. The number has gone up to at least 11 or 12 now. The general consensus was that there had been a serious erosion of the social situation since 1971 and that ordinary people were much better off in the past. *Matobbers* rarely delivered justice these days and were far removed from the law.²⁴

A new dimension of women's deprivation through *shalish* began in the rural areas of Bangladesh in the 1980s when, with the absence of any political activity, the then military regime decided to capitalize on people's religious sentiment to cope with their legitimacy crisis.²⁵ Rural elites increased the use of *fatwa* (religious edicts) on different issues to promote their interests over the locality.

In Islamic law, *fatwa* is a legal opinion to be issued by Islamic scholars who have proficiency in interpreting the *Quran* and *Hadith* and interpret the Islamic provisions under changing realities of the society through *Ijma* and *Qiyas*.²⁶ The traditional-minded, less educated but locally recognized religious priests, however, did not have that level of wisdom and started to give conservative interpretations of Islamic views in the name of *fatwa*. Thus, it came to mean the narrow and incomplete interpretation of Islamic views through the pronouncement of humiliating punishments of flogging, stoning, shaving of heads, wearing the garland of shoes etc. imposed discriminatorily upon the women (particularly in the rural areas) by the *mullah* (Muslim religious clergy) at the village *shalish*.²⁷ Consequently, 'the rural *mullahs*, guided by their patriarchal beliefs and attitudes, went on prescribing a gender-segregated, strictly subordinate role for women'.²⁸ Due to such a gender-biased role of the *shalishkars*, especially *mullahs* who conduct local *shalish*, women and other marginalized sections of the society lost their confidence in locally administered *shalish*.

However, High Court Division (HCD) of the Supreme Court issued a *suo moto* rule on 2 December 2000 about a news item published in the Daily Newspaper, and finally banned the verdict of *fatwa* issued by *mullah* on 1 January 2001. The Divisional Bench held that:

²⁴ See Siddiqi, above note 5, at p. 30.

²⁵ Ahmed, Dalia. 2004. *The Dispensation of Fatwa and Women's Progress in Bangladesh*. Dhaka: Bangladesh Freedom Foundation, at p. 8.

²⁶ *Ibid.*

²⁷ Chowdhury, Jamila A. 2005. *Women's Access to Fair Justice in Bangladesh: Is Family Mediation a Virtue or a Vice?*, Sydney: University of Sydney. (Unpublished PhD thesis), at p. 137.

²⁸ See Ahmed, above note 25, at p. 8.

Any fatwa including the instant one is unauthorised and illegal ... Giving a fatwa by unauthorised person or persons [including mullah] must be made a punishable offence by the Parliament immediately, even if it is not executed ... Before parting with this matter, we find it necessary to answer a question as to why a particular group of men, upon either getting education from madrassa [religious school] or forming a religious group, are becoming fanatics with wrong views. There must be defect in their education and their attitude (Writ Petition no. 1587 of 2000).²⁹

The landmark ruling is a glaring example where HCD from its own initiative applied its judicial activism to voice against patriarchal practice and protect fundamental rights of the citizen. Following this ruling, fatwa reduced significantly,³⁰ but gender-bias attitudes still pervaded local *shalish* and they became ineffective as a means to provide fair outcomes to women.³¹

NGO Mediation in Bangladesh- A Revitalization of *Shalish* under the Shadow of Law

To fill the vacuum of fair justice through traditional out-of-court mediation or *shalish*, some Non-Government Organization (NGOs) in Bangladesh initiated their operation in the field of human rights, specifically with the objective of enhancing access to justice for the poor by introducing NGO *shalish* (out-of-court mediation conducted by NGOs). This form of mediation was popularized in Bangladesh to complement other forms of non-functioning or gender biased out-of-court mediation (e.g. traditional *shalish*) as mentioned earlier. Leading NGOs providing mediation services to local people include *Madaripur* Legal Aid Association (MLAA), *Ain-o-Shalish Kendra* (ASK), Bangladesh National Women Lawyers' Association (BNWLA), Bangladesh Legal Aid and Services Trust (BLAST) and some others.³²

According to the contemporary literatures, while traditional *shalish* is biased against the poor, NGOs are now providing pro-women out-of-court mediation services to millions of women in Bangladesh. As observed by Khair:

²⁹ High Court Division of the Supreme Court of Bangladesh, *Writ Petition no. 1587 of 2000*.

³⁰ See Chowdhury, above note 27, at p. 138.

³¹ Khair, Sumaiya. 2004. "Alternative Dispute Resolution: How It Works in Bangladesh", Vol. 15, No. 1 *The Dhaka University Studies, Part F*, pp. 59-75, at p. 59.

³² See Chowdhury, above note 27, at p. 138.

[T]he traditional shalish is composed exclusively of male members and as such, engenders an environment that discriminates against women disputants instead of playing a judicious role.³³

Unlike traditional *shalish*, NGO *shalish* is ensuring the greater participation of women in *shalish* and ensuring their voice in the society.³⁴ Further, unlike NGO *shalish*, traditional *shalish* turns private issues into public ones as its legitimacy depends upon social acceptance and consent.³⁵ Due to its strict adherence to patriarchal social norms, this local *shalish* has not rendered justice for women.³⁶

Gender Equity in Out-of-court NGO Mediation- A Concern for Fair Justice

Though it is mentioned in literature that out-of-court family mediation in Bangladesh provides a possibility for quick resolution of disputes, quick realisation of post-separation entitlements, and enhancement of women voice in mediation,³⁷ it is widely argued by scholars from Western democratic countries that family mediation may not ensure fair outcomes for women in the presence of considerable gendered power disparity and family violence.³⁸ *Facilitative* mediation, which is the style of mediation

³³ See Khair, above note 31, at p. 63.

³⁴ Casper, Karen L. and Kamal, Sultana. 1995. *Evaluation Report: Community Legal Services Conducted by Family Planning NGOs*. Dhaka: The Asia Foundation, at p. 35. See further, Golub, Stephen. 2000. "From the Village to the University: Legal Activism in Bangladesh", in McClymont, M. and S. Golub (eds.): *Many Roads to Justice: The Law-related Work of Ford Foundation Grantees around the World*. New York: Ford Foundation, at p. 139. The Asia Foundation, 2002a. *Access to Justice: Best Practices under the Democracy Partnership*. Dhaka: The Asia Foundation, at p. 21. Siddiqi, above note 5, at pp. 48-50.

³⁵ See Siddiqi, above note 5, at pp. 15-6.

³⁶ See Khair, above note 30, at p. 63.

³⁷ The Asia Foundation. 2002a. *Access to Justice: Best Practices under the Democracy Partnership*. Dhaka: The Asia Foundation. See further, The Asia Foundation. 2002b. *In Search of Justice: Women's Encounters with Alternative Dispute Resolution*. Dhaka: The Asia Foundation; Chowdhury, above note 27, at p. 141; Chowdhury, Jamila A. 2005. *Women's Access to Justice in Bangladesh through ADR in Family Disputes: Present Limitations and Remedial Measures with Some Lessons from Egypt*. Monsoura: Modern Book Shop, at pp. 41-3.

³⁸ Bryan, Penelope E. 1992. "Killing us Softly: Divorce Mediation and the Politics of Power", Vol. 40, No. 2 *Buffalo Law Review*, pp. 441-523, at 441. See further, Cobb, Sara. 1993. "Empowerment and Mediation: A Narrative Perspective", Vol. 9, No. 3 *Negotiation Journal*, pp. 245-55 at 247; Field, Rachael M. 1996. "Mediation and the Art of Power (Im) balancing", Vol. 12 *Queensland University Technology Law Journal*, pp. 264-73, at 265; Astor, Hilary and Christine M. Chinkin. 2002. *Dispute Resolution in Australia*. 2nd edn. Sydney: Butterworths, at 102; Astor, Hilary. 2007. "Mediator's Neutrality: Making Sense of Theory and Practice", Vol. 16, No. 2 *Social & Legal Studies*, pp. 221-39, at 225.

most used in Western liberal democratic states, restricts the role of mediators 'to improve communication between the parties and to help them making their own decisions'.³⁹ However, there is another type of mediation — *evaluative* mediation— where the role of the mediator is not *facilitative* but to guide parties 'to an appropriate settlement based on law, industry practice of other professional standards'.⁴⁰

As discussed in contemporary literatures, considerable gendered power disparity and family violence is present in Bangladesh.⁴¹ Therefore, quick resolution of disputes through facilitative out-of-court mediation may not ensure that women are also getting fair outcomes through mediation, if it allows legal norms to be ignored. Nevertheless, there is a possibility that practices of *evaluative* mediation could provide fair outcomes to women.⁴² However, existing literatures on the family mediation of Bangladesh did not indicate what style of mediation is practised in out-of-court NGO mediation.

Presumably, mediation carried out by out-of-court NGO mediators follows the evaluative pattern; and thus women benefit from such mediation. The history of *panchayet/shalish* demonstrates that the practice of evaluation in dispute resolution is not a recent phenomenon in Bangladeshi culture, rather a customary practice of the informal justice system that has a history of more than thousand years. Thus, it

³⁹ Spencer, David and Michael Brogan. 2006. *Mediation Law and Practice*. Cambridge: Oxford University Press, at p. 177.

⁴⁰ *Ibid.*

⁴¹ Akter, Sabiha. 2000. "Changing Role and Status of Working Women in Urban Bangladesh: A Study of Dhaka City", Vol. 17, No. 1 *Social Science Review*, pp. 233-52, at p. 235. See further, Sultana, Nasrin. 2004. "Polygamy and Divorce in Rural Bangladesh" Vol. 11 *Empowerment*, pp. 75-81, at p. 77; Ansari, S F. 2005. "Violence against Women: Law, Implementation and Reform", in W Rahman & M Shahabuddin (eds.): *Judicial Training in the New Millennium: An Anatomy of BILIA Judicial Training with Difference*. Dhaka: Bangladesh Institute of Law and International Affairs (BILIA); Begum, Hamida A. 2005. "Combating Domestic Violence through Changing Knowledge and Attitude of Males: An Experimental Study in Three Villages of Bangladesh", Vol. 12 *Empowerment*, pp. 53-70, at p. 53; Blunch, Niels H. and Maitreyi B. Das. 2008. *Changing Norms about Gender Inequality in Education: Evidence from Bangladesh*. Washington DC: The World Bank. at pp. 7-9; Khair, Sumaiya. 2008. *Legal Empowerment for the Poor and the Disadvantaged: Strategies Achievements and Challenges: Experiences from Bangladesh*. Dhaka: Canadian International Development Agency, at p. 39.

⁴² Marthaler, Dennis. 1989. "Successful Mediation with Abusive Couples", Vol. 23 *Mediation Quarterly*, pp. 53-66, at 53, 61. See further, Wade, John. 1997. "Four Evaluative studies of Family Mediation Services in Australia", Vol. 11, No. 3 *Australian Journal of Family Law*, pp. 343-48, at pp. 343, 347; Bagshaw, Dale. 2001. "The Three M's-Mediation, Postmodernism, and the New Millennium" Vol. 18, No. 3 *Mediation Quarterly*, pp. 205-20, at pp. 205, 217-18.

is not unlikely that the evaluative nature of traditional dispute resolution system might have some influence on our current-day practice of mediation. However, the existing literatures on family mediation in Bangladesh have not addressed this issue. Further, question remains on what gives NGO mediators a legitimacy to use their evaluative power in mediation.

Therefore, an empirical study was conducted to discover more about out-of-court mediation in Bangladesh. Before discussing about the empirical findings, the next section will make a brief discussion about some major providers of NGO mediation services in Bangladesh and their visions to ensure gender equity in mediations.

Vision towards Gender Equity under the Shadow of Law: NGO Experiences in Out-of-court Mediation

Madaripur Legal Aid Association (MLLA) is the pioneer among the out-of-court mediation providers in Bangladesh.⁴³ MLLA, established in 1978, is considered to be the pioneer in the introduction of NGO-based out-of-court mediation in Bangladesh. To provide mediation services, MLLA formed a mediation committee with the Chairman and members of the Union *Parishad* (Council) and also included other local elites such as teachers of the primary school, *madrassa* (religious school), and other influential local leaders to form a mediation body that could ensure more equitable justice.⁴⁴ Trained paralegals from MLLA also attended mediation sessions as watch-dogs to monitor women's effective participation in mediation. Since its establishment in 1978, MLLA is not only resolving local disputes through mediation, it also giving training to the local leaders and elites to change their knowledge and attitude towards the use of law whilst conducting *shalish* at the local level.⁴⁵

Like MLLA, *Bachte Sekha*, another NGO established in 1982 and working in the *Jessore* and *Khulna* districts of Bangladesh, practices another variation of traditional *shalish* that gives maximum emphasis on strengthening the voice of women during the *shalish* process. To ensure this, *Bachte Sekha* forms an 11 member village mediation committee out of which seven of the appointees are women.⁴⁶ Legitimacy of mediation

⁴³ See Chowdhury, above note 27, at p. 139; See further, Chowdhury (2005), above note 37, at p. 22.

⁴⁴ Rojdecizer, Lukasz and Alejandro A. de la Campa. 2006. *Alternative Dispute Resolution Manual: Implementing Commercial Mediation*. Washington DC: International Finance Corporation, The World Bank, at p. 103.

⁴⁵ See The Asia Foundation (2002a), above note 37, at p. 18. See further, MLLA. 2008. *Mediation Manual*. Madaripur: MLLA, at p. x.

⁴⁶ *Ibid.*

from MLLA and *Bachte Sekha* therefore depends on the legitimacy of the village committee formed to conduct mediation.

Another human rights NGO, *Ain- o- Shalish Kendro* (ASK), is not only providing the service of mediation but also, through its 'Gender and Social Justice Project', is sensitizing the local government bodies and law enforcement officials to the violation of women rights. It also strengthens the ties among local people, including journalists and lawyers, to monitor human rights enforcement mechanisms. Therefore, ASK is working towards changing the knowledge of the society so that women may get more benefit from the implementation of law as time goes on.

Bangladesh Legal Aid and Services Trust (BLAST) started its operation in 1993 and now has a network covering all 19 greater districts of Bangladesh. BLAST is running legal awareness programs and public interest litigation to establish rights in various sectors including labour law, family law and state abuse of prisoners. One of the popular services of BLAST is to provide a legal aid and advocacy service to its clients if their mediation effort to resolve a dispute fails. 'BLAST utilizes a people-oriented model for mediation which also adheres to the jurisprudence principles of the country'.⁴⁷ It seems that BLAST conducts its mediation under the shadow of law and uses law to legitimize its mediation efforts.

As most of the major NGO mediation providers conduct mediations under the shadow of law, it can be reasonably hypothesized at this point that, use of law might legitimize mediator's intervention and opens up the way towards fair justice and gender equity in mediation. However, the next section will examine this hypothesis detailing data and methodology used to observe out-of-court NGO mediations conducted at different BLAST offices and to interview BLAST mediators in three districts of Bangladesh.

Understanding Mediators' Role: An Empirical Observation

Since one of the purposes of this study was to explore the method of intervention applied by out-of-court family mediators in Bangladesh, observation of mediation sessions was considered to be the best methodology to satisfy such objective. However, besides observation, semi-structured interviews were also conducted among BLAST mediators. Twelve out-of-court mediators were selected randomly from the list of mediators provided by BLAST from *Dhaka*, *Mymensingh*, and *Narayanganj* districts. Though the interview schedules included open-ended questions, the interviews were focused in nature. The main purpose of the interview was to corroborate data already observed in

⁴⁷ *Ibid.*, at p. 26.

mediation sessions, and to get a profound insight on mediators' ideology towards intervention in mediation.

It is already indicated that mediation sessions were observed at different BLAST offices in Bangladesh. To represent any variation of mediation practiced in urban, rural and suburban areas, BLAST offices at three different rural, urban and sub-urban districts were chosen for this study. The feature of urbanization used to choose these three districts was the percentage of total female population living in rural, urban and suburban areas according to the latest Population Census Report in 2007. These districts were chosen in such a way that any difference between rural and urban women could easily be understood from the sample. For example, in aggregate, 77.33 per cent of all women in Bangladesh live in rural areas, whereas 9.35, 44.62 and 85.58 per cent women lived in rural areas in *Dhaka*, *Mymensingh* and *Narayanganj* districts respectively. The choice of sample on the basis of rural, urban and suburban variation of the districts also reflects the difference in the literacy rate of adult women and women's participation in economic activity. For example, among the three districts chosen, the percentage of literate adult women in *Dhaka* (urban) district was 60.74 per cent, compared with 48.10 per cent in *Narayanganj* (suburban) and 34.84 per cent in *Mymensingh* (rural) districts. Likewise, regarding the economic participation of women, the rate within *Dhaka*, *Mymensingh*, and *Narayanganj* districts was 16 per cent, 8.69 per cent and 7.77 per cent respectively.⁴⁸

An observation schedule was prepared with the objective of collecting three different types of information. Firstly, general information including age, sex, and nature of dispute was collected about the mediation session and the parties concerned. Secondly, the nature of mediation conducted by the mediators was observed. Using Riskin model⁴⁹, the level of mediator intervention was observed looking especially at:

- whether the mediators proposed an agreement to the parties or helped parties to develop their own proposals
- whether mediators predicted likely court outcomes for the parties or asked parties about what consequences they were expecting if no settlement was reached in mediation
- whether mediators assessed the strengths and weaknesses of the parties' cases or helped parties to understand their interests and
- how legal provisions were used by the parties and mediators during this process.

Thirdly, while preparing the observation schedule, importance was placed on how mediators tried to redress power disparity in mediation and how they dealt with the issue of family violence in mediation.

⁴⁸ BBS. 2007. *Population Census Report*. Dhaka: BBS, at pp. 12-5, 123-37.

⁴⁹ See Riskin, above note 4, at p. 25.

Using this schedule, 18 mediation sessions were attended to fulfil the three objectives of the observation schedule mentioned earlier. Mediation sessions were chosen randomly using the lists of on-going mediations collected from the registries of BLAST offices visited in three districts.

However, it was possible that participants would modify their behaviour, words and conduct as a reaction to the presence of a researcher. The problem of reactivity arises when the presence of a researcher affects the natural behaviour of a participant.⁵⁰ However, the reactivity of participants to my presence in the mediation sessions was controlled throughout the observations of mediation sessions. To control reactivity of participants from the very beginning, during this introduction phase, both the parties were assured that I would not, in any way, interfere in the mediation process, and the mediator assured them that my presence would not influence the outcome of the session. Moreover, I observed the mediation sessions from a distant corner of the room and took a position so that I could be hardly seen by the mediator and not at all by the parties. To control reactivity of the participants about my presence at the mediation session, I remained silent during the entire mediation session and did not provide any participation that may distort the outcome.

Since no tape recorder was used, during the mediation sessions I was busy with intensive note taking so it was not always possible for me to look at the visual expressions of the parties. Rather, I recorded the mediation session based on the conversation between the mediators and parties. I tried hard to avoid subjectivity in my note taking, and tried to capture the mediation sessions in as much depth as possible. Note taking was done on the basis of criteria derived from Riskin model⁵¹ to ensure that consistent data on pre-determined criteria were obtained from all mediation sessions observed. As observed by Yin, results of a study could be biased if the 'investigator seeks [to] substantiate a preconceived position. One test of this possible bias is the degree to which [an] investigator is open to contrary findings'.⁵² Therefore, although my hypothesis was that mediators used *evaluative* mediation, I included corresponding points of *facilitative* mediation in my observation checklist, along with the points that could capture the practice of *evaluative* mediation by the mediators.

⁵⁰ Participants may remain hesitant to negotiate or to share their grievances if they realize that somebody is observing their performance. It is generally argued that the higher the degree of participation of a researcher into a mediation session, the more the reactivity of clients towards a researcher's presence in mediation. See further, Rarkhuff, Robert R and Bernard G. Berenson. 1976. *Beyond Counseling and Therapy*. New York: Holt Rinehart Winston, at p. 265.

⁵¹ See Riskin, above note 4.

⁵² Yin, Richard K. 1990. *Case Study Research*. 2nd edn. California: Sage Publications, at p. 65.

Use of Law to Legitimize Mediators' Power - Techniques of Intervention Used in NGO Mediation

As all of the major providers of NGO mediation discussed earlier in section 3.2 have an objective to use law to promote justice, it can be presumed that NGO mediators' intervention under the shadow of law might protect women rights in mediation. However, as mentioned earlier, the style of out-of-court NGO mediation is not clearly delineated in any contemporary literature in Bangladesh. It was therefore necessary to follow a model during the empirical survey to confirm which style of mediation is practised in Bangladesh. The Riskin's grid on 'Mediator Techniques' that classifies the *facilitative* and *evaluative* roles of mediators was used for this purpose.⁵³

Figure 1 Riskin's Grid on Mediation

		MEDIATOR TECHNIQUES	
		Role of Mediator EVALUATIVE	
Problem Definition NARROW	Urges/pushes parties to accept narrow (position-based) settlement Proposes narrow (position-based) agreement Predicts court or other outcomes Assesses strengths and weaknesses of each side's case	Urges/pushes parties to accept broad (interest-based) settlement Develops and proposes broad (interest-based) agreement Predicts impact (on interests) of not settling Educates self about parties' interests	Problem Definition BROAD
	FACILITATIVE		
	Helps parties evaluate proposals Helps parties develop & exchange narrow (position-based) proposals Asks about consequences of not settling Asks about likely court or other outcomes Asks about strengths and weaknesses of each side's case	Helps parties evaluate proposals Helps parties develop & exchange broad (interest-based) proposals Helps parties develop options that respond to interests Helps parties understand interests	

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Source: Riskin 1996, p.25.

According to Riskin's grid as shown in Figure 1, mediation can be conducted broadly in two modes (1) *facilitative* and (2) *evaluative*. Both

⁵³ See Riskin, above note 4.

modes of mediation can be used with a broader party interests-based approach, or a narrow rights-based approach.⁵⁴ In a rights-based approach, a resolution of dispute is sought only on the basis of the rights of the parties, for example rights that are given in law. In an interest-based approach, a dispute is resolved with the aim of maximizing party welfare. But, in reality, a solution may be sought with a trade-off between these two continuums. As observed by Riskin:

*At one end of this continuum sit narrow problems, such as how much one party should pay the other. At the other end, lie very broad problems, such as how to improve the conditions in a given community or industry. In the middle of this continuum are problems of intermediate breadth, such as how to address the interests of the parties or how to transform the parties involved in the dispute.*⁵⁵

Criteria for broader *facilitative* mediation are placed in the lower right quadrant of the grid (Figure 1). In broader *facilitative* mediation, mediators emphasize party interests that increase their welfare. On the other hand, criteria set on the lower left quadrant indicate narrower *facilitative* mediation, where mediators emphasize a narrower right-based approach, such as the rights of parties given in law. Criteria for broader *evaluative* mediation is set on the upper right quadrant where mediators make evaluations about the content and outcome of a dispute and help parties to settle their dispute based on their best interests. The upper left quadrant shows the criteria for a narrow *evaluative* mediation where parties settle their disputes based on their rights, for example, those given in law. However, though mediators may have some preference towards an individual grid, they may not strictly adhere to that particular grid in every situation. As observed by Riskin:

*[T]he grid can help us envision an ideal mediator for any individual case. [Mediators] would be sufficiently flexible to employ the most appropriate orientation, strategies, and techniques as the participants' needs present themselves.*⁵⁶

Riskin's grid not only helps us to identify whether mediation is *facilitative* or *evaluative* but also to understand whether mediation is being conducted by strictly adhering to the provisions of law or

⁵⁴ *Ibid.*

⁵⁵ *Id.*, at p. 17.

⁵⁶ *Id.*, at pp. 40-1.

considering party interests. As existing literatures do not provide any indication of whether *facilitative* or *evaluative* mediation is being conducted in Bangladesh, the observations of the features of the out-of-court mediation process discussed in the next section, together with Riskin's grid which is designed to identify a mediator's procedural orientation, assisted us to reveal the style in mediation being practiced in Bangladesh.

Style of Out-of-court NGO Mediation: An Empirical Evaluation

Though Riskin's grid is related especially with the nature of interventions made by mediators during mediation sessions, this section delineates how BLAST mediators try to attain equitable outcome for women at different stages of mediation. As observed in mediation sessions conducted at BLAST offices, on the day of out-of-court mediation, a staff lawyer from BLAST usually acts as a mediator, presides over the session and maintains the following steps while conducting mediation:

Initiation with Ground Rules: All of the mediation sessions that were attended in various BLAST offices started with the mediator outlining the ground-rules:

- that both husband and wife have equal right to participate in the mediation session
- that both will be heard equally
- that one party should not talk while the other is expressing his/her view
- that sufficient time will be given to the other when one has finished his/her part, and
- that friends, relatives, neighbours and others attending mediation are also called on not to interrupt the parties to express their own grievances.

As was shared by the mediators during interviews and also observed while attending mediation sessions, after stating the ground rules, mediators try to create an informal, congenial and non-confrontational environment so that both parties, especially women, can feel relaxed and express their grievances freely. As was observed in Bangladesh, at the beginning of the session, the mediators clarify that BLAST is not a court, and so parties can express their own choices according to their convenience. As was expressed by all of the BLAST mediators interviewed for this purpose, in order to make the environment friendly for women, BLAST encourages greater participation of women in their *shalish* as well as includes women lawyers as mediators.

Gathering Information on the Issue of the Dispute

BLAST mediators usually ask the women to share the facts of their dispute first, then the other parties. Such a strategy is beneficial for women because, as identified by Cobb, the first speaker has an

opportunity to tell the story from a positive perspective.⁵⁷ Those who speak first in mediation can explain their own position positively and put a positive light on the facts.⁵⁸ Establishing a positive light at the beginning is important because 'once imprisoned in a negative position, few persons are able to construct alternative positive positions for themselves'.⁵⁹ All of the BLAST mediators interviewed give women an opportunity to share their grievances freely with them when they first come to a BLAST office to file their complaint. The mediators also stated that about 80 to 90 per cent of women speak freely about their claims in mediation.

Mediators' Intervention on the Content of Dispute

In all mediations at BLAST offices, it was observed that mediators challenge the statements made by a husband or any other accompanied members from his friends and family. For example, in one mediation session observed at the BLAST office, Dhaka, a husband was claiming reconciliation with his wife. Addressing the mediator, the maternal uncle of the husband who was also present at the mediation session said:

Uncle of husband: *When she (wife) went to my residence with a complaint against her husband, I asked her (wife) whether your husband tortures you; but she replied "No". If so, why she is not returning to her husband?*

Mediator: *She might say 'No' in your house out of fear; but now she is saying that her husband tortured her and has not paid proper maintenance. Moreover, they made a love marriage. So, if still there is love and affection and the husband provides proper maintenance why she will not return?*

[Assessed the weakness of the claim made from husband's side: Narrow evaluative]

In another BLAST mediation at Mymensingh district, the wife demanded her full amount of dower written in the marriage contract, while the husband was claiming that he had already paid dower to his wife:

Husband: *(to mediators) I have already paid her dower through ornaments and other valuables during marriage.*

Wife: *those were my marriage gifts.*

⁵⁷ See Cobb, above note 38, at p. 245.

⁵⁸ Aster, Hilary. 2005. "Some Contemporary Theories of Power in Mediation: A Primer for the Puzzled Practitioner", Vol. 16, No. 1 *Australian Dispute Resolution Journal*, pp. 30-9, at pp. 30, 36.

⁵⁹ See Cobb, above note 38, at p. 253.

Mediator: (to the husband) *On your marriage contract have you mentioned about the valuables you are claiming now?*

Husband: No.

Mediator: *Though it is generally believed that anything paid to bride during marriage will be treated as dowry, to claim it legally, one need to mention it in the marriage contract. Otherwise, it will be considered as marriage gift, even if you go for litigation.*

[Predicted court outcomes: Narrow Evaluative]

Therefore, if we fit mediator's role, in the situation mentioned above, with Riskin's grid, it can be said that mediator at BLAST used a narrow evaluative role to assess the weakness of the claim made by a husband and predicted court outcomes that may promote women's right. Similarly, in another BLAST mediation session observed in *Mymensingh*, a husband claimed that he would not provide maintenance to his wife because the wife did not carry out his orders. The mediator made an evaluation of the wife's right to maintenance as follows:

Husband: *I will not provide maintenance to her because I forbid her to go to my neighbour's house, but she does not care.*

Wife: *I need to go there to fetch water. How can I run my daily works without water? Why doesn't he (husband) bring water from other places, if he does not want me to go there?*

Mediator: (to the husband) *Why do not you bring water for your wife?*

Husband: *I have to leave home in the early morning. So, I do not have much time to fetch water for her.*

Mediator: *You should make an alternative source of water available, if you do not want your wife to go to your neighbour's house. To get maintenance is her legal right. You cannot stop her maintenance. If your wife claims her right to maintenance in the court, your defence to deny her right to maintenance on this ground will be rejected in court too.*

[Predicted court outcomes: Narrow Evaluative]

Here also the role of the mediator resembles to a narrow evaluative mediation through prediction of court outcome on wife's claim for maintenance from her husband. Therefore, as observed during mediation sessions at BLAST, mediators protected women's rights by emphasizing their legal rights while evaluating the content of a dispute.

Assisted Bargaining for Outcomes under the Shadow of Law

A rather narrow based evaluative mediation as indicated in Riskin's grid is practiced at this stage, while mediators help women to negotiate for a

better outcome, they advise what women might get if they do not settle in mediation and opt for litigation. However, mediators do not propose any specific outcome for the parties. At all BLAST mediations attended, I observed BLAST mediators using different provisions of law to protect the rights of women. For example, while observing the process in a BLAST mediation I attended in Dhaka district, a mediator assisted negotiation under the shadow of law on polygamy to protect the rights of the woman.

Mediator: *Now what do you want to do?*

[Helped parties to develop and exchange broad (interest based) proposals: Broad Facilitative]

Wife: *I want to live with my husband, but not with that second wife.*

Husband: *I want to live with them both [first and second wives].*

Father of the wife: *He has made his second marriage without taking any permission from my daughter. Now we will sue him.*

Mediator: (to the husband) *Haven't you taken permission from your wife?*

[Educated self about parties' interests: Broad Evaluative]

Husband: *No.*

Mediator: (to the husband) *The law is now very strict in this regard and you might get imprisoned if they sue.*

[Predicted impact of not settling: Broad Evaluative]

Mediator: (to the husband again) *What you would do now? According to law, you may pay dower money to one of them and get divorced from her.*

[Proposed narrow (law/position-based) agreement: Narrow Evaluative]

Husband: *(thinking)*

Mediator: (to the wife) *What is the amount of your dower?*

[Educated self about parties' interest: Broad Evaluative]

Wife: *Tk.50, 000 (US\$642)*

Mediator: *Would you consider getting divorced from your husband after getting Tk.50, 000 (US\$642) or do you like to continue with him?*

[Proposed narrow (law-position based) proposals: Narrow Evaluative]

Wife: *I do not want money; I want to get back my husband. (Wife's strong desire towards restitution)*

Mediator: (to the husband) *What do you think now? You have already heard what your wife said. (Though indirectly, mediator is giving emphasis to the proposals made earlier under the shadow of law).*

[Helped parties to evaluate proposals: Narrow Facilitative]

Husband: (after a discussion with his parents and relatives) *I will divorce my second wife.*

An examination of the interventions made by mediators at various stages of mediation, discussed so far, indicates that mediators follow a narrow evaluative role while intervening on the content of a dispute. However, while deciding about the outcome in a mediation session, mediators start with a broad facilitative role; then switch into a broad evaluative role, and finally end-up with a narrow evaluative role. Despite their evaluative role, instead of urging/pushing parties to accept a settlement, mediators rather help parties to choose from the narrow (position based outcomes) proposals under the shadow of law. Further, while protecting the right of one woman in mediation, mediators were observed to be conscious about the non-infringement of any third party interest, especially the interest of any other women who are not attending the mediation session but whose interest will be affected by the outcome. For example, in the same mediation session mentioned earlier, the mediator used his narrow evaluative role by using legal provisions to protect the right of the second wife. When the husband decided to divorce his second wife and live with the first one, the mediator replied:

Mediator: (to the husband) *Well, you have decided to divorce your second wife and live with the first one; but in that case you have to wait for a few months. As I have been informed by your father, your second wife is now expecting. According to law, you cannot divorce your wife during her pregnancy.*

[Predicted court outcome: Narrow Evaluative]

Mediator: (to the husband again) *Moreover, you have to pay her unpaid dower, maintenance for three months iddat period and periodic maintenance to any child born*

[Predicted court outcome: Narrow Evaluative]

Mediator: (to the wife) *When claimed, you should not restrain your husband from paying the periodic child maintenance. If the child is a boy, maintenance should be paid until his maturity at 18, and if the girl is a child, until her marriage.*

[Predicted court outcome: Narrow Evaluative]

Mediator: (to the wife again) *Do you agree?*

Wife: *Yes, I do.*

Mediator: *Fine, now we may proceed to draft the mediation agreement between you.*

The example mentioned above indicates that though the divorcee wife and children, the mediator tried to frame a solution under the shadow of law and protected the mediator let parties make their own decisions, by reminding the husband of his legal obligations to pay dower and maintenance to his rights of third parties.

An examination of mediators' role as revealed through the observation and their corresponding linkage with the Riskin grid demonstrated in Figure 1 indicates that BLAST mediators generally practice evaluative mediation to challenge the discourses made by husband and their accompanied person to legitimize the position of women and give them more voice in mediation. However, mediators provide more emphasis on 'party self determination' while settling the outcome of mediation. Mediators do not provide any strong evaluation towards the outcome of disputes rather help parties to develop their own outcomes under the shadow of law. The following section summarizes how BLAST mediators ensure equitable outcomes during mediation.

6.5 Attaining Fair Outcomes for Women

When the facts of a dispute and the position of both parties in attaining a solution are clear to mediators, they ask parties to express their desired solution. Women and their guardians are usually given the first chance to share their views. Generally, as observed in BLAST mediations, the outcome is reached as follows:

- After hearing from both the parties, BLAST mediators initially asked parties about any possibility of reconciliation. However, mediators did not encourage or force parties to reconcile; rather they ensure that any agreed reconciliation was made with the wife's free consent by asking the wife whether she agreed voluntarily or not. Mediators also stressed the point that the wife is not bound to accept the proposal of reconciliation by the husband and she has complete right to refuse her husband's proposal. In such a case, BLAST mediators helped women to get a fair share of their post separation entitlements.

- In the case of attaining an outcome for dower and maintenance, they tried to ensure that the woman's dower and maintenance as stated in their marriage contract, is recovered in the shortest possible time. However, as observed during the mediation sessions and confirmed by the mediators during interviews for this purpose, BLAST mediators did not pressure parties to accept a particular amount of dower or maintenance as outcome; rather they tried to ensure fair outcomes for women.
- As well as recovery of dower and maintenance, according to the mediators interviewed, the other objective of a mediator regarding mediated outcomes varied depending on the issue of a dispute. In the case of custody of children, however, the prime objective is to ensure the welfare of the children. This motive of emphasizing child welfare while determining custody of children corresponds with the legal provision set in the *Guardianship and Wards Act 1890*. It indicates that during mediation, the issue of child custody is also determined in the shadow of law.

Agreement Writing and Closure

Finally, an attempt is made to resolve the differences between the two sides with terms and conditions which are acceptable to both parties. A mediator summarizes the terms and conditions, under which the two parties decide to settle the dispute, and writes down those points in a prescribed form. The written agreement is then read to the parties and signed by the mediator/s as representatives of BLAST, both the parties and one guardian as witness from each side. While compiling the agreement, BLAST mediators have a final look at the equity of the agreement reached. If any one or more of the conditions seem/s inequitable for the woman, the mediator explains to the parties its negative consequences and asks the parties to consider revising the terms. According to all of the BLAST mediators interviewed, their objective is to ensure that women will get fair outcomes in comparison to what that may get through litigation.

Conclusion

As observed in out-of-court NGO mediation in Bangladesh, mediators do not use facilitative style of mediation. Rather, they use evaluative style of mediation to help parties, especially women, to express their opinions; challenge the dominant social discourse that husbands might use to subjugate the position of women in mediation; educate parties about the probable outcome of the dispute if settled in litigation; and warn them about the extra cost and money that they may require to settle the dispute through litigation. All these criteria observed during mediation sessions in Bangladesh, when matched with Riskin's criteria set out above, demonstrate that mediators in Bangladesh generally use narrow *evaluative* mediation to intervene in the content of a dispute. However, 'shadow of law' has a strong impact on the outcome of mediation. While settling outcome, though mediators help parties to evaluate proposals, or help parties to develop their proposals under the shadow of law, they do not decide the outcomes of a dispute and do not dictate to parties what outcome they may demand. Thus, the narrow facilitative style of mediation practiced at the end opens up the possibility that mediation may provide fair outcomes for women, based on legal principles, and also promote 'party self determination' in mediation.

In Bangladesh, family law is evolving gradually to be more protective of women's rights. Since the law embodies equality, and if it is the touchstone for standards in mediation, this is more likely to uphold women's rights and women's equality than is recourse to community values. Therefore, at this point we can at least propose that as the most reliable protections of women's rights are in law, the dominance of the values of law in mediation means that a practice of *evaluative* mediation, as observed at BLAST, has a greater capacity to promote party self determination and protect women's legal rights to provide fair outcomes for women in mediation.

Further, unlike traditional *shalish*, NGO administered mediation or NGO *shalish*, as it is conducted at BLAST, is preferable for women because it ensures the availability of legal advice to them. Furthermore, unlike traditional *shalish*, a written and signed agreement in NGO *shalish* usually stimulates the opposite party to abide by the terms of agreements settled through mediation.⁶⁰ As these rule-based NGOs provide low-cost informal justice, 'poor people, particularly women feel

⁶⁰ UNDP. 2002. *Human Security in Bangladesh: In Search of Justice and Dignity*. Dhaka: UNDP, at p. 93.

comfortable and pleased about the easy access to local dispute resolution mechanisms'.⁶¹ Therefore, there appears to be a broad consensus in Bangladesh that the '[NGO] *shalish* as a dispute resolution mechanism has tremendous potential for making justice more accessible to marginalized individuals and groups', especially for women.⁶²

⁶¹ *Ibid.*

⁶² See Siddiqi, above note 5, at p. 15.