

Gender Justice in Bangladesh: A Time and Cost Impact to Resolve Family Disputes through Litigation vs. Court-connected Mediation

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Introduction

Delay in litigation *‘[h]as reached a point where it has become a factor of injustice, a violation of human rights. Praying for justice, the parties become part of a long protracted and torturing process, not knowing when it will end’*.¹ The problem of delay in litigation vividly persists in Bangladesh. Delay discourages two-thirds of the plaintiffs from entering the formal court process.² Of those interviewed in a survey conducted by the Transparency International, Bangladesh, 53.9 per cent of plaintiffs/ defendants were uncertain about when their cases might be resolved.³ The *‘existing judicial system cannot ensure justice for the poor; many people in this country are never produced before the court because of their poverty and the loopholes in our system’*.⁴ As women are the poorest section of the society, they have particular problems of access because of their reduced ability to bear the costs of justice.⁵ Therefore, *‘the formal legal system has no attraction for the people [of Bangladesh] especially women’*.⁶

Apart from delay or the overwhelming pressure on the limited number of judges to hear thousands of cases, one more reason for the backlog might be flaw in case management. Another important factor that hinders people’s access to justice is the cost of the dispute resolution process. Cost is important because we live in *‘a system in which money often matters more*

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¹ M Shah Alam, ‘A possible way out of backlog in our judiciary’, *The Daily Star* (Dhaka), 16 April 2000.

² UNDP, *Human Security in Bangladesh: In Search of Justice and Dignity* (2002) 9.

³ Transparency International, ‘Corruption in South Asia: Insights and Benchmarks from Citizen Feedback’, (2002) <<http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN019883.pdf>> accessed 18 June 2009.

⁴ The former Minister of Law Justice and Parliamentary Affairs, Bangladesh, Barrister Moudud Ahmed was speaking as chief guest at the inaugural function of a division-level training workshop on ‘Mediation techniques: Alternative Dispute Resolution (ADR) in the civil justice delivery system in Bangladesh’ held at a city hotel on 24 July, 2003.

⁵ ADB, ‘Bangladesh: Gender, Poverty and MGDs 2004’ (2004) <<http://www.adb.org/Documents/Reports/Country-Gender-Assessments/ban.asp>> accessed 15 February 2010. See further Sumaiya Khair, *Alternative Approaches to Justice: A Review of ADR Initiatives under the Democracy Partnership* (Asia Foundation, 2001); Nusrat Ameen, ‘Dispensing Justice to the Poor: The Village Court, Arbitration Council *vis-a-vis* NGO’ 16(2) *Dhaka University Studies: Part F* 103.

⁶ USAID, *Alternative Dispute Resolution Practitioners Guide* (1998)

than merits'.⁷ In Bangladesh, sometimes costs are exacerbated due to delay. As the disposal of cases is delayed, total charges paid to the lawyers increase with consecutive court appearances. An increased number of court appearances also involve higher transportation costs, more forgone daily wages and other incidental expenses incurred at court. All these expenses pose an additional burden and may cause economic hardship to the poor, especially to poor women. In fact, *'[i]ncreasing expenses of litigation, delay in disposal of cases and huge backlogs in our legal system have virtually shaken the confidence of people in the judiciary'*.⁸

Though many protective legal provisions are theoretically available in different laws of the country, because of the high-cost and delay in litigation, women may not be able to access the benefits of such laws. As prudently observed by Rhode, *'[p]rocedural hurdles and burden of proof may prevent the have-nots from translating formal rights into legal judgment'*.⁹ To make a clear distinction between 'availability' and 'accessibility', Hutchinson rightly linked availability *'to the question of whether a service exists'* and accessibility *'to the question of whether a service is actually secured'*.¹⁰ Therefore, a mere availability of legal provisions carries only a little meaning to the 'accessibility' of justice to many poor women in Bangladesh.

Enforcement of legal orders is yet another important criterion for measuring access to justice. If court decrees cannot be enforced then what people win in the court may not become a win in their life.¹¹ As women are facing a power disparity in relation to their male counterparts in Bangladesh where husbands usually control family finances,¹² women may have no means of support until they can achieve a realisation of their post-separation entitlements. Thus, enforcement, or what is in Bangladesh called 'execution of the decree' is significant to enhance people's access to 'real' or 'ultimate' justice.

Availability of adequate legal aid is another factor that can affect the ability of poor people to access justice through litigation¹³ Adequacy of legal aid is important because otherwise many litigants who are theoretically entitled

⁷ Deborah L Rhode, 'Access to Justice' (2000-01) 69(5) *Fordham Law Review* 1785, 1785.

⁸ K M Hasan, 'A Report on Mediation in the Family Courts: Bangladesh Experience' in S Islam and M Shahiduzzaman (eds), *Reviewing the Family Courts Ordinance 1985* (Bangladesh Legal Aid and Services Trust, 2008) 7, 8.

⁹ See Rhode, above n 7, 1787.

¹⁰ Allan C Hutchinson, *Access to Civil Justice* (Carcwell, 1990) 181.

¹¹ See Rhode, above n 7, 1787.

¹² Roushan Jahan, *Hidden Danger: Women and Family Violence in Bangladesh* (Women for Women, 1994) 91; see also R I Nasir, 'Role and Status of Urban Working Women' (1991) 8(1-2) *Social Science Review* 135, 141-4.

¹³ Shepherd Tate, 'Access to Justice' (1979) 65(6) *American Bar Association Journal*, 904, 906; see also B Dickson, 'Access to justice' (1989) 1 *Windsor Review of Legal and Social Issues* 1, 3.

to get service from the state appointed lawyers, may not get quality services or have to suffer long delays if 'court appointments are a financial loss for lawyers'.¹⁴ Although barriers to accessing justice due to the high-cost of litigation can be eased by the provision of legal aid, the scarcity of legal aid funding from both government and NGOs in Bangladesh means that women's access to justice through litigation is extremely difficult.¹⁵

Among the barriers to access to justice, sometimes complexity of process is also identified.¹⁶ Literature shows that litigation is a much more complex procedure than mediation. In Bangladesh, there is some procedural complexity in dealing with civil disputes (including family disputes) that severely affect plaintiffs who do not have sufficient means to finance protracted litigation. In the 283 court files examined for this study (litigation and in-court mediation), in more the 90 per cent of cases, family suits are filed by women as plaintiffs. This is because, family courts broadly deal with two types of family cases depending, on the status of the conjugal relationship between disputing parties: family cases filed after divorce (i.e. dower, maintenance and custody of children) and family cases filed before divorce with/without separation (dissolution of marriage, restitution of conjugal life). Women were plaintiffs for all cases filed after divorce relating to dower and maintenance. However, another type of case filed after divorce is the custody of children, where both husband and wife can be a plaintiff. Nevertheless, as observed in the mediation sessions and also confirmed by the mediators during interviews conducted under this study, in more than 80 per cent of cases, women are plaintiffs as husbands are not willing to take physical custody of their children after divorce. Similarly, wives generally initiate the filing of cases for dissolution of marriage as husbands are not willing to initiate divorce to pay dower and maintenance after divorce.

Further, husband initiated suits declined after the Supreme Court's decision in *Nelley Zaman's* case where the court expressly rejected a suit that was filed separately claiming only the restitution of conjugal life, the ground generally used by husbands in the past when they initiated a family suit.¹⁷ Thus, after banning the most used grounds – restitution of conjugal life – where husbands could sue against their wives, we can reasonably expect that in most of the family cases, women become plaintiffs and men are defendants/respondents. Since in the family court women are generally the plaintiffs, any procedural complexity affecting plaintiffs in litigation

¹⁴ Laura Mansnerus, 'A Brake on the Wheels of Justice; Shortage of Lawyers for the Poor Plagues the Courts', *The New York Times* (online), 17 January 2001, <<http://www.nytimes.com/2001/01/17/nyregion/brake-wheels-justice-shortage-lawyers-for-poor-plagues-courts.html>> accessed 10 July, 2010.

¹⁵ Nusrat Ameen, 'The Legal Aid Act, 2000: Implementation of government legal aid versus NGO legal aid' (2004) 15(2) *Dhaka University Studies Part F* 59.

¹⁶ Jamila A Chowdhury, *Gender Power and Mediation: Evaluative Mediation to Challenge the Power of Social Discourses* (Cambridge Scholars Publishing, 2012) 6.

¹⁷ *Nelly Zaman v Giasuddin Khan* (1982) 34 DLR (SC) 221.

disproportionately affects women. One such procedural complexity that arises out of litigation is non-acknowledgement of summons by the defendants. According to the *Code of Civil Procedure 1908* (CPC)¹⁸, a summons may be issued at the initiation of a case ordering a defendant to appear before the court. In the case of family disputes, when a case is heard *ex parte*, a delinquent husband who fails to attend the court may claim that the summons was not duly served and ask that the *ex parte* decree be set aside, thus requiring the filing of a fresh suit.¹⁹ The problem escalates when the plaintiff has to bear any cost of issuing such a summons. According to Order IX, Rule 8 of CPC 1908, a suit will be considered as a default if the plaintiff fails to provide costs for issuing a summons or sending summons to the defendant through postal delivery. Such delinquency may occur if the plaintiff is a woman and, for example, is not able to bear the cost of service.

Even when a woman may overcome the procedural complexities to initiate a case through the issuance of a summons etc., complexity may again arise in the realisation of post-separation entitlement as ordered in a court decree. Though a family court is a civil court, it can also act as a Magistrates' Court for the execution of monetary decrees (e.g. execution for unpaid dower or maintenance) and a sentence of three months' imprisonment may be imposed on a delinquent husband²⁰ by issuing a 'show cause' notice to the judgment-debtor to respond why he should not be committed to a civil prison.²¹ Nevertheless, one rule that may work against the female decree-holder is the provision that:

No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into the Court such sum as the judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the court.²²

Because of this rule, women having insufficient financial capacity to pay money may fail to ask the court to issue a warrant against the judgment-debtor. But in the case of mediation, women may not have to bear such extra cost to realise the decree money from the judgment debtor because, in most cases the amount of post-separation entitlements settled through mediation is paid in a lump-sum amount. But, as demonstrated in this paper, for litigation, post-separation entitlements are not usually paid until the women file a further execution suit.

Another important complexity of the formal court system is its procedure being difficult to understand by poorly educated, illiterate women. It has been shown that women do not understand what is happening and they

¹⁸ Provisions of the *Code of Civil Procedure 1908* are applicable where the *Family Courts Ordinance 1985* does not provide any specific procedural guidance.

¹⁹ *Code of Civil Procedure 1908*, Order IX, Rule 6.

²⁰ *Family Courts Ordinance 1985*, Section 16(3B)-(3C).

²¹ *Code of Civil Procedure 1908*, Order XXI Rule 2(1).

²² *Code of Civil Procedure 1908*, Order XXI, Rule 39.

therefore do what their lawyers tell them to do.²³ Once the dispute reaches the lawyers, they take control and parties just follow their instructions. This turns the matter of dispute from a difference between two laymen to a battle between two well-trained professionals who are arguably motivated primarily for enhancing their financial gain.²⁴ An earlier study in Bangladesh indicates that, in terms of the complexity of process, women in Bangladesh feel much more comfortable with mediation than with litigation.²⁵ In several focus group discussions conducted with the family court clients, it was unanimously agreed by the participants (women) that they did not understand the court procedure; and had to depend completely on the lawyers from the beginning to end.²⁶ Complexity in litigation goes one step further because sometimes witnesses are hired to fabricate a case. In one survey conducted by Transparency International, Bangladesh²⁷, hiring witnesses was reported by 19.8 per cent of the households involved in court cases. Twenty-eight point six per cent of urban households are markedly higher than the 18.9 per cent of rural households hiring paid witnesses. This type of fabricated witness can destroy any remnant of faith and honour remaining between the parties for each other. Their primary objective appears to be one of simply getting rid of their opponent rather than of making any amicable or fair settlement.

As 'available' modes of litigation remain 'inaccessible' to many poor and disadvantaged people in Bangladesh, it becomes imperative to find an alternative means that will render justice accessible to women. Whilst we know that there are problems with access to justice via litigation, there is no existing empirical data comparing litigation and mediation. Thus, this paper compares access to justice through mediation in comparison with litigation on the basis of time-to-resolution, time-to-realization, and cost of resolution. The following part demonstrates how court-connected mediation is enhancing women's access to justice in Bangladesh in terms of its quick

²³ Jamila A Chowdhury, *Women's Access to Justice in Bangladesh through ADR in Family Disputes* (Modern Book Shop, 2005).

²⁴ Formanul Islam, *The Madaripur Model of Mediation: A New Dimension in the Field of Dispute Resolution in Rural Bangladesh* (research paper, file with the author).

²⁵ See Chowdhury, *Women's Access to Justice in Bangladesh*, above n 23, 33.

²⁶ Ibid.

²⁷ 'Survey on Corruption in Bangladesh' conducted for the Transparency International Bangladesh by the Survey and Research System, Dhaka, Bangladesh with the assistance for The Asia Foundation, Bangladesh. The survey was divided in to two phases. Phase I consisted of a 'pilot study' to ascertain the nature, extent, intensity wherever possible, of corruption, and the places where corruption occurs. In the pilot study, a small scale national household survey was undertaken to obtain information on public delivery services and their corruption in providing those services. This study was performed in six different public sectors among which judiciary deserve a particular mention. Phase II was a large scale survey to provide baseline information on corruption in a sample of 2500 households.

and low-cost resolution and better realization of decree money when compared with litigation.²⁸

One alternative adopted by many other developed and developing countries to reduce the backlog and delay in courts is the use of mediation that may provide a low-cost quick access to justice for women. Because it has the potential to provide a low-cost alternative means to access justice, family mediation has become popular in the family courts of Bangladesh since 2000²⁹. *'Mediation has flourished in the country against the backdrop of a logjam of cases, leading to unacceptable delay and expenses in the adjudication of disputes and stagnation of civil litigation'*.³⁰

The reform movement which started at the beginning of 2000 has made initial progress in developing mediation in a more methodical way in the

²⁸ Empirical data from a representative sample was collected to make such comparison. To represent urban, rural and suburban areas, the three districts of *Dhaka* division were chosen under this study were *Dhaka*, *Mymensingh* and *Narayanganj*. The features of urbanisation determining which of these three districts were urban, suburban, and rural are based on the percentage of women 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 the 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. But *Dhaka*, *Mymensingh* and *Narayanganj* districts were chosen to represent urban, rural and suburban areas where 9.35, 44.62 and 85.58 per cent women lived in rural areas respectively. Thus, the sample districts were not chosen to ameliorate the national average of rural women rather than to make the rural urban difference more vivid in this sample. 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. These factors may affect women's capacity to negotiate in mediation. Further, the three districts examined in this study incorporate 11.83 per cent of women living in the 61 districts of Bangladesh who attended family courts in 2007. The sample of these three districts can be considered as representative of Bangladesh as they cover the variation in rural, urban and suburban areas, and are the domiciles of more than 11 per cent of the total population of women in Bangladesh. The total number of women in Bangladesh in 2007 was 60,264,000. The number of women in the three districts *Dhaka*, *Narayanganj* and *Mymensingh* was 3,800,000; 1,012,000 and 2,193,000 respectively. For details on statistics, see Bangladesh Bureau of Statistics. 2007. *Population census 2001*. Dhaka: Bangladesh Bureau of Statistics.

²⁹ Though the provision of conducting mediation by family court judges was inserted in ss. 10 and 13 of the FCO 1985, this provision was hardly used by the family court judges before policy makers took the initiative to popularise the use of mediation in the family courts in 2000.

³⁰ The former Chief Justice in an workshop on 'Mediation Techniques-Alternative Dispute Resolution in the Civil Justice Delivery System in Bangladesh', organized by the Legal and Judicial Capacity building Project (LJCBP), financed by world Bank, held at *Chittagong*, Bangladesh on 17 July 2003.

family courts of Bangladesh thus mitigating backlogs of cases and getting enormous support from the legal community at large.³¹ The former Chief Justice K.M. Hasan observes:

Within this short period, the mediation course embraced an unexpected and commendable success. Average rate of substantive disposal by mediation has come up to 60 [per cent] in comparisons with contested decrees.³²

As further stated by Hasan:

Statistics show that the total realisation of money, through execution of decree in suits disposed of, by [litigation], is far below the total realisation of money in disputes settled through mediation. From 1985 to 2000 the total money realised in connection with Family Courts cases of the three courts is Tk. 6,199,759.5 [USD 80,516.36] whereas the total realisation through mediation since the introduction of mediation in the same Courts from June 2000 up to 16 May 2001 i.e. in twelve months is Tk. 50,94,50.³³

However, such assessments were made by scholars in Bangladesh based only on the performance of 16 pilot family courts covered under the World Bank project in 2000³⁴. Such positive remarks, therefore, reflect neither the performance of those other family courts which were not included in the pilot project nor the performance of NGOs conducting out-of-court mediation. Subsequent research has not evaluated the efficiency of mediation at providing speedy access to resolution of disputes either. All these unexplored issues are considered in this paper.

In order to address these issues, this paper examines whether court-connected mediation can provide a low-cost quick access to dispute resolution for women, in comparison with litigation. However, as existing literature on this issue is scarce in Bangladesh, the analysis is made on the basis of documentary data collected from family courts providing mediation services in Bangladesh. Based on these data, this paper makes a comparative evaluation between court-connected mediation and litigation to

³¹ Mustafa Kamal, '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, 2002) 1-20; see also K M Hasan, 'Mediation in the Family Courts: Bangladesh Experience' (Paper presented at the First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, 2002)1, 1-2.

³² Ibid.

³³ K M Hasan, 'Alternative Dispute Resolution' in R Waliur amd M Shahabuddin (eds) *Judicial Training in the New Millennium: An Anatomy of BILIA Judicial Training with Difference* (Bangladesh Institute of Law and International Affairs, 2005) 123, 133.

³⁴ Under the World Bank project in 2000, 16 family courts in 14 districts of Bangladesh were chosen as pilot family courts to popularise the practice of mediation in family courts. Each of the 14 districts except *Dhaka* has only one pilot family court. Three pilot family courts were set up in *Dhaka* district.

examine whether court-connected mediation continues to provide a quicker resolution of disputes and execution of decrees compared with litigation. After demonstrating that court-connected can provide quicker resolution and timely realisation of post-separation entitlements of family disputes compared with trial, based on the analysis of empirical data collected from lawyers in family courts, this paper also highlights that court-connected mediation is a less costly method of providing resolution compared with trial.

Whilst we know that there are problems with access to justice via litigation, there is no existing empirical data comparing litigation and court-connected mediation.³⁵ This paper, therefore, compares access to justice through court-connected mediation in comparison with litigation on the basis of time-to-resolution, time-to-realization, and cost of resolution. The following part demonstrates how family mediation (court-connected mediation) is enhancing women's access to justice in Bangladesh in terms of its quick and low-cost resolution and better realization of decree money when compared with litigation.

Access to Justice through Resolution of Family Disputes: Court-connected Mediation vs. Litigation

This part compares the time taken by women to get their disputes resolved through mediation (court-connected mediation) and litigation. It also considers the time taken for the realisation of post-separation entitlements under mediation and litigation. To do so, a comparison between mediation (court-connected mediation) and litigation is made in terms of the time-to-resolution and time-to-realisation. Though mediation services in Bangladesh are provided in-court and also out-of-court by NGOs, discussion of mediation in this paper is concentrated on court-connected mediation. A consideration of time-to-realization is important because getting a dispute resolved is of little use, if it cannot be executed. However, the existing literature does not provide sufficient data to make a comparison of realization through mediated agreements and court orders. Therefore, as mentioned earlier this study collected data from court registries of three districts in Dhaka division – *Dhaka*, *Mymensingh* and *Narayanganj*. This paper therefore provides original analysis that allows for the first time a comparison between time-to-resolution and time-to-realization for court-connected mediation and litigation in Bangladesh.

Rate of Resolution through Court-connected Mediation and Litigation

Aggregate data collected from court registries summarised in Table 1, indicate that 9 to 24 per cent of cases filed in court were resolved through court-connected mediation. Among the total 592 cases resolved through in-court mediation and litigation in the specialised family courts in *Dhaka* district, 424 cases (72 per cent) were resolved through in-court mediation,

³⁵ See Chowdhury, *Women's Access to Justice in Bangladesh*, above n 23.

while only 168 cases (28 per cent) were resolved through litigation. But, in the mixed family courts of *Narayanganj* and *Mymensingh* districts, the rate of resolution was much lower. Nine per cent of the total number of cases was resolved through in-court mediation in *Narayanganj* and 10 per cent were resolved through in-court mediation in *Mymensingh*. In the case of *Narayanganj* and *Mymensingh* districts, out of 212 cases resolved through in-court mediation and litigation, only 75 cases or 35 per cent were resolved through in-court mediation with as many as 137 cases (65 per cent) needed to be resolved through litigation. The percentage of cases resolved through in-court mediation is significantly higher in *Dhaka* district when compared with *Narayanganj* and *Mymensingh* districts.

It is pertinent to mention that, family courts in *Dhaka* district are specialised courts that deal only with family disputes. Family courts in *Narayanganj* and *Mymensingh* districts, on the other hand, are mixed courts that try both family disputes and other civil disputes. One reason for the higher rate of resolution in specialised family courts in *Dhaka* district could be that these courts do not have the case loads of other civil disputes which mixed courts have. However, this proposition is not tested in this paper and thus might be an area for further research.

Table 1 Disposal of Family Court Cases through Court-connected Mediation and Litigation (2006)

	<i>Dhaka</i>		<i>Narayanganj</i>		<i>Mymensingh</i>	
	Number	Percentage	Number	Percentage	Number	Percentage
Litigation	168	9%	29	10%	108	21%
<i>Ex parte</i>	621	35%	115	39%	111	22%
Dismissed	580	32%	126	42%	233	47%
Total	1793	100%	297	100%	500	100%

Source: Unpublished data from court registries of *Dhaka*, *Narayanganj* and *Mymensingh* districts, Bangladesh.

As mentioned earlier, women as plaintiffs generally file family suits. Therefore, we can reasonably expect that most of the *ex parte* cases³⁶ are granted to women and dismissal orders³⁷ are passed against them. This rate of dismissal of cases suggests that women as plaintiffs may begin, but not

³⁶ According to Order IX, Rule 6(1)(a) of the *Code of Civil Procedure* 1908, where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, and if it is proved that the summons was duly served, the court may proceed *ex parte*.

³⁷ According to Order IX, Rule 8 of the *Code of Civil Procedure* 1908, where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the court shall make an order that the suit be dismissed.

be able to continue more than one-third of the total cases filed. This high rate of dismissal order against women implies that the women are absent in court, but the respondents (men) appear. This might be due to the poor economic condition of women that make them unable to bear the cost of a lawyer, transportation and lodgings to be present in court. This could be a reason for higher rate of default in family cases.

On the other hand, although as many as 33 per cent of total cases in three districts were dealt with *ex parte*, only 5 per cent of the total realisation was made under *ex parte* cases. This means that though in one-third of the total cases women who were heard *ex parte* get a decree, they may not be successful in the ultimate outcome. It is possible that one reason is the procedural complexity in the litigation mentioned earlier. In *ex parte* cases, respondents (usually husbands) have the opportunity under law to revive the case by claiming that the suit was *ex-parte* because the summons was not served properly. As cases dismissed and heard *ex parte* do not ensure 'ultimate' justice to women through realisation of post-separation entitlements, the analysis below concerns only cases resolved through court-connected mediation and litigation.

Time-to-resolution: Court-connected Mediation vs. Litigation

Average times-to-resolution for in-court mediation and litigation in the three districts suggest a longer time for litigation cases when compared with in-court mediation. While the average time-to-resolution for in-court mediation is around 10 months, the average resolution time for contested litigation is more than 17 months (Table 2). Therefore, the average time-to-resolution for in-court mediation is more than 7 months less than the average time-to-resolution experienced for litigation cases.

Table 2 Average Time-to-resolution (months) for Court-connected Mediation and Litigation in Dhaka, Narayanganj and Mymensingh Districts

Type of Resolution	Specialised court	Mixed court		Total
	<i>Dhaka</i>	<i>Mymensingh</i>	<i>Narayanganj</i>	
Litigation	17.6	16.5	16.9	17.1
Court-connected mediation	9.8	11.5	10.2	10.3

Source: data collected from family court case files in Bangladesh.

Average time to resolution for in-court mediation in specialised family courts of *Dhaka* is 0.4 months to 1.7 months less than the mixed courts in *Narayanganj* and *Mymensingh* respectively. Such difference may result because specialised courts can spend more time in resolving disputes through mediation and is thus able to solve more cases through in-court mediation at a lower average time to resolution.

Table 3 Distribution of Time-to-resolution (months) for Court-connected Mediation

Time-to-resolution	Cumulative Number of cases resolved	Cumulative % of cases resolved
Less than three months	32	19.0%
Less than six months	68	40.4%
Less than twelve months	120	71.4%
Twelve months or more	168	100%

Source: data collected from family court case files in Bangladesh.

An analysis of Table 3 indicates that though court-connected mediation settled the cases quicker than litigation, around 60 per cent of court-connected mediation cases remain unresolved within a period of six months. Therefore, despite the potential of court-connected mediation to resolve family disputes much quicker than litigation, whether such quicker resolution can also ensure fair outcomes for women and whether such rate is also competitive with that of NGO mediation is not discussed under the purview of this paper.

Access to Justice through Realisation of Post Separation Entitlement: Court-connected Mediation vs Litigation

Discussion so far shows that court-connected mediation resolves disputes much quicker than litigation. Further, rates of resolution vary between in-court mediation conducted by specialised courts and mixed family courts. Perhaps, because of the lower case-loads of specialised family courts, they show a quicker resolution of disputes in comparison with mixed family courts. However, attainment of compromise/contested decrees benefits women only if those decrees can be executed through a realisation of post-separation entitlements. Therefore, the following part discusses the success of specialised/mixed family courts in the realization of decrees and mediation agreements respectively. The following discussion closely examines the time required for such realisation — an important issue indispensably related to access to justice.

Table 4 Realisation under Court-connected Mediation and Litigation (2006)

District	Following a compromise decree* under mediation		Following a contested decree		Following an Ex-parte decree	Total
	Before execution suit	After execution suit	Before execution suit	After execution suit		
<i>Dhaka</i>	65 (62%)	Nil	01	31	8	105
<i>Mymensingh</i>	22 (34%)	3	02	38	0	65
<i>Narayanganj</i>	09 (36%)	1	00	14	1	25
Total	96 (49%)	4 (2%)	07 (3.5%)	79 (41%)	9 (4.5%)	195

Source: data collected from family court case files in Bangladesh.

* Agreement reached through in-court mediation and further endorsed by the court as compromise decree.

The situation was even worse in cases of realisation through litigation. As delineated in Table 4, while for all three districts 52.5 per cent of total cases were realised before the execution suit, 49 per cent out of those 52.5 per cent of cases were dealt with by mediation. In the case of trial, only 3.5 per cent of total cases were realised before filing an execution suit. Among the total cases realised, 26 per cent cases were realised through a one-time or lump-sum payment made by clients. But all of these lump-sum payments were made for cases settled through mediation. None of the cases resolved through litigation resulted in payment of a lump sum for the realisation of a decree. Realisation of post-separation entitlement through mediation was better for specialised family courts in *Dhaka* district, than when compared with the mixed family courts in *Narayanganj* and *Mymensingh* districts. According to Table 4, 62 per cent of total realisation in *Dhaka* district was through mediation (without requiring any execution suit) in comparison with 36 per cent and 49 per cent for *Mymensingh* and *Narayanganj* districts respectively.

There might be two more reasons why in-court mediation cases in *Mymensingh* and *Narayanganj* districts portray lower realisation rates than those in *Dhaka* district. Firstly, in *Narayanganj* and *Mymensingh* districts, in most cases, compromise decrees through in-court mediation were made for the reconciliation of the spouses. Compromise agreements were drafted in vague language without mentioning any objective criteria that could be reviewed later. Typical orders were that a husband and a wife will continue

their conjugal life peacefully and the husband will provide maintenance to his wife according to his ability³⁸. Secondly, another type of compromise decree made during in-court mediation does not specifically mention restitution but asserts that parties agree to withdraw their cases under a compromise reached between them. In these cases also, the terms and conditions of the compromise were not specifically mentioned in the compromise agreement submitted to the court. However, this type of reconciliation or withdrawal of cases was less frequent in the specialised family courts in *Dhaka*.

Therefore, mediation in family courts offers women quicker resolution of their disputes and realisation of their post-separation entitlements than litigation. For example, as shown in Table 4, out of the total 52.5 per cent of cases that were realised before filing of an execution suit, 49 per cent came from in-court mediation; and in the case of litigation, only 3.5 per cent of cases can be realised before filing an execution suit.

However, to tap into all these benefits, women must have the capability to access mediation. Although mediation ensures quicker resolution of disputes, it may not be the least costly method for dispute resolution in every situation.³⁹ While acclaiming mediation as a means to enhance access to justice for the poor, earlier literature in Bangladesh has not addressed the issue of cost. Therefore, the following discussion compares the costs that women have to bear for in-court mediation, and litigation.

Access to Justice through Cost Efficiency of Court-connected Mediation over Litigation: An Empirical Evaluation

As discussed earlier, most women in Bangladesh have lower education, lower income and less opportunity to work outside home. Therefore, the high-cost of any dispute resolution system or mechanism may restrain their ability to access a means of resolution. Moreover, to access justice, even at the lowest tier of a formal court, a disputant woman who lives in a village has to come to the district level which may be three administrative units away from her hamlet. Since many women in Bangladesh are housewives, they do not earn money and they live in distant villages. In addition to the added burden of long distance travel costs, women may have to bear the costs of meals and accommodation plus court fees, lawyer's fees, and the costs of collecting evidence.⁴⁰ Transportation and accommodation costs could be significant for women; those for each day of court appearance under in-court mediation and litigation would be the same because both of

³⁸ After *Nelly Zaman's* case, couples cannot file cases for the restitution of their conjugal rights. However, it is possible that a separated wife may initially file a case for maintenance or custody of children, but subsequently agree to reconcile with her husband.

³⁹ Hilary Astor and Chinkin Christine, *Dispute Resolution in Australia* (Butterworths, 2nd ed, 2002) 53.

⁴⁰ The Asia Foundation, *Access to Justice: Best Practices under the Democracy Partnership* (2002) ch 1.

them are conducted at the same venue. Another major cost could be the fees for lawyers paid by the parties under in-court mediation and litigation. Therefore, the aggregate amount is likely to be too expensive for many poor women, especially when time-to-resolution and execution is long. On the contrary, a shorter time-to-resolution for in-court mediation compared with litigation suggests that clients might have to travel to courts on fewer days and so bear a lower total cost for transportation and accommodation.

Because of the importance of cost for women, this part of the paper compares the cost involved in in-court mediation and litigation. While comparing various methods of resolution based on their cost, one important consideration is the question of who bears such cost. We might ask whether it would be sufficient to look only at the cost of the concerned parties or whether the costs borne by the government and society should also be included.⁴¹ However, the concern of this paper is not to determine the exact cost of mediation or litigation. Rather it is to look at accessibility of various methods for women. Therefore, this part compares only the major costs involved for the parties and how these costs may vary among clients who seek justice through in-court mediation and litigation.

A questionnaire survey was conducted among family court lawyers in Bangladesh to determine the total amount usually charged by lawyers for cases resolved through court-connected mediation and litigation. Thirty lawyers were chosen randomly from the registers maintained in the various district Bar Council offices in three districts and were surveyed. Questionnaires were designed to measure comparative costs of in-court mediation and litigation.

Cost of Court-connected Mediation and Litigation

It has already been mentioned that lawyers' costs constitute a major part of the total cost incurred by family court clients. Therefore, lawyers were asked to indicate what they usually charged their clients to resolve their cases through mediation and litigation. Responses from lawyers in all three districts (Table 5) clearly indicated that lawyers charged a higher amount to resolve cases through litigation. From the perspective of the lawyers involved, more than 50 per cent of them charged over Tk.10,000 (USD129.87) to resolve family cases through litigation, while none of the lawyers charged more than Tk.10,000 (USD129.87) to resolve a case through mediation. Almost 25 per cent of the lawyers charged less than Tk. 2000 (USD24.46) to resolve cases through mediation, while none of the litigation cases were resolved with a lawyer's fee of less than Tk.2000 (USD25.97). In fact, 95 per cent of the total cases resolved through mediation required a lawyer's fee of Tk.5000 (USD64.94) or less, while only 25 per cent of total litigation cases were resolved with fees lower than this for lawyers.

⁴¹ See Astor and Christine, above n 39, 52.

Table 5 Lawyers' charges in court-connected mediation and litigation cases

Tk.	Dhaka		Narayanganj		Mymensingh		Three districts together	
	Mediation	Trial	Mediation	Trial	Mediation	Trial	Mediation	Trial
<2000	2	nil	3	nil	3	nil	8	nil
2000 to <5000	10	2	8	3	7	3	25	8
5000 to <10,000	2	3	nil	2	nil	4	2	9
>10,000	nil	9	nil	6	nil	3	nil	18

Source: data collected through questionnaire survey of lawyers in Bangladesh.

Therefore, parties who resolved their cases through court-connected mediation received some cost advantage over those parties who resolved their cases through litigation. Although family court mediation involved a much lower cost for clients when compared with litigation, an even greater cost reduction would be possible if lawyers were enthusiastic to solve a higher number of cases through mediation.

There are indications in literature that lawyers may not expedite resolution of cases by mediation.⁴² The former Chief Justice K. M. Hasan also asserts that *'the lawyers and bar council should change their mindset and come forward to strengthen the mediation system in the judiciary'*.⁴³ There seems to be a possibility that lawyers may not consider mediation as financially beneficial for them. The tendency of lawyers to make unnecessary time petitions was highlighted by many family court judges⁴⁴ Therefore, most of the judge-mediators prefer direct interaction between them and their clients in settling disputes and to minimise the involvement of lawyers.

According to all of the lawyers surveyed under this study, the number of cases resolved through litigation was higher than the cases resolved through mediation. It was evident from the questionnaire survey that lawyers rarely

⁴² See Chowdhury, *Women's Access to Justice in Bangladesh*, above n 23, 8-9; See further Kamal, above n 31.

⁴³ See Hasan, above n 31, 15.

⁴⁴ Jamila A Chowdhury, *Women's Access to Fair Justice in Bangladesh: Is Family Mediation a Virtue or a Vice?* (PhD thesis, University of Sydney, 2011) 212.

initiate resolution of disputes through negotiation before filing a suit, nor do they try to resolve them outside court prior to court proceedings. Minimal involvement of lawyers and effective intervention by judges may contribute to reducing delay in the disposal of cases through mediation. However, an in-depth analysis of the causes of delay is beyond the scope of this paper and should be addressed by further research.

Conclusion

The earlier discussion has illustrated that, women in Bangladesh get better access to justice through court-connected mediation than litigation. However, while indicating a concern for access to justice through cost, time-to-resolution and time-to-realisation of post-separation of entitlements, one should not forget about the 'quality' of justice.⁴⁵ Getting quicker access to justice through mediation may not ensure that women are getting 'fair' justice. Women in Bangladesh may get speedy access – but because of gendered power disparity and family violence, there remains a concern that access may not ensure fair outcomes to women. The presence of gender power disparity and family violence increases the possibility that women in Bangladesh might not be able to participate effectively in mediation and therefore fail to attain fair outcomes. Further research on the quality of justice attained by women through mediation can confirm this issue.

⁴⁵ See Astor and Christine, above n 39.