

# **Pro-women Metamorphosis in Legal Discourses on Matrimonial Rights: Is Family Mediation a Speedway to Reap Its Fruit?**

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## **Introduction**

Matrimonial rights for women in Bangladesh are in transition where the predominant traditional mind-set regarding limited women rights is transforming positively through propagation of pro-women knowledge in the society. One such transformation in knowledge is being attained by enacting pro-women laws.<sup>1</sup> Laws provide normative standards on what is right and wrong in a society. Consequently, society's knowledge and attitude towards women rights and gender equality in Bangladesh are also progressing through these gender-equalising laws.<sup>2</sup> However, attitudinal changes in the society are progressing in a much slower pace than the pace of legal changes that are being made to protect women rights. Therefore, gender sensitivity on social practices, whilst improving gradually, still embodies considerable inequalities, including gendered power disparity and family violence against women in Bangladesh. In a related vein, sometimes it is argued that changes in law cannot bring about effective changes in society, and that legal changes cannot progress without social change. Further, there is a view that where legal principles and widely accepted social norms collide, changes in law might not work smoothly.<sup>3</sup>

Following a contrary view, however, this paper exhibits that when social norms are changing gradually, still embracing gender disparity at its core, pro-women legal discourses can be deployed to extend better matrimonial rights to women in a much accelerated manner through mediation, in comparison with trial. As explained in the paper, providentially, a change in social attitude is not a pre-condition for the application of pro-women laws to empower women in mediation. Therefore, pro-women laws can be used to empower women and attain their rights through mediation, even when women remain vulnerable in the broader spectrum of the society outside the mediation room. For instance, pro-women legislations and

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<sup>1</sup> Dale Bagshaw, 'The Three M's-Mediation, Postmodernism, and the New Millennium' (2001) 18(3), *Mediation Quarterly* 205, 209.

<sup>2</sup> Asian Development Bank. 'Bangladesh: Gender, Poverty and the MGDs', <<http://www.adb.org/Documents/Reports/Country-Gender-Assessments/ban.asp>> accessed 25 September 2014.

<sup>3</sup> Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 1<sup>st</sup>ed, 1990).

case laws can be used by mediators in family mediation to define matrimonial rights of women. Parties attending mediation accept those legal discourses, no matter what different social discourses are prevailing in the society. As observed by Foucault<sup>4</sup>, the construction of truth or establishment of rights or wrongs is not the:

‘Ensemble of truths which are to be discovered and accepted’ rather ‘the ensemble of rules according to which the true and the false are separated’ ... It’s not a matter of emancipating truth from every system of power... [e.g. power generated through social discourses] but of detaching the power of truth from the forms of hegemony, social, economic, and cultural, within which it operates at the present time.

Therefore, “*the problem* [of empowering women in mediation] is *not changing people’s consciousness– or what’s in their heads*”<sup>5</sup> – rather it relates to emancipating legal discourses about women rights by detaching the application of such discourses from social and cultural hegemony. Thus, it is rightly argued that mediation itself is an ‘*empowering process*’<sup>6</sup>. Following the same line, this paper exhibits how a mediator can minimise the impact of gendered power disparity during mediation by challenging the dominant social discourses<sup>7</sup> – a source of men’s power in the society, and upholding gender equalising legal discourses to protect women’s rights. Therefore, gender-equalising legal discourses can empower women during mediation<sup>8</sup>, even when considerable gendered power disparity exists in the society.

In a related vein, Bagshaw<sup>9</sup> observed:

The professional disciplines, such as social work and law, are imbued with authority and are seen as having the monopoly of a neutral, objective, and rational account of the truth ... these truths can serve to specify or prescribe normal or correct ways of being (often in the guise of “neutrality”) and are therefore insidious and effective in moulding people’s lives.

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<sup>4</sup> Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (The Harvester Press, 1980) 132-33.

<sup>5</sup> Ibid. 133.

<sup>6</sup> David Neumann, 1992, 'How mediation can effectively address the male-female power imbalance in divorce', *Mediation Quarterly*, vol. 9, no. 3, pp. 227-39.

<sup>7</sup> Sara Cobb and Janet Rifkin 1991, 'Practice and paradox: Deconstructing neutrality in mediation', *Law & Social Inquiry*, vol. 16, no. 1, pp. 35-62; see also Alison Taylor 1997, 'Concepts of neutrality in family mediation: Contexts, ethics, influence, and transformative process', *Mediation Quarterly*, vol. 14, no. 3, pp. 215-36.

<sup>8</sup> Bernard Mayer, *The Dynamics of Conflict Resolution* (Jossey-Bass, 2000) 55. See also, Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia*, 2<sup>nd</sup> edn, Butterworths, (Sydney, 2002).

<sup>9</sup> See Bagshaw, above n 1, 209.

Before discussing the '*empowering process of mediation*' through legal discourses at the later segment of this paper, this paper firstly explains the prevailing gender disparity in our society, and then illustrates how legal discourses are evolving through legislations and case laws to augment the legal basis of Muslim women's matrimonial rights in Bangladesh. Finally, the paper demonstrates that family mediation conducted under the shadow of law enable women to get benefit of gender-equalising legal discourses in a quicker, least costly and more accessible manner in comparison with trial.

### **Social Discourses Creating Gendered Power Disparity in Bangladesh – A Reflection of Society's Notion towards Limited Rights for Women**

Because of social practices, many women in Bangladesh have to remain at home to perform household work. Even when they do get involved in economic activities, they are employed as non-paid family workers or are employed in part-time activities<sup>10</sup>. Although a recent labour force survey by the Bangladesh Bureau of Statistics<sup>11</sup> indicates women are increasingly being engaged in the labour force, women still have to work mostly as unpaid family workers (60.1 per cent) compared to their male counterparts (9.7 per cent). The incidence of such unpaid female labour is remarkably higher in rural areas (71.8 per cent) compared to their urban counterparts (22.3 per cent).

Even when women are engaged in paid employment outside the home, most are employed in low-paid part-time work. For example, wage data shows that in 2005, urban women employed in the ready-made garments sector earned 75.9 per cent of the earnings of their male counterparts. While as many as 25 per cent of male labourers earned more than Tk.5000 (USD 65) only 3.7 per cent of female workers reached that level. Twenty-six per cent of female workers earned less than Tk.3000 (USD 39), while none of the male workers earned such a low income in 2005. Women labourers receive a lower income in comparison with their male counterparts, even for performing the same work. For example, for the same hours worked, female machine operators and female helpers in the ready-made garments sector earned 71.3 per cent and 52.7 per cent respectively of the earnings of their male counterparts.

<sup>10</sup> Jahan Haq, *Empowerment of Women in Bangladesh: Nairobi to Beijing* (Women for Women, 1995) 62; See also, Shamim Hamid, *Why Women Count: Essays on Women in Development in Bangladesh* (The University Press Limited, 1996) 32-36.

<sup>11</sup> Bangladesh Bureau of Statistics (BBS), *Report of the Household Income & Expenditure Survey 2005* (BBS, 2007) 7-9.

**Table 1 Who makes household decisions in Bangladesh?**

<b>Nature of decision</b>	<b>Who makes the decision</b>	<b>Rural%</b>	<b>Urban%</b>	<b>Total%</b>
How much money the household spends on food	Wife only	5.2	6.4	5.4
	Husband only	47.8	44.3	47.1
	Wife and other household member(s) jointly	32.0	34.8	32.6
	Other household member(s)	14.9	14.6	14.9
What food is bought for the household	Wife only	6.2	9.5	6.8
	Husband only	44.8	41.2	44.1
	Wife with other household member(s) jointly	33.8	35.2	34.0
	Other household member(s)	15.3	14.1	15.0
What food is cooked for the household	Wife only	49.5	56.7	50.9
	Husband only	10.6	6.1	9.7
	Wife with other household member(s)	27.5	25.3	27.1
	Other household member(s)	12.3	12.0	12.3
Whether mother attends health facility for her own health needs	Wife only	5.3	7.1	5.6
	Husband only	38.8	40.3	39.1
	Wife with other household member(s) jointly	40.8	40.5	40.7
	Other household member(s)	15.2	12.0	14.6
Whether the child of mother goes to health facility	Wife only	4.7	7.3	5.2
	Husband only	38.8	38.8	38.8
	Wife with other household member(s) jointly	41.5	42.1	41.6
	Other household member(s)	15.0	11.8	14.4

Source: *Key findings of Child and Mother Nutrition Survey of Bangladesh 2005*, BBS, 2005, p 3.

In a related vein, another study by Akhter<sup>12</sup> confirmed that 88 per cent of married women in *Dhaka* city do not receive any dower during their marital life, despite dower constitutes a major matrimonial right for every married Muslim woman in Bangladesh. Therefore, a better application of pro-women laws is required to promote women rights in the society. After a discussion of the scope, objectives, and methodology of the paper, in the following section, this paper explains how pro-women laws are evolving, and are being used to ensure better matrimonial rights for women attending family mediation.

### **Scope, Objectives, and Methodology**

While discussing evolving legislations and case laws to protect women rights, this paper limits its discussion to evolving personal laws and related case laws that guide Muslim women's matrimonial rights in Bangladesh. Further, though these changes in law could be a reflection of the broader change in social outlook, the objective of this paper is not extended to explore social changes through law. Rather this paper argues that statutory enactments and case laws protecting women rights can ensure fair matrimonial rights for women, if married women have a quick and less costly access to such pro-women laws through family mediation.

To verify this proposition, the following two sections highlight some statutory enactments and case laws that strengthened women matrimonial rights in different marital issues including dower, maintenance, divorce, custody, and restitution of conjugal rights. Then, it reveals that high-cost and long-time to resolve disputes through litigation may deprive women from accessing the benefits of pro-women laws. In conclusion, this paper demonstrates how in-court and out-of-court family mediators are using these pro-women legal discourses to empower women in mediation, and ensuring their matrimonial rights through a quick and low-cost resolution of family disputes in comparison with trial.

To demonstrate the low-cost, quick resolution of disputes through mediation, and to understand the use of legal discourses in empowering women during mediation, data on time to resolution was collected from family court registries in *Dhaka*, *Narayanganj*, and *Mymensingh* districts; judge-mediators from respective courts and NGO-mediators from Bangladesh Legal Aid and Services Trust (BLAST) were also interviewed to gather comparative benefits between mediation and litigation. Finally, nine in-court mediation sessions were observed in family courts and nine other out-of-court mediation sessions were observed in BLAST offices in *Dhaka*, *Narayanganj* and *Mymensingh* districts to understand how in-court and out-of-court family mediators use legal discourses to empower women in mediation. Before exploring such empirical findings, the next two sections elaborate the system of Muslim personal laws in Bangladesh, and how such laws are evolving to provide better matrimonial rights to women.

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<sup>12</sup> Cited in *Ibid.* 41.

### **Laws Construing Muslim Women's Matrimonial Rights in Bangladesh: A Gender Equalising Legal Drift towards Equity**

The legal system of Bangladesh is mainly based on Common law developed during the colonial regime of British-India. Apart from Common law which deals with different civil and criminal matters, personal laws of respective religions are used in regulating personal matters. In Bangladesh:

The legal system may be said to be pluralistic in the sense that there exists an uniform and non-religious system of law, applicable to all Bangladeshis, e.g., criminal laws, land laws etc., on the other hand personal and private family matters such as marriage, its dissolution, custody of children and so forth fall within the ambit of the personal law of each religious community<sup>13</sup>

Thus, the legal status of Muslim women in Bangladesh is based on Muslim personal laws and other secular laws including the Constitution, Penal Code, the Civil Procedure Code, and the Criminal Procedure Code. Muslim personal laws regulate only the ambit of matrimonial rights for Muslim women in Bangladesh. According to *Muslim Personal Law (Shariat) Application Act 1937* (Act No. XXVI of 1937), in dealing with family matters parties who are Muslims shall be treated with Muslim Personal Laws (s.2). Hence, family matters of Muslim women including marriage, divorce, dower, maintenance, guardianship, and inheritance are dealt with Muslim personal laws.

Muslim personal law is synonymous with the Arabic word *munakahat*, which means rules and regulations of family life, or rules that regulate the day-to-day family life of a Muslim. *Munakahat* is a part of Islamic principles or *Shariat*<sup>14</sup> that evolves from four different sources: (a) *Al-Quran*—the first source of *Shariat* that was revealed as will of God (*Allah*) transmitted through angel Gabriel and expressed to the Prophet *Mohammed* (Peace Be upon Him)(PBUH) during the particular moments of inspiration (*Wahi*); (b) the *Sunnah*— the second source that is also referred to as *Hadith* that was developed as a compilation of sayings, deeds and approval of Prophet *Mohammed*(PUBH); (c) *Ijma*—the third source that is developed through consensus of interpretation by Islamic scholars on a juridical rule in any particular age, where the literal meaning of the direction given through *Al-Quran* and *Sunnah* is ambiguous<sup>15</sup>; and (d) *Qias*—the fourth source is an application or extension of *Shariat* through

<sup>13</sup> Shahnaz Huda, 'Personal Laws in Bangladesh: The Need for Substantive Reforms'(2004) 15(1)*Dhaka University Studies Part-F* 103.

<sup>14</sup> The root Arabic word of *Sharia* is the verb "*shara'a*". The literal meaning of "*shara'a*" is to open up a street like to open a door upon a street. In legal term, "*shara'a*" means to make or establish laws. *Shariat* is divided into 4 categories (a) *Ibadat* to deal with rituals (b) *Muamalat* to deal with commercial matters (c) *Jinayat* to deal with offences, crimes and punishments (d) *Munakahat* to deal with matters relating to marriage and family life of Muslim.

<sup>15</sup> Since *ijma* is a consensus of Islamic jurists, once a question is determined by *ijma*, it cannot be re-opened by an individual jurist. However, one *ijma* may be reversed by a subsequent *ijma*; See more, Fyzee, A. A. A. 1974. *Outlines of Muhammadan Law*. 4<sup>th</sup>edn, Oxford: Oxford University Press.

analogical deductions established by a binding authority to a particular case<sup>16</sup>, where the other three sources do not have any direct or indirect indication regarding the matter concerned.

Since Muslim personal laws, based on above mentioned sources, were subject to different interpretations, the *Muslim Family Laws Ordinance 1961* (MFLO) was promulgated in Pakistan regime to unify the Code of Islamic *Shariat* on various matrimonial rights including succession, polygamy, dissolution of marriage, maintenance, and dower. The MFLO — “the only major family law reform in Pakistan” was made following the report of the Marriage and Family Laws Commission (MFLC).<sup>17</sup> “The primary object of the Commission was to revive, reaffirm, and establish liberal interpretations of different matrimonial rights granted to women by Islam”.<sup>18</sup> To express the liberal approach taken by the Commission, while recommending reforms, the MFLC report asserts<sup>19</sup>:

What is not categorically and unconditionally prohibited by a clear and unambiguous injunction [in Quran] is permissible, if the welfare of the individual or of society in general demands it.

Thus, the power of courts to interpret Muslim personal laws in dealing with Muslim family matters can be rationalized if it is done for the welfare of the society. Hence, with the passage of time, different case laws and statutory enactments were developed to enhance women rights in Bangladesh. However, as the scope of this paper is limited to the discussion of matrimonial rights for Muslim women in Bangladesh, the following section discusses only about the evolution of Muslim women’s matrimonial rights through evolution of different statutory laws and case laws relevant for strengthening such rights.

### **Evolution of Muslim Women’s Matrimonial Rights through Statutory Laws and Case Laws**

It is already mentioned that matrimonial legal rights of Muslim women are evolving through statutory laws and case laws. Therefore, discussion in this section primarily concentrates on Muslim women’s matrimonial rights as described in the *Muslim Family Laws Ordinance 1961* (Act No. VIII of 1961). A brief discussion on the *Dissolution of Muslim Marriage Act 1939* (Act No. VIII of 1938) has also been included to discuss Muslim women’s right to divorce even when such right is not delegated through their marriage contracts.

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<sup>16</sup> With the expansion of Islam, even after centuries of Prophet *Mohammad* (PUBH), Islamic jurists were encountered by new cases which were not provided in the Quran, the *Sunnah* or any *Ijma* made earlier. Therefore, jurists had to make analogy on those cases.

<sup>17</sup> See Monsoor, above n 11, 107-8.

<sup>18</sup> Cited in *Ibid.* 95.

<sup>19</sup> *Ibid.*

### **Muslim Family Laws Ordinance 1961 (Ordinance No. VIII of 1961)**

As mentioned earlier, one of the most robust and pioneering laws protecting the rights of Muslim women in Bangladesh is MFLO, 1961 that was promulgated during the Pakistan era and later adopted after the independence of Bangladesh.<sup>20</sup> This sub-section of the paper describes different matrimonial rights for Muslim women defined under MFLO, 1961 and how such rights are evolving through case laws. The specific matrimonial rights that were described in the MFLO relate to succession (s. 4), polygamy (s. 6), dissolution of marriage by husbands (s. 7), maintenance (s. 9), and dower (s. 10).

**Right to succession:** Prior to the advent of Islam, women's right to inheritance was not recognised; they could not inherit any property from the death of their male relatives: father, husband and brother. Muslim law, for the first time clearly states that women have the right to inherit for themselves. By declaring the right to inheritance, Islam changed the status of women in an unprecedented fashion. The *Quran* declares, "Men shall have a share in what parents and kinsfolk leave behind, and women shall have a share in what parents and kinsfolk leave behind." (*Al-Quran* 4:7). Particularly, Islam ensured an inheritance right to wives over 1/8<sup>th</sup> of the total property<sup>21</sup> value left by their deceased husbands (*Al-Quran* 4:12). The remaining 7/8<sup>th</sup> is divided among other heirs according to Islamic principles of inheritance.<sup>22</sup> However, before the enactment of the MFLO according to the *Hanafi* school of Islamic Jurisprudence followed in Bangladesh<sup>23</sup> minor children did not get any share of their deceased father's estate, if the father died before the grandfather.<sup>24</sup> Though Islam made such provisions considering the grandfather as the legitimate guardian after the father, under the socio-economic conditions of the Indian sub-continent, this caused the deceased person's wife and children to become vulnerable to the vagaries of their grandparents, and lacked proper attention. Under such social reality, s. 4 of the MFLO provided rights for the children to become successors of their deceased father's property, if in any case, the holder of a property passed away before succession opens to his children. Therefore, provision of succession in the

<sup>20</sup> See Monsoor, above n 11, 107.

<sup>21</sup> A widow gets 1/4<sup>th</sup> instead of 1/8<sup>th</sup> of the total property left by her deceased husband, if they do not have any children (*Al Quran* 4:11).

<sup>22</sup> Alimuzzaman Choudhury, *Mahomedan Law* (Interline Publisher, 1983) 57- 8.

<sup>23</sup> The various schools of Islamic law (*mazhab*) which prevail in the Muslim world are (a) the *Hanafi* school (b) the *Maliki* school (c) the *Shafii* school (d) the *Hanbali* school (e) the *Imamiya* school (f) the *Zaidiyah* school and (g) the *Ismailiya* school. Among these seven schools, the school followed in Bangladesh is *Hanafi* school of Islamic law. The main features of this school are: (i) Less reliance on traditions unless their authority is beyond any doubt; (ii) Greater reliance on *Qias*; (iii) A little extension of the scope of *Ijma*; and (iv) evolving the doctrine of *Istihsan* i.e. applying a rule of law as the special circumstances required. The same school of thought is followed in Turkey, Egypt, Afghanistan, Pakistan, India, China, Bangladesh etc. and adhered to by more than one third of the Muslim world.

<sup>24</sup> See Choudhury, above n 23.



MFLO reduces the misery of those children who may lose not only their father but also their rights of inheritance, as grandparents and uncles became successors of their deceased father (MFLO s 4). This also helps widows to maintain their family and bring up their children by getting income from or selling the inherited property of their children for cash.

**Development through case laws:** Subsequently, court decisions also reaffirmed this right. For example, in *Mst. Fatima Begum v Habib Ahmed*<sup>25</sup>, the court decided that since it does not contradict with any specific *Quranic* verse mentioned in this regard, it would be permissible to depart from the usual Muslim custom about succession, as adherence to fundamental provisions may go against the welfare of the children concerned.

**Right against polygamy:** Although Islam permitted polygamy, it also imposed stringent conditions for a polygamous husband to maintain equity among his wives. Regarding polygamy, *Al-Quran* asserts:

Marry women of your choice, two or three or four; but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess; that will be more suitable, to prevent you from doing injustice... (Al Quran 4:3).

Emphasising the need to maintain "equity" among wives the Prophet (PBUH) states:

If a man has two wives and has not treated them equally and justly, then he will emerge on the Day of Judgment in such a way that half his body will have fallen off.

Since polygamy is permitted in Islam under certain strict conditions, the MFLO did not ban it, rather made it more difficult to attain. It made provisions for imprisonment, a fine or both, when a polygamous husband fails to follow the regulations in the said Ordinance.

According to s. 6 of the MFLO, any person who wishes to marry again, despite the presence of his current wife/wives, has to take written permission from his existing wife/wives and submit a copy of such permission to the Arbitration Council<sup>26</sup> (AC), with the objective of getting permission for remarriage from the AC. Further, a marriage without getting such permission cannot be registered under the *Muslim Marriage and Divorce (Registration) Act 1974* (Act no. LII of 1974) [s. 6(1)]. The MFLO also imposed an obligation on a polygamous husband who married without the permission from an AC to pay immediately any amount of unpaid dower to his existing wife/wives. Any arrears of such payments will be recoverable as arrears in land revenue [MFLO s. 6(5)]. Therefore, the MFLO has provided a mechanism by which the number of polygamous marriages in the society may reduce.

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<sup>25</sup> (1968) 20 DLR (WP) 254.

<sup>26</sup> A local body formed under MFLO to resolve family disputes in a community.

**Development through case laws:** In *Fatima Banu v. Habib Ahmed*<sup>27</sup> the High Court Division (HCD) of the Supreme Court suggested a ban on polygamy and held that:

Muslim Jurists and Scholars are almost unanimous in taking the view that in the context of modern society, it is virtually impossible to be able to deal with the wives justly and as such the *Quranic* sanction for taking a second wife under specified conditions virtually amounts to a prohibition in taking a second wife during the subsistence of an existing marriage. ... So we find that section 6 of the MFLO 1961 is against the principle of Islamic Law. We recommend that this section be deleted and be substituted with a section prohibiting polygamy.

Though Appellate Division of the Supreme Court overruled this judgement on the ground that the direction of HCD contradicts *Quranic* principle, later in the judgement of *Elias v Jesmin Sultana*<sup>28</sup> the Supreme Court strongly discouraged polygamy and ordered that a recommendation be sent to the Ministry of Law Justice and Parliamentary Affairs of Bangladesh for scrutinizing a possible ban on polygamy. As similar laws already exist in other Muslim majority countries like Turkey, Morocco, and Uzbekistan, statutory enactment of such a law in Bangladesh may become a reality.

In addition to recognition of punishment to a polygamous husband who contracts a second or subsequent marriage without the permission of Arbitration Council under section 6(5) of the MFLO, case laws also strengthen the punishment of a polygamous husband by further extending this notion in *Tahera Begum v Farukh Miah*<sup>29</sup>; *Ayesha Sultana v Shajahan Ali*<sup>30</sup>. A recent development through case law on this issue is also pertinent to mention here. Now-a-days, a polygamous husband who conceals his first marriage and contracts a subsequent marriage may also be prosecuted under section 495 of the *Penal Code, 1860* (Act No. XLV of 1860). In *Md Ariful Haque v Mst. Afroza Khatun*<sup>31</sup>, it was held that the accused will be convicted for concealment of an existing marriage from the person with whom the subsequent marriage is contracted.

**Right to dower (Mehr):** A key feature of all Muslim marriage contracts that differs from a standard Western civil marriage is a provision regarding dower (*Mehr*), a sum of money or any other valuables that a husband gives, or undertakes to give, to the bride upon marriage. In Islam, dower is a dignified receipt by wives as a token of love and respect rather than their price.<sup>32</sup> Although a Muslim husband is obliged to bear every expense

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<sup>27</sup> (1986) 20 DLR (WP) 254.

<sup>28</sup> (1999) 51 DLR (AD).

<sup>29</sup> (1983) 35 DLR (AD) 170.

<sup>30</sup> (1986) 38 DLR (HCD) 140.

<sup>31</sup> (2013) 2 ALR 499.

<sup>32</sup> See Choudhury, above n 25.

necessary to keep his wife, dower is a first provision made by a Muslim man in this regard.<sup>33</sup> The Holy *Quran* says,

“You shall give the women their due dowers, equitably”(Al Quran 4:25). It further dictates, “O Prophet (Muhammed)! Verily we have made lawful to you your wives, to whom you have paid their mehr (dower)...”(Al Quran 33: 50).

The religious right of Muslim married women to get a dower has been established as a legal right by the promulgation of MFLO and subsequently strengthened by other case laws. As the amount and mode of payment of dower is kept flexible in Islam, and are determined by the couples themselves or their family during marriage, the MFLO has not made any specification in this regard. By doing so, the MFLO has left the issue to be determined by the parties themselves in their marriage contracts. However, the MFLO has enhanced women’s rights to get dower by specifying that “*when there is no mention in the marriage contract about which part of a dower is prompt dower (to be paid on demand) and which part is deferred dower (to be paid later), a wife can demand the entire amount due as prompt dower*”(MFLO s. 10). Further, to protect women’s rights against their polygamous husbands who may have a second marriage and remain delinquent to pay proper maintenance to their first wife/wives, the MFLO made a provision that a wife can claim instant payment of her entire amount of dower, no matter whether the remaining amount was prompt or deferred (MFLO s. 6(5)(a).

**Development through case laws:** In addition to women right on dower prescribed under MFLO, different court decisions made subsequently have also enhanced such rights for women. In *Atiqul Huque Chowdhury v Shahana Rahim*<sup>34</sup>, it was held that:

If there is any breach by way of non-payment of dower fixed in a *kabinnama* [Marriage contract] registered by a *Nikah* [marriage] Registrar, it will amount to a breach of registered contract.

Further, case laws also strengthened women’s right to get unpaid dower. For example, in *Sugra Bibi v Masuma Bibi*<sup>35</sup>, it was held that unless otherwise provided in any legislation, the court shall award the entire amount claimed under a marriage contract as dower.

Although dower is considered as an inalienable right for Muslim women, women in Bangladesh may be deprived of receiving their proper share of dower because of two prevailing customs of the society. Firstly, waiver of dower at the wedding night is a customary practice that might deprive women of their right to dower. On the wedding night, many husbands urge

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<sup>33</sup> Sheikh A Husain, *Marriage Customs Among Muslims in India: A Sociological Study of Shia Marriage Customs*(Sterling Publishers, 1976) 119.

<sup>34</sup> (1995) 47 DLR 301 (HCD).

<sup>35</sup> (1877) 2 ILR 573 (All).

wives to waive the amount of dower.<sup>36</sup> Under Islamic law, a wife can forgo her dower but it should be a *free and voluntary* act. The Holy *Quran* directs:

And give the women (on marriage) their dower as a free gift, but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer (Al-Quran 4:4).

In the social context of Bangladesh, where society teaches women to be submissive and less demanding of their husbands, it is very unlikely that newly married women could deny such a waiver proposal made on the first night of their marriage. As observed by Monsoor:<sup>37</sup>

It is significant to point out that this imposed tradition to waive dower on the wedding night is another customary practice forced on women to deprive them of their right of dower.

However, this customary practice is not accepted in case laws. For example, in the case of *Shah Banu v Iftekharmd*<sup>38</sup>, it was held that if a wife remits her dower just to retain the affection of her husband, the waiver is not valid.

**Right to maintenance (Nafaqa):** Under Islamic law, a lawfully married wife has a right to get proper maintenance (*nafaqa*) from her husband during her conjugal life. The husband's obligation to maintain his wife continues until he divorces her.<sup>39</sup> The Holy *Quran* directs: "*The duty of feeding and clothing nursing mothers according to decent custom is upon the father of the child*" (Al Quran 2: 233). Moreover, Islamic law grants a Muslim wife the right to maintenance from her husband not only during the subsistence of their marriage but also after the dissolution of marriage during her *iddat* (waiting period)<sup>40</sup>. The Holy *Quran* asserts:

Let the women live (in *'iddah*) in the same style as you live according to your means: annoy them not so as to restrict them. And if they carry life in their wombs, then spend (your substance) on them until they deliver their burden: and if they suckle your (off spring) give them their recompense: and take mutual counsel together according to what is just and reasonable (Al-Quran 65:6).

Therefore, under Islamic law, if a wife is pregnant during divorce, the husband is obliged to pay maintenance until delivery. Unlike dower, generally no specific monetary amount is mentioned in the marriage contract regarding maintenance; rather it is stated in the marriage

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<sup>36</sup> See Husain, above n 36, 202.

<sup>37</sup> Ibid.

<sup>38</sup> (1956) PLD 363 (Kar.).

<sup>39</sup> See Monsoor, above n 11.

<sup>40</sup> *Iddat* means a waiting period of three months before remarriage of a divorced wife to identify the paternity of the child, if any, in the womb of the divorced wife at the time of divorce. The Holy *Quran* states: '*Divorced women shall wait concerning themselves for iddat period (three monthly periods) nor is it lawful for them to hide what Allah hath created in their wombs if they have faith in Allah and the Last Day...*' (Al-Quran 2:228)

contract that a husband will pay reasonable maintenance, and the wife may divorce the husband if reasonable maintenance is not paid to her. Similarly, the MFLO does not have any provision regarding the amount of maintenance that a husband has to make for his wife. It is left to the parties to determine the amount. However, the MFLO has provisions to protect women rights against non-payment of maintenance by their husbands. In case of non-payment of maintenance, a woman is eligible to seek a legal remedy and can also apply to the local government body to issue a certificate specifying the amount that a delinquent husband will have to pay to his wife and children (MFLO s 9(1)). To ensure women's right to maintenance from their delinquent husbands, the MFLO asserts that unpaid maintenance shall be recoverable from husbands as arrears of land revenue (MFLO s 9(3)).

**Development through case laws:** Further to the provisions of the MFLO, development of case laws has also improved women rights to get maintenance. For example, in *Rustom Ali v Jamila Khatun*<sup>41</sup>, the HCD of the Supreme Court did not grant past maintenance passed by the first instance court, on the grounds that the wife was not residing with her husband. However, when *Jamila Khatun* sought an appeal against the decision of the HCD, the AD of the Supreme Court reversed the decision of the HCD and upheld the decision of the first instance court by declaring that the wife will get past maintenance even though she did not stay with her husband.<sup>42</sup>

Subsequently, similar judgments relating to past maintenance were also granted in other family cases placed before the HCD including *Hosne Ara Begum v Md Rezaul Karim*<sup>43</sup> and *Sirajul Islam v Helana Begum and Others*<sup>44</sup>. Now-a-days, a husband cannot use the grounds that his wife refuses to live with him as a defence for not paying maintenance. Therefore, under liberal interpretation of case laws, the right of women to leave an oppressive conjugal life without losing their right to maintenance has been established. Furthermore, a wife can also enjoy the right to maintenance even if she leaves her husband on the grounds that her husband is not paying her prompt dower upon demand.<sup>45</sup>

**Right to dissolution of marriage:** Islam has discouraged the continuation of bitter conjugal relationships marked by cruelty or inhumane behaviour towards wives. As the Holy Quran says, "either retain them [wives] with humanity or dismiss them with kindness"(Al Quran 65:2). Forbidding the inhumane behaviour during divorce, Al-Quran says:

Oh Prophet, when you divorce women, divorce them for their prescribed time, and calculate the number of days prescribed, and be careful of (your duty to) Allah, your Lord. Do not drive them out of their house, nor should

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<sup>41</sup> (1991) 43 DLR 301 (HCD).

<sup>42</sup> *Rustom Ali v Jamila Khatun*(1996) 16 BLD (AD) 61.

<sup>43</sup> (1991) 43 DLR 543 (HCD).

<sup>44</sup> (1996) 48 DLR 48 (HCD).

<sup>45</sup> See Monsoor, above n 11, 207.

they themselves go forth unless they commit an open indecency and these are the limits of *Allah*, and whoever goes beyond the limits of *Allah*, he indeed does injustice to his own soul (Al-Quran 65:1).

According to Muslim law, the contract of marriage in Islam may be dissolved in any one of the following modes<sup>46</sup>:

- through a decision by the husband at his will by pronouncing three times the word '*talaq*' and without the intervention of the court, called *talak-ul-bain*
- through a proposal of the wife which is mutually agreed by the husband and the wife, and without the intervention of the court, called *khula* or *mubarat*
- by the wife at any time without assigning any reason and without the intervention of the court, if right to divorce is delegated to a wife by the husband in their marriage contract, called *talaq-e-tafweed* (clause. 18 of the marriage contract)<sup>47</sup>
- by a judicial decree following a suit filed by a wife to get a divorce.

Generally, Muslim women cannot divorce their husbands without consent from their husband if a power of delegated divorce (*talaq-e-tafweed*) granted by the husband during marriage, or a decision made by the court. However, Muslim men enjoy a unilateral right to divorce. Therefore, to protect women from unscrupulous and unilateral decision made by husbands, MFLO 1961 included a provision of reconciliation between a husband and a wife that is attempted by Arbitration Council (AC) comprising of representatives from both sides and such attempt is made before a divorce decision by a husband can be finalized (s.7(4))

Among different modes of dissolution of marriage for Muslim couples, the form of divorce in which Muslim women are most vulnerable to the vagary of their husbands is *talaq-ul-bain*, which is executed just by the pronouncement of the word '*talaq*' three times by a husband. For example, in an earlier case law, it was held by the court that no particular word is prescribed for affecting a *talaq* and no proof of intention is required.<sup>48</sup> It was not necessary for the *talaq* to be pronounced in the presence of the wife or to be addressed to her.<sup>49</sup> However, the MFLO has strengthened women's right against such sudden pronouncement of *talaq*, by stretching the period of pronouncing *talaq* by husbands. According to s. 7 of the MFLO, when a husband pronounces *talaq* to his wife, he should serve a

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<sup>46</sup> See Husain, above n 36, 119,139.

<sup>47</sup> The problem of such divorce is that women in Bangladesh are still not aware of the need to bargain for this right and to include it in the marriage contract; thus, they fail to enjoy the right after marriage and without the intervention of courts.

<sup>48</sup> *Ma Mi v Kallandar Ammal* (1927) 54 IA 61.

<sup>49</sup> *Ahmad Kasim v Khatoon Bibi* (1932) 59 ILR (Cal) 803.

written notice denoting such *talaq* to the Chairman of the Union Council<sup>50</sup>. After receiving such notice, the Chairman should form an AC and try reconciliation within 30 days of the serving of the notice. The marriage dissolves automatically within 90 days of serving the notice unless there is a reconciliation or revocation of *talaq* during this period.

**Development through case laws:** Following the statutory provisions under MFLO, the pronouncement of court decrees regarding *talaq* is also developing for women. Notice to the AC can act as a safeguard for women without which they may become prey to the vagaries of their unscrupulous husbands. For example, in *Kazi Rashed Akhter Shahid v Most. Rokshana Chowdhury*<sup>51</sup>, it was held that *talaq* will not be effective and the marriage will subsist if proper notice of such *talaq* is not served to the Chairman of the Union Council according to s. 7(1) of the MFLO. As the defendant failed to prove that he had given notice of divorce to his wife, it was held that he has to provide maintenance to his wife. Therefore, the provisions of *talaq* in the MFLO, and further case laws asserting its strict application that enhanced women's right by establishing a watch-dog in the process of divorce by husbands.

#### ***Dissolution of Muslim Marriage Act 1939 (Act No. VIII of 1939)***

As mentioned above, Muslim women do not have any inherent right to divorce like Muslim men. Therefore, following the fourth mode of divorce mentioned in the above section, the *Dissolution of Muslim Marriage Act 1939* (Act No. VIII of 1939) sets out grounds under which a Muslim woman can apply to a court to get a divorce from her husband, even though she does not have any power of delegated divorce in her marriage contract. According to s. 2 of the *Dissolution of Muslim Marriage Act 1939*, these grounds include:

- The whereabouts of the husband has not been known for a period of four years;
- The husband neglected or failed to provide for his wife's maintenance for a period of two years;
- The husband took an additional wife in contravention of the provisions of MFLO;
- The husband has been sentenced to imprisonment for a period of 7 years or more;
- The husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;
- The husband was impotent at the time of marriage and continues to be so;

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<sup>50</sup> Union council is the lowest tier of the local government in Bangladesh. This local body represents a union or cluster of few villages.

<sup>51</sup> (2006) 26 BLD 613 (HCD).

- The husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;
- The husband treats the wife with cruelty, that is to say:
  - habitually assaults her;
  - associates with women of evil repute or leads an infamous life;
  - forces her to live an immoral life;
  - disposes of her property or prevents her exercising her legal rights over it;
  - obstructs her in observing her religious practices;
  - if he has more wives than one, does not treat her equitably in accordance with the provision of *Al Quran*; or
  - makes her life miserable by cruelty of conduct, even if such conduct does not amount to physical ill treatment.

Therefore, the *Dissolution of Muslim Marriage Act 1939* provides Muslim women an option to divorce their husbands through the intervention of court even when divorce rights are not delegated in their marriage contracts.

### **Development of Matrimonial Rights under Other Legislations and Case Laws**

This section elucidates some other development through case laws that are not related with MFLO but have profound impact on the development of matrimonial rights for Muslim women in Bangladesh.

***Right to guardianship and custody of children (Hizanat):*** Under the *Hanafi* school of Islamic Jurisprudence, a mother can retain custody of her daughter until puberty and a male child until the age of 7 years. Over the years, these Islamic principles were practised in different courts to determine the guardianship of minor children. For example, in *Imam bandi v Mutsaddi*<sup>52</sup>, it was held that:

It is perfectly clear that under the Muslim law, the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child.

Despite the fixed age-yardstick about child custody mentioned in Muslim laws, the “*best interest principle*” became operative after the enactment of *Family Courts Ordinance (FCO) 1985*<sup>53</sup> that emphasised more on the provisions of *Guardianship and Wards Act 1890* (Act No. VIII of 1890) in determining custody of children. Section 24 of the FCO granted a right to women in getting lawful custody of their children by accepting the provisions of the *Guardianship and Wards Act 1890* which states that:

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<sup>52</sup> (1918) 45 IA 73.

<sup>53</sup> FCO is a procedural law used to settle family disputes through family courts, irrespective of religion.



In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this Section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor (s. 17).

In *Rafiq v Smt. Bashiran*<sup>54</sup>, it was held that where the provisions of Muslim personal law are in conflict with the provisions of the *Guardianship and Wards Act 1890* the later takes precedence over the former. A similar decision was held in *Ayesha Khanam v Major Sabbir Ahmed*<sup>55</sup>.

Presently the judiciary in Bangladesh focuses on the paramount consideration of welfare of the minor while determining the custody issue. In *Md. Abu Bakar Siddique v S.M.A. Bakar and others*<sup>56</sup>, the AD of the Supreme Court ruled:

It is true that, according to *Hanafi* school, the father is entitled to the *hizanat* or custody of the son over 7 years of age. Indisputably, this rule is the recognition of the *prima facie* claim of the father to the custody of the son who has reached 7 years of age, but this rule which is found neither in the *Quran* nor *Sunnah* would not seem to have any claim to immutability so that it cannot be departed from, even if circumstances justified such departure.

Further, in *Rehanuddin v Azizun Nahar*<sup>57</sup>, the HCD of the Supreme Court agreed with the decision of the court of District Judge and observed:

Although the appellant was the natural guardian under the Muslim law, the mother in facts and circumstances of the case was entitled to be appointed as the guardian.

Therefore, although according to the Muslim *Hanafi* law, a boy should remain in the custody of his mother until his seventh year and a girl until her puberty, family court judges, in case of determining custody, place prime emphasis on the welfare of the child – not their age.<sup>58</sup> Therefore, at present, the family courts determine guardianship and custody based on the *Guardianship and Wards Act 1890* which emphasises on the welfare of children.<sup>59</sup>

**Right against involuntary restitution:** Though the term 'restitution of conjugal rights' is used under s. 5 of the FCO as one of the jurisdictions of family courts, FCO does not provide any definition of the term. Until the recent development of case laws on restitution of conjugal rights, the courts interpreted it strictly. The earlier approach of courts in undivided Pakistan permitted involuntary restitution of conjugal rights sought by the

<sup>54</sup> (1963) AIR 239 (Raj.).

<sup>55</sup> (1994) 46 DLR 399 (HCD).

<sup>56</sup> (1986) 38 DLR 106 (AD).

<sup>57</sup> (1981) 33 DLR 139 (HCD).

<sup>58</sup> *Md. Abu Baker Siddique v SMA Baker and others*(1986) 38 DLR (AD) 114; see also, *Bhakti Bhusan Shahav Moulana Ruhul Amin* (1986) 38 DLR (HCD) 396.

<sup>59</sup> Begum A Siddiqua, *The Family Courts of Bangladesh: An Appraisal of Rajshahi Sadar Family Court and the Gender Issues*.(Bangladesh Freedom Foundation, 2005) 21.

husbands to get their wives back, despite their wives' unwillingness to go back to live together.<sup>60</sup> This approach of judiciary, however, has changed after the independence of Bangladesh.

The shift in the attitude of the judiciary after independence in 1971 can be understood if the cases reported after the emergence of Bangladesh are considered. After the independence of Bangladesh, in the case of restitution of conjugal rights, judges have advanced "social welfare" arguments towards women. The judicial activism<sup>61</sup> to adapt social changes protecting women rights is reflected in the leading case, *Nelly Zaman v Giasuddin Khan*<sup>62</sup> where the court held that:

It may be specially mentioned that by lapse of time and social development the very concept of husband's unilateral plea for forcible restitution of conjugal rights as against a wife unwilling to live with her husband has become outmoded and does not fit in with the accepted state and public principle and policy of equality of all men and women being citizens equal before law entitled to equal protection of law and to be treated only in accordance with law as guaranteed in Article 27 and 31 of the Constitution of Bangladesh.

In a subsequent case, *Hosne Ara Begum v Alhaj Md. Rezaul Karim*<sup>63</sup>, it was upheld that cruelty of conduct of a husband is a valid ground for his wife to refuse the restitution of conjugal rights claimed by the husband. Though in Bangladesh, a majority of women perform their household chores voluntarily by themselves, by giving a liberal interpretation of the term "cruelty", the HCD of the Supreme Court asserts that in a well-off family, even compelling a wife to do domestic work can be treated as cruelty of conduct on the grounds of which a wife may refuse restitution.

Although family courts in Bangladesh had the jurisdiction to try cases for restitution of conjugal rights, family courts do not currently exercise such provisions in litigation. The reason is that if the wife had been ordered forcefully by the court to go with her husband "without her consent", any court order making such compulsion would violate the fundamental rights incorporated in Articles 27<sup>64</sup> and 31<sup>65</sup> of the Constitution of Bangladesh.<sup>66</sup>

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<sup>60</sup> See Choudhury, above n 25, 287.

<sup>61</sup> Judicial activism refers to judicial creativity through which judges provide their views to expand interpretations departing from established precedents or in opposition to supposed legislative intent.

<sup>62</sup> (1982) 34 DLR 221.

<sup>63</sup> (1991) 43 DLR 543 (HCD).

<sup>64</sup> "All citizens are equal before law and are entitled to equal protection of law". (Article 27, the Constitution of the People's Republic of Bangladesh.

<sup>65</sup> According to Article 31 of the Constitution, "To enjoy the protection of the law is the inalienable right of every citizen, wherever he may be, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law" (Article 31, the Constitution of the People's Republic of Bangladesh.

<sup>66</sup> See Siddiqua, above n 62, 53.

Therefore, after a progressive start with the MFLO in 1961, developments in case laws over the years have made family laws in Bangladesh more protective of women's matrimonial rights. Nevertheless, despite all these pro-women developments in legal discourses, "*existing judicial system cannot ensure justice for the poor; many people in this country, especially women, are never produced before the court because of their poverty and the loopholes in our system*"<sup>67</sup>. As women are the poorest section of the society, they have particular problems of access to courts because of their lack of ability to bear the costs of litigation<sup>68</sup>. However, as discussed in the following section, family mediation could be a better tool for women that can reap-up fruits of pro-women legislative and judicial developments of matrimonial rights by ensuring a quicker and low-cost non-adversarial mode of justice, in comparison with trial.

### **Opportunities for Using Legal Discourses in Mediation - An Accelerated Means for Ensuring Matrimonial Rights to Women**

While, due of backlog of cases and high cost of litigation, women are deprived of getting benefits from pro-women development of laws through contested trial, family mediation is considered as a better and accelerated means for attaining low-cost, quick access to matrimonial rights in comparison with trial. Following an analysis of empirical data, this section demonstrates that mediation conducted under the shadow of law is not only providing a quick and low-cost access to justice for women in comparison with trial, but also ensures women's access to the benefits of pro-women laws enacted for enhancing women's matrimonial rights in Bangladesh.

#### ***Quicker Resolution through In-court Mediation vs. Litigation***

It is evident from empirical findings that average times-to-resolution for in-court mediation and litigation in the three districts (*Dhaka, Narayanganj* and *Mymensingh*) suggest a longer time-to-resolution 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. 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. Further, average time-to-resolution for in-court mediation in specialised family courts<sup>69</sup> of *Dhaka* is 0.4 months to 1.7 months less than the mixed courts<sup>70</sup> in *Narayanganj* and *Mymensingh* respectively. Such

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<sup>67</sup> 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.

<sup>68</sup> Sumaiya Khair, *Alternative Approaches to Justice: A Review of ADR Initiatives under the Democracy Partnership* (The Asia Foundation, 2001).

<sup>69</sup> Specialized family courts are courts that deal with only with family disputes.

<sup>70</sup> Non-specialized family courts or mixed courts deal with all kinds of civil disputes including family disputes.

difference may result because specialised family 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. Therefore, specialized family courts can provide women a much quicker access to their matrimonial rights through in-court mediation.

### ***Low Cost of In-court Mediation vs. Litigation***

Mediation not only provides quicker resolution of disputes, it is also able to ensure justice at a lower cost than litigation. An empirical survey conducted by Chowdhury also confirmed this proposition. As lawyers' costs constitute a major part of the total cost incurred by family court clients, lawyers were asked to indicate what they usually charge from their clients to resolve cases through mediation and litigation. Responses from lawyers in all three districts 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 (USD 130) to resolve family cases through litigation, while none of the lawyers charged more than Tk.10,000 (USD 130) to resolve a case through mediation. Almost 25 per cent of the lawyers charged less than Tk.2000 (USD 26) to resolve cases through mediation, while none of the litigation cases were resolved with a lawyer's fee of less than Tk.2000 (USD 26). In fact, 95 per cent of the total cases resolved through mediation required a lawyer's fee of Tk.5000 (USD 65) or less, while only 25 per cent of total litigation cases were resolved with fees lower than this amount. Therefore, women who resolved their cases through mediation received some cost advantage over those women who resolved their cases through litigation. Further, use of legal discourses during mediation empowers women in mediation and enables them to attain fair matrimonial rights through mediation.

### ***Mediation under the Shadow of Law***

As observed in the mediation sessions in Bangladesh, when disputants have arguments with each other about any issue, mediators are likely to inform parties about the probable legal consequences that might follow if parties go to litigation to resolve the issue. During in-court mediation judge-mediators of family courts also inform parties about their rights and duties relating to a dispute. For instance, while mediating dispute involving dower, almost all of the mediators highlighted the point that dower is a legal-cum-religious right of a wife, and only a wife has the right to make any concession on it. For instance, in one in-court mediation sessions observed at *Narayanganj*, when a husband urged the mediator to forgive a part of the unpaid dower as he did not have the ability to pay the entire amount, referring to *Sugra Bibi v Masuma Bibi*<sup>71</sup>, the mediator replied:

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<sup>71</sup> (1877) 2 ILR 573 (All).

According to law, it is only your wife who has the right to forfeit any part of her unpaid dower, if she wishes to do so. Other than your wife, no one else has the authority to reduce the amount of her dower as it is her legal and religious right. Even the court does not have any power to forfeit or reduce any part of it unless she wishes so.

Not only in case of dower, but also in relation to different other matrimonial rights, as observed in mediation sessions, judge-mediators of family courts highlighted different gender sensitive laws and other judicial decisions during mediation. For example, use of legal provisions was apparent in some of the observed mediation sessions that related to the custody of children. As mentioned earlier, under the FCO, provisions of *Guardianship and Wards Act 1890* are used to determine child custody after divorce. According to s. 5 of the *Guardianship and Wards Act 1890*, more emphasis is given to the “welfare of children”, while determining child custody in Bangladesh, than what is mentioned specifically in Islamic law. As was observed in one in-court mediation sessions, the consent of the minor appeared to be an important consideration in this regard. For example, in one of the in-court mediation sessions, a father was claiming the custody of his 7½ year old son on the grounds that according to the Islamic law, a father should get physical custody of his son:

**Father:** *I have asked to Imam [religious priest] of our local mosque; and as my boy is more than 7, I will get his custody.*

**Mediator:** *(to the boy attending mediation) will you be with your father?*

At that time, the minor-boy attached himself even closer to his mother and grabbed her even more squarely.

**Mother:** *(to the father of the boy) Don't you know my boy is scared of you?*

**Mediator:** *As the child is living with his mother since divorce, he seems to have more mental attachment with his mother. Moreover, he is studying in a school located in a place near to her mother's residence. So, it may hamper the smooth growth of the child if he is taken away from his in-situ condition.*

When mediators consider the welfare of a child, they are, in fact, adhering to section 7(1) the *Guardian and Wards Act 1890* that require them to consider child welfare instead of following age-criteria as provided under the Islamic law. The in-court mediator also applied the case law of *Mst. Fatima Begum v Habib Ahmed*<sup>72</sup> as mentioned earlier in which the learned court observed that where it does not contradict with any specific *Quranic* verse mentioned in this regard, it would be permissible to depart from the

<sup>72</sup> See DLR, above n 28; See more, *Md. Abu Bakar Siddique v SMA Bakar and others*, (1986) 38 DLR (AD) 106; *Gulfam v Gazala Parvin and others* in Monsoor, above n 11, 195.

usual Muslim practices. Such interventions of mediators under the shadow of pro-women laws empower women in mediation, and make them able to have better matrimonial rights through mediation.

Besides in-court mediators in family courts, out-of-court mediators at BLAST – a reputed NGO in Bangladesh, were even more pro-active in preserving women rights in mediation under the shadow of law. For example, in a mediation session observed at BLAST in *Mymensingh* district, the wife was demanding her full amount of dower written in the marriage contract, while the husband was claiming that he had already paid the 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.*

**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 dower, 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.*

In this mediation session, the mediator applied the case law *Atiqul Huque Chowdhury v Shahana Rahim* and *Sugra Bibi v Masuma Bibi*, mentioned earlier under 'right to dower', to establish the importance of repaying unpaid dower and to indicate that any unreported amount of dower in marriage contract would be treated as gift to the bride. Similarly, in another BLAST mediation session observed in Bangladesh, 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 on the wife's right to maintenance under the provisions of section 9(1) of MFLO, 1961 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 don't 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. According to Muslim*

*Family Law Ordinance 1961, you are bound to maintain her; 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.*

In the above mentioned mediation session, the out-of-court mediator has expressly mentioned the legal right of wives to get maintenance as established in section 9 of the MFLO mentioned earlier in this paper. What the out-of-court mediator suggested here also connotes to case laws regarding maintenance<sup>73</sup>. Therefore, it is evident that application of pro-women statutory laws and case laws are propelling for the protection of women rights, when such legal developments are used in mediation that is more accessible to them in comparison with trial. Such a practice of mediation under the shadow of law can safeguard women rights even when considerable gender disparity, as discussed earlier, is still prevailing in the society.

### **Stringent Laws Restricting Violence on Women: A Channel of Empowerment through Mediation**

It is not only gender equalizing laws but also the existence and awareness of stringent laws against violence that works as a source of courage to empower women during mediation. While explaining how legal provisions are helpful to enable women to get better outcomes in mediation, one judge-mediator in *Dhaka* family court responded:

To me, pro-women law is the strength of women in mediation. Without legal support mediator's evaluation may not bring any fruitful result in mediation. What we say is already said in law, what we try to attain for women is already granted as a legal entitlement for women.

Result of observations of mediation sessions confirms that use of law gives strength to women during mediation. Amongst the 15 cases observed where women revealed their history of family violence, in 3 cases victims specifically mentioned law as a negotiating strategy.<sup>74</sup> In a related vein, while mediating abusive couples, Marthaler observed that 'it is important to follow procedures that encourage and allow the legal consequences of abuse to follow their normal course'.<sup>75</sup> 'Strict adherences to the view that past abuse has its consequence and future abuse will not be tolerated'<sup>76</sup> can change the behaviour of couples regarding violence.

As further revealed during interviews of out-of-court mediators, NGOs provide counselling services to women and make them more conscious of

<sup>73</sup> *Ambia Khatoon v Md. Yain Bepari* (unreported case) in Monsoor, above n 14, 80.

<sup>74</sup> Abused wife in observation no. 1: "I will put him in jail by using the law"; Another abused wife in observation no. 7: "He thought he can do anything what he wants; no, now law is with us...I will not tolerate anymore"; Abused wife in observation no. 14: "I will be happy if he gets the maximum punishment provided in law. I wish he will be in the prison for his whole life".

<sup>75</sup> Dennis Marthaler 1989, 'Successful mediation with abusive couples', *Mediation Quarterly*, vol 23, pp. 53-66.

<sup>76</sup> *Ibid.*

their legal rights against family violence when they come to their offices, and they urge them to seek justice. As informed by one out-of-court mediator during the interview:

When victim women come to our office seeking justice, we sometimes bring them to a nearby police station to file a police complaint. Additionally, we provide some basic safeguards to target women, such as the phone number of police and a shelter home, or help them to attain a protection order against violence. All these help them to gain courage to participate effectively in mediation.

Lawyers and mediators may be able to provide proper counselling and other legal support that helps to build confidence for victims of family violence and enables them to participate effectively in mediation. Research findings show that women have less anxiety about attending mediation when they are clearly informed about what they can expect from negotiation.<sup>77</sup> Therefore, it seems that existence of stringent laws to protect women from family violence and access of such legal remedies makes them more courageous to raise their voice against their perpetrator husbands in mediation.

### Conclusion

As discussed in the paper, under current socio-economic condition, women in Bangladesh remain in a subjugated position compared to their male counterparts. However, the condition of women in terms of their legal entitlements on different matrimonial issues is progressing gradually. Promulgation of gender equalising legislations and liberal interpretation of case laws, as discussed throughout this paper, have strengthened women's matrimonial rights over the years. As argued earlier, even when gendered power disparity exists in a society, women in mediation can be empowered to claim and receive their legal entitlements by the application of gender equalising legislations and progressive case laws that promote rights for women. Further, a gradual but positive change in the social outlook toward women also enhances social awareness on women rights and their improved status in the society. However, improved legal rights may have little practical effect if these rights remain inaccessible and not enforceable to women. Despite the development of gender sensitive laws and women's awareness about these pro-women laws, if women do not have sufficient means to "enforce" such laws, it might not be possible for them to enhance their rights. Therefore, often the problem is not the law itself, but that women cannot access law because of high-cost and time involved in resolving family disputes through litigation.<sup>78</sup> Thus, because of the existence of pro-women laws and its application in mediation, that is already acclaimed as a quick and low-cost dispute resolution process in Bangladesh, family mediation under the shadow of law can be considered as a speed-way for women to extract the benefits of pro-women legal developments in realizing their matrimonial rights.

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<sup>77</sup> John Wade 1997, 'Four evaluative studies of family mediation services in Australia', *Australian Journal of Family Law*, vol. 11, no. 3, pp. 343-48.

<sup>78</sup> The Asia Foundation, *In Search of Justice: Women's Encounters with Alternative Dispute Resolution* (ADB, 2002).