

ADR under the Family Courts Ordinance, 1985



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Suitability of ADR on Family Suits

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

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

Suitability of ADR on Family Suits (Continued)

Firstly, The high **costs** of any dispute resolution system or mechanism may restrain disputant's ability to access justice, the prime pillar of justice. In case of family matters this problem is very acute, because most of the victims are jobless housewives. On the contrary, in case of out of court mediation and NGO mediation people may not have to bear such costs. For example, Bangladesh Legal Aid and services Trust (BLAST), Ain O Shalish Kendro (ASK) conducting mediation free of cost, and Bangladesh Lawyers Association (BNWLA) takes registration cost of only amount of 20 BDT. It is rightly pointed out by Prof. Sumaya Khair 'the most tangible gain from mediation services is the lesser cost of disposing the disputes'. Considering the above points it can be said that ADR mechanism is not only desirable but also effective in family matters.

Suitability of ADR on Family Suits (Continued)

Secondly, no **complex procedural** or evidentiary rules which are to strictly be followed by the facilitators of ADR in family matters because most ADR system is 'fact and act oriented' and a good ADR mechanism is 'person oriented'. The simplicity of the system and no requirement of legal representation lessen the cost in ADR. Moreover, practices of ADR minimize the probability to delay in disposing cases.

Suitability of ADR on Family Suits (Continued)

Thirdly, ADR system in family matters may ultimately ensure justice for the poor and other disadvantageded people. It has a considerable impact on protecting women's rights in the family and outside. As ADR is cheap and easy so they can move to dissolve any dispute issue with nominal cost that they can afford. Alternative dispute resolution has initiated a shift in the attitude of men who have come to accept that women have to treat equitably.

Fourthly, reaching the court is a taboo for victim from rural areas and formal court system often offends family tradition and prestige. Moreover, the court process is open and often does not respect people's privacy but the privacy is more important. Thus, ADR mechanisms may effectively ensure the privacy of the disputants of family matters.

Suitability of ADR on Family Suits (Continued)

Fifthly, overwhelmingly Informal nature of ADR turns it as unique character. Most of the cases the mechanisms that practiced in Bangladesh are flexible and the parties have the autonomy to settle their disputes. Thus, ADR mechanisms of settling the dispute are habitually less stressful for the parties than the litigation in the court.



Suitability of ADR on Family Suits (Continued)

Finally, unlike adversarial trial, win-win outcome is an important feature of a successful ADR. It helps to resolve the dispute in a nonviolent way. To evaporate the disputes, the parties select the decision makers and proceedings. Thus, resolution of dispute through ADR helps parties to continue their relationship in harmony.



Manifestations of ADR in Family Court

Trial The complicated, lengthy and costly dispute settlement system in Bangladesh places **justice beyond the reach of poor and mass people**. However, ADR mitigates the formal complexities, unnecessary delay and cumbersome procedures. It resolves the dispute of delicate nature effectively. Thus, ADR is overwhelmingly required for ensuring effective and desired outcomes of particular issue, especially, in the delicate family affairs. Bangladeshi legal framework has been tried to accommodate the mechanisms of ADR in settling family disputes.

The establishment of the family courts in Bangladesh under Family Courts Ordinance, 1985 is a landmark decision of the government. Prior to establishment of FCO all litigations relating to family matter were adjudicated by the ordinary civil courts.

Manifestations of ADR in Family Court (Continued)

Consequently, the formal, lengthy, costly alongside the complicated procedures often place the justice beyond the reach of poor and mass people. Moreover, MFLO was only applicable to Muslim communities, thus, all the ADR procedures were attached to the citizens with Islamic religion not others. **A separate special law for all was required to deal with family disputes in a uniform manner irrespective of religion.** The FCO, 1985 which under Section 5 incorporates some key subject matters of family disputes (i.e. dissolution of marriage, restitution of conjugal rights, dower, maintenance, and finally guardianship and custody of children)

The FCO, 1985 in Brief

- ▶ ADR was introduced in Bangladesh under Family Court Ordinance, 1985.
- ▶ It is a separate special law for dealing family disputes in a uniform manner irrespective of religions.
- ▶ The FCO, 1985 under Section 5 incorporates some key issues of family disputes such as
 1. Dissolution of marriage,
 2. Restitution of conjugal rights,
 3. Dower,
 4. Maintenance, and finally
 5. Guardianship and Custody of Children.

Precisely contains the provisions of ADR in the form of **pre-trial, pre-judgment and post-judgment conciliation** as outlined in the section **10, 13 and 23** of the FCO, 1985.

ADR Flashback

ADR mainly consists of negotiation, conciliation, mediation, arbitration and a series of hybrid procedures.

- ▶ Arbitration is adjudicatory and the result is binding.
- ▶ **whereas conciliation is a consensual decision taken by the parties themselves and the neutral third party gives some advice so that the parties' relationship is sustained.**
- ▶ Negotiation is a non-binding settlement by the parties themselves without the help of the third party.
- ▶ **Mediation is a decision-making process in which the parties are assisted by a third party, the mediator, but the decision is taken by the parties themselves.**
- ▶ The primary objective of ADR system is avoidance of complexity, expense and delay, and promotion of easy access to justice.

ADR in the Family Courts Ordinance

Pre-trial proceeding [U/S. 10]

(1) When the written statement is filed, the Family Court shall fix a date ordinarily of not more than thirty days for a pre-trial hearing of the suit.

(2) On the date fixed for pre-trial hearing, the Court shall examine the plaint, the written statement and documents filed by the parties and shall also, if it so deems fit, hear the parties.

(3) At the pre-trial hearing, the Court shall ascertain the points at issue between the parties and attempt to effect a compromise or reconciliation between the parties, if this be possible.

(4) If no compromise or reconciliation is possible, the Court shall frame the issues in the suit and fix a date [ordinarily of not more that thirty days] for recording evidence.

Trial in Camera [U/S. 11]

- (1) A Family Court may, **if it so deems fit**, hold the whole or any part of the proceedings under this Ordinance in camera.
- (2) Where **both the parties to the suit request** the Court to hold the proceedings in camera, the Court shall do so.

Recording of Evidence [U/S. 12]

(1) On the date fixed for recording of the evidence, the Family Court shall examine the witnesses produced by the parties in such order as it deems fit.

(2) The Court shall not issue any summons for the appearance of a witness for any party, unless, within three days of the framing of issues, the party intimates the Court that it desires the witness to be summoned through the Court and the Court is satisfied that it is not possible or practicable for the party to produce the witness.

(3) The witnesses shall give evidence in their own words and may be cross-examined and re-examined.

(4) The Court may forbid any question which it regards as indecent, scandalous or frivolous or which appears to it to be intended to insult or annoy or be needlessly offensive in form.

(5) The Court may, if it so deems fit, put any question to any witness for the purpose of elucidation of any point which it considers material in the case.

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(6) The Court may permit the evidence of any witness to be given by means of affidavit:

Provided that the Court may, if it so deems fit, call such witness for the purpose of examination.

(7) The evidence of each witness shall be taken down in writing, in the language of the Court, by the presiding Judge of the Court and shall be signed by such Judge.

(8) Where the evidence of a witness is given in any language other than the language of the Court, the presiding Judge may take it down in that language, if possible, and an authenticated translation of such evidence in the language of the Court shall form a part of record.

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(9) When the evidence of a witness is taken down, it shall be read over to him and shall, if necessary, be corrected.

(10) If the witness does not accept the correctness of any part of the evidence, the presiding Judge may, instead of correcting the evidence, make a memorandum of the objection made by the witness, and shall add such remarks as he thinks necessary.

(11) If the evidence is taken down in a language different from that in which it has been given and the witness does not understand that language, the evidence shall be interpreted to him in the language in which it was given or in a language which he understands.

Conclusion of Trial [U/S. 13]

(1) After the close of evidence of all parties, the Family Court shall make another effort to effect a compromise or reconciliation between the parties.

(2) If such compromise or reconciliation is not possible, the Court shall pronounce judgment and, on such judgment [either at once or on some future day not beyond seven days of which due notice shall be given to the parties or their agents or advocates], a decree shall follow.

Compromise Decree [U/S. 14]

Where a dispute is settled by compromise or conciliation, the Court shall pass a decree or give decision in the suit in terms of the compromise or conciliation agreed to between the parties.



Writing of judgment [U/S. 15]

(1) Every judgment or order of a Family Court shall be written by the presiding Judge or from the dictation of such Judge in the language of the Court and shall be dated and signed by the Judge in open Court at the time of pronouncing it.

(2) All judgments and orders which are appealable shall contain the point for determination, the decision thereon and the reasons therefore.

Enforcement of decrees [U/S. 16]

(1) A Family Court shall pass a decree in such form and manner, and shall enter its particulars in such register of decrees as may be prescribed.

(2) If any money is paid, or any property is delivered, in the presence of the Court in satisfaction of the decree, it shall enter the fact of such payment or delivery in the aforesaid register.

[(3) Where the decree relates to the payment of money and the decretal amount is not paid **within the time specified by the Court**, the decree shall, on the prayer of the decree-holder to be made **within a period of one year from the expiry of the time** so specified, be executed-

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(a) as a decree for money of a Civil Court under the Code, or

(b) as an order for payment of fine made by a Magistrate under the Code of Criminal Procedure, 1898 (Act V of 1898), and on such execution the decretal amount recovered shall be paid to the decree-holder.

(3A) For the purpose of execution of a decree under sub-section (3)(a), the Court shall be deemed to be a Civil Court and shall have all the powers of such Court under the Code.

(3B) For the purpose of execution of a decree under sub-section (3)(b), the Judge of the Family Court shall be deemed to be a Magistrate of the first class and shall have all the powers of such Magistrate under the Code of Criminal Procedure, 1898 (Act V of 1898), and he may issue a warrant for levying the decretal amount due in the manner provided in that Code for levying fines, and may sentence the judgment debtor, for the whole or any part of the decretal amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to three months or until payment if sooner made.

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(3C) When a decree does not relate to payment of money, it shall be executed as a decree, other than a decree for money of a Civil Court and for that purpose the Court shall be deemed to be a Civil Court and shall have all the powers of such Court under the Code.]

[(4) The decree shall be executed by the Family Court passing it or by such other Family Court to which the decree may be transferred for execution by the Court passing it and in executing such a decree the Court to which it is transferred shall have all powers of the Family Court passing the decree as if the decree were passed by it.]

(5) The Court may, if it so deems fit, direct that any money to be paid under a decree passed by it be paid in such instalments as it deems fit.

Appeal [U/S. 17]

(1) Subject to the provisions of sub-section (2), an appeal shall lie from a judgment, decree or order of a Family Court to the Court of District Judge.

(2) No appeal shall lie from a decree passed by a Family Court-

(a) for dissolution of marriage, except in the case of dissolution for reasons specified in section 2(viii)(d) of the Dissolution of Muslim Marriages Act, 1939 (VIII of 1939);

(b) for dower not exceeding five thousand taka.

Appeal [Continued...]

(3) An appeal under this section shall be preferred **within thirty days of the passing of the judgment, decree or order excluding the time required for obtaining copies thereof:**

Provided that **the Court of District Judge may, for sufficient cause, extend the said period.**

(4) An appeal shall

(a) be in writing;

(b) set out the grounds on which the appellant seeks to challenge the judgment, decree or order;

(c) contain the names, description and addresses of the parties; and

(d) bear the signature of the appellant.

(5) A certified copy of the judgment, decree or order of the Court from which the appeal is preferred shall be attached with the appeal.

(6) Any order passed by the Court of District Judge shall, as soon as may be, be communicated to the Family Court which shall modify or amend the judgment, decree or

Appeal [Continued]

order accordingly and shall also make necessary entries to that effect in the appropriate column in the register of decrees.

[(7) The District Judge may transfer an appeal to the Court of an Additional District Judge or a Subordinate Judge for hearing and disposal and may withdraw any such appeal from such Court.]

Ordinance VIII of 1961 not affected (U/S. 23)

(1) Nothing in this Ordinance shall be deemed to affect any of the provisions of the Muslim Family Laws Ordinance, 1961(VIII of 1961), or the rules made thereunder.

(2) Where a Family Court passes a decree for the dissolution of a marriage solemnised under the Muslim Law, the Court shall, within seven days of the passing of the decree, send by registered post a certified copy of the same to the appropriate Chairman referred to in section 7 of the Muslim Family Laws Ordinance, 1961 (VIII of 1961), and upon receipt of such copy, **the Chairman shall proceed as if he had received an intimation of talaq required to be given under the said Ordinance.**

(3) A decree passed by a Family Court for the dissolution of a marriage solemnised under the Muslim Law shall-

(a) not be effective until the expiration of ninety days from the day on which a copy thereof has been received under sub-section (2) by the Chairman; and

(b) be of no effect if within the period specified in clause (a) a reconciliation has been effected between the parties in accordance with the provisions of the Muslim Family Laws Ordinance, 1961 (VIII of 1961).

Family Court deemed to be a District Court for purposes of Act VIII of 1890 [U/S. 24]

(1) A Family Court shall be deemed to be a District Court for the purposes of the Guardians and Wards Act, 1890 (VIII of 1890), and notwithstanding anything contained in this Ordinance, shall, in dealing with matters specified in that Act, follow the procedure specified in that Act.

(2) Notwithstanding anything contained in the Guardians and Wards Act, 1890 (VIII of 1890), an appeal from an order made by a Family Court as District Court under that Act shall lie to the Court of District Judge, and the provisions of section 17 shall apply to such appeal.

Transfer and stay of suits and appeals [U/S.25]

(1) The High Court Division may, either on the application of any party or of its own accord, by an order in writing, -

(a) transfer any suit under this Ordinance from one Family Court to another Family Court in the same district or from a Family Court of one district to a Family Court of another district;

(b) transfer any appeal under this Ordinance from the Court of District Judge of one district to the Court of District Judge of another district.

(2) A District Judge may, either on the application of any party or of his own accord, by an order in writing, transfer any suit under this Ordinance from one Family Court to another Family Court within the local limits of his jurisdiction.

(3) Notwithstanding anything contained in this Ordinance, a District Judge may transfer an appeal pending before him under this Ordinance to any Court of Additional District Judge or Subordinate Judge under his administrative control and may also retransfer such appeal from such Court to his own Court

(4) Any Court to which a suit or appeal is transferred under this section, shall, notwithstanding anything contained in this Ordinance, have the jurisdiction to dispose it of in the manner as if it were instituted or filed before it:

Provided that on the transfer of a suit, it shall not be necessary to commence the proceedings before the succeeding Judge de novo unless the Judge, for reasons to be recorded in writing, directs otherwise.

(5) A District Judge may, by an order in writing, stay any suit pending before a Family Court within the local limits of his jurisdiction.

(6) The High Court Division may, by an order in writing, stay any suit or appeal pending before any Family Court or Court of District Judge.

Pre-Trial Conciliation

Section 10 of FCO envisages pre-trial conciliation in the family dispute. When the written statement is filed by the defendant, the family court shall fix a date ordinarily of not more than 30 days for pre-trial hearing of the suit. As far as elaborated on the date fixed for pre-trial hearing, the court shall examine the plaint, the written statement and documents filed by the parties and shall also, if it so deem fit hear the parties. The provision of ADR was effectively mentioned in section 10(3) of FCO 1985, under which, at the pre-trial hearing, the courts shall ascertain the point at issue between the parties and attempt to effect a compromise or reconciliation. If the parties agree to mediate the presiding judge usually meet them in his chamber. Lawyers may or may not be allowed to stay, however in most of the cases, the family court judges do not allow lawyers to stay in the conciliation session.

Pre-Judgment Conciliation

The provision of pre-judgment mediation is prescribed **under section 13** of the Family Court Ordinance 1985. If a pre-trial mediation fails, **after completing the trial process and before pronouncing judgment the judge shall ask parties regarding their intention to solve the dispute through mediation**. If parties reach in agreement, the court shall give compromise decree. The significant feature of family court mediation is that the mode of mediation practiced in family court is mandatory both under sections 10 and 13.

Post-Judgment Arbitration

The **post-judgment mediation is facilitated under section 23** of the FCO if the divorce decree is pronounced. The judge sends the judgment to the concerned chairman of Union Council or Municipality to take the initiative **under section 7 of the MFLO mutatis mutandis treating the judgment as a notice of divorce**. If the arbitration council can hold successful mediation, the judgment will be vacated and marriage will be restored and vice versa. On such notice the chairman shall constitute an Arbitration Council within thirty days to try and reconcile the aggrieved couple. The Arbitration council shall be constituted by the chairman and two nominated representatives from both sides. The decision will be taken on the opinion of the majority. If the attempt is successful, the divorce is avoided; otherwise talaq shall be effective after 90 days from the chairman receiving the decree or the end of pregnancy if the wife is pregnant at the time of pronouncement whichever occurs later.

Statutory Limitations and Practices of ADR in Family Courts

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

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Although there were some confusions and ambiguities on the applicability of FCO, 1985 on basis of religion, however, the confusions have been removed by judicial decisions. **At the outset, it was claimed that FCO is only applicable to Muslims not to other religions. In *Krisnapada Talukder vs. Geetasree Talukder* (BLD 1994 HCD, p. 415), the question arose whether a Hindu female can claim maintenance under FCO. It was held by the High Court Division that FCO is only applicable to the people who belong to the Islamic religion, thus, people from other religion cannot claim any remedy under FCO. The view of the court has been changed later on in *Pochon Rikssi Das Vs Khuku Rani Dasi and others* (50 DLR (AD), p. 47) by removing all the confusions. It was held that The Family Court Ordinance has not taken away any personal right of any litigant of any faith and it is applicable to all litigants irrespective of their religions. Thus, Family Courts have jurisdiction over all citizens if it is covered by section 5 of FCO, 1985.**

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Family Courts also empowered to resolve the dispute alternatively to the conventional process of the court. If the parties agree to mediate the presiding judge usually meet them in his chamber, the lawyers of each party may or may not be allowed to stay. However it has been observed in most of the cases, **the family court judges do not allow lawyers to stay in the mediation session.** As a result the parties can hardly reaches in an agreed position. The main purpose of mediation is that parties should be able to express their grievances and in the process by their active participation would be able to reach at reconciliation. However, in many cases, **parties cannot do so because of the time constraint, unwillingness of advocates even non-facilitation from the judges.** Despite the satisfactory legal provisions for mediation at FCO still the outcomes are not good enough due to the existing practices at ground level.

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Regarding the post-judgment reconciliation by Arbitration Council, it has been a matter of great concern that often the purpose of reconciliation between the parties under section 7(4) has been frustrated because of statutory limitations and practices thereof. The MFLO imposes a duty upon the chairman to constitute an arbitration council but without containing any explicit provisions as to what will happen if the chairman does not constitute that willfully or otherwise. The whole scheme of arbitration council has been turned into optional one rather than mandatory. Even if the arbitration council is constituted which does not take any effective steps or no step at all to bring about reconciliation, nowhere in the MFLO remedy is provided in such case (25 DLR HCD, p. 227). Moreover, in the context of social reality of Bangladesh, chairmen of Union Parishad do not play neutrally good role in discharging their duties in the reconciliation process.

Statutory Challenges to Implement ADR

ADR incorporated 10 laws in Bangladesh as formal and quasi-formal. In every law ADR can be used effectively except in FCO because there are gaps in the ADR of FCO.

Section 10, 13 of FCO only mentions ADR but it does not prescribe how ADR will work in respect of other laws such as Code of Civil procedure (CPC) 1908, Money Loan Court Act 2003, Income Tax (Amendment) Act 2011, Labour Act 2006.

That is why, the mediator shall be the judge to whom the case should be filed. If the mediation process fails, parties can go to the court for trial. But there are major loopholes in this law. Parties shall go to the same judge who was the mediator during the mediation stage. A possibility is there that the judgment may be influenced by pre-trial mediation. There is no option here as in CPC and others laws.

ADR provisions in CPC have been added in 2003 by amendment of CPC and after that, it was amended thrice. FCO deals with family disputes which are very crucial matters but it did not get suitably amended till now.

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Family disputes are very sensitive in nature that need experienced judges. **But section 4 of the FCO states that Assistance Judges shall be family court judges, who are members of the subordinate judiciary and hence lack sufficient experience in judiciary. In the Indian Family Courts Act, 1984, a person shall not be qualified for appointment as a family court judge unless s/he has held a judicial office at least for seven years.**

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Only the Family Court Judges are responsible for resolving family disputes by ADR in the FCO and no provision relating to dispute solving by person outside of court is present in the FCO. That is why, in the family court mediation, parties cannot go to experienced mediators for resolving their problems.

Concerned authorities should take immediate steps for amending this law for fairly and effectively addressing family disputes by using ADR and opening the third party system mediation for resolving problem by experienced mediators.



Questions Session

