



RAJSHAHI UNIVERSITY LAW JOURNAL

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Reforming the Prosecution Service in the Subordinate Courts of Bangladesh

Shaping the Modern Police in Indian Sub-Continent with Special Reference to Police Commission 1902-1903

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Cyber Violence Against Women in Bangladesh: Laws and Realities

ইসলামী আইনে রোমান আইনের প্রভাব : একটি তুলনামূলক পর্যালোচনা



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Dispensing Justice through Court Annexed ADR in Bangladesh: Family Court Experience

Armin Khatun*
Khaledur Rahman**

Abstract: *Alternative Dispute Resolution (ADR) is the best practice in family disputes worldwide. In a country like Bangladesh, ADR offers a great opportunity for an aggrieved person especially for woman, to directly participate in the dispute resolution process and voice her grievances. It removes bitterness between the parties, the risk of exposure of a woman to public, avoids ill effects on the other members of the family, particularly the children and aids to make an outcome within a shortest possible time. A uniform family court law named The Family Court Ordinance has passed in 1985 that introduced compromise or reconciliation, as a mode of ADR where a Judge himself can conciliate a family suit. This study recounts the institutionalized provisions of ADR in Family Courts and evaluates its application level approach. The aims of this study are to explore and analyse the statutory, institutional and procedural lacunas of ADR provisions under the law. This research also pointed out the challenges and addressed court connected ADR in family disputes.*

Keywords: FC, FCO, Court Annexed ADR, Mediation, Conciliation, Dispense of Justice.

1. Introduction

Alternative Dispute Resolution (ADR) is a non-adversarial method of dispute resolution with the form of negotiation, mediation, conciliation or some hybrid forms (e.g. rent a judge, MEDALOA or Med-Arb) where the disputants represent themselves personally or through their representatives i.e., mediator, arbitrator, conciliator, arbitrator and try to resolve the dispute through a process of mutual consent.¹ “ADR is an informal settlement of legal and judicial disputes through a process of mutual compromise”.² The ultimate goal of the processes are to relieve court backlog, undue cost, and delay and to

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¹ Dr. Sk. Golem Mahbub, *Alternative Dispute Resolution through Civil Courts in Bangladesh* (Dhaka: Bangladesh International Arbitration Centre, 1st ed, 2019) 154

² <http://archive.thedailystar.net/2007/04/29/d70429060168.htm> Accessed on 31 March 2021

provide more effective, efficient and satisfying dispute resolution, thereby improving the quality of justice and citizen's perception of it.³ Suits arising out from family affairs are considered as suits of civil nature which have been disposed of through the traditional Civil Courts following the provisions of the Code of Civil Procedure, 1908.⁴ These issues were also dealt with by the Magistrate Courts following the Code of Criminal Procedure (CPC), 1898.⁵ The traditional Civil Courts, overburdened with huge case backlogs, delay in disposal of suits and procedural complexities, failed to successfully deal with the suits relating to family issues. With a view to assisting the smooth, effective and amicable disposal of suits arising out from family matters and to restore people's trust and confidence on judiciary a special Court named Family Court was introduced under the Family Courts Ordinance, 1985⁶ (hereinafter FCO). In accordance with the FCO, the Family Court (hereinafter FC) is empowered to dispose of a family suit both in adversarial system and in alternative way in its sections 10, 11, 13, 14 and 23 namely, compromise or reconciliation. The court- connected mediation is observed as one of the significant advantages that may persuade parties to choose mediation instead of a formal trial to resolve their disputes.⁷ In June 2000, the process of conciliation was initiated officially and Court based ADR has been applied in three Family Courts of the capital Dhaka judgeship⁸ and after that the mediation process started to gain its outcome.⁹ In Bangladesh, the type of mediation practiced is evaluative in nature, and conducted under the shadow of law. In evaluative mediation, mediators can focus their normative views on the content of a dispute and assist parties to understand their rights and liabilities under different contexts relating to their dispute.¹⁰ Unfortunately, the noble aim of introducing FCs has not been expectantly achieved though already more than two decades have passed after the courts' coming into

³ *Supra Note*, 1 at 165

⁴ Act No. V of 1908

⁵ Act No. V of 1898

⁶ Ordinance No. XVIII of 1985

⁷ Dr. Jamila A. Chowdhury and Ifat Mubina Eusuf, 'A Gentle Breeze on the Wheels of Fair Justice for Women in Bangladesh: An Empirical Evolution of Family Courts' Mediation Underpinning Rawls' Theory of Justice, *The Dhaka University Studies*, Part. F, Vol. 31, (2020) 70

⁸ *Supra note* 2 at 223

⁹ *Supra note* 6

¹⁰ *Ibid*

operation.¹¹ Judges of the FC can play the most vital role as evaluative mediators where parties' expectation can be fulfilled and best outcome can be affirmed than that of litigation and ultimately FC can achieve its desired goal. In this study existing judicial mechanisms of FC have been observed to verify its role in dispensing justice. FC successes in providing justice through judicial ADR would be a great initiative. It would move the importance of dispute resolution towards mutual compromise instead of win-lose calculation which serves to build a healthy relationship and a peaceful co-habitation among the disputants in the society.

2. Methodological Issues

This study is an explanatory research work designed with both analytical and empirical method. Qualitative and quantitative data collection method have been used for concluding the research. Data, resources and necessary information are collected from Primary and secondary sources of the relevant field. To fulfill the study, information have been collected from the Judges of the FC, lawyers deals civil and family matters and litigants through in depth interviews. Expert opinion has taken from Law teachers. Secondary sources include relevant text books, articles, journals, newspapers and electronic media, published and unpublished thesis, juristic writing, written opinion of the concerned experts, and internet browsing. One of the prime limitation of this study is that, it was not possible to collect specific data from the FCs Registries of whom the judges interviewed was in charge due to procedural complexities and the limitation of the study period. In this study, units for the sample are selected deliberately by the research and total 20 respondents are selected to fulfil the study.

3. Aims and Objectives

The general objective of this study is to appraise the Court based ADR conducted by the FC in Bangladesh. This paper also attempts to achieve the following objectives:

- i. To focus on the laws and practices of Court annexed ADR in Family Courts and

¹¹ See, <https://www.assignmentpoint.com/arts/law/family-courts-bangladesh.html> Accessed on 23-01-2021

- ii. To identify the challenges associated with the FCs ADR procedure and to frame out possible ways to encounter the challenges

4. Court Annexed ADR in Bangladesh

Variety of ADR categories are practiced in Bangladesh in the name of formal, quasi-formal and informal ADR. Formal ADR means a process which is conducted in connection with the Court. The Court in this regard conducts the judicial proceedings through ADR as approved by the laws. For example, ADR referred to the Code of Civil Procedure, 1908; the Family Courts Ordinance, 1985; Money Loan Court Act 2003;¹² the Labor Act, 2006¹³ etc. considered as formal ADR.¹⁴ Both the Code of Civil Procedure, 1908 and the Family Courts Ordinance, 1985 authorize Court annexed ADR where the Judges can play an active role to resolute.

5. Significance of ADR in Family Suits

The FCO, 1985 not only moderated the procedure of litigation, but also incorporated the compromise and conciliation system into FCs as an outcome of thoughtful response of the legislature to the need of time. As a matter of fact, disposing of disputes through ADR was and is the prime object of establishing FCs where the Judges can control and determine the course of the suit through ADR. The purpose of incorporating the provisions of ADR in family suits is to administer quick and effective disposal of disputes in the family affairs and to restore people's trust and reliance on the judiciary.¹⁵ At the same time, it is noted that with the disposal of the main suit through ADR, countersuits, arises out of the same family disputes, are also settled. Experience shows that for each FC suit, there are other cases arising out of the main dispute. For example, against a suit for dower generally criminal cases for theft or unlawful confinement are filed, whereas a case for dowry encourages filing of a suit for defamation or libel. Against a case under the

¹² Act No. VIII of 2003

¹³ Act No. XLII of 2006

¹⁴ Khaledur Rahman, *Alternative Dispute Resolution and Legal Aid: Principle & Practice* (Dhaka: Law Palace, 1st ed, 2018) 66

¹⁵ Zahidul Islam, *Strengthening Family Courts: An Analysis of the Confusions & Uncertainties thwarting the Family Courts in Bangladesh* (Bangladesh Legal Aid Services Trust, Dhaka, 1st ed, 2006) 9-10

Women and Children Repression Prevention Act, 2000,¹⁶ the other party invariably files a suit for restoration of conjugal rights. Therefore, ADR encompasses not only the settlement of the main suit but other related suits or cases arising out of the same disputes and with the final disposal of the main suit all others are also disposed of. Thus, the cumulative effect of ADR is much larger than disputes settled in a trial proceeding.¹⁷

6. Family Court: Establishment and Jurisdiction

Pursuant to section 4 of the FCO, there shall be as many FCs as there are Court of Assistant Judges in a district. All Courts of Assistant Judges shall be the FCs and are entitled to conduct the ADR proceedings. Subject to the provisions of the Muslim Family Laws Ordinance (hereinafter MFLO), 1961¹⁸, a FC enjoys exclusive jurisdiction to entertain, try and dispose of any suit relating to, or arising out of, all or any of the following matters, namely: (a) Dissolution of marriage; (b) Restitution of conjugal rights; (c) Dower; (d) Maintenance; (d) Guardianship and custody of children.¹⁹

Just after the FC began functioning, confusion raised about its jurisdiction that whether it deals only with family matters of Muslim community or of all communities and the uncertainty lasted till 1998 when the Apex Court in a path finding judgment removed all the complexities regarding FC's jurisdiction. In *Krishnapada Talukder vs Geetasree Talukder*,²⁰ High Court Division held that "Family Courts have the jurisdiction to entertain, try and dispose of any matter in clauses (a) to (e) of section 5 of the FCO only between the litigants who are Muslim by faith."²¹ However, the High Court Division, just a few days later²² of the preceding judgment, in *Nirmal Kanti Das vs Sreemati Biva Rani*²³ dramatically expressed opposite opinion where it is stated that "any person professing any faith has a right to bring a suit for the purposes mentioned in section 5 of the FCO. A Hindu wife is therefore

¹⁶ Act No. VIII of 2000

¹⁷ *Supra* note 15 at 11

¹⁸ Ordinance No. VIII of 1961

¹⁹ *The Family Courts Ordinance*, 1985, section 5

²⁰ 14 (1994) BLD 415

²¹ *Ibid*, 417

²² The former judgment came on 5th June 1994, and the later on 25th July 1994

²³ 14 (1994) BLD (HCD) 413

entitled to bring a suit for maintenance against her husband under the FCO.”²⁴ In, *Meher Nigar vs Md. Mujibur Rahman*²⁵ it was observed that “the provisions of the Family Courts Ordinance, 1985 are not only applicable to the members of the Muslim Community but also to other communities which constitute the populace of Bangladesh.”²⁶ Following such dissimilar decisions confusion arisen and continued until 1997 when a larger bench of the High Court Division of Supreme Court in its path-finding judgment in *Pochon Rikssi Das vs Khuku Rani Dasi and others*²⁷ removed all the confusions. The special bench of the High Court Division comprised of three Judges declaring in a very straightforward way that FCO applies to all citizens irrespective of religion.²⁸ Accordingly, there remains no confusion in regards with the jurisdiction of the FC now.

7. Advent of ADR in Family Court Proceedings

The FCO contains the provisions of ADR in different stages of the suit *i.e.*, ADR in Pre-Trial Proceedings, ADR in Pre-judgment Proceedings and ADR in Post-Judgment Proceedings as outlined in sections 10, 13 and 23 respectively of the Act. A successful conciliation also results a compromise decree.

7.1 Compromise or Reconciliation in Pre-Trial Proceedings

Every suit under this Ordinance is instituted by the presentation of a plaint to the Family Court.²⁹ When a plaint is presented to the Court, it fixes a date ordinarily of not more than 30 (thirty) days for the appearance of the defendant; issue summons to the defendant to appear and answer the claim on the date specified therein.³⁰ On the date fixed for the appearance of the defendant, the plaintiff and the defendant appear before the Court and the defendant presents a written statement of his defence.³¹ The Court may, on the

²⁴ *Ibid*, 415

²⁵ 14 (1994) BLD (HCD) 467

²⁶ *Ibid*, 415

²⁷ 50 (1998) DLR (AD) 47

²⁸ *Ibid*, 53

²⁹ *The Family Courts Ordinance*, 1985, section 6 (1)

³⁰ *Ibid*, section 7

³¹ *Ibid*, section 8 (1)

prayer of the defendant and for good cause shown, fixes another date not beyond twenty-one days for the presentation of the written statement of his defence.³² When the written statement is filed, the Family Court fixes a date ordinarily of not more than thirty days for a pre-trial hearing of the suit.³³ On the date fixed for pre-trial hearing, the Court examines the plaint, the written statement and documents filed by the parties and also, if it so deems fit, hear the parties.³⁴ At the pre-trial hearing, the Court ascertains the points at issue between the parties and attempt to affect a compromise or reconciliation between them.³⁵ The Court may hold the proceedings in camera.³⁶ On the application of both disputants it is bound to conduct the proceedings in camera.³⁷ The Presiding Judge, in this regard, usually meets the opponents in his chamber. Judge may attend several sessions if parties are not able to attain a settlement in a single session. Lawyers may or may not be allowed to stay, however in most cases, the FC Judges do not allow lawyers to stay in the ADR proceedings.³⁸ If parties fail to settle through ADR, the Court resumes and the same Presiding Judge can settle the dispute following the usual trial procedure. In the usual trial procedure, the Court frames the issues in the suit and fixes a date ordinarily of not more than thirty days for recording evidence.³⁹

7.2 Compromise or Reconciliation in Post-Trial/ Pre-judgment Proceedings

If a Pre-trial ADR proceedings fails, another option is given to the parties after completing the trial procedure and before pronouncing judgment. In accordance with section 13(1) of the FCO, after the closing of all evidence of all parties, the FC makes another effort to affect a compromise or reconciliation. If such compromise or reconciliation is not possible, the Court shall pronounce judgment.

³² *Ibid*, Proviso of section 8(1)

³³ *Ibid*, section 10(1)

³⁴ *Ibid*, section 10(2)

³⁵ *Ibid*, section 10(3)

³⁶ *Ibid*, section 11(1)

³⁷ *Ibid*, section 11(2)

³⁸ See, [https:// www.lawyersnjurists.com/article/family-courts-in-bangladesh/](https://www.lawyersnjurists.com/article/family-courts-in-bangladesh/) last accessed on 01-03-2023

³⁹ *Ibid*, section 10(4)

7.3 ADR in Post-Judgment Proceedings

The provision of Post-Judgment Arbitration is incorporated in section 23(2)(3) of the FCO. Pursuant to the section, if a decree on dissolution of marriage of a Muslim is passed, the Judge shall send it to the Chairman or Mayor of concerned Union Council or Municipality as a notice of divorce to take the initiative under section 7 of the MFLO.⁴⁰ Upon such notice the concerned Chairman or Mayor shall proceed as if he had receipt an intimation of talak (divorce) and constitutes an Arbitration Council and take further initiatives to give effect of the decree. The decree will not be effective until the expiration of ninety days from the date of notice received. The decree will have no effect if within ninety days a reconciliation has been effected between the parties.⁴¹

7.4 Result of Conciliation

7.4.1 Compromise Decree: Where a dispute is settled by compromise or conciliation, the court shall pass a decree or give a decision in the suit in terms of the compromise or conciliation agreed to between the parties.⁴²

7.4.2 No Appeal: Though section 17(2) of the FCO not explicitly mentioned that the compromise decree are not appealable⁴³ but reading altogether, from the words and expressions of section 2(2) of the FCO, section 96(3) and 89A(12) of the Code of Civil Procedure, 1908, it can be interpreted that the scope of section 17 are not applicable to the decree passed under section 14 of the FCO as they have mutually agreed on it.⁴⁴

8. Family Suits: Scenario under FCO

In family disputes ADR method works effectively to dispense justice through FC. An empirical study was conducted to make this decision. For an empirical study data were collected from court registries of three FC of Dhaka district i.

⁴⁰ For detail see section 7 of the *Muslim Family Laws Ordinance*, 1961

⁴¹ *The Family Courts Ordinance*, 1985, Section 23(1), 23(2), 23(3) respectively

⁴² *Ibid*, section 14

⁴³ *Ibid*, section 17 mentions the provision of Appeal and section 17 (2) states the exceptions for filing an appeal in a Family Court

⁴⁴ Dr. A.B.M. Mahmudul Haque, *Alternative Dispute Resolution in Bangladesh: Challenges and Prospect* (Dhaka: Law Book Company, 2015) 155

e. 2nd, 3rd and 5th courts in July 2020 for the years from 2015-2019.⁴⁵ Data were collected to compare the disposal rate and the outcomes attained through mediation with that of litigation. Here the data are presented in a tabular form.

Table: 1 Disposal in all Three Family Courts, Dhaka 2015-2019⁴⁶

Family Court	Year	Disposal by Trial	Disposal by Mediation	Total Disposal of Family Cases
2 nd Court	2015	227.0	816.0	1043.0
	2016	356.0	838.0	1194.0
	2017	363.0	850.0	1213.0
	2018	336.0	789.0	1125.0
	2019	244.0	902.0	1146.0
	Average	305.2	839.0	1144.2
3 rd Court	2015	392.0	587.0	970.0
	2016	291.0	550.0	841.0
	2017	319.0	550.0	869.0
	2018	171.0	466.0	637.0
	2019	587.0	1140.0	1727.0
	Average	352.0	658.6	1008.8
5 th Court	2015	305.0	569.0	874.0
	2016	253.0	529.0	872.0
	2017	243.0	568.0	811.0
	2018	105.0	434.0	539.0
	2019	385.0	923.0	1308.0
	Average	604.6.0	880.8.0	880.8
All 3 Courts	2015	924.0	1972.0	2887.0
	2016	900.0	1917.0	2907.0
	2017	925.0	1968.0	2893.0
	2018	612.0	1689.0	2301.0
	2019	1216.0	2965.0	4181.0
	Average	915.4 (30.2%)	2102.2 (69.3%)	3033.8 (100.0%)

⁴⁵ Due to Corona pandemic, mentionable data were not available for the year 2020 and 2021 during the study

⁴⁶ Information has taken from the research article by Jamila A. Chowdhury and Ifat Mubina Eusuf, *ibid*, 78

The above table shows that the rate of disposed mediation by FC is higher than disposed by trial for the year 2015-2019. This is not the total scenario of Bangladesh and scenario is not same also.

In the parliament, the Law Minister of Bangladesh Anisul Huq publicized the statistical data about highest pending cases under FC in Bangladesh where it demonstrate that total 59,860 cases reported pending Bangladesh. Dhaka district is in high position regarding this.⁴⁷

Here at a glance top five district are mentioned where the number of pending cases is comparatively high:

Table: 2 Top Most Pending Cases in FC

District	Pending Cases
Dhaka	5509
Chattagram	4643
Mymensingh	2165
Rajshahi	1996
Bagura	1898

The preceding statement ultimately shows the delicate situation of the FCs in ensuring justice both in traditional way as well as in alternative way which lead a lack of public trust and confidence on it and result an adversarial relation rather harmonious co-operation between the disputants. Advocates interviewed during this study blamed the parties not to agree to attain mediation, parties whose cases pending in FC blamed their pleaders not to inform them about conciliation session. Sometimes Judges of the FC are not informed or invite the parties to mediation as the parties claimed during study. The Judges interviewed opined that after passing the provision of establishment of Legal Aid Office under a Legal Aid Officer (LAO)⁴⁸ in every district, they refer the matter to the LAO to mediate. In some cases where

⁴⁷ See, <https://www.thedailystar.net/country/news/more-3582-lakh-cases-now-pending-law-minister-bangladesh-1758820> Accessed on 18 June 2019

⁴⁸ The Legal Aid Act-2000, Section 21A

mediation possible but not conducting, results the notion of ADR very frustrated.⁴⁹

Case No-1 (A Suit for Dower and Maintenance):⁵⁰

Nahar (22) from Dhaka Sadar having a child, filed a case in early 2016 before the FC of Dhaka complaining that her husband Hasan (27) is not providing her dower and maintenance. The summary of the fact is that they got married on 21-06-2013. After a few days of marriage, her husband and mother-in-law both started demanding dowry and torturing regularly for that, physically and mentally. Nahar's family provided money several times, thinking for the betterment of their daughter (as stated in the plaint) but they didn't stop. In the meantime, they are blessed with a son in 16-07-2014. But Hasan got married again and the level of torture increased more and more and Nahar got divorced in 22-07-2015. After that, she demanded her unpaid dower TK. 400000/- that was fix during marriage ceremony TK. 700000/- and past maintenance TK. 15000/- for each month, for 23 months before divorce and for 3 months for Iddat period after divorce and maintenance for her son demanding TK. 10000/- monthly from July 2014. During study, litigant opined that they were never asked to attain in any mediation process by their pleaders. They never appeared before the Judges of their suit as directed by their pleader that they need not to appear. Pleadors are taking their fees and telling that 'come next date, the other party not appeared today'. Again they are charging money and stated the same in the name of 'time-petition'. Both the parties of the suit are very frustrated with the lengthy procedure they facing, not being able to understand the extra formal court proceeding but now both want a peaceful settlement of the fact.

Case No-2 (A Suit for Restitution for Conjugal Life):⁵¹

Mala Khatun (fictitious name) (23) from Chuadanga Sadar, filed a case on restitution of conjugal life before the FC of Chuadanga Assistant Judge Court, came before the LAO with an application for the out of court settlement of the

⁴⁹ Armin Khatun, "Access to Justice for Indigent People and the Laws on Legal Aid in Bangladesh" (PhD Diss., Department of Law, Islamic University, Kushtia, Bangladesh, March, 2020) P. 154

⁵⁰ Observed and interviewed on 03-02-2022 at 11:30 am before a third party pleader advising them to go to the District Legal Aid Office (DLAO), Dhaka

⁵¹ Observed on 01-02-2022 at the DLAO, Chuadanga at 12:00 pm

issue of restitution of her conjugal life or compensation. She demanded that Md. Harun married him, received money from her family for job purpose but now refusing to recognize her as wife. Harun (31) demands that he never married Mala, but, yes, he lent money from her family, he is a victim of the conspiracy done (false Kabinnama, documents etc.) by Mala's family. Mala is now demanding that if Harun takes her to his home, continues happy married life that will be very fine otherwise he need to pay compensation. Harun is agree to pay the money he borrowed, not more, but demands that before paying the money, Mala have to withdraw the pending suit before the Court. The LAO provided necessary advice to them, enlisted the problem at the registry and ordered to serve a notice to the witnesses to appear before the LAO within 7 days from the notice served to take attempt to mediate the case.

9. Finding and Remarks

The journey of Court annexed ADR was started with the enactment of the FCO, 1985. FCs in this case witnessed tremendous success in resolving family disputes but it is facing some problems and challenges too. The lacunas and the recommendations on such gaps are discussed under the following heading:

- i. **ADR at Pre-Litigation Stage by LAO:** Under the CPC, Court can refer all the civil suits to the LAO to mediate.⁵² Though the cases of the FC are civil in nature but as FCO governs by a special law, it need to amend to empower the LAO to arrange settlement conference or mediate on the referred cases. Without any binding force, a mediation agreement conducted by the LAO would not be effective. It results to bring back the parties to the court again. A successful mediation agreement conducted by the LAO should get the status of a decree under section 14 of FCO and should be executed as per further proceeding. The Act and the Rules should amend without any delay in this regard. It will be helpful to reduce the backlog of cases and stop further sufferings of the parties.
- ii. **'Compromise' or 'Reconciliation' are not defined:** The term 'mediation' as a form of ADR is defined under CPC⁵³ but ADR provisions inserted in the FCO in terms of 'compromise' or 'reconciliation' has not defined in the FCO. Sometimes the term 'compromise' is used to refer the

⁵² *The Code of Civil Procedure, Section 89A(1)*

⁵³ *Ibid*, Explanation- 1

same meaning of mediation. Conciliation is similar to mediation but the neutral third party *i.e.*, conciliator takes a more interventionist role in bringing the two parties together.⁵⁴ In practice, the function of FC in this regard refers like mediation which is facilitative where the parties made the outcomes. So it may define compromise as mediation which requires to be defined clearly. Another point is that, the law though authorizes conciliation but no conciliation has been practiced in FC and no third party conciliator can make the outcome. Therefore, it is required to address the two terms and apply both the principles of mediation and conciliation in family disputes.

- iii. **Mandatory Provision of ADR and Consequences Regarding the Non-Appearance of the Parties:** The FCO nowhere binds the FC to conduct compromise or conciliation rather gives an option to attempt for compromise or conciliation. In ADR proceeding, mandatory ADR process means participation of the parties are mandatory. Hence a mandatory provision to conduct the ADR proceedings may be incorporated by amending the law unlike CPC. Moreover, no consequences regarding the non-appearance of the parties in the proceeding are mentioned in the statute that is a crying need to attain the very object of incorporating the provisions of ADR under FCO, 1985.
- iv. **Time Limit to Conduct ADR:** As mentioned above the FCO prescribes a time limit for the commencement of a pre-trial proceeding but the law does not provide any time limit within which a compromise or conciliation should conduct. A compromise proceeding can be possible to conduct within a very short period of time like in one month or several weeks or even couple of days. CPC allows maximum ninety days to conduct mediation. Compromise or conciliation can also be possible to complete within a very short duration and that is required for a timely resolution.
- v. **Continuation by the Same Judge Mediated as there is No Panel of Mediators:** Under the Ordinance, the trial judges of the FC performed as conciliators and himself conducts the ADR proceedings. There is no provision for panel of mediators, conciliators or lawyers to act as mediator or conciliator in FC as like the provision of CPC. Even when a compromise or conciliation attempt fails; the same Judge continues the

⁵⁴ *Supra* note 14 at 53

trial of a suit. Majority of the lawyers and litigants interviewed opined that a provision of 'panel mediators' should incorporate by amending the law where the representation of lawyers, third party pleaders and parties choices will be reflected. They also opined that the same judge should not continue the same case because if the same Judge continues after the failure of a compromise or conciliation effort, then there is a possibility that the judgment may be influenced. The continuity of the trial by the same Judge may be revised in this regard.

vi. Absence of Mediation Provision at Appellate Stage: The Ordinance mainly approves ADR proceedings in two different stages of a suit *i.e.*, in Pre-Trial and another in Post-Trial stage but it does not have any provision of practicing ADR at the stage of appeal. Thus, ADR at the stage of appeal may be inserted in the Ordinance as like the provision of appeal under section 89C of the CPC⁵⁵ and such inclusion can extend the scope to settle family dispute and the litigant will get more support from the Court.

vii. Absence of Judicial Review and Reporting to the Higher Officials: After settling the issue by compromise agreement, the FCO directs to follow the next procedure. There may any threat, coercion, force, imbalance exists during the mediation process but there is no provision of judicial review after the finalization of conciliation agreement. In absence of judicial review, the strong and powerful opponent may take undue advantages over weak and poor parties during the period of conducting mediation. Also mistakes of law and mistakes of fact may happen. So the provision should be amended by including the provision of judicial review. Besides this, there is no provision of reporting system to the higher authority of the Presiding Judge is allowed in the law. It would pursue a successful compromise or conciliation if it would conduct under the proper supervision of the concerned higher authority. Consequently, the Presiding Judge may be alarmed more to give his full effort for compromise or conciliation rather the traditional litigation.

⁵⁵ Section 89C of CPC states: '(1) An appellate Court shall mediate in an appeal or refer the appeal for mediation in order to settle the dispute or disputes in that appeal, if the appeal is an appeal from original decree under Order XLI, and is between the same parties who contested in the original suit or the parties who have been substituted for the original contesting parties. (2) In mediation under sub-section (1), the provisions of section 89A shall be followed with necessary changes (*mutatis mutandis*) as may be expedient.' For more detail, see section 89A of the CPC

- viii. Provision for Revision:** The Court can pass an order or decree after receiving compromise or conciliation between the parties. No single provision is included revision provision to ensure that both the parties understand the terms of the agreement and its probable outcomes. An explicit provision of revision on the decision would make the Judges more transparent and responsible in the process. Thus, an explicit provision of judicial revision would be inserted in the law.
- ix. Separate Family Court:** It has been enunciated in the Ordinance to form separate FCs but few Family Courts have been established e.g., in Dhaka, Chattagram, Khulna District Courts in Bangladesh. Assistant Judges Courts are overburdened with so many judicial dispositions as they have to try all civil suits and family matters within its jurisdiction. As presented earlier, multiplicity of the family suits becomes one of the most burning problem for the administration of justice system of Bangladesh. Judges-litigants ratio is also alarmingly frustrating.⁵⁶ Judges, lawyers and litigants opined during study that there is a lack of proper environment at the FC. Moreover, there is no available separate FC room in every district. By establishing a well-equipped separate FC in every judgeship these problem can be cured.
- x. Skilled and Experienced Judicial Officer:** In case of conducting ADR a Judge of the FC requires to be skilled enough with motivational power as the family disputes is very much sensitive and personal in nature. The Judge of the FC being an Assistant Judge, the junior most Judge of the sub-ordinate civil judiciary, often fails to play the actual role in compromise or conciliation due to lack of experience. So, a pre-condition for the appointment of a Family Court Judge should be added in the law. In India, a person shall not be qualified for appointment as a Judge of a FC unless he has for at least seven years' experience as judicial officer or the office of a member of a Tribunal or any post under the Union or a State requiring special knowledge of law.⁵⁷ Similar kind of provisions may be incorporated into the FCO, 1985.

⁵⁶ See, <https://doj.gov.in/sites/default/files/Judicial-manpower.pdf>, "Judges-Population ratio stands at about 18 judges per one million of the population." Accessed on 24 February 2022

⁵⁷ *The Family Courts Act 1984 of India*, section 4(3)(a)

- xi. Women Judge:** Women are the party of every Family Suit, where most of the time it includes children. It is found during study that women members as a party in a family disputes mostly depends on the decisions of the male family members and don't want to present before the FC physically. As they not presented, they can't express and share their opinion about the remedy they desire. Most of them endure hesitation to expose something towards the male Judge in the time of conducting compromise or conciliation. It is observed that witnesses of the cases are absent frequently, among them female witnesses are in a notable number. As a result sometime the attempt of compromise or conciliation becomes negative. So the system of appointment of Judge in the FC is required to be reformed where a provision can be incorporated that only the woman Judge can conduct the compromise or conciliation process. In Punjab, the province of Pakistan, at least one FC in each District is presided over by a woman Judge.⁵⁸ Similar kind of provisions may be incorporated in Bangladeshi law especially in case of conducting compromise or conciliation.
- xii. Role of Lawyers for Restorative Justice Procedure:** The lawyers' role is crucial in establishing the rule of law in the society.⁵⁹ The adversarial nature of the court proceedings makes lawyers an indispensable part of the legal proceedings in Bangladesh.⁶⁰ Lawyers should not be more interested in money-making commercially but to represent the parties to establish their right. As remarkably, process of disposal of civil suits are inherently time consuming. Lawyers' cooperative intention is much more necessary in this regard. The tendency of submitting time-petition should not be practiced regularly and frequently. The expert lawyer on family laws is not available in our country. Lawyers should get expertize on family matters/issues and laws. It is observed during study that most of the lawyers are not interested and don't want to solve the issue in the suit by alternative way. Bangladesh Bar Council, as the key institution for issuing license to lawyers and monitoring authority, have much more to be done

⁵⁸ *The Family Courts Act, 1964*, section 3(1)

⁵⁹ Dr. Farzana Akter, Ensuring Access to Justice for the Poor: The Need to Establish Organized Pro Bono in Bangladesh, *The Dhaka University Studies*, Part- F, Vol. 28 (2017) 71

⁶⁰ *Ibid*, 68

towards justice seekers. Though there is no express specific provisions in the Bar Council Rules⁶¹ and the Canons of Professional Conduct and Etiquette for Advocates⁶², Bangladesh Bar Council can play an active role to obligate lawyers to work for the betterment of justice seeker whatever be their fees and facilities. Judicial compromise or conciliation in FC does not recognize involving the engaged pleader as mediator or conciliator. As a result pleaders often discourage their party to resolve the dispute alternatively. During study, it is found that pleaders even not informing the parties that they have to attain the mediation process. Undue aggravation in certain cases also reported. Judges opined that lawyers have to be more where devoted, dedicated and pro people. The law can be amended to engage pleaders in a mediation process, the state can evaluate them for their service by offering handsome and reasonable fees or other ways. The pleaders who inspire their parties to compromise or conciliate their dispute should be honored by award in every Bar Association. Therefore, lawyers need to be sensitized enough and be more *pro bono* especially in ADR proceedings as a means of restorative justice procedure.

- xiii. Economic Reform for the Lawyers:** There is no state oriented economic structure for the advocates. Only Government Pleaders and Public Prosecutors gets a certain amount of fees fix by the government. All other advocates don't enjoys such kind of opportunity. They need to depend on their clients' payment as per situation of the case or litigation. All the lawyers interviewed strongly opined that Economic reform is needed for the lawyers to practice the philosophy of ADR. The government may form a 'commission' or 'committee' for deciding their payment or honorarium.
- xiv. Proper Training for Service Providers:** Being the most junior one of the sub-ordinate judiciary the FC Judges are not well trained on counseling and conciliation. The Judges opined during study that proper knowledge and training of the FC Judges relating ADR should be a pre requisite to hold the post. Mere seven or eight days long part-time training is not enough in this regard. At least six months full-time training is required to be prepared well. Lawyers also opined the same. For successful compromise or conciliation results, it is necessary to provide proper

⁶¹ President's Order No. 46 of 1972

⁶² Amended up to 2013, Chapter II

training on Personal Laws, necessary skills on counseling and conciliation to the FC Judges. Training workshops, seminar, symposium need to organize for judges as well as lawyers. Motivational skill development and other capacity building training for lawyers should be organized jointly by the Judgeship and the Bar Council and Bar Association. Besides these, training on professional ethics and morality for the lawyers should be introduced, continued and monitored regularly.

xv. Effective Monitoring and Follow-up Mechanism: FC, being a special court, need to be more pro-people and develop a proper monitoring and follow-up program on the cases it resolves. Resolving a family dispute through conciliation can contribute to re-build a relation between the parties which may lead a happy family. Court can appoint one or more officials who could monitor and follow up the facts as well as parties to the disputes and will report to the Court for a certain period. A separate register can be maintained for that. Judges resolving family dispute through conciliation should be honored and treated specially like providing extra special increment with salary, annual reward, national award, speedy promotion etc. Advocates presenting the cases before the court would also bring under the monitoring mechanism. Among them who are doing *pro bono*, informing the parties about conciliation and represent properly should get honorarium from government, also reward and award. It also need to monitor that whether they are representing the party properly or not by following professional code of conduct, harassing the justice seeker in the name of time petition or by any other means. Bar Associations and Bar Council need to be more active in this regard. Pleaders who are not performing in a right way should bring under the punishment provision like cancellation of license, suspension etc. A full time duty counsel could be appointed at the FC.

xvi. Awareness and Legal Literacy: Door to door service is an ethical commitment of any welfare state.⁶³ Common people are not aware as well as familiar with the legal terminologies and the available provisions made for their benefit. Bangladesh is a country with mentionable literacy rate,⁶⁴

⁶³ *Supra* note 55 at 259

⁶⁴ according to the Bangladesh Bureau of Statistics (BBS) Report, 2019, the current literacy rate of Bangladesh is 73.9%

but here major portion is illiterate on the basis of basic legal education, so not aware of their rights. State should include basic human rights and fundamental rights, primary family laws and protection, state legal aid service mechanism at school level curriculum. Legal literacy campaign should arrange at every schools and colleges gradually.

xvii. Enforcement of the New ‘Paribarik Adalat Ain, 2021’: By the annulment of the Constitution (Seventh Amendment) Act, 1986⁶⁵ the effectiveness of the current Ordinance has been abated. So that a draft law in this regard has been prepared named *Paribarik Adalat Ain, 2021* containing the same provisions of ADR as prescribed in the Ordinance in its different sections which is yet to publish. Therefore, to give effect the constitutional mandate the new law should be introduced as early as possible by government official gazette.

10. Conclusion

A dispute may arise in a family regarding maintenance, guardianship etc. but quick and speedy disposal of such dispute is deserved by all the social community. When such disputes comes before FC, the FC need to be act more pro people to solve the issue without any delay. Judges of the FC being the mediator or conciliator can contribute for fair outcomes particularly where the question of women and children are engaged.

Thus, FC has a great importance in Bangladesh, especially for woman. Due to some drawbacks in the FCO, the Courts are facing several difficulties in their legal and procedural application. The shortcomings mentioned in this study should be immediately removed to make the FC more effective. It is expected that the state would come forward as soon as possible, to bring the suggested amendments especially in regards with compromise or conciliation into reality in the law, to fulfill the hopes and aspirations of the people of Bangladesh.

Finally, experience and observation of the study demands that a common approach is much more essential to implement the recommendations and to make successful the ADR provision of FC which includes judges, pleaders, litigants, witnesses, civil society members, policy makers respectively.

⁶⁵ Act No. I of 1986.