

A Gentle Breeze on the Wheels of Fair Justice for Women in Bangladesh: An Empirical Evaluation of Family Courts' Mediation Underpinning Rawls' Theory of Justice

Dr. Jamila A. Chowdhury* and Ifat Mubina Eusuf**

1. Introduction

In contemporary literature, it is often applauded that increased practice of mediation is improving access to justice for the disadvantaged or poor by shrinking their 'social exclusion' to access to justice. In its narrower sense, access to justice means access to the formal adjudicative process in the court system or access to litigation¹. Therefore, the doctrine of 'social exclusion' echoes 'limited access to the full range of social citizenship rights, which precludes the poor from exercise of such rights' from the formal adjudicative process². In its broader sense, however, access to justice includes justice delivered to 'all', especially the poor, through both formal adjudicative and informal non-adjudicative process³. Hence, in its broader sense, the increased practice of mediation has potentials to improve access to justice for the disadvantaged, especially for the poor women in Bangladesh. Family mediation in Bangladesh is often acclaimed for providing low-cost, quick access to justice for poor women who would otherwise be deprived of a mechanism to resolve their post-separation disputes. It has been contended that 'the caravan of judicial justice provides first-class seats and that of mediation justice only economy class'.⁴

Further, it is also argued by scholars in Western liberal democracies that because of power disparities and family violence, even women from well-off families may lack the ability to negotiate effectively during mediation and therefore may fail to attain fair outcomes. Thus, mere boosting up the accessibility of justice through mediation does not necessarily ensure that mediated outcomes are fair and equitable.

Consequently, to substantiate the validity or invalidity of this claim, the present paper firstly operationalized the notion of 'fair' justice. Then the next part introduced some significant issues, including the procedural and distributive variation of fairness and their relative importance in providing justice. This part further elaborated how

* Professor, Department of Law, University of Dhaka, Bangladesh.

** Joint-District Judge, District Court, Dhaka, Bangladesh.

¹ AG-AGD, *A strategic framework for access to justice in the federal civil justice system* (Australian-Government Attorney General's Department 2009).

² Hilary Sommerlad, 'Some Reflections on the Relationship between Citizenship, Access to Justice, and the Reform of Legal Aid' (2004) 31(3) *Journal of Law and Society* 345, 349.

³ Michael Zander and Hamlyn Trust, *The Hamlyn Lectures: The State of Justice*, (Sweet & Maxwell 2000); See also, AG-AGD (n 1).

⁴ Laurence Boulle, *Mediation: Principles, Process, Practice* (Butterworths 1996) 55.

legal provisions could be used as a benchmark in this process. While analyzing the fair justice criteria, the empirical data were collected from *all* three family courts of Dhaka for the last five years from 2015 to 2019.

By examining the empirical data on outcomes of family courts through trial vis-à-vis mediation, this paper indicated the volatility of mediated outcome over the last five years (2015-2019) in different family courts of Dhaka raised a concern on the fairness of justice through mediation. To emphasize the importance of this fairness issue, this paper allied with the procedural leverage by the mediator that poor and vulnerable women may get through the practice of normative evaluative mediation. If such practice is equally and effectively applicable in family courts in Bangladesh, the notion of the Constitutional mandate of positive discrimination will also be promoted. In the later part of this paper, a theoretical basis for providing procedural leverage through evaluative mediation in family courts are established under the *difference principle* or Rawls' second principle of justice.

Although Rawls' theory constitutes a core of the argument placed in this paper, it is not a widely used theory in the field of mediation. Hence, the context in family courts and its linkage with some operational criteria on the fairness of justice are discussed first to clarify the perspective, instead of perplexing the readers by introducing weighty theoretical issues ahead. After that, training on normative evaluative mediation and accreditation for mediators are suggested to institutionalize the fair mediation practices in Bangladesh in its conclusion.

2. Operationalizing the Criteria of 'Fair' Justice: Setting the Benchmark for Evaluation

Scholars have defined '*justice*' positively from two different viewpoints, i.e. '*availability*' and '*accessibility*'.⁵ Accessible justice should not only be speedy, '*but above all things, [it should be] cheap*' as well.⁶ Criteria for accessible justice are those which '*make justice easier to access, simpler to comprehend, quicker to deliver, and more certain*'.⁷ However, justice, in general, has another inherent normative meaning of being '*fair*'. Fairness is a criterion that does not discriminate between two persons based on their colour, sex, race, educational attainment, economic status or any other aspect of their life. Therefore, while operationalizing access to fair justice in the context of family mediation in Bangladesh, this paper perceived justice of two folds:

⁵ Hans Kelsen, *What is Justice?* (The Law book Exchange 2000).

⁶ Willard Estey, 'The Changing Role of the Kudiciary' (1985) 59 *Law Institute Journal*; 1076.

⁷ Roslyn Atkinson, 'Access to Justice: Rhetoric or Reality' (Australian Law Reform Agencies Conference, Wellington, April 2004) 6; See also, Wilfried Scharf(ed), *Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice System* (Penal Reform International, November 2000).

- **Firstly**, the positive view to ensure that people have '*physical access*' to the available justice delivery system,⁸ such as court, tribunal, or any other informal forums delivering justice; and
- **Secondly**, the normative view, to ensure that the '*justice delivery system*' (i.e. procedure) accessed by people is providing a fair justice⁹ for all. If the justice delivery system is not fair, mere physical access to court, tribunal, or any other justice mechanisms may not ensure access to '*quality*' justice.

Hence, there are two contesting views regarding the fairness of justice. While many scholars are concerned about '*procedural*' fairness or fairness in the grievance handling process¹⁰, others are concerned about the '*quality*' of the outcome¹¹. Those who support procedural fairness argue that fairness in grievance handling process leads to greater satisfaction of the aggrieved person and also a fair outcome. Nevertheless, supporters of the later view show their concerns that a fair process may not end up with a fair outcome¹². All these different views on access to fair justice have been categorically compiled by Lord Woolf¹³ in his '*General principles to access to justice*'. As advised by Lord Woolf, to ensure access to fair justice in a civil justice system, the system should be just in its outcome; it should be fair by ensuring that litigants have an equal opportunity regardless of their resources to assert or defend their legal rights. Under a 'fair' justice system, every litigant has an adequate opportunity to state his own case and answer to his opponent's. The system should deal with cases with reasonable speed and should be understandable to those who use it. It should provide as much certainty as the nature of the particular case allows and involves procedures and cost proportionate to the nature of the case.

The following sections will unfold and examine all these criteria of '*accessible*' and '*fair*' justice and then critically analyze the extent to access to fair justice for women through mediation under family courts of Bangladesh.

⁸ AG-AGD (n 1).

⁹ Boulle (n 4).

¹⁰ Jean Landis and Lynne Goodstein, 'When is Justice Fair? An Integrated Approach to the Outcome versus Procedure Debate' (1986) 11(4) *American Bar Foundation Research Journal* 675; Tom Tyler, 'What is Procedural Justice? Criteria used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 (1) *Law and Society Review* 103; Terry Carney, 'Client Assessment of Victoria's Guardianship and Administration Board' (1989) 15 (3&4) *Monash University Law Review* 229.

¹¹ Tom Beauchamp, 'Distributional Justice and the Difference Principle' in H Gene Blocker and Elizabeth Smith (eds), *John Rawls' Theory of Social Justice: An Introduction* (Ohio University Press 1980) 5; See also, Robert Buttram, Blair Sheppard and Robert Folger, 'Equity, Equality and Need: Three Faces of Social Justice' in Barbara Bunker and Jeffrey Rubin (eds), *Conflict, Cooperation, and Justice: Essays Inspired by the Work of Morton Deutsch* (Jossey-Bass 1995).

¹² Carrie Menkel-Meadow, 'Pursuing Settlement in Adversary Culture: A Tale of Innovation Co-opted or the Law of ADR' (1991) 19(1) *Florida State University Law Review* 1.

¹³ Harry Woolf, *Access to Justice Interim Report to the Lord Chancellor on the Civil Justice System* (Bernan Assoc 1995).

3. Measuring Access to ‘Fair’ Justice: Procedural Justice vs Distributive Justice

As mentioned above, scholars have a clear distinction when they come to the question of whether a dispute resolution system can ensure fair justice to its recipients. In many cases, scholars examine the fairness of a process or measure ‘*procedural justice*’ to comment on the overall fairness of justice.¹⁴ Other scholars emphasize ‘*distributive justice*’ because a fair process may not ensure fair outcomes, and participants of a dispute resolution process may not be happy with the outcome – even when they acknowledge positive aspects of the process.¹⁵ As explained later in this paper, justice is defined as the state of affairs when a ‘*person has been given what he [or she] is due or owed and therefore has been given what he [or she] deserves or can legitimately claim*’.¹⁶ Following this argument, this part will discuss the notions of procedural and distributive justice.

3.1 Procedural justice

As mentioned earlier, while determining the fairness of a legal system, many scholars have emphasized the procedural justice or fairness of the process through which a decision has been made. As observed by Tyler, four essential criteria that make a dispute resolution process fair are ‘*consistency, accuracy, bias suppression and representation*’.¹⁷ It is argued that a fair process leads to a fair outcome.¹⁸ Thibaut and Walker, for the first time, indicated two essential factors — ‘*process control*’ and ‘*decision control*’ — against which we may measure the fairness of a justice system.¹⁹ While ‘*decision control*’ means the ability of parties to influence the outcome of a dispute resolution process, ‘*process control*’ refers to the influence an individual has on the process through which a decision has been settled upon.²⁰ Scholars sometimes put more emphasis on participation (representation, as termed by Tyler) as the key to attaining a fair outcome and raising the voices of participants in the dispute resolution process.²¹ Other scholars, however, state that parties may not

¹⁴ Tyler (n 10); Carney (n 10).

¹⁵ Karen Cook and Karen Hegtvædt, ‘Distributive justice, equity, and equality’ (1983) 19 *Annual Review of Sociology* 217; See more, John Cooley, *Mediation Advocacy* (2ndedn, NITA 2002); See also, Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (2ndedn, LexisNexis Butterworths 2002).

¹⁶ Beauchamp (n 11).

¹⁷ Tyler (n 10) 105.

¹⁸ Landis and Goodstein (n 10); Tyler (n 10); Carney (n 10).

¹⁹ Thibaut and Walker, cited in Tyler (n 10) 104.

²⁰ Laura Klaming and Ivo Giesen, ‘Access to Justice: The Quality of the Procedure’ (2008) *TISCO Working Paper Series on Civil Law and Conflict Resolution Systems* 002/2008<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091105> accessed 10 September 2020.

²¹ John Konley and William O’Barr, *Just Words: Law, Language, and Power* (2ndedn, University of Chicago Press 2005).

be satisfied with the outcome attained, even when they admit that the dispute resolution process is fair.²²

3.2 *Distributive justice*

Distributive '*principles function to divide given collections of benefits and burdens to known individuals when there is such a collection to be divided*'.²³ The principles of distributive justice are usually evaluated under three competing criteria – equality, equity and need.²⁴ While under egalitarian theory, everyone should get an equal share from a common pool of goods or services distributed among all. According to equity theory, a distribution is made according to the effort a person made when compared with another. The socialist theory, on the other hand, emphasizes the need for an individual. It neither requires a distribution to be equal for all nor considers the contribution made by each person when compared with others.²⁵ As is discussed in the later part of this paper, outcomes attained through litigation can ensure all these three criteria of justice simultaneously. Therefore, in this paper the three terms: '*equality*', '*equity*' and '*need*' are not treated separately; rather all three criteria of distributive justice have been used simultaneously by using the more generic term '*fairness*'.

3.3 *Procedural justice vs Distributive justice: Are they equally important to ensure fair justice?*

As '*process is not all*'²⁶ and the fairness of process may not ensure the fairness of outcome always.²⁷ At the same time, distributive justice is equally essential based on equality, equity and need. Therefore, both procedural justice and distributive justice have been emphasized for measuring the fairness of mediated outcomes in this paper. While measuring distributive justice, the outcome attained through litigation is used as a benchmark for a fair outcome. The next section elaborates the rationale for taking legal provisions as normative benchmarks to measure the fairness in the mediated outcome.

3.4 *Law as a normative benchmark to evaluate distributive justice*

Standards set out in law are sometimes considered fair outcomes for a dispute resolution process as the law could be a combination of all three criteria of

²² Astor and Chinkin (n 15).

²³ Beauchamp (n 11) 134.

²⁴ Buttram, Sheppard and Folger (n 11) 261; Two other criteria used are: (1) according to societal contribution and (2) according to merit. See, Beauchamp (n 11) 134; See more, Nicholas Rescher, *Distributive Justice: Constructive Critique of the Utilitarian Theory of Distribution* (Bobbs-Merrill 1966).

²⁵ Beauchamp (n 11).

²⁶ Menkel-Meadow (n 12).

²⁷ *ibid* 220.

distributive justice — equality, equity and needs.²⁸ There may be errors in judgments, but their expected average outcome is considered to be fair.²⁹ Further, litigation is ‘a system which “knowingly struggles against inequalities”.’³⁰ Hence, when citizens respect and accept the probity of those who make laws and those who apply them because it struggles against inequalities, the law provides a benchmark outcome that is generally accepted as legitimate. The legitimacy of legal benchmarks is essential if we want to take it as a benchmark for the mediated outcome because all parties must accept a negotiated settlement as legitimate. Using the notions of Rawls’ theory of justice, the subsequent section 6.3 of this paper discusses how the family laws involving abstract rules and individuation can be considered as fair.

3.5 Evaluative mediation vs litigation: Which one may create better procedural leverage for the susceptible women?

The process of litigation is different from the process of conducting evaluative mediation. In the formal litigation process, a judge follows an equal procedure for all. On the other hand, an evaluative mediator tries to attain equitable mediated outcomes for disadvantaged who may not be able to continue their cases through litigation, due to financial constraints, lengthy litigation process, fear from the other party, little understanding of the litigation process and so on. Due to these constraints, the disadvantaged, especially women, may decide to drop out their cases. However, in optimal condition, the purpose of an evaluative mediator is to minimize the disparity between parties by setting and maintaining the ground rules that everyone has a fair chance to raise their voices and participate in the negotiation process. In other words, one should not overpower others through abusive language or dominant gesture. Evaluative mediators also have an opportunity to control the use of those social discourses in the mediation table that may disempower women or promote masculinity among husbands.

In Bangladesh, family court judges mandatorily try to reach an amicable solution between parties through mediation at pre-trial stage under section 10 of the *Family Courts Ordinance, 1985*. Therefore, when a family court judge-mediator practices evaluative mediation in his/her chamber, he/she has an opportunity to create some procedural leverage for the disadvantaged party. In Rawls’ theory of justice, as elaborated more later in section 6 of this paper, such practices of extra care have been

²⁸ John Griffiths, ‘The General Theory of Litigation: A First step’ (1983) 4(2) *Zeitschrift für Rechtssoziologie - The German Journal of Law and Society* 145; Maurits Barendrecht, José Mulder and Ivo Giesen, ‘How to Measure the Price and Quality of Access to Justice?’ (2006) *Social Science Research Network* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=949209> accessed 9 October 2019.

²⁹ John Rawls, *The Law of Peoples* (Harvard University Press 2002); See also, Barendrecht, Mulder and Giesen, *ibid*

³⁰ Astor and Chinkin (n 15) 74.

rationalized under the '*Difference principle*' or through the application of affirmative discrimination to vulnerable parties attending mediation as incorporated under Article 28(4) of the Constitution of Bangladesh.³¹ It is assumed that the widespread practice of evaluative mediation can minimize the gap between outcomes attained through mediation and litigation. The better practice of evaluative mediation may emancipate mediated outcomes from the extent of vulnerability faced by parties and make mediated outcomes more predictable, as in the case of trial. Therefore, by comparing the outcome attained through mediation and litigation, we can perceive the quality of evaluative mediation practised in family courts of Bangladesh.

4. Collection of Empirical Data: Some Methodological Issues

Empirical data were collected from court registries of three family courts of Dhaka district (i.e. 2nd, 3rd and 5th courts) to compare the disposal rate and the outcomes attained through mediation with that of litigation. Aggregate data on the total number of disputes resolved through litigation and mediation was collected from respective court registries. Court registry data was explored further to calculate the total amount of decree granted each year, respectively, for all cases resolved through litigation and mediation. All these aggregate data was collected from each of the three family courts for five years from 2015 to 2019. For better triangulation, data from a set of individual case files of both litigation and mediation were also collected in the three family courts of Dhaka for a period of five years from 2015 to 2019.

The post-separation entitlements are measured by the amount that women are entitled to receive in compliance with the court decrees under mediation or litigation. It is pertinent to remind here that in the family courts of Bangladesh when the parties sign a mediated agreement, the judge-mediator attest the agreement as a compromise decree. Like other contested decrees, compromise decrees are equally enforceable by the courts. However, no further appeal is granted when parties resolve their dispute under a compromise decree³². Since individual case files were not recorded digitally, it was not feasible to get a holistic comparison between the outcome of litigation and mediation. Thus, sixty case files from three courts (twenty from each court) were chosen under the limited functionality of the courts during the COVID-19 pandemic. These files were selected from the already resolved cases during the last five years (2015-2019). The required information from the individual case-files were collected

³¹ Article 28(4) of the Constitution of the Peoples' Republic of Bangladesh [hereinafter The Constitution of Bangladesh 1972] provides that '*Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement or for any backward section of citizen.*

³² Jamila A. Chowdhury, *ADR Theories and Practices: A Glimpse on Access to Justice and ADR in Bangladesh* (London College of Legal Studies (South) 2013).

in July 2020, when the countrywide lock-down was trimmed down due to COVID-19 crisis. Otherwise, the number of individual case files could be even higher.

Although several issues, including dower, past and post-divorce maintenance of wife, child maintenance, and child custody are resolved through family courts only the financial aspects of the decrees, which are only stipulated explicitly in the *Kabinnama* (i.e. Contract of marriage) are considered in this paper to compare between the compromise decrees and the contested decrees. Since financial and non-financial obligations are separately defined in family courts, such partial analysis based only on the financial outcomes will not overawe the quality of fairness established under this paper. Further, dower consists of a lion share in family court decrees attained either through litigation or mediation. Therefore, while comparing financial outcomes between cases resolved through mediation and litigation, the rate of resolution and realization of dower money is shown as two different fairness criteria in this paper.

5. Women's Access to Fair Justice in Family Courts: A Premise for the Proposition of this Paper

Contemporary literature on mediation around the globe has acclaimed mediation on the ground of its better accessibility in terms of the litigation. In an earlier study, the time to resolution for court-connected mediation was observed as one of the significant advantages that may persuade parties to choose mediation instead of a formal trial to resolve their disputes³³. Delay in litigation:

[h]as reached a point where it has become a factor of injustice, a violation of human rights. Praying for justice, the parties become part of a long protracted and torturing process, not knowing when it will end.³⁴

In contrary, when the mediation process started to gain its outcome, and the backlog of cases in the formal courts set to alleviate gradually, the Former Chief Justice KM Hasan applauded the success of mediation as follows:

Within this short period [since the introduction of mediation from June 2000 up to May 2001], the mediation course embraced an unexpected and commendable success. The average rate of substantive disposal by mediation has come up to 60 [per cent] in comparisons with contested decrees.

³³ Mustafa Kamal, 'Introducing ADR in Bangladesh: Practical Model' (Alternative dispute resolution conference In quest of a new dimension in civil justice system in Bangladesh, Dhaka, October 2002); See also, Begum A. Siddiqua, *The Family Courts of Bangladesh: An appraisal of Rajshahi Sadar Family Court and the Gender Issues* (Bangladesh Freedom Federation 2005); See more, Jamila A. Chowdhury, *Women's Access to Justice in Bangladesh through ADR in Family Disputes: Lessons from Egypt* (Modern Book Shop 2005).

³⁴ Shah Alam, 'A Possible way out of backlog in our judiciary', *The Daily Star* (Dhaka, 16 April 2000). See also, Jamila A. Chowdhury, *Gender Power and Mediation: Evaluative Mediation to Challenge the Power of Social Discourses* (Cambridge Scholars Publishing 2012).

Highlighting the improved realization of money through mediation, as further stated by CJ Hasan³⁵:

Statistics show that the total realization of money, through execution of the decree in suits disposed of, by litigation], is far below the total realization of money in disputes settled through mediation. From 1985 to 2000, the total money realized in connection with family courts cases of the three courts is Tk. 6,199,759.5. In contrast, the total realization through mediation since the introduction of mediation in the same courts from June 2000 up to May 2001, i.e. in twelve months is Tk. 50,94,501.

While discussing the fairness of justice attained through mediation, it has been argued by scholars in Western democratic countries that, because of many factors, including gender role ideology, and power disparities, family violence, women may lack the ability to bargain effectively during mediation, and therefore may fail to attain fair outcomes through mediation.³⁶ In this paper, however, it is demonstrated that in Bangladesh, the type of mediation practised is evaluative in nature, and conducted under the shadow of the 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.

Thus, when a mediator makes evaluative mediation (i.e. evaluations under the shadow of the law), the best outcome that parties can expect from mediation is the fair outcome that other claimants under similar contexts may expect to get through litigation. Further, women can participate in the mediation process and can understand the process³⁷. Therefore, at the inception of the paper, it is not striving to assume that practice of evaluative mediation in Bangladesh not only ensures better access to justice, quick resolution of disputes and greater realization of decree money in a shorter period when compared to litigation but also has a potential to ensure fair outcomes for women.

To validate the claim (i.e. whether normative evaluative mediation is providing fair outcomes), Rawls' theory of justice is applied in this paper to compare outcomes obtained through family mediation and those obtained through litigation, taking the

³⁵ Justice Hasan, 'Alternative Dispute Resolution' in Wali-ur-Rahman and Mohammad Shahabuddin (eds), *Judicial Training in the New Millennium: An Anatomy of BILLA Judicial Training with Difference* (Bangladesh Institute of Law and International Affairs 2005) 123-36.

³⁶ Diane Neumann, 'How Mediation can Effectively Address the Male-Female Power Imbalance in Divorce' (1992) 9(3) *Mediation Quarterly* 227; See also, Carol Watson, 'Gender Versus Power as a Predictor of Negotiation Behaviour and Outcomes' (1994) 10(2) *Negotiation Journal* 117; Joan Kelly, 'Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention' (1995) 13(2) *Mediation Quarterly* 85; Kathy Mack, 'Alternative Dispute Resolution and Access to Justice for Women' (1995) 17(1) *Adelaide Law Review* 123; Rachael Field, 'Mediation and the Art of Power (im) Balancing' (1996) 12 *Queensland University Technology Law Journal* 264.

³⁷ Jamila A. Chowdhury, *Mediation to Enhance Gender Justice in Bangladesh: Navigating Wisdom in Asia and the Pacific* (London College of Legal Studies (South) 2018).

outcomes of litigation as a benchmark for this purpose. As the outcomes attained through litigation follow the fair benchmarks of law, outcomes achieved through litigation will be used as the benchmarks of fairness to evaluate the mediated outcome under similar contexts. However, outcome attained through mediation usually varies from the outcome attained through litigation, under similar contexts. As observed by Mnookin and Kornhauser,³⁸ though parties to mediation keep the legal standard in mind while making negotiated agreements under the presence of a mediator, they may tailor the standard outcomes according to their own needs and interests. As explained further in the later part of this paper, fulfilling such needs and interests can also be considered as fair.³⁹ Taking the outcomes mentioned in the law as a benchmark for distributive justice are justified as long as they do not worsen the situation of the least advantaged taking the notion of 'equality'. However, movements away from equality are justified only if they benefit the least advantaged.⁴⁰ Therefore, it may be desirable that mediated outcomes differ from the expected outcomes attained through litigation as the former is motivated by the notion of 'equity'. In contrast, the notion of 'equality' drives the latter. Further, as stated earlier, the Constitution of Bangladesh has granted the possibility to make affirmative discrimination to the vulnerable section of our society.

As discussed, the deviation of mediated outcome from their legal standards may be desirable by vulnerable women who need immediate cash after divorce. Further, the provision of affirmative discrimination in the Constitution has granted us a legal mandate to practice such discrimination for the greater interest of women, and other vulnerable section of the society. Nevertheless, how may we consider mediated outcomes fair for women who could attain even better outcomes through litigation?

In her earlier research⁴¹, Chowdhury demonstrated that even if the amount of decree attained by women through mediation remains less than the amount of decree attained through litigation, the net financial gain through mediation may remain equitable and fair. For instance, in case of mediation, a part of the decree amount is usually paid by parties as lump-sum payments and the remaining in a few other monthly instalments. However, in most of the cases, decree attained through

³⁸ Robert Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The case of Divorce' (1979) 88(5) *Yale Law Journal* 950.

³⁹ Morton Deutsch, 'Equity, Equality, and Need: What Determines Which Value will be used as the Basis of Distributive Justice?' (1975) 31(3) *Journal of Social Issues* 137; See also, Morton Deutsch, *Distributive justice: A Social-psychological Perspective* (Yale University Press 1997); Elizabeth Mannix, Margaret Neale and Gregory Northcraft 'Equity, Equality or Need? The Effects of Organizational Culture and Resource Valence on Allocation Decisions' (1995) 63 *Organizational Behaviour and Human Decision Processes* 276.

⁴⁰ Hardy Jones, 'A Rawlsian Discussion of Discrimination' in H Gene Blocker and Elizabeth Smith (eds), *John Rawls' Theory of Social Justice: An introduction* (Ohio University Press 1980) 270.

⁴¹ Jamila A. Chowdhury, 'Women Access to Justice in Bangladesh: Is Family Mediation a Virtue or a Vice?' (PhD thesis, University of Sydney 2011).

litigation need to file execution suits that may take three or more years on average. During these three or more years, women have to bear lawyers' fee and other costs for attending courts.

Women who settle through mediation are free from such extra expenses. As discussed, this comparison of outcomes from mediation and litigation used the primary data collected for this paper from three different family court registries in Dhaka, Bangladesh. Due to its more concrete and quantitative nature of family disputes, distributive justice has been taken as the prime consideration in this paper for the evaluation of fairness in mediated outcomes in comparison with the outcome attained through litigation. However, as discussed earlier, the notion of 'fair' justice is linked with both procedural justice and distributive justice. Therefore, while conducting normative evaluative mediation under the shadow of the law, judge-mediators in family courts have opportunity to provide some extra procedural care to vulnerable women making them more comfortable to negotiate with their husbands, reducing the possibility of a power play by creating some ground rules of participation by both parties or superseding some gender-discriminatory dominant social discourses by gender-neutral legal discourses. Such procedural leverage cannot be applied by judges when women seek to attain their decree through litigation. Hence, judge-mediators in family courts have an opportunity to leverage better procedural fairness for vulnerable women that in turn, improves the distributive fairness of mediated outcomes in comparison with outcome attained through litigation.

As discussed later, under Rawls' theory of justice, such procedural leverage is ethically justified, though not equally applicable under the contemporary practice of mediation in all the family courts of Bangladesh. Analyzing family courts' data on resolution of cases and realization of decree money under mediation and litigation, this paper demonstrates the possibility that the procedural leverage under normative evaluative mediation may not be practised equally and effectively by all different family courts to make mediated outcomes fair and competitive for women.

6. Rawls' Theory of Justice: Evaluating Fair Outcome in Mediation using 'Difference Principle'

In this paper, Rawls' theory of justice is applied to examine fairness in mediated outcomes. Although in his 1958 paper, Rawls' confined his analysis of the theory of justice to the practices of society, the same theory of justice can also be used at the individual level. As observed by Rawls', *'The term "person" is to be construed variously depending on the contexts. On some occasions, it may also imply human individuals. However, sometimes it may also refer to nations, provinces, business firms, churches, teams, and so on'*.⁴²

⁴² John Rawls, *A theory of Justice* (Oxford University Press 1971) 193-94.

6.1 Rawls' first principle: Equality for all

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.⁴³ For instance, the right to access to justice has been emphasized in different articles of the Constitution of Bangladesh, which is the Supreme law of the land⁴⁴. Article 27 of the Constitution declares: “*All citizens are equal before law and are entitled to equal protection of law.*” Article 31 enumerates equal protection of the law as an inalienable right of every citizen of Bangladesh by stating that, “*To enjoy the protection of the law, and to be treated in accordance with the law, and only in accordance with the law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh...*”. Though the term ‘access to justice’ is not categorically included in these articles, the essence of access to justice is incorporated with the terms ‘equal’ and ‘protection of the law’. Thus, while reading both articles together, it can be assumed that people’s right to access justice (protection of the law) is inalienable and equal, irrespective of the poor and rich. By placing these rights as fundamental (as enumerated in Part III of the Constitution) — the violation of which can be enforced by law — it can be assumed that the Constitution asserts a Constitutional ‘guarantee’ of these rights.⁴⁵ Article 26 of the Constitution reconfirms that any part of law made contrary to any fundamental right granted under the Constitution will be void from the commencement of the Constitution. The fundamental principles of state policy, as discussed under Part II of the Constitution also emphasize this issue. Though fundamental principles are not legally enforceable, these principles act as a guide to the interpretation of the Constitution and also carry as an ideological and promotional value for the government. As stated in the Constitution of Bangladesh⁴⁶:

[t]he principles set out in this part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens...

⁴³ *ibid* 250.

⁴⁴ The Constitution of Bangladesh 1972, art 7(2). Article 7(2) of the Constitution of Bangladesh provided that, “*This constitution, as the solemn expression of the will of the people, the Supreme law of the Republic and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.*”

⁴⁵ *ibid*, art 44(1). Article 44(1) provides that “*The right to move the High Court Division in accordance with clause (1) of Article 102, for the enforcement of the rights conferred by this part [Part III] is guaranteed*”. Again, Article 102 (1) states that “*The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution.*”

⁴⁶ *ibid*, art 8.2.

6.2 Rawls' second principle: Individuation and affirmative discrimination

The fundamental state policy under Article 11 of the Constitution states that “*The Republic shall be a democracy in which fundamental human rights and freedoms... shall be guaranteed...*”⁴⁷ As the right to access to justice is one of the fundamental human rights recognized in the *United Declaration of Human Rights, 1948*, protection of this right is also incorporated as a fundamental state policy. Therefore, when Articles 8(2), 11, 27 and 31 are read together, it establishes the notion that right to access to justice is constitutionally recognized as a fundamental right and also promoted to ensure this right by incorporating in it as a fundamental principle. Similarly, the *Second Principle* of Rawls' states that social and economic benefits are to be arranged so that they are both: (i) to the most effective use of the *least advantaged*, and (ii) attached to offices and positions open to all under conditions of fair equality of opportunity.⁴⁸

The two principles of Rawls' are concerned with the allocation of basic liberties and that of primary goods. The first principle is concerned with the distribution of basic liberties,⁴⁹ while the second one is concerned with the distribution of primary goods that create social and economic disparity. In his theory, the first principle considered by Rawls' is related mainly to the rights we usually consider as fundamental rights and human rights under different Constitutions and Conventions. Rawls' considered the distribution of the second set of goods, i.e. social and economic goods from a different perspective. He accepted a ‘*difference principle*’ to distribute these goods among its recipients based on their position as ‘*least advantaged*’ in the society. The difference principle of Rawls' theory of justice advocates the distribution of economic and social goods and services following the social theory of need. Unequal treatment among persons is justified *if such treatments enhance the utility of the most disadvantaged section of society*.

[T]he Difference Principle requires that the basic structure be arranged in such a way that any inequalities in prospects of obtaining the primary goods [or services] of wealth, income, power and authority must work to the greatest benefit of those persons who are the least advantaged with respect to these primary goods [or services].⁵⁰

⁴⁷ *ibid*, art 11.

⁴⁸ Rawls (n 42) 302-3.

⁴⁹ By the term basic liberties, Rawls' means, (i) freedom of participation in the political process (the right to vote, the right to run for office etc.); (ii) freedom of speech (including freedom of the press); (iii) freedom of conscience (including religious freedom); (iv) freedom of the person (as defined by the concept of the rule of law); (v) freedom from arbitrary arrest and seizure, and (vi) the right to hold personal property.

⁵⁰ James Buchanan, *The Limits to Liberty* (The University of Chicago Press 1975) 10.

For example, the Constitution of Bangladesh admits affirmative discrimination in law towards the backward section of the society⁵¹ and also recognizes the equality of its citizens.⁵² While clarifying the principle of *'equality before law'* and the principle of *'affirmative discrimination'*, in *Anwar Hossain Chowdhury v. Bangladesh Sahabuddin Ahmed*, J observed that:

Equality before law is not to be interpreted in its absolute sense to hold that all persons are equal in all respects disregarding different conditions and circumstances in which they are placed or special qualities and characteristics which some of them may possess but which are lacking in others.⁵³

That is to say, the principle of equality before law has to be illustrated not in its absolute sense,⁵⁴ rather in its relative sense, depending on the persons *'who are not by nature, attainment or circumstances in the same position, as the varying needs of different classes of persons often require separate treatment'*.⁵⁵ Thus, following the Constitution, different laws and government policies recognize special treatment for women and disadvantaged sections of the society.

6.3 Notions of abstract rule and individuation

As observed by Sunstein, a court may provide justice on the basis of two different types of principles: abstract rules and individuation.⁵⁶ Abstract rules specify legal standards unambiguously and are equally applicable for all. According to Rawls' first principle of justice, the law can be considered as an abstract rule when it takes place in *'a hypothetical situation in which people are behind a "veil of ignorance" of their positions in society, i.e., their social status, wealth, abilities, strength, etc.'*⁵⁷ For example, the Constitution of Bangladesh declares that *'all citizens are equal before law and are entitled to equal protection of law'*.⁵⁸ This principle of justice should attempt to give guidance to justice through abstract rules laid down in advance of actual applications and will be equally applicable in similar situations. But such abstract rules may not provide justice to the poor and vulnerable

⁵¹ The Constitution of Bangladesh 1972, Art 28(4).

⁵² Article 27 ensures equality before law to all its citizens. Article 31 of the Constitution also provides that, *"To enjoy the protection of the law, and to be treated in accordance with the law, and only in accordance with the law, is the inalienable right of every citizen..."* _The Constitution of Bangladesh 1972.

⁵³ *Anwar Hossain Chowdhury v Bangladesh* (1989) 41 DLR 43, 45.

⁵⁴ Ian Brownlie, 'The Rights of Peoples in Modern International Law' (1985) 9 *Bulletin of the Australian Society of Legal Philosophy* 104; Brij Sharma, *Introduction to the Constitution of India* (4thedn, 2009).

⁵⁵ Prafullah Padhi, *Labor and Industrial Laws* (Prentice-Hall 2007) 5.

⁵⁶ Cass R. Sunstein, 'Two Conceptions of Procedural Fairness' (2006) 73(2) *Social Research* 619.

⁵⁷ James Konow, 'Which is the Fairest one of the All? A Positive Analysis of Justice Theories' (2005) 41 *Journal of Economic Literature* 1188, 1195.

⁵⁸ The Constitution of Bangladesh 1972.

who have *special needs*. Therefore, we may not use abstract rules⁵⁹ as benchmarks of fairness as such laws advocate equal distribution among all without considering the special needs of the poor and disadvantaged in society. The Constitution of Bangladesh has also mandate to the principle of positive discrimination to promote poor and disadvantaged in society.

6.4 Financial outcome of normative evaluative mediation under the shadow of the law

The shadow of legal norms in negotiating disputes is reflected between the parties while determining the mediated outcomes. *To divorcing spouses and their children, family law is inescapably relevant. The legal system affects when a divorce may occur, how a divorce must be procured, and what the consequences of divorce will be.*⁶⁰ Thus, we can expect that mediated outcomes follow the shadow of legal principles. Critics, however, sometimes argue that under western-style *facilitative* mediation, parties make their own decisions based on their interests and the mediator, being neutral, only facilitates parties to attain the decision through negotiation.⁶¹ Therefore, we can expect that, unlike western-style mediation, in the current practice of *evaluative* family mediation in Bangladesh, mediators' evaluations are greatly influenced by the fairness benchmarks set by family laws and those benchmarks will be reflected in the outcome of mediations. While conducting the mediation, mediators can use both rules and individuation to enhance the welfare of disadvantaged women through mediation. As observed, family mediators in Bangladesh conduct normative evaluative mediation under the shadow of the law and inform parties about their rule-bound legal rights. However, as explained in the next section, while making such evaluations, mediators may diverge from the expected outcome of litigation to enhance the welfare of the women through mediation.

7. Enhanced Access to Fair Outcome Attained in Family Courts: Litigation vs Mediation

Scholars around the world have identified numerous reasons why family mediation can provide better access to justice for women. Among other reasons, it is less costly in comparison with the trial, provides a quick resolution that also reduces lawyers' cost and additional associate costs to attend courts. Therefore, after the inception of

⁵⁹ 'Rule-bound judgments focus on the arbitrariness and error that come from the exercise of unbounded discretion; those who favour individualized judgments focus on the arbitrariness and error that come from rigid applications of rules.' 'Public authorities should avoid 'balancing tests' or close attention to individual circumstances. They should attempt instead to give guidance to citizens through clear, specific, abstract rules laid down in advance of actual applications'; Cass Sunstein, 'Two Conceptions of Procedural Fairness'(2006) 73(2) *Social Research* 619, 620.

⁶⁰ Mnookin and Kornhauser (n 38) 951.

⁶¹ Allan Stitt, *Mediation: A practical guide* (Cavendish 2004).

the reformed ADR movement in 2000 at three model-pilot family courts of Dhaka (the same three courts were also considered for this study), rate of resolution through mediation remained high in comparison with total disposal of cases.

7.1 Resolution of disputes in family courts: A comparative analysis between mediation and litigation for the last five years (2015-2019)

The purpose of analysis in this section is to examine the present-day success of mediation and understand its recent trends. In other words, this paper explores whether the current trend of mediation in the three family courts is consistent, which was attained considerable achievements through the same three family courts in 2000 remains valid under the contemporary practice of the last five years (2015-2019).

Table 1: Disposal in Family Courts, Dhaka 2015-2019

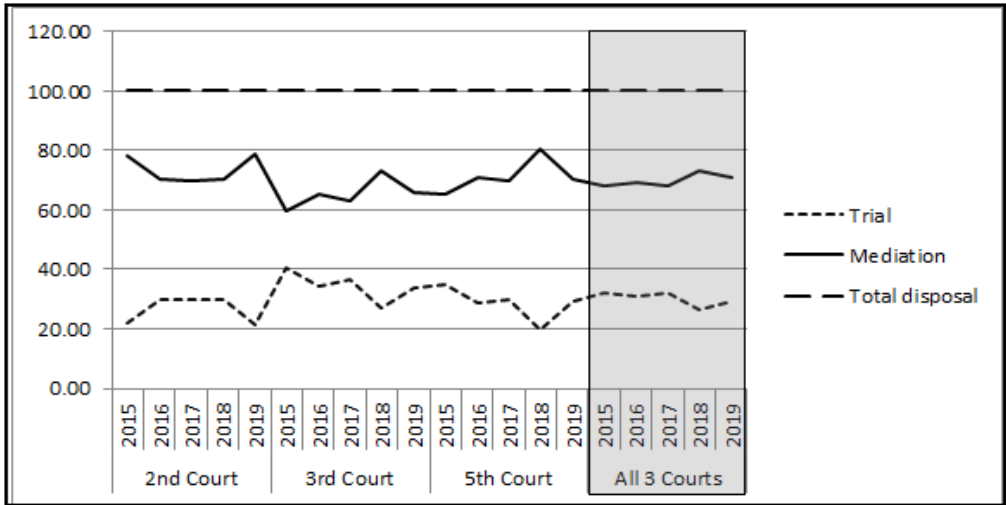
Family Court	Year	Disposal by Trial	Disposal by Mediation	Total disposal of family cases
2nd Court	2015	227.0	816.0	1043.0
	2016	356.0	838.0	1194.0
	2017	363.0	850.0	1213.0
	2018	336.0	789.0	1125.0
	2019	244.0	902.0	1146.0
	Average	305.2	839.0	1144.2
3rd Court	2015	392.0	587.0	970.0
	2016	291.0	550.0	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
5th 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%)

Source: Empirical data collected from the Family Courts, Dhaka in July 2020

As depicted in Table 1, the total number of disposal of family disputes is increasing in all three courts except in 2018 when due to some reason, total disposal

in all three courts declined in comparison with total disposal in 2017. Even in case of a general decline in disposal, the 2nd family court, Dhaka outperformed the other two courts. The number of disposals through mediation vs litigation varies over the years.

Figure 1: Maturity of disposal through mediation in family courts



Source: Empirical data collected from the Family Courts, Dhaka in July 2020

Nevertheless, the number of disposals through mediation always remains markedly higher than the number of disposals attained through litigation. The ratio of disposal through mediation vs litigation and their trend over the years can be perceived better through Figure 1 above. As depicted in Figure 1, though rates of disposal through mediation and litigation differed over the years in each of the three courts, variance in disposal rates through both mediation and litigation have always maintained a limit of 20per cent.

For instance, the rate of disposal through mediation in any of the three family courts never declined below 60 per cent nor increased above 80 per cent during the five-year tenure (2015-2019) covered under this study.

Therefore, we can reasonably perceive that after the inception of mediation in a reformed movement of ADR in 2000, the disposal rate in family mediation during the last five years attained its long-term threshold and becomes more predictable. This kind of consistent performance in the disposal of family disputes through mediation is essential not only for the policymakers but also for the justice seekers, to get a reasonable projection before choosing mediation as an effective tool to resolve their disputes. However, quick disposal of family cases from court dockets is not the sole objective that women may aspire to attain from mediation. Such access to justice and quick disposal of cases should be *‘just’* in its outcome. Although this paper

demonstrates that the resolution of disputes in family courts through mediation have already achieved the criteria of fair justice as indicated by Lord Woolf, the same is not correct for realization attained through mediation in all family courts equally. Therefore, better resolution of cases through mediation is not enough until cases resolved through mediation also attracts better realization of decree amounts in comparison with the litigation.

7.2 Realization of financial outcome in family courts: A comparative analysis between mediation and litigation for the last five years (2015-2019)

Many western scholars often argue that the outcome of mediation may not be fair, especially in many developing countries where women remain less empowered, face frequent family violence, and stay silent in mediation out of fear, or a self-helpless attitude developed through a long-persistent deprivation received from their family and society⁶². Thus, there remains a possibility that gendered power disparity and family violence in Bangladesh might hinder women's access to fair outcomes through mediation. Further, as warned by the expectation state theory of negotiation as provided by Watson, even women with superior power may lose negotiation when her counterpart is a male person⁶³.

However, the context and practice of mediation in Bangladesh and other eastern countries are different from western democratic countries where mediators follow a mere facilitative mediation, where party autonomy and self-determination construe the cornerstones of facilitative mediation. Departing from facilitative mediation, eastern countries, including Bangladesh, follow an evaluative mode where family court judges may apply their procedural power and others powers of mediators as propounded by Mayer⁶⁴ to maintain better equity in negotiation during mediation. In evaluative mediation, a judge-mediator may conduct normative evaluative mediation under the shadow of the law and control the use of social discourses by the other parties to emancipate women rights from marginalizing social discourses and ensure fair outcome through mediation inside the mediation room — not beyond the room. A family court judge-mediator cannot eradicate the gendered power disparity and dominant social discourses that exist in society.

Though contemporary literature has discussed elaborately various benefits of and barriers to attaining even better disposal rate through mediation, the 'equity' issue

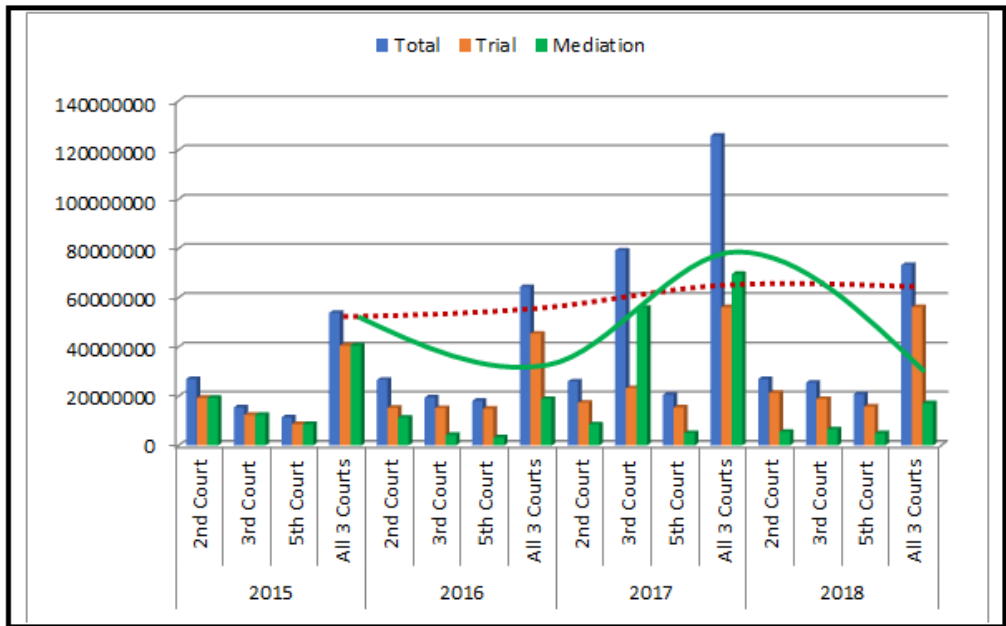
⁶² Chowdhury (n 34).

⁶³ *ibid.*

⁶⁴ Mayer's typology rests on his explicit inclusion of 'structural power' that includes '*the objective resources people bring to a conflict, the legal and political prerogatives, the formal authority they have and the real choices that exist*'. He has identified different forms of power that are held by a mediator during mediation like procedural power, formal authority, legal prerogatives, definitional power etc. See more, Bernard Mayer 'The Dynamics of Power in Mediation and Negotiation' (2000)16(1) *Mediation Quarterly*75.

remains mostly unexplored, especially in the context of Bangladesh. Hence, the purpose of this section is to compare the output attained through mediation and litigation in general and conclude on the potential of family mediation to provide fair justice for women in Bangladesh. Figure 2 compared the total amount recovered in the family courts of Dhaka under both litigation and mediation.

Figure 2: Fluctuations in mediated outcomes and its potentials for further development



Source: Empirical data collected from the Family Courts, Dhaka in July 2020

In litigation, judges equally follow the procedure of litigation set in family laws and the substantial laws governing post-divorce payments to Muslim women are more or less limited to the marriage contract. Therefore, the total decree amount for cases resolved through litigation remains stable over the years. This steady amount of decree (from Tk. 40 million to Tk. 56 million), as shown by the dotted trend line in Figure 1, is consistent with the steady number of cases resolved through litigation (20 per cent to 40 per cent of total cases in Figure 1). Therefore, as identified by Lord Woolf under his fair justice criteria, family cases resolved through litigation are getting more predictable both in terms of rate of resolution (quantity) and amount of decree (quality). However, the total decree amount for cases resolved through mediation, as shown by the solid trend line in Figure 2, is marked with high variability (from TK. 17 million to TK. 70 million) over the years. Therefore, family cases resolved through mediation are getting more predictable in terms of rate of resolution (quantity) but still remain many variables in terms of the amount of decree (quality).

However, the contrary opinion may suggest such high variability can be analyzed that the fluctuation in the aggregate amount of decree through mediation may result from the difference of the amount of dower claimed by the parties in any particular year. For instance, in one suit, the dower fixed at the time of marriage may be high due to the financial conditions and social status of the bride and groom. On the other hand, in many cases, the claimed amount of dower and maintenance may be low depending upon their status. Thus, at the time of resolving the cases through mediation, the settled amount of dower amount may sharply rise and fall in relevant years irrespective of the fact of little variance in the number of disposal of suits.

If this is the case, we may expect a similar yearly variance for cases settled through litigation. However, as shown in Figure 2, the more stable dotted line showing aggregate decree values through litigation over the year does not support this notion. Therefore, as indicated by Lord Woolf, the resolution of disputes in family courts have already attained the predictability criteria of fair justice. However, the same is not valid for realization achieved through mediation in family courts. Therefore, financial outcome through mediation still requires more equitable and competitive in comparison with litigation. In order to get a more detailed image in this regard, a more rigorous comparison between financial outcomes attained through mediation and litigation is compiled in the next section to clarify this issue further. Analysis in the next section is based on data collected from individual case files taking dower value as a proxy to the socio-economic condition of women attending mediation and litigation.

7.3 Comparative financial outcomes attained through mediation and litigation: An empirical evaluation of the realization of dower money

Dower was explained earlier as a safeguard for Muslim women against post-divorce economic vulnerability. Repaying unpaid dower to a wife after divorce is not only a religious obligation for Muslim husbands but also a legal responsibility for them under s. 10 of the *Muslim Family Laws Ordinance, 1961*.⁶⁵ Therefore, in the case of litigation, judges in family courts always make full provision for the repayment of unpaid dower to women after divorce. As already discussed, during mediation, clients may make agreements that deviate from the rules stated in the law. For example, as demonstrated in Table 3, women in mediation may make mediation agreements that involve taking less than their full amount of unpaid dower. Whether such deviations in the mediated outcome can benefit women is our next concern in this paper. Criteria given by Mnookin and Kornhauser⁶⁶ are used to evaluate the fairness of mediated outcomes compared with litigation outcomes.

⁶⁵ The Muslim Family Laws Ordinance 1961 (Bangladesh). Section 10 of the Ordinance provides that, "Where no details about the mode of payment of dower are prescribed in the *nikahnama*, or the marriage contract, the entire amount of the dower shall be prescribed to be payable on demand."

⁶⁶ Mnookin and Kornhauser (n 38).

Table 2: Realization of dower as financial outcome through litigation in family courts

Family court	Cases Observed	Avg. Amount of Unpaid Dower Claimed	Avg. Amount of unpaid Dower Realized	% of dower realized on an average	Total Decree value realized as a % of dower value
2 nd Court	15	345,000	302,539	87.69	138.12
3 rd Court	14	407,786	407,786	100	122.77
5 th Court	13	437,176	437,176	100	142.42
All 3 Courts	42	396,654	382,500	96.43	128.72

Source: Empirical data collected from the Family Courts, Dhaka in July 2020

Table 2 indicates that on average in three family courts of Dhaka, the realization of dower amount through litigation varies from around 88per cent to 100per cent of the claimed unpaid dower. For the three courts together, the average realization of unpaid dower remains 96.43per cent. The last column of Table 2 indicates that on average, the total decree value received by women through litigation was 128.72per cent of their unpaid dower value (or Tk 510,573). Similar data were collected in all three family courts for cases resolved through mediation, which is depicted in Table 3.

Table 3: Realization of dower as financial outcome through family court mediation

Family court	Cases Observed	Avg. Amount of Unpaid Dower Claimed	Avg. Amount of unpaid Dower Realized	% of dower realized on average	Total Decree value realized as a % of dower value
2 nd Court	13	649,111	358,111	55.17	69.42
3 rd Court	11	261,112	197,777	75.74	80.85
5 th Court	11	533,000	390,000	73.17	118.21
All 3 Courts	35	488,659	319,348	65.35	77.74

Source: Empirical data collected from the Family Courts, Dhaka in July 2020

As demonstrated in Table 3, on average, in three family courts of Dhaka, the realization of unpaid dower amount through mediation varies from 55.17per cent to 75.74per cent of the unpaid dower amount claimed by women. For the three family courts together, the average realization of unpaid dower remains only 65.35per cent. The last column of Table 3 indicates that on average, the total decree value received by women through mediation was only 77.74 per cent of their unpaid dower value (or Tk 379,884). Therefore, on average, women who resolve through mediation may receive Tk 130,698 (510,573 - 379,884) less in their total decree value in comparison with their counterpart who resolve through litigation.

As discussed, the amount recovered under normative evaluative mediation depends on the application of 'standard' techniques attached to this mode that many of our family court judges are not adaptable due to a lack of institutional training on mediation. A further consideration in the variation of the realization of unpaid dower amount allowed by different courts indirectly substantiates our earlier claim that due to a lack of training on 'standard' techniques of normative evaluative mediation. As a

result, the quality of evaluation applied by three family courts may not follow any established '*objective standard*'; instead, remain subjective upon the judge-mediators. For instance, in both 3rd and 5th family courts, women attain almost three fourth of their unpaid dower through compromise decree under mediation. In contrast, in the 2nd court, women get a compromise decree to realize only 55 per cent of their unpaid dower money through mediation. That means, the attitude to a fair outcome for women applied under 3rd and 5th court is also apparent from the 100 per cent decree for the realization of unpaid dower under litigation, while in 2nd court women are yet to sacrifice around 12 per cent of their unpaid dower claimed under litigation. Therefore, setting an objective standard for normative evaluative mediation and ensuring its application through training is essential to attain a more equitable and fair outcome for women through mediation.

8. Conclusion

It is also argued that despite gender power disparity and family violence in Bangladesh, the interventionist, and legally informed role of mediators contributes to fair outcomes for women through normative evaluative mediation under the shadow of the law when compared with litigation. As discussed earlier in the paper, procedural leverage through normative evaluative mediation has a robust theoretical linkage with Rawls' second principle of justice. Therefore, unlike western-style facilitative mediators, our mediators have a more significant opportunity to apply individuation through Rawls' second principle of justice. Application of individuation principle, while practicing normative evaluative mediation, would promote fair justice to vulnerable women who may not be able to attain such outcome, due to some practical constraints mentioned earlier. Analyzing family courts' data for the last five-year (2015-2019) on the resolution of cases and realization of dower money under mediation and litigation, it is demonstrated that despite the positive threshold attained in the rate of disposal through mediation, still, there seems to be a window of opportunity to improve recovery under family mediation and ensure more fair outcomes in comparison with cases resolved through litigation.

Further, there is a possibility that the procedural leverage under the normative evaluative mediation, as suggestive under the Rawls' second principle of justice, may not be practiced equally and effectively by all family courts to make mediated outcome more equitable and fair for women. As a result, the performance of all family courts in terms of realizing financial outcome is not evenly persuasive. Thus, to mitigate the considerable variance from one court to another, training of judge-mediators on the objective benchmark on normative evaluative mediation is necessary to enhance an equitable justice for women. Consequently, women can attain more fair outcomes from family courts' mediation in Bangladesh than they can through litigation.