

CHAPTER 5

IMPROVEMENT OF *SHALISH* SYSTEM BASED ON BANGLADESHI LEGAL FRAMEWORK AND THE QURANIC APPROACH

Dispute resolution is a state-concern issue and it has formal institution for it. A formal institution has some limitations based on which so many informal institutions develop to meet the instant needs. A major limitation of formal dispute resolution institutions is that it is located in district headquarters. Rural people though theoretically have access to those institutions, in reality they are deprived of it automatically. Keeping this limitation in mind, the government has set some dispute resolution institutions for rural petty disputes of both civil and criminal in nature. Though the government has family court to settle family disputes amicably regardless of religion or region, disputes of the Muslim families have received an extra importance, for family is the basic social unit receiving huge attention from the holy Qur'an. All the rural institutions for dispute resolution are meant for resolution of dispute informally. Some human rights and legal aid based NGOs developed the system of traditional *shalish* and modified it eliminating some limitations from the present traditional system. However, they are limited in their working areas. Again, village court is not allowed to settle family disputes i.e. matrimonial disputes – polygamy, divorce, dower, maintenance, restitution of conjugal rights, custody of child, guardianship etc. Though Arbitration Council (AC) is assigned by Muslim Family Law Ordinance 1961 to intervene some matrimonial disputes, it is practically very weak in position from both legal and social structure. In this gap of inactiveness of Arbitration Council, some legal aid and human rights-based NGOs are dealing so many family disputes directly by their appointed mediators or referring some of these disputes to a

right place for it. As the family disputes center round the wife as nucleolus, NGOs sometimes refer the family cases to *Upozila* Women Affairs Related Officer or to the family courts. Once a case comes to an NGO office, they maintain a record of it. The NGOs follow up the cases and provide necessary legal aid to the aggrieved party. Thus, the NGOs are very active in dispute resolution especially of family matters in rural areas in Bangladesh. One of the important features of NGO-*shalish* is that it does not go against state law in doing *shalish*.

The Quranic approach to dispute resolution centers round primarily on the concept of restoration of relationship and fair settlement of the dispute. Rural dispute resolution system in Bangladesh is found geared towards this direction accordingly. Various methods and institutions set up for this purpose are found operating By And Large in conformity with the form or spirit of the Quranic approach. Rural disputes in Bangladesh can be categorized as family, personal or social in nature.

Traditional *shalish* as a rural dispute resolution institution is more informal and active everywhere in the country. In every category of disputes, either of family or of society, traditional *shalish* has an access to deal it socially. The *shalishkars* take everything happening in their society as a social issue and deal it for social wellbeing. It needs a guide for them. They need proper legal and moral education in this purpose. The discussion bellow is to find out the way of improvement of *shalish*. For this purpose of integration and improvement, the disputes based on its occurring place are divided into two categories namely family disputes and social disputes. Family dispute takes place

between husband and wife based on their physical and emotional relationship. Family dispute may also happen between two brothers or sisters or between a brother and a sister based on inheritance or other behavioral issues. Interfamily or social disputes may be caused by grabbing tangible or intangible property, land demarcation, cattle trespassing, crimes etc. The discussion will be done under legal and judicial framework of the country and Quranic guidance, which is the proposed way of improvement of the *Shalish* system. The discussion is as follows-

5.1. Traditional *Shalish* and its backup institutions:

Traditional *Shalish* is a panchayat or *samaj* (Society/Community) based dispute resolution institution. Therefore, it needs to get an idea about the structure and present status of panchayat or *samaj* of rural area to evaluate and review *Shalish* properly. Previously panchayat was a committee of five persons or more elected by the state authority or local people to collect tax or to distribute land in rural areas. Panchayat or *samaj* is nowadays is the rural community consisting of heads of the families residing in an area sharing a common interest. *Panchayat* or *samaj* in rural area is mainly based on blood relationship - family (husband-wife and parent-child) relationship, kinship (mainly paternal) and neighborhood relationship (relative neighbor mainly). Family is a basic unit of this *panchayat* or *samaj*. Nursing a family means nursing a society. A blood relationship covering some other families creates a (*gusti*) clan. More than one clan make a hamlet (*para/hati*). Then a village consists of some hamlets. A panchayat thus is not necessarily based on same blood relation. Several blood relations may act there and create several groups. Several sub-grouping based on economic or political interest exist in a society. Generally, a village in rural Bangladesh functions centering round a Masjid.

Whenever a dispute arises between two individuals of a panchayat or a *samaj*, it touches the sensitivity of related family. It may happen at intra family or inter family level. The family members try to resolve a family dispute inside the family (intra-family). If it crosses the family boundary, the clan has to resolve it. Whenever a dispute harms the society/community/*samaj*/village *panchayat*'s harmony, it becomes a matter of *panchayat*. Members outside the disputing parties play the role of a neutral third party or *Shalish* to settle the dispute peacefully. There is no formal authority to control or oversee the activities of panchayat and *shalish* except a social pressure and feelings of rights and wrong. Rural people are Muslims in majority and they bear a sense of accountability to Allah. As Allah is the only judge in the Day of Judgment, *shalishkars* will remain self-motivated through this belief if they can maintain it properly. People in rural area feel that their safety and security is linked with their community and their position in the community through family and kinship. Therefore, family, clan and village community (*panchayat/samaj*) are the backup institutions of *Shalish* in rural Bangladesh. Among all these backup institutions family is the base or primary unit.

The main objective of *Shalish* is to restore the relationship between the disputing parties. In doing so, *Shalish* does *bichar* (arbitration) or *somojuta* (mediation, conciliation, compromise of action) or combination of both *bichar* and *somojuta*. However, its *bichar* (arbitration/adjudication) is anyway informal aiming at an amicable settlement through imposition of a decision by the neutral third party. In a *somojuta* the consent of the parties is main, but when they combine both the process, they impose their decision

partially on the uncompromising disputing parties and some on agreed conditions by both disputing parties.

5.2. Management of family disputes under Bangladeshi legal framework

Every case is a new case to the *shalishkars*. As they never keep record of previous *shalish* in the same legal issue, they have to consider every case as a new one and find out a solution giving their efforts jointly. Keeping formal judiciary, village court, arbitration council and NGO-*shalish* as some models for traditional *shalish*, rural disputes have been divided into two categories as family disputes and social disputes mentioned before. Family Court from formal judiciary and Arbitration Council from state-led rural dispute resolution system are assigned to deal some family disputes following statutory laws. Formal civil courts and criminal courts following CPC and Cr.P.C. respectively are resolving disputes of the country as a whole. Village court as a state-led dispute resolution institution has authority to deal cases valued up to tk. 75000.00 both civil and criminal in nature. Likewise, conciliation Board is doing the same act with the same manner in urban areas. It means that rural family disputes resolution system has two models, Family Court (FC) and Arbitration Council (AC). Similarly social disputes resolution system has some models to follow. As *shalish* has entrance into the both categories, it needs to examine how the *shalishkars* are doing it and how it should be done actually. Through this process, the improvement techniques will be determined. Discussion on family disputes should come first.

5.2.1. Marriage and Dissolution of Marriage under Bangladeshi Legal Framework and Islamic Jurisprudence

Traditional *shalish* system is most popular and common method used for various dispute in rural Bangladesh. For resolving family or personal disputes, Family Courts under the Family Court Ordinance 1985 works for all citizens of the country regardless of their religion. However, in doing so it follows statutory laws for people of various religions. Family Court deals family disputes relating with restitution of conjugal rights, dissolution of marriage, dower, maintenance and custodianship of children. *Shalish* deals all these issues also to resolve a family dispute. *Shalishkars* have no clear knowledge about statutory laws for family dispute resolution. Hence, they have to take help of *Ulamas* in this regard. In family courts, judges work like operators only following statutory laws regarding a person or family. As both the Muslim Family Laws Ordinance 1961 and the Dissolution of Muslim Marriages Act, 1939 are framed based on the spirit and norms of the Quranic approach, it is assumed that family courts' judges do not go against the Quranic approach in resolving family disputes. However, question may rise how far the statutes are in conforming to Quranic approach. This study finds that with some exception like *iddah* (waiting period) for divorcees and compulsory bequest under doctrine of representative for the grandchild the statutes are to some extent in an inconformity with the Quranic approach. Traditional *shalish* follows the *shari`ah* rules and uses local *Ulamas* (*Imams*, *khatibs*) mostly in resolving family disputes.

Family is the primary unit of a social life. Marriage is the basis of a family. From the Quranic Approach a marriage is a civil contract between a husband and a wife. It may be termed as a registered civil contract for compulsion of registration of marriage under the

Muslim Marriages and Divorces (Registration) Act 1974. It is the only way for a man and a woman to lead a conjugal life coming through a valid marriage. Just A couple coming together can form a family through *`aqd* (marriage contract). Likewise, they can go away breaking a marriage tie through divorce (*talaq, ila, zihar, talaq-tafweez, khula, mubaraat, lian and faskh*). Like all other civil contracts, a marriage concludes through an offer and acceptance in the presence of two men or a man and two women as witnesses. For both who offer and accept the offer have some conditions before they do it like maturity in age as a proof of competence to come to a contract, freedom of choice, equality in social and religious status etc. After the marriage is solemnized, both husband and wife have some rights and duties to each other. Marriage demands a bridal gift-dower (*Mahr*) on the bridegroom to the bride essentially. It makes the maintenance (*Nafqah*) including food, clothing and lodging compulsory on husband. Marriage needs registration to receive necessary legal treatment in time. A family is the primary unit of a collective life and as a fundamental unit it needs a leader to lead the unit smoothly and a guardian who will take responsibility of guardianship of its members both minor or major and the custody of children as minor members. Therefore, obedience and maintenance are two important things as well. Maintaining husband-wife and parent-child relationship properly are very important issue to maintain a family smoothly. Dispute or disagreement is a natural phenomenon of human society. Disputes related to these and other issues of family may be defined as family disputes. To resolve family disputes a judge or *shalishkar* (mediator, arbitrator or conciliator) must know all related matters on which a family dispute takes place. The related laws in Bangladesh encompass some of the issues mentioned above in this or that way.

Sl.	Main Act/Ordinance	Present Act	Remarks
01	The Guardians and Wards Act 1890		
02	The Child Marriage Restraint Act 1929 repelled by	The Child Marriage Restraint Act, 2017	
03	The Muslim Personal Law (<i>Shari'at</i>) Application Act 1937		
04	The Dissolution of Muslim Marriages Act 1939		
05	The Muslim Family Law Ordinance 1961		
06	The Muslim Marriages and Divorces (Registration) Act 1974		

The laws mentioned above identified some family issues. Every member holding the responsibility of a family should know it. Likewise, whoever devotes himself to resolve the family disputes should know these issues based on which these legislative pieces surround. For convenience of understanding these family issues are discussed under two main headings namely marriage and divorce. It may be noted here that personal law explained under The Muslim Personal Law (*Shari'at*) Application Act 1937 governs marriage and divorce legally until today. It continues to govern the application of Muslim family law in Bangladesh. The Act states that

“Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, (including personal property inherited or obtained under contract or gift) or any other provision of Personal Law, marriage, dissolution of marriage, (including *talaq, ila, zihar, lian, khula* and *mubaraat*) maintenance, dower, guardianship, gifts, trusts and trust properties, and *waqfs* (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (*Shariat*)”.

Almost all issues mentioned in the act will come under our discussion of marriage and divorce. In addition to that, Muslim Family Law Ordinance (MFLO) 1961 contains some important marriage and divorce related issues. Following MFLO 1961 and the Dissolution of Muslim Marriages Act (DMMA) 1939 Formal Family Courts resolve most of the matrimonial disputes. Hence, to improve the Quality of traditional *shalish* system it needs to discuss the following points so that *shalish* can have fair knowledge about these issues.

5.2.1.1. Marriage and its effect

In Islamic Law, marriage is a social contract distinct from a commercial transaction. It is sometimes also termed a 'civil contract' between a single man and a single woman of sound mind who have attained puberty. These contracts must be understood by the parties in order to ensure that the marriage has been performed in the proper manner and the rightful effects of the marriage are granted to each of the participating partners. Also, it is considered best if the contract is executed in spoken form. However, it may be done through writing or signing if needed (Hossain 2013).

In classical Islamic law, a Muslim man can have four wives at the same time. Accepting a fifth wife while already having four is not however illegal, but would amount to an irregular situation. Women however are prohibited from polyandry. The primary argument against multiple husbands has to do with indeterminate the paternity, whereas maternity under polygamy is not subject to question. Muslim Family Law Ordinance (MFLO) 1961 permits a man to accept second wife when the first marriage is still continued. But the law requires permission from the existing wife/wives, and a valid reason for second, third or fourth marriage. An Arbitration Council is established to deal with the application for permission to marry up to fourth. It takes into consideration whether the existing wife consents to such marriage and whether the marriage is necessary and just. Women are seemingly taken into consideration in the decision making process about multiple wives (Hossain 2013). Penal sanctions for contracting a polygamous marriage without prior permission, though there are no sanctions for failing to obtain existing wife's permission and subsequent marriage is not invalidated for lack of registration or failure to obtain official permission, the husband's contracting a

polygamous marriage in contravention of legal procedures is sufficient ground for first wife to obtain decree of dissolution. There are certain essentials for marriage from Quranic perspective. They are-

- both parties need to be competent to come to marriage contract.
- there needs to be a proposal on behalf of or made by one of the parties, also.
- there needs an acceptance on behalf of or by another party.
- the acceptance and proposal need to be expressed in one of the meetings.
- at the time of hearing of proposal and acceptance, there is a need for witnesses. This includes two males or one male and two female. These people should be adult and of sane mind.

Age is an important fact to prove competency to come to a contract. It is very important in case of marriage contract. The marriage agreement is a contract between two persons bearing sound mind. Since the idea of 'sound mind' is more general, in order to avoid any confusion, it only excludes "insane" or "lunatic" from the contract of marriage. A man and a woman coming to the marriage contract take responsibility of a father and a mother. They jointly discharge their duties to themselves and to their offspring.

Attaining puberty is very important for a marriage contract. It demonstrates that parties to the contract are matured enough to express their consent independently. It is, however, confusing as to when one gets puberty. There are many dissenting opinions on this issue among the different schools of thoughts. Under Muslim Law, a child becomes an adult upon attaining puberty, which varies with gender. An average female child ceases to be a child upon attaining puberty at the age of 12 years and an average male child on reaching 15 to 16 years of age (Hossain 2013).

According to the *Hanafi* School, a girl attains her puberty at the age of 15, which in other schools is even lower. The *Hanafi* School, nevertheless, does not rule out a marriage contract done before the age of 15. In that case, the girl has the right to repudiate the marriage once she attains puberty. In this case the marriage contract is arranged by her guardians (Hossain 2013).

According to prevailing laws, puberty is determined based on one's attaining majority. In fact, the term puberty is no longer relevant. What is relevant for a marriage contract is whether one has crossed the age of minority. Laws regarding majority were enacted at different times and in response to different situations. The concept of minor or child has thus, been given varied definitions by different acts and statutes in force in Bangladesh.

The Majority Act of 1875 defines a person below 18 to be a child. The Guardians and Wards Act of 1890 states that if a child is made a ward of court then he/she will remain a ward until 21 years, thus defining him/her as a child up to that age. The Children (Pledging of Labor) Act of 1933 regards a person below 15 as a child. The Vagrancy Act 1943 (Bengal Act) considers a person below 14 a child. The Factories Act of 1965 defines a child as a person who has not reached 16 years. The Children Act of 1974 states that a child is a person below the age of 16 years. The legal system in the country also makes a distinction between boys and girls in defining a child. This is especially apparent in the Child Marriage Restraint Act of 1929 repelled in 2017. In this Act the age of majority, defined in terms of contracting a valid marriage has been placed at 21 years for boys and 18 years for girls. However, it does not contemplate that marriage contract

under that age is void. Rather such marriage is subject to the condition that the parties have right to repudiate upon attaining majority. Though a minor may be given in marriage, no minor may contract herself in marriage during her minority and any such marriage would be held void. Where a minor get married and marriage has been consummated before puberty, such consummation does not operate to deprive the minor of the option to repudiate after puberty (Hossain 2013).

Effects of Marriage

The legal effects of marriage depend on the validity of marriage. For example, a marriage can be classified as *ṣaḥīḥ* (full valid), *fāsid* (irregular) or *bāṭil* (void). There are no legal consequences for a *bāṭil* or void marriage, since according to Islamic law it is not a marriage at all. Limited legal consequences are, however, found in an irregular or *fāsid* marriage (Hossain 2013). Once the marriage (*ṣaḥīḥ*) between both the parties is over, some lawful obligations may arise. They are-

- the mutual intercourse between both parties is legalized.
- also, a child that is born is legitimate.
- furthermore, a wife has the right to '*Mahr*' and is entitled to maintenance.
- for valid reasons only, a husband can prohibit the movement of a wife.
- also, after divorce or death of a husband, a wife needs to complete the period of *Iddat*. She cannot marry anyone during this period.

At the time of marriage contract in Islam, any legal conditions may be agreed on. The wife may require in the contract to live in a certain city or country. The wife may require to have the right to divorce for a certain reason. The wife may require a written item in the contract that guarantees her right to visit her parents. The wife may require the right to divorce if her husband marries another wife in her life. This shows two things. Firstly,

it shows the nature of marriage as a contract in which each one (and usually the wife) has the right to enjoy certain conditions.

Nature of disputes relating to Marriage and its resolutions:

Dispute relating to marriage mainly occurs based on additional marriage with existing wife or wives. MFLO has curtailed the opportunity by imposing a condition of taking permission from first wife/wives and thus approval from Arbitration Council. However, the law does not go against the Quranic spirit. MFLO 1961 does not ban the second marriage but it empowered women much. It was deemed necessary to impose such a condition for that time for misuse of the Quranic option by men to some extent. The scenario has already been changed now and women take it almost as a prohibited matter. They hardly allow their husbands to marry again even though both of them feel it necessary for their safety, security and prosperity. Statutory law may need to take a step including any clause stating that if the second marriage is deemed necessary by the chairman of the arbitration council he may issue a letter of permission for the husband and the wife will get no chance to apply for dissolution of marriage for this ground.

Shalish in resolving this kind of disputes follows the real fact. They watch the problem by their own eyes. *Shalishkars*, more or less, have knowledge about present family law and they follow it to resolve this kind of marriage related family issues. This is actually a managerial issue and changeable accordingly. As family courts follow the statutory law, it has no chance to resolve a dispute based on denial of the wife to give permission for second marriage to her husband. *Shalish* is in a better position to address the problem properly.

There are some customs and traditions also create some marriage related disputes like nature of ceremony, excess number of presence with the bridegroom, shortage items of food etc. Courts hardly address these problems. It becomes the trend that bride's family will bear the total cost of feast, which is a clear injustice from Islamic point of view. *Shalish* resolves these types of disputes also. However, society is not prepared yet to make any ban on this culture.

Dower (*Mahr*)

The reasons behind the husband's paying a dower to his wife are many. Firstly, the dower is a symbol that stands for the seriousness of the husband in this marriage contract. Secondly, it stands as a proof that this husband financially is capable to maintain a family and shoulder all coming responsibilities of housing and taking care of his wife and children. Thirdly, the dowry, especially the deferred dowry, stands as an obstacle in the way of divorce and makes the husband think twice or more before divorcing his wife.

Maintenance (*Nafqah*)

The issue of maintenance and obedience within marriage continue to be governed by classical law for the most part. It includes food, clothing and lodging.

Custody (*Hidannah*) and Guardianship (*Wilayah*)

Custody continues to be governed by the Guardians and Wards Act 1890 in Bangladesh.

Custody and guardianship can be distinguished as follow:

Custody is the bringing up, nursing or fostering the child and taking care of the child's emotional and personal affairs on a day-to-day basis whereas guardianship means the power to effect legal transactions and contracts with responsibility for the legal consequences. Unlike guardianship in custody, the child must live with the custodian. In cases regarding custody, the best interests of the minor are given primary consideration (Sabreen 2017). The Guardians and Wards Act 1890 gives a few rules regarding custody and the rest is left to the discretion of the courts, which occasionally results in contradictory judgments. Due to the lack of detailed rules in the statutes, the litigants have to resort to case law to find out rules regarding custody (Sabreen 2017). General rules is that divorce is entitled to custody until age of 7 for males (classical *Hanafi* position) and puberty for females, subject to classical conditions, though there is some flexibility as ward's best interests are considered paramount under terms of Guardians and Wards Act 1890. The underlying intention of the Guardians and Wards Act is to clarify who will take responsibility of whom. For this purpose it defines-

“Minor” means a person who, under the provisions of the Majority Act, 1875, is to be deemed not to have attained his majority.

“Guardian” means a person having the care of a minor person or of his property, or of both the person and property.

“Ward” means a minor for whose person or property, or both, there is a guardian.

Registration of Marriage

All the issues described above have some legal effects and various statutory laws include them from various legal points. However to get a legal remedy of disputes under family

domain the marriage must be registered. Thus, registration of a Marriage is very important. **The Muslim Marriage and divorce (Registration) Act 1974**, described that-

“Notwithstanding anything contained in any law, custom or usage, every marriage solemnized under Muslim law shall be registered in accordance with the provisions of this Act”.

The act again instructs that –

“Where a marriage is solemnized by the *Nikah* Registrar himself, he shall register the marriage at once”.

“Where a marriage is solemnized by a person other than the *Nikah* Registrar, the bridegroom of the marriage shall report it to the concerned *Nikah* Registrar within thirty days from the date of such solemnization”.

“Where solemnization of a marriage is reported to a *Nikah* Registrar he shall register the marriage at once”.

“A person who contravenes any provision of this section commits an offence and he shall be liable to be punished with simple imprisonment for a term which may extend to two years or with fine which may extend to three thousand taka, or with both”.

5.2.1.2. Divorce (Dissolution of marriage)

The Dissolution of Muslim Marriages Act 1939 has included some grounds for a Muslim woman to get judicial decree for dissolution of a marriage. Muslim Family Law Ordinance 1961 has some directions regarding divorce. A general discussion on divorce is necessary to understand it as an important means of family dispute resolution.

In pre-Islamic Arabian society, divorce was considered as the absolute, unlimited and unilateral right of the husband. In Islam, divorce is still absolute right of husband. However, modern jurists contend that the husband cannot exercise the power of *Talaq* arbitrarily, irrationally or unreasonably (n.a. 2012). Divorce in Islam is permissible as a

last resort only followed by some reconciliatory steps. The holy Qur'an in this regard says:

But those [wives] from whom you fear arrogance - [first] advise them; [then if they persist], forsake them in bed; and [finally], strike them. But if they obey you [once more], seek no means against them. Indeed, Allah is ever Exalted and Grand. (34) And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever Knowing and Acquainted [with all things]... (Al-Quran, An-Nisa 34-35).

Divorce in Islam cannot occur until all means to reconciling the dispute between the husband and the wife are over. The husband must choose a judge whom he trusts and the wife may choose a judge she trusts. These two judges do their best to overcome the causes of the wife-husband dispute in order to bring harmony back to the husband and his wife. If these judges fail, only then divorce may come.

Modes of Dissolution of Muslim Marriage

The dissolution of marriage tie can take place in either by death of the parties or by Act of the parties. If it takes place by act of the parties, it may be in the following ways-

By Act of the Husband

The husband may dissolve a marriage by four ways.

(a) **Talaq-e-Sunni**: *Talaq-e-Sunni* is further divided into two forms, namely *Talaq-e-Ahsan* and *Talaq-e-Hassan*. According to the Sunnah, the best procedure for divorce is *talaq-e-ahsan* (most approved form of divorce) in which divorce is pronounced once in *tuhr* (purity, i.e., when the wife is free from her menstrual courses), with no conjugal relations in that period, and then the couple wait for the entire *iddah* (waiting period) for completing the divorce. During the *iddah*, the husband has the absolute right of *ruju* (i.e.

reversal of the divorce process by the husband and maintenance of matrimonial relations as in the past) either verbally or practically. It will be executed and will become irrevocable after *iddat* period (Kalanauri). The Sunnah also permits a second form of divorce, which jurists call *talaq-e-hasan* (proper form of divorce). In this, divorce is pronounced three times, with a gap of one *tuhr* period of the wife between each pronouncement, so that each party has ample time for reviewing its standpoint regarding the dispute. Again, the husband has the absolute right of *ruju* until the divorce becomes final. If the husband pronounces *Talaq* third time in the 3rd period or *tuhr* it will be irrevocable and executed (Kalanauri).

(b) ***Talaq Bid'ee***: The practice of pronouncing three divorces at the same time is against the Sunnah and has been termed as *talaq-e-bidah* (the innovated divorce) by Muslim jurists. However, two opinions prevail among Muslim jurists regarding the effect of this practice. One group considers such a pronouncement as one divorce, while the other takes it as three divorces and declares the outcome to be the final *talaq-e-mughallaza*. Notably, it is unanimously agreed that such divorce is against Sunnah and highly disliked (Kalanauri). Based on the opinion of latter it is also called *bain talaq*, which means irrevocable *talaq*. Under this form, *talaq* becomes effective immediately after the pronouncement of *talaq*. As for example, a man says to his wife that I have given you *talaq bain*. This *talaq* is irrevocable and the husband has no right to retract. This is based on classical Islamic scholars. However, the present practice of majority Muslim countries called triple *talaq* in a session is counted one single revocable *talaq* only. Bangladesh is one of them (Chua and Gudykunst 1987). The practice of triple *talaq* was not allowed

during the Prophet's lifetime, during the first Caliph Abu Bakr's reign and also for more than two years during the second Caliph *Umar's* life.

(c) *I'la*: *I'la* or vow of continuance legally means when a husband swears that he will not have sexual intercourse with his wife and if he abstains from it for four months or more and then *Talaq* becomes effective. The Holy Quran states

“For those who swear not to have sexual relations with their wives is a waiting time of four months, but if they return [to normal relations] - then indeed, Allah is Forgiving and Merciful.”(Al-Quran, Al-Baqara 02:226).

(d) *Zihār*: *Zihār* means injurious comparison. The word “*Zihar*” is derived from the word *Zahir* or *Zahr* meaning back. Legally, it signifies the act of a husband comparing his wife to any of his female relations with whom the marriage is prohibited on account of consanguinity or fosterage. *Zihar* by itself does not dissolve the marriage, but the wife becomes unlawful to the husband without expiation. *Zihār* was a practice of the pre-Islamic days of the Arabs by which the wife was kept in a state of alienation for the whole of her life, having neither the position of a wife nor that of a divorced woman free to marry elsewhere. An Arab in the days of ignorance would say to his wife- *anti 'alayya ka zahri ummî* “You are to me as the back of my mother”. No sooner did those words pronounced then the conjugal relations between husband and wife ended, as by a divorce, but the woman was not free to leave the husband's house and she remained as a deserted wife ('Omar 2010, 725). *The Holy Prophet prohibited Zihār*. The Holy Qur'ân calls it a hateful word and a lie.

“Those who pronounce *Zihar* among you [to separate] from their wives - they are not [consequently] their mothers. Their mothers are none but those who gave birth

to them. And indeed, they are saying an objectionable statement and a falsehood. But indeed, Allah is Pardoning and Forgiving” (Al-Quran, Al-Mujadila 58:02).

By act of the wife

The power to divorce may be delegated to the wife herself or to a third person. This is called *Tafweez*. This delegation may be absolute or conditional and it may be once only or for a period or permanently. The power so delegated to the wife is irrevocable and it can be exercised even after the institution of a suit against her for restitution of conjugal right. Delegation of power may be given at the time of marriage or at any time after the marriage contract. However, delegation of *talāq* does not reduce the absolute right of husband at all (Akter 2010).

By Mutual Consent

Marriage may also be dissolved by mutual agreement between the parties. These are –

(a) *Khula*:

Literal meaning of *Khula* is redemption. If the mutual relationship between the husband and wife is not good, the wife, if she so desires, may seek a *Khula* divorce by relinquishing her claim to the dower. The Maliki jurists refer to the *Khula* form of divorce as *Talaq-bil-Iwad* or ‘divorce by giving something in return’ while to the Hanafi jurists the *Khula* form of divorce meaning the end of a marital relationship with consent either with the utterance of the word *khul* or something that means the same (Akter 2010). *Khula* signifies an agreement entered into for the purpose of dissolving a

connubial connection in lieu of a compensation paid by the wife to her husband out of her property. Holy Quran says about *khula*-

“And it is not lawful for you (men) to take back (from your wives) any of your *Mahr* (bridal money given by the husband to his wife at the time of marriage) which you have given them, except when both parties fear that they would be unable to keep the limits ordained by Allah (e.g. to deal with each other on a fair basis). Then if you fear that they would not be able to keep the limits ordained by Allah, then there is no sin on either of them if she gives back (the *Mahr* or a part of it) for her *Al-Khul'* (divorce)”(Al-Quran, Al-Baqara 02:229).

(b) *Mubarat*

The word *Mubara'a* indicates the freeing of each other (from the marital tie) by mutual agreement. It is a mode of mutual release or discharge, which leaves each party without any claim upon the other. Here both parties desire dissolution of marriage. When the divorce is affected by mutual consent of the husband and wife, it is known as *Mubara'at* (i.e. freeing one another mutually) (Akter 2010).

Dissolution by Judicial Process

Dissolution of marriage can take place by judicial process in the following cases.

(a) *Li'an* or Imprecation

Li'an, though rare, is another procedure of dissolving marriage. When a husband raises adultery charges against his wife but is unable to produce four witnesses to prove his claim he may either accept that his allegation was false or he will swear by the name of Allah to be cursed if he proves false. Likewise, his wife will do the same. This mutual cursing is termed as *Li'an*. The husband will get 80 stripes for allegation of adultery (Savaneli!) he raised against his wife if he fails to swear. It is a mode of dissolution of

marriage, which signifies testimonies confirmed by oath, on the part of a husband and a wife. The holy Quran states -

And those who accuse their wives [of adultery] and have no witnesses except themselves - then the witness of one of them [shall be] four testimonies [swearing] by Allah that indeed, he is of the truthful. (Akter) And the fifth [oath will be] that the curse of Allah be upon him if he should be among the liars. (7) But it will prevent punishment from her if she gives four testimonies [swearing] by Allah that indeed, he is of the liars. And the fifth [oath will be] that the wrath of Allah be upon her if he was of the truthful (Al-Quran, An-Nur 24:6-9).

(b) *Faskh* or judicial Rescission:

The word *faskh* means annulment or abrogation. It comes from a root, which means the right of *Qadi* or judge to annul a marriage contract on the application made by the wife. It is therefore, the dissolution or recession of the contract of marriage by judicial decree.

Option of puberty or *Khyar-ul-Bulug*:

Islam allows a child marriage under the guardianship (*wilayat*). If the husband or wife is minor at the time of marriage, he/she can approve or repudiate it after attaining puberty. This is called option of puberty or *Khyar-ul-Bulug*.

Dissolution on ground of apostasy

According to Islamic law, an apostasy is a treasonable offence. The marriage of a Muslim male and female shall stand dissolved on apostasy.

Divorcees and their relationship with *iddah* (waiting period)

Any *talāq* given for the period during which the husband can take back his wife is called *talāq-e-rajaa* (revocable divorce). After the first or second pronouncement of divorce, a

husband can take his wife back by word or action before her *iddah* ends. If the *iddah* period is completed, the husband, prior to the pronouncement of the third divorce, has the option of taking his wife back by re-marry with her consent. This type of divorce is called *talaq-e-bain sughra*. The third pronouncement makes divorce final and irrevocable—it is then called *talaq-e-bain kubra or mughallaza* (the irrevocable divorce). The third divorce means that the couple can never stay together, unless the extraordinary condition of *halala* is fulfilled (Kalanauri). The *idda* (waiting period) varies based on nature of divorce and divorcees. But statutory law of MFLO 1961 has directed that 90 days of waiting period has to be observed mandatorily irrespective of age and physical fitness of a divorcee. This law clearly keeps some provisions to violate basic human rights as it has not shown any consideration towards the immature girl or women who are married but not consummated, women who reached to menopause etc. On the other hand, Islamic law has been found more flexible and humane as it exempted from 90 days of waiting for some women. An overall comparison between Islamic laws of divorce and divorce under Muslim Family Law Ordinance, 1961 has been shown below-

Table 5.1

Distinguishing points	Islamic law for divorce	MFLO 1961
Focus	On justice	On operational convenience
Step taken	categorize divorcee for justice purpose	Merge all categories for operational purpose
Divorce types	<i>Hasan, Ahsan</i>	<i>Ahsan</i> only
Triple divorce in one session	Has option to accept as one	Accepted as one in <i>ahsan</i> form
Starting point of <i>Iddah</i>	Immediately after pronouncement of <i>Talaq</i>	After the notice is received by the AC chairman
Duration of <i>iddah</i>	varies based on categories of divorcee	No variation
Category 01	exempted from <i>iddah</i>	90 days
Category 02	End of delivery	90 days / end of delivery if it is larger
Category 03	Three successive courses of menstruation	90 days /+
Category 04	90 days (3 months)	90 days /+
Category 05	90 days (3 months)	90 days/+

Category 01 = Marriage not consummated
Category 02 = Consummation caused pregnancy (al - <i>Talaaq</i> 65:04)
Category 03 = Consummation cause possibility of pregnancy and needs a clarification (al - <i>Baqarah</i> 2:228)
Category 04 = Consummation will cause no pregnancy for the divorcee is of menopause (al - <i>Talaaq</i> 65:04)
Category 05 = Consummation will cause no pregnancy for the divorcee is of immature girl (al - <i>Talaaq</i> 65:04)

From the table above it is seen that *iddah* (the waiting period) for a divorcee varies based on nature of divorce and divorcees but MFLO failed to accommodate it. Under Islamic law, a third divorce becomes effective as soon as it is pronounced but under section 7, a third divorce will be effective only after ninety days have elapsed from the date of the receipt of its notice by the chairman, and not from the date of pronouncement of the *talaq* (Chua and Gudykunst 1987).

The Holy Quran has attributed sanctity and permanence to matrimony. However, in extremely unavoidable situations, *talaq* is permissible. But an attempt for reconciliation and if it succeeds, then revocation—are the Quranic essential steps before *talaq* attains finality.

Registration of Divorce

The registration of the marriage is the basis of legal treatment of matrimonial dispute and registration of divorce is also an important matter for some legal deals with the couples. Section 5 of the MFLO 1961 created a connection with the Muslim Marriages and Divorces (Registration) Act 1974.

Regarding Registration of Divorce, The Muslim Marriage and divorce (Registration) Act 1974, described that –

1. A Nikah Registrar may register a divorce effected under Muslim Law within his jurisdiction on application produced before him for such registration.

2. An application for registration of a divorce shall be made orally by the person or persons who has or have effected the divorce. If the woman be a *parda-nashin*, such application may be made by her duly authorized *wakil*.
3. (The *Nikah* Registrar shall not register a divorce of the kind known as *Talaq-i-tafweez* except on the production of a document registered under the Registration Act, 1908 (XVI of 1908), by which the husband delegated the power of divorce to the wife or of an attested copy of an entry in the register of marriages showing that such delegation has been made.
4. Where the *Nikah* Registrar refuses to register a divorce, the person or persons who applied for such registration may, within thirty days of such refusal, prefer an appeal to the Registrar and the order passed by the Registrar on such appeal shall be final.

5.2.1.3. Accommodation of other school of thoughts to resolve some family disputes which basis is *Ijtihad*

A dispute is to bring allegation by one and denied by the other and both want to show some reasons on their behalf. In another word dispute is a problem to be solved together rather than a war to win. It means that resolution of dispute is an act of *Mu`amalah* (worldly issue) and *twfiqi* in nature meaning that on whom Allah blessed can understand the fact more perfectly and solve the problem accordingly. It is not an act of *Ibadah* (religious observance) which is *tawqifi* in nature meaning that none has right to think otherwise without doing it as it is ordained. The holy Quran described the fact of resolution of a dispute when said:-

وَدَاوُدَ وَسُلَيْمَانَ إِذْ يَحْكُمَانِ فِي الْحَرْثِ إِذْ نَفِثَتْ فِيهِ غَنَمُ الْقَوْمِ وَكُنَّا لِحُكْمِهِمْ شَاهِدِينَ (٧٨) فَفَهَّمْنَاهَا سُلَيْمَانَ ۖ وَكُلًّا آتَيْنَاهَا حُكْمًا وَعِلْمًا ۚ

“And [mention] David and Solomon, when they judged concerning the field - when the sheep of a people overran it [at night], and We were witness to their judgment. (78) And We gave understanding of the case to Solomon, and to each [of them] We gave judgment and knowledge” (Al-Quran, Al-Ambiya 21:78).

The dispute in this *ayah* was between two parties, one had a folk of goats and the other had paddy field destroyed by the goats. They came to Dawud (AS) to get their dispute

resolved. Dawud (AS) ordered the owner of the goats to give them to the owner of the paddy field. Sh`arawi (1991) said that probably Dawud (AS) finding the value of the goats equivalent to that of paddy field gave this verdict. On the way to go back, the disputants met Solomon (AS), the eleven years old son of Dawud (AS). Solomon after hearing the verdict remarked that the best fit is to give the goats to the owner of the paddy field for a period to get benefit from them and within this time, the owner of the goats will repair the paddy field. Then both will get their property returned (Sh`arawi 1991). Solomon did not say the verdict of Dawud (AS) is a wrong one. It was fit but Solomon suggested the fittest one. Which Allah (SWT) said “And We gave understanding of the case to Solomon”. This is the *fiqh*, the judgment and knowledge, which Allah granted both Dawud and Solomon (AS), but Solomon’s suggestion was the fittest in this case.

Concerning resolution of any dispute, it may be noted that dispute generally occurred as to rights of human being, which is in another word out of act of *Mu`amalah*. Only a few part of *mu`amalah*, which is unchangeable in nature, the holy Quran has given details like family laws, Inheritance law etc. However, there are some issues left without giving details by the Quran tactfully, thus scholars have to find out the solution based on their research (*Ijtihad*). For example, triple *ṭalāq* in a session, grounds of dissolution of marriage etc. Various schools of thoughts differ to resolve such cases in various ways. All these opinions of various *fiqh* may suit in its proper place or with a changing situation. Therefore, people following one school of thought may have a proper solution from other school of thought. Moreover, for a proper resolution thus all school of

thoughts may be followed without any hesitation. The case bellow may be the best example in this regard-

In *Hanafi* law, women do not have the right of *khulaa* without the consent of husbands. Similarly, in case of *faskh* (dissolution of marriage) only the wife of an impotent husband could apply for *faskh* (dissolution of marriage). So if a Muslim woman in Indian subcontinent wanted to get rid of her cruel husband, she was not having any option. The *Hanafi* School never recognizes the dissolution of marriage based on non-maintenance, cruelty, imprisonment of the husband, missing husband, or based on any defect in the husband. The most miserable condition was in the case of missing husband. According to the *Hanafi* School of *Islamic* jurisprudence, the wife of the missing husband cannot get separation until the people of the same age of her husband are alive. So, according to *Ahnaf*, the period is approximately eighty to one twenty years. Therefore, in practical, she can never contract a second marriage. So these things forced the Muslim women of India to renounce Islam just to get rid of their cruel husbands. The *Hanafi* law regarding dissolution of marriage was greatly blamed for these conversions (Arafat 2015). The Dissolution of Muslim Marriages Act, (DMMA) 1939 allowed all grounds admitted in *Maliki* School of *Islamic* jurisprudence for the dissolution of marriage. The Act provided a women the right to terminate her marriage if her husband (Kalanauri):

- is missing,
- has failed to provide maintenance,
- is sentenced to imprisonment for seven years,
- has failed to perform marital obligations,
- is impotent,
- is insane,
- is suffering from leprosy or venereal disease,
- is cruel,
- is associated with women of evil repute,
- attempts to force her to lead an immoral life,

- dispossesses her of her property, or
- obstructs her from practicing religion.
- On any other ground which is recognized as valid for the dissolution of marriage under Muslim law, provided that-
 - (a) a decree passed on ground of missing shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorized agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree;
 - (b) no decree shall be passed on ground of imprisonment until the sentence has become final; and
 - (c) before passing a decree on ground of impotency the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.

5.2.1.4. Family Dispute resolution Traditional *Shalish* and Role of *Ulamas*

The vital issues of Islamic family law covered by the MFLO 1961 and DMMA 1939 still remain as subject matter of traditional *Shalish*. As the issues are related with *shariah*, general perception of people and *shalishkars* is that *ulamas* have proper knowledge about the issues. Previously It was the trend for local *shalishkars* (arbitrators) to engage and seek verdicts from *maulanas* or *imams* of local mosques on legal family disputes governed by *shari'ah*. In this process, *fatwa* on Islamic family law issues were sometimes issued by mostly un-informed, traditional-minded and unscholarly *mawlanas*. These *fatwas*, which are far from being rational legal interpretations by qualified muftis, often prescribe physical and mental punishments (torture) to women for breaches of *shari'ah*, which have, on occasions, provoked victims to commit suicide.

Although fatwa-giving and rural mediation will continue to be used as dispute resolution mechanisms, there was a need to impose legal and moral control on the existing arbitrary practice of issuing '*fatwa*' not with regard to statutorily governed family law issues only but regarding all disputes in which rights and honor of anybody is attached. There is no *shari`a* court existing in Bangladesh. No Fatwa board or authorized institution is working for giving fatwa legally. Fatwa is being given privately. An authorized board for giving fatwa is deemed necessary nationally under which various centers will work to address day-to-day needs of society and for resolving dispute specially. Family disputes are mainly resolved by the family *shalish* through family members of the disputing parties within family boundaries that hardly goes out. However based on the nature of dispute and its gravity it may become issue of clan or village *panchayat* also. As family disputes are mostly surrounded with husband-wife relationship, which sometimes leads to separation of a family. Though statutory laws covered many important issues of family disputes for lack of knowledge *shalishkars* are not following it. Again, for lack of integration between Islamic Family laws with statutory Muslim family laws traditional *ulamas* are not aware of many things related with family disputes. However, it has been observed from interviews with various categories of *shalishkars* that they feel presence of *ulama* in *shalish* activities. Because, *ulama* have much ability to convince disputing parties reminding them about the final Day of Judgment.

Issues of family disputes are countless. It is quite impossible to address all the issues by state law or bring them under a legal framework. Rural disputes occur under rural environment and *shalishkars* are right persons to address for they have practical

knowledge about the facts of the disputes. Some family related issues that cause disputes in family level in rural areas are mentioned below-

Violence against women
 Domestic Conflict
 Divorce due to non-payment of dowry
 Violence against Woman (VAW) Based on Dowry
 Dispute over Extra-Marital Affairs
 Wife beating (physical torture) by husband
 Confinement of wife at her father's house
 Divorce and claim of alimony (for children)
 Remarriage of husband without first wife's consent
 Conjugal maladjustment
 Financial maintenance for a wife and children or
 a combination of such issues.

From the list above it has been seen that husband is the person liable for almost for all these issues and wife has a very little part to that. To prevent some of these causes there are some statutory laws available. For example, The Dowry Prohibition Act 2018, has repealed the Dowry Prohibition Act 1980. Lewis (2005) defines Dowry as a gift-payment demanded by husband's family from bride's family at the time of marriage. Dowry Prohibition Act, 2018 defined dowry. It fixed penalty for claiming, giving or receiving it. It has also guarded against false cases in the name of dowry. It treated the issue as a crime and described the way of trial of this crime extensively. Dowry has been one of the leading causes of torture of women in Bangladesh. The Dowry Prohibition Act 1980 outlaws dowry with a maximum penalty of 5 years imprisonment, and safeguard from physical abuses is repeatedly affirmed in several pieces of legislation (Begum 2014). The Cruelty to Women (Deterrent Punishment) Ordinance 1983, The Repression against Women and Children Act 2000, The Parents Care Act, 2013 are some important pieces of legislation in this regard.

al-Hafid (2004) categorize all matrimonial disputes under three categories. To understand rural family disputes this may help the *shalishkars*. The Causes of marital discord based on the parties involved in the dispute are as follow-

1. Causes of matrimonial dispute from the husband
2. Causes of matrimonial dispute from wife
3. Causes of matrimonial dispute from both sides

Causes of matrimonial dispute from the husband

The following comprises the behaviors exhibited by the husband, which in turn leads to matrimonial or marital dispute:

- a) Oppression and rough treatment
- (b) Refusing to maintain her financially
- (c) Injustice among wives in polygamous family
- (d) Breaching pre-marital agreements
- (e) Abandonment
- (f) Financial problem
- (g) Dowry demand

Causes of matrimonial dispute from wife

- (a) Being disobedient to and garrulous with her husband
- (b) Being negligent in carrying out domestic chores and duty to her husband
- (c) Going out without her husband's permission
- (d) Lack of domestic skill
- (e) Lack of proper dress or dress up alluring for her husband

Causes of matrimonial dispute from both

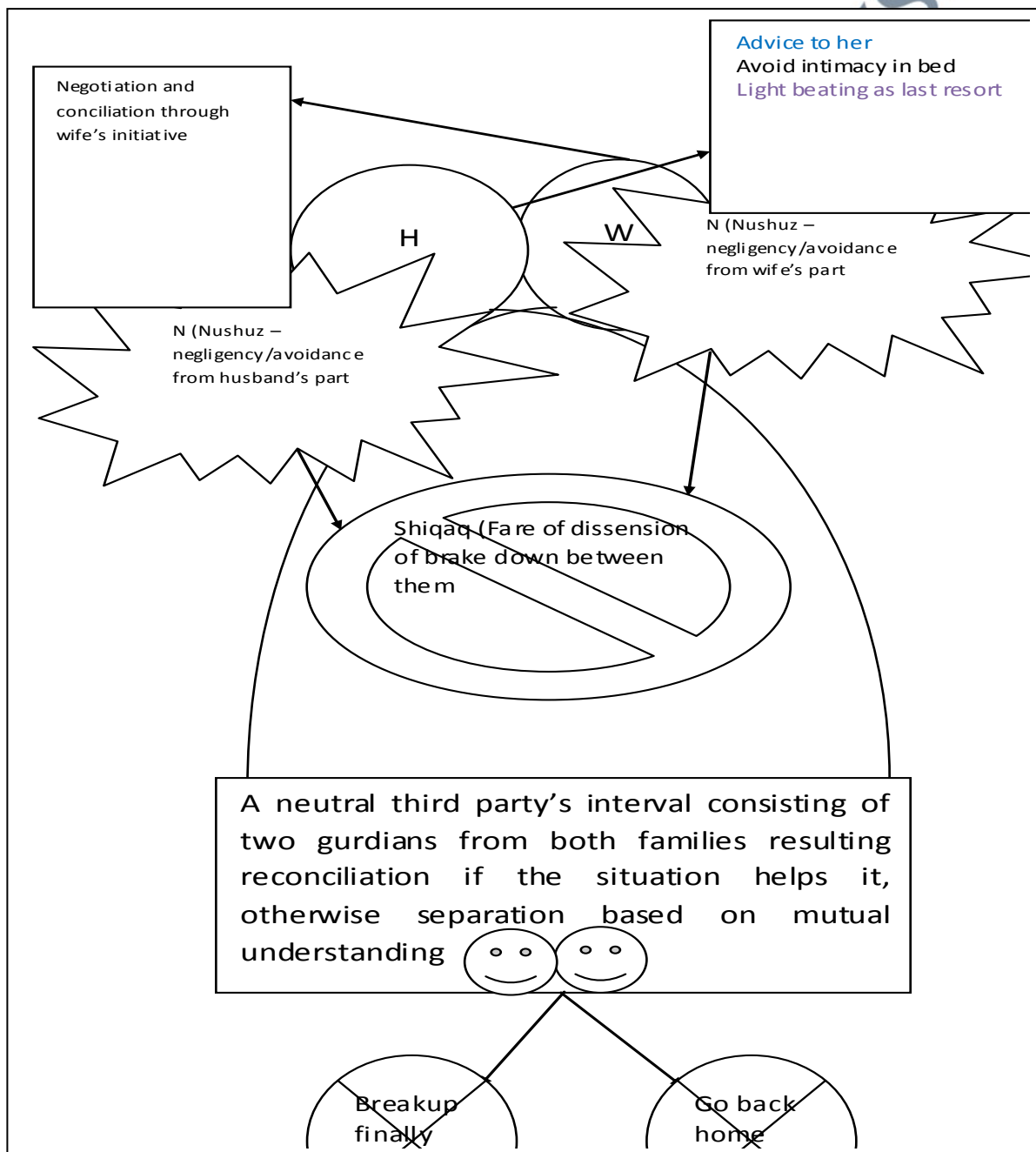
- (a) The nature of the husband or wife's work
- (b) Difference in personal and career goal
- (c) Unnecessary jealousy and suspicion
- (d) Transgressing against the matrimonial rights of one another
- (e) Unfriendly to cleanliness and adornment by either of the spouses
- (f) Child-rearing issue
- (g) Religious and cultural difference
- (h) Sexual incompatibility

All these causes are the general causes for family disputes all over the world. Misuse of modern technology may cause some family disputes like social media, cellular phone, TV, etc. Dowry demand and putting pressure on the wife to collect it from her paternal home is also a special cause for a family dispute. Face book scandal or cell phone misuses, staying of the husband in abroad for a long time are great factors of family disputes also. A family dispute may be resolved through reconciliation by the couple themselves or by intervening of a neutral third party consisting of two guardians of the disputing parties. It may be resolved through the dissolution of marriage when it deemed necessary. However, dissolution of a marriage must go through some reconciling steps by the husband or wife or a neutral third party or an administrative authority set by the state like arbitration council. Generally, in rural Bangladesh for close blood tie, people take so many steps to reconcile between a husband and wife involved in a matrimonial dispute. Families automatically become involved with a family dispute resolution through family *Shalish*. However, some social elites or notables take part to resolve some of the family disputes through their intervention if the main family involved in the dispute invites them.

Figure 5.1

Representing matrimonial dispute resolution based on Quranic Approach

H= husband, W= wife and N= *nushuz*. It shows that in the stage of *shiqaaq shalish* will act as *hakam*.



5.3. Disputes of Social domain and dealing of *Shalish* with them under Bangladeshi Legal Framework

A dispute in social domain means a dispute happening outside of family domain between husband and wife. But it occurs between two individuals or two groups out of the same family. Village court deals cases in social domain with a limited range of financial value. A Village Court can deal with both criminal and civil disputes. The Village Courts Act, 2006 contains a Schedule with two parts, which specifies the nature of cases and disputes a Village Court can deal with. The Village Courts Ordinance, 1976 was in force until it is replaced by the Village Courts Act, 2006. But the Village Courts Rules prepared for that time are still in force. As such, the Village Courts of Bangladesh are established and adjudicating disputes mentioned in the Schedule (Part I on criminal cases and Part II on civil suits) within the purview of the Village Courts Act, 2006 and the Village Courts Rules, 1976 and maintain records of judicial procedure according to the prescribed forms annexed with the Village Courts Rules, 1976. The Village Courts Act, 2006 amended in 2013 has enhanced pecuniary jurisdiction up to Taka seventy five thousand. Among cases of social domain land-property dispute is in the high in number. **Cases Identified for Village Court to deal by two schedules are following:**

Criminal Cases of

- Unlawful assembly consisting of not more than ten persons
- The crime against the cattle valued up to seventy five thousand taka.
- The crime against a property other than the cattle, worthy of fifty thousand taka at best
- When the amount in respect of which the offence is committed does not exceed seventy five thousand taka.
- When the value of the property involved does not exceed seventy five thousand taka.
- When the value of the animal does not exceed seventy five thousand taka
- Attempts to commit or the abetment of the commission of any of the above offences

Civil Cases of

- Recovery of money on due contracts, receipts or other documents
- Recovery of movable property, or for the value thereof
- Recovery of possession of immovable property within one year of dispossession
- Compensation for wrongfully taking or damaging movable property
- Damages by cattle trespass
- Payable wages of the farmer and recovery of compensation
- Condition that the value of recovery or compensation will not exceed tk. 75000.00

The issues that cause rural disputes of social domain and resolvable by village courts are mentioned above. It does not mean that these two schedules covered entire rural disputes.

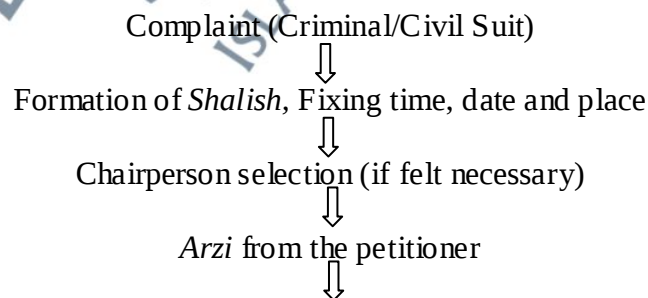
Some researchers identified some social disputes that occur in rural areas, as mentioned below-

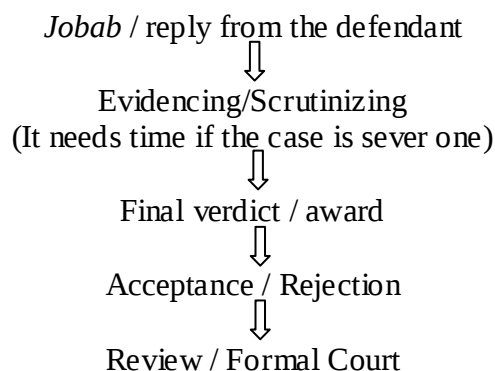
- Stigmatizing wives whose husbands are abroad
- Quarrel over delay in handing over assets (land, cattle etc) to the buyers
- Quarrel over distribution of inherited land between close relatives
- Enmity arising from personal rivalry
- Inheritance based disputes between two relative neighbors
- Family and patrilineal clan tensions
- Violence against women based on Land Dispute
- Harassment due to Land Disputes
- The demarcation of a sold land
- Protest by demanding ownership over a land
- Try to obtain possession over a land bought 17 years ago
- Possessing land fraudulently
- Procrastinating to hand over the possession of a land and in failure to pay borrowed money
- Occupying more land property based on a sold small part, etc.

A flow chart of *shalish* for dealing social disputes

A *Shalish* starts in response to a complaint by a petitioner and through calling some elderly persons by both parties. Generally, the *shalishkars* are selected on suggestion of the one to whom the complaint is raised first. Then consulting among them and asking the disputing parties the *shalishkars* fixed a date, time, and place for a *Shalish* meeting. A

place is chosen at home premises of the petitioner or where the incidents happen. It starts its procedure by selecting a chairperson through proposal and support. The chairperson generally delivers his opening speech and systematically attracts the attention of the audience. The *shalishkars* try their best to create a friendly environment and then the chairperson asks the petitioner to state his speech, which they called '*Arzi*'. After the '*Arzi*' ends, the respondent has to reply. As the reply is generally to defend the respondent himself, he is thus called defendant also. Then in the next stage the *shalishkars*, if the case is property related, demand necessary evidence supporting statements from the plaintiff and from defendant as well. If the case seems a complex one and it needs several sessions, the *shalishkars* constitute a small jury board. The Jury board may consult among themselves to find out a solution fairly. If the case is behavioral like quarreling based on cattle trespassing, domestic birds destroying something of neighbors gardening, the dispute based on such silly matters may end by only one session with sincere advising from *shalishkars*. *Shalishkars* try their best to reach an amicable settlement peacefully by any means. That is why they endeavor to convince the disputing parties through reminding them the final judgment of life hereafter. Finally, if the agreement comes, they declare a solution which is enforced by social pressure. The flow chart below may give a clear idea about the overall proceeding of a *Shalish*.





5.3.1. Maintaining Islamic Social Relationship is a great preventing step to social dispute

Islam gives great importance on social relations. The peace and stability of society depend on good social relations amongst the members of society. Islam has laid down detail instructions so that the social relations are properly maintained and not disrupted by wrong practices. The importance of social relations will be clear from the following saying of the Prophet Muhammad (SAAS).

Anas bin Malik (May Allah be pleased with him) said:

The Messenger of Allah (SAAS) said, "Do not desert (stop talking to) one another, do not nurse hatred towards one another, do not be jealous of one another, and become as fellow brothers and slaves of Allah. It is not lawful for a Muslim to stop talking to his brother (An-Nisaburi) for more than three days" (Hadith. An-Nawawi. Bab Tahrimu al-Hijran baina al-Muslimin ...: #Bab No. 280)

Islam has made it unlawful for a Muslim to cut relations with fellow Muslims.

Jubair bin Mut'im reported on the authority of his father:

The Prophet (SAAS)) said: Anyone who cuts off relationship from his nearest relatives will not enter Paradise (Hadith. Al-Sijistani. Kitab Al-Zakat: Bab fi al-silat al-rahim: Juz 0 : # 1696)²⁴.

²⁴ For online check please click here, <https://sunnah.com/abudawud/9/141>

The Prophet of Islam has also said,

Narrated Abu Hurayrah:

The Prophet (SAAS) said: It is not allowable for a Muslim to keep apart from his brother for more than three days, for one who does so and dies will enter Hell (Hadith. Al-Sijistani. Kitab Al-Adab: Bab fi Man Yahjiru Akhahu al-Muslim: Juz 0: #4914) ²⁵.

Abu Ayyub al-Ansari reported the Messenger of Allah (SAAS) as saying:

It is not allowable for a Muslim to keep apart from his brother for more than three days. When they meet, this turns away from him, and that turns away from him. The better of the two is the one who initiates in salutation (Hadith. Al-Sijistani. Kitab Al-Adab: Bab fi Man Yahjiru Akhahu al-Muslim: Juz 0: #4911) ²⁶

It is not permissible for a Muslim to keep apart from his brother for more than three days. If three days pass, he should meet him and greet him, and if replies to it, they will both have share in the reward. If he does not reply, he will bear his sin while the Muslim (who offered him the greeting) will have been freed from the sin of keeping apart. Islam has also emphasized the need for immediate settlement of social disputes so that peace in general prevails in the society.

Allah says in His book, the Qur'an,

"The believers are nothing else than brothers (in Islamic religion). So make reconciliation between your brothers, and fear Allah, that you may receive mercy"(Al-Quran, Al-Hujrat 49:10).

Narrated Abud Darda':

The Prophet (SAAS) said: Shall I not inform you of something more excellent in degree than fasting, prayer and almsgiving (sadaqah)? The people replied: Yes, Prophet of Allah! He said: It is putting things right between people, spoiling them is the shaver. (Hadith. al-Ash'ath. Kitab al-Adab: Bab fi Islahi Dhat al-Bain: Juz 7:#4919)

²⁵ For online check click here please, <https://sunnah.com/abudawud/43/142>

²⁶ For online check please click here, <https://sunnah.com/abudawud/43/139>

Social peace is disrupted because of greed and consequent effort to grab property of others. Islam has prohibited all illegal methods of acquiring property. Allah says in His book:

“And eat up not one another's property unjustly (in any illegal way e.g. stealing, robbing, deceiving, etc.), nor give bribery to the rulers (judges before presenting your cases) that you may knowingly eat up a part of the property of others sinfully” (Al-Quran, Al-Baqara 2:188).

“O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent. And do not kill yourselves (nor kill one another). Surely, Allah is Most Merciful to you” (Al-Quran, An-Nisa 4:29).

For the same reason, Islam has declared life as sacred and has prohibited killing of any person except in accordance with the provisions of law. Allah says in His book:

“whoever kills a soul unless for a soul or for corruption [done] in the land - it is as if he had slain mankind entirely” (Al-Quran, AL-Maida 5:32).

The Prophet of Islam has said in this connection

Narrated Ibn `Umar:

Allah's Messenger (SAAS) said, "A faithful believer remains at liberty regarding his religion unless he kills somebody unlawfully". (Hadith. Al-Bukhari. Kitab al-diyat: Bab qawlu Allahi " wa man yaqtul mumina..!": # 6862)

It is for this purpose that Islam has declared the honour of people as sacred. None is allowed in Islamic law to spoil the sanctity of any person's honour. The Prophet of Islam has said, "Your lives, your honour, and your property are as sacred to each other as the sacredness of this day (of Arafat) this month (of Zilhajj) this city (of Makka, where there is Kaba)".

For healthy social relations, Islam has prohibited spreading of rumor. This means passing on to others what one person hears from another person in such a manner that will cause dissension among people or increase bitterness among them. The Qur'an said in this regard-

“And do not obey every worthless habitual swearer. [And] scorner, going about with malicious gossip”(Al-Quran, Al-Qlam 68:10-11)

It is reported from Hudhaifa that news reached him (from the Holy Prophet) that a certain man carried tales. Upon this Hudhaifa remarked: I heard Allah's Messenger (SAAS) saying: The tale-bearer shall not enter Paradise (Hadith. Lashin. Kitab al-Birr wa as-Silah wa al-Adab: Bab Tahrimu An-Namimah: # 177)

Islam has also prohibited unnecessary suspicion. The Qur'an said in this regard

“O you who have believed, avoid much [negative] assumption. Indeed, some assumption is sin”(Al-Quran, AL-Hujrat 49:12).

The Prophet (SAAS) has said in this regard,

Abu Hurairah narrated that the Messenger of Allah (SAAS) said: “Avoid suspicion, for suspicion is the most false form of talk.”. (Hadith. Ibn Hambal. Bab Ibtidau Musnad Abihurairah:#7333)

For good social relations Islam has also prohibited mocking at other people, slandering others, violation of privacy of other people, backbiting, calling people by bad nick names. If the above principles are followed properly in any society, the social relations will surely attain high standards of decency and will ensure better social peace.

5.3.2. Use of sources of Islamic *Shari'ah* in dispute resolution

Dispute resolution is a social, legal and judicial issue. *Shalish* as a dispute resolution intervening by a third party is similar to *sulh*, which is equivalent to present day ADR system. The main difference between *shalish* and other two is resolution of a dispute by disputing parties themselves without the help of any third party does not come under *shalish*. On the other hand, *sulh* may be by the disputing parties themselves or by the help of a neutral third party. Unlike *qada* (formal Judiciary) ADR, *Sulh* or *Shalish* are based on disputants consent from beginning to the end. Dispute resolution in Islam formally or informally is always based on Islamic *sharia'h* and hence all sources of Islamic *shari'ah* are the sources of all dispute resolution systems. The table bellow presented the dispute resolution system as a whole and *sulh* as informal system.

Table 5.1

Dispute Resolution in Islam

Sources	Primary		Secondary								
	Qura'n	Sunnah	Main		Additional						
			<i>Ijma</i>	<i>Qias</i>	<i>isthsan</i>	Istislah, Masalih al mursalah	Madhab al sahabi	<i>Urf, Adat</i>	Sadd al-darai	istishab	Sar' man qablana
Fatwa	Fatwa (legal expert's opinion) as processing unit of <i>sharia</i> to adjust with present problem for both <i>qada</i> & <i>sulh</i>										
System	<i>Qada</i>	<i>Sulh</i>									
		<i>nasihah</i>	<i>Sulh</i>			<i>tahkim</i>	med-arb	<i>Muhtasib</i>	<i>Wali al mazalim</i>		
Process			negotiation	Mediation conciliation	Compromise of action						
Proposed		<i>nasiha</i>	<i>mufawadat</i>	<i>Wasitah</i>	<i>tanazul</i>	<i>tahkim</i>	Med-arb	<i>muhtasib</i>		Hiwar, etc	

The table (1st column 3rd row) explains that there are two systems for dispute resolution namely *Qada* (formal judiciary) and *sulh* (informal system). The sources for both are divided into two categories namely primary and secondary sources. Secondary sources are again of two types, main secondary and additional secondary. Fatwa of a mufti acts as a processor of *shariah* laws to make it applicable for current problem and to help judges to resolve the current disputes. Fatwa acts as processing unit to adjust *shariah* (quran, Sunnah, *ijma*`, *qiyas* and heritage of Islamic *fiqh*) with current situation to solve contemporary problems. *Sulh* and *qada* are the main two systems for dispute resolution.

Chapter four elaborately shows how *sulh* is based on Quran and Sunnah as primary sources. The holy Qur'an promotes dispute resolution, explicitly in family law within the Muslim community and amongst the monotheistic religions, and provides a procedural framework for solving disputes within the family (kambeck 2012). Various narratives from Prophet's biography represent him as a well-respected person who was often asked to settle conflicts. One such example is the story of settling a dispute between tribes in Makka in connection with the black stone (*hajr al aswad*) while they were rebuilding *ka'ba* (kambeck 2012). Kambeck remarked that neither in history nor since ADR became commonly used dispute resolution methods in countries with a Muslim majority, it has been raised no objection against the practice of ADR. It can be argued that this is a

consensus in the absence of objection, *'ijmā' sukūtī*. Considering ADR as *ṣulḥ*, it has direct base in the holy Quran. Any process that can help in resolving a dispute if it does not go against the spirit of Quran and Sunnah necessarily will not go against *ijma* also. In this way kambeck (2012) explained other sources of *shariah* like *Qias*, *isthsan*, *Istislah*, *Masalih al mursalah*, *Madhab al sahabi*, *'Urf*, & *Adat*, *Sadd al-darai*, *istishab*, *Sar'uman qablana* as sources of ADR which is equivalent to *ṣulḥ*. It does not mean that *shalishkars*, mediators or arbitrators will use all these sources in resolving disputes. But they will perform as operators only. This is the duty of Mufti or *mujtahid* to use all these sources and find out the prospective solution of current problems.

5.4. Personal and Collective Quality Development of *Shalishkars*

The main objective of legal activities is to ensure justice and equity. *Shalishkars*, resolving disputes, are dispensing justice for rural people. They are not authorized officially by the state but their community authorizes them commonly to do so. In any specific dispute, they utterly take authorization from both disputing parties. Whatever it is, they do *shalish* being authorized socially and morally. The holy Quran when orders to ensure justice it orders generally including all justice dispensing institutions and persons. In doing so, all those related to justice dispensing activities should have some qualities. Sincerity, fairness, good reputation, acceptability to both parties and profound Islamic knowledge are the core conditions of any neutral third party for both formal and informal dispute resolution system.

In addition to that a *shalishkar* needs also some other qualities to improve the quality of *shalish*, like:

- Maturity in age; that a minor who has not attained the age of maturity cannot be a *Qadi*.
- Strength of memory and genius
- Soundness of wisdom and conscience
- Authenticity of justness and fairness
- To be male, though a woman may also be appointed as *Qadi* in those cases wherein her evidence is admissible
- To be a Muslim; that a non-Muslim is not eligible for holding the office of *Qadi*.
- To be away from anger, hunger and over excitement during the time of trial and judgment
- And should never get tired at litigant's lengthy arguments; but they must exhibit patience, perseverance in scanning the details in examining points and sifting fact from fictions.

“Since Islam laid down utmost importance on justice and it is dependent on the judges, they should have capability and maturity of judgment and should meet the above-mentioned conditions” as commented by Masud, Messick, and Powers (1996). It may, concerning traditional *shalish* and *shalishkars*, not be possible to achieve all these qualities. However, they will do well if they have these qualities or most of them. It has been observed that the *shalishkars* who have good academic background are doing *shalish* more effectively. As in traditional *shalish*, *shalishkars* deal common people who sometimes behave roughly they have to tolerate it. They need to be patient, intelligent, wise and dutiful to their affairs to ensure justice, respect to each other, differ gently to put their opinion, ability to consult and collect opinion of others. They should show organizational behavior following the chairperson of *shalish*.

Summary

Traditional *shalish* exists traditionally. It dates back to the history of human being residing anywhere. *Shalish* as a traditional dispute resolution system for rural Bangladesh has a great importance. Whereas Village court deals some petty disputes both civil and criminal in nature and Arbitration Council deals only some prescribed matrimonial disputes, *Shalish* deals almost all types of disputes in rural areas of Bangladesh. It thinks disputes as social concern and society has to resolve it for maintaining social relationship. It deals even so many murder cases and brings the parties to come to a peaceful settlement. Its history goes back to the history of dispute resolution system in rural Indian subcontinent. Therefore, it got its ingredients from Hindu, Muslim and British regime in India. However, the *shalish* is mainly influenced by Islamic norm in Muslim majority Bangladesh. Present day ADR as an umbrella term includes *shalish* as an informal ADR. *Shalish* needs a legal acceptance in the sense that whenever a *shalish* is done properly following a standard and justice is ensured, it should be accepted by the village court and be registered in a register book. For that, it needs proper recording and documentation.

Improvement of *shalish* is very important. To improve *shalish* as a dispute resolution institution demands improvement of *shalishkars* necessarily. *Shalishkars* need to have legal and moral education. For this purpose, NGOs have some initiatives to serve their NGO-led *shalish* in their working areas only. NGOs have some booklets based on matters covered by traditional *shalish*. For family disputes resolution a *shalishkar* needs to know about marriage and its effects, divorce and its consequences. They should know the Quranic approach to family disputes in details. *Shalishkars* should have profound

knowledge about basic land laws of his country and the Quranic approach to land. *Shalishkars* are finally operators. They can operate successfully if they have sufficient operational manuals available for them. *Ulamas* (Islamic Scholars), *Khatibs*, and *Imams* of Mosques should also have proper knowledge about contemporary rural disputes resolutions institutions. They should come forward regardless of their *Madhhabi* background. Dispute resolution is basically an issue of *Mu`amalah* (worldly issues). Its scope is very wide. Naturally *Muamalah* issues are changeable. Only the matters, which are strictly based on Quran and Sunnah and need no change remain untouched. The rest, which are based on *ijtihad*, more suitable *ijtihad* from any school of thoughts should be granted.