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ARTICLE

Rethinking Marriage: Blurring the "Legal" and the "Social"

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Abstract

Is a marriage rendered invalid in the absence of a marriage certificate? How does the absence of state recognition influence the legitimacy of a marriage across different legal and cultural systems? In Bangladesh, customary marriages—where a marriage might not be formally registered with the state—are common. This article explores how *shalish* (community-based courts) accept alternate evidence to prove a marriage, noting the ways in which this approach can benefit women. Drawing on ethnographic fieldwork in urban and rural courts in Bangladesh, archival research studying court records, and interviews with diverse interlocutors, my findings indicate that Muslim women who do not have a *kabinnamma* (marriage certificate) prefer to go to shalish to mediate disputes because this site is embedded within the community and attuned to the cultural context of marriage. I provide a comparative analysis on the admissible evidence used to prove a marriage in state courts and in shalish, examining the legal reasoning within each system. Shalish operates with a flexible legal reasoning, which in theory has the capacity to recognize social hierarchies, balancing power and implementing justice in more equitable ways. Noting the kinds of cases where marginalized women benefit from the decisions in shalish compared to decisions from state courts reveals the gaps in state law, challenging the claims of universality and superiority over other forms of law as well as a need to rethink evidentiary protocols from the ground up. This article highlights alternate epistemic frameworks of justice that recognize and center rural women's positionalities, desires, and standpoints, thereby decentering thinking about law and evidentiary processes rooted in Eurocentric, patriarchal, and urban frameworks.

Keywords: marriage; evidence; law; gender; ijtihad; South Asia

Introduction

In a small village in Bangladesh, Pakhi claims that she is married to Sujon, but Sujon denies it. He demands Pakhi to show the public their marriage certificate or an official record of the event. She is unable to do so. What evidence can she provide to prove they are married? A common answer within urban spaces is typically: a marriage

certificate. If one has lost the certificate, they will probably locate their marriage registration in the relevant government office and request a new copy. But what happens if the marriage was never legally registered by the state? Does that necessarily indicate that a couple is not married? When such cases reach Bangladesh urban state courts, the typical response is that a marriage cannot be established without official paperwork; however, when these cases are tried within *shalish* (community-based, customary courts), alternate forms of evidence are commonly used to determine whether a couple is married or not.

In this article, I discuss the evidence that is accepted as proof of marriage in shalish and state courts, highlighting how decisions within shalish in such cases incorporate women's positionality within the gendered power structure in which they are situated. While a marriage certificate, which is known locally as *kabinnamma* for Muslim marriage certificates and *nikahnnama* more broadly in Islamic societies, is the primary evidence to prove a marriage in state courts, shalish accept alternate evidence such as the couple having children, cohabitation for a prolonged period, or the community accepting the couple as husband and wife. Problems that arise in the villages are also often first handled by shalish. If the case cannot be mediated in a shalish or if an aggrieved party is not satisfied with the outcome, they can take their case to a state court. Scholars have attributed rural women's preference for shalish over state courts to their lack of education (Hasan 1994; Islam 2019), but I argue that it is because shalish can at times offer more equitable outcomes for them than state courts, which are constrained by the commitment to fixed doctrine and formal procedures of the modern rule of law.

Long-standing patriarchal and transnational power structures as well as colonial legacies prevent women, particularly in rural areas, from accessing the evidence demanded by state courts in many instances. Recently, women in Bangladesh have started to use digital media from their personal archives to provide evidence of a marital or intimate relationship. As such, using digital evidence is a way that women can present evidence in ways that they could not before. That is not to say that women did not have creative ways to present evidence in the past, nor to say that digital evidence does not have ties to prior media forms. Rather, the point to note is that the emergence of digital evidence provides a new avenue to document and present evidence that needs further study.

Plural legal systems coexist in almost all nation-states. This is evident in legal pluralism scholarship that dismantles the notion that non-state courts only operate in non-Western spaces (Merry 1988, 1990). Bangladesh has two primary legal systems: state courts and shalish. These community courts are also referred to as sites of alternate dispute resolution (ADR). Most international human rights groups such as Human Rights Watch (Human Rights Watch, 2012) and Amnesty International (Amnesty International, 1993) as well as Bangladesh's urban, elite groups tend to regard shalish as being "too Islamic," backwards, and harmful toward women. As such, there are many global and local projects to reform shalish through awareness campaigns and various initiatives so that they can adopts "progressive" laws and practices. Over fifteen months of ethnographic fieldwork, archival research, and interviews, I conducted a comparative analysis of how evidence is handled in family law to demonstrate how alternate courts' non-doctrinal and flexible approach can generate an evidentiary process that is elastic and adaptable. I explored instances in

shalish where this flexible approach can empower women in inconspicuous ways that tend to be overlooked by global organizations and Bangladesh's urban, elite groups.

It is worth mentioning that this article does not intend to pit state courts against shalish or downplay how women in Bangladesh face discrimination in both legal systems. There are many scholarly discussions and reports from non-governmental organizations (NGO) that explore how shalish are limiting, but comparatively fewer research documents on how modern state courts fail to uphold women's rights in Bangladesh through a comparative analysis with shalish. A more nuanced approach to studying shalish demonstrates how alternate legal systems that operate within different frameworks of justice can at times produce more equitable outcomes for marginalized communities. Noting the kinds of cases where marginalized women benefit from the decisions in shalish over state courts reveals the gaps in the modern rule of law, challenging the claims of its universality and superiority over other forms of law.

A key reason why I chose to study shalish is because they are spaces within which to understand how rural women in Bangladesh approach law, how they testify and frame their grievances, and what their expectations of justice are firsthand. If cases go to state courts, the cases are mostly handled by men in the family or through official figures (such as lawyers or NGO workers). The research in this article examines shalish to understand how Muslim women attending shalish navigate barriers to justice across different legal systems and enforce agency in creative ways. The flexibility and uncodified legal structure of shalish can allow women to demonstrate agency and have access to justice in ways that state courts do not have the space and ability to provide. As such, it is important to study alternate legal systems and their frameworks of justice to rethink conceptualizing law and evidentiary procedures from the ground up.

Methodology and research sites

This article is based on fifteen months of in-person ethnographic fieldwork in Bangladesh. I conducted participant observation in three main sites to understand what kinds of evidence is admissible in state courts and shalish to prove a marriage: Dhaka city, villages in Madaripur district, and villages in Jamalpur district. Dhaka, which is the capital city where the Supreme Court of Bangladesh is located and where the central locus of power is held, provides a perspective from an elite, urban space. Villages across Madaripur and Jamalpur districts provide insight on how rural communities practice law and what the communities' expectations of justice are. In Dhaka city, I was a research fellow in the Dhaka head office of a leading national NGO: Bangladesh Legal Aid and Services Trust (BLAST). There are notable lawyers at BLAST who are affiliated with the Supreme Court of Bangladesh in various capacities such as barristers, advocates, law students, and researchers. Close engagement with this NGO provided insight on how evidence is handled in state courts—namely, the Supreme Court of Bangladesh. While working on different projects at BLAST as a fellow, I built my network in the urban legal community and traced potential interlocuters for further inquiries into relevant cases and interviews.

Outside the capital city of Dhaka, I conducted fieldwork in multiple villages in Madaripur district and Jamalpur district to understand how evidence is handled in shalish. In Madaripur, a NGO called Madaripur Legal Aid Association (MLAA) allowed

me to attend the NGO-mediated shalish that they run. Interviews with the lawyers and field coordinators revealed how NGO-mediated shalish use procedures intermittently from both state law and shalish. Ibrahim Miah, an advocate from MLAA, suggested that the use of shalish is a familiar justice mechanism for the rural community but that the NGO-mediated shalish are partly regulated so that they have a "watchdog" that is involved in the mediation and can intervene to influence the decisions when necessary. These watchdogs are the community-based organizers who are trained by MLAA to pay attention to minority and marginalized communities that are often discriminated against within society due to asymmetries of power. The watchdogs are expected to intervene when necessary to ensure that proper justice is met. In more complex cases, those individuals with formal legal training (such as advocates) are the watchdogs. In both BLAST and MLAA, I used the snowball sampling method to trace networks and find new informants/participants for follow-up research and interviews.

Despite the benefits of studying NGO-mediated shalish, it is important to study those community-based shalish that are not regulated by NGOs or the state. It is difficult to study these kinds of shalish due to restricted access and the spontaneity with which they occur within close-knit communities. Shalish can occur in any location—be it religious sites like *masjids* (place of prayer and worship for Muslims), education sites like schools and madrasas, government buildings like union councils, and even private spaces like households and courtyards. My third research site centered on my own village in Jamalpur district, where I have family and extended kin. Through my personal networks, I was able to learn when a shalish was scheduled in surrounding villages and attend them. As an insider/outsider researcher, I had access to study shalish that are not governed by NGOs or the state but solely run by the community. Ethnographic accounts of these kinds of community-based shalish are the primary examples I draw from to demonstrate my arguments. If I refer to a NGO-mediated shalish, I will clarify that this is the case; otherwise, I am referring to the non-NGO-mediated shalish that I had access to through community and kin-based networks. The names of the villages where I attended shalish are not specified to protect my interlocutors and help them remain unidentifiable. Similarly, the names from the shalish and the interviewees have mostly been anonymized to maintain the respect and safety of the participants and informants of this study. I have included the real names for only those individuals who have provided consent.

My fieldwork focused primarily on marriages where women provided consent to the relationship and not coerced marriages. There are existing academic scholarship and NGO reports that discuss the dangers of nonconsensual marriage and coerced consent in Bangladesh. This article, instead, focuses on the understudied cases where women provide consent to marriage but find it difficult to produce evidence of the marriage during a dispute.

I conducted thirty-five semi-structured interviews with various informants, including barristers, advocates, and legal aid employees as well as those who run shalish such as locally elected members of the village union council, community leaders, religious figures, and women attending shalish. I also conducted unstructured interviews, which are a conversational approach that allow researchers to engage with interlocutors in the field and ask unprompted/unprepared questions depending on the conversation, and I updated the questions to cater to the interviewee's

response. Many qualitative research scholars argue that unstructured interviews provide agency and voice to participants since they are not restricted to the researcher's pre-fixed questions or templates (Corbin and Morse 2003).

Though I have been closely affiliated with many of my interlocutors in the villages of Bangladesh for years, I am aware that our positionalities differ. My family moved to Dhaka before I was born, and I moved to the United States for my education in 2010. Living in cities such as Dhaka and New York symbolize social, financial, and cultural capital that prevent ethnographers from having "complete" access and understanding of the sites they study since the outsider's presence will inevitably shift the behavior of the community (Sangtin Writers Collective and Nagar 2006). While I was self-reflexive and consciously attempted not to impose my presence or my own frameworks when documenting the events (Bourdieu and Wacquant 1992), it is worth noting Clifford Geertz's (1973) point that anthropological work is to some extent "fictional" since the researcher's conclusions are always based on their own interpretations. Yet ethnographic research is valuable as it is a means to immerse oneself within the field(s) and bridge gaps (for example, language, frameworks, lived experiences) in ways that would not be possible using any other method.

In an ideal world, the women and their viewpoint that I wish to highlight in this article would be telling these stories on their own terms. While my collaborators and interlocutors have asked me to share their stories hoping to change the current legal and social structures, we should collectively work toward creating academic spaces where collaborators have more voice during the analysis of data and distribution of knowledge. I only attended the shalish where community members provided consent. I also attended some shalish to which the community gave me access in order to conduct participant observation so that I could understand how shalish operate, but they did not want me to write about the events. In 2021, a person who ran shalish in a village in Jamalpur district said: "You may sit and watch to learn how we do things, but we do not want our tragedies being circulated outside our community."[1] To respect the request of such interlocutors, I do not include any of those events in this article, but they have helped me gain knowledge of shalish, particularly how they handle evidence and the legal reasoning with which they operate.

Apart from ethnographic fieldwork and interviews, I also conducted archival research to study Bangladesh Supreme Court cases on family law and employed discourse analysis to study them. This article weaves together perspectives from state court case judgments, extended ethnographic accounts of shalish and NGO-mediated shalish, and close engagement with state and non-state mediators of law to demonstrate the contested epistemic frameworks of law that is present in society and to explain why evidence is handled in different ways in different legal systems. The goal is to note how events in shalish can help rethink formal evidentiary procedures that currently restrict rural women from access to justice in many ways.

This article is limited to studying only heterosexual Muslim marriages, which primarily center on shalish from two districts of Bangladesh. It is important to also explore the experiences of rural women and other gendered minorities in more

[1] Personal communication with local community leader, 2021.

districts. My hope is that this conversation will prompt discussions to rethink marriage and state laws such as Bangladesh's Evidence Act from marginalized standpoints from across various groups and communities.[2] It is imperative to include the experiences and struggles encountered by the Hindu and other religious minorities, non-Bengali and Indigenous communities, *hijra* and other LGBTQIA+ communities, persons with disabilities, and Rohingya refugees.

Contextualizing shalish

Shalish are community-based, customary courts, commonly associated with ADR. They operate orally, with little to no documentation. The NGO-mediated shalish and state-sponsored village courts, which attempt to bridge shalish and state courts, are required to have documentation, but the unregulated community-based ones do not. As per state law, shalish are not legally allowed to mediate cases outside of family law and a few minor civil cases; on the ground, however, shalish handle disputes of all kinds, including (but not limited to) marriage, divorce, polygamy, custody, inheritance, theft, harassment, violence, and even murder (Berger 2017). The people who run shalish are usually from within the community such as elders, local politicians, religious figures, schoolteachers, and social workers. These figures decide the outcome of shalish and are known as *shalishkars* or *shalishdars* (someone who runs a shalish). Shalishkars generally do not have familiarity with state legal doctrine, nor do they have any formal training in law. People in the rural and *mufassil* (towns) areas prefer to go to shalish as these courts are run by familiar figures from the community and are more accessible. Shalish are not strictly governed by state law and have been operating in Bengal prior to British colonial rule (Mollah 2016).

Each shalish within the same community can have a different group of shalishkars. While families can have some influence in selecting the shalishkar presiding over their shalish, notable figures with power, social influence, and financial capital within the community expect to be asked to be the shalishkars when conflict arises. Powerful figures within the community are selected as the *shobapoti* (leader) of the group of shalishkars, mediating the disagreements among them in a shalish. The shobapoti are often the locally elected chairman or a member of the union *parishad* (union council), but they can also be someone respectable in society such as a schoolteacher or a well-respected elder. The community considers a shalish to be "good" if all the shalishkars agree with their decision(s). Shalish decisions are not legally binding by the state; obligations to adhere to them rely on how powerful or well respected the shalishkars are and the symbolic significance and weight that these figures have within the community.

While a shalish is not considered to be part of the official law by state courts, a shalish is recognized within state law through the Code of Civil Procedure.[3] In this Act, section 13(1) defines mediation as a "flexible, informal, non-binding, confidential, non-adversarial, and consensual dispute resolution process in which the mediator

[2] Evidence Act, Act no. 1 of 1872, *Laws of Bangladesh: Government of the People's Republic of Bangladesh Legislative and Parliamentary Affairs Division*, http://bdlaws.minlaw.gov.bd/act-24.html.

[3] Code of Civil Procedure, 1908, section 89A (mediation), *Laws of Bangladesh: Government of the People's Republic of Bangladesh Legislative and Parliamentary Affairs Division*, http://bdlaws.minlaw.gov.bd/act-86/section-15219.html.

shall facilitate the compromise of disputes in the suit between the parties without directing or dictating the terms of such compromise." Bangladesh is not alone among states that recognize alternate legal systems within society. In the United States, for instance, the 1934 Indian Reorganization Act recognizes the operation of Tribal Court systems and Courts of Indian Offences.[4] The US Department of the Interior Indian Affairs (2023) mentions on its website: "Tribal sovereignty is protected throughout the Tribal justice system or through a traditional court." The concept of "legal pluralism" recognizes that legal systems exist outside of state law. Scholars such as Sally Moore (1973), Sally Engle Merry (1988), Brian Tamanaha (2008), Carol Greenhouse (2019) highlight that it is important to decenter studying law from a Eurocentric and state-centric perspective since there are alternate forms of moral and normative orders that also generate rules in society. This line of scholarship suggests that the influence of non-state legal systems can be just as impactful as state law (Nader 1990). Hence, it is important to study alternate legal systems and their frameworks of justice to rethink conceptualizing law and justice from the ground up.

Shalish are sometimes mistakenly treated as *shari'a* (Islamic court) by global media outlets. In Islamic courts, such as in India and Malaysia, the judge is usually a *qadi/kadi/kazi*[5] who is well versed in Islam and Islamic legal thought. Shobhapotis and shalishkars, on the other hand, are not required to be learned religious figures. Most of the time, they do not have any academic or professional background on Islamic law. They nonetheless frequently discuss morals and ethical issues using Islamic language and philosophies. Islam is the majoritarian religion in this nation, and being Muslim plays a central role in people's identities in Bangladesh (Uddin 2006). As such, it is not surprising that Muslim shalishkars will use Islamic language when discussing issues of ethics and morals. Shalish is not restricted to Muslims and can be called customary courts as they draw from Bengali culture and operate across diverse groups and religions within the nation. For instance, there was a shalish that I attended that consisted of both Muslim and Hindu shalishkars, and I was informed by my interlocutors within those sites that shalish are popular within Hindu communities as well.

Each justice mechanism has advantages and disadvantages, and people move in and out of the systems depending on the case. Ibrahim Miah from MLAA suggested that it was significant to recognize women's positionalities and lean toward the legal system that would grant them justice in that specific case: "Sometimes a case might be more favorable for women in state courts, and sometimes a woman might benefit more in shalish. For example, if a woman does not have a kabinnamma, then we try to mediate that case through shalish instead of state courts. If it is a case of violence, then state courts are the better option. It depends on the case."[6] Miah emphasized that it was important for those in charge of running courts—be it in state courts or in shalish—to locate those who have less power and consider the social consequences that they might face. Due to social hierarchies that are tied to intersectional

[4] Indian Reorganization Act, June 18, 1934, 48 Stat. 984.

[5] In many parts of the world, a *qadi* or *kazi* is a judge or someone tied to Islamic jurisprudence who has the authority to run an Islamic court or *shari'a*. This is not the case in Bangladesh where a kazi is a marriage/nikah registrar appointed by the state, authorized to formally register marriages.

[6] Personal communication with Ibrahim Miah, 2021.

attributes of gender, sexuality, race, ethnicity, class, religion, citizenship status, and disability condition, specific individuals and groups live in more precarious conditions than others (Crenshaw 1991). As such, the court plays an important role in ensuring minority communities have access to justice. Since shalish are embedded within the local community, those individuals running them are more culturally aware, having the scope to contextualize and decode gendered coded language in ways that state courts sometimes cannot (Hoque 2023).

In NGO-mediated shalish, at least one member from the group of shalishkars is affiliated with a NGO in some capacity. Sometimes, they can even act as the shobhapoti. The NGO member is there to ensure that the marginalized members of the community are receiving justice. This is a valid concern due to the asymmetrical power dynamic in shalish. Generally, the shobhapoti and the shalishkars are elite members within the community and tend to be men. Hence, the decisions that these groups determine can be patriarchal and not representative of those who are not elite or from the dominant groups. Figures like the chairman or member of the union parishad are political figures, and there are many instances when their decisions in shalish are motivated by their own political agendas and personal goals of sustaining power. Md Abdul Alim and Tariq Omar Ali (2007, 3) have written about "the dark side" of shalish; they note that studies have found "serious functional complications owing to intense factional infighting and rivalries in the villages" as well as "the pressure of the rich, influence of money or special favour, fear of the local terrorists, and domination of orthodox religious views are identified to be the main bottlenecks responsible for unfairness in *shalish*." They also warn that a "*shalish* has sometimes acted as an instrument for carrying out the perverse 'fatwas' (misinterpretation of religion that mostly directed against women) issued and propagated by some local religious leaders" (3).

In other words, women and other marginalized groups in the rural communities can be silenced in these spaces, and there are no means of "appeal" to overturn decisions as there are in state courts. Global human rights groups and intergovernmental organizations frequently contrast shalish with courts that follow the modern rule of law, indicating that shalish must be amended to ensure that justice is properly implemented in Bangladesh. These dichotomizing tendencies often suggest that shalish are harmful for women because they are "too Islamic," echoing the rise in Islamophobia that has become a global trend. While shalish draw on Islamic language and Islamic philosophical frameworks, my fieldwork indicates that they are not limited or restricted to any specific religion, and their practices are not fixed or monolithic. Drawing on feminist postcolonial theory, this research contributes to scholarship that demonstrates how these fixed labels and binaries reinscribe and essentialize modern/traditional frameworks onto spaces and communities/groups where they are not applicable, limiting the theoretical tools that we have to analyze these spaces (Kogacioglu 2004).

On the other hand, some scholars treat shalish in a similar way to *panchayats*, another popular dispute mechanism with a long history in South Asia. Dina Siddiqi (2015), who studies women's rights and shalish, states that, while shalish may resemble non-state models of adjunctions such as Northern India's *khap panchayat* and Pakistan and Afghanistan's *jirga*, it is distinct; shalish are much more fluid and flexible. Tobias Berger (2017), on the other hand, explores the ideologies and language

of the secular rule of law (which might have origins in Europe) and how its meaning changes by the time it reaches Bangladesh villages. Local NGO workers attempt to translate state law and secular ideologies through the lens and language of Islam and Bengali culture. For example, Berger mentions how the local grassroots NGO actors emphasize on "*samaj* justice," (which can be translated as "community or "social" justice), and they "translate the normative vocabulary of the secular rule of law into the language of Islam and Islamic law" since that is the shared language and social reality of the majority in those communities (9). If the NGO workers want to enhance women's participation, they try to show how the state-backed law adheres to Islam and the local culture.

While the shortcomings of shalish are reported in various local and global academic research and human rights reports, these reports pay little attention to how the modern state courts that are considered more liberating and attuned to women's rights can also be discriminatory toward women. My goal is to unpack how the alternate legal epistemologies and evidentiary processes that these shalish offer respond to the positionalities and particular problems that women face in rural Bangladesh in ways in which the doctrines and procedures of state law do not.

A case from Shalish: proving the marriage of Pakhi and Sujon

How can a person prove their marriage when there is no official record of it?[7] I attended a shalish in Jamalpur district in 2021 that explored this question. In this case, the couple—Sujon and Pakhi—got married without telling their family members and neighbors. The husband—Sujon—wanted to keep their marriage a secret, while the wife—Pakhi—wanted to tell their parents. She wanted to move into his house where he stayed with his parents[8] and start their *shongshar* (domestic life). They frequently had arguments about whether to keep their marriage a secret or tell everyone. One day, the argument escalated, leading to Pakhi telling her parents about the marriage. Sujon was angry with Pakhi for telling her parents against his wishes and stopped all contact with her. Word got around in the community that Pakhi and Sujon were married. Sujon and his family denied it. After desperately trying to communicate with Sujon and his family and being denied every time, Pakhi and her family were compelled to request a shalish and ask the community leaders to help them solve this problem.

A shalish was arranged in Pakhi's home courtyard. The shalishkars—respected elders of each family, two *hujurs* (Islamic religious figures), a schoolteacher, and some other local elites and community leaders—were accepted by the families of both parties. The neighbors that lived around the area, including young children, came to

[7] In line with the spirit of a shalish's win-win and restorative justice model, I believe it is more appropriate to use "Pakhi and Sujon" rather than "Pakhi versus Sujon." I observed this case in August 2021 in a village in Jamalpur district. All members spoke Bangla, and I am fluent in understanding the local dialect in this region. All the quotes are translated in English by me.

[8] It is common practice for women in Bangladesh to live with their in-laws when they are married. There are instances when the husband might live abroad for extended periods (such as with labor migration). Even when the husband is away, it is expected that the wife will live with her in-laws. Family opinions and their feelings are considered when deciding issues related to marriage and divorce. Community harmony is a key factor during decision making.

watch. The shobhapoti was a schoolteacher who both parties accepted as fair and of good moral character. Both Sujon and Pakhi lived in the same community and knew the shobhapoti and shalishkars well. Before the shalish started, the shalishkars told me that their aim was to try to reconcile the couple since shalish primarily focus on reconciliation, community harmony, and restorative justice. Pakhi told the shalishkars in advance that she wanted them to convince Sujon to publicly accept her as his wife and take her to his home so that they could start their shongshar. My conversation with the shalishkars prior to starting the shalish indicated that they were sympathetic to Pakhi, a subaltern rural woman in a precarious position. Such bias toward one side of a dispute would be considered inappropriate for a judge in a modern state court, but most of the shalishkars recognized that the community questioned Pakhi and her family's moral character as well as their Muslimness, which resulted in social ostracization and scandal for them all. Pakhi's mother stated: "Who will marry her [Pakhi] now? Who will marry my daughter? Who will marry my younger daughter [Pakhi's younger sister] after this scandal? It is not just one life? So many lives are ruined/destroyed[9] now."

While mediation was the primary goal, the shalishkars also discussed amongst themselves that if Sujon was still adamant about leaving Pakhi at the end of the shalish, then they would try to ensure that Pakhi receives compensation of some sort. The first layer of compensation was making sure Sujon apologized to her publicly for deceiving her and neglecting her (and her family's) attempts of mediation. The second layer of compensation was symbolic, where they planned to confirm to the community that Pakhi did not commit any transgression or sin out of wedlock, safeguarding her safety and mitigating social ostracization. The third layer was financial compensation. The shalishkars wanted to ensure that, if Sujon abandoned Pakhi, then she could claim her *den mehr*[10] —the money Muslim women are entitled to receive upon divorce, which men in Bangladesh often try to avoid paying.

[9] The original word used here was "*dhongsho*/ধ্বংস."

[10] For a Muslim marriage in Bangladesh, *den mehr* is the agreed upon money (or valuables) that a husband is legally obligated to give his wife upon marriage. This financial exchange is more commonly known as *mehr* in other countries, but, in Bangladesh, the local vernacular for *mehr* is *kabin.* While some argue that the rules of kabin require the full amount to be paid to the wife immediately upon marriage, this is not the norm in Bangladesh. Popular practice of kabin on the ground is that the couple's families negotiate an amount of money that husbands are obligated to fully pay if the couple are to divorce. Women and their families usually ask for high kabin to secure the woman's future since a high kabin prevents men from easily divorcing their wives. Even though men do not have to pay the full amount of kabin when they are married, they would be legally obligated to pay the full or remaining amount of kabin during divorce. Since men can divorce women more easily than women can divorce men in Bangladesh, the practice of a high kabin is the local community's way to ensure protection for women so that men cannot easily divorce women without any dire consequences. On the other hand, it gives the woman some capital to adjust to before she finds a new home or manages to find a job. On the ground, during a divorce, *shalishkars* usually consider the man and his family's financial position and come to an understanding with the wife to settle on a more realistic kabin amount that he can actually provide her. Ideally, it is supposed to be a "win-win" solution for both parties since shalish do not conceptually adhere to a "win-lose" model. While the flexibility of shalish benefits women in many ways, it can also harm women since they might get a much lower amount of kabin money than they had intended. Moreover, in some shalish, women forgo all of their kabin money because they initiated the divorce or chose not to reconcile with their husband when the husband wanted to give their marriage another try.

During this shalish, Sujon admitted that he and Pakhi had an affair but denied that he had married her: "What is the proof that I married her? Ask her to show some proof." Pakhi could not provide the kabinnamma. Sujon and his family claimed that Pakhi lied about being married. Pakhi responded: "He is lying. Sujon and his three friends came near my home. We rode to Imul's[11] house, and we got married there. He brought a kazi (marriage/nikah registrar), and we said *kobul* (consent),[12] his friends were witnesses, we did everything. Then I went back to my parents' house. He told me to keep it a secret until he saved enough money to host a proper event." The schoolteacher asked: "Did you sign any papers?" and Pakhi replied: "Yes, of course I did." One of the members of the community (who was not a shalishkar) whispered in my ear: "Do you understand? He made her sign fake papers. This man has been a *bodmaish* (rascal) since he was a child."[13] I asked him: "How do you know he made her sign fake paperwork?" He replied: "These things are common. Look at his *acharon* (behavior) and his *bhab-bhongi* (attitude/body language). We know him. Poor girl. Even we are sometimes too late to catch his tricks; how can she?" The schoolteacher then asked Pakhi: "Do you have his friend Imul's address or the phone number of anyone else who was there?" She did not, but she claimed would recognize them if she saw them. Sujon responded: "Yes, we went for a ride on my bike [motorcycle] and then went to my friend's house, but we never got married. We never signed any kabinnamma. You can ask any of my friends." Pakhi's uncle screamed from the side: "Of course his friends will vouch for him."

In a state court, a marriage that lacks a kabinnamma or registration by a state-appointed kazi would typically not be considered a valid marriage. A lawyer I met during my fieldwork in Dhaka city told me (in English): "No kabinnamma, no marriage. It is as simple as that."[14] There are a few exceptional cases where the Bangladesh Supreme Court (which consists of the Appellate Division and the High Court Division) has accepted alternate forms of evidence to establish a marriage in the absence of a kabinnamma or marriage registration. In these cases, the courts concluded that marriage and divorce for Muslims are under personal laws and that Islamic or Muslim law in South Asia has long had alternate means of establishing a marriage in the absence of a kabinnamma. Some types of alternate evidence are witness testimonies, verifying that the couple got married, checking whether the couple has any children or if the woman is currently pregnant, noting long-term cohabitation, and checking with the community to see whether they accept the couple as husband and wife.[15] A similar practice in the West is common law marriage.

There are a couple of notable cases in the Bangladesh Supreme Court that have considered alternate evidence to prove a marriage. For example, in *Momtaz Begum v. Anowar Hossain*, the Appellate Division overturned a High Court ruling that decided

[11] One of Sujon's friends who came around Pakhi's neighborhood to pick her up that night.

[12] কবুল: *Kobul/qobul* indicates consent, like "I do" or "I accept." It is the phrase commonly uttered by Bengali couples to convey that they accept the marriage. Another common phrase of acceptance is "*Alhamdulillah*," which means "Praise be to Allah."

[13] "*Bucchen na, bhuwa kagoje shoi koraise. Ei sera ta choto bela theikai ekta bodmaish*."

[14] Personal communication with a lawyer, 2021.

[15] In Bangladesh, the most popular text about Islamic law is the book *Ameer Ali's Commentaries on Mohammedan Law*, written during the period of British colonial India and revised and updated by S.H.A. Raza (Ali and Raza 2015).

that a marriage was invalid because the couple did not have a kabinnamma as evidence.[16] The Appellate Division disagreed with the High Court, arguing that consummation followed by cohabitation was a valid means for women to prove marriage. The Appellate Court wrote: "There are even options that a marriage may be constituted without any ceremonial and even in the absence of direct proof, indirect proof might suffice. The High Court Division, in the premises, erred in holding that mere living together as husband and wife did not bring it within the bound of marriage."[17]

Similarly, the judgment of *Md. Chan Mia v. Rupnahar* states that failure to register a marriage in a state-appointed kazi office does not indicate that a marriage is invalid:

> If the marriage is otherwise valid, absence of written kabinnama or its registration does not invalidate the marriage. The Muslim Marriages and Divorces (Registration) Act 1974 has provided that marriage solemnised under Muslim Law shall be registered in accordance with the provisions of this Act. But nowhere in the said Act it has been provided that non- registration would render the marriage invalid.[18]

Chan Mia used the absence of a kabinnamma to claim that he was not married to Rupnahar in order to avoid his legal financial obligation in the event of a divorce. This judgment emphasizes that marriage between a couple is valid when there is "a declaration made by one contracting party being followed by a corresponding acceptance from the other," and it notes that cohabitation and joint finances can also act as evidence of a marriage in the absence of a kabinnamma.[19] Apart from using Islamic law, Supreme Court lawyers sometimes turn to international law and human rights' guidelines to help women. The judgment of *Momtaz Begum v. Anowar Hossain* cites a *Harvard Law Review* article to show that cohabitation is a common way of proving marriage in other parts of the world as well.[20] Under Anglo-American common law, the court explained: "The only evidence of the agreement may be that the parties have lived together as husband and wife: from this a common law marriage is often inferred, even without proof of an express agreement: an implied agreement being sufficient."[21]

Yet these decisions within state courts are not the norm and often deemed as landmark or exceptional cases as they stray away from treating the kabinnamma as the sole evidence to validate a marriage. In most state courts on the ground, the kabinnamma holds precedence over all other forms of evidence to prove a marriage, especially in the cities. When I asked mediation and legal officers in Dhaka city how they responded when a client without a kabinnamma approaches them with marriage/ divorce issues, most said that they usually turn away such clients: "Without a kabinnamma, it is hard to make a case. If they have children, we can try but without

[16] *Momtaz Begum v. Anowar Hossain*, 2011 8 ADC 855, section 6.
[17] *Momtaz Begum*, sections 35, 38.
[18] *Md. Chan Mia v. Rupnahar*, 1998 18 BLD 329, section 16.
[19] *Md. Chan Mia*, sections 15, 20.
[20] *Momtaz Begum*.
[21] *Momtaz Begum*, section 8.

children it's close to impossible."[22] However, in shalish, these forms of alternate evidence are not only acceptable but also common and popular ways to validate a marriage in the absence of a kabinnamma.

In Sujon and Pakhi's case, the shalishkars tried to use these other means to prove that the couple was married. When Sujon and his family stated that there was no kabinnamma, the shalishkars asked about the friends who were present and who might offer witness testimonies. Since Pakhi did not know the names or contacts of Sujon's friends who were present, the shalishkars then asked her: "Do you have any children? If you have his child, then he has given you his wife's place." She did not have any children. They asked whether she was pregnant. She was not. Then they tried to find out whether there was any cohabitation at any point during their relationship: "Did you stay with him for a while in this friend's house? Are there any witnesses that can attest to you staying with him for a few days?" Pakhi replied:

> No, he wanted to keep our marriage a secret, so I could not stay with him for long. I told my parents I am staying with my friend Shimli, but I stayed with him in his friend's house only that one night we got married. I'm not that kind of girl and I had to come back the next day, otherwise everyone would have known. He told me to wait until he could pay for a big wedding event and take me to his home properly.

Pakhi's testimony eliminated the possibility of cohabitation and witness testimonies. She could not provide the contact details of the kazi either. One of the elites in the villages said: "Sujon you have duped an innocent girl. Everyone here knows about your habits and your reputation. It is not too late to do the right thing and properly take this girl—your wife—home with you. Start your shongshar properly." Sujon's mother responded to him: "We do not know if she is his wife. Where is the proof? This girl is a liar."

It seemed that Pakhi had no valid evidence to prove that she was married to Sujon. She failed to provide the evidence demanded by the state court—that is, the kabinnamma or marriage registration. She also lacked any of the alternate evidence (popular in Islamic/Muslim law in South Asia) that might prove her marriage in shalish. But, then, when all hope seemed lost, Pakhi opened her Itel smartphone[23] and announced: "I'm not a liar. Here are all the text messages he sent me. Here are all the chat messages he sent to me on Facebook." Enter digital evidence to prove a marriage in shalish.

Admissibility of digital evidence in shalish

When accused of being a liar and when all other doors to establish her marriage had failed, Pakhi resorted to the personal digital archive in her smartphone to convince the shalishkars and the community that she was married. She showed a conversation thread between her and Sujon on Messenger from the night they had planned to elope and get

[22] Personal communication with legal aid non-governmental organization (NGO) employee, 2021.

[23] Itel is a mobile phone company based in China and popular for selling affordable smartphones in Bangladesh, India, Pakistan, Sri-Lanka, and some parts of Africa.

married in secret. One message from Sujon was, "অপেক্ষায় আছি কখন বউ বইলা ডাকমু" ("Waiting for when I can call you my wife").[24] Pakhi showed another conversation where Sujon suspected her of having an affair with another man and threatened to divorce her: "তোর ভাতাররে কল দে মাগী, তোরে তালাক দিমু" ("Talk to the person you are having an affair with you slut. I will divorce you."[25] Pakhi asked the shalishkars: "If I am not his wife, then why is he saying that he will divorce me? Why did he say he can't wait to call me his wife [on the same day we got married]? This is proof (*proman*)! What other proof can I provide? Try to understand my situation (*Amar kotha ta ectu bujhar chesta koren*)." Most of the shalishkars nodded in agreement, and Pakhi also started to show screenshots of some Facebook photos that Sujon had shared of them on his profile but then deleted later. An elder community leader said: "Stop, you do not have to show us anything anymore. How much more dishonor/humiliation (*beizzat*) does this girl have to go through?"

The shalishkars concluded that the chat messages were valid evidence to prove that Sujon and Pakhi were married. Their reasoning was that the online messages proved Sujon's promise and intent to marry Pakhi as well as the intimacy between them: "The kind of intimacy that only husband and wife share." The logic was that, even if they were not married under state law, these messages proved that they were married "under the eyes of God." In addition, there was evidence that Sujon intended to marry Pakhi at a certain moment in time and then had treated her as his wife since that date: the schoolteacher said: "In Islam, it is the *niyat* (intent) that is the most important. If the *niyat* of the words uttered during *talaq* (divorce) holds weight, then the *niyat* of the words uttered for marriage also holds the same weight. Sujon clearly intended to marry her, and the messages prove that he treated her as his wife since that day. That is proof of the marriage."[26]

The focus on the intent to determine a marriage for Muslim couples is a practice that has historical roots in Islamic legal thought and expands outside of shalish as

[24] The transliteration is: "*Opekkhai achi kokhon bou boila dakmu.*"

[25] The transliteration is: "*Tor bhaatar re call de magi. Tore talaq dimu.*" The exact word-for-word translation is: "Call the person who provides you rice, you slut. I will divorce you." Using the term *bhaatar* (provider of rice or rice provider) is a local, patriarchal slur that is often used against girls and women ironically to indicate that other men are not providing for them or bearing their expenses.

[26] In many countries, Muslim men can divorce their wives through oral proclamations. Although Bangladesh's state law requires a written notice to the Union Council/Union Parishad (the rural administration tied to the state), which must be supplemented with the oral proclamation, some communities accept divorce through oral proclamations of "*talaq*" (divorce). The Muslim Family Laws Ordinance, 1961, Ordinance no. VIII of 1961, *Laws of Bangladesh: Government of the People's Republic of Bangladesh Legislative and Parliamentary Affairs Division*, http://bdlaws.minlaw.gov.bd/act-details-305.html, mentions talaq procedures in section 7(1): "Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife." Moreover, similar to shalish's focus on reconciliation, state law also encourages the union parishad to mediate the situation and reconcile couples who want a divorce; section 7(4) states: "Within thirty days of the receipt of notice under sub-section (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation." Hence, the ideologies and practices of mediation and reconciliation that are popular in shalish are also embedded within state law as well. This shows the complex interactions and negotiations between shalish and state law. Different legal systems not only coexist, but they often shape each other in complex ways, despite the sharp binaries that are often imposed.

well. For instance, section 15 in the Supreme Court's judgment of *Md. Chan Mia v. Rupnahar* states: "Marriage is legally contracted by a declaration made by one contracting party being followed by a corresponding acceptance from the other."[27] Intent and declaration are key signs of acceptance and validity of a Muslim marriage in South Asia. Both Pakhi and Sujon's shalish and the Supreme Court in *Rupnahar* highlight the importance of intent, declaration, and the acceptance of one another as husband and wife as key indicators of a marriage for Muslims. In legal systems worldwide, people attempt to use digital media such as text messages, social media posts, audio recordings, images, and videos as evidence in court. Judicial limitations on certain forms of digital evidence can affect whether a litigant wins or loses their case. Studying how state courts and shalish accept, reject, and analyze digital evidence is telling of the legal reasoning within which they operate.

Many urban lawyers regard shalishkars as whimsical and prejudiced, while they themselves uphold "proper" legal norms by following standards and protocols. However, Pakhi and Sujon's case demonstrates that shalishkars do not approach justice arbitrarily; rather, they have a system of accepting and analyzing evidence that is grounded in an alternate framework of legal reasoning to determine the *bastobota* (truth or reality) of the situation, noting the consequences that can occur within the community. This alternate approach to the law, paired with shalish's non-doctrinal and flexible legal reasoning, allow this site to incorporate digital evidence to prove a marriage. The shalishkars were accustomed to using common alternate evidence—witness testimonies, cohabitation, having children—to prove a marriage, but using digital evidence to determine a marriage was unprecedented within this community. While accepting digital evidence to prove a marriage was novel, the flexibility of shalish to incorporate evidence outside fixed normative practices is not uncommon. In other words, shalish can provide a creative means to grant women rights in ways that state courts cannot since the latter courts are bound by codified law and formal procedures that limit them from easily accepting non-normative forms of evidence.

A different shalishkar said: "Pakhi has said a valuable thing. What other proof can she provide? She is just a woman. Men and women are not the same. We have to consider that while we are making our decision." One take from this view is that it demonstrates the prevalence of patriarchy and the prejudiced assumption that men and women are not equal in society. A more nuanced take implies that this view might not refer to women's unequal position but, rather, to their unequal positionality and the structural asymmetry of power. In this case, the shalishkars assured Pakhi, declaring to the community that she was indeed married. Hence, justice here is much more closely related to helping restore the balance through the lens of social equity rather than equality. Equality is defined in terms of the individual subject before the law, and equity is defined in terms of the social justice that the law promises but rarely delivers. It is not just shalish; other legal systems center on this form of moral logic as well and have done so historically. For example, Islamic law scholar Wael Hallaq (2009, 61) suggests that "[t]he Muslim court succeeded precisely where the modern court fails, namely, in being a sanctified refuge within whose domain the weak and poor could win against the mighty and affluent. A case in point is women.

[27] *Md. Chan Mia*, section 15.

Considerable recent research has shown that this group received not only fair treatment in the Muslim court but also even greater protection than other groups."

It is worth remembering that most societies today continue to perpetuate inequalities and fail to recognize the positionalities of gendered minorities that can hinder them from receiving fair verdicts. How the shalishkars frame Pakhi's case has the power to impact not only her life but also her family's life, including the risk of increasing the economic and social precarity of her younger sister who was innocent of all transgressions in this case. Pakhi's desire and expectation was for the court to mediate the situation and allow her to reconcile with Sujon. A non-intersectional liberal feminist approach might suggest that Pakhi is "weak," "passive," or "not empowered," but postcolonial feminist scholarship suggests that there are alternate forms of women's agency and desires that are not included within liberal feminist frameworks developed in the West (Mahmood 2005; Mohanty 2005). These frameworks can lead to harmful projects of "saving" Muslim women through Western ideologies and civilizing missions. For instance, Lila Abu-Lughod (2013) explores how the rhetoric of saving Muslim women from Islam and Muslim men are used as justifications for Western military invasion in Muslim societies. Epistemologically, a large portion of academic research continues to treat Muslim women's desires and agency through Western feminist frameworks. Pakhi is a woman with agency and intelligence. She told the shalishkars what her expectations from them were and the harmful consequences awaiting her and her family; she was the one who thought to show the digital evidence when no one else thought of it; and she crafted her own legal narrative, meticulously weaving together conversations with whatever evidence she had to support her claim. She played the central role in delivering her story to persuade the shalishkars, who were elite and powerful men within the community, and she leveraged any means possible to convince the attendees of the shalish.

Pakhi's desire for mediation was practical, and she was aware of the repercussions that could lead to her, as well as her family, being ostracized from their community. In a private conversation with me, she said that she still loved Sujon and believed that, once the community accepted them as husband and wife, they would both be happy as the love between them was still there on both ends. I probed her on why she thought Sujon still loved her if he was denying their marriage so vehemently in the shalish. She told me that it was because of the pressure he received from his family. They were enraged and hurt that he got married without their blessing and permission. Sujon's public behavior served to prove to the community that he was making his family a priority and attempting to pacify his parents' and elder family members' anger. I asked her why she came to this conclusion, and she simply said: "*Ami ore khub bhalo moton chini*" (I know him very well). Sujon had broken the custom and kinship rules of marriage and was being punished for it, leading him to endanger Pakhi's situation even more. Sujon was also from a higher income family compared to Pakhi and her family. Pakhi's choice of mediation was closely connected to her position within society and the scope that she had to navigate within existing class and gendered power structures. Her take on justice entailed the public recognition of her relationship with Sujon and the community accepting her marital status. Yet Pakhi's expectation of justice had little to no space in state courts.

After the shalishkars established that Pakhi and Sujon were married, they rebuked Sujon for how he treated his wife and convinced his family to accept her and allow her to live in their home. Sujon eventually admitted that he had married Pakhi with good intentions but felt betrayed that she disobeyed him and told her family about the marriage against his will. He claimed that his mother had a weak heart, and, as a result, this unexpected news could have killed her. He stated that Pakhi's disregard for his mother's health and disrespect of his promise to her that he would host a big event and welcome her to his home at a more appropriate time were the reasons why he was angry and did not want to be with her anymore. The shalishkars called a local kazi and married the couple with a kabinnamma on the spot with a den mehr of three lac taka (thirty-five hundred dollars), which was a large amount of money in this context. The shalishkars reminded Sujon that, if he left Pakhi again, he would have to pay the entire amount of den mehr money and maybe even more depending on the circumstances. Pakhi and Sujon's case is an example of a shalish's scope and means of accepting digital evidence in new and creative ways to ensure women have their positionalities and frameworks of justice recognized.

Even though judgments in shalish are not legally binding by the state, the kabinnamma is. The shalishkars recognized this difference in power and made sure that Sujon could not evade the state law's repercussions for leaving Pakhi again. There is no sharp binary between state and non-state legal systems, and, on the ground, they interact with each other in complex ways. For instance, the fact that the shalishkars called a state-appointed kazi to formally register Pakhi and Sujon's marriage in a shalish and that state courts ask couples to try and mediate their problems in a shalish first before formally filing a case indicate that state law and non-state law do not operate in isolation. On the other hand, it is also important to note that, while shalish decisions might not appear to hold any "formal" legal binding, they are authoritative and hold weight in the community. Pakhi and Sujon's case is just one example of how a shalish's approach to evidence can benefit rural women.

Another example of how evidence is analyzed differently in shalish and modern state courts is to compare how silence is treated in each site. I attended a shalish where the husband (and his family) wanted the community members to convince the wife to return to his home after she left indefinitely.[28] She returned to her own village and stayed with her grandmother and refused to go back to her husband even after he came to visit her to take her back several times. When the shalishkars asked her what the problem was, why she left, and why she would not go with him, she was silent. The shalishkars took turns to ask her kindly at first, then with irritation, then with anger, and, finally, with threats that silence would lead to worse consequences for her. Throughout the multiple interrogations by various members of the community, she did not utter a single word. She looked at her interrogators with no overt expression and just remained silent. The shalishkars asked a few women from her community to ask her privately inside a religious figure's house with closed doors. She still said nothing.

One of the leading shalishkars stated: "We cannot forcibly send her back to her husband's house. Shalish's goal is *mimangsha* (reconciliation), but she must have been

[28] I discuss more about silence and silenced testimonies in the article "Neocolonial Digitality: Analyzing Digital Legal Databases Using Legal Pluralism" (Hoque 2023).

treated so cruelly that she is afraid to speak up in fear of what will happen if we send her back to him? They will probably beat her and use her words/testimony against her. That is probably why she is quiet. We cannot do this injustice. We have to ensure her protection and make sure she receives justice." I was informed after the shalish that she was happy that the shalish resulted in her separation from her husband rather than reconciliation. An interlocutor later told me that the reason for staying silent was so that her words could not be "twisted" because "that's what they always do." Western feminist ideology of women's emancipation is "speaking up" but that is not always possible in Bangladesh due to many factors that prevent women from engaging in open dialogue such as fear of being harmed, structural inequality, and precarious financial and employment positions. Women's silences are not absent of meaning, but they convey how gendered issues might not be easily articulated but have shared meanings and social understandings within the community. In Pakhi and Sujon's case, the shalishkars had noted Sujon's behavior and his attitude/body language in the shalish.

The modern state court has very little space to integrate the complex meanings of silence and non-verbal speech as verbal testimonies hold higher value. If a woman refuses to speak or file a case, then there are few means to help her in state law, whereas, in shalish, a woman's silence is not absent of meaning but, rather, a form of testimony itself. Incorporating silence as evidence is part of a shalish's approach of flexible thinking, allowing it to include sensorial and affective responses as well as non-verbal cues to locate the pain, fear, and precarity that women may face that might not have empirical evidence (testimony/scars/wounds) to back it up. Islamic law scholar Brinkley Messick (2008, 164) analyzed marriage cases in Yemen, noting how non-verbal cues such as tears and other bodily expressions can help in interpreting consent or non-consent in shari'a courts: "In these suggested legal readings of the nonverbal signs of the female inner state, fleeing "from room to room" indicates consent while the more extreme fleeing "from house to house" is taken as non-consent." These forms of indications are culturally specific and might differ from group to group. As such, community leaders who are running the courts, when aware of the cultural context, reduce barriers to decode gendered coded language—be it silence, verbal speech, or other forms of communication such as haptics (touch), proxemics (space/distance), and kinesics (movement/gesture).

(In)Admissibility of digital evidence in state courts

While digital evidence is readily accepted in shalish, it is still restricted in many ways in state courts, even outside of marriage and divorce cases. It was not until 2022 that Bangladesh's 1872 Evidence Act, which was constructed during the British colonial period and only slightly updated since then, was modified to include digital or electronic evidence.[29] Despite the general inadmissibility of digital evidence prior to 2022, there have been exceptional instances when state courts have allowed digital evidence. For example, if a case was tried under the Speedy Trial Tribunal Act or the Anti-Terrorism Act, digital evidence could be admissible (Apurbo 2020). In 2019, Abrar Fahad, a student at the Bangladesh University of Engineering and Technology, was

[29] Evidence Act.

murdered, and digital evidence played a critical role in being able to prove who was involved in his murder. In order to ensure that evidence such as Facebook posts, mobile data, and digital forensics would be admissible in court, this case had to go through a special legal tribunal known as the Dhaka Speedy Trial Tribunal (Sheikh, Afroj, and Iqbal 2024).

Even though the Evidence Act has been amended to include digital evidence, there is still a general distrust of digital media. This is because of the popular assumption that digital media is much easier to fake and manipulate than official documents. Moreover, some individuals suggest that the Bangladesh courts do not have the proper infrastructure and expertise widely available to monitor and validate these forms of evidence. While there is much conversation on how to incorporate digital evidence in criminal law in a suitable way, there is much less attention paid to family law. In family law, the admissibility of digital evidence might be at the judge's discretion, but my interviews and ethnographic fieldwork suggest that documentary evidence holds the most weight, and it is not that common to accept digital evidence in marriage and divorce cases.

The demarcation of family law as "separate" from the rest of "law" stems from deep- seated colonial ideologies of sidelining family matters in formal courts.[30] Historian Julia Stephens (2018) describes how colonial administration in Bengal domesticated issues such as marriage, divorce, and custody, separating them into the private realm. Colonial courts played an important part in ingraining new structures of law while modifying existing practices. According to Stephens, these modifications often benefited the colonial state in the guise of benefiting the local inhabitants. Moreover, family law was categorized under personal or religious laws, and the codification of these laws was predominantly through the lens of colonial officials who had little to no knowledge on local practices on the ground, especially in the rural areas. Family law is a site where religion and law interact in intricate ways, generating complex power structures. The colonial vision of the Muslim Personal Law (Shariat) Application Act, 1937 intended to govern family matters such as marriage and divorce for Muslims, but the understanding of shari'a and Islamic or Muslim law stem from Eurocentric and orientalist ideologies of Islam that do not align with how Bengali rural communities view their Muslimness.[31] Colonial officials sometimes completely excluded local rural practices in the conceptualizing of personal laws, or they incorporated their own understanding or local elite perspectives.

In Bengal, most of the local elites tended to be non-Muslim *zamindars* (landowners) who had little knowledge about Islamic law and the Muslim rituals of marriage and divorce. The zamindars owned land and had the power to mediate knowledge between the rulers and the working class (including the "peasant" population who were mostly Muslims). Elite Muslim figures from other parts of the region, such as

[30] The Family Courts Ordinance, 1985 (repealed in 2023) and the updated Family Courts Act, 2023, *Laws of Bangladesh: Government of the People's Republic of Bangladesh Legislative and Parliamentary Affairs Division*, http://bdlaws.minlaw.gov.bd/act-682.html and http://bdlaws.minlaw.gov.bd/act-1444.html require that cases dealing with family matters such as the dissolution of marriage, dowery, maintenance, guardianship, and custody of children must first go through the family courts.

[31] Muslim Personal Law (Shariat) Application Act, 1937, Act no. XXVI of 1937, *Laws of Bangladesh: Government of the People's Republic of Bangladesh Legislative and Parliamentary Affairs Division*, http://bdlaws.minlaw.gov.bd/act-173/section-21539.html.

Northern India, might have had some influence on the codification of Islam and the development of Muslim law within British India. However, the Muslim population in Bengal—particularly, those residing in East Bengal, which is where current-day Bangladesh is located—did not have the power or the scope to have much influence. This is important since Islam developed in Bengal in distinct ways, and the practices of Islam within this region differ from other spaces even within the Indian subcontinent. Historian Richard Eaton (1993) argues that Islam in Bengal is syncretic, incorporating different ideologies, cultures, and philosophies with each new encounter, which has led to the development of a language and practice of Islam that caters to the histories and cultures of people within this region. As such, the codification of British Indian law and, later, postcolonial Muslim law does not include the Muslims of Bengal in many ways.

In addition, codification also marked a distinction between which practices are "religious" and which are "cultural," reducing the fluidity of how people approached rituals on the ground. Shahab Ahmed (2015) has shown how Islam is not only constituted via doctrinal and judicial institutions but also other aspects of lived experience by those who identify as Muslims. Ahmed emphasizes that Muslims have practiced and experienced Islam in ways that do not follow any fixed, singular canon. Instead, Islamic philosophy, art, poetry, and Sufi thought in the Indian subcontinent might appear to contrast, or even be in opposition to, the strict doctrinal, judicial, and textual (scripture) interpretation of Islam. Muslims for generations have attempted to justify how such contested experiences are very much part of what constitutes their Muslimness.

These contested lived experiences of Muslims and contradictions with Islamic doctrine are factors that colonial officials did not consider, resulting in a limiting, Eurocentric version of family law in most postcolonial states. After Bangladesh became an independent nation-state in 1971, the Constitution of Bangladesh adopted the 1937 Muslim Personal Law (Shariat) Application Act from colonial times and the 1961 Muslim Family Laws Ordinance from when the region was part of Pakistan.[32] There have been minor amendments to these laws since then. While the Evidence Act was updated to include digital evidence in 2022, most of these other laws that are related to marriage and divorce have not yet been updated as much, which make it even harder to accept digital evidence in these cases.

While state courts limit the use of digital evidence in family law cases, such evidence is readily accepted in shalish. Shalishkars in the villages do not hesitate to incorporate digital evidence such as text messages, social media posts, and mobile phone photos and videos. Shalish are not bound by Bangladesh's Evidence Act, the Muslim Personal Law (Shariat) Application Act, and the Muslim Family Laws Ordinance, meaning that these courts have the scope to handle digital evidence differently than the state courts. Pakhi and Sujon's case took place in 2021 when digital evidence was not part of Bangladesh's Evidence Act. Women had the chance to use their personal archives (using various forms of media) in shalish, even though they were barred from doing so in the state courts. While the Evidence Act has been

[32] British colonialism ended in the Indian subcontinent in 1947, resulting in the partition between India and Pakistan. The land where Bangladesh is situated was part of Pakistan, known as East Pakistan. Bangladesh gained independence from Pakistan and became a sovereign nation-state in 1971.

updated to include digital evidence in 2022, most of these other laws that are related to marriage and divorce have not yet been updated, which makes it even harder to accept digital evidence in these cases.

If the state courts were to have determined Pakhi and Sujon's case using primary evidentiary protocols—that is, the kabinnamma—they would have determined that Pakhi was not married to Sujon. As mentioned previously, in some rare, exceptional cases, the Supreme Court accepted alternate evidence to determine a marriage as long as it falls under existing codified Muslim laws in Bangladesh. In Pakhi and Sujon's case, the state courts would still not have determined that they were married since Pakhi did not have the relevant alternate evidence—witness testimony, cohabitation, children, or community acceptance. Even if the digital evidence that Pakhi provided was admissible, would that have changed the state court's stance on this matter? Probably not. The evidence she provided was not part of the list of alternate evidence that might be used to prove a marriage. I do not intend to list new forms of evidence—digital or otherwise—that can be added to the existing corpus of state law but, rather, unpack the legal reasoning that has allowed such evidence to prove a marriage in shalish in the first place. While digital evidence is a site that allows us to explore the emerging complexities of marriage in rural Bangladesh, the goal is locating how the flexible legal reasoning within shalish and the community's perspective of justice allowed them to reformulate what counts as admissible evidence to prove a marriage.

Flexible legal reasoning: shalish and state courts

Flexible legal reasoning in shalish

The shalish used to mediate Pakhi and Sujon's case is a lens to understand how shalish's flexible legal reasoning operates on the ground. Using text and social media messages to prove a marriage did not have precedence in this community, and it is not the norm to do so in surrounding areas either. There was nothing in state doctrine and Islamic law that directly state that social media messages can act as valid evidence to prove a marriage. Nor was there any social practice within this village to use digital media in this way prior to this shalish either. What is the legal reasoning behind the flexible mechanics within shalish? The first question is: are the decisions made by shalishkars as random and unpredictable as they appear? I would argue that ambiguity and flexible legal reasoning are not random components of shalish but, rather, the integral mechanism of how shalish operate. Despite the absence of a codified legal structure, the prevalence of flexible legal reasoning within shalish across different regions indicates a pattern—that is, it is an alternate rulemaking norm and not as "random" as one might assume.

A shalishkar from Pakhi and Sujon's case said: "This is exactly why we have *ijtihad* [referring to the flexible legal reasoning]. For situations like this. This is how shalish can benefit women. Otherwise, what would happen to her? Can you think of what would happen to her." What would have happened to her is that Pakhi and her family would probably have been ostracized by the community since people would consider her of "bad moral character" for "mixing" with a man outside of marriage. The shalish allowed the case to break from the pre-existing options for admissible evidence and helped Pakhi (when it was obvious that Sujon had duped her into believing they were

getting married by signing a kabinnamma and then treating her as his wife thereafter). Based on who is running a shalish, this form of flexible reasoning can be used to deny women rights. How good the legal system is is determined by the people who are running it, and corrupt agents can misuse power in shalish, state courts, and other sites. The point is that the form of flexible reasoning that the shalishkars performed might have been outside of their usual ways of determining a marriage, but the practice of flexible reasoning was not surprising to the community. Whether they agreed with the decision or not, they did not deny that this was a valid form of legal reasoning.

The implementation of flexible legal reasoning and the fluidity within these legal systems does not mean they lack structure. One way of understanding this is through a comparison of the case-by-case structure of Islamic legal thought more broadly. Lawrence Rosen (1980) argues that the legal proceedings within Islamic courts are embedded within the rules and moral orders that develop from a particular society's history and culture. According to Rosen, law, religion, and culture are closely entangled with one another, and the qadi's decision is influenced by both Islamic legal thought and cultural propositions, which allow the verdicts to be legible, "if not universally acceptable, to the society he serves" (218). While Islamic law recognizes that no two cases can be treated in the same way, it does not mean that there is no formal structure or coherent rulemaking. As Rosen writes, "[t]hey [Qadi] insist that the same reasoning process—of drawing analogies, of weighing moral implications, of adducing evidence, of assessing entailments, of gauging the social interest-may reasonably lead to different conclusions, but that if the procedures are the same, the most important criterion for treating similar cases similarly will have been met" (242).

The rules of operation might shift over time, but there are still rules and consistencies within these alternate courts that make their decisions acceptable to society. In his study of Islam and Muslims in South Asia, Shahab Ahmed (2015) suggests that scholars who search for coherency within Islam and Islamic legal thought assume a modern analytical framework that erases the value of inconsistencies and ambiguity. He argues that "[t]he main difficulty in conceptualizing Islam/Islamic lies on the prolific scale of contradiction between the ideas, values and practices that claim normative affiliation with "Islam," which poses the demanding problem of how to locate the coherence of an internally-contradictory phenomenon" (109). Unlike the Western inclination for order, the ambiguous, non-rigid structure is welcomed in Islamic legal thought in South Asia, and it is possible to have contradictions between legal decisions and doctrine, be it state or religious. These contradictions and debates within scholarship show the difficulty of theorizing how law and rulemaking work in alternate legal systems that have flexible thinking.

My interlocutors (who were Muslim shalishkars) explained to me that they call this form of reasoning "ijtihad" and employ it when they feel that established doctrine or customary norms are not directly applicable to grant justice in a particular case. Yet they do not think that this type of moral reasoning is outside of the domain of Islam but, rather, a central part of being Islamic. Ijtihad is a concept in Islamic legal thought that incorporates the idea that only God knows the truth and that human judgments will always rely on interpretation with the possibility of error. Hallaq (2011, 27) explains that,

> [e]xcept for a relatively few Quranic and Prophetic statements which were unambiguous and which contained clear and specific normative rulings, the rest of the law was the product of *ijtihad.* . . . Islamic law is therefore overwhelmingly the result of *ijtihad*, a domain of interpretation that rests on probability. Every accomplished jurist could exercise *ijtihad*, and no one knew, except for God, which *MUJTAHID* (the jurist conducting *ijtihad)* was correct. This relativity gave rise to the famous tenet and maxim that "Every *mujtahid* is correct."

Ijtihad is a way of understanding how plural interpretations of the same Quran verse can contradict and coexist among Muslims. Ridwanul Hoque and Morshed Khan (2007, 206) who study Bangladesh courts state that Islamic legal thought encompasses internal legal pluralism: "Despite the uniformity of its basic norms, the Islamic legal system is essentially pluralistic, as evident in the diversity of schools of legal thought which offer different views on a particular legal problem." Some of the popular schools of legal thought are Hanbali, Hanafi, Maliki, and Shafi'i. People in Bangladesh primarily draw from the Hanafi school of thought, but, as mentioned earlier, Islam in Bengal has a long historical tradition of being a hybrid and influenced by many religions and cultures.

Being able to interpret Islam and locate "the spirit" of the Quran provide the scope for shalishkars to expand beyond fixed parameters. Fauzia Ahmed (2011, 127), a Bangladesh scholar, writes: "Ijtihad is a type of Islamic jurisprudence that states that in issues for which there is no explicit solution in the Koran or in the hadith, jurists should be informed by the spirit of the Koran to use their moral capacities." Unlike shari'a or Islamic courts, it is not mandatory or common for Islamic religious figures like the qadi/kazi/kadi to lead shalish. Instead, as mentioned previously, the shobhapoti and shalishkars tend to have no background in law or Islam. Hence, this form of flexible reasoning is not bound to religious expertise and can be employed by anyone in the community. In 2025, I had a conversation about this with Micheal Peletz, a scholar who studies shari'a courts in Southeast Asia, and he mentioned to me that this is not the case in Malaysia where only specific learned jurists, who are mostly men, have the legitimacy and authority to practice ijtihad.[33]

Fauzia Ahmed's (Ahmed, 2011) study, on the other hand, finds that ijtihad is not only employed by notable figures in Bangladesh, but rural women frequently employ ijtihad to enforce agency in creative ways. Ahmed contributes to how ijtihad is understood in Bangladesh by noting how the term relates to *boodhi* (wisdom). She argues that women who employ ijtihad in the villages are considered in a positive light in the community: "The collective ideology of everyday resistance for poor women in rural Bangladesh, boodhi is consciously based on a feminist interpretation of Islam" (127). In this context, ijtihad is decentered from the elite and "educated" and deemed as a practice that can be employed by anyone. Hence, shalishkars with no formal training or extensive knowledge on Islam can employ ijtihad in shalish.

Shalish is not a shari'a or Islamic court, and many Islamic law scholars and practitioners in other Muslim societies might consider shalish's flexible reasoning as not "proper" ijtihad based on how they understand and define the term. Some Islamic

[33] Personal communication with Michael Peletz, 2025.

law scholars asked me to reconsider calling shalish's flexible reasoning as ijtihad since it did not align with how the concept is understood and practiced more broadly. I still chose to mention ijtihad in order to maintain the integrity of the fieldwork and respect my interlocutors' standpoint. Scholars sometimes (unintentionally) reinforce hierarchies of Islam, centering interpretation(s) and meaning(s) through dominant sites of power. This can lead to patronizing people in Bangladesh, treating them as though they have "failed" to understand and implement "proper" ijtihad like the "well-esteemed" Islamic scholars or jurists in other Muslim societies. I have taken an anthropological approach to contextualize the concept of ijtihad as it has developed in Bengal. The way in which ijtihad is practiced in this particular region might differ from popular and more dominant understandings of the term, which has originated from societies that have documented histories of ijtihad. Since shalish is an oral legal system, tracing the meaning of ijtihad throughout history is difficult and outside the scope of this project. Scholars such as Eaton (1993) and Ayesha Irani (2021) have shown how Islam in Bengal has a hybrid nature, adapting and weaving together languages and philosophies within the region, and, as such, it is not a stretch to surmise that ijtihad in this space might also have developed through influences from plural cultures and ideas, explaining why it appears similar, yet distinct, from other spaces.

Another hesitancy of using the term ijtihad to discuss shalish's flexible reasoning stems from the contradiction that ijtihad is an Islamic concept while shalish is not an Islamic court. Shalish is not limited to Muslims and are run by non-Muslims as well. The flexible legal reasoning practiced within shalish is tied to Bengali culture as well, and it is important to note the blurred lines between religion and culture. Since the majority in Bangladesh identify as Muslim, Islam and Islamic language can influence various aspects of shalish. In 2024, I had a conversation about this with Dina Siddiqi, a scholar who has conducted extensive research on shalish for decades, and she mentioned to me that no one had referred to this flexible reasoning as ijtihad when she conducted fieldwork and that the recent turn to using this Islamic language, observed by newer ethnographers, can be telling of a larger shift in the politicization of Islam in Bangladesh.[34]

Whether this flexible reasoning should be called ijtihad or not is outside the scope of this article. I mention the term simply because it was used by multiple shalishkars during my fieldwork. I did not wish to erase their voices and perspective just because I could not find a more cohesive explanation for the term. I report my findings and leave this line of inquiry open for other scholars to pursue. For the purpose of this research, my goal has been to show how the shalishkars employed flexible legal reasoning in Pakhi and Sujon's case to decide whether digital evidence—though unorthodox and not the norm within shalish—could be accepted as a valid form of evidence to prove a marriage existed. It was not about the form of the evidence itself but, rather, the way in which it was analyzed that piques interest. The shalishkars have the scope within shalish to employ such flexible legal reasoning when they feel that the doctrine—be it state law or religious policies—are not sufficient enough to grant justice. After Pakhi and Sujon's case in the shalish was completed, the schoolteacher told me: "The end goal is justice. Shari'a provides guidelines, not rules.

[34] Personal communication with Dina Siddiqi, 2024.

If those guidelines do not help women, the poor, and the disabled then we should think outside the box. That is why shalish is good. Each case is special and is determined on a case-by-case basis."

This flexible legal reasoning can be used to help vulnerable communities, or it can be used to oppress them. This depends on the people who are running the shalish. There are many instances throughout Bangladesh's history when patriarchal and heteronormative decisions have led to the persecution of minority groups and those with less power. While the goal of this article has been to analyze moments when such flexible reasoning provides justice in ways that state courts cannot, I do not want to minimize the harms that can occur due to the misuse of power.

A "good" shalish, according to the community, is one where power is acknowledged and positionalities are recognized —that is, the social consequences of the minority and less privileged are taken into account when a decision is made. This is a shared understanding, a social contract within societies that accepts and respects the authority of shalish. When the flexible legal reasoning is misused and injustices prevail, the community deems this social contract broken. The shalish is scorned by the community, sometimes in private when they cannot speak up against the shalishkars due to asymmetries of power. Like any other legal system, the quality of shalish as a ruling mechanism relies on the people running them and the capacity of the community to hold them accountable. The ideal theoretical model of this flexible legal system includes the principle to recognize inequalities and hierarchies, which can help balance power and implement justice in a more equitable ways when operated by those with good moral judgment.

Ijtihad in state courts

State courts in Bangladesh have the scope to perform ijtihad. A primary reason why ijtihad enters Bangladesh state courts is because areas of family law such as marriage and divorce are under personal or religious laws. As mentioned previously, these personal laws are adopted from colonial laws that tried to formalize customary and Islamic law through elite, colonial, and skewed perceptions. There have been minor updates to laws such as the 1961 Muslim Family Laws Ordinance, which impact how marriage and divorce are processed in state courts in Bangladesh even today. While state courts do not rely solely on ijtihad to make decisions, there are interesting ways in which ijtihad permeates state law. For instance, in the case *Jamila Khatun v. Rustom Ali*, the High Court Division of the Bangladesh Supreme Court provided the judgment that Khatun was not entitled to past maintenance money since a considerable amount of time had already passed since her separation with her husband.[35] They made this decision according to the Hanafi school of thought, which is prevalent in Bangladesh, arguing that this line of legal philosophy tends to not allow women to receive past maintenance money. The Appellate Division of the Supreme Court of Bangladesh overturned the High Court's decision, and the judge decided to employ ijtihad to

[35] *Jamila Khatun v. Rustom Ali*, 1996 48 DLR (AD) 110.

grant Khatun the money. Alamgir Serajuddin (2015, 151), a professor at the University of Chittagong in Bangladesh, has analyzed this case and suggests that,

> [t]hough traditional Hanafi law does not allow past maintenance, the Shafi'i law does. The Appellate Division of the Supreme Court held that in these cases "the advance by way of ijtihad has been made in the right direction, with strong reason so far undisputed and of course within the bounds of Sunni law". Therefore, past maintenance was payable to the wife and the child. But because of the law of limitation, she was entitled to past maintenance for only six years prior to the institution of her suit.

In other words, the judge switched from Hanafi law to Shafi'i law "by way of ijtihad." Note that, in this case, ijtihad is used to parse through different Islamic texts and search for a re-interpretation that can help Khatun. Employing ijtihad like this within more formalized courts and by authority figures can be seen in other spaces, including shari'a courts in Malaysia (Peletz 2020).

The formalization of ijtihad in contemporary, postcolonial states is in part a legacy of colonialism. Employing ijtihad in formalized, bureaucratic courts can limit the scope of the concept in many ways. For instance, because of the structure of modern state courts, there is little scope to look outside the parameters of written Islamic texts or formal doctrine. Legal scholars such as Hoque and Khan (Hoque & Mahmud Khan, 2007) argue that the Bangladesh Supreme Court employs ijtihad as a way to curb the limitations and patriarchal tendencies of Islamic family law—that is, ijtihad provides an avenue to reinterpret prevalent texts that have been used for discriminatory purposes. They call this practice "neo-ijtihad" and state that "*Jamila Khatun* introduced a symbolic policy of shunning the unhealthy trend of consulting ancient texts without referring to modern situations, and seemingly embraced judicial neo-ijtihad, which, as seen above, has attained salience in Pakistan, for example" (223). This view assumes that Islamic law is inherently inferior to modern state law and treats Supreme Court judges as saviors and progressive figures who can "fix" these texts.

In the Supreme Court, the logic of ijtihad and the reinterpretation of Islamic texts and Muslim law often lacks sufficient weight to stand on its own as a persuasive legal argument; the judgment must also be supported by citations and evidence that are more familiar within modern state courts, such as referring to prior notable cases, international law, and significant human rights' guidelines such as the United Nations' Universal Declaration of Human Rights.[36] As such, to strengthen their legal reasoning, the Appellate Division's judgment in *Jamila Khatun v. Rustom Ali* had to be supported by citations of previous cases such as *Sardar Muhammad v. Nasima Bibi*, which is a landmark case in Pakistan about maintenance.[37] They also must cite various prominent Islamic texts, such as *Ameer Ali's Commentaries on Mohammedan Law*, to

[36] *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810, 10 December 1948.

[37] *Sardar Muhammad v. Nasima Bibi*, 1966 9 DLR (WP) 50=PLD 1966 (Lahore) 703.

rethink what "maintenance" means (Ali and Raza 2015). This is evident in other cases such as *Abdul Jalil v. Sharon Laily Begum*, where the Appellate Division of Bangladesh chose to "depart from the orthodox law of custody" and instead relied on the welfare of children guidelines of the Convention on the Rights of the Child.[38]

The curbing of ijtihad in state law is tied to British colonialism in South Asia. Colonial officials often did not recognize or value that Muslim legal thought did not have a universal, fixed doctrine as well as the importance given to interpretation. Stephens (2018) discusses the debates surrounding ijtihad and *taqlid* in the nineteenth century between Islamic scholars. Stephens defines ijtihad as "the effort of forming an independent judgement, often through direct consultation of the Quran and hadith" and taqlid as "the act of following or submitting to the authority of another person's interpretation, and is often associated with conforming to the decisions of one of the four schools of Sunni jurisprudence" (109). She mentions the complex debates among different scholars such as Nazir Husain who endorsed following "a school of law so long as it conformed to an individual's own understanding of the Quran and *hadith*" (119), and Irshad Husain who valued the notion of *Intisar*, which advocates that "the Quran and hadith had to be read in the context of changing historical circumstances, which could give rise to new legal obligations, including following a school of law" (121). Stephens states that colonial officials started to connect many thoughts with a rigid and centralized state law, which resulted in normative practices as well as restructuring Muslim legal thought.

A significant difference between how the flexible legal reasoning operates within shalish and state courts lies in its spirit—the spirit of ijtihad within shalish is to center on ensuring justice, particularly for the marginalized party. Shalish's flexible reasoning has the capacity to defy formal doctrine and fixed parameters—that is, not only adjusting and readjusting the elasticity of law but also breaking through those elastic barriers when necessary. However, due to the more rigid structures and bureaucratic legal procedures within state law, sometimes this is not possible.

Problematizing the marriage certificate/kabinnamma

State courts in Bangladesh treat the marriage certificate or kabinnamma as the most important piece of evidence to prove a marriage exists because it is a document produced by state and state-recognized authorities. Considering the state-sponsored marriage certificate as the sole evidence of marriage suggests that the state's recognition of marriage trumps the lived experiences and meanings of marriage for people on the ground. While marriage registrations have increased in contemporary society compared to the past, it is very common for people in Bangladesh to get married via customary rituals even today. Customary marriages are well accepted within society even when there are no kabinnammas. When disputes occur in these circumstances, women prefer to go to shalish as these sites are familiar with the norms of customary marriage and accustomed to mediating or providing some form of compensation to women.

[38] *Abdul Jalil v. Sharon Laily Begum*, 1998 18 BLD (AD) 21; *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3.

Many global as well as local (usually elite urban) human rights activists and lawyers claim that shalish's "erratic" practices would not be needed if rural women were "educated" and obtained the "proper" legal documents in the first place. This argument does not consider the barriers women face to obtain the official legal documents. A woman from one shalish in Jamalpur district said: "I do not have access to any documents. My husband and mother-in-law keep all of that locked away. But I have my phone. I can show evidence from my phone." Official documents are usually out of reach from women, which make it difficult for them to provide as official evidence when required. In a shalish that I attended in Jamalpur district, Moin married a second time without his first wife Anika's consent. He admitted to Anika that he had a second marriage after she initially confronted him but denied it to her and everyone else afterwards. Anika went to her local legal aid office (a NGO) with evidence that she found while secretly going through Moin's phone: a picture of Moin and his second wife, some comments of them flirting on his Facebook profile, and a never-posted TikTok video (in drafts) of Moin and his second wife in bed together. Since the video was private, Anika recorded the video from his phone using her smartphone's built-in camera. The legal aid office turned her away, saying that state courts would not accept these forms of evidence to validate that he had a second marriage; only the existence of a second kabinnamma could prove that. Anika said: "I don't even have my own kabinnamma and you are asking me to bring this other woman's kabinnamma? There is nothing you can do to help me?" The legal aid office tried to mediate the situation through a shalish, but Moin refused to attend any of the arranged shalish. He had a job in Dhaka city, and the local community's hold on him was not as strong. Anika was left with the option to either wait for him to contact her or formally initiate a divorce in court.

Anika protested against the legal aid officer: "This is not justice. I showed you proof and there is nothing you can do. This is not justice." The legal aid officer explained: "No, but this is reality (*bastobota*). This is our law." Anika responded: "The reality is you won't help me, and I have nowhere to go. If that is the law, then the law is for men and rich people. That is the reality." While Anika's outburst is something that is not seen frequently, it was a reaction commonly experienced by rural women when their positionalities and barriers are not recognized in legal systems.[39] It is the frustration that the courts do not recognize their lack of access to "valid" forms of evidence and dismiss the kinds of evidence that they can manage to provide within their means/scope.

During my fieldwork, my interlocutors in Dhaka mentioned that it is difficult to incorporate digital evidence for family law in state courts as it can be manipulated and altered easily, and yet this same line of scrutiny is not extended to documentary

[39] A group of women expressed to me that they wanted to solve their cases through shalish because "court *mamla*"—that is, state courts twist the situation without any fruitful results—"*Ora khali pechaite thake, pechai kintu kisui hoi na*," which translates as "they keep twisting things, but nothing happens." Similarly, in many shalish that I attended, women gather together and have their own conversations about what is being said and discussed in the main inner circle of shalishkars; frustration and anger is a common reaction since women are sometimes silenced and treated as inferiors. In some instances, they directly expressed their anger in shalish, and, in many others, they remained silent but talked in small circles amongst themselves nearby. Even though they spoke amongst themselves, they spoke loud enough for the male shalishkars to hear their disagreement and contempt.

evidence such as the kabinnamma. It is common knowledge in the villages that kabinnamas are often forged. For example, when men marry girls that are underage, they or their families bribe the kazi to change the age. This is not a rare practice. There are also many instances when men generate fake kabinnammas to harass women. For example, the Supreme Court case of *Amirul Bor Chowdhury v. Nargis Sultana* involved the consideration of the validity of a couple's kabinnamma.[40] In this case, there was a debate between the two parties about whether Nargis Sultana had married a second time or whether her ex-husband had generated a fake kabinnamma in order to restrict the custody of their children. Sultana claimed that this was her ex-husband's attempt to harass her and insinuate that her priority would be her new family and not raising children from her previous marriage. Sultana's legal team countered that she had never signed a kabinnamma: "The so-called Kabinnamma which has been produced before this Court is a forged one and the petitioner created the same with the help of his men only to create a new story and to make delay in handing over the minors to the mother."[41] Other instances of kabinnamma forgery involve the amount of kabin/den mehr money that the husband is legally bound to give the wife in case of a divorce. I have been to two shalish where the shalishkars determined that the husbands had bribed the kazi to change the kabinnamma to reduce the den mehr money without the knowledge of their wives and in-laws.

In shalish, as in many legal systems, documents are usually supplemented by oral testimony. Brinkley Messick (2002, 262–63) observed that in shari'a legal proceedings in Yemen, "documents do not stand alone," and "writings have to be converted to spoken testimony to have evidential value." Similarly, documentary evidence such as kabinnammas hold importance in shalish but not in the same way as in state courts. When there are claims and hints that suggest that the kabinnamma is forged, shalishkars rely on other evidence to mediate the situation. Documentation is a collective human process, and official documents gain legitimacy and authority through affiliation with the state and "official" judiciary rather than through any intrinsic quality or nature of the medium itself (Messick 1996; Johns 1998; Hull 2012). It is important for state law to recognize the shortcomings of considering kabinnammas as the primary evidence of marriage as access to gaining such documents are restricted to women and can be unavailable during customary marriages. While state legal actors express concern that digital evidence can be manipulated easily, the same concern is not extended for state documents such as kabinnammas, which can also be easily altered through bribes and other fraudulent practices.

Many women in the villages do not obtain a kabinnamma when they get married because they believe that this form is only an Islamic document and not a state-sponsored form. In order to secure themselves, many women in rural Bangladesh insist on having a "court marriage"[42] with the assumption that documents endorsed in law firms provide the official paperwork for marriage. A court marriage is when couples go to a lawyer and sign an affidavit stating that they are married or intend to get married. Most lawyers and legal aid officers state that this document holds almost

[40] *Amirul Bor Chowdhury v. Nargis Sultana*, 1999 19 BLD 213.
[41] *Amirul Bor Chowdhury*, section 8.
[42] Alternate names can be "notary marriage" or "affidavit marriage."

no validity in state law to establish a marriage. Affidavits are generally used in court to verify an oath or promise between parties, but such documents do not count as evidence to prove a marriage in state courts. Yet, many women believe paperwork from lawyers holds more legal value than the kabinnamma, which they see as a religious piece of paper. At an NGO-mediated shalish in Madaripur district, I asked a woman why she chose to have a court marriage instead of going to the kazi office to get a kabinnamma. She responded:

> I wanted to get married in the proper way. I thought kabinnamma is according to shari'a, according to Islam, do you understand? But court marriages are according to the state. I wanted to make sure that he would not abandon me and I picked the path that I thought would protect me. What a mistake I have made! How would I know that this paper means nothing? We even went to a nice building where the lawyer sits. I paid him with all my savings.[43]

Apart from the kabinnamma, the term "kazi" has a long-standing history of being affiliated with Islam since the kazi/qadi/kadi are judges or magistrates of the shari'a court in many parts of the world. In Bangladesh, the kazi is a person who registers marriages and divorces, formally known as a "nikah registrar," and they are appointed by the state under the Muslim Marriages and Divorces (Registration) Act, 1974.[44] Even though these figures are sanctioned by the state, the common perception is that a kazi is tied to religion, while a lawyer is someone who handles professional and formal state procedures.

There are mixed feelings about court marriages on the ground. An advocate from Madaripur Legal Aid Association said: "This is just a money-making scheme and should be banned." On the other hand, in a shalish in Jamalpur district, a man who abandoned his wife after getting a court marriage, stated: "The lawyer told us that we should get a kabinnamma within thirty days, otherwise the court marriage will be annulled (*batil hoye jabe*). We didn't get a kabinnamma in thirty days. That means the marriage has been annulled. So, there is no need for any divorce, and I do not have to pay any *kabin*." The shalishkars did not consider this marriage annulled because they knew that the woman was misled into thinking she was getting married, would face ostracization, and that her morality and honor would be questioned by her community members. But, in state law, there was no marriage registered in the first place, and there was no way for the woman in this case to get redress and support.

In another shalish in Jamalpur district, a nineteen-year-old girl who had a court marriage told me: "People will say I'm used now; who will marry me," referring to how society will shame her for not being a virgin and having sex with someone who was not "officially" her husband. Even though documents from court marriages are not enough to establish a marriage in state courts, they hold some weight in shalish to establish the intention and efforts of the couple to get married. The point is, even when women attempt to secure the official documents, there are many factors that

[43] Personal communication with woman in Madaripur, 2021.

[44] Muslim Marriages and Divorces (Registration) Act, 1974, *Laws of Bangladesh: Government of the People's Republic of Bangladesh Legislative and Parliamentary Affairs Division*, http://bdlaws.minlaw.gov.bd/act-details-476.html.

prevent them from following the "proper" protocols of marriage. There are also many cases where men have coerced women to sign a marriage certificate with violent threats ranging from throwing acid to rape. In such cases, shalish have attempted to reduce the validity of the kabinnamma, highlighting the lack of consent based on social context and local knowledge. Men can use a kabinnamma to claim legal status of a marriage and trap women into forced marriages. As such, instead of looking only at a kabinnamma, a shalish will try to mitigate the situation, focusing on determining the relationship of a couple. My interlocutors from the MLAA said that the opposite can also happen where a man can be coerced into signing a kabinnamma by a woman or a woman's family, albeit such cases are far fewer in number.

Getting married through audio or video calls has become an increasingly common practice within the middle- and lower-income populations in rural Bangladesh. Marrying remotely is an appealing option due to the increase in Bangladesh labor migration to countries such as Saudi Arabia, the United Arab Emirates, Malaysia, Kuwait, United Kingdom, and Italy, which prevents workers from returning home to get married due to financial or visa restrictions. In a NGO-mediated shalish, there was a dispute between a husband, Rony, who lived in Italy, and his wife, Rina, who lived in a village in Madaripur district. The couple got married via a WhatsApp video call, and, after nine months, Rony had yet to meet his wife in person. If he left Italy, he would be unable to return because his visa had expired. He did not have the required paperwork or finances to sponsor his wife to join him in Italy either. This was an arranged marriage. The kabinnamma included both family's signatures (witnesses), but the space for the husband's signature was left blank. A legal aid NGO worker from the MLAA who had accompanied me to this shalish wanted to mediate the dispute between the two families within the shalish since he was aware that the validity of the marriage would be questioned in the state court because the husband's signature was not on the form.

The NGO worker told me that, if the husband fell in love with someone else in Italy or chose to leave his wife for any other reason, he would try to get out of this marriage without paying any den mehr. He could find a loophole in the state law to argue that a marriage for Muslims relies primarily on the kabinnamma, and, in this instance, the contract had not been fulfilled properly since he had not signed the paper. This potential problem is evident in the following point made by the High Court Division in the judgment of *Khodeja Begum and Others v. Md. Sadeq Sarkar*: "The Muslim marriage is a socio-religious contract and the signatures of both the parties are very essential to prove the contract of marriage written in the form of Kabinnama. In such circumstances no amount of oral evidence will cure the deficiency and no amount of oral evidence will be sufficient to prove the marriage when the plaintiff failed to prove the Kabinnama according to Law."[45] In this case, Begum was happily married to Delwar Mollah, but the plaintiff Sarkar argued that he had been married to Begum previously. A kabinnamma with no signature of the bride was produced, and, thus, Begum's legal team claimed that it was fabricated evidence. While the decision might have benefited Begum and can benefit women in these kinds of circumstances, it can have consequences in other instances such as in Rina and Rony's case.

[45] *Khodeja Begum and Others v. Md. Sadeq Sarkar*, 1998 50 DLR 181, section 14.

In a state court, Rina's claim of marriage would have been further weakened by the fact that the couple had never cohabited or consummated the marriage, which can be grounds annulment. All these factors might lead a state court to decide in Rony's favor rather than in Rina's. The NGO worker said: "He is in Italy, what will happen to him? Plus, he is a man. It is the helpless [*oshohai*] woman who will suffer here."[46] The stakes and consequences of marriage and divorce are gendered. These types of decisions might be at the state court's discretionary power, but digital platforms and technology continue to play a central role in making visible how the complexities of marriage and divorce on the ground are not captured by state law and the shortcomings of treating the kabinnamma as the ultimate form of proof that a marriage exists. The examples above indicate that the kabinnamma does not always depict facts. State law considering such paperwork as the primary (if not the only) form of evidence to prove a marriage in Bangladesh is limiting. The "proof" of the marriage certificate is meant to convey one meaning—marriage; yet all the other meanings and circumstances that are woven into the social fabric of society are not reflected in a state court's recognition of marriage. The Evidence Act, along with family law more broadly, needs to be reformulated in ways that integrate the lived experiences of people and their expectations of justice.

Conclusion

US hip-hop artist A$AP Rocky had a hearing in 2025 where there was a debate between his lawyers and the opposition on whether the artist's romantic partner—musician and businesswoman Rihanna—should be referred to as his wife or not. His lawyer claimed that Rihanna is his "common law wife" as they have children together. The prosecution countered that, if they are not "legally married," then she should be called his "significant other" or the "mother of his children." The judge in this hearing declared: "There's no common law marriage that is recognized" within that state, and so Rihanna was not considered A$AP Rocky's wife in the eyes of state law. This event was reported in minor news outlets, and the clip was shared in social media.[47] While this discussion was not the central issue in this case, the conversation points to scopes of marriage outside of state paperwork within the United States today. This case is not an exception. In 2017, celebrity couple Ron White and Margo Rey were involved in a court case centering on common law marriage (Brandy Austin Law Firm 2017). Rey claimed that she was White's common law wife in Texas and had evidence of mutual agreement, cohabitation, and witness testimonies attesting to this. White denied any marriage, claiming that there was no marriage certificate registered in Texas to prove this claim. These instances demonstrate that the question of a person's marital status, even when there is no state-registered evidence, occurs on a global stage and is not limited to the global South.

The state's role in controlling love, family, and kinship is not new, nor is it restricted to Bangladesh. Marriage has long been a mode of controlling society and is closely tied to institutions of power that seek to sideline certain groups. This is partly

[46] Personal communication with legal aid NGO employee, 2021.

[47] For example, this was reported in *The Breakfast Club of iHeart* (Centino 2025) and shared in social media such as X/Twitter post by @meghanncuniff on January 15, 2025 (Cuniff 2025).

due to the power that marriage brings with claims to land, inheritance, and titles as well as genealogy, all of which have a racialized history. Vulnerable communities often face restrictions on marriage that are imposed by the state and those in power. For example, gay marriages are not allowed by the state in many countries, and, in many cases, long-term partners are not allowed to see or make any decisions related to their loved ones when they are in hospitals because they are not considered a spouse or an immediate family member. Some couples might choose not to get married due to the financial risks of debt that would take over the family—that is, their partner and children might also be restricted from getting loans, renting or buying property, or starting a business. Access to marriage is not equal across the board, and it is a struggle that many marginalized communities face worldwide.

In Bangladesh, the state has set marriage restrictions for Bangladeshi citizens to marry Rohingya refugees. A report from the British Broadcasting Corporation (2018) highlights: "Under it anyone found to have married a Rohingya can be sentenced to seven years in prison." Marriage with Bangladeshis will allow Rohingya refugees and their children to claim Bangladeshi citizenship, and restricting marriage is a means to draw lines on who can be a citizen and who cannot. During my fieldwork, I noticed that cases of interreligious marriages such as between Hindus and Muslims are frowned upon in society and often difficult to conduct without one party converting to the other's religion. Since marriage is legislated under personal laws, Muslim family law takes precedence and holds power due to the majority identifying as Muslim. As such, people tend to convert to Islam rather the other way around. My point is that, because states restrict marriage between select individuals and groups, countercultures value alternate ways of proving a marriage because they are aware that the state fails to grant them rights. Dominant and elite groups often benefit from state laws as they align with their experiences and scopes, while marginalized groups suffer due to their exclusion. As discussed in this article, marriage recognized by state law is not the only lived experience of marriage on the ground. There are many barriers that prevent women in Bangladesh from getting married with a state-sponsored marriage certificate, and the alternate way of establishing a marriage becomes key in moments of dispute.

Rural women's expectations of courts are complex and can be related to mediation, reparation as well as financial and symbolic compensation. When cases go to state courts, they often identify and categorize the problem according to fixed legal protocols and standards. Marriage and divorce are viewed as private matters that are "not as serious" or "as pressing" as other issues in society. Yet, for women in Bangladesh, marriage is critical in securing access and safety within society, and disruptions in marriage can lead to dire consequences for them and their families. The lines between what is a "legal" marriage and a "customary" marriage are not sharply demarcated. State courts might consider local customary marriages as "not legal" based on the absence of a kabinnamma; however, a shalish would recognize the marriage as "legal" based on alternate evidence. For shalish, there are no fixed parameters of alternate evidence; a shalish's flexible legal reasoning allows women to provide new types of evidence, such as evidence from their personal digital archives, to prove that a marriage exists. What is considered legal in one court, might not be considered legal in another. The development of legal systems and ideologies of governance are closely tied to cultures, epistemic frameworks, histories, and power

relations. State law has power in Bangladesh, having the authority to restrict and normalize the parameters of marriage. Women without a kabinnamma prefer to go to shalish to mediate disputes because it is a community-based system attuned to the local, cultural context of marriage.

My goal in this article is not to create a binary between these legal systems but, rather, to use a comparative approach to demonstrate the shortcomings of state law that draws from the ideologies of the modern rule of law. A shalish's non-rigid approach to justice allows shalishkars to accept evidence, including new forms of digital evidence, in legal proceedings in ways that state courts do not. Marriage is a significant space to locate gendered power structures that cut across the domains of law and society. The global North as well as urban, elite groups in South Asia treat shalish as backwards, overlooking how these sites can provide an avenue for women to establish marriage in ways that are restricted elsewhere. Studying shalish helps us to understand the kinds of problems related to marriage and divorce that rural women face on the ground and the kinds of evidence they are able to obtain. When such evidence is considered inadmissible in state courts, it poses problems for women when they need to prove their marriage exists.

Justice for many communities includes courts helping them mitigate social stigma and supporting them to reintegrate back into the community. Unlike lawyers, the work of shalishkars does not end with the decision of the case but continues after as they are obligated for follow-up visits to note how the couple and the families are getting along. This kind of continuity and the consideration of judgments as a process is common in other legal systems as well. For instance, Hussein Ali Agrama (2015) has studied the Egyptian context and compares the concept of "justice" and "*adl*" or "*adala*" to explore whether Islamic shari'a can be compared to Egyptian civil law. He suggests that justice in the liberal legal tradition has a sense of closure or final word with regard to a judgment but that adl in the Islamic shari'a is related to a continual and ongoing narrative that tends to stay "open."

In Bangladesh, it is important to rethink how marriage is treated in state law so that it caters to the rural population, centering on marginalized communities' experiences and possibilities. As of 2023, the total rural population of Bangladesh is 60 percent according to a report by the World Bank (2025). As such, it is vital to include women and other vulnerable communities' experiences and expectations of justice within state law. Bangladesh's 1872 Evidence Act was implemented during the British colonial period, and there have been only minor updates to it since that time. While including digital evidence in the Evidence Act has been beneficial, the process by which evidence is examined—be it oral, print, or electronic—needs to be reimagined. My inquiry is not limited to locating which evidence is demanded by each legal system. Instead, my focus has been on locating the legal reasoning behind the acceptance and rejection of evidence to prove a marriage, paying attention to how decisions in state court and shalish impact women.

The flexible thinking—ijtihad (or any other term that is more suitable)—in shalish is a key component that allows courts to recognize asymmetrical power structures that limit women from access to justice. This flexible legal reasoning has the scope to seek a solution that works best for a particular case in a particular space at a particular time. Some may argue that this approach enables impartiality since individuals are not treated as equals; however, there are many alternate practices of

law worldwide that consider neutral and equal treatment of all as potentially harmful for marginalized communities. The logic is that we do not live in a society where everyone is equal. There are pre-existing social biases and hierarchies that determine an individual's position within society. To not reckon positionalities, hierarchies, and power within society is detrimental for those who are in the margins. This view is echoed by political theorist and philosopher Talal Asad (2018, 38): "But perhaps more perplexing about equality is this: Its pursuit (regardless of whether the motivation is religious or secular) can, paradoxically, produce inequality—and, hence, a sense of injustice." There are alternate legal systems that recognize that the stage is tilted, and a fair trial is one that needs to balance this offset. Put into perspective, shalish's flexible legal reasoning operates with a moral logic—at least in its ideal theoretical form—centering on social equity and recognizing the position of an individual within the wider structure(s) of power.

This article does not claim that shalish provides the perfect model of justice. Like other normative orders and ruling mechanisms, they are only as good as the people running them. Modern state courts have more checks and balances to hold legal actors accountable than shalish. This lack of accountability has led to the abuse of power and the suppression of vulnerable groups throughout Bangladesh's history. Drawing attention to understudied aspects of shalish that offer women avenues to pursue justice should not be interpreted as ignoring or minimizing the injustices and heteronormative, patriarchal practices often reproduced through shalish. Denying the harms and risks associated with shalish is harmful but so is overlooking the damage caused by state courts. Pitting shalish against state courts is not the way as women face discrimination in both spaces. My goal has been to recognize moments within shalish that "work" for women, providing them with justice in ways that state courts do not and explaining the reasons why this occurs. Alternate frameworks of justice that incorporate rural, Muslim women's positionalities, desires, and standpoints reveal a need to decenter thinking about law and evidentiary processes outside of Eurocentric, patriarchal, and urban frameworks.

It is essential to rethink and update state law to recognize the injustices vulnerable groups encounter and accommodate to their needs. While this article has provided a glimpse of the oppression of rural Muslim women in relation to marriage and divorce, there are other avenues of life that also demand attention such as women's right to custody, inheritance, employment, health care, education, mental health, and so on. Moreso, there are particular forms of violence that vulnerable groups such as the non-Muslim minority, refugees, persons with disabilities, hijra and other LGBTQIA+ communities and Indigenous groups encounter, which are also important to note when reimagining state law. The relationship between caste and law in Bangladesh also demands further study. State law and coloniality go hand in hand, and it is difficult to decolonize this legal system. There are many lawyers within Bangladesh who attempt to work both within and against these systems and advocate for the rights of women and minority groups. There is still a lot more work to be done to reform law in a way that includes the diverse socio-legal realities of Bangladesh, and my hope is that this article can contribute to the amazing work conducted by the legal, academic, and activist communities in Bangladesh who are working toward such change.

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