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**Research Monograph
On
“A Critique of Legislative Changes of Family
Laws in Bangladesh”**

**This submitted for the partial fulfillment of the award of the
degree in LL.B Hon’s (4th Year)**

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Dedication
Dedicated to my Parent's

LETTER OF TRANSMITTAL

To

Sagor Hossain

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Subject: Submission of Thesis Paper.

Dear Sir,

It is a great pleasure to submit my thesis on “**A Critique of Legislative Changes of Family Laws in Bangladesh**” which is a requirement of LL.B (Hon’s) program. I tried my best to complete this thesis properly and submitting this for your our kind consideration. I have given best efforts to finish the thesis with relevant information that I have collected from various sources. I am confident that this thesis has increased both of my practical experience and theoretical knowledge to a great extent. I requesting and hope that you would be kind enough to accept my thesis and oblige thereby.

Yours Sincerely

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Certification

This to certify that the thesis on “**A Critique of Legislative Changes of Family Laws in Bangladesh**” is done by **Rumi Akter Bonna** in the partial fulfillment of the requirement for the the degree of LL.B(Final) from Sonargaon University of Bangladesh.

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DECLARATION

I do solemnly declare that the work presented in this thesis has been carried out by me and has not been previously submitted to any other institution. The work I have presented does not breach any copyright. I further undertake to indemnify the University against any loss or damage arising from breach of the foregoing obligations.

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Abstract

This research aims to identify “**A Critique of Legislative Changes of Family Laws in Bangladesh**” Ordinance, 1961 from Pakistan with the controversial provision in Section. Although no one, unlike the cases in Pakistan, has challenged this section whether the change brought by the section is justified or not should not go unexamined and unanswered. I think Bangladesh should amend of MLFO to address the per stripes succession from its right perspective.

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Chapter One

Introduction

Bangladesh is a multi-religious and multi-racial Country. The majority of the population consists of the Muslims (89.7%), followed by the Hindus (9.2%), Buddhists (0.7%) Christians (0.3%) and some other minor communities (0.2%) There are several indigenous tribes as well (Chakmas, Marmas, Tripuras, Garos, Santhals, Murong, Khasia, Kuki, Hazong etc.) living mostly in the hilly fringes of the Country. In absence of any uniform Code of Family Laws, family disputes related to marriage, divorce, maintenance, custody of children, guardianship, inheritance etc. are dealt with under various Personal Laws. The State has enacted several laws with general application to all to deal with disputes like repression of women, domestic violence, guardianship, etc. In addition to the codified Personal Laws, many family disputes are resolved through local customs, practices and various methods of informal dispute resolution including shalish (a traditional form of dispute resolution). The Personal Laws of the indigenous people have not been codified till date. As a result, they tend to resolve most of their family disputes according to customs, traditions and age-old practices. . Although the Family Courts Ordinance 1985 provides an effective forum for all communities to seek legal redress in the wake of disputes relating to dissolution of marriage, dower, maintenance, restitution of conjugal rights and guardianship of children, in practice, most of the family disputes in Bangladesh are settled through local Shalish.

1. Scenario of Women's Status under the Personal /Customary Laws

Women enjoy a discriminations status under all major religions in Bangladesh including Islam, Hindu, Buddhism and Christianity. Although fresh reforms have been effected in personal laws to eliminate gender discrimination in other Countries, the law makers in Bangladesh is yet to demonstrate its success towards any workable initiative to bring about a significant change in its legal system which would establish a society on the basis of gender equality and justice. The Muslims claim that Islam has placed women in an honorable place. However, the grim reality is that women are

perceived and groomed to assume roles and responsibilities invented exclusively for them by their male counterparts. The condition of Hindu & Buddhist women is worse than the women belonging to other communities in Bangladesh. The Christian women in Bangladesh are comparatively in better position. Christian women and men are treated equally in terms of inheritance of ancestral property, marriage, dissolution of marriage and adoption. Around 50 tribal groups are currently residing in Bangladesh. Though majority of the indigenous communities are governed under different religious laws, they have some independent customs regarding family matters also. The scenario of women`s status will be reflected in our next discussion.

1.1 Issues of Concern

A) Age:

The Child Marriage Restraint Act, 1929 have fixed the eligibility age to contract marriage as 21 years for men and 18 years for women. Unless this age is attained at the time of marriage, such marriage will constitute child marriage. According to the law, anyone charged with the offence of aiding, abetting and encouraging a child marriage shall be punishable with simple imprisonment. Since the Child Marriage Restraint Act, 1929 is applicable to all citizens irrespective of religion² ; the minimum age requirement is applicable for the Muslims as well as people professing other faiths.

B) Consent: Against the backdrop of a male-dominated society which treats women as subordinates, women are seldom encouraged to make an informed decision including choosing a spouse and to consent freely at the time of marriage. Parents tend to impose their decisions regarding marriage on the bride and under coercion the bride gives consent to marry the man chosen by her guardians.

* Lecturer, Department of Law, EXIM Bank Agricultural University Bangladesh (EBAUB) ¹ Dr. Muhammad Ekramul Haque, Muslim Family Law- Sharia and Modern World, First Edition, 2015, London College of Legal Studies (South), 33. ² Haque, Muslim Family Law, 34.

C) Witnesses:

According to the Shariah, two male or one male and two female witnesses are necessary for contracting a valid marriage. According to the Evidence Act, both male and female have been accorded equal status. In Hindu law, witness at marriage is not necessary. However, male priest officiating at marriage is considered witness for legal purposes. Notably, a Hindu woman does not have any scope of being witness. Amongst Christians, witness is required for valid marriage and male and female stand on an equal footing.

D) Dower Money:

In accordance with its historic background and eternal meaning, the dower money concept undermines the dignity of woman though some people argue that dower is a token of respect for women and essential for their economic security. Unlike Islam, other personal laws do not recognize the concept of dower money payable to wife.

E) Registration:

According to existing law of Bangladesh Muslim marriages must be registered.. The statute imposes liability to register the marriage on the bridegroom and the marriage registrar. Hindu and Buddhist marriages do not require registration. Christian marriage is registered in the book kept in the Church and no registration is not punishable.

F) Polygamy / polyandry:

According to the Shariah, Muslim men are allowed to keep up to four wives at a time with the consent of previous wife. A Hindu male, on the other hand can keep as many wives at a time as he wishes. Law prohibiting polygamy is yet to come. There is no bar for the Christian, Hindu and Buddhist men to solemnize more than one marriage at a time.

G) Hilla Marriage:

When the divorce becomes irrevocable and the couple in dispute desires to cohabit again, a fresh marriage between them becomes mandatory. However before remarrying her husband, the wife is required to marry a third person and such kind of

intermediate marriage (hereinafter called as hilla marriage) has to be consummated. The issue of hilla marriage often instigates violence against women and should be abolished immediately. Unfortunately, it has neither been prohibited nor abolished completely. With the completion of pronouncement of triple talak, according to Section-7 of MFLO, 1961 hilla marriage becomes obligatory for the wife if the couple wants to cohabit again. The concept of hilla marriage is absent in other religious communities.

1.2 Divorce/ Separation

A) By Mutual Consent:

Section-7 of the Muslim Family Laws Ordinance, 1961 lays down the procedure for execution of divorce which is mutatis mutandis applicable for all forms of dissolution of marriage. Khula and mubarah are the two forms of divorce by mutual consent though in both cases, the husband has been vested with unfettered power and the wife's status has been reduced to a divorcee. In the context of khula however, the wife has to relinquish the claim of dower.

B) Talaq-E-Taufiz:

The husband has the power to delegate his exclusive right of pronouncing divorce to some third person or to the wife by virtue of this provision enumerated in the 18th column of kabinnama (marriage contract). This provision empowers a Muslim wife to obtain her freedom from a failed or broken marriage without the intervention of any Court.

C) Contested Divorce:

A Muslim wife is allowed to claim divorce in the Court on some specific grounds laid under The Muslim Marriage Dissolution Act, 1939. Both the Christian spouses are entitled to dissolve their marriage through Court under the provision dealt in the Divorce Act, 1869. There is no legal provision for divorce by mutual consent or contest for the Hindus and the Buddhists. Hazong (indigenous tribe) women enjoy the

right to divorce though they claim themselves to be followers of Khatrio of Hindu religion.

D) Right to Separate:

Residence and Maintenance As there is no scope for a Hindu married woman to divorce or marry another person, by virtue of Section 2 of The Hindu Married Women's Separation And Maintenance Act,1946 she is entitled to separate residence and maintenance from her husband on any one of the seven grounds provided in the statute. However, the Hindu married woman seeking maintenance for separate residence should be able to prove her chastity and continue to practice her religion.

E) Registration:

A divorce is required to be registered under Section 6 of The Muslim Marriage and Dissolution of Marriage (Registration) Act, 1974. The statute does not make the registration of divorce mandatory and silent about consequence of no registration. The Divorce Act, 1869 which is applicable for the Christians does not lay down any provision for the registration of a confirmed decree for dissolution of marriage. As there is no scope of divorce, registration thereof is beyond question among the Hindus and Buddhists.

1.3 Fatwa and its Social Implications:

Fatwa is a religious injunction and a deadly weapon for repression of women in particular used by religious fundamentalists that has negative consequences inducing women to commit suicide. Surprisingly however, no new law prohibiting or intending to control Fatwa has been introduced. The Prevention of Repression against Women and Children Act which has been amended a couple of times is also silent about Fatwa and does not address it as a punishable offence.

³The Editors of Encyclopedia Britannica, "Taqlid", Encyclopaedia Britannica inc. <https://www.britannica.com/topic/taqlid>, accessed on 16 November 2022. ⁴A.W.M Abdul Huq, "Section ⁴ of the Muslim Family Laws Ordinance, 1961: A Critic" (2010) 1(1) NUJL https://www.researchgate.net/publication/269491262_Section_4_of_the_Muslim_Family_Laws_Ordinance_1961_A_Critic accessed on 16 November 2022. ⁵ Haque, Muslim Family Law, 45.

1.4 Maintenance

A) Maintenance during Ideate:

Period After termination of marriage, a Muslim wife is entitled to be maintained all kinds living expresses by her husband till the expiration of three terms of menstruation or to the end of pregnancy whichever is longer. Since the concept of Ideate is unrecognized in other religious communities maintenance during that period is not available among them.

B) Maintenance for Children 3 :

According to the Muslim Law both legitimate and illegitimate sons are entitled to maintenance until they attain puberty; whereas only legitimate daughters are entitled to maintenance until they are married.

1.5 Restitution of Conjugal Rights

The Hindus, the Muslims, the Buddhists and the Christians can apply to the Family Courts for the restitution of conjugal rights. No gender discrimination is identified in this context. According to the Divorce Act, 1869, either spouse may sue for restitution of conjugal rights. Some milestone judgments have also come from the apex Court regarding restitution of conjugal rights.

1.6 Guardianship and Custody of Children

A) Contested Custody Cases:

According to Islamic Jurisprudence, the father is the natural guardian of the children. After his death guardianship accrues upon the paternal grandfather and the paternal grandfather's executor. A Muslim mother can never be the legal guardian of her children. Instead of guardianship, she can claim the custody of her son until he is seven years of age and of her daughter until she is eighteen years of age. If there is a breach of this duty by a unilateral act of the father or anybody on his behalf, the aggrieved mother has the right to move before the High Court Division under Article 102 of the Constitution for immediate custody of the children which may be ordered in their interest and welfare. The law however stipulates that the father continues to be the children's legal guardian even if the mother is granted custody through the Courts.

By virtue of The Guardian and Wards Act, 1890, the doctrine of welfare of children has assumed importance and over the past decades a visible shift has been noted in the application of judicial mind in matters relating to custodianship. No technical division as to guardianship and custody of children exists under Hindu or Christian personal laws. However, although The Guardian and Wards Act, 1890 is uniformly applicable to all citizens, the Hindu and Christian personal laws are yet to evolve accordingly.

1.7 Right to Property

Women from all communities excepting the Christians suffer from discrimination with regard to claiming their right to property. According to the Golden Rule of the principle of law of inheritance for the Muslims, female co-sharer gets half of a male of same grade i.e. husband gets $\frac{1}{2}$ and $\frac{1}{4}$ in two capacities while wife gets $\frac{1}{4}$ and $\frac{1}{8}$ in the same capacities respectively. Brothers and sisters inherit at 2:1 ratios. A Bangladeshi Hindu woman's right to inheritance is nonexistent. In Bangladesh the limited right of life estate⁴ or widow's estate accorded to a women, is sometimes referred to as inheritance, although this is an anomaly within the strict understanding of the term inheritance. However, a Hindu widow is not entitled to alienate the immovable property inherited by her. A Christian woman is in a comparatively better position under the law of inheritance than a Muslim or Hindu woman given she is entitled to inherit equally as that of her brother. The Married Women's Property Act, 1874 provides that the earnings of any married women remain her exclusive and separate property. Among indigenous tribes the Marma women inherit equally. Tanchanga daughters cannot claim ancestral property if there is a son and Tripura & Chakma daughters as a matter of practice do not claim their right to ancestral property.

⁶The Muslim Personal Law (Shariat) Application Act, 1937, Section 2. ⁷ Shahih Al Jamee ⁸ A.A. Asaf Fyzee, Outlines of the Muhammadan law, oxford university press 1974, edition 2006-07, chapter II, Marriage: 88-121 ⁹ Haque, Muslim Family Law.

1.8 Adoption

According to Hindu law, only men have the right to take a male child in adoption. Hindu women have no right to adopt. Right to adopt is recognized and encouraged in Christian law. The concept is prohibited in Muslim law. As a State party to the CEDAW, Bangladesh is under obligation to take all appropriate measure to eliminate discrimination against women and to ensure on the basis of equality of men and women the same rights and responsibility with regard to adoption of children. No legislative initiative has been taken to ensure that the right to adopt is open to all irrespective of gender or marital status.

1.9 State Commitments

According to its enunciation in the 5th periodic report to the United Nations on implementation of CEDAW, Bangladesh is committed to:

- Remove incompatibilities between personal laws and the Constitution.
- Withdraw reservation from articles 2 and 16(1) (c) of CEDAW.
- Improve the women's economic and social empowerment condition with a view to facilitating the process of eliminating dowry, polygamy and early marriages.
- Prepare the society for ensuring greater acceptance of measures taken for reformation of personal / religious laws while the Government endorses the need for undertaking measures for fresh reforms in Shariah and Personal Laws.

1.10 Gaps regarding fulfillment of commitments

A wide gap between commitments made by Bangladesh and their implementation has been identified in this report. No initiative to remove incompatibilities between personal laws and the Constitution has been taken as yet. Articles incorporated in Parts I & II of the Constitution dealing with fundamental principles of State policy and fundamental rights provide for gender equality in public life but remains silent about private life. Though the Child Marriage Restraint Act, 1929 limiting the age of marriage as 21 years for men and 18 years for women is applicable to all citizens irrespective of religion⁶ ; the minimum age requirement is applicable for the Muslims

as well as people professing other faiths, At present 68% girls below 18 years are being married in rural areas.⁷ Against the backdrop of a male-dominated society which treats women as subordinates, women are seldom encouraged to make an informed decision including choosing a spouse and to consent freely at the time of marriage. Parents tend to impose their decisions regarding marriage on the bride and under coercion the bride gives consent to marry the man chosen by her guardians. 65% of the aforesaid numbers of child marriages are occurred forcibly.⁸ Dowry has become an inevitable part of marriage amongst all communities in Bangladesh, although it is prohibited by legislation and has been made a punishable offence. In the event that the wife and her relations fail to comply with the financial demand of the husband, she is subjected to both psychological as well as physical abuse. It is also one of the most common causes of domestic violence in Bangladesh.^{10- 11}; Current research showed that up to 50% of all women experience domestic violence at least once. Some of reported violence against women continued to be related to disputes over dowries. A total of 1884 women fell victim to dowry related violence from 1 January 2001 to 28 February 2007. Of them 1241 women were killed, 479 were brutally tortured, 61 suffered acid burns and 95 committed suicide.¹³ According to another survey report in 11 Tribunals of 6 Divisional Cities of Bangladesh 2237 dowry related cases had been instituted in the year of 2007.¹⁴ According to law the investigation over the offence is to be completed within 90 days but unfortunately in most of the cases investigation remain uncompleted in the prescribed time.¹⁵ Bangladesh is still continuing reservation to Articles 2 & 16(1) (c) of CEDAW and no visible initiative for the withdrawal thereof has been taken by the respective Governments. No major endeavor from the Government's side to mobilize the society to accept necessary reforms in the Personal Laws has been noticed.

¹⁰ The Child Marriage Restraint Act, 1929, Section 2. ¹¹ The Majority Act, 1875, Section 3. ¹² Ibn Abbas in Ibn Hanbal No. 2469. ¹³ Ibn Maja, No. 1873.

1.11 Implication on account of Reservations to Article 2 and 16(1) (c) of (CEDAW)

The government of Bangladesh ratified CEDAW on 6 November 1984 with four reservations. In 1997, it had partially lifted reservations from Article 13 (a) and 16(f) of the CEDAW. Though the Convention provides a comprehensive range of mechanisms and policy measures for combating gender discrimination, the Government of Bangladesh has not ratified CEDAW in full and has retained reservations to Article 2 and Article 16 (c) on the grounds that they are in direct contradiction with the Shariah and other personal laws. The Country is largely governed by the Civil and Criminal Procedure Codes enacted during the British rule. In case of disputes relating to marriage, dissolution of marriage, maintenance, custody and inheritance, they are adjudicated upon under the personal laws of the parties in dispute.¹⁶ Bangladesh's reservation to Article 2 which is considered to be the heart of the Convention is in contradiction with its own Constitutional guarantee provided under Articles 10, 19, 27, 28, 29 which pledge that the State shall not discriminate against any Citizen on the ground of religion, race, caste, sex or place of birth and women shall have equal rights with men in all spheres of the State and public life. Bangladesh is also under a legal obligation to comply with International Human Rights Instruments by enforcing, enacting and reforming national laws so that they conform to the principle of nondiscrimination and equality.¹⁷ Bangladesh has not lifted its reservation from Article 16 (1) (c) which stipulates for women's equal rights with men in marriage and its dissolution. The problem is exacerbated by the fact that the Constitution also mandates for equal rights for men and women in public life but remains silent about private life. Consequently, the Muslims, Hindus, Buddhists, and Christian women continue to be subjected to discrimination under religious personal laws while claiming their right to marriage, divorce and inheritance. Under Muslim personal law, a Muslim man has a unilateral right to divorce, whereas women's right to divorce is conditional. A Muslim man may marry a Muslim woman or a kitabiya but Muslim women cannot marry anyone except a Muslim. When a Muslim man marries a Hindu woman, the marriage is only invalid and does not affect the legitimacy of the offspring, as the polytheistic woman may at any time adopt Islam

which would at once remove the bar and validate the marriage. 18 Hindu and Buddhist women have no legal right to bring a suit for divorce and the existing Christian civil laws are so outdated that they are quite useless in practical terms. The Special Marriage Act of 1872 provides for civil marriages, but this law has limited impact given the fact that there is only one Marriage Registrar for the whole Country and that requires a formal declaration from the parties intending to marry that they do not profess any religion. The society also has to grapple with dowry demands, polygamy and child marriage that continue unabated.

1.12 Irrational Argument on continuing reservation

In 1937, 1939, 1961 and 1985 Muslim Family Laws had been reformed radically and the reformists did so by progressive interpretation of the Holy Quran and through using the mechanisms of interpretation i.e. Ijma, Quias, Sunna and Fikah. The process was recognized and practiced even by the Caliphs and Olamas during the advent of Islam. The Doctrine of Himariah¹⁹ is a glaring example of reformation in the law of inheritance. Islamic law is not followed in civil and criminal jurisprudence of Bangladesh except in the family laws. General people always welcome the reform in favor of mankind but a little group of dogmatic persons who deserve the declaration of being outlawed create anarchy and violence when attempt to reform is taken. It is mysterious why Governments become submissive to and afraid of the militants. Recently such kind of anarchists created violent movement against National Policy for the Women's Development, 2008 and Government surrendered to those miscreants whereas the same Government arrested and atrociously tortured university teachers, students and famous intellectuals as they raised their voice against military torture on general University students. Before 1829 Hindu widows were forced to commit suicide and were lively burnt with their deceased husband and thus their right to life was brutally slaughtered by the dogmatic customary law. The civil society of the then Indian Sub-Continent raised their voice against this brutality and finally their advocacy came to a successful end when the Government enacted a law prohibiting such kind of suicides of the Hindu widows. In 1856 another inhuman treatment to Hindu widows was removed by enacting Hindu Widows Remarriage Act. So

reformation is nothing new to religious customary laws and as all religions approve reform by interpretation, there can be no bar to enact laws to ensure the enjoyment of women's human rights. In stark contrast however, no reform has been instituted to the Hindu family law since 1947 although in neighboring India that has an overwhelming majority of Hindu population, drastic changes have been effected in the family laws and the laws relating to inheritance for the welfare of the women. Bangladesh is not an Islamic State but rather a Muslim majority Country. Secularism was established as one of the main pillars of the Constitution at the Nation's birth that was later revoked when Islam was declared the State Religion in 1986 by the 8th amendment to the Constitution. Eventually, a space was created to ensure the influence of Shariah law in society, which has in turn relegated women to a subordinate status. Human rights are very much essential for the fullest development of all faculties of human being and the women are being deprived of their human rights merely because of their being female. In our Country half of the total population is suffering acute discrimination regarding enjoyment of civil, political and ESC rights and our present and past governments never pay head to this problem.

1.13 Government and NGO Initiatives in Effecting Reforms in the Family Law

The Ministry for Women and Children's Affairs assigned to implement different programs in 64 Districts and 396 Sub-Districts of Bangladesh for empowering women at the grass roots level and for improving socio-economic status of women. However, the Government is yet to demonstrate its interventions with regard to effecting reforms within the family laws on the basis of gender equality. The National Women's Development Policy was reviewed several times but it is yet to be implemented in its letter and spirit given the resistance from different vested the recent interest groups. The past caretaker Government formulated the National Women's Development Policy 2008 with the objective of amending existing laws and enacting new laws on the basis of gender equality. The policy includes raising maternity leave from four months to five months, enacting new laws to ensure equal opportunity for women, ensuring women's security at national, social and family level, empowerment of women in political, social and economic sector and ensuring that women are entitled

to equal rights as that of men concerning property, employment, market and business. The Ministry for Women and Children's Affairs and civil society groups has engaged in programs on legal literacy and awareness around social evils emanating from dowry, polygamy and child marriages. Recently, the Government has provided gender training to a number of government officials. The Women and Children Repression Prevention Act was also amended in 2003 with inputs from the civil society. Several NGOs have engaged in different lobbying and advocacy initiatives to put pressure on the Government to lift reservations from Article 16(1) (c) and Article 2 of CEDAW. Training has also been provided to rural women about family laws. Legal aid NGOs have played a pioneering role in providing pro bono legal assistance and services to the poor women in particular with a view to enabling them to claim their rights and entitlements through courts as well as mediation. Women beneficiaries have been encouraged to register their marriages alongside provide basic information about laws relating to marriage and divorce.²⁰ Program interventions have been chalked by different NGOs to reduce child marriages, dowry, polygamy, domestic violence and violence against women. Women's rights activists have lobbied with concerned government authorities for the establishment of a Uniform Family Code. A lot of brainstorming and consultations have been underway with different stakeholders to enact an effective legislation to combat domestic violence. Bangladesh Legal Aid and Services Trust (BLAST) has organized five regional workshops on CEDAW with active participation of service providers in the justice sector including the media and local government representatives covering nineteen districts of Bangladesh. It has also holistically reviewed and provided recommendations on the Family Courts Ordinance 1985 and the Women and Children Repression Prevention Act in consultation with different stakeholders at the local and national level including the Law Commission. Since its inception in 1994, BLAST has provided pro bono legal assistance in more than 45811 cases (amongst these cases 17264 were family court cases out of which 6394 were disposed of in favor victims. Notably, majority of its beneficiaries are poor women who have been enabled to claim their rights and entitlements in family disputes. Women's social capital has been enhanced in as much as money recovered through legal aid and mediation (Taka 115,788, 121) has been used for different

livelihood purposes. Alongside implementing programs on legal literacy and awareness, many frontline human rights and legal aid NGOs including ASK, BLAST, BNWLA, BSEHR have filed a significant number of test cases in the High Court Division of the Supreme Court of Bangladesh that have in turn led to progressive interpretation of women's rights within the family.

1.14 Towards a Social Change

Expansive Interpretation of Women's Rights through Courts Analysis of reported Bangladeshi case laws in matters relating to the family provides a glimmer of hope in an otherwise murky environment for women. It is encouraging to note that between 1971 to date in response to a woman's claim for the protection of her rights relating to the family, the courts have through some groundbreaking decisions in many instances provided progressive interpretation of women's rights. It is common practice in Bangladesh that the husband tends to arbitrarily exercise his power of divorce on simple grounds and for trivial matters. This is in spite of the legal procedure and provisions laid down under Section 7 (1) of the Muslim Family Laws Ordinance, 1961. In *Kazi Rashed Akhter Shahid (Prince) V. Rokshana Choudhury (Sanda)* 58 DLR (HC) 271 (2006) the High Court made an observation with regard to Section 7 (1) of Muslim Family Law Ordinance 1961 which requires the husband to give a notice in writing of his having pronounced Talaq (Divorce) to the Chairman. The Court observed that if the husband abstains from issuing such notice to the Chairman, it would be deemed that the husband has revoked the Talaq and the marital status of the parties has not been changed. In the case of *Ikhtiar Hossain Choudhury V. Shahenoor Akhter*, 11, BLC (HC) Page 516, the High Court has granted past maintenance to the wife after separation for 4 years 10 months including 3 months for

¹⁴ Moslay Uddin & MD. Ayatullah, "Muslim Law: judicial and legislative changes around the world" https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2539541_code2339045.pdf?abstractid=2539541&mirid=1, accessed on 17 November 2022. ¹⁵ Alamgir Muhammad Serajuddin, *Muslim family law, secular courts and Muslim women of south Asia. A study in judicial Activism*, Oxford University Press 2011. Chapter 5 "Muslim family law, Judicial interpretation and Muslim women's legal rights in Bangladesh, 190. ¹⁶ 18 CLC (HCD), 1999. ¹⁷ Haque, *Muslim Family Law*, 102 ¹⁸ Haque, *Muslim Family Law*, 103 ¹⁹ The Holy Quran, 4:4

Ideate period which is an excellent precedent for the protection and promotion of women's rights in the country. In *Hefzur Rahman v. Shamsunnhar Begum*²¹, the learned justice of HCD decided that a person after divorcing his wife is bound to maintain her on a logical scale beyond the period of Ideate for an indefinite period that is to say, till she loses the status of a divorcee by remarrying another person. The judgment was overturned on appeal before the Appellate Division of the Supreme Court of Bangladesh which has been a setback in promotion of women's rights. 13 R e f o r m s i n t h e F a m i l y L a w s According to Islamic jurisprudence father is the natural guardian of the children. After his death guardianship falls on the father's executor, the paternal grandfather and the paternal grandfather's executor. A Muslim mother can never be the legal guardian of her children. Instead of guardianship, she is entitled to the custody of her son until the age of seven years and of her daughter till she is eighteen years of age. If the mother is denied of this right by a unilateral act of father or anybody on his behalf, the aggrieved mother has the right to move the High Court Division under Article 102 of the Constitution for immediate custody of the children which may be ordered in the interest and for the welfare of the said children. By virtue of The Guardian and Wards Act, 1890, the Doctrine of Welfare of Children has been evolved and over the past decades a noticeable shift is seen in judicial attitudes in the matter of custodianship. In *Amirul Bor Choudhury V. Nargis Sultana* 19 BLD (HCD) 213 (1999), the Court held that father's remarriage is a disqualification and awarded custody to the mother. The Court observed that it appears that the defendant petitioner (father) has got married again and as such the welfare of the twin sons will not be protected in the hands of the step mother. In *Sharon Laily Begum's case*²² (this case was brought to court by Ain o Shalish Kendro) mentioning a citation from Ameer Ali that 'the milk of a Muslim mother is not more nutritious than that of a Christian mother', a family court granted full custody of four minor children aged between five and fourteen years to the mother, a British Christian citizen. A High Court bench held that custody and guardianship of minors cannot be settled by a private compromise or even by arbitration²³. In a recent case *Farzana Azad V. Samudra Ejajul Haque* 24 where the petitioner instituted a Writ Petition of habeas corpus, a Division Bench of the High Court ordered to put the

minor children under the custody of their mother. No technical division as to guardianship and custody of children exists under Hindu or Christian personal laws. Even though the Guardian and Wards Act, 1890 is applicable to all citizens, the Hindu and Christian personal laws are yet to evolve accordingly. With regard to the right of guardianship, the High Court has shown an affirmative approach in Syeda Shamsunnahar's case²⁵ where the mother's right to guardianship has been recognized. Where there is no divorce by either side then title suit for the restitution of conjugal rights can be instituted either by the husband or the wife and if there is a decree then the decree can be executed by the attachment of property of the defendant if the judgment debtor is unwilling to abide by the decree. Given an overwhelming majority of Bangladeshi women do not own enough property; the decree cannot be executed if the losing defendant is the wife. It is a common practice among husbands to institute a suit for restitution of conjugal rights to compel the unwilling wife to cohabit with them. In *Khodeja Begum V. Md. Sadeq Sarker* 50 DLR (1998) 181, the Court held clearly that the law of restitution is a violation of social justice as enunciated in the preamble of the Constitution. In *Chand Mia V. Rupnagar* 51 DLR (1999) 292 the Court held an important 14 Refor m s in t h e F a m i l y L a w s obligation of marriage is that of consortium thus if either spouse refuses to live with the other, the other is entitled to sue for restitution and fulfillment of his or her marital duties and obligation. An expansive interpretation to the indefeasible right to life was provided by the apex court of Bangladesh in the *Editor, Banglabazar Patrika V. DM & DC, Naogaon*²⁶. In this case, a Division Bench of the High Court has delivered a milestone judgment prohibiting fatwa. Later the application of the judgment had been stayed by the Appellate Division of the Supreme Court which is now pending for hearing. The apex court held that fatwa means a legal opinion which therefore means legal opinion of a lawful person or authority. It further observed that the legal system of Bangladesh empower the courts alone to decide all questions relating to legal opinion on Muslim law and other laws being in force. The Honorable Court therefore concluded that fatwa is both illegal and unauthorized. In a claim of restitution of conjugal rights against the wife, the Court interpreted that unwillingness to live with the husband cannot be claimed on the ground of want of mutuality between them. It is

also a violation of principle of equality between men and women as laid down in Article 28(2) of the Constitution.²⁷ In comparison to the disputes pertaining to family matters adjudicated upon by the Courts, a few number of test cases have been initiated which has enabled the court to render progressive interpretation concerning women's right to inheritance and succession. Nevertheless, we may conclude that expansive interpretation of women's rights by the Apex Court has to an extent paved the way towards social change for the protection and promotion of women's rights.

²⁰ A.A. Asaf Fyzee, "Outlines of the Muhammadan law" oxford university press 1974, edition 2006-07, chapter III, 133 ²¹ Ishtiaque Rahman, "Plausible Reformation of laws regarding Marriage and Divorce in Bangladesh Based on Sharia", https://www.researchgate.net/publication/343530418_Plausible_Reformation_of_laws_regarding_Marriage_and_Divorce_in_Bangladesh_Based_on_Sharia, accessed 17 November 2022 ²² Ishtiaque, "Plausible Reformation". ²³ Moslay Uddin, "Muslim Law: judicial and legislative changes." ²⁴ The Holy Quran, 4:34

Chapter Two

An analysis of the Family Courts Act

2. Introduction

Recently, the parliament has repealed the Family Courts Ordinance 1985 and passed a new Act, namely the Family Courts Act 2023 (FCA). Unfortunately, no significant changes have been brought by the new Act, and the pre-existing problems and challenges remain unresolved.

There are two main explicit changes in the new Act. Firstly, the court fees have been made BDT 200 from BDT 25. And secondly, family appellate courts have been established consisting of one district judge in each court. Beyond these, most provisions of the Ordinance remain the same in the newly adopted FCA.

In terms of jurisdiction, the family court has jurisdiction over matters relating to divorce, restitution of conjugal rights, dower, maintenance, and guardianship and custody as per section 5 of the Act. However, issues arising from formation of marriage, inheritance, will, heba (gift), maintenance of parents, adoption, etc. cannot be brought before the court.

Additionally, it was unclear in the Ordinance who can come to the court for restitution of conjugal rights. Initially, it was a settled rule that only husbands could come to the court for restitution of conjugal rights. However, the case of Nelly Zaman Giasuddin Ahmed (1991) pronounced that Article 27 (equality before law) and Article 31 (equal protection of law) of the Constitution of Bangladesh are incompatible with the stringent rule. But, even after such decisions, our judiciary did not show consensus on the matter. Therefore, it was expected that the confusion would be dispelled through the new Act which has not happened.

Regarding maintenance, the issue of post-divorce maintenance was highly debatable as it was not clear in the Ordinance. It was reasonably expected that a clear provision would be made on this issue in the new Act. Again, the issue of maintenance of parents, which too is a family matter, is to be tried by the magistrate court as per the

Parents' Maintenance Act 2013. The FCA could have inserted maintenance of parents within its jurisdictional provisions.

Lastly, it can be argued that there should have been a provision making room for Alternative Dispute Resolution (ADR) in the appellate stage as well. That is because ADR in the appellate stage has a great impact on reducing the backlog of cases as it diminishes the scope of execution suit, or further appeal or revision procedure. However, this expectation of the legal experts was also not met by the new Act.

To sum up, it is submitted that the Act failed to meet people's expectations regarding resolving the unattended issues emanating from the 1985 Ordinance. The Act should be amended as per the recommendations of the experts to get rid of the prevailing confusions and problems once and for all.

²⁵ Haque, "Muslim Family Law". ²⁶ The Holy Qur'an, 2:241 ²⁷ Abdullah Al Mamun, "Islamic Law of Personal Status: Analysis of the Reforms of Islamic Family Law in Various Muslim Countries", <https://www.ijlhss.com/wp-content/uploads/2017/06/IJLHSS-05-17-03.pdf>, accessed 19 November 2022. ²⁸ Moslay Uddin, "Muslim Law: judicial and legislative changes." ²⁹ Haque, "Muslim Family Law".

Chapter Three

Section 4 of the Muslim Family Laws Ordinance

3.1 Grandchild's inheritance right: the Islamic Law

The Islamic law of inheritance does not altogether deny the grandchild of the porosities their right to inheritance. Sunni Law places them in the list of quranic sharers. Unless excluded otherwise, they inherit from their grandparent. The doctrine of representation comes into question in case of allotment of their shares. The doctrine is accepted at least for two purposes:

A) For the purpose of determining who are entitled to inherit

However while using the doctrine of representation for the purpose of determining who are entitled to inherit, the principle of exclusion (nearer in degree excluding the remote) is not curtailed or suspended. Thus if A dies leaving him surviving a son and grandsons by a predeceased son, the grandsons are excluded from inheritance by their uncle. They do not take in their father's stead though he would have been an heir had he survived his father. This is true in Shia and Sunni Law alike.

B) For the purpose of determining the share of the heirs

But if both sons predeceased the porosities who died leaving three grandsons by one son and two by the other then all the grandsons are heirs. In that case, the principle of representation is applied in Shia Law for the purpose of ascertaining the share of each grandson. If the principle is applied, the estate of the *propitious* shall be distributed *per stripes* among the grandchild. The grandsons of one branch will have to divide into three what the grandsons of other branch will divide in half. However Sunni Law does not recognize representation in that case. The five grandsons shall inherit *per capita* in their own rights as heirs of the *propitious*, not as the representatives of the predeceased son or daughter.

3.2 Addressing an apparent injustice: the 1961 Reform

Being excluded by heirs of nearer degree, as shown above, the orphaned grandchild become economically and socially vulnerable. So all over the Muslim world the jurists thought and tried to solve this problem, using different devices, intending to preserve

the interest of the orphaned grandchildren in the property of the properties. To this end, a new sort of doctrine of representation was adopted in Pakistan in 1961. The Government of Pakistan promulgated the Muslim Family Laws Ordinance (hereinafter MFLO) in 1961 touching some of the substantive Islamic personal law issues.

3.3 Section 4 of the Ordinance reads as follows

In the event of death of any son or daughter of the propertious before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall *per stripes*, receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive.

Thus it is clear that Section 4 of the MFLO, 1961 has accommodated the doctrine of representation by suspending the rule of nearer excluding the remote. It has also incorporated into Sunni Law, the Shia concept of steroidal succession. Now the orphaned grand children are *per stripes* allotted the share which their deceased parents would have taken had he or she survived the propertious.

3.4 Anomalies of Section 4: Pakistani approach

This accommodation of steroidal succession has caused some anomalies with which the Courts in Pakistan had to deal with at least in three cases.

Dr. Lucy Carroll finds the Peshawar decision preferable to that of Lahore. She questions the hypothesis of Lahore High Court:

The Ordinance does not say that the orphaned grandchild will receive that share of the grandparent's estate to which he would be entitled (1) on the assumption that the predeceased parent had been alive at the time of the grandparent's death, and (2) on the further assumption that the predeceased parent had then died leaving his notional share of the grandparents' estate to be distributed among his heirs. To Carroll, as the purpose of the legislation is to improve the position of orphaned grandchild, it is hardly surprising that she would receive a larger share than she would have received under the traditional law.¹⁰ Dr. Alamgir Muhammad Sirajuddin also is not wondered to see that in the prevailing 'mood of conservatism' the Pakistan Supreme Court would confirm the Lahore decision in 1990 and 'strike at the root of Section 4'.

3.5 Defending the Pakistan Supreme Court's stance

It is submitted, however, that the critics of the Pakistan Supreme Court have overlooked at least two seriously important points. On substantial grounds, I support the Pakistan Supreme Court and recommend the adoption of it in the MFLO, 1961.

Firstly, section 4 may be seen as a sort of insurance for the orphaned grandchildren. It is a cardinal principle of law of insurance that under no circumstances the insured is allowed to benefit more than the loss suffered by him. This is because, if that were so, the temptation would always be there to desire the insured event and thus to obtain the policy proceeds.

Under the Peshawar High Court scheme, the grandchildren would be benefited more if their parents predecease their grandfather. Now they shall get the whole of their parent's share, which they would otherwise have to share with other heirs of their parents like the case of Zarina Jan above. The sole spirit of *shariah* is to ensure the sanctity of life of the propitious. That is why there is no vested right recognized in Islam and a murderer is excluded from inheritance. Who knows due to the interpretation of Peshawar High Court, now a daughter would wish her parents predecease her grandparents!

Secondly, what section 4 aims at is justice for the otherwise excluded and destitute orphans. Justice will be done if they are substituted in the position in which they would have been had their parent survived. To do justice to the orphans we cannot do injustice towards others. Say for example, the case of a widow whose husband died before her father-in-law. Now her sons and daughters would get whole of her husband's share in exclusion of her. Had her husband not died before her father-in-law, she would have a share in her husband's estate. Who shall do justice to her?

³⁰ Article 5 of the Law No. 05 of 1929. ³¹ The Dissolution of Muslim Marriages Act, 1939 ³² The Muslim Family Laws Ordinance, 1961, Section 7.

Chapter Four

International Conventions and Family Laws in Bangladesh

4.1 Introduction

Article 16 of United Nations Declaration on Human Rights (UNDHR) states the fundamental right to marry; (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during the marriage and at its dissolution;

Marriage shall be entered into only with the free and full consent of the intending spouses.

The provision recognizes that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. Therefore as soon as a person is legally entitled, he or she has the right to marry and have a family. The reason for having such a provision is to protect the human right to marry and establish a family of his or her choice. The purpose is to avoid forced marriage which is customarily practiced in certain countries. However, the argument on the right to marry has been extended in some

countries as to include the recognition by the state of same-sex marriages, a familial relationship such as cohabitation which has been given legal recognition either in statutory forms or judicial decisions. As far as Bangladeshi law is concerned, those relationships are not recognized as a marriage under the current family laws. The law provides that the marriage must be between a male and female and any marriage solemnized contrary to the above requirement is null and void.

The right to marry and establish a family as envisaged in UNDHR is further strengthened by the United Nations Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962) on the premise that the participating countries should take all appropriate measures with a view to abolishing such customs, ancient laws and practices by ensuring, inter alia, complete freedom in the choice of a spouse, eliminating completely child marriages and the

betrothal of young girls before the age of puberty, establishing appropriate penalties where necessary and establishing a civil or other register in which all marriages will be recorded. Based on the above objectives the Convention provides a few provisions in relation to the requirement of consent, setting the minimum age of marriage and compulsory registration of marriages. Those provisions states;

4.1.1 Article 1

1. No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law.

2. Notwithstanding anything in paragraph 1 above, it shall not be necessary for one of the parties to be present when the competent authority is satisfied that the circumstances are exceptional and that the party has, before a competent authority and in such manner as may be prescribed by law, expressed and not withdrawn consent.

4.1.2 Article 2

States Parties to the present Convention shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses.

³³ The Muslim Family Laws Ordinance, 1961, Section 7. ³⁴ Haque, "Muslim Family Law". ³⁵ Anisur Rahman, "Development of Muslim Family Law in Bangladesh: Empowerment or Streamlining of Women", https://www.academia.edu/3356450/Development_of_Muslim_Family_Law_in_Bangladesh_Empowerment_or_Streamlining_of_Women, accessed 17 November 2021

4.1.3 Article 3

All marriages shall be registered in an appropriate official register by the competent authority.

In response to the above provisions, Bangladeshi law has incorporated those requirements in both family law statutes through the impact on the validity of marriage varies depending on the general principles governing specific elements of marriage requirements. Generally, in the case of Islamic Family Law, both consent of the girl and the guardian is required for the legal recognition of the marriage.

With regard to the age of marriage, the law provides for a minimum age of marriage of 21 years for male and 18 years old for female. The marriage that takes place below the minimum age does not render the marriage void in Islamic Family law but strongly discouraged and it is a punishable offence.

4.2 Convention on Elimination of all forms of Discrimination Against Women (CEDAW)

CEDAW is one of the conventions that directly affects family law and family relationships through the main objective of this convention is to remove discrimination between genders. It equally applies the same in the context of a husband and wife relationship which has been addressed in article 27.

The most significant move is reflected in the incorporation of the word gender in the Bangladesh Constitution in response to public demand and to prove the government's commitment towards gender issues when ratifying International conventions. Being the highest law in the country, the formulation of future policies and law must be streamlined with gender issues non-discrimination. Prior to the ratification of the international convention, the National Policy on Women provide directions for the government to make more policies and laws for women and children. The focus is to guarantee equal sharing of resources, information, opportunities and benefits of development for both men and women and to integrate women in all sectors of development in accordance with their capabilities and needs so as to enhance their

quality of life, eradicate poverty and eliminate illiteracy, and ensure a peaceful and harmonious and prosperous nation.

In pursuant to the above aspiration and by agreeing to the commitments set forth in the Beijing Platform for Action at the UN Fourth World Conference on Women (1995), a few more policies are being formulated to enhance the national machinery for women's advancement, increase women's participation in decision-making, safeguard women's rights to health, education and social well-being and remove legal obstacles and gender discriminatory practices. The Platform of Action also emphasizes that women share a common concern that can be addressed only by working together in partnership with men towards the common goal of gender equality around the world. This commitment is in line with the National Policy on Women as set forth earlier and the promotion of greater female participation in various sectors such as labour force, business and entrepreneurial activities that have been incorporated in the Ninth Bangladeshi Plan. Other commitments include reducing poverty and violence against women and reviewing laws and regulations to promote the status of women.

The above policies remain significant as the driving force for the incorporation of women in any future planning as well as in allocating financial resources and formulating policies and laws that are women-friendly. It can be seen that many laws and policies have been regulated in response to feedback from various agencies suggesting reforms on matters that affect women including the protection of women's rights and interests.

4.3 Ratification of CEDAW

Bangladesh became a party to CEDAW subject to the understanding that the provisions of the Convention are not in conflict with the provisions of the Constitution of Bangladesh.

Based on that premise, reservation is made to several provisions that are perceived to be in conflict with the national laws as an interpretation of equality in CEDAW seems to suggest a literal one. These reservations to articles 2 (f), 5 (a), 7 (b), 9 and 16 of the

aforesaid Convention are significant to Muslim society as Shariah law is one of the major sources of law. The reasons for the reservation are briefly explained below;

a. Article 2 (f) imposes obligations on the State party to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices, which constitute discrimination against women. The reservation to this article is based on the premise that such measures must not be contrary to Shariah law, custom and other policies already in practice in Bangladesh.

b. Article 5 (a) requires the State party to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudice and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. The reservation is based on the fact it would be difficult to remove certain cultures that are already imbued in the society. The same applies to Shariah law on the division of inheritance property for Muslims where the proportion is based on Quranic distribution.

c. Article 7 (b) demands greater participation of women in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government. This reservation is due to certain posts such as Mufti and Imam who are appointed among qualified male.

d. Article 9 (1) obliges the State to grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

(2) States Parties shall grant women equal rights with men with respect to the nationality of their children.

In relation to article 11, Bangladesh interprets the provisions of this article as a reference to the prohibition of discrimination on the basis of equality between men and women only.

4.4 Areas of Incompatibility with Cedaw and the Legal reform

There are areas of Islamic law that are perceived to be incompatible with CEDAW on the basis that they discriminate the rights of women. Those laws are pertaining to polygamous marriage, guardianship or wail for men, and other matters pertaining to rights and responsibilities to provide maintenance. While the pressure to remove all reservations is mounting, the Islamic law experts have to respond to grievances by women for lack of legal enforcement in dealing with law abuse rather than the substantive law itself. Responses to these grievances are discussed below.

4.5 Legal and judicial status on polygamy

The current stand of the Muslim countries including Bangladesh on the legal status of polygamy is best explained by understanding the sociological aspect of this law. The practice of polygamy in Islam is a modified version of the pre-Islamic period where men could take an unlimited number of wives. After Islam, the practice was retained on the basis of *maslahah* (public interest) in order to encourage social justice in helping girls who were left as orphans and women who had become widows. In order to avoid exploitation of these girls and widows, the law permitted Muslims to take more than one wife with a proviso that justice between co-wives in terms of maintenance and conjugal rotation must strictly be observed. Otherwise, they are advised to practice monogamy. The majority of Muslim countries including Bangladesh adopts restrictive measures and provides for prescribed procedures through the judicial inquiry process. Matters that are subject to inquiries include financial implications, views of the existing wife or wives, possible harm the subsequent marriage causes to the existing wife, equal treatment between co-wives and the justice and necessity of the proposed marriage. All those requirements must be satisfied. Reasons such as infertility or sexual dysfunction of the existing wife can be good grounds to support the application for polygamy. The procedure is troublesome for those who are not legally qualified and opted for marriages to be solemnized in

neighboring countries either through syndicate or self-arrangement. These marriages are usually unregistered and the women become the victim if they are not successful in getting the marriage registered upon failure to provide satisfactory evidence. It does not only affect the interest of the subsequent wife, but the interest of the existing wife will also be jeopardized for failure to prove that the polygamous marriage has taken place. This will affect her right to make other claims associated with the polygamous relationship.

To protect the interest of the existing wife, the current reform requires the husband to allocate maintenance for existing wife and children and propose for the division of jointly acquired property during marriage prior to the solemnization of subsequent marriage.

4.6 Equal Responsibilities between husband and wife

Shariah law provides more responsibilities on the husband as a financial provider in which the husband is responsible to provide maintenance and other financial needs for the wife and children. There is no change with regard to marital duties.

The husband is obliged to pay maintenance (nafka) that comprises basic needs such as shelter, food and clothing inclusive. The applicable law in Bangladesh may widen the scope of maintenance depending on the needs of the party and the capability of the husband to pay. Non-payment of maintenance is considered as an offence and recoverable as debts in the court. In respect of a wife, her responsibility is to respect and obey the husband on matters that do not go against Shariah principles. Willful disobedience of the wife is an offence. A wife is said to be disobedient if she willfully refuses to associate with her husband, leaves the matrimonial home unreasonably or refuses to cohabit with her husband without any valid reason according to Shariah law.

The common problem that is faced by women nowadays is the failure or neglect on the part of the husband or the father to provide maintenance. The issue of gender is not relevant in this context as to impose liability on the mother would mean an extra burden for women except for the rich. Therefore, the reform that is underway is to

strengthen the law that imposes the liability on other family members from paternal relatives to pay.

4.7 Pronouncement of Talaq outside the Court

The law pertaining to divorce by Talaq is well regulated in Islamic family law in a modified form where both parties to the marriage may apply for such divorce even though traditionally, it is an exclusive right of the husband to make the pronouncement. The deviation from the traditional practice, in the eye of the legislature, gives the opportunity for the court to examine the reasons for the divorce and determine other things that relate to the dispute. This legal device is seen as a control measure to prevent unwanted divorces as it makes an imposition on either party to the marriage to formally apply to the court so that the Talaq can only be pronounced with the permission of the judge after considering the arguments of both parties. This practice is in accordance with the spirit of Shariah law as the intention is to promote an amicable and harmonious relationship between the parties after the divorce and to reduce the hardship caused to any children.

Due to the difficulty faced by Muslim wives, talaq divorce outside the court has not been recognized in some Muslim countries and should be discouraged. Moreover, Talaq divorce will take effect even without the wife's fault, which is contrary to the purpose of Talaq itself.

It is suggested that woman is given equal opportunity to walk out from the marriage through khulu' if life becomes torture and to provide a balance of rights in divorce. This is because it is imaginable that the woman will relinquish any part of her property but with a view to her own safety and ease, which cannot be obtained but by a total separation.

It is reasonable to conclude that the generality of primary sources and the intention to preserve the family unit have placed the legislature and the judiciary in a difficult position in balancing the right of the wife with the hardship of the divorce on family members.

Although a precautionary measure in the form of arbitration proceeding may be adapted to

look for a possible reconciliation, it has to be professionally exercised by taking into account that the wife is also accorded such a right to divorce. The general rule that hardship must be removed remains an acceptable test to accord to a judicial decree.

4.8. Conflict of Laws

As a dualist state, conflict of laws is bound to happen. The determination as to the religious status of a child as well as the custodial right is very much in dispute between these parents as their marriages have to end in a legal system where religion decides on the legality of the marriage such as Bangladesh. In most occasions, the general rule on custody arrangement after the divorce has not been emphasized to resolve the conflict as the main focus of the dispute is on marital status and religion seems to be the only consideration especially in the case when one parent converts to Islam. The issue on gender is not a directly relevant but religious conviction of the parties is pertinent in a legal proceeding.

This approach has resulted in dissatisfaction if the whole dispute is to be assessed from human right's perspective as an international convention on human rights does not support religion as the only criteria for consideration in family court proceedings involving custody of children.

The above contention is becoming more complicated in determining a child's religion in case of unilateral conversion to Islam, as the parent who is awarded custody order will have a better chance to decide on the religious upbringing of the child. As shown in several cases decided in the civil courts, the issue of religion is equally important in determining the welfare of the child apart from the capability of the custodian to raise the child in a more suitable and conducive environment. The court will give preference to the religious status of the custodian, as one of the important criteria as expressly provided for under the Islamic Family law, though the issue of religion for the custodian in Islamic jurisprudence, is subjective. This is quite understandable as the issue of faith is fundamental for Muslims.

However, the present law creates a tug of war situation between the Muslim and non-Muslim parents. This situation could be even worse if the escalation concerns minor children and the mother who is preferred by the law as the best to care for minor children is the non-convert spouse.

³⁶ Article 5 of the Law No. 05 of 1929. ³⁷ The Dissolution of Muslim Marriages Act, 1939 ³⁸ The Muslim Family Laws Ordinance, 1961, Section 7.

Change laws that undermine women's position in If we look at the evolution of laws related to gender-based violence (GBV) in Bangladesh, the changes fuelled by women's outrage at the status quo – have come from a place of understanding the right to equality, dignity and self-determination, not from a position of pity for a victim. It started with a demand for accountability for routine and extreme violence, although unfortunately, we still continue to witness the powerful using their influence to evade justice.

What we need now is a focus on the survivor, and the financial assistance, health support (including for mental health), and safety and security that she requires to survive a process of justice that can be unacceptably lengthy. So far, our whole focus has been on criminal law and punishment and accountability, and less on reparations and compensation for survivors.

While we can't stop looking at legal barriers, we must also demand emergency shelters, improvement of safety net measures that already exist, speeding up the process of claiming maintenance and, crucially, we need to make sure those seeking justice through the courts are not threatened or intimidated by the accused.

We have heard government officials talk about how GBV cases are lower in Bangladesh than in certain countries (although we must remember that these are just reported cases). But our concern is not with numbers; it's with what happens to a woman who faces violence. Can she report it? Can she seek support? Whether through a legal process and accountability, or by simply getting on with her life, we still don't have the same pathway to justice and reparations that we see elsewhere.

We also need to address the issue of rights within the family, since this hugely impacts women's capacity to seek protection against violence. Our current family laws give women very different rights from men, and also create inequalities between women. For example, the difficulties Hindu and Christian women face in seeking divorce clearly limits their ability to ensure their own safety. Muslim women can only get three months of maintenance after divorce, and no rights to the home she built with her husband or any other safety net provisions. How can you seek protection against domestic violence in such situations?

If we're really serious about tackling GBV, we have to look at laws that continue to undermine women's position within the family, particularly within marriage.

Finally, we need to address the stigma that is still very much prevalent, especially around unmarried and divorced women. We need to stop viewing survivors as "unfortunates" and acknowledge that women are entitled to seek justice.

When we were young, girls were taught that life would send many problems their way and they would have to deal with them. If you are harassed, you can't talk about it, you just have to avoid it. Without a change in perspectives, changes in the legal system are not enough. Girls should not be raised to accept and tolerate violence, as if they have no other choice.

In terms of concrete measures, the reform of laws that discriminate between the sexes is a priority. The current rape law still has many colonial-era influences that women's rights activists have long been campaigning against, and the removal of character evidence is a result of this, although now we need to ensure its implementation.

There has been a lot of institutional changes within the police, especially in terms of dealing with GBV, such as its establishment of victim support centers. Although there aren't enough, they exist in quite a few districts and are working with women's rights organizations on a regular basis. More recently, police created help desks for women, children, disabled persons, etc. The system is not always put into practice, but at least the intent is there and a basic structure has been put into place.

There is also a High Court directive that clarifies that police cannot refuse someone filing a rape case that they must be given medical care immediately, and that police cannot discriminate in this regard. There are also different police circulars on how they should treat rape survivors.

Despite that, there are still instances of police refusing to accept cases or not providing support to survivors, especially if they don't have family support, either. At the end of the day, police, lawyers, and judges all exist within a patriarchal society and are influenced by its norms. The attitude that if you are a victim of violence, then you must learn to deal with it, is still too common.

The main thing we need to work on now is removing the power of influentials over the process of justice and ensuring that women get equal rights and opportunities when pursuing justice.

The way the state and society responded to the Birangona after 1971 carries lessons for us on how we should think about survivors of violence today. We know that giving them recognition as survivors of extreme sexual violence was an important part of the response they needed, as well as the initial support in government rehabilitation centers (1972-1975). Steps were taken to ensure opportunities for employment, financial support, critical medical intervention like MR and, crucially, victims were almost immediately seen through the lens of survivor. Obviously, there were many challenges over the next 40 years, and state recognition only came recently, but it happened.

Groups like Naripokkho also campaigned against the use of words like shombhrom when talking about Birangona, arguing that it's not the women or their communities who have been dishonored, but the men who carried out these acts of violence. These words are very loaded, but unfortunately continue to be used today, even coming up recently in a draft legislation. An important step would be to move away from subjective terms like "decent" or "moral" and talk about dignity instead.

³⁹ The Muslim Family Laws Ordinance, 1961, Section 7. ⁴⁰ Haque, "Muslim Family Law". ⁴¹ Anisur Rahman, "Development of Muslim Family Law in Bangladesh: Empowerment or Streamlining of Women", https://www.academia.edu/3356450/Development_of_Muslim_Family_Law_in_Bangladesh_Empowerment_or_Streamlining_of_Women, accessed 17 November 2021

Chapter Five

5.1 Recommendations

1. The Government of Bangladesh should take concrete steps to withdraw reservations to Article 2 and 16 (1) (c) of CEDAW.
2. The National Women's Development Policy (2008) should be implemented at right earnest and steps should be taken to mobilize public opinion in favor of the policy.
3. The Government needs to build consensus amongst concerned stakeholders including the policy makers, civil society groups, media and the general public to adopt a Uniform Family Code in order to protect the rights of all Bangladeshi women within the family. To this end, a Consultative Group should be formulated at the national and local level with representatives from the civil society, rights activists, media and the legal community including ethnic, indigenous and minority groups.
4. The Child Marriage Restraint Act 1929 should be reviewed and amended with a view to ensuring that child marriage practices are reduced if not eliminated. Accordingly, the law should provide for stringent punishment including imposing a fairly large amount of fine as well as a longer term of imprisonment for those aiding, abetting and encouraging child marriages. 15 R e f o r m s i n t h e F a m i l y L a w s
5. Registration of all marriages, whether civil or religious should be made mandatory and a uniform registration form should be introduced for all marriages.
6. Adequate infrastructure arrangements including logistic support and budget should be made available for strengthening the work and record maintained by the Marriage Registrars to prevent child marriage and polygamy. Polygamy should be made a punishable offence under the Women and Children Repression Prevention Act.
7. The Government should endeavor to include a chapter on Family Laws and gender in the Social Science curriculum of High Schools so that the young generation has a better gender orientation which in turn would empower women to negotiate their rights and entitlements.
8. The Chittagong Hill Tracts Regulation (Amendment) Act, 2003 should be made effective by notification through Official Gazette and necessary infrastructure and logistic support should be provided for establishment of Family Courts in the Chittagong Hill Tracts.
9. The jurisdiction of the Family Courts should be extended to address disputes relating to inheritance, adoption, registration of birth, marriages and death, prevention of dowry and domestic violence so as to provide an efficacious forum for adjudication of family disputes.
10. The Government of Bangladesh should take appropriate steps for enacting an effective legislation combating domestic violence in consultation with women's rights activists and civil society groups.
11. Right to adopt should be open to all irrespective of gender or marital status and welfare of child and competence of adoptee should be the basis for consideration.

5.2 Conclusion

The above discussion proves that the ratification of the international instrument is significant to accelerate legal reforms despite inconsistencies with fundamental principles. However, new situations and challenges suggest for the need to develop possible and permissible methods that necessitate fresh interpretations of fundamental principles which require application in an ever-changing world and modern realities. This is particularly relevant when dealing with human relationships such as family where the legal rulings must be consistent with changes in time and circumstances.

⁴¹ The Muslim Family Laws Ordinance, 1961, Section 7. ⁴² Haque, “Muslim Family Law”. ⁴³ Anisur Rahman, “Development of Muslim Family Law in Bangladesh: Empowerment or Streamlining of Women”, https://www.academia.edu/3356450/Development_of_Muslim_Family_Law_in_Bangladesh_Empowerment_or_Streamlining_of_Women, accessed 17 November 2021

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- accessed 17 November 2022 ²² Ishtiaque, “Plausible Reformation”. ²³ Moslay Uddin, “Muslim Law: judicial and legislative changes.” ²⁴ The Holy Quran, 4:34
- ²⁵ Haque, “Muslim Family Law”. ²⁶ The Holy Qur'an, 2:241 ²⁷ Abdullah Al Mamun, “Islamic Law of Personal Status: Analysis of the Reforms of Islamic Family Law in Various Muslim Countries”, <https://www.ijlhss.com/wp-content/uploads/2017/06/IJLHSS-05-17-03.pdf>, accessed 19 November 2022. ²⁸ Moslay Uddin, “Muslim Law: judicial and legislative changes.” ²⁹ Haque, “Muslim Family Law”.
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 - ³⁶ Article 5 of the Law No. o5 of 1929. ³⁷ The Dissolution of Muslim Marriages Act, 1939 ³⁸ The Muslim Family Laws Ordinance, 1961, Section 7.
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