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## **In Search of Equality: Marriage Related Laws for Muslim Women in Bangladesh**

By Kamrul Hossain<sup>1</sup>

### **Abstract**

The problem of inequality for women in Bangladesh is more social than legal. As regards to the law, except for personal matters, inequalities in the provisions of law are hardly found. Personal matters, however, are regulated by religious laws or customs. In the legal system of Bangladesh though these laws or customs are incorporated separately under the head of Personal Law, these are not, however, as a whole derived from religious laws or customs. Some changes through introducing enactments or promulgating ordinances were made in their application. Still, these have been insufficient to establish equality between women and men. This paper shows how Muslim women are being treated with regard to their Personal Law, in particular marriage and its related law applicable in Bangladesh. Prevailing social constructions of gender are still a fundamental obstacle in realizing the demands of existing law. In order to remove inequalities and impose justice, particularly in marriage-related matters, for both Muslim and non-Muslim women living in Bangladesh, this paper suggests the importance of adopting the Uniform Family Code. At the same time it emphasizes the need for social education and awareness programs through government and non government institutions.

*Key Words:* Islamic Marriage Contracts, *Talaq*, Family Law in Bangladesh

### **Introduction**

The legal system of Bangladesh is based on common law, which was applied during the colonial regime of British-India. Still, some special parts of law applied during the British period remained untouched. This special area of law is called *personal law*, and it is shaped by religious law or customs. This personal law includes: marriage, divorce, dower, maintenance, guardianship, inheritance and so on. In 1947 India was partitioned in two, *Hindustan* - the present India – where the majority of the population is Hindu, while the other is Pakistan – a Muslim state. India had declared itself a secular country, whereas Pakistan had claimed to be an Islamic country. Interestingly, both the countries had upheld their religious rules in the case of *personal law* matters. Bangladesh was at that time part of Pakistan, the then East Pakistan, only because the majority of its population had been Muslim when India was divided on the basis of the *Two-Nation* theory – Hindu and Muslim. In 1971 Bangladesh achieved independence after a nine-month bloody war. A constitution was adopted stating “secularism” as one of the policies in the preamble which was eventually changed by an amendment. All the citizens, however, were put as equal before the law. Nonetheless, no uniform code for family matters were adopted, and personal law were still existed on the basis of religious rules and customs. The majority of the population in is Muslims, but there are also religious

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minorities including Hindu, Christian and Buddhist. In the case of family matters, everyone is ruled by his or her own religious law.

A careful examination of this religious law shows that women are not equal to men. This truth is not only applicable in Muslim personal law, but also equally true with regard to other religious law, for example, Hindu personal law. My concern here is to look at only a narrow area of marriage related personal law for Muslim women applied in Bangladesh. This would include: marriage, divorce and post-divorce situation of a woman. I will show that Muslim personal law is not the same as in other Muslim countries, nor is it completely similar to the classical Muslim tradition. Therefore, I will present a comparative analysis in which I will examine the present status of Marriage related laws for Muslim women and at the same time I will look into progressive developments achieved thus far.

### **Marriage**

In Islamic Law, marriage is a contract – a social contract – as distinct from a commercial transaction.. It is sometimes also termed a ‘civil contract’ between a single man and a single woman of sound mind who have attained puberty.<sup>1</sup> These contracts must be understood by the parties in order to ensure that the marriage has been performed in the proper manner and the rightful effects of the marriage are granted to each of the participating partners. Also, it is considered best if the contract is executed in spoken form.<sup>2</sup> However, due to need or necessity, it may be done through writing or signing.

In Islam, marriage involves sharing between the two halves of society. Its objectives, besides perpetuating human life, are emotional well-being and spiritual harmony. Its bases are love and mercy. It also indicates legalization of sexual intercourse, and provides a license to produce children. Therefore, in Islam extra-marital sexual relations are prohibited, let alone reproduction. According to *Shia* law marriage in Islam can be of two kinds: first, marriage through a regular contract which is called “permanent”, and second *muta* marriage – a non-permanent marriage for a fixed term.<sup>3</sup> *Muta* is distinguished from regular, permanent marriage on the basis of its nature. As it is temporary it does not reflect any far-reaching consequences. For example, *Muta* marriage does not create mutual rights of inheritance between the man and the woman, but children conceived while it exists are legitimate and capable of inheriting from both parents. All that is needed for *Muta* is a valid contract with a mention of the specified period accompanied by a fixed amount of dower. What is also important to note is that for a valid *Muta* two witnesses are required as is also required for the permanent marriage. In the remainder of the paper, I illustrate some basic existing elements of Muslim regular marriage, rather than *Muta* that discriminate against women in Bangladesh.

The legal effects of marriage depend on the validity of marriage. For example, a marriage can be classified as *sahi* (full valid), *fasid* (irregular) or *batil* (void). There are no legal consequences for a *batil* or void marriage since according to Islamic law, it is not a marriage at all. Limited legal consequences are, however, found in an irregular or *fasid* marriage.

*Limitation on Age*

As earlier stated, the marriage agreement is a contract between two persons bearing sound mind. Since the idea of ‘sound mind’ is quite broad, in order to avoid any confusion it only excludes “insane” or “lunatic” from the contract of marriage.

Attaining puberty is very important for a marriage contract. It demonstrates that parties to the contract are mature enough to independently express their consent. It is, however, confusing as to when one gets puberty. There are many dissenting opinions on this issue among the different schools of thought. Under Muslim Law a child becomes an adult upon attaining puberty which varies with gender. An average female child ceases to be a child upon attaining puberty at the age of 12 years and an average male child on reaching 15 to 16 years of age. According to the *Hanafi* school a girl attains her puberty at the age of 15, which in other schools are even lower. The *Hanafi* school, nevertheless, does not rule out a marriage contract written before the age of 15. But in that case the girl has the right to repudiate the marriage once she attains puberty. In this case the marriage contract is arranged by their guardians.

According to prevailing laws puberty is determined on the basis of one’s attaining majority. As a matter of fact, the term puberty is no longer relevant. What is relevant for a marriage contract is whether one has crossed the age of minority. Laws regarding majority were enacted at different times and in response to different situations. The concept of minor or child has, thus, been given varied definitions by different acts and statutes in force in Bangladesh. The Bangladesh Majority Act of 1875 defines a person below the age of 18 years to be a child. The Guardians and Wards Act of 1890 states that if a child is made a ward of court then he/she will remain a ward until 21 years, thus defining him/her as a child up to that age. The Children (Pledging of Labor) Act of 1933 regards a person below the age of 15 years as being a child. The Bengal Vagrancy Act 1943 considers a person below the age of 14 years as a child. The Factories Act of 1965 defines a child as a person who has not completed 16 years of age. The Children Act of 1974 states that a child is a person below the age of 16 years. The legal system in the country also makes a distinction between boys and girls in defining a child. This is especially apparent in the Child Marriage Restraint Act of 1929. In this Act the age of majority, defined in terms of contracting a valid marriage has been placed at 21 years for boys but 18 years for girls. It does not, however, contemplate that marriage contract under that age is void. Rather such marriage is subject to the condition that the parties have right to repudiate upon attaining majority. Though a minor may be given in marriage, no minor may contract herself in marriage during her minority and any such marriage would be held to be void.<sup>4</sup> Where a minor has been given in marriage and marriage has been consummated before puberty such consummation does not operate to deprive the minor of the option to repudiate after puberty.<sup>5</sup>

*Forced Marriage*

Forced marriage is prohibited in Islam. It could be assumed from the discussion of previous section that age of puberty is necessary so that one can freely express his or her consent. So, Islam prohibits marriage where a woman (or man) does not have consent. There are guiding principles through the *Hadit* in this regard. The Prophet Mohammad (SAS) had advised a girl, on her complaint that her father had forced her to marry without her consent, that she had a choice either to accept or invalidate the marriage (Ibn Abbas,

in Ibn Hanbal No. 2469). In another version, the girl said: “Actually I accepted this marriage but I wanted to let women know that parents have no right (to force a husband on them)” (Ibn Maja, No. 1873). Therefore, it is established in Islam that forced marriage is not at all a marriage if not accepted or invalidated by a woman (or even a man).

Free consent is a requirement for a valid marriage under Bangladeshi law. A woman cannot be forced and she cannot be given in marriage unless she freely agrees on it. A free consent is to be expressed in front of at least two witnesses and thereafter to be properly signed in order to have the effect of valid marriage. As mentioned earlier, one could only express his or her free consent once he or she reaches the age of marriage according to the applicable law. If a marriage is completed before that age through the action of a guardian, it is subject to approval upon reaching the prescribed age by the either party and registered properly. Otherwise in the eye of law it is not at all a marriage. In the year 2000, in the High Court Division of Bangladesh a case<sup>6</sup> concerning interim (*hilla*) a forced marriage caused by a *fatwa* given by a local *Imam* was declared illegal.<sup>7</sup> There is no place for *fatwa* in Bangladesh’s legal system, because laws are enacted in the Parliament and applied through the courts.

#### *Restriction to Marry Non-Muslim(s)*

This restriction comes from the classical Islamic tradition that a Muslim man can validly marry a *kitabi* (Muslim or Jewish or Christian) woman. The legal consequences of this kind of marriage would follow a full valid marriage. Whereas a Muslim man can also marry a non-*kitabi*, and the marriage would be regarded merely as an irregular one. Such a marriage would become fully legal when it becomes regular. For example, when, if a man is married to a non-*kitabi* woman, and she converts to Islam, the marriage becomes regular or valid from the time of her conversion.

This rule discriminately applies for a Muslim woman in Islamic law. No Muslim woman can validly marry a non-Muslim man, even a *kitabi*, unless he becomes Muslim. However, marriage with a *kitabi* man is not *prima facie* void, but irregular. Any marriage with other religion, for example with Hindu, would amount to a *batil* or void marriage where no legal consequence would be followed from such marriage. Rules regarding such restriction on marriage are, without any change, followed in the legal system of Bangladesh.

#### *Witness*

Witness is the necessary condition for Muslim marriage. In the absence of any witness, though, marriage is not void but becomes an irregular one, and continues to be so as long as no witnesses are found. According to classical Islamic law two witnesses composed of men are required for a valid marriage. If two men are not available, one man and two women could fulfill this requirement.<sup>8</sup> This has led to a long debate whether women are considered “half man” in Islam. Both negative<sup>9</sup> and positive<sup>10</sup> interpretations are found in this respect. This important epistemological issue aside, it is in the 1961 Muslim Family Law Ordinance where a single woman is not prohibited from acting as a single witness.

*Number of Wives*

In classical Islamic law a Muslim man can have four wives at the same time. Accepting a fifth wife while already having four is not, however, illegal, but would amount to an irregular situation. Women however are prohibited from polyandry. The primary argument against multiple husbands has to do with indeterminate the paternity, whereas maternity under polygyny is not subject to question. Muslim law permits a man to accept the second wife when the first marriage is still in existence, but first, the law requires permission from the first wife, and a valid reason for the second marriage.<sup>11</sup> An Arbitration Council is established to deal with the application for permission to marry additional wives. It considers whether the existing wife consents to such marriage and whether it is necessary and just to grant the permission.<sup>12</sup> Although women are seemingly taken into consideration in the decision making process about multiple wives, the Arbitration Council lacks discretionary power. In practice the Arbitration Council is composed of males who give permission to remarry even on the slightest pretexts.

*Dower*

The term dower is not to be confused with dowry. The former<sup>13</sup> is some sort of money or gift given or promised to be given by husband to wife for her security at the time of marriage, while the latter is unknown in Islamic law; but consists of presents made by the father or other relations of the bride to the bridegroom. In Indian sub-continent including Bangladesh dowry is very much familiar though Islamic law applied in Bangladesh does not support dowry. However, the practical reality is that it developed as a custom in a male dominated society. Although marriage is conducted under strict Islamic law, there are plenty of cases, mostly belonging to the less educated people living in villages, where it is common to demand dowry from the wife's parents. Demand of dowry is a criminal offence under the existing law in Bangladesh. Therefore, such demand is mainly made by oral agreement. In these cases, the equality of women is seriously injured. For dower (to wife) as it is usually fixed by the parties at the time of marriage, it could be amount of any number of money agreed upon in a marriage contract. Whereas for dowry (to husband), as it is beyond the Islamic marriage contract, in most cases it exceeds the amount fixed for dower. Therefore, despite legal protections, women are treated unequally. The law appears a helpless bystander. This problem is more social than legal. When so many women are not independent, seeking legal remedy would merely cause them more sufferings. Still, some development with respect to dower have emerged in the Family Law Ordinance of 1961. For example, the amount of dower is generally split into two parts – prompt and deferred. The former is payable immediately on demand by the wife while the latter is payable only in dissolution of marriage by death or divorce. However, after 1961 the entire amount is now treated as prompt. Claim to dower is not lost when the marriage is dissolved by the Court at the instance of the wife or when the wife exercise the right to divorce.

**Divorce**

Islam allows divorce if circumstances warrant or necessitate it, indeed reluctantly neither liking nor recommending it. The holy Qur'an states, "[a]nd if you fear that the two (i.e., husband and wife) may not be able to keep the limits ordered by Allah, there is no blame on either of them if she redeems herself (from the marriage tie) ..."<sup>14</sup> The

Prophet of Islam, Mohammad (SAS) said, among lawful things, divorce is most disliked by Allah.<sup>15</sup> The general ground for divorce in the Qur'an is perceived as a hopeless failure of one or both parties to discharge their marital duties and to consort with each other in kindness, peace and compassion. The right to divorce is, however, conferred upon men, not on women. Classical Islamic law contemplates different kinds of divorce procedures. This includes: divorce through oral pronouncement (*talaq-i-ahsan*, *talaq-i-hasan*, *talaq-ul-bidaat* or *talaq-i-badai*) and divorce in written form (which is irrevocable divorce (*talaq-i-bain*) and takes its effect immediately on its execution). Among these procedures, the most common mode of divorce in Bangladesh is *talaq-ul-bidaat* or *talaq-i-badai*, which means three pronouncements at the same time (e.g., I divorce you thrice or separately, I divorce you, I divorce you, I divorce you or with a single pronouncement that I divorce you irrevocably). Once such a pronouncement is complete, divorce becomes irrevocable or *bain*, and is effective immediately. Remarriage between the parties, according to classical Islamic law, is absolutely forbidden unless an intervention of another marriage with a third party is concluded and divorced thereafter upon consummation.<sup>16</sup> It is interesting that such an interim marriage is only applicable in case of a woman. A man does not need to be married with a third party in between two marriages.

#### *Grounds for Divorce*

As mentioned earlier, only men have the unilateral right to divorce in Islamic law, for which, in fact, no reasoned ground is necessary. This is an arbitrary power exercised by men only. The wife has no such right, and when her husband exercises his right, the wife has no redress. The jurists, however, have developed some indices, which may be accepted as grounds of divorce in case the divorce matter goes to the court. A long absence of the husband without any information, long imprisonment, refusal to provide maintenance for his wife, impotence etc. are some of the grounds on which a wife can *ask* for divorce; cannot, however, divorce herself straight away. Either party may take steps to divorce in cases of chronic disease, insanity, deceptive misrepresentation during marriage contract, desertion etc., but again through the proceedings of a court of law. The wife can still divorce her husband *only if* this condition is stipulated in the marriage contract. This kind of divorce is called 'Delegated Divorce' (*Talaq Taffiz*) by which the wife is delegated the right to divorce by her husband during the marriage contract. Marriage can also be dissolved through mutual consent. This is called *Khula* in the technical language of Islamic law. Nonetheless, a Muslim female does not have the right to divorce in the same way as men do.

The Muslim Family Law Ordinance of 1961 has already provided the provisions for arbitration in the case of divorce. However, the Arbitration Council cannot prevent the *talaq* by the husband even if it is highly arbitrary and unjust and can only delay the divorce with the hope that some reconciliation might take place between the parties. For example, a divorce given by the husband shall not take effect until the husband has given notice of the divorce to the chairman of local administrative unit - *Union Parishad* and ninety days have elapsed after issuance of the said notice and within the said period the husband can revoke the divorce. The husband is also under obligation to give a copy of the said notice to the wife. The Chairman on receipt of the notice would constitute an Arbitration Council for effecting a reconciliation which, if successful, would render the

divorce ineffective.<sup>17</sup> It is an offence not to notify the Chairman about the exercise of divorce by the husband. The provision of the Ordinance applies *mutatis mutandis* in the case of divorce exercised by the wife. The divorce does not take effect unless notice thereof is given to the Chairman and 90 days have elapsed thereafter.<sup>18</sup> The husband can delegate his power of divorce unconditionally or with condition to his wife through what is called *talaq-i-tawfeez*. When any condition is stipulated the wife can divorce her husband when said condition occurs. Moreover, triple pronouncement of divorce has been abolished through the introduction of the Ordinance. The procedure mentioned above must be followed for the completeness of divorce. Now the divorced parties can remarry without the formality of the marriage with third party.<sup>19</sup> Although this is definitely an important legal development, its provisions cannot be realized in many cases where people live beyond the reach of judicial remedy.

### *Women's Right to Divorce*

According to existing law in Bangladesh a woman can divorce her husband subject to a clear stipulation in the marriage contract. This is not, however, absolute. There are certain grounds as stipulated in the Dissolution of Muslim Marriage Act 1939<sup>20</sup>, for which a woman does have the right to obtain judicial divorce. According to the Act, a Muslim woman can obtain judicial divorce on any ground recognized by Muslim law. These grounds were discussed in the previous section. The Act, however, added some new grounds for woman to seek judicial divorce. For example, neglect or failure of the husband to provide maintenance for two years could be a valid ground for obtaining divorce. This provision, however, provides exceptions such as if the wife refuses herself to her husband without any lawful excuse and/or abandons her husband, or otherwise wilfully fails to perform her marital duties, she loses the right to claim maintenance. Thus she could be refused the right to obtain a divorce. The wife is entitled to judicial divorce if the husband brings a false charge of adultery against her unless the husband, with *bonafide* intention, retracts the charge of adultery. To constitute a valid retraction, it must be made before the commencement of the hearing of the suit, it must be *bonafide* and there must be an admission by the husband about making the charge, and an unconditional acknowledgement by him that the charge is false.<sup>21</sup> Incompatibility of temperament which results in a hateful union has been accepted as a ground for seeking judicial divorce. Before the Dissolution of Muslim Marriage Act in 1939 apostasy from Islam of either party operated as a complete and immediate dissolution of marriage. After passing of the Act, apostasy from Islam of the wife does not dissolve the marriage<sup>22</sup> while apostasy of the husband dissolves the marriage immediate.<sup>23</sup>

### *Post-Divorce Affect on Women*

Post-divorce affect for a Muslim woman is a matter of great concern, particularly in a society like Bangladesh, where women are still neglected at large while living under the domination of husbands. The main problem that arises upon divorce for a Muslim woman is financial insecurity.<sup>24</sup> When in Islamic law it is unanimously agreed among Muslim scholars and jurists that the women's right to maintenance arises upon marriage, and that the wife is the first in the order of priority to this entitlement, even before the children, parents and relatives, it is, however, disputed whether this right extends after the marriage has ended. A good number of exponents of Islamic law have argued that the



right for Muslim women to maintenance from the husband exists even after the marriage has dissolved.<sup>25</sup> This has further confirmed by the judicial decision as well, although in actuality, many husbands neglect their former wives once a divorce has gone into effect.

### *Changed Social Status*

In Bangladesh, unmarried Muslim women remain under the shelter of their fathers. When their status changes to wife and mother, this shifts to their husbands. In practice then, their primary duty is to take care of children and perform household activities when the leadership is at the hand of the husband. Although in Islam it is not prohibited for women to engage in economic activity if necessary, but the reality is that women are still largely economically dependent on their husbands. Because taking care of children and other household activities are weighty responsibilities, when divorce is recognized, the subsequent consequences should not to be ignored. Remedy and rehabilitation for divorced women should be introduced. Rehabilitation is especially important for women who would remain otherwise helpless upon such changed status. Most women involved in socially condemned activities, for example, were left by their husbands. This is because survival is more important than incurred condemnation. Therefore, such changed circumstances of women do have a long and in-depth affect for the social order. It is also important to mention that the law does in fact provide post-divorce maintenance to women; however, it is very difficult to achieve through the Court. These issues are raised in ordinary civil courts, which do not help poor or divorced women who desperately lack monetary sustenance for themselves and for their children. Moreover, it is expensive on the one hand, and time consuming on the other. Fortunately, the Family Courts Ordinance of 1985 was adopted which not only has a streamlined procedure but also permits women to pay only minimal fees for a suit of maintenance or post-divorce maintenance. The Qur'an not only mentioned post-divorce circumstances, but also ordered for compensation in those cases as discussed in the next section.

### *Legal Issues of Post-Divorce Maintenance*

As mentioned above with respect to dower, the part of dower which is called prompt is payable immediately on demand by wife from her husband whereas the other part – the deferred dower – is only payable upon divorce. Whether the latter provides necessary financial security for divorced women is a widely discussed topic. Laws applicable in Egypt and Jordan include *mut'at-al-talaq* or *nafaqat-al-mut'a*, or a payment (a 'gratification' or a 'gift') by a husband to his wife upon divorcing her.<sup>26</sup> This perhaps, provides a subsequent payment beyond dower. The Qur'an makes specific reference in this regard. There are three verses, which, when read together lead to the conclusion that there is a right of entitlement of post-divorced Muslim women, for maintenance. In *sura* II (Baqara), it is stated that a year's maintenance and residence is due for a widow (verse: 240). Then the Qur'an categorizes women who leave their matrimonial residence on their own and those who have not left on their own. For the former, it states, "there is no blame on you for what they do with themselves." But this sentence is subject to the provision that "it is reasonable" to provide maintenance (verse: 240). However, as for divorced women it is stated that "maintenance (should be provided) on a reasonable (scale)" and "this is a duty of righteous" (verse: 241). The next verse is open ended<sup>27</sup> leaving the right to decide reasonably, and room for progressive developments that should conform to the

practical circumstances in question, that “[t]hus doth God makes clear His signs to you: in order that ye may understand”.

Therefore, law in this regard has developed both through legislative acts as well as in judicial fashion. The 1956 Commission on Marriage and Family Law, while dealing with its task, had been concerned with the question of post-divorce maintenance whether maintenance is obligatory or optional. The view expressed in this respect by the members of the Commission as well as by hundreds of Muslims was that, “a large number of middle aged women who are being divorced without reason should not be thrown on the street without a roof over their heads and without any means of sustaining themselves and their children.”<sup>28</sup> Therefore, the Commission recommended that Courts should have the jurisdiction to order a husband to pay maintenance to his divorced wife for her life or till she remarried. The Muslim Family Law Ordinance of 1961 dealt with the question and found in favor of women’s claim. But it only awarded maintenance for married women despite the recommendation from the 1956 Commission. A judicial development, however, invokes that it is permissible to follow a non-*Hanafi* school when *Hanafi* law does not provide relief. This is the prevailing point of argument as to how 1961 Ordinance is based on *Maliki* law. This principle was applied in *Gul Bibi v. Muhammad Saleem* on the basis of justice, common sense and the position that it is possible to borrow from another school of Muslim law when one school does not provide relief. Thus, the Court held “according to *Shiah* and *Shafi* law the wife is entitled to maintenance notwithstanding the fact that she was allowed to get into arrears without having the amount fixed by the Court, or by agreement with the husband... In the instant case the parties admittedly follow *Hanafi* school of thought... However, as some thinkers of Islam do favor the positive view and such view is also consistent with reason, logic and common sense, its adoption as a rule in case of such sects which do not strictly follow that school of thought, would not be unjustified.”<sup>29</sup>

### **Progressive Developments**

The law for Muslim women applied in legal system of Bangladesh is not derived directly from classical Islamic law. Some progressive developments have been introduced throughout the decades, including the Muslim Family Law Ordinance of 1961 which has brought about some fundamental changes as I have referred frequently in the previous sections. Furthermore, judicial decisions have also showed some fundamental development in this regard. Above all there are always social, political and moral pressure created by NGOs, human rights activists, lawyers, professionals and so on. In the following sections, I will try to show these developments in order to demonstrate that the search for equality is underway, although most of the time it is hindered by religious fundamentalists who, in fact, do not compose the majority of the population. Also I intend to argue that these developments should be unified by means of adopting a common code applicable to all the citizens equally, regardless of what religion they belong to.

### *Legislative Concerns*

Most legislative development of the Muslim personal law has occurred through the introduction of 1961 Muslim Family Law Ordinance. The provisions of this

Ordinance stated that it shall have effect notwithstanding any law, custom or usage, and every marriage solemnized under Muslim Law shall be registered in accordance with the provision of this Ordinance. For the purpose of registration of marriages under this Ordinance, the Union Council shall grant license to one or more persons, to be called *Nikah Registrars*.<sup>30</sup> This fundamental change had been made firstly, by denouncing other laws, customs or traditions (mostly Islamic) are inapplicable once the Ordinance came into effect. Secondly, registration of marriage had been made compulsory; and thirdly, polygamy had been prohibited.<sup>31</sup>

Concerning divorce the Ordinance abolished triple divorce in one sitting as a means of divorce. It introduced the Qur'anic concept of arbitration as indicated in the verse 4:35 which is quite fair to women as they too have the right to appoint an arbitrator to take care of their interests in matter of divorce. Also with respect to polygamy the Ordinance made it obligatory on the husband taking second wife to notify the first wife, obtain her approval and also to convince the court of law as to why second wife is needed. Although the Ordinance was promulgated when Bangladesh belonged to Pakistan, the force of the Ordinance still exists in present Bangladesh. Interestingly it was not even subject to amendment in Pakistan during 1980s when Pakistan was starting to become increasingly Islamized from the continuous pressure of the orthodox Muslims.

Apart from the Ordinance of 1961, there are also some laws exist in Bangladesh in order to protect the interests of women, despite the fundamental changes were mostly introduced by the Ordinance. Among these laws, the Cruelty to Women Ordinance, Dowry Prohibition Act and the Family Court Ordinance are worthy to mention.

Moreover, currently draft laws are underway which would go much further than the Ordinance of 1961. Both major political parties had reached a consensus in this matter. The proposed law, once enacted, would be subject to uniform nature and would apply equally to all. This uniform family code will offer women greater control over their lives.<sup>32</sup>

The main purpose of enacting the Uniform Family Code is to reform existing family laws to make them more humane and beneficial for women. These laws will end discrimination against women and will give them equal status in society whatever religion they belong to. This uniform family code (UFC), which is under active consideration of the Government of Bangladesh, has been prepared by *Bangladesh Mahila Parishad* (BMP) – an organization acting for the interests of women in Bangladesh.

Grounds for divorce was also revised in the draft code, where it proposed some new grounds for obtaining divorce rights for Muslim women. Besides the usual grounds like immorality, impotency, and physical and mental torture for which women can claim divorce, the UFC also includes dowry demands as a valid ground.<sup>33</sup> Of course dowry has no Islamic sanction but to make it a ground for divorce would be a new concept. Dowry is not practiced in other Islamic countries but is unfortunately quite common among Muslims of the Indian sub-continent. When a husband is addicted to drugs of any sort, divorce claim would be valid for women. Husband could also demand divorce if so is wife. One other development found in the draft is that a husband is entitled to divorce right if his wife is a lesbian. However, women do not have the right to claim divorce if their husband is gay. This is a new ground in the sense that it does not exist in *shari'ah*. As impotency entitles a woman for divorce since she is deprived of her right to sex within

the marital frame-work, one could argue through analogical reasoning, that a woman is deprived of sex if her husband is gay (of course if he neglects her sexually) she could be entitled to divorce right on that ground.

Regarding maintenance, it proposed compulsory maintenance for divorced women for life or until their remarriage. It also lays down the course of action that should be taken if maintenance is not paid.

### *Judicial Developments*

As a recent judicial development, the High Court Division of the Bangladesh Supreme Court has ruled in a landmark judgment that triple divorce through verbal pronouncement is illegal and that any *Imam*<sup>34</sup> of the mosque or other religious leader giving *fatwa*<sup>35</sup> in favor of triple divorce is liable to be prosecuted; and *fatwa* given by such persons are unauthorized by law and punishable.<sup>36</sup> The ruling of the Court came about following an episode in a village in Naogaon in which a woman, *Shahida Begum* was forcibly given in *hilla* marriage with her husband's cousin following a *fatwa* by a self-appointed religious leader. The plea behind the *hilla* was that *Shahida's* marriage with her husband had been dissolved because during a quarrel the husband had pronounced the word *talaq*. The Court held that *Shahida's* marriage had not been dissolved according to the provisions of the Muslim Family Law Ordinance of 1961, and that even if for argument's sake it is conceded that the marriage was dissolved, there is no legal bar to the couple re-marrying, without any interim marriage with third person or *hilla*. This ruling of the Court created a great stir in orthodox circles, which virtually turned into a battle between the secular and progressive elements and the orthodox elements causing some loss of life. People at large in Bangladesh, however, welcomed the judgment of the Court.

In 1999, in a case before the High Court Division, the Court ruled that a divorcee is entitled for maintenance for life or until she remarries. This ruling was based on the interpretation of the Qur'anic verse 2:241. The judges ruled that since maintenance is meant for a divorcee, she should be entitled to it as long as she remains a divorcee. This represents true progress in the interpretation of Muslim laws, not only applicable in Bangladesh but also in the rest of the Muslim world. The Appellate Division of the Supreme Court unfortunately, overturned this; on the grounds that Bangladeshi law exists does not recognize such a right, notwithstanding such reasoned interpretation.

### *Initiatives from Local NGOs*

Social and non-political organizations, NGOs are also active in progressive judicial reform. As I stated before, *Bangladesh Mahila Parishad*, who works for the rights of women in Bangladesh is effectively active in this area. For example, the draft Uniform Family Code was prepared by this organization. The government of Bangladesh is under continuous pressure from this and other organizations alike to introduce developments in this area. Since in Bangladesh many girls, especially in rural areas, are married off as soon as they reach age of puberty and sometimes even earlier. These marriages, needless to say, are hardly ever registered. BMP in its draft code recommended the age of marriage for boy at the age of 22 and for girl at 18 and at the same time obligatory provision for marriage registration. It is needless to say that once

marriage and divorce are registered, it will give women legal grounds to get what is rightfully theirs.

At the moment some trusts and NGOs for example, *Naripakkha*, *Ain-O-Shalish Kendro*, *Bangladesh Mahila Parishad*, *Bangladesh Women Lawyers Association*, human rights organizations and also some other NGOs are taking care of divorced women who are in serious need of shelter and food. They cannot, however, afford to care for all the victims, since the number of abandoned women is on rise every day. Therefore, it is in the interest of women that the government of Bangladesh will adopt the Uniform Family Code (UFC), which the above-mentioned Organizations are fighting for.

### **Conclusion**

This paper has examined classical Islamic laws concerning marriage and related issues; Muslim laws as they exist in Bangladesh; and has attempted to identify the inequalities between rights enjoyed by men and women. While I stressed the inequality of Muslim women through their own personal laws, people belonging to other religions living in Bangladesh and ruled by their own personal religious law, also experience various inequalities. Since laws vary from religion to religion, inequalities also vary from woman to woman, depending on which religion she belongs to. It is extremely undesirable for laws regarding the same matters to be so diversified. There is high demand for the Uniform Family Code, with the exception of religious fundamentalists, which would bring the diversity of personal laws under one rubric within the country's civil code. However, in order to achieve a balanced and equal society such objections should be overcome. Moreover, such fundamentalist groups both in the Muslim and Hindu communities – the two major religious community in Bangladesh among the four – do not represent the opinion of the majority of the people. Therefore, adoption of the new code should not be difficult to achieve.

### **APPENDIX - I THE MUSLIM FAMILY LAW ORDINANCE (VIII OF 1961)**

An Ordinance to give effect to certain recommendations of the commission on marriage and Family Laws.

Whereas it is expedient to give effect to certain recommendation of the commission on Marriage and Family Laws.

Now, therefore in pursuance of the proclamation of the seventh day of October 1958, and in exercise of all powers enabling

him in this behalf, the President is pleased to make and promulgate the following Ordinance:-

#### **1. Short title, extent, application and commencement**

(1) This Ordinance may be called the Muslim Family Laws Ordinance, 1961.

(2) It extends to whole of Pakistan, and applies to all Muslim citizens of Pakistan,

wherever they may be.

(3) It shall come into force on such date as the Federal Government may, by notification in the official Gazette, appoint in this behalf.

## **2. Definition**

(a) “**Arbitration Council**” means a body consisting of the Chairman and a representative of each of the parties to a matter dealt with this Ordinance:

**Provided** that where any party fails to nominate a representative within the prescribed time, the body formed without such representative shall be the Arbitration Council.

(b) “**Chairman**” means the Chairman of the Union Council or a person appointed by the Federal Government in the Cantonment areas or by the Provincial Government in other areas or by an Officer authorised in that behalf by any such Government to discharge the functions of chairman under Ordinance:

**Provided** that where the Chairman of the Union Council is a non-Muslim, or he himself wishes to make an application to the Arbitration Council, or is, owing to illness or any other reason, unable to discharge the functions of Chairman, the Council shall elect one of its Muslim members as Chairman for the purposes of this Ordinance.

(c) “**Prescribed**” means prescribed by rules made under Sch. II.

(d) “**Union Council**” means the Union Council or the Town or Union Committee constituted under the Basic Democracies Order, 1959 and having jurisdiction in the matter as prescribed.

(e) “**Ward**” means a ward within a Union or Town as defined in the aforesaid Order.

## **3. Ordinance to override other laws, etc.**

(1) The provisions of this Ordinance shall have effect notwithstanding any law, custom or usage, and the registration of Muslim marriages shall take place only in accordance with these provisions.

(2) For the removal of doubt, it is hereby declared that the provisions of the Arbitration Act, 1940 (X of 1940), the Code of Civil Procedure 1908 (Act V of 1908), and any other law regulating the procedure of Courts shall not apply to any Arbitration Council.

## **4. Succession.**

In the event of death of any son or daughter of the propositus 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.

## **5. Registration of marriage.**

(1) Every marriage solemnized under Muslim Law shall be registered in accordance with the provisions of this Ordinance.

(2) For the purpose of registration of marriage under this Ordinance, the Union Council

shall grant licenses to one or more persons, to be called Nikah Registrars, but in no case shall more than one Nikah Registrar be licensed for any one Ward.

(3) Every marriage not solemnized by the Nikah Registrar shall, for the purpose of registration under this Ordinance be reported to him by the person who has solemnized such marriage.

(4). Whoever contravenes the provisions of such-section (3) shall be punishable with simple imprisonment for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both.

(5). The form of nikahnama, the registers to be maintained by Nikah Registrars, the records to be preserved by Union Councils, the manner in which marriage shall be registered and copies of nikahnama shall be supplied to parties, and the fees to be charged thereof, shall be such as may be prescribed.

(6) Any person may, on payment of the prescribed fee, if any, inspect at the office of the Union Council the record preserved under sub-section (5), or obtain a copy of any entry therein.

## **6. Polygamy.**

(1) No man, during the subsistence of an existing marriage, shall except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage contracted without such permission be registered under this Ordinance.

(2) An application for permission under Sub-section (1) shall be submitted to the Chairman in the prescribed manner together with the prescribed fee, and shall state reasons for the proposed marriage, and whether the consent of existing wife or wives has been obtained thereto.

(3) On receipt of the application under Sub-section (3), Chairman shall ask the applicant and his existing wife or wives each to nominate a representative, and the Arbitration Council so constituted may, if satisfied that the proposed marriage is necessary and just, grant, subject to such condition if any, as may be deemed fit, the permission applied for.

(4) In deciding the application the Arbitration Council shall record its reasons for the decision and any party may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision, to the Collector concerned and his decision shall be final and shall not be called in question in any Court.

(5) Any man who contracts another marriage without the permission of the Arbitration Council shall,

(a) pay immediately the entire amount of the dower whether prompt or deferred, due to the existing wife or wives, which amount, if not so paid, shall be recoverable as arrears of land revenue; and

(b) on conviction upon complaint be punishable with the simple imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

### **7. Talaq.**

(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 a notice in writing of his having done so, and shall supply a copy thereof to the wife.

(2) Whoever, contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

(3) Save as provided in sub-section (5) talaq, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from day on which notice under sub-section (1) is delivered to the Chairman.

(4) 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.

(5) If the wife be pregnant at the time talaq is pronounced, talaq shall not be effective until the period mentioned in Sub-section (3) or the pregnancy, whichever later, ends.

(6) Nothing shall debar a wife whose marriage has been terminated by talaq effective under his section from remarrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective.

### **8. Dissolution of marriage otherwise than by talaq.**

Where the right to divorce has been duly delegated to the wife and she wishes to exercise that right, or where any of the parties to a marriage wishes to dissolve the marriage otherwise than by talaq the provisions of section 7 shall, mutatis mutandis and so far as applicable, apply.

### **9. Maintenance.**

(1) If any husband fails to maintain his wife adequately, or where there are more wives than one, fails to maintain them equitably, the wife, or all or any of the wives, may in addition to seeking any other legal remedy available apply to the Chairman who shall constitute an Arbitration Council to determine the matter, and the Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband.

(2) A husband or wife may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision of the certificate, to



the Collector concerned and his decision shall be final and shall not be called in question in any Court.

(3) Any amount payable under Sub-section (1) or, (2) if, not paid in the due time, shall be recoverable as arrears of land revenue.

***PUNJAB AMENDMENT***

In sub-section (2), the full-stop occurring at the end shall be replaced by a colon and thereafter the following proviso shall be added, namely:

Provided that the Commissioner of a Division may, on an application made in this behalf and for reasons to be recorded, transfer an application for revision of the certificate from a Collector to any other Collector, or to a Director, Local Government, or to an Additional Commissioner in his Division. [Ord. II of 1975, Section 2].

**10. Dower.**

Where no details about the mode of payment of dower are specified in the nikahnama or the marriage contract, the entire amount of the dower shall be presumed to be payable on demand.

**11. Power to make rules.**

(1) The Government may make rules to carry into effect the purposes of this Ordinance.

(2) In making rules under this section, such Government, may provide that a breach of any of the rules shall be punishable with simple imprisonment which may extend to one month, or with fine which may extent to two hundred rupees, or with both.

(3) Rules made under this section shall be published in the official Gazette and shall thereupon have effect as if enacted in this Ordinance.

**APPENDIX - II**

**THE DISSOLUTION OF MUSLIM MARRIAGE ACT**

**(VIII OF 1939)**

[ An Act to consolidate and clarify the provisions of the Muslim Law relating to suits for dissolution of marriage by women married under Muslim Law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie.]

whereas to is expedient to consolidate and clarify the provisions to Muslim Law relating to suits for dissolution of marriage by women married under Muslim Law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie: it is hereby enacted as follows:--

**1. Short title and extent**L1) this Act may be called the Dissolution of all Marriages Act, 1939.

**(a) It extends to all the Provinces and the Capital of the Federation.**

**2. Grounds for decree for dissolution of marriage:** A woman married under Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on any one of more of the following grounds, namely:--

(i) that the whereabouts of the husband have no been known for a period of four years;

(ii) that the husband has neglected of has failed to provide for her maintenance for a period of two years;

(ii-1) that the husband has taken an additional wife in the contravention of the provision of the Muslim Family Laws Ordinance, 1961;

(ii) that the husband has been sentenced to imprisonment for a period of seven years or upwards.

**Notes:**

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<sup>1</sup> See, *Mustaq Ahmed Vs. Mahmud Amin*, P.L.D., p. 442; Sufia Ahmed and Jahanara Choudhury, *Women's Legal Status in Bangladesh*, p. 301; in Sultana Kamal, *Law for Muslim Women in Bangladesh*, published in "Women Living under Muslim Laws" at <http://www.wluml.org/english>

<sup>2</sup> It is interesting to note here that in the classical Islamic tradition spoken form of such contract is emphasized, because it is assumed that those who are Muslims will not lie as it is one of the basic principles of Islam that lying or making false statement is prohibited. Therefore, the need for a written document is not recommended, perhaps because it might create an extra burden or bureaucratic difficulties.

<sup>3</sup> But this idea of marriage lacks support from *Sunni Muslims*. Nevertheless, this belief is common among the *Shia Muslims*. According to Iranian scholar Dr. Rokeya Shiraji, as it is common in the western society that a mature man and woman upon their wilful consent can have a "one night stand", the same is possible for Muslim men and women in Iran, but subject to marriage. This marriage could even last only one hour. This is called *Sigheh*. This view was expressed in the Conference "The Future of Democracy" arranged by Charter 88, London, Nov. 02, 2002; see also Wendel Stevenson, *Marriage for a Night*, Prospect magazine, October, 2002 that the *sigheh* is *Shia* solution to a physical need.

<sup>4</sup> See, 9 DLR 1957, p. 45

<sup>5</sup> *ibid*

<sup>6</sup> Landmark case of *Shahida Begum* where verbal divorce and religious decree were declared void.

<sup>7</sup> See, *infra* at section 5.2. (Judicial Development)

<sup>8</sup> See, The Holy Qur'an 2:282, where It states requirement of witnesses as regards to the business deal, that "[...] get two witnesses out of your men, and if there are not two men, then a man and two women, such as you choose for witnesses so that if one of them errs, the other can remind her."

<sup>9</sup> In the sense that women are not treated as equal to men because the absence of one man requires two women for a testimony.

<sup>10</sup> The rule that women's testimony is one half of men's testimony cannot be used as an argument that there is a general rule in the Qur'an. If such generalization is accepted it contradicts verse 24:6-9. Still as regards to business deal as it is stated the requirement for two women in absence of one male witness is for unintended errors. However, female are not the only gender that may err and need corroboration of their testimony. This is why the general rule of testimony in Islamic law is to have two witnesses, even when they are both male; see, "Gender Equity in Islam", <http://www.jannah.org/gender-equity/equitychap4.html>

<sup>11</sup> For example, Section 6, Muslim Family Laws Ordinance 1961 provides that no man, during the subsistence of existing marriage, shall contract another marriage without prior written permission of Arbitration Council and violation of this provision entails liability of conviction and punishment.

<sup>12</sup> See, *ibid*

<sup>13</sup> See, D. F. Mulla, *Principles of Mohammedan Law*, 17<sup>th</sup> Ed., p. 277, that dower is the sum of money or other property which the wife is entitled to receive from the husband in consideration of marriage.

<sup>14</sup> See, the Qur'an, verse 2:229

<sup>15</sup> In the book of tradition of Abu Daud, see generally,

[http://www.wponline.org/vil/Books/SH\\_SL/islamic\\_law\\_regarding\\_divorce.htm](http://www.wponline.org/vil/Books/SH_SL/islamic_law_regarding_divorce.htm)

<sup>16</sup> See, D.F. Mulla, *supra* n. 13, that upon exercising right of divorce, remarriage is not possible unless the wife was married to a third person and then divorced after consummation of the marriage.

<sup>17</sup> See, Section 7 of the Muslim Family Law Ordinance 1961

<sup>18</sup> *ibid*

<sup>19</sup> Section 7(6), *ibid*

<sup>20</sup> Act N° VIII of 1939

<sup>21</sup> Sultana Kamal, *supra* n. 1

<sup>22</sup> See, Sec.4 of the Dissolution of Muslim Marriage Act 1939

<sup>23</sup> See, *supra* n. 13, Mulla, p. 305; the argument behind this assertion assumes that in Islamic marriage the woman belongs to the members of her husband's family. If she lose the faith from Islam, and her husband's family still belongs to the Islamic faith, she could regain the faith. Whereas for husband, if he loses his faith from Islam, there is also a chance that he might convince the woman to follow his way.

<sup>24</sup> Even in rural areas, there is increasing support for women to participate in economic activities outside the home.

<sup>25</sup> See, for example, the works on this subject of Dawoud El-Alami, Abdullahi Ahmed An-N'aim, Lucy Carroll, Asghar Ali Engineer, Ahmed Ibrahim, Daniyal Latifi, et al., quoted in, Dr. Faustina Pereira, *Post Divorce Maintenance for Muslim Women and Islamist Discourse*, Dossier 22, "Women Living Under Muslim Laws", n. 3, see at, <http://www.wluml.org/english>

<sup>26</sup> Dawoud El-Alami, Mut'at-al-talaq under Egyptian and Jordanian Law, 2 Yearbook of Islamic and Middle Eastern Law 54 (Cotran and Mallat, eds. 1995), see in *ibid*, n. 5

<sup>27</sup> As stated in Gazette of Pakistan, Extraordinary, 20 June 1956, that "[i]slam very justly claims to be a simple and liberal creed . . . . The Qur'an says that previous societies perished because they were burdened with too much inflexible law and too much unnecessary ritual . . . . No progressive legislation is possible if Muslim assemblies remain only interpreters and blind adherents on ancient schools of law."

<sup>28</sup> *Ibid*, at 1215

<sup>29</sup> PLD 1978 Quetta 117, in Dr. Faustina, *supra* n. 25

<sup>30</sup> Sec. 5, the Ordinance (1961)

<sup>31</sup> Sec. 6, the Ordinance (1961)

<sup>32</sup> Asghar Ali Engineer, *Muslim Women and Far Reaching Changes in Bangladesh*, <http://www.newark.rutgers.edu/~rtavakol/engineer/bangla.htm>

<sup>33</sup> Seminar on Muslim Women held in Delhi on 7-8 April, 2001, where Ulama themselves agreed that dowry is an anti-Islamic practice and a campaign should be launched against it.

<sup>34</sup> Who are mostly semi-literate holding the position of priest in the mosques across the whole country, but those who hold such position in villages are much influential among the villagers, and therefore, their judgement or rulings on certain religious issues (*fatwa*), though not recognized by legal system of the country, have an affect in the local area.

<sup>35</sup> In the *Shahida Begum* case, the Court observed that *fatwa* means legal opinion, where in the legal system of Bangladesh only the court is vested with the power to give such opinion on a dispute arising out of Muslim or other laws; *fatwa*, sometimes is argued as a 'religious decree' given by the person or a body authorised in this respect.

<sup>36</sup> See, The Daily Star, 2001/01/02