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Research Monograph

on

WOMEN POSITION UNDER THE FAMILY LAWS OF BANGLADESH: A CRITICAL ANALYSIS

A RESEARCH MONOGRAPH SUBMITTED IN THE PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF BACHELOR OF LAWS

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Letter of Transmittal

To,

Sanjoy Pal

Lecturer, Department of Law,

Sonargaon University, Dhaka.

Subject: For the submission of Research Monograph on "Women Position under the Family Laws of Bangladesh: A Critical Analysis."

Dear Sir,

It is a matter of pride for me to submit the Research Monograph on "Women Position under the Family Laws of Bangladesh: A Critical Analysis."

While doing this research monograph, I have tried my level best to keep the required standard. I hope, this dissertation will fulfill your expectation. I hope that you would be kind enough to go through this dissertation for you kind evaluation.

I am always available for any clarification or any other necessity of any part of this Research Monograph at your convenience.

Yours obediently

Juma Aktar

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Declaration

I am Juma Aktar (ID- LLB1803015023) a student of LLB, hereby declare that, this Research Monograph entitled on "Women Position under the Family Laws of Bangladesh: A Critical Analysis" has been performed only by me and the research paper has not been submitted any book or journal or anywhere earlier. I also affirm that this research paper has done by me obeying copyright provisions and it is not counterfeited.

Signature:

Date:

Supervisor Certificate

This is hereby certified that the research Monograph titled "Women Position under the Family Laws of Bangladesh: A Critical Analysis" submitted by my student- Juma Aktar (ID-LLB1803015023), in fulfillment of the requirements for LLB from Sonargaon University, under my active supervision and guidance and that no part of this paper has been submitted anywhere earlier, to the best of my knowledge.

Sanjoy Pal

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Abstract

'Family law and women' has always been a contentious issue. In South Asia, as elsewhere, there is a simmering discontent that family law does not allow gender equality, which is apparently granted at the level of international law as well as in the realm of constitutional law. In religious and official family law, on the other hand, women have only equitable rights. In social reality, women may even be denied such equitable treatment. There is, it would seem, a popular belief that family law is the last bastion in which women need to achieve equal rights with men. The term women position refer to the status of freedom and entitlements of women and girls of all ages. These rights may or may not be institutionalized, ignored or suppressed by law, local custom, and behavior in a particular society. These liberties are grouped together and differentiated from broader notions of human rights because they often differ from the freedoms inherently possessed by or recognized for men and boys, and because activists for this issue claim an inherent historical and traditional bias against the exercise of rights by women and girls. These problems are now not so complex now in different family laws in BD, but further amendments are needed.

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Chapter One

Introduction

1. 1 Background of the study

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%)1 . There are several indigenous tribes as well (i.e. 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.

There are criticisms that the traditional legal scholarship is a political practice which systematically demands obedience of women to authority relations constructed from the male standpoint in the name of legality. New laws have to be formulated to reflect Bangladesh's concurrence with international laws such as the Universal Declaration of Human Rights and CEDAW. While religion and culture have to be respected, violations of basic human rights in the name of religion or tradition must be categorically condemned and shunned by the laws of the land. Most importantly laws that govern both public and personal spheres must be compatible to the Constitutional laws and be equally applicable to all citizens irrespective of sex, religion or the community they belong to. The Personal or Family Laws are under the General Law but mostly are governed by the civil law: the matters which directly affect women such as marriage, divorce, dower, maintenance, guardianship, custody, inheritance and restitution of conjugal rights are separately governed by each religious community's "religious personal law" system. But these laws are not free from defects which need to be looked into.

1.2 Research questions

- Weather the family laws in Bangladesh are effective for ensuring women's perfect position or not?
- What are the problems in family laws of Bangladesh which creates barrier on ensuring perfect position of women?
- Weather reforms are needed in family laws or not?
- What type of amendments should be included in different family laws for improving the overall situation?

1.3 Research objective

- To find out in the core concept of different family laws.
- To understand family laws deeply and the lacuna there.
- To know family laws are how effective for the betterment of women.
- To find out the possible solutions for the betterment of women's position in family laws.
- To examine the ongoing perspective on courts and the global, local and national legal reactions, covering from statutory law to exceptional legal decisions, towards the idea of reformation of Bangladesh’s family laws in settling cases recording before it.

1.4 Methodology

The methodology of this research paper are qualitative and comparative and also all around dependent on secondary materials however to some degree I have utilized essential information moreover. The secondary source of data are Books, digital books, DLR, AIR, PLD, online case reports, diaries, sites and newspapers. In order to complete my research from various sources, I have collected materials from books, journals, internet, and law reports and responds data relating to family laws of Bangladesh.

1.5 Limitation of the Monograph

I have collected all the materials from different books, scholars' articles and offices from Law organization. I have collected the information about International aspect of family laws from different site of internet. At first I have collected different books relating to writ petition. But I cannot go through all the books and journals due to the shortage of time limitation. I had only a few months for finishing the research Monograph. But I have not been able to present all related information in this monograph. I have only 2 and half months for making this monograph.

Chapter Two

Development and Constitutional framework

2.1 Development of family laws in Bangladesh

The movement for liberation in Bangladesh accelerated the urge of women towards social and legal emancipation. Women played a significant role in the freedom movement. But the literature primarily portrays women's contribution in the movement as victims of rape by Pakistani soldiers and collaborators, or as women left alone by a freedom-fighter father, brother or husband.[1]

After independence, the sovereign Democratic Republic of Bangladesh gave new promises to women, acknowledging their contribution in the liberation movement. Speaking to a mass crowd in Dacca in March 1972, the father of the nation, also regarded as the friend of the nation or 'Bangabondhu'. Sheikh Mujibur Rahman stated: In the past religion has been exploited in order to enslave our mothers and sisters; this will no more be permitted. Some legal measures were devised in this period, supposed to advance women's welfare and to deter crimes against women by more severe punishments, particularly the Cruelty to Women (Deterrent Punishment) Ordinance. 1983 and the Family Courts Ordinance, 1985. Details of these enactments are discussed further below. The role of the government in islamising the state needs to be discussed in this context, particularly when the constitutional amendments are analysed. Because of this Islamic trend, the government did not ratify the UN Convention on All Forms of Discrimination Against Women of 1979 in full and reserved certain clauses which conflicted with the sharia. However, in family law this pressure is creating confusions and contradictions, as women do not enjoy absolute equality. Further, in social reality, women are not even given those rights which are granted under the Islamic and official family law. The attempts to improve the status of women which have been taken by the politicians have remained largely rhetoric and did not reduce the domination of males. It remains to be seen to what extent the various measures could protect women from economic deprivation and violence.

[1] Ahmed, Rahnuma: 'Women's movement in Bangladesh and the left's understanding of the woman question'. In The Journal of Social Studies. No.30, 1985, pp.41-56, at p.48.

2.2 Constitutional framework of women's rights in Bangladesh

In fulfilment of his promise to women, the father of the nation stipulated fuller participation of women in the national life by confirming it in the Constitution of Bangladesh, which came into effect on 16 December 1972, exactly one year after independence from Pakistan.This shows that women's rights were not at par with those of men so far and that some efforts were made by the Constitution to tackle this disparity. Under article 8 of the Constitution, the fundamental principles of state policy are laws fundamental not only to the governance of Bangladesh but they are also to be applied by the state in the making of laws. However, according to article 8(2) of the Constitution of Bangladesh, the fundamental principles are not judicially enforceable or justiceable as fundamental rights.

As per article 29(2) of the constitution, No citizen shall, on grounds only of religion, race, caste, sex or place of birth, be ineligible for, or .discriminated against, in respect of any employment or office in the service of the Republic. And this provision is judicially enforceable. While providing for equality of opportunity to women, the Constitution under article 29(3) (c) has explicitly given the right to the state to reserve certain employment and offices to men alone, if they are seen as unsuited to women. This urge of the legislature can also be gathered in other provisions of the Constitution.

the legislature recognises the unequal status of women in Bangladesh, although they outwardly claim that the Constitution ensures sexual equality. The tenor of all these provisions read as a whole makes it obvious that the drafters of the Constitution could not fail to acknowledge tacitly the fact of the inequality present in the status of women.[2]

[2] Sobhan, Salma: Legal status of women in Bangladesh. Dhaka 1978, P. 5

2.3 Reforms to family law in independent Bangladesh

The development of family laws in South Asia shows generally that the aim of reforms was not so much to emancipate women but that concern with religious politics has been dominant. The personal law system of Bangladesh has seen hardly any substantial change in contrast to the changes in the general law regarding violence against women, dowry, cruelty and the establishment of Family Courts. Men as law makers have been blamed for not making substantial reforms in the discriminatory features of the religio-personal laws, as this would weaken their own interests.[3]

In fact the major portion of family law reforms made in Bangladesh was in the general law effecting all the communities. Legislative enactments in Bangladesh have been made on the issues of restraining dowry by the Dowry Prohibition Act, 1980, prohibition for cruelty to women by the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 and establishment of Family Courts by the Family Courts Ordinance 1985 which are general law affecting all communities.

Only the issue of registration of marriage and divorce has been tackled for the majority of the population by the Muslim Marriages and Divorces (Registration) Act 1974. However, there is a demand for registration of marriage and divorce in all communities as it is becoming more widely recognised that non-registration works against the interests of women. This might be regarded as a modified version of achieving uniformity of family laws in Bangladesh. We are regarding it as a better method of uniformity as it does not generate agitation, conflict and tension in the communities concerned because only procedural uniformity is effected, while substantive rights are not curtailed.[4]

[3] Khan, Salma: The fifty percent: Women in development and policy in Bangladesh. Dhaka 1988, p.17

[4] Taslima Monsoor, From Patriarchy to Gender Equity: Family Law and its Impact on Women in Bangladesh, ProQuest LLC, 1994, P. 195

In Bangladesh the ambivalence of the government to enhance the rights of women under family law can be gathered by analysing the different Acts and Ordinances, which were enacted at different times. On the surface, the Acts show that they are ameliorating the status of women. But in fact, in social reality, the legislature could not put themselves out of the patriarchal interpretation of the laws. For example, there are still no laws which state that the minimum age of marriage of males and females are at par; girls have always an earlier age of marriage. However, laws enacted after independence to enhance the position of women signify that the legislature is now more sympathetic to women. On the other hand, there is a growing reluctance against the effective implementation of such laws. The main obstacle that lies in the way of the practical application of the legal rights of women in Bangladesh is primarily the inherent contradiction of attitudes, that persist in a maledominated society.

Chapter Three

Characters of Family laws

3.1 Bangladeshi family laws and religious laws

The Muslim personal law covers the field of marriage, divorce, maintenance, guardianship of children and inheritance whereas the general law covers the rights under the Constitution, penal codes, the civil and criminal procedure codes, evidence act etc. It is necessary to examine the legal status of the Muslim women in Bangladesh in the context of these two sets of law as in both cases women are supposedly fortified with theoretical legal rights, but there is a gulf of difference existing between theory and its actual application. Most important of all, it must be seen that some of these laws though excellent in theory prove largely elusive in practice. According to Fyzee, "The Koranic reform came as a super-structure upon the ancient tribal laws: it corrected many of the social and economic inequalities then prevalent.[5]" Whereas the spirit of the Quranic legislation exhibits an obvious direction towards the progressive embodiment of the fundamental human values…nonetheless the actual legislation of the Quran had partly to accept the then existing society as a term of reference.

On the other hand, Hindus and other community are the minority in Bangladesh. Some laws are containing their rights as usual. The Christian community also be treated as minor as their short number in Bangladesh, and a few laws are effective to ensure their rights as usual. The existence of separate laws for each community means that the kind of justice meted out to a woman is determined by the religious community she belongs to. Most of these laws are antiquated and originate from patriarchal mindsets and therefore do little to change the status of women as helpless, inferior citizens.

The strongest instruments of change in society are the laws that it is governed by. There are existing laws in the country, which guarantee many rights for women. But many of them are archaic and need immediate reform or amendment. Discriminatory laws need to be abolished and replaced with more progressive ones.

[5] A. Fyzee – Outline of Mohammedan Law, 4th Edition. Oxford University Press, Delhi 1974. p.388

3.2 Discriminations all over

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.

In all spheres, denigrates women, but it certainly does not elevate them. Discussing the law of maintenance of wives under Muslim Law, the law, as it is, cannot probably rescue Muslim wives from, first, being abandoned and then being divorced and left with a life-time of indigence by arbitrary, capricious and whimsical husbands.[6]

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. 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.

[6] Naimuddin Ahmed – Maintenance of Wives under Muslim Law, published in Law and International Affairs Vol.8, N°2, 1985, Journal of the Bangladesh Institute of Law and International Affairs. P.64

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, their 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.[7]

[7] Legislative Initiatives and Reforms in the Family Laws, Published by BLAST, 2018, p. 11

Chapter Four

Women position in laws relating to marriage and divorce

4.1 Position of women in marriage laws

Marriage in Islam is a contract and every Muslim of sound mind who has attained puberty may enter into a contract of marriage. Puberty is presumed, in the absence of evidence, when one reaches the age of 15 years, but this presumption is rebutable.[8]

Until the age of puberty, a minor may be given in marriage by his or her guardian and though this is in fact against the provisions of the Child Marriage Restraint Act, such a marriage even 4 under that Act would not be void. Under the Sharia Hanafi, a girl given in marriage below the age of puberty can repudiate that marriage after she attained it and up to the age of 18 provided the marriage was not consummated. By statute puberty is no longer relevant and girl given in marriage below the age of 16 can repudiate the marriage either on the attaining of 16 years, or puberty, where she was married before puberty. Since according to the Sharia a girl is free from guardianship at puberty and by the time she is 13 this is assumed, the law presents another anoamaly in that a girl can give herself in marriage if she wishes below the age of 16, if she has attained puberty and the marriage would be valid though the person officiating and the groom himself where he was over 18 would be liable for punishment under the Child Marriage Restraint Act.

A Muslim male can contract valid marriage with a Muslim as also with a Ketabi (Jew or Christian). But his marriage with an idolatress will be irregular. On the other hand, A Mulsim woman may not contract a valid marriage with any one else but a Muslim. A marriage with a Christian or a Jew would be irregular while a marriage with a Hindu would be invalid (that is any children born would be illegitimate). It simply means that while a man may marry someone who is not his "social equal" a woman should be protected against such marriages. A Muslim

[8] D.F. Mulla – Principles of Mohamedan Law, 17th Ed. M.M. Tripathi (Private Ltd) Bombay 1972. P, 255

male can take four wives at a time, but a Muslim woman cannot take more than one husband. Even a male marries having already four wives, the fifth marriage is not void, but only irregular. Though Islamic Law vastly improved the then status of woman, the idea of woman being a property could not be altogether thrown away as can be found from the permissibility of plurality of wives. However, realising the evil effects of and the injustice inherent in the polygamy of men Muslim Family Laws Ordinance, 1961.

Though it can be said that Muslim law in all its egalitarian principles confers upon women equal status is also interpreted in various other ways. Though it was always felt that the man must marry himself to a woman of equal status, there was no such provision for the women that a woman must marry herself to a man of equal status. Rather it was always considered that a man, on marriage with a woman of lower status, would simply elevate her position to his own position. This concept of equality between the two parties to a Muslim marriage was traditionally known as kafa'a. The idea of faskh demonstrates the uncommon platform on which men and women stand in Muslim law. This concept was that a woman who contracts herself to marriage with a man of unequal status without the consent of any of her male relations would render such a marriage violable and rescindable by the Court.[9]

In Bangladesh, Hindu marriages differ from caste to caste. The Hindu marriage rituals have often no lawful ground. So, when the Hindu women want to come out of bad marriages they are in trouble because there is no marriage registration system in the Hindu society in Bangladesh. Consider the case of Kazali Rani Das, 23. She works as a day-labourer at her village. Her neighbour, Sanjoy Madhu, lured Kazali with a marriage proposal and convinced her. Then they got married and began their conjugal life at the house of Kazali's parents. Before long, Kazali becomes pregnant and Sanjoy is asked to take Kazali to his own house. Kazali's trouble begins here. It does take long for Kazali to understand that she has fallen into a trap. Sanjoy delays to take Kazali to his house by making false excuses and later disclaims his marriage with her. Kazali is now too helpless to express her plight. Society does not want to believe what she says. She has no official document, as her marriage was not registered.

According to Hindu social customs, Hindu marriages are solemnized merely through some religious rituals. There is no marriage registration system for Hindu people in Bangladesh. It is surprising that there is also no Hindu marriage law or Hindu marriage register in the country.

[9] Mohammad Nazmi, Mohammadan Law (Allahabad: Central Law Publications, 2005), p. 200

So, if any Hindu woman suffers in the hands of her in-laws, she does not get legal help. As per a 1946 law, Hindu women can file cases with courts to only regain the rights to conjugal life. Besides, the Hindu women can file cases under Family Court Ordinance 1985, Dowry Act 1980 and Women and Children Repression Act 2003. But these laws are too inadequate to protect the Hindu women's rights. Besides, new laws have been made in India after independence in 1947. These include Hindu Marriage Act 1955, Immature Children's Property Act 1956. Efforts to enact laws to protect Hindu women's rights in Bangladesh are thwarted by conservatives. There are Hindu men who leave their first wives and take second ones, but the same people resist changes for the better. Although the clauses No 19 (1) and 19 (2) of the constitution carry clear provisions that the state will ensure equal rights to all citizens and remove social and economic disparities, no government came up with steps to reform Hindu laws for protecting Hindu women's rights.

Muslim Law still allows polygamy “with the previous permission in writing” from his first wife and a wife can only file for divorce from her husband if her husband gives her the permission to do so in a marriage certificate. A man, however, can divorce his wife whenever he wants. Under Muslim Law a man is always the legal guardian of a child and the mother only has temporary custody of the child up to a certain age depending on the sex of the child. But she is not the natural guardian either of the person or property of the child; the father, or if he is dead his executor, is the legal guardian. A Hindu woman is the most vulnerable. The rights and obligations of Hindus are determined by the principles of Hindu law. Although in India the laws have been reformed.

4.2 Women position in divorce laws

Section 7 of the Ordinance provides that 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 to give a copy of the said notice to the wife. The Chairman on receipt of the notice would constitute Arbitration Council for effecting a re-conciliation which, if successful, would render the divorce ineffective. It is an offence not to notify the Chairman about exercise of Divorce by the husband. The provisions of Sec. 7 of the Ordinance apply mutatis mutandis in case of divorce exercised by the wife and the divorce does not take effect unless notice thereof is given to the Chairman and 90 days have elapsed thereafter. The husband can delegate his power of divorce to his unconditionally or with condition and that is called Talak-e-Tawfeez. When any condition is stipulated the wife can divorce her husband in the happening of that condition.

In Khula, the marriage is dissolved by an agreement between the parties for a consideration paid, or to be paid, by the wife to the husband, it being necessary condition that the desire to separate should come from the wife. Where desire to the separation is mutual, it is said to be Mubarat. A wife is entitled to Khula as of right or restoration of what she had received in consideration of 5 marriage, if she satisfies the conscience of the court that it will otherwise mean forcing her into a hateful union. As stated above, a Muslim female does not have the right to divorce in the way a mal-e has, but she could seek judicial divorce on grounds permitted by Muslim Law. The Dissolution of Muslim Marriage Act, 1939 (Act N° VIII of 1939 (Vide Pakistan Code 1966, Vol.IX,P.716). was passed in order to consolidate and to clarify those grounds and also to add some new grounds.

A wife is entitled to obtain a judicial divorce on neglect or failure of the husband to provide maintenance for two years. But if the wife refuses herself to her husband without any lawful excuse and deserts her husband, or otherwise willfully fails to perform her marital duties, she has no right to claim maintenance and cannot obtain a decree for dissolution of marriage on the ground of nonpayment of maintenance. The fact that the wife is a woman of means would not be a defense to the claim of judicial divorce for non-payment of maintenance. A Muslim woman can obtain judicial divorce on any ground recognized by Muslim Law. Thus a wife is entitled to judicial divorce if the husband brings false charge of adultery against her unless the husband bonafide 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. Incompatibility of temperament as results in a hateful union has been accepted as a ground for seeking judicial divorce. Before the Dissolution of Muslim Marriage Act 1939 apostacy from Islam of either party operated as a complete and immediate dissolution of marriage. After passing of the Act, apostacy from Islam of the wife does not dissolve the marriage (Sec.4 of the Act) while apostacy of the husband dissolves the marriage immediately.[10]

[10] D.F. Mulla – Principles of Mohamedan Law, 17th Ed. M.M. Tripathi (Private Ltd) Bombay 1972. P 305

Chapter Five

Women position in laws relating to maintenance and guardianship

5.1 Maintenance laws and women's position

In accordance with Muslim Law, the father is bound to maintain his daughter until she is married. The fact that the mother has the custody of the daughter till the latter attains puberty does not relieve the father of his obligation to maintain the daughter. If the father is poor, but the mother is in easy circumstances, the mother has the obligation to maintain the daughter. But a father is not bound to maintain a daughter who is capable of being maintained out of her own property. A Muslim mother is entitled to maintenance from her son if she is poor or if the son is financially solvent. A Muslim husband is bound to maintain his wife so long the wife remains faithful to him and obeys his reasonable orders. If the wife refuses herself to her husband without any lawful excuse and deserts her husband or otherwise wilfully fails to perform her marital obligations she has no right to claim maintenance from the husband. But if the wife refuses to perform her marital obligations on the failure of the husband to pay the prompt dower the husband will not be absolved of his liability to maintain his wife. A Muslim woman in the event of divorce is entitled to maintenance by the husband till the expiry of the period of Iddat (e.i.90 days, and in case of a pregnant wife till the end of the pregnancy). A Muslim male maintains his daughter as best as his means permit and a husband also maintains his wife to the best of his ability so long the relationship remains good, but if the relationship is estranged, the condition of the wife is very difficult. The social milieu and cumbersome court procedure made it difficult for the wife to have maintenance through Court.

According to Mulla's Principle of Mohammedan Law, the husband is bound to maintain his wife (unless she is too young for matrimonial intercourse) so long as she is faithful to him and obey his reasonable orders. But he is not bound to maintain her who refuses herself to him or is otherwise disobedient.[11] Unless the refusal or disobedient is justified of non payment of prompt dower. If the Husband is neglect or refuses to maintain his wife without any lawful cause the wife may sue him for maintenance, unless the claim is based on a specific agreement.[12] Muslim Family Laws Ordinance, 1961 tried to evolve a procedure through which

[11] Muhammed Ali Vs. Mt Gulam Fatima (1983)160 I.C. 335,(135)A.L. 902.

[12] Abdool Futtah Vs.Zabmessa (1881) 6 Cal. p,631.

the wife can easily have her remedy, but it has not produced any appreciable improvement. The Family Courts Ordinance, 1985, however, has been promulgated to deal with divorce and related matters and provisions have been made to dispose the cases of within the shortest time possible. A Muslim widow is essentially dependent on her son, for, generally even her share in the property of her husband remains in the hands of the son and ironically enough, her fate depends upon the attitude of the daughter-in-law. But if the widow has no son to depend upon the relations of the husband; her condition in most cases is miserable.

The Hindu Women's Right to Separate Residence and Maintenance Act" – 1946, says that, notwithstanding any custom and law of a woman is entitle to have maintenance and separate residence from her husband-

i. If he is suffering from certain loathsome diseases.

ii. If he is abandoned her.

iii. If he has married another woman.

iv. If he is converted to another religion.

v. If he is cruel to the wife

vi. If he keeps concubine

However a woman cannot claim maintenance if-

i. She is guilty of unchastity

ii. She convert to another religion

iii. She refuse to go back to her husband without any justified cause

iv. She has re-married to another person.

5.2 Guardianship laws and women's status

In the matter of guardianship of children, a Muslim woman is definitely at odds. Under Muslim Law, the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian either of the person or property of the child; the father alone, or if he is dead, his executor is the legal guardian. In Islam a careful distinction is made between being entitled to the custody of one's children and being their guardian…….one would be tempted to compare the difference between these two concepts to the difference between possession and ownership. In any event, in Muslim Law, the mother is never entitled to the guardianship of her children…….However, a mother is always entitled in the first instance to the care and custody of her young children. Her sons she may keep till they are seven, and her daughters till puberty. The father is responsible for their maintenance during that period. A mother may lose custody of her children, particularity her daughters, if she re-marries a stranger, someone that is, who is not barred to the children by the rule of consanguinity. These are the basic rules, but they have been modified, not only by the Guardian and Wards Act, but there is also a fairly substantial amount of case-law on the subject, which on the whole has been very sane.[13]" It is laid down by the Guardian and Wards Act, 1890 that the courts have stated that these provisions are for the benefit and protection of the child, and that it is the courts paramount duty to consider the welfare of the children over the rights of the parents.[14]

Remarriage of the mother outside the permitted degrees has not been held an absolute reason for depriving her of the custody of her children. Were the children having been all along in the custody ceased, it was still considered advisable to let them continue in her care and control, as the father had re-married and it was felt that the children's interests would not be so well looked after by their step-mother. The father is only free from the burden of maintaining his children where they are being withheld from him illegally. The mother's poverty is never a sufficient reason to deprive her of her right to the custody of her children.

[13] Salma Sobhan, Legal Status of Women in Bangladesh, Bangladesh Institute of Law and International Affairs, 2007, p.29
[14] 20 D.L.R.1968 P.1

5.3 Restitution of conjugal rights

The early law on restitution of conjugal rights has already been discussed.[15] It was argued that although this remedy is allowed to both husband and wife, its Anglo-Indian development has strengthened the already strong position of a Muslim husband. However, there are grounds of defence which can be used by the wife to refuse the forced restoration of her conjugal life. Payment of prompt dower is one such defence, which acts as a condition. precedent to the husband's claim for restitution of conjugal rights.[16]

The courts, before the independence of Bangladesh, seemed to be not very appreciative of these defences. The shift in the attitude of the judiciary can be gathered if we consider the cases reported after the emergence of Bangladesh. After independence, in cases on restitution of conjugal rights, judges have forcefully advanced social welfare arguments against orthodox canonical precepts. The leading example here is Justice S.M. Hussain's potent pronouncement in Nelly Zaman v Giasuddin Khan[17] - A reference to article 28 (ii) of the constitution of Bangladesh guaranteeing equal rights of women and men in all spheres of the state and public life would clearly indicate that any unilateral plea of a husband for forcible restitution of conjugal rights as against a wife unwilling to live with her husband is violative of the accepted state and public principle and policy.

In fact, irrespective of gender, the Family Court judged, at least in cases of restitution of conjugal rights, are bringing modern insights into family law. Thus, restitution of conjugal rights can be used by the wife when the husband denies the wife a divorce which she wants. However, the plea of equality in restitution of conjugal rights cases may also work against women's interests, as wives could also not force their husbands to continue marital life with all its obligations. Thus, deserted and abandoned wives have been losing their remedy to reconcile with their husbands and to continue with their marital life. One could almost go as far as saying that this law underwrites desertion, but this might be an unintended result.

[15] Layish, Aharon: Women and Islamic law in a non-Muslim state-a study based on decisions of the sharia courts in Israel. Jerusalem 1975, p.105
[16] Shabbir, Mohammad: Muslim personal law and judiciary. Allahabad 1988, pp.104-110;
[17] 34 DLR (1982) 221.

Chapter Six

Some important cases regarding women's status under family laws

6.1 Hafizur Rahman v. Shamsun Nahar Begum[18]

This case is under the Muslim Law, maintenance. In this case the court determined how much and how far the husband is bound to maintain his wife as well as the child. In this case the decision of the High Court Division was set aside because of that it is beyond of the Islamic Law. And court decide the point suo moto.

Shumsun Nahar Begum filed Family count suit no.60 of 1988 in the Family Court and the Court of Assistant Judge, Doudkandi, Comilla on 2-11-1988 for realization of dower money of taka 50,001.00 and for maintenance of each of the plaintiffs, mother and son. The parties are married on 25-3-1985 at dower money of taka 50,000.00. The son borned in their wedlock, on 15-2-1987, and the defendant divorced plaintiff on 10-08-1988. The family court by judgment and order dated 30-10-1990, decreed the suit for Taka 89,000.00 including taka 3,000.00 to the wife as maintenance during the Iddat period at Taka 1000 per month.
In family appeal no.2 of 1991, preferred by the appellant, the learned District Judge, Comilla by judgment and decree dated 20-04- 1992, reduced the amount of Taka 1,000.00 to Taka 600.00 per month in respect of maintenance of wife. The learned District judge deleted Taka 2,000.00 claimed to have been spend by plaintiff at the time of holding that the Family Court Ordinance did not provide for realization of any such amount. The total decretal amount was reduced from taka 89,000.00 to 72,000.00.

It was held that the learned judge of the High Court Division had no jurisdiction to give her any further relief beyond what was granted by the first two courts below. The decision of the High Court Division was set aside because of that it is beyond of the Islamic Law. And court decide the point suo moto.

[18] 51 DLR (AD) 1999 p.177

6.2 Abu Bakar Siddique v. S.M.A. Bakar and Others[19]

This case is a unique case in Muslim personal law, it maintain the doctrine of welfare of child. This is the only case which gave judgment which is separate from sharia law which opens a new door to ensure natural justice.

ppellant Abu Bakar Siddique filed an application under section 25 of the Guardian and Wards Act (Act VIII of 1890) in the Court of District Judge, Dhaka for Custody of his minor son. The boy is about 8 years, was born on 22nd may 1976. He married respondent who is an M.B.B.S. doctor on 10th June 1973 she on getting a job left for Saudi Arabia leaving the boy with his father. In July 1978, she came back home and after two months she again left for Saudi Arabia. This time she took the boy with her. Appellant also went to Saudi Arabia and lived with his wife and son. But come back in April 1981 leaving the boy with his wife. In a suit for dissolution of marriage is filed at the instance of respondent. Her marriage with the appellant was dissolve in June 1982. in may 1984 respondent returned with her son to Bangladesh and went back to Saudi Arabia keeping the boy with her relations. At this stage the appellant filled an application for the custody of the boy. She filed a written statement thereafter denying the allegation. It was stated that, the boy has been suffering from 'Hirshtring' a diseases. Steps were to taken to take boy to the UK. Welfare of the boy would be best served if he is allowed to live with his mother District Court agreed with her statement and dismissed the suit, and then the appellant go to High Court Division, however, it was also dismissed in the same ground.

Question regarding Hizanat (custody) of a minor boy or daughter is depended on his or her age. The right of mother to custody of infant child: the mother is entitling to the custody of her male children until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by her husband unless she marries a second husband in which case the custody belongs to the father. The right of father to custody of infant child: right of father to custody of a boy over seven years of age and an unmarried girl who has attained puberty. Failing the father the custody belongs to the paternal relations. If there be none of these it is for the court to appoint a guardian of the person of the minor. - Mulla's Principle of Mohammedan Law. Rules of Hizanat as formulated in Islamic Law find place in Hedaya. The following tradition of the Holy prophet (upon whom be peace) is quoted, "A women once applied to the Prophet, saying O' Prophet of God! That is my son the

[19] 38 DLR 1986, AD p.106

fruit of my womb, cherished in my bosom and suckled at my breast, and his father is desirous to taking him away from me into his own care," to which Prophet replied, "thou hast a right in the child prior to that of thy husband, so long as thou do'st not marry with a stranger". (Chapter XIV 'on Hizanat') In the hedaya there is also mentioned of the reason as to why the mother should have the custody of a infant child. Thus it is stated that, a mother is naturallynot inly more tender, but also better qualified to cherish a child during infancy, so that committing the care to her is of advantage of the child.

6.3 In case Zohora Begum v. Ahmed Munawar [20]

here the court observed as followed, "…… it would be permissible courts to differ from the rule of Hizanat stated in the text book on Muslim Law for there is no Quranic or traditional text on the point. Courts which have taken the place of Quazis can, therefore, come to there own conclusion by process of Ijtihad which, according 'Imam-al- Shafei" included in the doctrine Qiyasit has been mentioned earlier that the rule propounded in different text books on the subject of Hizanat is not uniformed. It would therefore be permissible to depart from the rule stated therein, if on the fact of a given case its application is against the welfare of the minor, I am fortified in this view by the instance in which a Quazi of another school of law which took a liberal view of the matter."

6.4 Amulya Chandra Modak v. The State[21]

This case is a milestone under the Hindu Personal Law, to decide requirement of valid marriage, of Hindu community. Fact behind the Case This case for the prosecution in brief is that complaint Kalpona Rani Modak (aged about 17/18 years at the time of occurrence) used to lived with her parents in the house whice is adjacent to the house of accused Amulya Chandra Modak (aged about 22 years at the time of the occurrence) the accused mother was ailing. The accused in month of Baisakh 1383 B.S. took her to his house to look after his mother and also work in his house. The accused mother also asked her to nurse and work in her house about 10/15 days latter the condition of accused mother deteriorated and she was transferred to her elder son's house at Mymensing town. After his mother went Mymensing the accused proposed to marry her by exchanging garlands and also proposed to marry her ceremonially after his mother returned from Mymensing.

[20] 17 DLR 1965, p,138; PLD 1965, Lah, p,695
[21] 35 DLR 1983 p.31.

On 17th Baishakh 1383 B.S. at night the accused brought two readymade garlands (made of paper) and secretly exchanged garlands with her in night. She was made to understand that she was married to appellant. Thereafter Kalpana Rani co-habited with him under the belief thatshe was lawfully married to him. In this way the accused co-habited with her about one and a half month. There after the accused mother came back from Mymensing , Kalpana Rani told him to marry her ceremonially. The accused promised to marry her within 2/3 days. But his parents did not agree with this and drove her out from their house. Kalpana Rani told the accused that she is pregnant by him when the accused again promised to marry her. The accused brought some roots and ask her to eat the same so that a miscarriage could take place but se denied to do this. Thereafter she narrated the occurrence to her parents, her father reports this to the villagers, they request to the accused father to get his son married to Kalpana Rani as the accused had made her pregnant even after such request the parents of the accused refused to agree.

According to 493 of the Penal Code, Muhammed Habibur Rahman, j accused Amulya Chandra Modak has been convicted by Mr. S.M.A. Rahman, Assistant Session Judge. Second Court, Mymensing on 30.12.1978 under section 493 of the Penal Code and sentenced to suffer rigorous imprisonment for five years and pay a fine of taka 1,000.00 in defaults to suffer 2 months more.

Chapter Seven

Recommendations and finishing up

7.1 Recommendations

1. 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.

2. 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.

3. Discrimination regarding guardianship and custody of children between father and mother should be abolished and the government should take measures to ensure the equitable right of the mother.

4. Men and women should have equal rights to seek divorce or dissolution of marriage. Enabling legislation should be in place to facilitate remarriage of both spouses after dissolution of marriage.

5. Hilla marriage and Fatwa should be prohibited and stringent penal provisions should be incorporated in the Women and Children Repression Prevention Act to abolish such practices.

6. Procedural amendments should be effected in the Family Courts Ordinance in the many areas.

7. The Government of Bangladesh should take concrete steps to withdraw reservations to Article 2 and 16 (1) (c) of CEDAW.

8. 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.

9. 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.

10. 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.

11. Registration of all marriages, whether civil or religious should be made mandatory and a uniform registration form should be introduced for all marriages.

12. 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.

13. 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.

7.2 Conclusion

The question of women has acquired great importance throughout the world today among all communities. This is for obvious reasons. For centuries, women have been in total subjugation in male-dominated patriarchal societies. It has been a “natural law” to regard women as the inferior sex and for them to submit to male authority for the smooth functioning of society in its day to day progress. In the today’s world it is an issue of impartiality of law irrespective of race was clearly crucial. Indeed the law which prevented women from achieving their full development as individuals must be bad law. So the personal law which is discriminate against women should be reformed the only solution of this gender discrimination by the personal law is enacting a Uniform Personal Law, the women must no be deprived any more. Since we see there are many barriers in implementing necessary reforms in the personal laws, we need to accelerate awareness programs among the common people against the violence oppression and deprivation to women. Educated community should move forward to ensure social justice and equality. They need to speak for the deprived class; they have to take strong possession against injustice. If this social conscious class continues whole heartedly to contribute the social awareness activities then very soon the conscience of the nation would be awaken, and the Law commission should not get chance to termed this demand of a uniform law as the opinion of few rather it would be the demand of the majority. Only then we will be succeed to establish equality, that will lead us to social order and justice in its real sense.

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