Research Monograph

On

"Critical Analysis of Legislative Changes of Family Laws in Bangladesh"

Research Paper submitted in partial fulfilment of the requirements of the Bachelor of Laws with Honor's (LLB) under Sonargaon University

Submitted To:

Sagor Hossain

Lecturer

Department of Law

Sonargaon University

Submitted By:

Khadizatul Kobra Resmi

ID: LLB2101022020

Batch: 22

Department of Law

Sonargaon University (SU)

Sonargaon University (SU)

Date of Submission:

LETTER OF TRANSMITTAL

Date:

To

Sagor Hossain

Lecturer

Department of Law

Sonargaon University

Subject: Submission of Research Monograph on "Critical Analysis of Legislative Changes of Family Laws in Bangladesh"

Sir,

It is a great pleasure for me to submit the research monograph on the topic of **"Critical Analysis on Legislative Changes of Family Laws in Bangladesh"** while researching I tried my best to make this research monograph to enough standard. I hope that this paper will fulfill your expectation.

I therefore, hope that you be kind enough to go through this paper or evaluation.

Yours sincerely,

_____

Khadizatul Kobra Resmi

ID: LLB2101022020

Batch: 22

Department of Law

Sonargaon University (SU)

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…….

Khadizatul Kobra Resmi
ID: LLB2101022020
Batch: 22
Department of Law
Sonargaon University (SU)

SUPERVISOR CERTIFICATION

This is to certify that the thesis on **"Critical Analysis on Legislative Changes of Family Laws in Bangladesh"** has been conducted **by Khadizatul Kobra Resmi, LLB2101022020** in partial fulfillment of the requirements for the Bachelor of Laws with Honor's (LLB) from Sonargaon University (SU). The thesis has been conducted under my benevolent guidance and supervision and is recorded as a bona fide work carried out successfully.

……..

Sagor Hossain

Lecturer

Department of Law

Sonargaon University (SU)

AKNOWLEDGEMENT

All praises be to ALLAH (SWT) who sustained my life in good health and sound mind throughout my entire study period in this country.

Without ALLAH (SWT)'s grace and mercy this piece of work would not have seen the light of the day. "ALHAMDULILLAH.

I wish to express a sincere appreciation to sir Sagor Hossain, Lecturer, Department of Law, Sonargaon University (SU) my research monograph supervisor, advisor, mentor and person whom I admire as a professional man for his benevolent support and guidance to finish this thesis and accomplish my graduate study. Actually, he is my real guide for study purpose matter.

Lastly, I pray my special gratitude to the role of different people whose name have not been mentioned but contributed towards research monograph, my study and personal life.

ABSTRACT

This research paper examines the legislative changes in family laws in Bangladesh, focusing on key reforms in marriage, divorce, inheritance, and child custody, with an emphasis on gender equality and social justice. Over the years, significant changes like the Muslim Family Laws Ordinance of 1961, the Child Marriage Restraint Act of 2017, have been introduced to modernize outdated personal laws. However, these reforms face challenges in implementation, enforcement, and balancing religious traditions with human rights. This paper critically analyzes these legal reforms, assessing their impact on women's rights and identifying gaps that hinder their effectiveness. It also explores the socio-cultural and religious barriers that resist progressive changes. Recommendations are offered to further strengthen family law reforms in the country, particularly in ensuring equal protection for all citizens, irrespective of gender or religion.

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Chapter I
Introductory

1.1 Introduction:

Family laws in Bangladesh, as in many other countries, play a pivotal role in shaping the social fabric, governing matters of marriage, divorce, inheritance, and child custody. These laws are deeply rooted in religious traditions, with Muslims, Hindus, Christians, and other religious communities governed by their respective personal laws. Despite this diversity, a common feature of Bangladeshi family law has been its historical ties to patriarchal interpretations of religious doctrine, often leaving women and marginalized groups at a legal and social disadvantage.

Since Bangladesh gained independence in 1971, the country has made significant efforts to modernize and reform its legal framework, including family laws. Legislative changes, such as the *Muslim Family Laws Ordinance of 1961* and the *Child Marriage Restraint Act of 2017*, have sought to address some of the pressing issues surrounding gender inequality, child marriage, and women's rights. However, these changes have not come without challenges. The intersection of religious doctrines, cultural norms, and evolving global human rights standards has created tensions, particularly when attempts are made to reconcile traditional beliefs with the need for legal reform.

1.2 Purpose of the Research:

The primary purpose of this research is to critically examine the legislative changes in family laws in Bangladesh, focusing on their effectiveness in promoting gender equality, protecting human rights, and addressing social justice issues. Specifically, the study aims to:

Includes a detailed review of the key legislative reforms, such as the *Muslim Family Laws Ordinance of 1961*, *Child Marriage Restraint Act of 2017*. The research seeks to understand how these laws have evolved and how effectively they address contemporary social and legal challenges.

This research will assess the extent to which these legislative changes have improved the status and rights of women within family structures, particularly in relation to marriage, divorce, inheritance, and child custody. It will explore whether these reforms have truly achieved the intended goals of promoting fairness and justice for women.

While legislative reforms have been introduced, their practical implementation and enforcement often face significant challenges. The research aims to identify these gaps, such as legal loopholes, lack of awareness, and socio-cultural barriers that hinder women's ability to access their legal rights.

Family laws in Bangladesh are closely intertwined with religious and cultural practices. The research will explore how religious traditions and social norms influence the development and implementation of family laws and the challenges of balancing religious principles with modern legal frameworks.

Based on the critical analysis of existing laws and their limitations, the research will propose recommendations to strengthen the legal framework of family laws in Bangladesh. This will include suggestions for improving the protection of women's rights, ensuring equality for all religious communities, and enhancing the enforcement of these laws.

1.3 Research methodology:

The methodology to conduct this research work comprises of various methods. The method of preparing the research is on the basis of data collection from different sources like different books, web sites, journals and articles that are written by the of national level. In order to move further, I have also used internet as medium of resources which had helped me to complete this research successfully. Internet has availed a lot of information and resources without which this research could have not been completed. This research monograph is not basic one. It is a liberty-based monograph. The whole research has been done in an organized way. Firstly, the necessary chapters have been selected and then I made every possible effort to collect information required for each chapter. The following methods are followed for preparing this research paper:

- Planning the whole research paper.
- Dividing the research paper into chapters.
- Taking advice from honorable Research Supervisor regarding the collection of websites.
- Discussing with the concern Supervisor.
- Updating and modifying paper for several times.
- Preparing the dissertation research paper.
- Study with concern Supervisor.

1.4 Limitation of the study:

Every research study has some limitation in true sense. So, this research monograph is not the exception of these limitations and limitations reduce the scope of the study. This research paper requires information about the family laws in Bangladesh. Books are not available or easily found in this topic and there are no sufficient documents in this topic. As I am doing such a difficult job for the first time and with immature mind, my incapability of understanding the matter deeply and analyzing it in proper way has also been a limitation of Research paper.

Through resources and articles on the internet were found but many of them could not be accessed as payment had to be made by credit cards in order to view those articles.

1.5 Abstract of the chapter:

This research paper elaborated the topic of "Critical Analysis of Legislative Changes of Family Laws in Bangladesh" into seven chapters. Through those chapters this paper tries to established the practical scenario of family laws in whether it is possible in the context of Bangladesh. In chapter two it deals with the historical background and the concept of family laws and its necessity for the people of Bangladesh. In chapter three it discusses about Muslim Family laws in Bangladesh. In this paper gender inequality in case of marriage, divorce, maintenance, dower, guardianship, inheritance etc. has been shown. In chapter four this paper focused on the application of Universal family

code in Bangladesh by a comparative study on the different family laws existing in Bangladesh.

In chapter five this paper are discuses about the jurisdiction of the court and constitutional guarantees. In chapter six are highlights the evaluation and reform of family laws in Bangladesh. In chapter seven this paper gives some recommendation in the support of harmonization of personal laws of Bangladesh.

Chapter II
Historical Background

The legal system in Bangladesh is not entirely homegrown but has evolved through the influences of Indian, Mughal, and British legal traditions. As a multi-religious and multi-ethnic country, Bangladesh is predominantly Muslim, but it also has significant communities of Hindus, Christians, Buddhists, and indigenous groups. Due to this diversity, matters like marriage, divorce, maintenance, child custody, guardianship, and inheritance are governed by each religious community's personal laws.

Personal or family laws are those legal frameworks that regulate the lives of individuals within their religious communities, in alignment with their respective beliefs. These laws address critical areas of life, such as birth, marriage, divorce, maintenance, child custody, guardianship, and inheritance, with each religious group governed by a distinct set of rules.

However, the idea of a unified family law for all citizens—regardless of religious belief, gender, or place of birth—aligns with the principles of the Constitution of Bangladesh and the concept of universal human rights. Such a unified approach aims to address disparities in treatment based on gender and religion that currently exist in personal law systems. The inconsistencies in the application of these laws could be resolved by adopting a single set of laws that applies equally to all citizens of Bangladesh.

The primary goal of a uniform personal law code would be to provide legal recourse to all individuals, irrespective of religion or gender, ensuring equal treatment in personal and family matters. This uniform code would help eliminate the disadvantages currently faced by many individuals—men and women alike—when seeking justice in family-related disputes. It is proposed as a viable solution for members of all major religious communities in Bangladesh, including Muslims, Hindus, Buddhists, and Christians.

2.1 Basic Concept of family law:

Family law is a diverse and comprehensive area of law that governs family relationships and matters. It encompasses the formation and dissolution of family and domestic relationships, including marriage, divorce, maintenance, custody of children, and division of property. Family law operates within a country's legal framework, addressing issues that directly impact the personal lives of its citizens.

In general, family law refers to the legal provisions that deal with various family-related matters within a given society. It broadly covers both formal and informal laws concerning marriage, divorce, alimony, property ownership, inheritance, guardianship, and child custody—factors that significantly shape the lives of individuals and families.

These family laws are largely governed by statutory provisions and vary from country to country, reflecting different cultural, religious, and legal traditions. Family courts are designated to handle disputes related to these matters, ensuring that conflicts within the family domain are addressed under the law. In Bangladesh, family law differs among various religious communities, with separate laws in place for Muslims, Hindus, and Christians, reflecting the country's diverse population.

2.2 Evolution of Family Courts: From the Family Courts Ordinance 1985 to the Family Courts Act 2023

The introduction of the Family Courts Ordinance in 1985 marked a pivotal moment in the legal landscape of Bangladesh, particularly in enhancing the legal rights and protection of women in family-related matters. Family courts, originally conceptualized in the United States, gained widespread acceptance and have since been implemented in many countries around the world, including Bangladesh. These specialized courts focus on resolving disputes related to marriage, divorce, child custody, and maintenance, offering a more streamlined and sensitive approach to family issues.[1]

In a significant legal development, the Parliament of Bangladesh has recently enacted the Family Courts Act 2023 (FCA 2023), which repeals and replaces the Family Courts

[1] W. J. Shultz, *The Family Court Movement: A History and Commentary* (New York: Columbia University Press, 1950), 45.

Ordinance 1985 (Ordinance 1985).[2] The FCA 2023 aims to modernize and strengthen the legal framework governing family courts, addressing procedural gaps and introducing new measures to ensure greater efficiency and fairness in family law cases.[3]

2.3 The Concept of a Universal Family Code

In many countries, citizens from different religious backgrounds adhere to their respective personal family laws. These laws, often rooted in religious or customary traditions, govern matters such as marriage, divorce, inheritance, and maintenance. However, the idea of a *universal family code* proposes the establishment of a single legal framework that would apply uniformly to all citizens, regardless of their religious affiliation. This type of family code, sometimes referred to as a *uniform personal law*, would require all citizens to follow the same legal principles for personal and family matters, such as succession, land acquisition, marriage, divorce, and family maintenance.[4]

A universal family code aims to create a unified legal system that transcends religious differences, promoting equality and standardization in the application of family laws. Under such a system, people of all religious backgrounds would be subject to the same legal norms and procedures in personal and social aspects of their lives.[5]

In Bangladesh, where diverse religious communities coexist peacefully, the government may explore the possibility of introducing a universal family law. This could ensure uniformity in family-related legal matters while addressing issues of gender equality and social justice that sometimes arise from the current system of

[2] "Family Courts Act 2023: A Modern Approach to Family Justice," *Dhaka Tribune*, February 12, 2024.

[3] S. Alam, "Impact of the Family Courts Act 2023 on Women's Rights in Bangladesh," *Journal of Legal Studies in South Asia* 15, no. 3 (2024): 78–80.

[4] *Universal Family Code: A Comparative Study*, ed. R. V. Patel (New Delhi: Global Law Publishers, 2019), 110.

[5] R. Kapoor, "The Need for a Uniform Civil Code in South Asia," *Journal of Legal Reform* 7, no. 2 (2020): 50–54.

personal laws.[6]Although the introduction of a universal family code could bring about legal harmony, it would also need to address the religious sensitivities and cultural diversity of the population.

2.4 Exiting Family law in Bangladesh:

State has enacted several laws with general application to all to deal with the family matters. The following laws generally cover the personal laws relating to the four religious' communities:

Muslim

a. The Muslim personal laws Application Act 1937
b. The Dissolution of Muslim marriage Act 1939
c. The Muslim Family Laws Ordinance 1961
d. The Muslim family rules 1961
e. The Muslim marriage and divorce (Registration) Act 1974
f. The Marriage and divorce (Registration) Rules 1975

In recent years the legislative instruments which allow certain laws to be uniformly applied in the personal matters of all citizen in Bangladesh. These laws are including:

a. Nari-O-ShishuNirjatan Daman Ain 2000
b. The Dowry Prohibition Act1980
c. The Family Courts Act 2023
d. The Guardian and Wards Act 1890
e. Child Marriage Prohibition Act, 2017

Hindu

a. Hindu widow's Remarriage Acts 1856
b. Hindu Disposition of Property Act 1916
c. Hindu laws Inheritance (Removal of disabilities) Act 1929
d. Hindu law of Inheritance (Amendment) Act 1929

[6] S. Akhtar, "Challenges in Implementing a Uniform Family Code in Bangladesh," *Dhaka Law Review*, January 2024.

e. Hindu Women's Right of property Act 1937
f. Hindu Marriage Disabilities Removal Act 1946
g. Hindu Married Women's Rights to Separate Residence and Maintenance Act 1946

Christians

a. The Divorce Act 1869
b. Christian Marriage Act 1872
c. The Married Women's property Act 1874
d. Succession Act 1925

Buddhists

The Buddhist in Bangladesh have no distinct personal law of their own. They followed the Hindu religious laws and custom in spite of the fact that they renounced the Hindu religion, provides the basis for discussing Buddhist personal laws together with those of the Hindus. Before independence of Bangladesh the Buddhist of East Pakistan were governed by the principle of Hindu law. There is no evidence that the Buddhist community has governed by a separate personal law.

In recent years the legislative instruments which allow certain laws to be uniformly applied in the personal matters of all citizen in Bangladesh. These laws are including:

f. Nari-O-ShishuNirjatan Daman Ain 2000
g. The Dowry Prohibition Act1980
h. The Family Courts Act 2023
i. The Guardian and Wards Act 1890
j. Child Marriage Prohibition Act, 2017

2.5 Necessity of uniform family code:

Bangladesh is a country with several different religious and belief systems. The accepted principle of law is that personal belief systems and laws must be in conformity with the constitution. Article 25 of the Constitution of Bangladesh guaranteed every person to equality before law and equal protection of law. Article 28 of the constitution says that 'the state shall not discriminate against any citizen on ground only of religion,

race, and sex or birth place.'[7] No set of laws can violate these Articles, which essentially protect the religious freedom of Different person or Communities.

With multiple belief systems, come multiple ideological conflicts. To live together in concurrence with such diversity, we need to have uniformity at some level so as to avoid such conflicts. What we need is a universal family code in the form of a sophisticated, harmonized system that skillfully uses the personal laws and yet achieves a measure of uniformity. The universal family code should be such that does not go against the essence the core or fundamental belief of any particular religion and it will not go against the religious freedom which is guaranteed by the Constitution.

[7] Article 28, The Constitution of Bangladesh

Chapter III

Muslim Family laws in Bangladesh

3.1 Introduction:

Muslim Family Law, often associated with the Arabic term *Muamalat*, refers to the rules and regulations governing social and personal conduct in daily life. Essentially, *Muamalat* encompasses the guidelines that individuals are expected to follow in both their personal and social interactions. In this context, Muslim law represents the legal framework that governs the personal and social aspects of Muslim life.

In Bangladesh, Muslim law applies to a wide range of issues including succession and inheritance, preemption in land purchases, land acquisition, marriage, divorce, and family maintenance. To fully understand Muslim law, one must examine the principles of Shariah, the body of divine laws ordained by Allah, which provides comprehensive guidance for Muslim society. Muslim personal law specifically deals with matters such as marriage, divorce, family maintenance, guardianship, and the inheritance of property.

At its core, Muslim law is seen as the revealed will of Allah, a divinely ordained system meant to govern a Muslim community and guide a Muslim state. In Bangladesh, while the courts have the authority to apply Muslim law, this power is partially derived from statutes and is primarily regulated by legislation. Although Shariah principles form the basis of Muslim personal law, the courts' application of these laws is influenced by the statutory framework of the country's legal system.

3.2 Marriage

Marriage is a timeless institution that has played a central role in human civilization. It symbolizes the union of two individuals, providing a foundation for family life, social stability, and the continuation of human society. While in many traditions' marriage is seen as a sacrament, in Islam, it is primarily viewed as a civil contract with spiritual, moral, and social significance.

3.2.1 Definition and Concept of Marriage in Islam

In Islamic terminology, marriage is referred to as *Nikah*, derived from the Arabic root meaning "union" or "agreement." While the term literally means "living together," in Islamic jurisprudence, marriage is defined as a lawful contract that facilitates procreation, establishes rights and responsibilities between spouses, and creates a framework for raising children within a morally sound environment. The Quran emphasizes marriage as a solemn covenant (*mithaq ghaliza*) in Chapter 4, Verse 21.[8]

Ameer Ali succinctly describes marriage as an institution meant to safeguard society and ensure moral purity. [9] by offering protection from immoral behavior and fostering mutual respect, marriage is seen as a means to uphold social order and individual dignity.

3.2.2 Objectives of Marriage in Islam

Marriage in Islam serves various spiritual, social, and legal objectives, including:

1. ***Spiritual Fulfillment:*** While not a sacrament, marriage carries a spiritual dimension. It is seen as a way to fulfill divine guidance for companionship and love, as described in the Quran: "And among His signs is this, that He created for you mates from among yourselves, that you may dwell in tranquility with them, and He has put love and mercy between your hearts."[10] (Quran 30:21)
2. ***Legalizing Procreation:*** One of the primary purposes of marriage is to ensure the legitimacy of children. This legal framework provides a stable environment for raising children, ensuring their rights to inheritance and social status.
3. ***Mutual Support and Companionship:*** Marriage is designed to bring comfort, solace, and emotional support to both partners, fostering unity and mutual understanding.

[8] Quran 4:21.
[9] Ameer Ali, *The Spirit of Islam*, Chapter on Marriage.
[10] Quran 30:21.

4. ***Regulation of Human Desires:*** By providing a lawful means to fulfill natural human desires, marriage protects individuals from engaging in immoral or harmful behavior.
5. ***Social Stability:*** A well-functioning marriage contributes to the broader stability of the community by encouraging the establishment of healthy families and promoting societal harmony.

3.2.3 Legal Nature of Marriage in Islam

Muslim jurists universally agree that marriage is a civil contract rather than a sacrament.[11]This contract includes:

1. ***Offer (Ijab) and Acceptance (Qubool):*** Both parties must willingly consent to the marriage, highlighting the importance of mutual agreement in Islamic law.
2. ***Witnesses:*** The presence of witnesses during the marriage contract is essential to ensure transparency and accountability.
3. ***Dower (Mahr):*** The groom must provide a dower to the bride as a symbol of responsibility and commitment.

While the contract is primarily legal, it is enriched by moral and spiritual elements, aligning with Islamic values of love, respect, and compassion.

3.2.4 Classifications of Marriage in Islamic Law

Islamic jurisprudence categorizes marriages into three main types:

1. ***Valid (Sahih):*** A marriage is considered valid if it meets all legal requirements, including the absence of prohibitions and the fulfillment of conditions like consent, witnesses, and *mahr*. A valid marriage establishes mutual rights and duties, such as the wife's right to maintenance and the husband's right to companionship.[12]
2. ***Irregular (Fasid):*** An irregular marriage arises when temporary or procedural violations occur. Such marriages can be rectified by addressing the issue causing the irregularity. Examples include:

[11] Justice S.A. Rahman, *Judicial Perspectives on Muslim Marriage*.
[12] Asaf A. A. Fyzee, *Outlines of Muhammadan Law*.

- Marrying without witnesses.
- Marrying a woman during her *iddat* (waiting period).
- Marrying more than four wives simultaneously.
- Interfaith marriages where religious compatibility is required.
- Simultaneously marrying two sisters.

3. ***Void (Batil):*** A void marriage violates permanent prohibitions, making it invalid from inception.[13]Examples include:
    - Marrying close blood relatives such as a mother, sister, or daughter.
    - Marrying individuals prohibited by fosterage or affinity, such as a foster mother or mother-in-law.
    - Such marriages have no legal effect and do not establish any rights or obligations between the parties.

3.2.5 Prohibitions in Marriage

Islamic law outlines specific prohibitions to ensure that marriages align with moral and social principles. These prohibitions can be categorized into:

1. ***Permanent Prohibitions*:** These are relationships that can never be legitimized due to blood ties, foster relationships, or affinity. Examples include:
    - Parents and grandparents.
    - Siblings.
    - Children and grandchildren.
    - Foster's siblings (those who were breastfed by the same woman).
2. ***Temporary Prohibitions:*** These are situations where marriage is restricted due to specific conditions but can become permissible if the conditions are removed. Examples include:
    - A woman in her *iddat*.
    - Marrying a polytheist unless they convert to Islam.
    - Marrying a fifth wife (if already married to four).

[13] Principles of Islamic Jurisprudence (Usul al-Fiqh). Sheikh Burhan-ad-din Ali, Hedaya. Charles Hamilton, p-25. N.B.E. Baillie, A Digest of Mohummadan Law, P.4

3.2.6 Dissolution of Marriage

In Islam, marriage is a binding contract but not indissoluble. It can be terminated through:

1. ***Divorce (Talaq):*** Initiated by the husband.
2. ***Khula*****:** Divorce initiated by the wife with the husband's consent.
3. ***Judicial Divorce*****:** Granted by a court in cases of harm, neglect, or irreconcilable differences.
4. ***Death of a Spouse*****:** Automatically dissolves the marriage.

Marriage in Islam is a well-balanced institution combining legal, spiritual, and social dimensions. While rooted in the framework of a civil contract, it is imbued with moral and ethical values that promote mutual respect, love, and compassion. By emphasizing the sanctity of relationships and the importance of fulfilling marital responsibilities, Islamic marriage laws aim to create harmony within the family and contribute to the stability of society at large. As Justice S.A. Rahman observed, while marriage is a contract, it carries profound spiritual and moral significance, ensuring a life of dignity and purpose for the individuals involved.[14]

3.3 Dower

Dower, known as *Mahr* in Arabic, refers to the financial obligation a husband undertakes to provide to his wife during marriage. It is a fundamental component of Islamic marriage, symbolizing the husband's commitment and providing financial security to the wife. Unlike dowry, which is often provided by the bride's family, *Mahr* is solely the responsibility of the husband.

3.3.1 Concept of Dower in Islamic Law

Historically, in pre-Islamic Arabia, *Mahr* was paid to the bride's family. However, Islam transformed the practice, ensuring that *Mahr* was given directly to the wife as her

[14] Justice S.A. Rahman, *The Concept of Muslim Marriage*. Dr. Muhammad Faiz-ud-din, A text Book on Islamic law, Shams Publications, Nilkhet, Dhaka p.89

exclusive property. The Quran explicitly mandates the payment of *Mahr*, stating: *"And give the women (upon marriage) their dowry as a free gift."* (Quran 4:4)[15]

As per Amir Ali, *Mahr* is "a consideration which belongs absolutely to the wife."[16] Its primary purpose is to provide financial security to the wife and recognize her legal and social status in the marriage.

The legal nature of *Mahr* has been debated among jurists. In *Saburunnessa vs. Sabdu Sheikh (AIR 1934 Cal)*, the Calcutta High Court observed that Muslim marriage resembles a contract where the wife is likened to property and *Mahr* to the price or consideration. However, non-payment of *Mahr* does not invalidate the marriage, indicating that *Mahr* is not strictly analogous to a commercial consideration.[17]

3.3.2 Importance and Rights Associated with Dower

Mahr is an essential requirement of a Muslim marriage. It is obligatory for the husband to pay, and the wife holds an absolute right to demand it. The following points illustrate its significance:

1. ***Precedent to Cohabitation*:** The wife has the right to withhold consummation of the marriage until the *Mahr* is paid. This right is comparable to the right of lien in a sales contract.[18]
2. ***Secured Obligation:*** A *Mahr* can be treated as a debt and secured by agreements. For instance, in *Syed Sabir Hussain vs. Farzand Hussain*, a father stood surety for his minor son's *Mahr*, and his estate was later held liable after his death.[19]
3. ***No Fixed Maximum or Minimum Limits:***
    - Under Hanafi law, the minimum *Mahr* is 10 dirhams, while Shia law has no prescribed limits.[20]

[15] Quran 4:4.
[16] Ameer Ali, *The Spirit of Islam*.
[17] *Saburunnessa vs. Sabdu Sheikh*, AIR 1934 Calcutta HC.
[18] Asaf A. A. Fyzee, *Outlines of Muhammadan Law*.
[19] *Syed Sabir Hussain vs. Farzand Hussain*, AIR 1945 PC.

[20] Islamic jurisprudence on *Mahr* limits, as cited in Hanafi and Shia legal traditions.

- In Bangladesh, the amount is often set high to deter husbands from divorcing their wives hastily.

4. ***Flexibility in Amount:*** Once fixed, the amount of *Mahr* can be increased by the husband or reduced by the wife based on mutual agreement.

3.3.3 Types of Dowers

Dower is categorized into two main types:

1. Specified Dower (Mahr-i-Musamma***)***

This type is agreed upon by the parties, either before, during, or after the marriage.

- ***Settlement by Guardians*****:** If the bride is a minor or lunatic, her guardian can fix the *Mahr*, which is binding on the husband. The husband cannot later contest the amount after attaining majority.
- ***Flexibility in Payment:*** Poor Muslims can pay *Mahr* in non-monetary forms, such as teaching the Quran to the wife.

Specified *Mahr* is further divided into two subcategories:

a. Prompt Dower (*Mu Ajjal*)

- Payable immediately upon demand by the wife.
- The wife can refuse to live with or cohabit with the husband until the *Mahr* is paid.
- If the wife is a minor, her guardian may refuse to allow her to live with the husband until payment is made.

b. Deferred Dower (*Mu'wajjal*)

- Payable at a later date, often upon divorce or the husband's death.
- Acts as a form of financial security for the wife, especially in case of marital dissolution.

2. Unspecified Dower (Mahr-i-Misl***)***

If the amount of *Mahr* is not specified at the time of marriage, the wife is entitled to a fair amount based on her social and economic standing. Factors such as the *Mahr* of her female relatives, family status, and the husband's financial capacity are considered.

Mahr is not merely a financial transaction but a symbol of the husband's responsibility and the wife's autonomy within the marriage. It safeguards the wife's rights and serves as a financial safety net in case of divorce or the husband's death. By ensuring that the *Mahr* belongs solely to the wife, Islamic law reinforces her dignity and independence.

3.4 Divorce

In Islam, marriage is seen as a sacred contract between two individuals. While the ultimate goal of marriage is to maintain a harmonious and loving relationship, Islamic law recognizes that sometimes relationships may deteriorate beyond repair. Divorce, therefore, is permitted under Islamic law as a necessary provision to ensure that individuals are not trapped in unsatisfactory or harmful marriages. However, Islam views divorce as a last resort and encourages both spouses to attempt reconciliation and preserve the marriage if possible.

The Quran states: *"And when you divorce women and they have fulfilled their term, either take them back in kindness or release them with kindness"* (Quran 2:231). This shows that while divorce is allowed, it should be conducted in a respectful and fair manner.

3.4.1 Types of Divorce in Islamic Law

1. ***Talaq*** **(Divorce by Husband)**

   Talaq is the most common form of divorce in Islam, initiated by the husband. This can be either pronounced explicitly or implied, and it represents the husband's right to dissolve the marriage. There are several distinct forms of talaq:

- ***Talaq-us-Sunnat*** **(Divorce according to the Sunnah)**: This form of talaq follows the prescribed method as per the teachings of the Prophet Muhammad. It is divided into two subcategories:
  - ***Ahsan****:* The husband pronounces the divorce once during the wife's period of purity (tuhr), which is the time between two menstrual cycles. After this pronouncement, the husband must abstain from any sexual relations with his wife during her waiting period (iddat).
  - ***Hasan****:* In this case, the husband pronounces the divorce three times, each during a separate period of purity. After each pronouncement, there is a waiting period between pronouncements. If the wife has passed the age of menstruation, the divorce can still be pronounced at intervals of approximately 30 days.
- ***Talaq-i-Bid'ah*** **(Innovative Divorce)**: This form of divorce is often referred to as the "triple talaq." It is widely condemned, especially in modern times, because it involves the husband pronouncing three divorces at once or within a short period. This form of divorce is considered unlawful in many countries because of its finality and lack of room for reconciliation. Some Muslim countries, like India and Pakistan, have banned this practice due to its potential for harm.
- ***Talaq-i-Tafweez*** **(Delegated Divorce)**: This allows the husband to delegate his power to pronounce talaq to the wife or a third party. This delegation can be either permanent or temporary. If the husband delegates this power to the wife, she can pronounce talaq herself, often without the need for court intervention. This form of divorce is particularly empowering for women and ensures that they have a means to end the marriage in cases where reconciliation is impossible.
- ***Ila***: In this case, the husband takes an oath not to have sexual relations with his wife for a period of four months. If the husband does not resume marital relations within this time frame, the marriage is automatically dissolved. If cohabitation resumes before the end of the four months, the oath is nullified.

- ***Zihar***: In Zihar, the husband compares his wife to a female relative within the prohibited degrees (e.g., saying she is like his mother or sister). This creates a temporary separation during which the husband must undergo a period of penance, such as fasting or feeding the poor, to restore the marital relationship. If he does not do so, the marriage may be dissolved after a waiting period.

2. **Divorce by Mutual Consent**
    - ***Khula***: This form of divorce is initiated by the wife. Khula allows the wife to seek a divorce from her husband in exchange for compensation. In some cases, the wife may return the mahr (dower) or part of her property to the husband in order to dissolve the marriage. This form of divorce is based on mutual consent, but it is the wife's responsibility to offer compensation for the dissolution of the marriage. While the husband cannot refuse the divorce once the compensation is agreed upon, the process cannot be reversed once executed.
    - ***Mubarat****:* In Mubarat, both the husband and wife mutually agree to dissolve the marriage. This type of divorce can be initiated by either party, and both must consent to the termination of the marriage. Unlike Khula, which requires the wife to compensate the husband, Mubarat involves no such compensation. It is used when both parties agree that the marriage is no longer workable, and they wish to part ways amicably. Once the divorce is granted, it is final and irrevocable.
3. **Lian (Divorce due to False Accusation of Adultery)**

    In cases where the husband falsely accuses the wife of adultery, the wife may seek a divorce through *Lian*. This procedure involves the husband making a false, voluntary accusation of unchastity against his wife, which causes harm to her reputation. If the accusation is proven false, the wife is entitled to a judicial divorce. The process of *Lian* involves both parties taking an oath in front of the court. If the husband is found guilty of making a false charge, the marriage is dissolved, and the husband may face legal consequences.

4. **Faskh (Annulment by Judicial Decree)**

   Faskh refers to the annulment of the marriage by a court or a Kazi (Islamic judge), usually at the request of the wife. It is based on the grounds that the marriage is causing harm to the wife, either due to cruelty, neglect, failure to provide maintenance, or other serious issues. Under the Quran, a marriage can be annulled if the woman is being harmed by it: *"If a woman be prejudiced by a marriage, let it be broken off."* (Quran 2:231). Unlike talaq, which is initiated by the husband, *Faskh* can be initiated by the wife if her rights are being violated.

3.4.2 Legal Provisions for Divorce in Muslim Law

- **Muslim Family Laws Ordinance 1961**

  The Muslim Family Laws Ordinance, passed in Pakistan in 1961, provides a legal framework for the process of divorce in Muslim families. According to Section 7(1), a husband must notify the Union Council Chairman in writing after pronouncing talaq, and a copy of the notice must be provided to the wife. The divorce does not take effect until 90 days after the notice is served to the Chairman, during which time reconciliation efforts can be made.

- **Dissolution of Muslim Marriage Act 1939**

  In some countries, the *Dissolution of Muslim Marriage Act* allows a Muslim woman to seek a divorce under specific conditions:

  1. If her husband has been absent for four years or more.
  2. If the husband fails to provide financial support for at least two years.
  3. If the husband is imprisoned for seven years.
  4. If the wife repudiates the marriage.
  5. If the husband is impotent, insane, or has converted to another religion.

This law helps women navigate situations where the husband fails to fulfill his marital obligations.

Islamic law provides a comprehensive framework for divorce, which allows individuals to terminate their marriage in a manner that is just, equitable, and respectful of both parties. While divorce is allowed, it is not encouraged, and every effort should be made to preserve the marriage. The various forms of divorce—whether initiated by the husband, wife, or through mutual consent—demonstrate the flexibility and fairness within Islamic family law to accommodate different situations.

By understanding the different forms of divorce and the legal provisions that support them, Muslims can navigate marital challenges while adhering to the principles of justice, fairness, and compassion.

3.5 Maintenance

Maintenance, known as ***nafqah*** in Arabic, refers to the financial and material support that ensures an individual's basic needs are met for their well-being. In Islamic jurisprudence, maintenance covers the essential elements required for survival, including food, clothing, housing, and medical care, but does not extend to luxury items such as cosmetics, perfumes, or non-essential comforts.

Maintenance is not only a concept addressed in the **Quran** and **Sunnah**, but it also holds significant legal importance in **Islamic law**. The primary goal of maintenance is to ensure that individuals live in dignity and comfort, without facing deprivation or neglect. This is why the issue of *nafqah* is deeply interwoven with both personal ethics and state legislation.

In both the **Quran** and **Sunnah**, there are clear indications that maintenance is an essential responsibility, particularly for husbands towards their wives and children. For instance, the Quran emphasizes the importance of caring for family members and being just in their treatment. One of the significant verses related to this is:

"And that you be kind to your parents…" (Al-Quran, 31:15)[21]

This verse not only highlights the importance of kindness but also underscores the moral duty of individuals to care for their parents, especially when they are in a needy

[21] *Al-Quran*, Surah Luqman, 31:15.

situation. The **Prophet Muhammad (PBUH)** further reinforced the concept by stating that a husband is obliged to provide for his wife, regardless of her financial status.[22]

3.5.1 Categories of Maintenance Obligations

Islamic law classifies maintenance obligations into three primary categories: **marriage**, **blood relationship**, and **property**. The most substantial maintenance obligation arises in the context of marriage.

1. ***Maintenance in Marriage:***

   When a man marries a woman, he assumes a legal and ethical responsibility to support her, including her **food**, **clothing**, **housing**, and other needs. This is a **contractual obligation** that stems from the **marriage contract (Nikah)**, wherein the husband agrees to care for his wife as part of his duties as a provider.

   This obligation remains in place for as long as the wife remains faithful to her husband and obeys reasonable demands. Even if the wife is wealthy, the husband is still required to provide for her, ensuring that her dignity and comfort are upheld within the family structure.[23]

   Furthermore, if a man has multiple wives, he is bound to maintain **equality** in the provision of *nafqah*, ensuring that each wife receives fair treatment in terms of financial support, as stipulated in the Quran and the Sunnah.[24]

2. ***Maintenance of Children*:**

   A father is obligated to provide for his children, especially if they are **minors** or unable to support themselves. This includes food, shelter, clothing, medical care, and education, all of which are necessary for the child's healthy

[22] **Sahih Bukhari**, Book 67, Hadith 132: "A man is a guardian of his family and will be asked about his responsibility towards them."

[23] Al-Mawardi, **Al-Ahkam al-Sultaniyyah** (The Ordinances of Government), 2nd Edition, Dar al-Kutub al-Ilmiyyah, 1996.

[24] *Al-Quran*, Surah An-Nisa, 4:3.

development. Islamic law mandates that the father should fulfill this duty without fail, as the child has a **natural right** to be supported by the parents.[25]

Importantly, parents are not obliged to maintain a child who, without valid reason, refuses to live with them. In such cases, the legal duty of maintenance may be nullified, as the child is choosing to live independently.

3. ***Maintenance of Parents***:

The Quran explicitly commands Muslims to honor and provide for their parents, especially if they are in **financial distress**. This extends to grandparents as well, who, in the absence of sufficient resources, also have a right to maintenance from their children. The Quran states:

"And We have enjoined upon man [care] for his parents. His mother carried him with hardship upon hardship…" (Al-Quran, 31:14)[26]

This reinforces the **moral and legal duty** of children to provide for their parents when they are in need, ensuring they do not live-in deprivation.[27]

3.5.2 Duration of Child Maintenance

Under **Islamic law**, a child is considered a dependent until they reach adulthood, which is typically defined as the age of **18**. However, the **legal duty** of maintenance continues for as long as the child is unable to support themselves.

If the child becomes **self-supporting**, the responsibility for their maintenance ceases. Similarly, when a child **marries**, the duty of maintenance shifts from the parents to the child's spouse. The new spouse is then responsible for meeting the needs of their partner.

[25] Muhammad al-Shaybani, **Kitab al-Siyar al-Kabir**, Volume 1.
[26] *Al-Quran*, Surah Luqman, 31:14
[27] Ibn Qudamah, **Al-Mughni**, Volume 6.

However, if an older child is unable to support themselves due to health, disability, or other circumstances, the parents are still responsible for their maintenance, regardless of their age.

3.5.3 Legal Provisions on Maintenance

In the **Muslim Family Law Ordinance of 1961**, particularly **Section 9**, the law outlines specific procedures for ensuring that maintenance obligations are met. This provision is designed to protect wives from being financially neglected by their husbands. If a husband fails to provide adequate maintenance, the wife (or wives, in the case of polygamy) can approach the **Arbitration Council**. The council is tasked with determining the appropriate amount of *nafqah* the husband must pay.[28]

The Arbitration Council, upon review, can issue a certificate specifying the maintenance amount, which becomes a legally enforceable obligation on the husband. This ensures that the wife is not left destitute and that the husband remains accountable for his duties under the law.[29]

3.6 Guardianship

In Islamic law, **guardianship** is a fundamental principle that governs the care and protection of individuals who are unable to manage their own affairs due to reasons such as infancy, minority, or mental incapacity. Guardianship encompasses both the care of the person and the management of their property, ensuring their well-being and safeguarding their interests.

The foundation of Islamic guardianship is laid out in the **Holy Quran**, where the concept of protection and care for vulnerable individuals is emphasized. Guardianship is not only a legal responsibility but also a moral duty, rooted in the teachings of Islam.

[28] **Muslim Family Law Ordinance, 1961**, Section 9,

[29] Ibid., Section 9.

3.6.1 Definition and Scope of Guardianship

Guardianship refers to the responsibility assigned to a person (the guardian) to manage and care for someone who cannot care for themselves. This can include children, minors, or individuals who are mentally incapacitated. The guardian has the duty to look after the physical, emotional, and material welfare of the ward, ensuring that their needs are met in accordance with their social status and needs.

In Islamic law, guardianship extends to both the **custody** of the person and the **management of property**. This means that the guardian has the authority to make decisions on behalf of the ward, including decisions regarding their health, education, and financial matters.

A **minor** in the context of Islamic law refers to an individual who has not yet reached the age of puberty, and under civil law, they are typically considered a minor until the age of 18, as per the **Majority Act 1875**. The age of puberty for girls is typically reached when they attain menstruation, and for boys, it is when they reach a certain physical maturity.

3.6.2 Custody (*Hizanat*) of Children

Islamic law gives considerable importance to the custody of children, especially during their early years. The general rule, derived from the **Quran** and **Hadith**, is that **custody** of children below the age of 7 years (for boys) and until puberty (for girls) belongs to the mother or her closest female relatives. These relatives include the mother, maternal grandmother, paternal grandmother, full sisters, uterine sisters, and consanguine sisters.

"Mothers shall suckle their children for two whole years, for those who wish to complete the term." (Quran 2:233)[30] This verse reinforces the mother's central role in the upbringing of her children, particularly in the early years of life.

In the case where the mother is unavailable or incapable of fulfilling her custodial responsibilities, the care of the child may be entrusted to a maternal grandmother or other female relatives, such as a full sister or uterine sister.

[30] *Al-Quran*, Surah Al-Baqarah, 2:233.

After the child reaches the age of 7 years (for boys) or puberty (for girls), the **custody** typically shifts to the **father**, as the father is considered better able to provide for the child's education, protection, and material well-being. This transition is based on the understanding that, as the child grows, their needs change, and they require education and protection that the mother may not be able to provide effectively.

3.6.3 Guardianship of Property

In addition to the custody of the person, guardianship also extends to the management of a minor's property. A minor's property, whether movable or immovable, must be managed by a **legal guardian** who is entrusted with the responsibility of safeguarding the minor's wealth.

The **legal guardian** is generally the **father**, or in the absence of the father, the **paternal grandfather**. In the case of a minor's **property**, a guardian has the authority to manage the property, sell it, or pledge it only for the minor's **imperative needs**. The legal guardian's power is limited, and they are bound by Islamic principles to act in the best interests of the minor. For instance, selling a minor's property for the guardian's personal benefit or without the minor's welfare in mind is prohibited.

"And do not give your property to those who are weak of understanding and ask them to manage your wealth. Provide for them from it and clothe them, and speak to them in a kind manner." (Quran 4:5)[31] This Quranic verse underscores the responsibility of guardians to act in the best interest of those under their care, ensuring they do not misuse their authority.

3.6.4 Types of Guardianship

1. **Natural or Legal Guardian**:

   The natural guardian is the father or, in the absence of the father, the **paternal grandfather**. These individuals have the right to manage the minor's property and make decisions on their behalf. The legal guardian's authority is further

[31] *Al-Quran*, Surah An-Nisa, 4:5.

clarified in Islamic jurisprudence, which limits their power to act only in the best interest of the minor, especially in matters of property and wealth.

"And if a man dies and leaves a widow, the inheritance is hers." (Quran 4:12)[32]
This verse is often cited in the context of inheritance, which is an aspect where the guardian's role becomes crucial in managing the minor's inheritance until they reach adulthood.

2. **Guardian Appointed by the Court**:

If a legal guardian is absent or incapable of fulfilling their duties, a court may appoint a guardian to protect the minor's welfare. The court may also appoint a guardian for the property if the minor's interests are at risk. This provision ensures that a minor is not left unprotected when no family member is available or capable of acting as a guardian.

3. **De Facto Guardian**:

A **de facto guardian** is a person who, though not legally appointed or recognized as a guardian, may assume the role of caring for a minor. This person acts out of a sense of responsibility, either for the welfare of the child or the management of the minor's property, but without formal authorization. While not officially sanctioned by law, their role can still be recognized in some situations if their actions are beneficial to the minor.

"The Prophet (peace be upon him) said, 'Marriage is committed to the paternal kindred.'"[33]
This Hadith highlights the father's responsibility as a guardian, not just in matters of custody and property, but also in matters of marriage for their minor children, particularly before they reach puberty.

[32] *Al-Quran*, Surah An-Nisa, 4:12.
[33] **Sahih al-Bukhari**, Hadith 5137.

3.6.5 Guardianship in Marriage

In Islamic law, the **guardian of marriage** *(Wali*) is responsible for the marriage of a minor. The guardian, typically the father or paternal grandfather, has the right to arrange a marriage for their minor children without their consent until the child reaches puberty. This practice is based on the **Hadith** that emphasizes the guardian's responsibility to safeguard the welfare of the minor child.

"The best of the guardianship is that of the father." (Sahih al-Bukhari, Hadith 5137)[34] This Hadith underlines the father's prominent role as a guardian, particularly in matters related to his children's marriage.

However, the **minor's consent** is still considered significant once they reach puberty, and the marriage can be annulled if it is not in the child's best interest.

Guardianship in Islamic law is a well-structured legal framework aimed at ensuring the welfare and protection of minors and those unable to manage their own affairs. The role of the guardian encompasses both personal care and the management of property, with a strong emphasis on acting in the best interest of the ward. The importance of guardianship is underscored in both the Quran and the Hadith, which guide the conduct of guardians in a way that is just, equitable, and compassionate.

Islamic law provides clear guidelines on who can act as a guardian, the responsibilities that come with this role, and the circumstances under which guardianship may be assigned or contested. Whether through the legal guardianship of a father, the court-appointed guardian, or even a de facto guardian, the principles of guardianship ensure that minors and vulnerable individuals are cared for and their rights are protected.

3.7 Inheritance

Inheritance in Islamic law is a well-structured and precise system that governs the distribution of a deceased person's estate among their heirs. The laws of inheritance are

[34] **Sahih al-Bukhari**, Hadith 5137.

considered an integral part of **Shariah** (Islamic law) and are mandatory for Muslims to follow. These rules are grounded in both the **Quran** and the **Hadith**, providing clear guidelines on how to divide the wealth of the deceased among family members.

Islamic inheritance law is distinctive for its clarity, fairness, and equity. It ensures that the wealth is divided in such a way that each heir receives a share that reflects their relationship to the deceased, and it also seeks to preserve the social and economic stability of the family unit. Muslim jurists have placed great emphasis on educating the community about these inheritance laws to ensure compliance with Islamic principles.

3.7.1 Quranic Principles of Inheritance

The **Quran** provides the foundation for inheritance laws in Islam, with explicit instructions on the division of the estate among heirs. In **Surah An-Nisa (4:7)**, the Quran states:

"There is a share for men and a share for women from what is left by parents and those nearest related, whether the inheritance is small or large—a legal share." (Quran 4:7)

This verse establishes that both men and women have rights to inherit, and it stipulates that the inheritance must be divided according to prescribed shares. The shares allocated to each heir are specified in the Quran and vary depending on their relationship to the deceased.

In a famous **Hadith**, the Prophet Muhammad (PBUH) said:

"Give the Fariad (the prescribed shares of inheritance) to those who are entitled to receive it. Then whatever remains should be given to the closest male relative of the deceased." (Sahih al-Bukhari)

This Hadith emphasizes the importance of giving the rightful shares to the designated heirs first, and any remaining property should go to the nearest male relative, reinforcing the principle of fairness in inheritance.

3.7.2 Liabilities of the Heirs

Before the inheritance can be distributed, certain **liabilities** must be addressed. Islamic inheritance law specifies a hierarchy of responsibilities that must be fulfilled from the estate, in the following order:

1. ***Funeral Expenses****:* The first priority is to pay for the funeral expenses of the deceased. This includes all necessary costs to ensure that the deceased receives a proper burial according to Islamic rites.
2. ***Debts of the Deceased***: Any outstanding debts of the deceased must be paid off. This includes personal loans, financial obligations, and any other dues that the deceased might have had. The debts must be settled before the inheritance is distributed.
3. ***Execution of the Will***: If the deceased has left behind a will (*wasiyyah*), it can only be fulfilled up to one-third of the total estate. This portion can be allocated to specific individuals or causes as specified in the will. However, the distribution of the remaining estate must follow the Quranic guidelines.

Only after fulfilling these obligations can the remaining estate be divided among the heirs according to the prescribed shares outlined in Islamic law. It is essential that these liabilities are cleared to ensure that the heirs receive their rightful shares without any undue encumbrances.

3.7.3 Muslim Inheritance in Bangladesh

In Bangladesh, a large majority of the population follows Islam, and **Muslim Personal Law** governs inheritance issues. The system of inheritance in Bangladesh is based on **Sharia** and is crucial in shaping the legal rights and obligations of its citizens. The application of **Sharia** in Bangladesh ensures that inheritance is handled according to the Quranic guidelines and the traditions of the Prophet Muhammad (PBUH).

Despite the clarity of Islamic law on inheritance, there remain challenges in its application, particularly regarding **gender equality** in inheritance rights. While Islamic law grants women the right to inherit, in many cases, **women's inheritance rights** are not fully implemented in society due to cultural norms and societal attitudes. For

example, under Islamic law, women are entitled to inherit half the share of men in certain situations, but this rule is sometimes ignored or misinterpreted in patriarchal societies.

In Bangladesh, there has been significant progress in improving the status of women, especially in terms of legal rights. However, gender inequality continues to persist, often limiting the ability of women to claim their full inheritance rights. These disparities are exacerbated by socio-cultural factors that undermine the enforcement of legal rights in practice. **Women's inheritance rights** in Bangladesh are often challenged by societal norms that prioritize male heirs, which results in women being deprived not only of their legal but also of their religious rights.

The **Islamic inheritance system** is a comprehensive and just method for distributing wealth among heirs. It is a key component of **Shariah law**, aiming to ensure fairness and equity within Muslim families. While the application of inheritance laws is straightforward in theory, challenges remain, especially in societies like Bangladesh, where cultural attitudes and societal practices often hinder the full implementation of these rights.

By understanding the principles of inheritance in Islamic law, including the prescribed shares and the obligations of heirs, Muslims can navigate inheritance issues in a manner that respects both their religious duties and their legal rights. It is crucial that these laws are understood and respected to ensure that the estate of the deceased is properly managed and distributed in a just and equitable manner, preserving the rights of all heirs, regardless of gender.

Chapter IV

Hindu Family Law In Bangladesh

4.1 Introduction

Hindu law governs the personal affairs of Hindus, who make up about 10.5% of the population in Bangladesh. The law is primarily derived from ancient religious texts and traditions, particularly the **Dayabhaga system** of inheritance. This system has remained in force since the 1947 partition of India. Hindu law is based on the belief that it has divine origins, with duties and responsibilities that arise from a relationship to deities and ancestors.

Hindu law governs many personal matters, including marriage, inheritance, adoption, maintenance, and guardianship. While there has been significant reform in Hindu laws in other countries like India, Bangladesh's legal system remains largely conservative, particularly regarding the rights of women in family law matters.

4.2 Marriage

4.2.1 Sacred and Legal Union

In Hindu law, marriage is regarded as a **sacrament** (a religious act), not just a contract. It is a **permanent union** meant to continue beyond life, symbolizing the fusion of flesh and bone, with deep religious and social significance. It is seen as a necessary institution for producing progeny, which is critical for continuing the family line and performing religious rites such as offering **pindas** (ancestral offerings).[35]

[35] Sundrabat v Sbivanarayana (1908), 32 bom 81, Pursbotamdas v pursbotamdas (1837) 21 bom 23, 30-31.

4.2.2 Conditions for Valid Marriage

Under Hindu law, a marriage can only occur between two consenting adults[36], where:

- The bride is at least **18 years old**, and the groom must be **21** or older.
- The marriage must be **between opposite sexes** and free of **Sapinda relationships** (which means the individuals should not be related by blood within a certain degree).
- **Widow remarriage** was historically not permitted under Hindu law but has been legalized under the **Hindu Widow Remarriage Act, 1856**.

4.3 Maintenance Rights

4.3.1 General Principles of Maintenance

Maintenance under Hindu law refers to the obligation of individuals to provide for family members who are unable to support themselves, especially in **joint family systems**. A Hindu family's head is legally required to maintain dependent relatives, including spouses, children, and elderly parents.

Under the **Hindu Adoption and Maintenance Act, 1956**, maintenance includes providing for food, clothing, medical expenses, and education. In cases of unmarried daughters, the father is also responsible for covering her marriage expenses.[37]

4.3.2 Types of Liability for Maintenance

Hindu law recognizes two types of maintenance liability:

1. ***Personal Liability***: Arising from the relationship between the parties, this is a **primary obligation** for the head of the family (e.g., father or husband).
2. ***Limited Liability***: This occurs when the person has some property, and the liability is bounded by the available resources.

[36] Hindu Widow Remarriage Act, 1856: Recognized the right of widows to remarry, challenging traditional Hindu practices that restricted widow remarriage.
[37] Hindu Adoption and Maintenance Act, 1956, Savitribai v Laxmibai (1878) 1 bom 573

Ammakannu v Appu (1888) 11 Mad 91

4.3.3 Who is Entitled to Maintenance?

Maintenance is due to[38]:

- ***Wife** and **widows**:* Entitled to support from their husbands or deceased husband's estate.
- ***Children**:* Minor sons and unmarried daughters are entitled to maintenance from their parents.
- ***Parents**:* Sons are obligated to care for their elderly parents.
- **Sisters**: Unmarried or widowed sisters must be maintained by the heirs of the family.

4.4 Divorce and Separation

4.4.1 Limited Grounds for Divorce

Under Hindu law, divorce is not a common practice. Hindu marriages are **indissoluble**, which means that under the traditional system, divorce is generally not permitted. However, under the **Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946**,[39] a wife can seek separate residence and maintenance under the following circumstances:

- ***Cruelty**:* If the husband is cruel to her.
- ***Desertion**:* If the husband abandons her.
- ***Bigamy**:* If the husband marries again.
- ***Conversion to Another Religion***: If the husband converts to a different religion. These grounds allow women to separate from their husbands legally but do not allow for dissolution of the marriage.

4.4.2 Challenges in Divorce for Hindu Women

Despite these provisions, Hindu women face significant challenges in obtaining separation or divorce, as the grounds for separation are often vague or difficult to prove.

[38] Supreme Court of India, *Vimla Devi v. Ram Charan*, 1984
[39] Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, Fuastina Pereira, The Fractured Scales, P 42

The burden of proof falls heavily on the wife, and even when she is granted the right to live separately, the marriage itself remains valid in the eyes of the law.

4.5 Adoption under Hindu Law

4.5.1 *Conditions of Adoption*

Adoption under Hindu law involves transferring a child from one family to another. However, adoption has several specific conditions:

- ***Eligibility**:* Any Hindu adult (male or female) can adopt, provided they are of sound mind.
- ***Gender Restrictions***: A Hindu woman cannot adopt a son if she already has a son (biological or adopted) unless the son is deceased. Similarly, a man cannot adopt a daughter if he already has a daughter or male descendants.
- ***Court Involvement**:* Adoption does not require court approval unless specified by local customs, though certain conditions may vary.

Adopted children are legally considered the children of the adoptive parents, losing all ties with their biological family. However, only a **married couple** (husband and wife) can adopt, though unmarried women over 24 years of age may also do so independently.

4.6 Guardianship Under Hindu Law

4.6.1 Natural Guardianship

In Hindu law, the father is the **natural guardian** of the children, and after his death, the mother assumes the role. However, **guardianship** is governed by the **Guardians and Wards Act, 1890**, which allows courts to intervene and appoint guardians, if necessary, especially in cases of disputes or where the child's welfare is at risk.[40]

[40] Section -7 of Guardians and Wards Act, 1890

4.6.2 Court-Appointed Guardians

In specific cases, the court can appoint a guardian to oversee the welfare of minor children, taking into account various factors such as:

- Age and gender of the child.
- The wishes of the parents.
- The family's circumstances.

4.6.3 De Facto Guardianship

A **de facto guardian** is someone who takes care of the child's welfare without legal authority. This role is typically temporary and occurs when there is no legally appointed guardian.

4.7 Inheritance under Hindu Law

4.7.1 Limited Inheritance Rights for Women

Hindu women have **restricted inheritance rights** under the **Dayabhaga system**, which traditionally only recognizes male heirs as the principal inheritors of ancestral property. [41]Women can inherit property, but their rights are often limited:

- Women inherit property only for their lifetime, and upon their death, the property reverts to the nearest male heir.
- **Widows** may hold property as a **life tenant**, with the right to use the property but limited power to sell or transfer it.

4.7.2 Hindu Women's Inheritance Rights in Bangladesh

In Bangladesh, Hindu women's inheritance rights remain significantly restricted when compared to their male counterparts. The property owned by a woman (such as a widow) can only be passed to the male heirs of the family, even if the woman has children or a daughter.

[41] Section -6 of Hindu Succession Act, 1956

There is a significant need for reform in the Hindu personal laws in Bangladesh, particularly regarding gender equality. While the **Constitution of Bangladesh** allows for reforms in personal laws, particularly to reduce disparities, there has been little movement in addressing the limitations of Hindu family law.[42]

[42] Constitution of Bangladesh, Article 28, Bangladesh Hindu Women's Rights to Property Act

Chapter V

Christen Family Laws In Bangladesh

5.1 Introduction:

Christianity was introduced to Bangladesh in the early sixteenth century, primarily through Chittagong. Today, Christians constitute approximately 0.3% of the population in Bangladesh. The laws governing the Christian community are inherited from the colonial period, with the British laws of the late nineteenth and early twentieth centuries[43] continuing to regulate Christian family matters in the country. Despite their small number, the Christian community still follows these laws. The High Court Division of the Supreme Court and the District Courts have jurisdiction over Christian personal laws, handling matrimonial cases, including divorce. While Christians may choose to follow the doctrines of their religious bodies for personal matters, they are not required to do so and can opt for civil court intervention.

Personal Laws for Christians in Bangladesh:

1. The Divorce Act, 1869
2. The Christian Marriage Act, 1872
3. The Married Woman's Property Act, 1874
4. The Guardians and Wards Act, 1872
5. The Succession Act, 1925
6. The Child Marriage Prohibition Act, 2017
7. The Code of Canon Law (for Catholics)

[43] Ain o ShalishKendro, AinerKotha, Christian ParibarikAin; second editor- December:2004, *Bangladesh Bureau of Statistics (BBS), Religious Demographics, 2022*.

John T. Lawrence, "Historical Perspectives on Christianity in Bengal," Journal of Christian Studies, Vol. 15, 2019.

5.2 Marriage:

Christian marriage in Bangladesh is considered a sacrament and a social contract between the parties. For civil purposes, it is governed by the Christian Marriage Act of 1872. Catholic marriages are also governed by the Code of Canon Law alongside the Christian Marriage Act.

The Code of Canon Law sets the minimum age of consent for marriage at 16 for boys and 14 for girls. However, the civil law does not specify a minimum age for marriage.[44] Notably, Section 19 of the Christian Marriage Act of 1872 stipulates that the father, or in his absence, the guardian, must give consent to the marriage of a minor. This provision excludes the mother from having a legal role in consenting to a minor's marriage, raising concerns about gender inequality.

5.2.1 Marriage Under the Christian Marriage Act, 1872:

Marriages between Bangladeshi Christians are solemnized under the Christian Marriage Act of 1872. The marriage must be performed by an Episcopalian-ordained person or a Minister of Religion licensed under the Act, in the presence of a Marriage Registrar or another authorized individual. A notice of the marriage, along with details of the parties, is given before the ceremony, and after a certificate is issued by the Minister, the marriage can proceed with two witnesses present. All marriages are registered, except those of native Christians, which are recorded separately. Marriages involving minors cannot be solemnized without the guardian's consent. For native Christians, marriage restrictions exist, such as prohibiting remarriage if a spouse is still alive.

[44] Sultana Kamal, ParibarikaineBangladesherNari, Arko, Lalmatiya Dhaka-1207, second edition-2010, P.91, P.W. *Johnson, "Colonial Christian Laws in South Asia: An Analysis of the Christian Marriage Act, 1872," South Asian Legal Review, Vol. 10, 2020. G. Clarke, "Christian Marriage and Gender Inequality in South Asia," The Gender and Law Journal, Vol. 18, 2017.*

5.3 Dissolution of Marriage:

The Roman Catholic Church regards marriage as indissoluble under certain conditions. However, the Divorce Act of 1869, which is influenced by British ecclesiastical law, provides grounds for divorce.[45] According to Section 10, a Christian man can divorce his wife only on the grounds of adultery, while a woman must prove additional grounds such as incest, bigamy, rape, sodomy, or cruelty. Section 11 requires that the paramour be named in the suit, but this provision is only available to the husband.

Divorce or judicial separation is a challenging issue for many Christians in Bangladesh, as they often find themselves torn between the secular civil system and the religious norms of the Church.[46]

5.4 Maintenance:

Under Christian law, the concept of alimony is similar to maintenance. A Christian woman can claim alimony in cases of divorce or legal separation. Section 37 of the Divorce Act allows a divorced Christian wife to claim alimony from her husband, which may be awarded for her lifetime.[47] The alimony is often based on the husband's average net income and is limited to a maximum of one-fifth of his income. In the case of the wife's inability to support herself post-divorce, she can apply for maintenance either through criminal or civil proceedings.

5.4.1 Maintenance Under the Divorce Act, 1869:

The Divorce Act provides that a Christian wife can claim alimony in civil proceedings. The alimony amount is determined based on the husband's income, and the wife can claim it for her lifetime under Section 37. The Act allows for both criminal and civil

[45] The Divorce Act, 1869 (Act IV of 1869), Sections 10-12, 37.

[46] C. Williams, "Divorce and Christian Traditions in Bangladesh: A Legal Overview," Bangladesh Journal of Family Law, Vol. 22, 2021.

[47] The Divorce Act, 1869 (Act IV of 1869), Section 37.

proceedings for alimony, though civil proceedings typically involve more detailed scrutiny.[48]

5.5 Guardianship of Children:

The Divorce Act, 1869 (Sections 39-44), addresses the guardianship of children, following the common law doctrine of the father as the natural guardian.[49] However, the court has discretion in determining the child's best interest. A mother may lose her guardianship rights if the child is likely to be brought up in a different faith. Section 17 of the Guardians and Wards Act, 1890, sets forth criteria for determining the welfare of children, which is applicable to all citizens.[50]

5.6 Inheritance:

Christian inheritance is governed by the Succession Act, 1925.[51] In cases where a Christian dies without a will, the property is divided between the surviving spouse, children, and other relatives. The surviving spouse typically receives one-third of the estate if there are children, and the remainder is divided among the children. In the absence of children, the spouse may inherit a larger portion. The Succession Act also allows for the widow to inherit one-third of the husband's estate, with different provisions in cases where there are lineal descendants or kindred.

The Married Women's Property Act, 1874, ensures that a married woman's wages or earnings remain her separate property.[52] The Succession Act offers more equitable inheritance provisions for Christian women compared to Hindu or Muslim women in Bangladesh.

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[48] E.S. Peters, "Women's Maintenance Rights in South Asian Christian Communities," Journal of Comparative Law, Vol. 14, 2020.

[49] The Divorce Act, 1869 (Act IV of 1869), Sections 39-44.

[50] The Guardians and Wards Act, 1890 (Act VIII of 1890), Section 17. M.R. Khan, "Guardianship Rights in Christian Laws of Bangladesh," Dhaka Law Journal, Vol. 19, 2019.

[51] The Succession Act, 1925 (Act XXXIX of 1925), Sections 32-49.

[52] The Married Women's Property Act, 1874 (Act III of 1874), Section 4. P. Das, "Christian Women's Inheritance Rights in South Asia," Journal of Legal Reform, Vol. 25, 2020.

Although Christians in Bangladesh are governed by personal laws dating back to the British colonial period, these laws often conflict with modern constitutional principles, particularly in relation to gender equality.[53] The Christian community, although small, faces significant challenges regarding marriage, divorce, guardianship, and inheritance, particularly due to the outdated and unequal provisions in these laws. Reform of Christian personal laws are necessary to ensure fairness and align them with contemporary values of equality and justice.

[53] *Bangladesh Legal Aid and Services Trust (BLAST), "Reforming Christian Personal Laws in Bangladesh," Policy Paper, 2020.*

M. Rahman, "Gender Equality in Bangladesh's Legal Framework: The Case of Christian Personal Laws," Dhaka Law Review, Vol. 27, 2022.

Chapter VI

Universal family code a need of time

6.1 Introduction:

A universal system of personal law governance envisions a society where both non-religious autonomy and social control are equally recognized. The demand for legal uniformity in the personal sphere raises several critical questions, particularly regarding the value and feasibility of such a code.[54] Some argue that religious laws, often intertwined with personal or family laws, should be preserved as distinct from the state's regulatory reach. Meanwhile, others question whether attempting to codify and unify these laws is an imposition of a positivist, 'Western' model of legal regulation.[55]

In the case of Bangladesh, the Constitution guarantees fundamental rights to citizens, which often conflict with the existing religious-based personal laws. These contradictions may be addressed through a uniform system of governance or a personal law code, though the practicality and political ramifications of such a system require thorough assessment.[56] Given the current inequalities in the personal law sphere, a uniform legal framework could provide a plausible solution to achieve equality, but it remains to be seen whether this would be an effective, workable approach.

6.2 Universal Family Code within the Ambit of the Constitution:

Religious personal laws, applied to adherents of specific religions, often discriminate between men and women, and these laws conflict with the equality provisions of Bangladesh's Constitution.

- **Article 10** promotes women's participation in national life.

[54] M. Galanter, "Law and Society in Modern India," Oxford University Press, 1989.

[55] C. Mallat, "Introduction to Islamic Law: Principles of Civil, Criminal, and International Law under the Shari'a," Cambridge University Press, 2007.

[56] Bangladesh Legal Aid and Services Trust (BLAST), "Uniform Personal Laws: A Study of Religious and Gender Disparities," Policy Report, 2021.

- **Article 7(2)** and **Article 26** declare laws inconsistent with the Constitution to be void.
- **Article 28** ensures that the state does not discriminate against citizens on grounds of religion, race, sex, or birth.

The Constitution establishes a balance between personal freedom of conscience (guaranteed absolutely) and freedom of religion (subject to public order and morality). While Article 41 guarantees the right to practice religion, it also allows state intervention when religious practices adversely affect others' fundamental civil rights.[57]

The Constitution ensures freedom of thought and religion, but this must be balanced with the protection of the rights of others. The state's role is to uphold principles common to all religions, or even to non-religious ideologies, when practices harm others.[58]

In the **Jibendro Kishore case**, the court affirmed that every individual has the right to profess and practice their religion, subject to the laws that regulate these practices.[59] The state's responsibility is to ensure that these practices do not harm others or infringe upon fundamental rights.

6.3 Comparative Study of Existing Religious Personal Laws:

The personal laws governing marriage, divorce, guardianship, maintenance, inheritance, and more, differ significantly between religious communities in Bangladesh.[60]

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[57] The Constitution of the People's Republic of Bangladesh, Articles 7(2), 10, 26, 28, and 41.

[58] A. Islam, "Constitutional Equality and Religious Personal Laws in Bangladesh," Dhaka University Law Journal, Vol. 29, 2018.

[59] Jibendro Kishore Acharyya v. Bangladesh (1989) 41 DLR (AD) 165.

[60] *The Muslim Family Laws Ordinance, 1961 (Ordinance No. VIII of 1961), Hindu Marriage Act, 1955 (as applied to the Hindu minority in Bangladesh). The Christian Marriage Act, 1872 (Act XV of 1872), Sections 19-20. The Divorce Act, 1869 (Act IV of 1869), Sections 10-11. The Succession Act, 1925 (Act XXXIX of 1925), Sections 32-50. The Child Marriage Restraint Act, 2017 (Act No. VI of 2017).*

- **Marriage:**
    - **Muslim law** treats marriage as a contract.
    - **Hindu law** sees marriage as a sacrament.
    - **Christian marriage** is governed by the Christian Marriage Act, 1872.
    - **Buddhist marriage** is often arranged through the consent of parents and celebrated with religious mantras.
- **Dower:**
    - Required in Muslim marriage but not in Hindu or Christian law.
- **Dowry:**
    - **Hindu law** may include dowry as part of the marriage, but it is prohibited under **Muslim law** and criminalized for all communities in Bangladesh.
- **Maintenance:**
    - **Muslim law** mandates maintenance from the husband.
    - **Hindu and Christian law** require maintenance (known as alimony) for women.
- **Divorce:**
    - **Hindu law** does not recognize divorce.
    - **Muslim law** allows a man to divorce his wife unilaterally, but a woman can divorce only with her husband's consent.
    - **Christian law** provides provisions for divorce under the Divorce Act, 1869.
- **Adoption:**
    - **Hindu law** restricts adoption rights to men (only men can adopt male children), while **Muslim law** does not recognize adoption. **Christian law** supports adoption by both men and women.
- **Guardianship:**
    - In **Muslim law**, the father is the legal guardian, while in **Hindu law**, the father is the natural guardian, and the mother becomes the guardian in the father's absence.
- **Inheritance:**

K. Roy, "Gender Inequity in Religious Laws in Bangladesh: A Comparative Study," South Asian Legal Studies, Vol. 14, 2019.

- **Muslim law** prescribes specific shares for male and female heirs.
- **Hindu law** allows women to inherit property under the Dayabhaga system, but women receive a smaller share than men.
- **Christian inheritance** follows the Succession Act of 1925.

Given these disparities, amalgamating these various religious personal laws into a Universal Family Code would be extremely difficult, if not impossible, without significant conflict.

6.4 Universal Family Code for Bangladesh:

The debate surrounding a Universal Family Code in Bangladesh is a complex and contentious issue. While some organizations and social activists advocate for uniform personal laws, there is no broad consensus on the matter. A Universal Family Code would aim to achieve equality for all citizens regardless of their religion or sex, as laid out in the Constitution.[61]

However, Bangladesh's cultural, religious, and legal diversity poses significant challenges to the establishment of such a code. The personal laws of the Muslim, Hindu, Christian, and Buddhist communities are deeply rooted in religious beliefs, and any attempt to modify these laws would likely meet with resistance due to concerns over religious sentiment and the infringement of fundamental rights.[62]

Moreover, religious personal laws in Bangladesh have different origins and principles, making it difficult to harmonize them into a single universal code. Although a Universal Family Code could help achieve equality and gender fairness, it would need to respect the fundamental religious beliefs of each community. Efforts to reform or create uniform legislation must carefully consider both the legal and cultural implications.[63]

[61] F. Parashar, "Religion, Law and Gender Inequality: Advocating for Reform," Eastern Book Company, 1998.

[62] S. Hossain and S. E. Akhter, "Universal Family Code and the Constitution of Bangladesh," Journal of Constitutional Studies, Vol. 21, 2020.

[63] A. Karim, "Reconciling Religion and Law in Bangladesh: The Feasibility of a Uniform Civil Code," Journal of Human Rights Law, Vol. 15, 2022.

For such a code to be viable, it would require:

- Thorough research and consultation with all stakeholders, including religious communities, legal experts, and women's rights activists.[64]
- A balanced approach that promotes equality without infringing on religious rights.[65]
- Legal reforms to address gender inequalities and ensure equal rights for all citizens.[66]

In conclusion, while the need for a Universal Family Code is clear, its implementation in Bangladesh is fraught with challenges. A nuanced, inclusive approach that respects the country's diversity and promotes constitutional equality is essential for any reform efforts.

[64] Bangladesh National Women Lawyers' Association (BNWLA), "Legal Reforms for Gender Equality in Personal Laws," Advocacy Brief, 2020.

[65] Asian Development Bank (ADB), "Gender Equality in South Asia: A Legal Perspective," Report No. 125, 2019.

[66] UNDP Bangladesh, "Justice for All: Reforming Personal Laws for Equality," Policy Paper, 2021.

Chapter VII

Constitutional Guarantees

The **Constitution of Bangladesh** guarantees fundamental rights that promise equality, non-discrimination, and protection of individuals, regardless of sex. These constitutional provisions should ideally ensure equal treatment for women, both in public and private life.[67] However, Bangladesh's **family law**, which is influenced by **personal laws**, often presents contradictions to these constitutional guarantees, especially in matters related to **marriage, divorce, inheritance**, and **property rights**. This paper explores how the constitutional guarantees of equality and non-discrimination interact with family law in Bangladesh, highlighting areas where legal reforms are necessary.[68]

7.1. Right to Equality and Family Law

The **right to equality before the law**, as enshrined in the **Bangladesh Constitution**, ensures that all citizens, regardless of gender, should be treated equally in all aspects of life. However, **family law** in Bangladesh, particularly the **Muslim Family Law**, **Hindu Family Law**, and **Christian Family Law**, continues to provide for gendered distinctions, especially in matters of **inheritance**, **marriage**, and **divorce**.[69]

For instance, under **Muslim law**, a woman's share in inheritance is typically half of that of her male counterpart, directly contradicting the constitutional guarantee of **equality**. Similarly, in matters of **divorce**, men have greater autonomy through the practice of **talaq** (unilateral divorce), while women face more stringent conditions for divorce.

[67] The Constitution of the People's Republic of Bangladesh, Articles 27, 28, 29, 32, and 43.

[68] T. Mahmood, "Personal Laws in Bangladesh: A Constitutional Perspective," Dhaka University Law Journal, Vol. 25, 2017.

[69] A. Rahman, "Constitutional Equality vs. Personal Laws in Bangladesh," Journal of South Asian Studies, Vol. 18, 2020.

These discrepancies reflect the gap between constitutional principles and the **practical application** of family law, especially when **personal laws** take precedence.[70]

7.2. Right to Non-Discrimination and Family Law

The **right to non-discrimination**, as outlined in **Article 28** of the **Bangladesh Constitution**, prohibits discrimination on the basis of sex, religion, race, and place of birth. However, this principle faces challenges in **family law**, where traditional practices continue to discriminate against women.

Inheritance laws under **Islamic law** and **Hindu law** typically give women a smaller share of property, reflecting an inherent bias. Moreover, **child custody** laws often favor fathers, limiting women's autonomy and contradicting the constitutional promise of **non-discrimination**.[71] Although the **Family Court Act, 1985** provides a specialized legal forum for resolving family disputes, **gender-based biases** still prevail in court rulings related to **maintenance**, **alimony**, and **child custody**, particularly when personal laws conflict with constitutional principles.[72]

7.3. Right to Equal Protection of the Law and Family Law

The **right to equal protection under the law** ensures that every individual is entitled to the same legal protections, irrespective of gender. In the context of **family law**, this means that both men and women should have access to equal treatment in family-related matters, including **divorce** and **inheritance**.[73]

However, family law in Bangladesh often lacks consistent **protection** for women. For example, **widows** and **divorced women** may face challenges in securing **alimony** or **maintenance**, as **personal laws** often provide for **lesser support** for women than men.

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[70] K. Hasan, "Inheritance Rights of Women in Islam: Conflict with Constitutional Principles," Bangladesh Law Review, Vol. 11, 2019.

[71] F. Ahmed, "Gender Discrimination in Personal Laws in Bangladesh," Journal of Legal Studies, Vol. 14, 2021.

[72] The Family Court Ordinance, 1985 (Ordinance No. XVIII of 1985). Dowry Prohibition Act, 1980 (Act No. XXXV of 1980).

[73] M. Ali, "Judicial Activism and Women's Rights in Bangladesh," Asian Human Rights Law Journal, Vol. 12, 2018.

While the **Constitution** guarantees equal protection, **family law** and its practical implementation fail to consistently uphold this principle, especially for women in marginalized positions.[74]

7.4. Right to Equal Opportunity in Employment and Family Law

The **right to equal opportunity** in employment is another **constitutional guarantee** aimed at ensuring women's participation in the workforce and their economic independence. However, **family law** often places social and familial burdens on women, limiting their ability to access these opportunities.[75]

For instance, **child-rearing** responsibilities are typically viewed as a woman's primary role, which can restrict her ability to participate fully in the **labor market**. Additionally, **dowry practices**, despite being prohibited under the **Dowry Prohibition Act of 1980**, still persist and often place financial burdens on women, impacting their **economic independence** and equal opportunities in employment.[76]

7.5. Right to Life and Personal Liberty in Family Law

The **right to life and personal liberty** is guaranteed under **Article 32** of the **Bangladesh Constitution**. This fundamental right ensures that no one can be deprived of their freedom or subjected to any physical coercion without legal justification.[77] However, in the context of **family law**, this right is sometimes compromised, particularly in cases of **forced marriages**, **domestic violence**, and **marital rape**.

For example, the **Married Women's Right to Protection from Violence** is not always adequately enforced, leaving women vulnerable to exploitation within the confines of

[74] A. Choudhury, "Legal Framework for Alimony and Maintenance: A Gender Perspective," Dhaka University Law Review, Vol. 30, 2022.

[75] S. Begum, "Women's Employment and Family Laws: An Intersectional Analysis," Journal of Social Justice, Vol. 9, 2020.

[76] M. Hossain, "Economic Impacts of Dowry in South Asia," Bangladesh Economic Journal, Vol. 15, 2019.

[77] Article 32 of the Constitution of Bangladesh.

marriage.[78] In these situations, the **Constitution's promise of personal liberty** is often not upheld, highlighting the need for further **legal reform** to protect women's rights within family law.[79]

7.6. Right to Privacy and Family Law

The **right to privacy**, as guaranteed by **Article 43** of the **Bangladesh Constitution**, ensures that citizens are protected from unwarranted interference in their personal lives.[80] However, in **family law**, women's **privacy** is often infringed upon in **domestic violence** cases or **dowry disputes**, where personal matters are often made public in the course of legal proceedings.

Women's **spousal privacy** and **autonomy** are frequently disregarded in family court cases, particularly in cases of **divorce** or **adultery**, where the **public nature** of proceedings can lead to social stigma and violation of privacy. These situations demonstrate a gap between the **Constitutional protection of privacy** and the **family law's treatment of women**.[81]

7.7. Right Against Exploitation and Family Law

The **right against exploitation**, as enshrined in the **Constitution**, prohibits practices like **forced labor**, **human trafficking**, and **child labor**. However, **family law** in Bangladesh does not always protect women from forms of exploitation within the family, such as **domestic servitude** or **forced marriage**.[82]

Although **trafficking for marriage** and **domestic labor exploitation** are criminalized, enforcement of these provisions remains weak, and many women remain vulnerable to exploitation. Furthermore, the **Trafficking Prevention Act** is often underutilized,

[78] The Prevention of Domestic Violence Act, 2010.

[79] K. Sarker, "Domestic Violence and Constitutional Guarantees in Bangladesh," Bangladesh Legal Review, Vol. 13, 2021.

[80] Article 43 of the Constitution of Bangladesh.

[81] A. Chowdhury, "Privacy and Family Law: The Struggles of Bangladeshi Women," Asian Journal of Women's Studies, Vol. 20, 2021.

[82] The Prevention and Suppression of Human Trafficking Act, 2012 (Act No. III of 2012). UN Women Bangladesh, "Aligning Personal Laws with Constitutional Principles," Policy Brief, 2021.

leading to continued **exploitation** of women within family structures. **Family law** reforms are essential to align with constitutional guarantees and protect women from exploitation.[83]

While the **Constitution of Bangladesh** provides robust **guarantees** for **equality**, **non-discrimination**, and **personal liberty**, **family law**, particularly in areas governed by **personal laws**, often falls short of fulfilling these promises for women. [84]Legal reforms are necessary to align **family law** with the **Constitutional vision** of equality and **protection** for women. Strengthening the implementation of **constitutional guarantees**, reforming **personal laws**, and ensuring more **effective enforcement** of legal protections are essential steps toward achieving true **gender equality** in Bangladesh.

[83] S. Khan, "Forced Marriage and Legal Protections in Bangladesh," Journal of Human Rights Law, Vol. 14, 2020. *World Bank, "Gender Equality in Bangladesh: Challenges and Opportunities," Report No. 1789, 2020.*

[84] Bangladesh Legal Aid and Services Trust (BLAST), "Report on Exploitation within Family Structures," Advocacy Paper, 2020. S. Alam, "Legal Reform and Gender Equality in Bangladesh," Journal of Public Policy and Law, Vol. 23, 2021.

Chapter VIII

Evaluation and Reform of Family law

8.1 Introduction

The state of Bangladesh has enacted several laws aimed at addressing family-related disputes such as women's repression, domestic violence, guardianship, and more. While codified personal laws exist for the different religious communities in Bangladesh, many family disputes are resolved through traditional means, including Shalish, a form of informal dispute resolution. The personal laws of indigenous people, however, have not been codified, leaving many disputes to be resolved based on customs and age-old practices. This situation is compounded by the recent passage of the Family Courts Act 2023 (FCA 2023), which has repealed the Family Courts Ordinance 1985. While the FCA 2023 introduces some changes, it fails to address several pre-existing challenges, leaving much of the system flawed.[85]

8.2 Provisions of the Family Courts Act 2023

The FCA 2023 introduces two significant changes to the functioning of family courts in Bangladesh:

1. **Court Fee Increase**: The court fee for family court cases has been increased from BDT 25 to BDT 200 (Section 25 of FCA 2023).
2. **Expansion of Appeal Options**: Appeals against the family trial court's decrees can now be brought to district courts or courts of equivalent status (including

[85] *M. Rahman, "Customary Laws and Family Disputes in Indigenous Communities," Dhaka University Law Review, Vol. 22, 2021.*

S. Alam, "Shalish and Informal Justice in Bangladesh," Journal of Community Justice Studies, Vol. 16, 2020.

Woman and Children or Labor Courts), providing relief in terms of reducing the backlog of cases.

Moreover, Section 13(6) of the FCA 2023 allows witness evidence to be submitted through affidavit without requiring the witness to attend the trial.[86] Additionally, the new law increases the threshold for appealing against a decree related to dower, raising the amount from BDT 5000 to BDT 50,000.

However, despite these improvements, several challenges remain unaddressed in the FCA 2023, particularly in the jurisdiction of family courts and the absence of Alternative Dispute Resolution (ADR) mechanisms in the appellate stage.[87]

8.3 Ongoing Challenges and Limitations in Family Court Jurisdiction

The FCA 2023 continues to limit the scope of family court jurisdiction, which primarily covers issues such as marriage dissolution, restitution of conjugal rights, maintenance, guardianship, and custody of children. Yet, important family matters such as adoption, inheritance, and maintenance for parents remain outside the family courts' purview.[88]

The High Court Division of Bangladesh Supreme Court, however, has extended the interpretation of "matters arising out of" family disputes to include certain issues not explicitly covered under Section 5 of the FCA 2023. Despite this, the jurisdiction of family courts remains contentious, and the legal framework does not clearly define who can approach the family court for restitution of marital rights, particularly in light of gender equality principles.[89]

[86] FCA 2023, Section 13(6), Section 25.

[87] *K. Hossain, "The Impact of Increased Court Fees on Access to Justice in Family Disputes," Bangladesh Law Journal, Vol. 14, 2023.*

A. Begum, "Affidavit Evidence and Its Effectiveness in Family Law Proceedings," Journal of Legal Reforms, Vol. 10, 2023.

[88] Article 5 of the Family Courts Act, 2023.

[89] *High Court Division Ruling on Restitution of Conjugal Rights: Nasreen Akhter v. Md. Sharif, 2022 BLD 45.*

In a landmark ruling, the court declared that a husband suing for restitution of conjugal rights against an unwilling wife is a violation of constitutional equality principles. However, the FCA 2023 has not provided a clear solution to this issue.[90]

8.4 Absence of ADR in the Appellate Stage

Another key limitation of the FCA 2023 is the absence of ADR mechanisms at the appellate stage, which could help reduce the backlog of family-related cases. Despite the success of ADR provisions introduced for civil cases under the Code of Civil Procedure (Amendment) Act 2006, no such provisions have been made for family cases in the appellate stage, even though the FCA 2023 explicitly includes ADR for pre-trial proceedings.[91]

8.5 Discriminatory Practices Under Personal and Customary Laws

Women in Bangladesh face significant legal discrimination, particularly under personal laws of Islam, Hinduism, Buddhism, and Christianity. While reforms have been made in other countries to eliminate gender bias in family laws, Bangladesh has yet to fully embrace such reforms. For instance, Muslim women are often groomed to assume roles defined by their male counterparts, while Hindu and Buddhist women face even worse treatment.[92]

Christian women, on the other hand, enjoy better legal protection, particularly in inheritance matters. However, tribal women, who follow indigenous practices, are still governed by outdated customs that place them at a disadvantage.

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[90] A. Haque, "Jurisdictional Challenges in Family Courts," Bangladesh Judicial Review, Vol. 17, 2023.

[91] Code of Civil Procedure (Amendment) Act, 2006. *S. Khan, "ADR Mechanisms and Case Backlog in Family Courts," Asian Journal of Alternative Dispute Resolution, Vol. 9, 2022.*

[92] *Muslim Family Laws Ordinance, 1961. Hindu Married Women's Separation and Maintenance Act, 1946. UN Women, "Personal Laws and Gender Bias in South Asia," Policy Paper, 2020. S. Amin, "Indigenous Women and Customary Law: The Case of Bangladesh," Journal of Ethnic Studies, Vol. 12, 2021.*

8.6 Issues of Concern Regarding Women's Rights

1. ***Marriage and Consent**:*
    - The Child Marriage Restraint Act, 2017 establishes the minimum age for marriage as 18 for women and 21 for men, but forced marriages continue to occur, particularly where women's consent is coerced by their families.[93]
    - The practice of dower (Mahr) in Muslim marriages, while intended as a form of respect, often undermines the dignity of women and their financial independence.
    - Polygamy remains legal for Muslim men, with few restrictions, while Hindu and Christian men have even fewer limitations on marriage.[94]
2. ***Divorce and Separation**:*
    - Under the Muslim Family Laws Ordinance, 1961, Muslim women can seek divorce under specific circumstances, but the power dynamics remain skewed against them. For example, the wife has to relinquish the dower in cases of Khula (divorce by mutual consent).
    - In contrast, Hindu and Buddhist women have no legal recourse for divorce and must resort to maintenance under the Hindu Married Women's Separation and Maintenance Act, 1946.
    - The practice of Hilla marriage, where a woman must marry another man before remarrying her former husband, continues to oppress women despite being outdated.[95]
3. ***Maintenance Rights**:*
    - Muslim women are entitled to maintenance during the Iddat period after divorce, but this concept is not recognized in other religious communities.

[93] Child Marriage Restraint Act, 2017 (Act No. XIX of 2017).

[94] K. Sultana, "Polygamy in Muslim Law: A Gender Perspective," Bangladesh Journal of Gender Studies, Vol. 8, 2022.

[95] *M. Ahmed, "The Practice of Hilla Marriage and Women's Rights," Bangladesh Law Review, Vol. 13, 2023.*

- Child maintenance is a legal entitlement under Muslim law but remains limited for women in other communities.

4. ***Guardianship and Custody**:*
    - Muslim law grants custody of children to the mother until they reach a certain age, but the father retains legal guardianship. This undermines the mother's role as a guardian and leaves her with limited rights.
    - Hindu and Christian personal laws do not have a clear distinction between guardianship and custody, creating confusion and a lack of protection for women and children.
5. ***Fatwa and Its Social Implications:***
    - The issuance of Fatwas continues to be a tool of oppression for women, particularly in rural areas, leading to emotional and physical abuse. Despite the enactment of the Women and Children Repression Prevention Act, Fatwas are not explicitly addressed as punishable offenses.
6. ***Property Rights**:*
    - Women in Muslim communities are entitled to inheritance, but receive only half of what their male counterparts inherit. Hindu women, on the other hand, have limited inheritance rights, while Christian women enjoy more equal rights to inheritance.
7. ***Adoption**:*
    - The right to adopt a child is restricted by gender under Hindu law, as only men can adopt a male child. Muslim law does not allow adoption, while Christian law permits it.

8.7 State Commitments and the Need for Reform

Bangladesh has committed to eliminating gender inequality in its family laws in its periodic report to the United Nations. However, the government has failed to implement substantial reforms, particularly in reconciling personal laws with the principles of gender equality laid out in the Constitution. While the Ministry for Women and

Children's Affairs has initiated programs to empower women at the grassroots level, legal reforms within the family law system are still inadequate.[96]

The recent passage of the Family Courts Act 2023 marks an important step towards reforming family law in Bangladesh.[97] However, significant gaps remain in the law's application, particularly in terms of gender equality, the scope of family court jurisdiction, and the absence of ADR in the appellate stage. Additionally, the discriminatory practices under personal and customary laws must be addressed to ensure that women's rights are truly protected. Bangladesh must fulfill its commitments to the United Nations and adopt comprehensive reforms that ensure gender equality in all aspects of family law, from marriage and divorce to inheritance and custody.[98]

[96] *Periodic Report to the United Nations Committee on the Elimination of Discrimination Against Women (CEDAW), 2021.*

[97] Bangladesh Ministry of Women and Children's Affairs, "Empowerment Through Grassroots Legal Reforms," 2022 Annual Report.

[98] *World Bank, "Legal Barriers to Gender Equality in Bangladesh," Country Policy Report, 2020.*

Chapter XI

Recommendations

9.1 Findings problem:

1. Family court jurisdiction includes polygamy and Dowry Prohibition Act. Family Courts Judges are not enough delegated with the power of magistrate 1st class.
2. Family Courts are not separated.
3. Family cases are not disposed of within a specified period, time.
4. The importance of dower in the Mohammedan law is not Considered totally, when an appeal arise against the judgment dower with regard to dower of the Family Courts, provision is made to deposit 50% of the decretal amount to the Family Courts. This provision will considerably reduce harassment of deprived wives and pave the way for realizing the dower. In case of misappeal 20% decretal amount to be deposited.
5. In case of dissolution of marriage necessary amendments are not made with regards to the Dissolution of Marriage Act. The power to dissolute a marriage is not equal for both husband and wife.

9.2 Recommendations

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

2. The National Women's Development Policy (2008) should be implemented at right earnest and steps should be taken to mobilize public opinion in favor of the policy.

3. The Government needs to build consensus amongst concerned stakeholders including the policy makers, civil society groups, media and the general public to adopt a Uniform Family Code in order to protect the rights of all Bangladeshi women within the family. To this end, a Consultative Group should be formulated at the national and local level with representatives from the civil society, rights activists, media and the legal community including ethnic, indigenous and minority groups.

4. The Child Marriage Restraint Act 2017 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.

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

6. Adequate infrastructure arrangements including logistic support and budget should be made available for strengthening the work and record maintained by the Marriage Registrars to prevent child marriage and polygamy. Polygamy should be made a punishable offence under the Women and Children Repression Prevention Act.

7. The Government should endeavor to include a chapter on Family Laws and gender in the Social Science curriculum of High Schools so that the young generation has a better gender orientation which in turn would empower women to negotiate their rights and entitlements.

8. The Chittagong Hill Tracts Regulation (Amendment) Act, 2003 should be made effective by notification through Official Gazette and necessary infrastructure and logistic support should be provided for establishment of Family Courts in the Chittagong Hill Tracts.

9. The jurisdiction of the Family Courts should be extended to address disputes relating to inheritance, adoption, registration of birth, marriages and death, prevention of dowry and domestic violence so as to provide an efficacious forum for adjudication of family disputes.

10. The Government of Bangladesh should take appropriate steps for enacting an effective legislation combating domestic violence in consultation with women's rights activists and civil society groups.

11. Right to adopt should be open to all irrespective of gender or marital status and welfare of child and competence of adoptee should be the basis for consideration.

12. 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.

13. 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.

14. 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.

15. Procedural amendments should be effected in the Family Courts Ordinance in the following areas:

a. Provisions should be made regarding qualification of Family Court judges. Just mere Assistant Judgeship should not be the only criteria for becoming a Family Court judge. Rather considerable length of experience and other relevant skills in dealing with family matters may be made mandatory for recruitment of Family Court judges.
b. To ensure more amicable settlements in the Family Court provisions may be made in the Ordinance regarding the following:
    i. In addition to conciliation and compromise, other ADR mechanisms such as mediation and counseling may be included in the Ordinance. For example, in Malaysia counseling is a first step in handling family disputes.
    ii. Panels of mediators and counselors may be prepared for referral of family disputes. While preparing the list of mediators and counselors' emphasis shall be given to include social welfare experts, counselors, psychologists and medical professionals for the services.
    iii. Provisions may be made for referral of family disputes to other Family Court judges or panel of mediators/counselors at any stages of the case, including whenever both parties intend so.
    iv. Mediation guidelines should be adopted as regards qualification of mediators, mediation process to be carried out, time line for

completion of mediation, payment for mediation services, enforcement of mediated settlement etc. It may be noted that to earn trust of the people, mediation process should be made least intrusive and fair and adopt a party controlled procedure for dispute resolution.

v. Long-term arrangements should be made for training and accreditation of judges, mediators and counselors before their enlistment in the panels.

vi. The same judge should not be allowed to hear a case which he tried to mediate. It is always feared that exposure of judges to the litigants may affect the neutrality of the judiciary. In some cases it may be possible for the litigants to establish personal rapport with the judge which might affect the process of fair justice. Some also think that the judge may not feel comfortable hearing a case which s/he mediated unsuccessfully.

vii. Funds may be allocated from the Government Legal Aid scheme to compensate services of the mediators and family court counselors.

viii. NGOs, civil societies may be encouraged and engaged in supplementing family dispute process, e.g. NGOs and members of the civil society may assist the disputants through imparting information, assisting in filing a complaint and arranging legal aid services.

ix. Various forms may be developed for simplification of family dispute processes. For example, in Malaysia a divorcee may file her complaint by simply filling a form. Family Affairs Consultants usually help them in filling up such forms.

c. To ensure recovery of decrial amount through civil as well as criminal proceeding the conjunction “or” appearing between Section 16(3) (a) and (b) may be replaced with “and”. This will allow recovery of the detrital amount through civil as well as criminal proceedings.

d. To expedite installments for the payment of decrial amount provisions may be made for allowing payment through four equal installments a

year instead of leaving it unlimited as in the case of the ArthaRinAdalat (Amendment) Ain, 2003.

e. To activate the Arbitration Council the Chairmen of the Council should give training on counseling and conciliation and members of the Arbitration Council should provide reasonable remuneration for their services. If adequately trained in Muslim personal laws and equipped with the skills of counseling and conciliation, the Arbitration Council could conciliate marital disputes rather efficaciously and positively.

f. The minimum amount of dower should be fixed and its prompt payment should be ensured in the event of non-maintenance of wife consequent upon separation and divorce, if it is not paid earlier28 or Failing reconciliation the Chairman be empowered to postpone the effectiveness of the divorce until the husband secures payment of dower and iddat maintenance of the wife. This may benefit women to a great extent and also reduces the rate of arbitrary divorce by the husband.

g. Motivate lawyers to participate in ADR and encourage their clients for amicable settlement of family disputes

9.3 Conclusion:

Harmonizations among the personal laws can co-ordinate different personal laws by eliminating major differences and creating minimum requirements or standards. No doubt, such confusions, uncertainties, misconceptions and difference of opinions are thwarting the Family Courts. And these should not be allowed to run anymore. Logically, there may be differing opinions as to how them is conceptions should be removed, or the confusion resolved, or uncertainties eradicated. But it is expected that there will be none to oppose the necessity of doing so. Therefore, keeping in view the purpose of establishing the family courts, all the concerned authorities should, separately as well as collectively, take necessary steps regarding this immediately.

As is evident from the above studyon the seven topics, there is no confusion regarding jurisdiction of Family Courts, camera trial or regarding filing of suit relating to dower and custody of children and guardianship; what is there is only the misconception. But it is clear that there is enough scopes for confusion regarding amendment of plaint,

interlocutory Order and application of CPC in the Family Courts, as there are contradictory opinions on these issues, and apparently there is no specially attentive decision of the Appellate Division clarifying the actual legal positions of those issues, as was done in PochonRikssi Das VsKhuku Rani Dasi and otherscase which clarified the legal position as to Family Court jurisdiction and dual option for filing suits for dower, guardianship and custody of children. As to execution of the decree, the provisions of the Family Courts Ordinance are not as clear as needed. The issue that when a judgment debtor suffered imprisonment for failure to pay decretal money, whether he would be exempted from the unpaid decree money for which he suffered imprisonment, or that decree-money would be recoverable through further execution process, is still unclear. The judges and lawyer society seem grossly divided on the issue.

In Bangladesh the rights of women is always violated because of male dominating family or personal laws. For this reason the provision of equality before law of the Constitution has been violated. If we try to abolish this discriminating provision from the personal laws, it may cause of injury of the sentiments of other communities of Bangladesh and also cause of violation of another article which is guaranteed Freedom of religion. A family law in Bangladesh focuses upon substituting or combining the existing personal laws and replacing them with a single system which is not possible in the contracts of Bangladesh. So that for the well-being of all citizen of Bangladesh we should harmonize the personal law in such a way that the provision of equality before law and freedom religion is not violated and is accepted by all the citizen of Bangladesh. By harmonization of personal laws existing in Bangladesh we can eliminate major differences and create minimum requirements or Standards of it.

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