

R E P O R T O N

# Legislative Initiatives and Reforms in the Family Laws



**Bangladesh Legal Aid and Services Trust (BLAST)**

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## *Legislative Initiatives and Reforms in the Family Laws*

### ***Methodology:***

First of all the *de jure* legal status of rights of Bangladeshi women has been determined through a rigorous study over legal history and laws which attract anyway the family matters of different religious and ethnic groups residing in Bangladesh. A lot of judgments regarding Women's Rights of the apex Court of Bangladesh have been examined to understand its view and role in the reform of family laws. The *de facto* condition is different of *de jure* condition and it has been identified by stir up the information collected from the news papers, reports and research out-puts of NGOs. Series of meetings with like minded organizations and scholars had been held and a survey to analyze the trend of Children and Women Repression Act, 2000 was conducted to gather information to prepare this report. Bangladesh Government's commitments enunciated in the 5<sup>th</sup> periodic report to the United Nations on implementation of CEDAW has been examined cautiously and the gaps between the commitments and both the statuses of Bangladeshi women have been diagnosed. Government repeatedly reinforces that the people's sentiment and Constitutional barrier is the reason for the reforms in so called sensitive family laws and so is argued on behalf of it's adherence to reservations to CEDAW Articles. Reason behind the reluctance of Government in reforming the family laws & withdrawn of reservations lies merely with its own policy and ideology not with others and this finding has come out from the comparison of the spirit of religious personal laws and corrupted dogmatic & militant forms thereof . Finally the recommendations have been made to complement the CEDAW.

## ***Introduction***

Bangladesh is a multi-religious and multi-racial Country. The majority of the population consists of the Muslims (89.7%), followed by the Hindus (9.2%), Buddhists (0.7%) Christians (0.3%) and some other minor communities (0.2%)<sup>1</sup>. There are several indigenous tribes as well (i.e. Chakmas, Marmas, Tripuras, Garos, Santhals, Murong, Khasia, Kuki, Hazong etc.) living mostly in the hilly fringes of the Country. In absence of any uniform Code of Family Laws, family disputes related to marriage, divorce, maintenance, custody of children, guardianship, inheritance etc. are dealt with under various Personal Laws. The State has enacted several laws with general application to all to deal with disputes like repression of women, domestic violence, guardianship, etc. In addition to the codified Personal Laws, many family disputes are resolved through local customs, practices and various methods of informal dispute resolution including *shalish* (a traditional form of dispute resolution). The Personal Laws of the indigenous people have not been codified till date. As a result, they tend to resolve most of their family disputes according to customs, traditions and age-old practices. . Although the Family Courts Ordinance 1985 provides an effective forum for all communities to seek legal redress in the wake of disputes relating to dissolution of marriage, dower, maintenance, restitution of conjugal rights and guardianship of children, in practice, most of the family disputes in Bangladesh are settled through local *Shalish*.

## ***Scenario of Women's Status under the Personal/Customary Laws***

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

The Muslims claim that Islam has placed women in an honorable place. However, the grim reality is that women are perceived and groomed to assume roles and responsibilities invented exclusively for them by their male counterparts. The condition of Hindu & Buddhist women is worse than the women belonging to other communities in Bangladesh. The Christian women in Bangladesh are comparatively in better position. Christian women and men are treated equally in terms of inheritance of ancestral property, marriage, dissolution of marriage and adoption.

Around 50 tribal groups are currently residing in Bangladesh. Though majority of the indigenous communities are governed under different religious laws, they have some independent customs regarding family matters also. The scenario of women`s status will be reflected in our next discussion.

## *Issues of Concern*

### **A) Age:**

The Child Marriage Restraint Act, 1929 have fixed the eligibility age to contract marriage as 21 years for men and 18 years for women. Unless this age is attained at the time of marriage, such marriage will constitute child marriage. According to the law, anyone charged with the offence of aiding, abetting and encouraging a child marriage shall be punishable with simple imprisonment. Since the Child Marriage Restraint Act, 1929 is applicable to all citizens irrespective of religion<sup>2</sup>; the minimum age requirement is applicable for the Muslims as well as people professing other faiths.

### **B) Consent:**

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

### **C) Witnesses:**

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

### **D) Dower Money:**

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

### **E) Registration:**

According to existing law of Bangladesh Muslim marriages must be registered.. The statute imposes liability to register the marriage on the bridegroom and the marriage registrar. Hindu and Buddhist marriages do not require registration. Christian marriage is registered in the book kept in the Church and non-registration is not punishable.

### **F) Polygamy / polyandry:**

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

**G) Hilla Marriage:**

.When the divorce becomes irrevocable and the couple in dispute desires to cohabit again, a fresh marriage between them becomes mandatory. However before remarrying her husband, the wife is required to marry a third person and such kind of intermediate marriage (hereinafter called as *hilla* marriage) has to be consummated. The issue of *hilla* marriage often instigates violence against women and should be abolished immediately. Unfortunately, it has neither been prohibited nor abolished completely. With the completion of pronouncement of triple talak, according to Section-7 of MFLO, 1961 *hilla* marriage becomes obligatory for the wife if the couple wants to cohabit again. The concept of *hilla* marriage is absent in other religious communities

**Divorce/ Separation****A) By Mutual Consent**

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

**B) Talaq-E-Taufiz**

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

**C) Contested Divorce**

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

**D) Right to Separate Residence and Maintenance**

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

### **E) Registration**

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

### ***Fatwa and its Social Implications:***

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

### ***Maintenance***

#### **A) Maintenance during Iddat Period**

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

#### **B) Maintenance for Children<sup>3</sup>:**

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

### ***Restitution of Conjugal Rights:***

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

### ***Guardianship and Custody of Children:***

#### **A) Contested Custody Cases:**

According to Islamic Jurisprudence, the father is the natural guardian of the children. After his death guardianship accrues upon the paternal grand father and the paternal grand father's executor. A Muslim mother can never be the legal guardian of her children. Instead of guardianship, she can claim the custody of her son until he is seven years of age and of her daughter until she is eighteen years of age. If there is a breach of this duty by a unilateral act of the father or anybody on his behalf, the aggrieved mother has the right to move before the High Court Division under Article 102 of the Constitution for immediate custody of the

children which may be ordered in their interest and welfare. The law however stipulates that the father continues to be the children's legal guardian even if the mother is granted custody through the Courts.

By virtue of The Guardian and Wards Act, 1890, the doctrine of welfare of children has assumed importance and over the past decades a visible shift has been noted in the application of judicial mind in matters relating to custodianship.

No technical division as to guardianship and custody of children exists under Hindu or Christian personal laws. However, although The Guardian and Wards Act, 1890 is uniformly applicable to all citizens, the Hindu and Christian personal laws are yet to evolve accordingly.

### ***Right to Property***

Women from all communities excepting the Christians suffer from discrimination with regard to claiming their right to property. According to the Golden Rule of the principle of law of inheritance for the Muslims, female co-sharer gets half of a male of same grade i.e. husband gets  $\frac{1}{2}$  and  $\frac{1}{4}$  in two capacities while wife gets  $\frac{1}{4}$  and  $\frac{1}{8}$  in the same capacities respectively. Brothers and sisters inherit at 2:1 ratios.

A Bangladeshi Hindu woman's right to inheritance is non-existent. In Bangladesh the limited right of life estate<sup>4</sup> or widow's estate accorded to a woman, is sometimes referred to as inheritance, although this is an anomaly within the strict understanding of the term inheritance. However, a Hindu widow is not entitled to alienate the immovable property inherited by her.

A Christian woman is in a comparatively better position under the law of inheritance than a Muslim or Hindu woman given she is entitled to inherit equally as that of her brother. The Married Women's Property Act, 1874 provides that the earnings of any married woman remain her exclusive and separate property. Among indigenous tribes the Marma women inherit equally. Tanchanga daughters cannot claim ancestral property if there is a son and Tripura & Chakma daughters as a matter of practice do not claim their right to ancestral property.

### ***Adoption:***

According to Hindu law, only men have the right to take a male child in adoption. Hindu women have no right to adopt. Right to adopt is recognized and encouraged in Christian law. The concept is prohibited in Muslim law. As a State party to the CEDAW, Bangladesh is under obligation to take all appropriate measure to eliminate discrimination against women and to ensure on the basis of equality of men and women the same rights and responsibility with regard to adoption of children<sup>5</sup>. No legislative initiative has been taken to ensure that the right to adopt is open to all irrespective of gender or marital status.



### ***State Commitments:***

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

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

### ***Gaps regarding fulfillment of commitments:***

A wide gap between commitments made by Bangladesh and their implementation has been identified in this report. No initiative to remove incompatibilities between personal laws and the Constitution has been taken as yet. Articles incorporated in Parts I & II of the Constitution dealing with fundamental principles of State policy and fundamental rights provide for gender equality in public life but remains silent about private life. Though the Child Marriage Restraint Act, 1929 limiting the age of marriage as 21 years for men and 18 years for women is applicable to all citizens irrespective of religion<sup>6</sup>; the minimum age requirement is applicable for the Muslims as well as people professing other faiths, At present 68% girls below 18 years are being married in rural areas.<sup>7</sup> Against the backdrop of a male-dominated society which treats women as subordinates, women are seldom encouraged to make an informed decision including choosing a spouse and to consent freely at the time of marriage. Parents tend to impose their decisions regarding marriage on the bride and under coercion the bride gives consent to marry the man chosen by her guardians. 65% of the aforesaid numbers of child marriages are occurred forcibly.<sup>8</sup>

Dowry has become an inevitable part of marriage amongst all communities in Bangladesh, although it is prohibited by legislation and has been made a punishable offence<sup>9</sup>. In the event that the wife and her relations fail to comply with the financial demand of the husband, she is subjected to both psychological as well as physical abuse. It is also one of the most common causes of domestic violence in Bangladesh.<sup>10-11</sup>, Current research showed that up to 50% of all women experience domestic violence at least once. Some of reported violence against women continued to be related to disputes over dowries.<sup>12</sup> A total of 1884 women fell victim to dowry related violence from 1 January 2001 to 28 February 2007. Of them 1241 women were killed, 479 were brutally tortured, 61 suffered acid burns and 95 committed suicide.<sup>13</sup> According to another survey report in 11 Tribunals of 6 Divisional Cities of Bangladesh 2237 dowry related cases had been instituted in the year of 2007.<sup>14</sup>

According to law the investigation over the offence is to be completed within 90 days but unfortunately in most of the cases investigation remain uncompleted in the prescribed time.<sup>15</sup> Bangladesh is still continuing reservation to Articles 2 & 16(1) (c) of CEDAW and no visible initiative for the withdrawal thereof has been taken by the respective Governments. No major endeavor from the Government's

side to mobilize the society to accept necessary reforms in the Personal Laws has been noticed.

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

The government of Bangladesh ratified CEDAW on 6 November 1984 with four reservations. In 1997, it had partially lifted reservations from Article 13 (a) and 16(f) of the CEDAW. Though the Convention provides a comprehensive range of mechanisms and policy measures for combating gender discrimination, the Government of Bangladesh has not ratified CEDAW in full and has retained reservations to Article 2 and Article 16 (c) on the grounds that they are in direct contradiction with the *Shariah* and other personal laws. The Country is largely Governed by the Civil and Criminal Procedure Codes enacted during the British rule. In case of disputes relating to marriage, dissolution of marriage, maintenance, custody and inheritance, they are adjudicated upon under the personal laws of the parties in dispute.<sup>16</sup> Bangladesh's reservation to Article 2 which is considered to be the heart of the Convention is in contradiction with its own Constitutional guarantee provided under Articles 10, 19, 27, 28, 29 which pledge that the State shall not discriminate against any Citizen on the ground of religion, race, caste, sex or place of birth and women shall have equal rights with men in all spheres of the State and public life. Bangladesh is also under a legal obligation to comply with International Human Rights Instruments by enforcing, enacting and reforming national laws so that they conform to the principle of non-discrimination and equality.<sup>17</sup>

Bangladesh has not lifted its reservation from Article 16 (1) (c) which stipulates for women's equal rights with men in marriage and its dissolution. The problem is exacerbated by the fact that the Constitution also mandates for equal rights for men and women in public life but remains silent about private life. Consequently, the Muslims, Hindus, Buddhists, and Christian women continue to be subjected to discrimination under religious personal laws while claiming their right to marriage, divorce and inheritance. Under Muslim personal law, a Muslim man has a unilateral right to divorce, whereas women's right to divorce is conditional. A Muslim man may marry a Muslim woman or a *kitabiyah* but Muslim women cannot marry anyone except a Muslim. When a Muslim man marries a Hindu woman, the marriage is only invalid and does not affect the legitimacy of the offspring, as the polytheistic woman may at any time adopt Islam which would at once remove the bar and validate the marriage.<sup>18</sup> Hindu and Buddhist women have no legal right to bring a suit for divorce and the existing Christian civil laws are so outdated that they are quite useless in practical terms. The Special Marriage Act of 1872 provides for civil marriages, but this law has limited impact given the fact that there is only one Marriage Registrar for the whole Country and that requires a formal declaration from the parties intending to marry that they do not profess any religion. The society also has to grapple with dowry demands, polygamy and child marriage that continue unabated.

### *Irrational Argument on continuing reservation:*

In 1937, 1939, 1961 and 1985 Muslim Family Laws had been reformed radically and the reformists did so by progressive interpretation of the Holy Quran and through using the mechanisms of interpretation i.e. Ijma, Quias, Sunna and Fikah. The process was recognized and practiced even by the Caliphs and Olamas during the advent of Islam. The **Doctrine of Himariah**<sup>19</sup> is a glaring example of reformation in the law of inheritance. Islamic law is not followed in civil and criminal jurisprudence of Bangladesh except in the family laws. General people always welcome the reform in favor of mankind but a little group of dogmatic persons who deserve the declaration of being outlawed create anarchy and violence when attempt to reform is taken. It is mysterious why Governments become submissive to and afraid of the militants. Recently such kind of anarchists created violent movement against National Policy for the Women's Development, 2008 and Government surrendered to those miscreants whereas the same Government arrested and atrociously tortured university teachers, students and famous intellectuals as they raised their voice against military torture on general University students. Before 1829 Hindu widows were forced to commit suicide and were lively burnt with their deceased husband and thus their right to life was brutally slaughtered by the dogmatic customary law. The civil society of the then Indian Sub-Continent raised their voice against this brutality and finally their advocacy came to a successful end when the Government enacted a law prohibiting such kind of suicides of the Hindu widows. In 1856 another inhuman treatment to Hindu widows was removed by enacting Hindu Widows Remarriage Act. So reformation is nothing new to religious customary laws and as all religions approve reform by interpretation, there can be no bar to enact laws to ensure the enjoyment of women's human rights. In stark contrast however, no reform has been instituted to the Hindu family law since 1947 although in neighboring India that has an overwhelming majority of Hindu population, drastic changes have been effected in the family laws and the laws relating to inheritance for the welfare of the women. Bangladesh is not an Islamic State but rather a Muslim majority Country. Secularism was established as one of the main pillars of the Constitution at the Nation's birth, that was later revoked when Islam was declared the State Religion in 1986 by the 8<sup>th</sup> amendment to the Constitution. Eventually, a space was created to ensure the influence of Shariah law in society, which has in turn relegated women to a subordinate status. Human rights are very much essential for the fullest development of all faculties of human being and the women are being deprived of their human rights merely because of their being female. In our Country half of the total population is suffering acute discrimination regarding enjoyment of civil, political and ESC rights and our present and past governments never pay head to this problem.

## *Government and NGO Initiatives in Effecting Reforms in the Family Law:*

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

The Ministry for Women and Children's Affairs and civil society groups has engaged in programs on legal literacy and awareness around social evils emanating from dowry, polygamy and child marriages. Recently, the Government has provided gender training to a number of government officials. The Women and Children Repression Prevention Act was also amended in 2003 with inputs from the civil society.

Several NGOs have engaged in different lobbying and advocacy initiatives to put pressure on the Government to lift reservations from Article 16(1) (c) and Article 2 of CEDAW. Training has also been provided to rural women about family laws. Legal aid NGOs have played a pioneering role in providing *pro bono* legal assistance and services to the poor women in particular with a view to enabling them to claim their rights and entitlements through courts as well as mediation. Women beneficiaries have been encouraged to register their marriages alongside provide basic information about laws relating to marriage and divorce.<sup>20</sup> Program interventions have been chalked by different NGOs to reduce child marriages, dowry, polygamy, domestic violence and violence against women. Women's rights activists have lobbied with concerned government authorities for the establishment of a Uniform Family Code. A lot of brainstorming and consultations have been underway with different stakeholders to enact an effective legislation to combat domestic violence.

Bangladesh Legal Aid and Services Trust (BLAST) has organized five regional workshops on CEDAW with active participation of service providers in the justice sector including the media and local government representatives covering nineteen districts of Bangladesh. It has also holistically reviewed and provided recommendations on the Family Courts Ordinance 1985 and the Women and Children Repression Prevention Act in consultation with different stakeholders at the local and national level including the Law Commission. Since its inception in

1994, BLAST has provided *pro bono* legal assistance in more than 45811 cases (amongst these cases 17264 were family court cases out of which 6394 were disposed of in favor victims. Notably, majority of its beneficiaries are poor women who have been enabled to claim their rights and entitlements in family disputes. Women's social capital has been enhanced in as much as money recovered through legal aid and mediation (Taka 115,788, 121) has been used for different livelihood purposes.

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

### ***Towards a Social Change: Expansive Interpretation of Women's Rights through Courts***

Analysis of reported Bangladeshi case laws in matters relating to the family provides a glimmer of hope in an otherwise murky environment for women. It is encouraging to note that between 1971 to date in response to a woman's claim for the protection of her rights relating to the family, the courts have through some groundbreaking decisions in many instances provided progressive interpretation of women's rights.

It is common practice in Bangladesh that the husband tends to arbitrarily exercise his power of divorce on simple grounds and for trivial matters. This is in spite of the legal procedure and provisions laid down under Section 7 (1) of the Muslim Family Laws Ordinance, 1961. In *Kazi Rashed Akhter Shahid (Prince) V. Rokshana Choudhury (Sanda)* 58 DLR (HC) 271 (2006) the High Court made an observation with regard to Section 7 (1) of Muslim Family Law Ordinance 1961 which requires the husband to give a notice in writing of his having pronounced *Talaq* (Divorce) to the Chairman. The Court observed that if the husband abstains from issuing such notice to the Chairman, it would be deemed that the husband has revoked the *Talaq* and the marital status of the parties has not been changed. In the case of *Ikhtiar Hossain Choudhury V. Shahenoor Akhter*, 11, BLC (HC) Page 516, the High Court has granted past maintenance to the wife after separation for 4 years 10 months including 3 months for *Iddat* period which is an excellent precedent for the protection and promotion of women's rights in the country.

In *Hefzur Rahman v. Shamsunnhar Begum*<sup>21</sup>, the learned justice of HCD decided that a person after divorcing his wife is bound to maintain her on a logical scale beyond the period of *Iddat* for an indefinite period that is to say, till she loses the status of a divorcee by remarrying another person. The judgment was overturned on appeal before the Appellate Division of the Supreme Court of Bangladesh which has been a setback in promotion of women's rights.

According to Islamic jurisprudence father is the natural guardian of the children. After his death guardianship falls on the father's executor, the paternal grand father and the paternal grand father's executor. A Muslim mother can never be the legal guardian of her children. Instead of guardianship, she is entitled to the custody of her son until the age of seven years and of her daughter till she is eighteen years of age. If the mother is denied of this right by a unilateral act of father or anybody on his behalf, the aggrieved mother has the right to move the High Court Division under Article 102 of the Constitution for immediate custody of the children which may be ordered in the interest and for the welfare of the said children. By virtue of The Guardian and Wards Act, 1890, the **Doctrine of Welfare of Children** has been evolved and over the past decades a noticeable shift is seen in judicial attitudes in the matter of custodianship.

In *Amirul Bor Choudhury V. Nargis Sultana* 19 BLD (HCD) 213 (1999), the Court held that father's remarriage is a disqualification and awarded custody to the mother. The Court observed that it appears that the defendant petitioner (father) has got married again and as such the welfare of the twin sons will not be protected in the hands of the step mother.

In *Sharon Laily Begum's case*<sup>22</sup> (this case was brought to court by Ain o Shalish Kendro) mentioning a citation from Ameer Ali that 'the milk of a Muslim mother is not more nutritious than that of a Christian mother', a family court granted full custody of four minor children aged between five and fourteen years to the mother, a British Christian citizen. A High Court bench held that custody and guardianship of minors cannot be settled by a private compromise or even by arbitration<sup>23</sup>.

In a recent case *Farzana Azad V. Samudra Ejajul Haque*<sup>24</sup> where the petitioner instituted a Writ Petition of *habeas corpus*, a Division Bench of the High Court ordered to put the minor children under the custody of their mother.

No technical division as to guardianship and custody of children exists under Hindu or Christian personal laws. Even though the Guardian and Wards Act, 1890 is applicable to all citizens, the Hindu and Christian personal laws are yet to evolve accordingly.

With regard to the right of guardianship, the High Court has shown an affirmative approach in *Syeda Shamsunnahar's case*<sup>25</sup> where the mother's right to guardianship has been recognized.

Where there is no divorce by either side then title suit for the restitution of conjugal rights can be instituted either by the husband or the wife and if there is a decree then the decree can be executed by the attachment of property of the defendant if the judgment debtor is unwilling to abide by the decree. Given an overwhelming majority of Bangladeshi women do not own enough property; the decree cannot be executed if the losing defendant is the wife. It is a common practice among husbands to institute a suit for restitution of conjugal rights to compel the unwilling wife to cohabit with them. In *Khodeja Begum V. Md. Sadeq Sarker* 50 DLR (1998) 181, the Court held clearly that the law of restitution is a violation of social justice as enunciated in the preamble of the Constitution. In *Chand Mia V. Rupnahar* 51 DLR (1999) 292 the Court held an important

obligation of marriage is that of consortium ....thus if either spouse refuses to live with the other, the other is entitled to sue for restitution and fulfillment of his or her marital duties and obligation.

An expansive interpretation to the indefeasible right to life was provided by the apex court of Bangladesh in the *Editor, Banglabazar Patrika V. DM & DC, Naogaon*<sup>26</sup>. In this case, a Division Bench of the High Court has delivered a milestone judgment prohibiting fatwa. Later the application of the judgment had been stayed by the Appellate Division of the Supreme Court which is now pending for hearing. The apex court held that fatwa means a legal opinion which therefore means legal opinion of a lawful person or authority. It further observed that the legal system of Bangladesh empower the courts alone to decide all questions relating to legal opinion on Muslim law and other laws being in force. The Honorable Court therefore concluded that fatwa is both illegal and unauthorized.

In a claim of restitution of conjugal rights against the wife, the Court interpreted that unwillingness to live with the husband cannot be claimed on the ground of want of mutuality between them. It is also a violation of principle of equality between men and women as laid down in Article 28(2) of the Constitution.<sup>27</sup> In comparison to the disputes pertaining to family matters adjudicated upon by the Courts, a few number of test cases have been initiated which has enabled the court to render progressive interpretation concerning women's right to inheritance and succession. Nevertheless, we may conclude that expansive interpretation of women's rights by the Apex Court has to an extent paved the way towards social change for the protection and promotion of women's rights.

### ***Recommendations***

1. The Government of Bangladesh should take concrete steps to withdraw reservations to Article 2 and 16 (1) (c) of CEDAW.
2. The National Women's Development Policy (2008) should be implemented at right earnest and steps should be taken to mobilize public opinion in favor of the policy.
3. The Government needs to build consensus amongst concerned stakeholders including the policy makers, civil society groups, media and the general public to adopt a Uniform Family Code in order to protect the rights of all Bangladeshi women within the family. To this end, a Consultative Group should be formulated at the national and local level with representatives from the civil society, rights activists, media and the legal community including ethnic, indigenous and minority groups.
4. The Child Marriage Restraint Act 1929 should be reviewed and amended with a view to ensuring that child marriage practices are reduced if not eliminated. Accordingly, the law should provide for stringent punishment including imposing a fairly large amount of fine as well as a longer term of imprisonment for those aiding, abetting and encouraging child marriages.

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 counselling may be included in the Ordinance. For example, in Malaysia counselling is a first step in handling family disputes.
- (ii) Panels of mediators and counsellors may be prepared for referral of family disputes. While preparing the list of mediators and counsellors' emphasis shall be given to include social welfare experts, counsellors, 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/counsellors 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 counsellors 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 counsellors.
- (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 decretal 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 decretal amount through civil as well as criminal proceedings.

d. To expedite instalments for the payment of decretal amount provisions may be made for allowing payment through four equal instalments a year instead of leaving it unlimited as in the case of the Artha Rin Adalat (Amendment) Ain, 2003.

e. To activate the Arbitration Council the Chairmen of the Council should give training on counselling 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 counselling 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 earlier<sup>28</sup> 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

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<sup>1</sup> Population Census, 2001, National Report (provisional), published in 2003 by Bangladesh Bureau of Statistics.

<sup>2</sup> Section- 1(2) Of The Child Marriage Restraint Act, 1929

<sup>3</sup> As section 488 of CrPC has been repealed now dispute over maintenance is settled only in the family court under section 5 of FCO, 1985.past maintenance is not available to a child unless it has become due under either the decree of a court or agreement by the father. Source: Rustom Ali Vs Jamila Khatun, 10 BLD -1990 (HCD), Page-434

<sup>4</sup> A widow's life estate generally means that the share inherited by a widow is to be enjoyed during her life time and as soon as her death her inherited portion is to be reverted to the fresh blood stock.

<sup>5</sup> Article 16(1) (f) of CEDAW.

<sup>6</sup> Section- 1(2) Of The Child Marriage Restraint Act, 1929

<sup>7</sup> The Bangladesh Today of 30.08.2008, page- 12, Column -1, at the news report `reason of early marriage more social and religious than legal: Trend of early marriage increasing alarming.

<sup>8</sup> *Ibid*

<sup>9</sup> Women and Children Repression Prevention (Amendment) Act 2003 and The Dowry Prohibition Act, 1980

<sup>10</sup> Nusrat Ameen , Wife Abuse in Bangladesh, An Unrecognized Offence, University Press Limited, Dhaka-2005 Page-41.

<sup>11</sup> Nusrat Ameen , Wife Abuse in Bangladesh, An Unrecognized Offence, University Press Limited, Dhaka-2005 Page-41.

<sup>12</sup> Bangladesh: Country Reports on Human Rights Practices-2007. Released by The Bureau of Democracy, Human Rights and Labor, 11 March, 2008

<http://www.state.gov/g/drl/rls/hrrpt/2007/1000612.htm>

<sup>13</sup> Odhikar Press Release on Violence against Women in Bangladesh on The Occasion of International Women's Day 2007.

<sup>14</sup> Survey on Trend Analysis of Women and Children Repression Prevention (Amendment) Act 2003, conducted by BLAST in the year of 2007.

<sup>15</sup> *ibid*

<sup>16</sup> The Fifth Periodic CEDAW Report, Page-10

<sup>17</sup> Faustina Pereira, The Fractured Scales, The Search for a Uniform Personal Code, University Press Limited, Dhaka, Page -112

<sup>18</sup> ASAF A.A. Fyazee, Outlines of Muhammadan Law- Forth Edition ,1974, Page 98

<sup>19</sup> During Omar's regime a woman died leaving husband, mother, two uterine brothers and two full brothers. According to the Muslim law of inheritance half of her property was distributed to the husband, one sixth to the mother and one third to the uterine brothers. As per shariah the full brothers were to take their share as residuary. In this case as the property had been exhausted by the Quranic sharers the full brothers were *de facto* excluded & deprived. Then the aggrieved brothers went to the caliph and then Omar gave his decision that the 1/3 of the property which was inherited only by uterines was to be distributed among the four brothers per capita. This is doctrine of himariah.

<sup>20</sup> Steps Towards Development, CEDAW and BANGLADESH: Constitution, Law, and National Initiatives A Comprehensive study 75(2002)

<sup>21</sup> Hefzui Rahman Vs Shamsunn Nahar Begum and another- 51 DLR (AD) 173 1999

<sup>22</sup> Abdul Jalil V. Sharon Laily Begum, family suit no. 145 of 1995 and family suit no. 183 heard analogously and judgment delivered by the Family Court on 1<sup>st</sup> April 1999. 50 DLR (AD) 55 & 1998 BLD (AD) 21.

<sup>23</sup> Mst. Tahera Begum v. Saleem Ahmed Siddique, PLD 1970 Karachi 619.

<sup>24</sup> W.P. No. 770 of 2007, 60 DLR ( January, 2008)

<sup>25</sup> Syeda Shamsunnahar Vs Md.Khorshed Anwar Khan 10 MLR (HC) 2005 page-148-150,

<sup>26</sup> W.P No. 5897 of 2000 Banglabazar Patrika Vs. DM and DC, Naogaon

<sup>27</sup> Nelly Zaman Vs. Giasuddin-34 DLR (HCD) 1982, Page-221

<sup>28</sup> M Abdul Halim, Women's Crisis Within Family in Bangladesh, Bangladesh Society for Enforcement of Human Rights (BSEHR)-1995, Page150