FROM PATRIARCHY TO GENDER EQUITY: FAMILY LAW AND ITS IMPACT ON WOMEN IN BANGLADESH

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ABSTRACT

This thesis constitutes a detailed assessment of the legal position of women in Bangladesh and argues that, despite some recent reforms purporting to improve their status, there is no real change in the situation of patriarchal domination. It is further argued that the dominant patriarchal structures, with the interlinked forces of religion, tradition and seclusion, are sustained not only in family life but also in family law.

The thesis illustrates some confusions in the debates about the legal position of women and suggests that the lack of conceptual clarity has handicapped a discussion of the real needs of women in family law within a patriarchally-dominated legal framework.

Based on a detailed exposition of family law under the British colonial regime and Pakistani state law, the present study focuses on the more recent Bangladeshi legal developments. These were officially brought about to meet certain social needs and to improve the overall situation of women. However, apart from the reforms concerning the Family Courts Ordinance of 1985, and some glimpses of judicial activism, in reported as well as unreported cases, the existing family law reforms are shown to be mainly procedural. In particular, they appear unable to protect women effectively from violence and economic deprivation. While not arguing for absolute gender equality, although this is apparently provided as a paper right in the Constitution of Bangladesh, the present study proposes that gender equity in family law can be meaningfully developed by better implementation of the existing law, prominently by sensitising the judiciary and society about the particular needs of women.

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Last but not least, gratitude goes to my husband, Mr. A.I.M.Monsoor, who gave invaluable support and encouragement throughout and our children, Tanzela and Tahmid, who have learnt to be tolerant and understanding, showing that it can be useful for overseas scholarship holders to be accompanied by their families.

GLOSSARY

1. Adl ---- Justice
2. Akika ---- Naming ceremony
3. Alims ---- Persons having knowledge in religion
4. Al-hadith ---- Tradition
5. Al-ray ---- Independent personal reasoning
6. Asummat ---- Large amount of dower shown in public while a lesser amount is arranged in private
7. Balikucha ---- An instrument for sharpening knives
8. Bangabandhu ---- Friend of Bengal
9. Barga ---- Share cultivation arrangements
10. Bati ---- Sharp cutting object
11. Bari ---- House
12. Bhodrochito hare ---- In a respectable manner
13. Birangona ---- Rape victims of war
14. Burkha ---- Covering cloak
15. Daabi ---- Demand
16. Dhenki ---- Husking instrument
17. Din ---- Religion
18. Faskh ---- Judicial dissolution of marriage
19. Fakir ---- Holy men or saint
20. Fatwa ---- A religious verdict
21. Fiqh ---- Jurisprudence, study of the sharia
22. Gaye holud ---- Purification before marriage
23. Hadith ---- Practice of the prophet
24. Harem ---- Secluded portion of the house
25. Hiba al-mahr ---- Gift of dower
26. Iddat ---- Wife's period of waiting to remarry after death or divorce of husband
27. Ijab ---- Offer
28. Ijtihad ---- Personal reasoning
29. Ila ---- Oath of abstinance
30. Izzat ---- Honour
31. Jamai ador ---- Special affection shown to the bridegroom
32. Kabin nama ---- Contract of marriage
33. Kazi ---- Religious Judge
34. Kitabia ---- Women professing a scriptural faith
35. Khiyar al-bulugh ---- Option of puberty
36. Khula ---- Divorce given by the wife

37. Khadi ---- locally manufactured cloth
38. Kanyadan ---- Gift of virgin
39. Lakh ---- One hundred thousand
40. Lathi ---- Stick
41. Lian ---- Mutual imprecation
42. Lojja ---- Shyness
43. Madrashas ---- Religious schools
44. Mahr ---- Dower
45. Mazar ---- Burial place of holy man or saint
46. Mendi ---- Beautification before marriage
47. Mubarrat ---- Divorce by mutual consent
48. Muftis ---- Muslim law officers
49. Mukhe vhat ---- First feeding of solids to a child
50. Naior ---- Married women's occasional visit to the parental home
51. Nashuzah ---- Disobedient wife
52. Neshakhor ---- Addicted to alchohol
53. Nikah ---- Marriage
54. Nikahnama ---- Marriage contract
55. Panchayats ---- Village court
56. Parishad ---- Local administrative unit
57. Pir ---- Holy men
58. Qabul ---- Acceptance
59. Qadi ---- Religious judge
60. Qawwam ---- Protection
61. Saram ---- Shyness
62. Sari ---- National dress of Bangladeshi women
63. Sharia ---- The recommended path
64. Shahar Committee ---- Local administrative unit
65. Shalish ---- Extra-judicial mediation or arbitration
66. Shehry ---- Late night meal for keeping fast
67. Sinduk ---- Locker or treasure-chest
68. Stridhana ---- Women's property in Hindu law
69. Sunnah ---- Practice of the prophet
70. Sunni ---- A Muslim Sect
71. Tabiz ---- Amulet wherein a verse of the Quran is written
72. Talaq ---- Unilateral dissolution by the husband
73. Talaq-al-bidah ---- Triple divorce in one sitting
74. Talaq-al-hasan ---- Three pronouncements of talaq during the period of purity
75. Talaq-e-tahweed ---- Delegated divorce
76. Thakkayur ---- A legislative method to pick and choose between different dictas
77. Ummah ---- Society
78. Usool ---- Paid
79. Usul ---- Customary practices
80. Zenana ---- Secluded portion of the house
81. Zihar ---- Impious declaration
82. Zina ---- Illicit intercourse

LIST OF ABBREVIATIONS

1.	APWA	All Pakistan Women's Association
2.	AIWC	All Indian Women's Conference
3.	AIR	All India Reporter
4.	BCAS	Bulletin of Concerned Asian Scholars
5.	BLD	Bangladesh Legal Decisions
6.	BRAC	Bangladesh Rural Advancement Committee
7.	BRDB	Bangladesh Rural Development Board
8.	BSCIC	Bangladesh Small and Cottage Industries Corporation
9.	BSCR	Bangladesh Supreme Court Reports
10.	DLR	Dhaka Law Reports
11.	DM	Dowry Murder Cases
12.	HCD	High Court Division of Supreme Court
13.	ILR	Indian Law Reports
14.	IC	Indian Cases
15.	MIA	Moore's Indian Appeals
16.	MFLO	Muslim Family Laws Ordinance, 1961
17.	NGO	Non Governmental Organisation
18.	PLD	All Pakistan Legal Decisions
19.	PR	Privy Council Judgements on Appeals from India
20.	PS	Police Station Cases
21.	SCMR	Supreme Court Monthly Review
22.	WID	Women in Development

TABLE OF CONTENTS

PAGE

ABSTRACT i

ACKNOWLEDGEMENTS ii

GLOSSARY . . . . . iii-iv

LIST OF ABBREVIATIONS v

TABLE OF CONTENTS . . . . . vi-ix

CHAPTER 1

INTRODUCTION 1

1.1 The central premise 1

1.2 The problem in a wider context 4

1.3 Justification of the study 13

1.4 Framework of the study 19

CHAPTER 2

THE SOCIO-CULTURAL SETTING OF WOMEN'S LEGAL STATUS . 30

2.1 Perceived notions of female subordination . 31

2.1.1 Women in Islam 32
2.1.2 The negative impact of traditional cultures 40
2.1.3 Patriarchal structures in Bangladesh 46
2.1.4 Seclusion or Purdah 53
2.1.5 The socio-economic and legal sphere 63

2.2 Forcs counteracting the perceived notions of subordination of women 70

2.2.1 Matriarchal sentiments and sexual monopoly of birth 71
2.2.2 Socio-economic position of women 75

CHAPTER 3

THE DEVELOPMENT OF SOUTH ASIAN FAMILY LAW PRIOR TO THE EMERGENCE OF BANGLADESH 85

3.1 Women and family law in British India . . . 87

3.1.1 Women's inequality and British colonialism 87
3.1.2 Interference with personal/family laws in British India 100
3.1.3 The Child Marriage Restraint Act, 1929 110
3.1.4 The Muslim Personal Law (Shariat) Application Act, 1937 . 117
3.1.5 The Dissolution of Muslim Marriages Act, 1939 122

3.2 Women and family law in the Pakistan era . 137

3.2.1 Legislation relating to family law in the Pakistan era 138
3.2.2 The Commission on Marriage and Family Laws 140
3.2.3 The Muslim Family Laws Ordinance, 1961 159
3.2.4 Application of the legislation relating to family law by the courts in Pakistan . . 166

CHAPTER 4

THE DEVELOPMENT OF FAMILY LAW IN BANGLADESH 175

4.1 Women and the legislature 176

4.2 The constitutional framework of women's rights in Bangladesh 182
4.3 The personal law system and women's rights 188
4.4 Reforms to family law in independent Bangladesh 194

4.4.1 The Family Courts Ordinance, 1985 199
4.4.2 Overview of the reforms to pre-Independence family laws in Bangladesh 220

CHAPTER 5

FAMILY LAW AND WOMEN IN BANGLADESH 230

5.1. Registration of marriage 233

5.2 Registration of divorce 242

5.3 Restitution of conjugal rights 245

5.4 Polygamy 252

5.5 Dissolution of marriage 257

5.5.1 Talaq 259
5.5.2 Khula 267
5.5.3 Talaq-e-tahweed 273

5.6 Custody and guardianship 277

5.7 Mehr or dower 284

5.8 Maintenance or nafaqa 296

CHAPTER 6

DOWRY AND CRUELTY TO WOMEN 312

6.1 Confusions about the dowry problem 314

6.2 Dowry and the law 324

6.2.1 The Dowry Prohibition Act, 1980 . 325
6.2.2 Cases on dowry 331

6.3 Cruelty and violence against women: An overview 335

6.4 Cruelty to women and the law 340

6.4.1 The Cruelty to Women (Deterrent Punishment) Ordinance,1983 341
6.4.2 Cases on cruelty and violence against women 344

CHAPTER 7

CONCLUDING ANALYSIS 358

7.1 Dialogue of the issues 358

7.2 Prospects for future studies 369

7.3 Recommendations 371

TABLE OF CASES 379

TABLE OF STATUTES 386

BIBLIOGRAPHY 390

APPENDICES

Appendix - I The Child Marriage Restraint Act, 1929 442

Appendix - II The Muslim Personal Law (Shariat) Application Act, 1937 . 446

Appendix - III The Dissolution of Muslim Marriages Act, 1939 . . . 449

Appendix - IV The Muslim Family Laws Ordinance, 1961 453

Appendix - V The Muslim Family Laws Rules, 1961 460

Appendix - VI The Muslim Marriages and Divorces (Registration) Act, 1974 468

Appendix - VII The Dowry Prohibition Act, 1980 472

Appendix - VIII The Cruelty to Women (Deterrent Punishment) Ordinance, 1983 476

CHAPTER 1

INTRODUCTION

1.1 The central premise

'Family law and women' has always been a contentious issue. In South Asia, as elsewhere, there is a simmering discontent that family law does not allow gender equality, which is apparently granted at the level of international law as well as in the realm of constitutional law. In religious and official family law, on the other hand, women have only equitable rights. In social reality, women may even be denied such equitable treatment. There is, it would seem, a popular belief that family law is the last bastion in which women need to achieve equal rights with men.

The concept of sexual equality influences the discourse about the position of women in family law in any particular jurisdiction. But such discourse misses important points about the realities of women's lives in a patriarchally-dominated society such as Bangladesh. Where the ideal concepts underlying the debates do not match with social facts, the discussion actually confuses idealised positioning and realistic goal achievement.

Focusing on women and family law in Bangladesh, the present thesis argues that gender equity, rather than full-fledged equality is a desirable and realistic aim for the development of Bangladeshi family law. We are mainly

dealing with Islamic family law and gender equity here, seen in a particular cultural context. Islam qualifies sexual equality with special rights and duties for both men and women in their social and natural roles and does not recognise absolute and undifferentiated equality. Thus, traditional models define the complementary roles of the sexes, i.e. that women should be protected in return for their obedience. But in social reality the situation is often not reciprocal when women, in return for their submission, are economically deprived and physically abused.

The real demands of women in Bangladesh are not focused on a premise outside the framework of the family but on working out a situation within it, where women will be free from economic deprivation and from violence. Bangladeshi women are not demanding the same as some Western women, i.e. sexual equality, freedom and liberation as an individual. Rather they see their roles within social contexts and would prefer gender equity within the traditional framework. Although there is some influence of idealised feminist thinking about sexual equality, women's proper place is seen to be within the family in the wider context of Bangladeshi society. In other societies, for example in Britain, it seems that absolute equality of rights is also not witnessed in practice.[1] The law, on the

[1] See for details Brophy, Julia and Carol Smart: 'From disregard to disrepute: The position of women in family law'. In Whitelegg, Elizabeth et al. (ed.): The changing experience of women. Oxford 1989, pp.207-225.

one hand, formally provides improvements in the legal position of women; on the other hand, it maintains its support to the patriarchal structures of the family.[2]

Women in Bangladesh tend to respect and cherish their family as the highest priority of their life. What they really want is not equality but freedom from violence and economic deprivation imposed by men. Thus, it makes not much sense to aspire for the distant mirage of sexual equality; rather, we shall argue for 'sexual equity' in family law in parallel with cultural norms. This is an acceptable and sustainable strategy towards the empowerment of women, securing their granted basic rights in the patriarchal society of Bangladesh. Thus, we are pursuing a model of sexual equity here which should enable the women of Bangladesh to cope with the reality of their existence and to assist them in articulating their grievances within that particular social and legal context.

Some recent reforms in the field of family law and some favourable judicial decisions exist in Bangladesh, purporting to ameliorate the status of women. But such vague references to 'amelioration of a depressed class' are not readily usable for legal analysis. To analyse how far relevant laws or decisions are enforced to protect or safeguard women's interest, or whether they are merely rhetoric, we have to go into details of the family law judgements of Bangladesh. The achievement of favourable legislation or decisions by itself does not modify

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[2] Ibid., p.208.

prevailing attitudes and change the patriarchal system of a male-dominated society.

While we are suggesting that gender equity can be meaningfully developed in family law by better implementation of the existing law, we must also recognise the limits of our analysis. Given the restraints of postgraduate legal research, the present thesis has to focus mainly on the official law and its various manifestations. Only extensive fieldwork could provide us with the basis for a detailed analysis of socio-legal realities.

1.2 The problem in a wider context

Bangladesh has a legal system consisting of two types of laws, the general and the personal law. The general law could be said to be based on egalitarian principles of sexual equality but the personal or family law, based on religion, does not operate on the basis of absolute equality to men and women.

The UN Convention on the Elimination of All Forms of Discrimination Against Women of 18th December 1979 purports to guarantee equal rights to women.[3] Women in Bangladesh

[3] On this Convention see for example Tinker, Catherine: 'Human rights for women: The U.N. Convention on the Elimination of All Forms of Discrimination Against Women'. In Human Rights Quarterly. Vol.3, No.2, Spring 1991, pp.32-43.

are also apparently guaranteed sexual equality by the Constitution of Bangladesh and the general law. But patriarchal interpretation of the law continues the dominance of patriarchal attitudes.[4] However, there are internal contradictions within the Constitution between granting sexual equality and making special laws for women.

All of this influences the position of women in family law but the religious and official family laws of Bangladesh clearly aim for gender equity rather than absolute sexual equality. If the gender equality concept were translated into family law, it would disturb the equilibrium of the social fabric and the power relationship between the sexes. As we shall see, women also benefit from living in a patriarchally-dominated system.

Problems arise over abuses of this relative status system. The crux of the problem is that many women in Bangladesh today are deprived even of the rights granted by the religious and state-sponsored family laws. Prominently, women are deprived of their rights of maintenance, dower, dissolution of marriage, custody, guardianship, and other forms of property. Thus, it was found in a study of the metropolitan city of Dhaka that 88% of Muslim wives did not receive any dower.[5] A study of two villages in Bangladesh

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[4] On this see in detail Bangladesh: Strategies for enhancing the role of women in economic development. Washington DC 1990, (World Bank); Jahan, Roushan: 'Hidden wounds, visible scars: Violence against women in Bangladesh'. In Agarwal, B. (ed.): Structures of patriarchy: State, community and household in modernising Asia. New Delhi 1988, pp.216-226.

[5] Akhter, Shaheena: How far Muslim laws are protecting the rights of the women in Bangladesh. Dhaka 1992, p.35.

revealed that 77% of women from families with land did not intend to claim their legal share in their parental property to retain better links with their natal family.[6] These are instances of the patriarchal arbitrariness of Bangladeshi society which regards women's claims to their rights as challenging the existence of the patriarchal system itself, despite the fact that these claims are based on an Islamic obligation or official law.

The usual manifestations of women's subordination in a patriarchally dominated society may be identified in child marriages, polygamy, unilateral divorce, seclusion, dowry and violence against women. Women in Bangladesh are, thus, subordinated within an intensely hierarchical system of gender relations which constantly attempts to deny women not only access to social power and control over their own lives but also granted rights to which they are entitled.[7] The material base of patriarchy is men's control of property, income and women's labour. With the growth of women's studies, more and more authors have identified labour, power and sexuality as the main structural elements shaping the relationship between gender and power.[8]

Several recent studies have analysed the life-style

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[6] Westergaard, Kirsten: Pauperization and rural women in Bangladesh-a case study. Comilla 1983, p.71.

[7] Kabeer, Naila: 'Subordination and struggle: Women in Bangladesh'. In New Left Review. No.168, March-April 1988, pp.95-121, at p.101.

[8] See for example Connell, R.W.: Gender and power. London 1986, p.104.

and status of women in Bangladesh. Some important studies[9] found that the average Bengali woman, particularly in rural Bengal, contributes very significantly in the household,[10] performing laborious jobs which are no less vital than those done by men. However, their contributions are not adequately recognised and often women are categorised together with children as minors appended to men as the guardians and breadwinners.[11]

After the independence of Bangladesh in 1971, persistent poverty, growing landlessness and subsequent

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[9] For example see Lindenbaum, Shirley: The social and economic status of women in Bangladesh. Dhaka 1974; Sattar, Ellen: Women in Bangladesh: A village study. Dhaka 1974; Adnan, Shapan et al.: 'Social change and rural women: Possibilities and participation'. In Role of women in socio-economic development in Bangladesh. Dhaka 1977, pp.80-93; Islam, Mahmuda: 'Women at work in Bangladesh'. In Women for women-Bangladesh 1975. Dhaka 1975, pp.93-120; Choudhury, Rafiqul Huda: 'Married women in non-agricultural occupations in a metropolitan urban area of Bangladesh-some issues and problems'. In Bangladesh Development Studies. Vol.v, No.2, April 1977, pp.153-200; Chen, M. and R. Ghaznavi: Women in food-for-work: The Bangladesh experience. Dhaka 1977, (BRAC).

[10] Farouk, Abdullah and M. Ali: The hard working poor: A survey of how people use their time. Dhaka 1977, p.42; Kabir, Khusi et al.: 'Rural women of Bangladesh: Exploring some myths'. In Role of women in socio-economic development in Bangladesh. Dhaka 1977, pp.72-79, at p.79; Cain, Mead et al.: Class, patriarchy and women's work in Bangladesh'. In Population and Development Review. Vol.v, No.iii, Sept. 1979, pp.400-438, at p.432; Abdullah, Taherunnessa A. and Saundra A. Zeidenstein: Village women of Bangladesh: Prospects for change. New York 1982, p.102; Majumdar, Pratima Paul: 'Women work and home'. In Bangladesh Institute of Development Studies Research Report. No.49, Dec. 1986, pp.1-167, at p.49; Wallace, Ben J. et al.: The invisible resource: Women and work in rural Bangladesh. Boulder and London 1987, pp.76-85.

[11] Kabeer, Naila: 'Monitoring poverty as if gender mattered: A methodology for rural Bangladesh'. In Institute of Development Studies Discussion Paper. No.255, Brighton 1989, pp.1-49, at p.9.

erosion of supportive networks have been pushing more and more women into the labour market.[12] Economic pressures are forcing women from all segments of society to seek employment, in contrast to the earlier situation when only women from the poorest and landless families sought paid employment. The myth that women's wages merely supplement the family income can no longer be sustained. Recent studies have demonstrated that income from women's productive labour has often become integral to the family's survival.[13] Women are engaged in domestic labour, in agriculture and construction sites in both rural and urban areas. Moreover, new forms of urban employment have become available for women since the 1980s and women now work in the garment, pharmaceutical, plastic and other industries.[14] It was found that better wage prospects, as in the case of garments, improved their chances in the marriage market; in some cases dowry demands have been dropped in view of the earning potential of the bride.

The enhancement of women's status by employment and

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[12] Afsar, Rita: Employment and occupational diversification of women in Bangladesh. [Asian Regional Team for Employment Promotion (ARTEP) Working Papers]. New Delhi 1990.

[13] See in particular Hossain, Hameeda et al.: No better option?: Industrial women workers. Dhaka 1990, pp.34-41; Begum, Kohinoor: 'Participation of rural women in income-earning activities: A case study of a Bangladeshi village'. In Women's Studies International Forum. Vol.12, No.5, 1989, pp.519-528, at p.519.

[14] On the garment industry see Khan, Salma: The fifty percent: Women and development policy in Bangladesh. Dhaka 1988, p.63, where it is reported that according to the Bangladesh Garment Manufacturers and Exporters Association out of the total work force of 250,000 as many as 225,000 are women.

other activities, although a viable avenue for the emancipation of women, was idealised in Bangladesh by international feminism as bringing sexual equality and was seen as a result of international influence. As we show in more detail in chapter 4 below, it appears that government-sponsored vigorous action to improve the status of women was not only to legitimise elite rule but to acquire more aid from the donor agencies by giving attention to women.[15] It is argued that not only the government but also non-government organisations (NGOs) used women's issues as a potential source of funding.[16] However, female employment in Bangladesh did not give women control over production, land ownership or income earned.[17] Although women have greater control of certain forms of production, these are usually not substantial enough to transform the core

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[15] White, Sara C.: 'Women and development: A new imperialist discourse'. In The Journal of Social Studies. No.48, April 1990, pp.90-111, at p.103; Kabeer, Naila: 'The quest for national identity: Women, Islam and the state in Bangladesh'. In Institute of Development Studies Discussion Paper. No.268, Brighton 1989, pp.1-33. A modified version of the article is published in Kandiyoti, Deniz (ed.): Women, Islam and the state. London 1991, pp.77-143, at p.127; Ahmed, Rahnuma: 'Women's movement in Bangladesh and the left's understanding of the woman question'. In The Journal of Social Studies. No.30, 1985, pp.41-56, at p.49.

[16] White, Sara C.: Arguing with the crocodile: Gender and class in Bangladesh. London, New Jersy and Dhaka 1992, pp.15-16.

[17] Khan, Zarina Rahman: Women, work and values: Contradictions in the prevailing notions and the realities of women's lives in rural Bangladesh. Dhaka 1992, p.198.

relations of the spouses within household structures.[18] Thus, the economic involvement of women did not lead to emancipation and could not create a real dent in the patriarchal value system.[19] On the other hand there are indications that under the pressure of increasing poverty, male normative commitment has eroded and that many men simply cannot fulfil the traditional role of supporter of women and children.[20] Drawing on such observations of social problems, it would appear that the lack of 'fit' between traditional institutions and values, on the one hand, and the countervailing needs of women for protection from economic deprivation and violence on the other pose the core problems for Bangladeshi law and society in the 1990s.

The urgency of the matter can be gathered in particular from the large volume of cases of violence against women in Bangladesh. A case in point is that of dowry violence. Women are expected to remain mute and suffer innumerable agonies at the hands of their husbands and in-laws if they fail to provide handsome dowries. Stories of women burnt alive or murdered by their husbands and in-laws for failing to procure the required dowry are not new any more. Women continue to fall prey to regular

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[18] Kabeer, Naila: 'Gender, production and well-being: Rethinking the household economy'. In Institute of Development Studies Discussion Paper. No.288, May 1991, pp.1-50, at p.20.

[19] Khan (1992), p.198.

[20] Cain et al. (1979), p.408.

harassment and disrespect. It has been rightly pointed out that dowry deaths are a gruesome reminder of the authoritativeness of patriarchy.[21] In one study, dowry demands have been identified as one of the major causes of murder of women in Bangladesh.[22] It has also been reported by an Indian author that many women in Bangladesh are filing divorce petitions to escape torture at the hands of in-laws for failing to meet the expectations of dowry.[23] Cruelty towards women in recent years has increased threefold and the overall incidence of violence is now a great social problem.[24] The Dowry Prohibition Act of 1980, and the Cruelty to Women (Deterrent Punishment) Ordinance of 1983 were hurriedly enacted to contain such problems. However, even if women in Bangladesh have secured favourable legislation, they could not secure its benefits due to impediments to its enforcement. This is also reflected in other family law reforms. The reason behind this lies in the traditional norms and values in the male-dominated patriarchal society of Bangladesh. Violence against women is a trend which is deeply related to the oppressive structures of the dominant male values of

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[21] Singh, Indu Prakash and Renuka: 'Dowry: How many more deaths to its end?'. In Sood, Sushma (ed.): Violence against women. Jaipur 1990, pp.311-319, at p.311-312.

[22] Akanda, Latifa and Ishrat Shamim: Women and violence. Dhaka 1984, p.5.

[23] Ghosh, K.S.: Indian women through the ages. New Delhi 1989, pp.46-47.

[24] Sobhan, Salma et al.: The status of legal aid services to women in Bangladesh. Dhaka 1992, p.5.

Bangladeshi society.[25] Although this society is subject to various forces of modernisation, traditional roles and values remain relevant for women today.[26] Within this system of structural inequality in society, simply calling for sexual equality is not a feasible answer. It is apprehended that South Asian societies will never accept total equality of the sexes. It has been stated, somewhat idealistically, by a male author,

> They are unequal because they are dissimilar, and girls' inequality may in fact be a sign of their superiority: In other words females may be given special treatment not because they are despised, but because they are peculiarly honoured and protected.[27]

This shows that the traditional society and its legal structures have the potential to treat women well.

The present thesis comprehensively analyses to what extent the legislative enactments in family law, as they apply in Bangladesh today, have contributed to giving women in Bangladesh a better legal status. This study of women and family law in Bangladesh does not aim to examine primarily whether the legal reforms reflect Western-oriented ideals of equality of the sexes but is arguing

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[25] Guhathakurta, Megna: 'Gender violence in Bangladesh: The role of the state'. In The Journal of Social Studies. Vol.30, 1985, pp.77-93, at p.77.

[26] Choudhury, Rekha: 'Exploration of women: A study of social norms'. In Saraf, D.N. (ed.): Social policy, law and protection of weaker section of the society. Lucknow 1986, pp.293-303, at p.295.

[27] Derrett, J. Duncan M.: 'The legal status of women in India from the most ancient times to the present day'. In Recueils De La Societe Jean Bodin. Vol.11, Brussels 1959, pp.237-267, at p.240.

that gender equity can be meaningfully developed by better implementation of the existing legal framework. The thesis attempts to assess to what extent the recent family law reforms and their interpretation and application by the courts have enhanced the rights and status of women in Bangladesh within such parameters.

1.3 Justification of the study

In studies on women and the law, 'law' is now often seen from the perspective of feminist scholarship.[28] Given our premises about inherent gender inequality in South Asia, the scope of our present exposition of women and law cannot centrally focus on feminist scholarship, however. Rather it concentrates on traditional legal scholarship which sees law as a major tool to sustain family life, giving protection to women within the family. There are criticisms that the traditional legal scholarship is a political practice which systematically demands obedience of women to authority relations constructed from the male standpoint in the name of legality.[29] In this context, law is regarded as

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[28] Grbich, Judith: 'Feminist's jurisprudence as women's studies in law: Australian dialogues'. In Arnaud, A.J. and E. Kingdom (eds.): Women's rights and the rights of man. Aberdeen 1990, pp.75-148, at p.76; Wetzel, Janice Wood: The world of women: In pursuit of human rights. London 1993, pp.152-177, at p.152.

[29] Ibid., p.78.

a reflection of the patriarchal normative structures, manipulated to perpetuate the oppression of women.[30] In fact, recently some feminists are alleging that the foundations on which traditional jurisprudence rests are deeply imbued with masculine perceptions and privilege and need to be transformed to a feminist perspective, even a 'feminist jurisprudence'.[31] This thesis does not explore these theoretical debates in depth, as it does not consider such feminist perspectives as a suitable platform for a discussion of the legal position of women in Bangladesh. Moreover feminist writing on the family remains ambiguous; sometimes it is critical of the existence of the family itself.[32] According to some feminist studies, the family is the main territory of sexual politics, and marriage itself is necessarily oppressive to women.[33] Thus, the feminist tendency is to assert freedom of sexual life and to break through the bonds of marriage.[34] While this study recognises that the family may be an oppressive institution for women, it also sees its potential to honour and protect

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[30] Singh (1990), pp.14-15.

[31] Smart, Carol: 'Feminist jurisprudence'. In Fitzpatrick, Peter (ed.): Dangerous supplements: Resistance and renewal in jurisprudence. London 1991, pp.133-156, at p.133.

[32] Flax, Jane: 'The family in contemporary feminist thought: A critical review'. In Elshtain, Jean Bethke (ed.): The family in political thought. Brighton 1982, pp.223-253, at p.223.

[33] Ibid., p.227; Millet, Kate: Sexual politics. New York 1970, p.22.

[34] Wadia, A.R.: The ethics of feminism: A study of the revolt of women. New Delhi 1977, p.137.

women.

In the context of the present study, particular emphasis must be given to Islamic family law, which is based primarily on the religion of Islam. Islam places women on equal footing with men in the eyes of Allah.[35] However, this definitely does not mean that men and women are equal in Islamic law. At the same time, the Quran and the early Islamic law are concerned about the betterment of the status of women.[36] Again, the concern is with equitable rights within the family context, not individualised norms of absolute equality. Islamic law justifies gender differentiations on the ground of creation and nature, giving special rights and duties both to men and women.[37]

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[35] Hussain, Aftab: Status of women in Islam. Lahore 1987, p.106; Doi, Abdur Rahman I. : Women in shari'ah (Islamic law). London 1989, p.4; Siddique, Muhammad Mazheruddin: 'Islam and the ideal of sex equality'. In Women in Islam. 2nd ed. Lahore 1959, pp.15-25, at p.16; Al-Abd Al-Hay, Abdal Khalek A.: Contemporary women's participation in public activities: Differences between ideal Islam and Muslim interpretation with emphasis on Saudi Arabia. Ph.D. Thesis, University of Denver, Denver 1983, p.62.

[36] For details see Calman, Leslie J.: Toward empowerment: Women and movement politics in India. Boulder, San Francisco and Oxford 1992, p.54; Hussain (1987), pp.88-140; Khan, Qamaruddin: Status of women in Islam. New Delhi 1990, p.13; Doi (1989), pp.7-10; Esposito, John L.: 'The changing role of Muslim women'. In Islam and the Modern Age. Vol.7, No.1, Feb. 1976, pp.29-56; Othman, Faisal Haji: 'How Muslim women have been misunderstood by Muslims'. In Islamiyyat. Vol.ii, 1990, pp.25-38; Pickthall, Muhammad Marmaduke: Islamic culture. Lahore 1958, p.134; Hjarpe, Jan: 'The attitude of Islamic fundamentalism towards the question of women in Islam'. In Boutas (ed.): Women in the Islamic societies-social attitudes and historical perspectives. Scandinivia 1983, pp.12-23, at p.12.

[37] Muthhari, Murtada: The rights of women in Islam. Tehran 1981, pp.113-123; Misbah, Mohammad Taqi et al.: Status of women in Islam. London 1990, pp.10-11.

Islam does not believe in concepts of sexual equality which ignore natural differences and the special aptitudes, specific powers and faculties of men and women, but regards men and women as complementary to each other.[38] One sex is making up what the other lacks, acting in their specific spheres, in different roles. Thus, socially the sexes are in an equitable symbiotic relation.

Sharia is the code of obligations covering the legal and moral sphere, while figh is the science of Islamic jurisprudence.[39] It has been rightly commented that every moral obligation defined in the sharia does not form a legal obligation under the figh.[40] Islamic family law reforms, until now in Bangladesh, have not been segregated from religion, nor is this likely to happen. In the chapters below, while focusing on legal reforms, we shall explain that Bangladeshi Muslim family law remains firmly within the framework of sharia and finds its primary justification somewhere in the religious texts or in the opinions of Muslim jurists.

The dominant reasoning behind this appears to be that law is regarded in Islam as divine and in some sense

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[38] For details see Siddiqui, Mohammed Mazheruddin: Women in Islam. Lahore 1966, pp.21-22.

[39] On the principles of Islamic law see Fyzee, Asaf A.A.: Outlines of Muhammedan law. 4th ed. New Delhi 1974, pp.14-32; Hidayatullah, M.A. (ed.): Mullah's principles of Mohammedan law. 17th ed. Bombay 1972, pp.xxiv-xxvi; Diwan, Paras: Muslim law in modern India. Bombay 1985, pp.16-19 and 26-32.

[40] Fyzee, Asaf A.A.: Outlines of Muhammadan law. Bombay 1955, 2nd ed. p.21.

unchangeable. Professor Coulson has noted the heavily contested arena of al-hadith and al-ray for accepting human reasoning within the broader framework of divine revelation.[41] Legal reforms were undertaken, as Professor Anderson has explicitly analysed, in four different ways.[42] The first method sometimes effected is a procedural device ordering the courts not to apply Islamic law in specified circumstances, without changing the substantive law. The second way was employing thakkayur, the picking and choosing from dicta or provisions of other recognised schools of thought. The third method was to reinterpret the Quran and sunnah through the technique of ijtihad.[43] The reformers felt at liberty to go back to the Divine Text and reinterpret it according to the exigencies of modern time. The fourth technique was to introduce administrative regulations imposing the results reached by one or more of the other three devices. It is relevant to note here that the legislative reforms which took place in Bangladesh fall squarely under any one or more of these devices.

Only the law of the majority population in Bangladesh, i.e. Muslim family law, will be considered in this

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[41] See in particular Coulson, N.J.: Conflicts and tensions in Islamic jurisprudence. Chicago 1969, pp.1-7.

[42] Anderson, J.N.D.: 'The eclipse of the patriarchal family in contemporary Islamic law'. In Anderson, J.N.D. (ed.): Family law in Asia and Africa. London 1968, pp.221-234.

[43] On this see ibid., p.225.

thesis.[44] Very little has been written specifically on Muslim family law in Bangladesh, and this writing does not primarily focus on women.[45] On the other hand, while some studies have centered on women in Bangladesh and their legal status generally, their core theme did not concern the impact of family law reforms on women.[46] None of the existing studies has considered unreported cases of the Family Courts in Bangladesh, as the present thesis does. Although an extensive sociological study is beyond our scope, an attempt will be made here to relate the concerns of the family and society about reforms of family law in order to provide a fuller understanding of societal and

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[44] On non-Muslim family laws in Bangladesh, hardly any material exists. For details see Rakshit, Mridul Kanti: The principles of Hindu law. Chittagong 1985; Menski, W.F. and Tahmina Rahman: 'Hindus and the law in Bangladesh'. In South Asia Research. Vol.8, No.2, Nov. 1988, pp.111-131.

[45] Choudhury, Alimuzzaman: The Family Courts Ordinance 1985 and other personal laws. Dhaka 1987; Choudhury, Obaidul Huq: Hand book of Muslim family laws. Dhaka 1993; Rahman, Md. Mojibur: Muslim o paribarik ain porichiti. Dhaka 1989. On Islamic family law and women in different jurisdictions see Nasir, Jamal J.: The status of women under Islamic law and under modern Islamic legislation. London 1990; Esposito, John L.: Women in Muslim family law. New York 1982; Layish, Aharon: Women and Islamic law in a non-Muslim state-a study based on decision of the Sharia Courts in Israel. Jarusalem 1975; Mir-Husseini, Ziba: Marriage on trial-a study of Islamic family law, Iran and Morocco compared. London and New York 1993.

[46] See Sobhan, Salma: Legal status of women in Bangladesh. (The Bangladesh Institute of Law and International Affairs) Dhaka 1978; Ahmed, Sufia and Jahanara Choudhury: 'Women's legal status in Bangladesh'. In women for women: Research and Study Group (ed.): The situation of women in Bangladesh. Dhaka 1979, pp.285-331; Chaudhury, Rafiqul Huda and Nilufer Raihan Ahmed: Female status in Bangladesh. Dhaka 1980; Chaudhury, Rafiqul Huda and Nilufer Raihan Ahmed: 'Women and law in Bangladesh: Theory and practice'. In Islamic and Comparative Law Quarterly. Vol.viii, No.4, Dec. 1988, pp.275-287.

familial needs, to which legal changes must respond. The major problem of the family law system in Bangladesh appears to be that it does not take into account the reality of the social conditions, particularly women's concerns about freedom from violence and economic deprivation, either by incorporating them into various enactments or by giving them appropriate importance while interpreting the law in courts.

The method applied in the present study does not differ from that which is commonly used in the legal sciences and is not based on empirical investigation. The impact of legal practice is revealed by reported and unreported cases, from which the views of the judiciary about the application of the laws for the upliftment of the women of Bangladesh can be analysed. In view of our premises, we shall need to focus particularly on the question whether judges and legislators are protecting women from abuse and exploitation.

1.4 Framework of the study

The main objective of the research, as stated, is to assess the effects of recent family law reforms on women in Bangladesh. In order to provide a theoretical understanding of the subject which concerns women, oppressed and suppressed by the patriarchal society, our topic must be

studied in a sociological context. In fact, the topic of women's status would automatically demand a sociological approach.

While in the present chapter we have defined the parameters of the thesis as a whole, the second chapter outlines the forces subordinating women. The subordinate status of women in their societal context originates in the traditional male-dominated views of their roles in the family and society; these have been reinforced by religion, tradition, seclusion and patriarchy.

Chapter 2, therefore, begins by focusing on the patriarchal arguments for the subordination of women in Bangladesh in the socio-cultural setting of women's legal status. The factors contributing to women's subordination are traced from religion to tradition, patriarchal structures to seclusion and various forms of discrimination in the socio-legal sphere. The chapter then tries to balance the position of women in Bangladesh by investigating the forces that protect and strengthen the position of women and discusses various aspects of women's power. In this context, matriarchal notions and the sexual monopoly of birth, together with the gradually increasing socio-economic power of women are analysed as forces which maintain the gender balance of society.

In continuing to trace the causes of subordination of women in a historical perspective, the contradictory attitude of the British imperialist government towards women in South Asia is analysed in the first part of

chapter 3, which examines to what extent British colonial imperialism contributed to the subordination of women. The second part of chapter 3 shows how family law was gradually interfered with by the British and considers how the legal reforms in British-India regarding the restraint of child marriages, women's right to divorce and restriction of customary laws have affected the position of Muslim women. Further on, for the Pakistani period (1947-71), we examine whether the important family law reforms of 1961 actually ameliorated the position of women in society and whether the judiciary has been taking a positive role in the interpretation of this law. The relevant judicial decisions discussed in this chapter provide a historical backdrop to the more recent family law reforms in independent Bangladesh. This approach allows us a dynamic view of the early developments of family law. It also shows that most legislation to ameliorate the legal position of women was merely rhetoric. At the same time, it has to be noted that there are many conflicting claims on the legal system, not all of them favouring women.

Chapter 4 provides a detailed exposition and critical analysis of family law reforms in Bangladesh in response to the needs of the new state, which became independent in 1971. Women's participation had been most extensive in the liberation movement of 1971, in which women from all walks of life rendered support to the freedom fighters. The independence of the country created a growing awareness among women about their social, political and legal rights

and responsibilities in the new society.

By the Bangladesh (Adaptation of Existing Bangladesh Laws) Order, 1972 Bangladesh inherited the legislative enactments of the British and Pakistan era. The Constitution of Bangladesh (1972) apparently guarantees sexual equality. In terms of family laws and the personal law system, however, the new state has retained the old divisions of personal and general law. Before going into details on actual legal enactments and case-law, we first consider how women were treated by the Constitution of the newly independent country. The analysis of women's rights under the constitutional framework indicates the disparity between the religious family law and the constitutional rights. However, it also reveals the internal contradictions within the Constitution between granting sexual equality and making special laws for women.

The personal law system is then analysed projecting how the Constitution ensures that the personal law system continues to survive although it is not in line with some basic principles of the Constitution.

In recent years, the Government has amended and promulgated several Acts and Ordinances in an effort to safeguard the legal rights of the female population and to improve their social status.[47] Indeed it can not be denied that there was immense pressure from women's groups and organisations campaigning for legislation against certain

[47] Women were 48.59% in a population of 109.9 million in 1991, see Bangladesh Bureau of Statistics: Statistical pocket book of Bangladesh. Dhaka 1992, p.3.

evils and abuses. However, they were not demanding total equality of the sexes within the family, but protection from violence and economic deprivation.

The media coverage of domestic violence against women also created active pressure for promulgation of some of these Acts and Ordinances. The areas of legal reforms include marriage and divorce registration, dowry prohibition and cruelty to women, and the establishment of the Family Courts. Moreover, there were minor amendments to the existing legislation on family law.

The major focus of inquiry of this chapter is whether the new laws ameliorated women's rights or whether they were simply rhetoric. How far in this legislation is there a deep-rooted commitment towards actually operating to the advantage of women?[48]

The fieldwork for this thesis involved collection of unreported cases from the Family Courts of Dhaka for the years 1971-1993. The collection includes unreported cruelty and violence cases of the criminal courts. It is significant to mention that the Family Courts were established in 1985 by the Family Courts Ordinance, 1985 for marital and family cases arising after 1985. Thirty unreported cases altogether were collected, but usually one case involved more than one issue.

It has been very difficult to gather these judgements

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[48] On this see Sobhan, Salma: 'Cost-free legislation? An evaluation of recent legislative trends in Bangladesh relating to women'. In Lawasia. Vol.4, 1985, pp.153-161, at p.160.

from the Family Courts as they had to be photocopied from the original judgements of the courts. It was also hard to make those decisions accessible for this thesis, as not only are they confidential, they are also usually in Bangla, the national language of Bangladesh. Nevertheless, an attempt has been made in this thesis to analyse the unreported decisions of the Family Courts of Dhaka to give a more complete picture of the family law situation than one gets from reported cases.

The unreported cases are significantly important in family issues, as jurisdiction lies with the higher courts on appeal only in cases of dower over 5000 taka and on the ground of cruelty under section 17 of the Family Courts Ordinance, 1985. The decisions of the Family Courts conclusively determine all issues except those where there is scope for an appeal. Thus, unless unreported cases are analysed, the impact of the legislation can not be ascertained in this field.

Chapter 5 aims to explore what is the attitude of the judges and the opinion of the court regarding women's status in Bangladesh and how far they are aware about the needs of women. The judge's views on this subject can be studied from their statements in court decisions.

This chapter also focuses on the question whether women in Bangladesh stand to benefit from judicial activism or more sensitivity in issues involving the welfare of

women and safeguarding them from abuse.[49] However, this attitude of the judiciary is only reflected in a few family law cases and is not a general trend. This could be the result of the socio-economic transformation of Bangladeshi society. As women's contribution to the national economy is gradually better valued and recognised, judicial notice will need to be takan of some social changes.

To achieve the aim of studying the effect of family law on women in Bangladesh, different issues are analysed which make their way to the courts, by first briefly tracing their sharia origin and then placing them in the context of the modern statutory enactments. In doing so, we seek to explore the assumptions behind the issues in sharia, any adaptation or reform in the statutes, and practice in the courts, especially in the Family Court. Registration of marriage and divorce, restitution of conjugal rights, polygamy, dissolution of marriage, dower, maintenance, custody and guardianship are analysed in turn. This also allows us to consider whether the modern legal apparatus of reforms is finding expression in social reality and how beneficial the modern reforms have been to women in practice.

Chapter 6 extends the examination of the issues of women in Bangladesh to disputes concerning dowry and cruelty to women asking whether the new legislation introduced to curb these social evils affecting women was

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[49] On judicial activism see Malik, Shahdeen: 'Once again Shah Banu, maintenance and scope for marriage contracts'. In 42 DLR (1990) Journal, pp.34-39, at p.39.

successful or not. However, it must be emphasised that by far not all dowry and cruelty cases come up to the courts. Some tables of crimes against women in Bangladesh are given to show generally that cruelty and violence against women have tremendously increased in Bangladesh. Violence against women has reached the proportion of a national problem. In the domain of domestic violence, cruelty to women for dowry and other causes has become a grave issue in Bangladesh.[50] The problem has become so disastrous that dowry deaths have become an everyday event in South Asia.[51] This scenario inspired us to separate this issue from the other topics of family law and to investigate the dowry problem in the context of the actual needs of women to be protected from violence and financial constraints. While cruelty to women puts the spotlight on the need of women in Bangladesh to be protected from physical violence and does not involve the sphere of freedom from economic deprivation, dowry problem involve both spheres. The urgency of the reforms to check these social evils was already felt earlier and the Dowry Prohibition Act of 1980 and the Cruelty to Women (Deterrent

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[50] Islam, Mahmuda: 'Women studies in Bangladesh: An overview'. In South Asia Newsletter. Center for Asian Studies Amsterdam and Documentation Center on South Asia, Leiden, No.4, Dec. 1989, pp.1-4, at p.1.

[51] The Guardian. 28th July 1980, p.5; Choudhury, Neerja: 'Burning of the bride'. In New Internationalist. No.81, p.27; Vyas, Neena: 'A mother's crusade'. In Kishwar, Madhu and Ruth Vanita (eds.): In search of answers: Indian women's voices from Manushi. London 1984, pp.206-207; Singh and Singh (1990), pp.311-319; Grover, Kanta: Burning flesh. New Delhi 1990, pp.20-23; Kumari, Ranjana: Brides are not for burning, dowry victims in India. New Delhi 1989; Ekelaar, John: 'Scream silently, or the neighbour will hear'. In The Lawyers. Vol.6, No.4, April 1991, pp.4-11.

Punishment) Ordinance of 1983 were enacted in response to growing evidence of dowry murders. We try to asses here whether these Acts or Ordinances were actually beneficial to women and can protect them against violence.

The judges of the criminal courts have been sympathetic to the plight of women and have been giving proper redress to women seeking protection from violence. It is significant that this has been more successful than protecting women from economic deprivation. Thus, the unsympathetic attitude of the judiciary is more clearly reflected in the private sphere than in the public arena of violence. However, only a negligible number of cases of violence are actually reported.

The issues discussed in chapter 6 fall under the jurisdiction of the criminal courts, as dowry murders and cruelty to women are criminal offences under the Penal Code, 1860. We suggest that the criminal jurisdiction of these issues should also be transferred to the domain of the Family Courts, so that any aspect of family law would be under one jurisdiction.

Finally, the concluding chapter summarises the legislative enactments in Bangladesh and discusses the trends in judicial decision making.It can be seen that there is a wide gap between the theory of religious and official family laws, intimately connected with the lives of women, and practical application in society. For example, child marriages still persist, marriages are not registered, divorce in most cases still seems to be the

prerogative of the man, dowers remain unpaid and there is a distinct gap between women's maintenance rights and actual practice.

In view of this, an attempt is made to recommend how these gaps in law and practice can be narrowed, even if they cannot be closed totally by the law. Informal dispute resolution through shalish as provided by the legal aid centers is given some consideration. There are many voluntary legal aid centers in Bangladesh giving women opportunities not only to have judicial redress, but also legal literacy, shalish and mediation.[52] However, the limitation of shalish through legal aid is that it does not have the same sanction or authority as the Family Courts and the parties may simply avoid to appear.[53] But as an out-of-court settlement, the local arbitration or shalish on women is recognised by the Family Courts in Bangladesh. Decisions of these shalish could, thus, be legitimised by the Family Courts to give women more rights. It seems that these alternative structures of justice could give practical remedies to women, but they are also dominated by patriarchal concerns. Sometimes, recourse to these legal aid services means that women are given considerably lesser remedies than would be granted by the Family Courts and the accused may escape punishment.[54]

We are arguing that it will protect women more

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[52] Sobhan et al. (1992).

[53] Ibid., p.27.

[54] Ibid., p.30.

effectively if the judiciary is more sensitised about the particular needs of women. What is required now is better implementation of the existing legal rights of women, at all levels, to secure for them freedom from violence and economic deprivation.

CHAPTER 2

THE SOCIO-CULTURAL SETTING OF WOMEN'S LEGAL STATUS

This chapter analyses the socio-cultural setting of Bangladeshi women which indisputably affects their legal position. As this study primarily deals with the rights of Muslim women, the position of women under Islam is given some consideration. By exploring these socio-cultural aspects the determinants for the enforcement of the rights of women in Islamic and official law can be traced.

This chapter seeks to cover the major factors which in their totality and also individually restrict women and assign them an role in Bangladeshi society. An attempt is then made to strengthen gender analysis in Bangladesh by balancing the stress on women's power with the usual male-biased perspectives which see and treat women as passive objects.[1] Thus, the chapter is progressing from perceived notions of female subordination to an analysis of the counter forces women have at their disposal. This part of our work tries to argue that there are avenues in which women are powerful, but these are rarely illuminated as it might hurt the ego of the male-dominated patriarchal

[1] For a similar approach see White, Sarah: 'Behind whose throne?: Power and images of women in Bangladesh'. In Politics. Vol.9, No.2, 1989, pp.28-33, at p.29.

society.

This discussion of social forces also lays open the tensions in family law about sexual equality and argues that improving gender equity is a feasible strategy for enhancing the freedom of women from economic deprivation and violence.

2.1 Perceived notions of female subordination

Women in Bangladesh, as elsewhere, are commonly depicted as subjugated and subordinated in a patriarchally-dominated society. This image of subordination is enhanced and amplified by the traditional views of stereotyped female roles in the family and society. The main factors stated to contribute to this subordination are the negative impact of tradition, religion, patriarchy, seclusion or parda and paternalistic attitudes in the socio-economic and legal sphere. These factors are analysed here in some detail to ascertain to what extent they are causes of the legal subordination of women.

This section first discusses briefly the position of women in Islam. In the second sub-section, the negative impact of traditional cultures on women is analysed to show that Bangladesh has a unique cultural amalgamation which often negatively oppresses women. We then analyse the patriarchal structures of Bangladesh to show how they undermine women's position, ask whether seclusion or parda

is a tool to control women or a system to preserve feminine modesty and consider finally, how women are perceived to be degraded in the socio-economic and legal spheres.

2.1.1 Women in Islam

The intentions of the early Islamic leaders in Arabia towards women and the provisions in Islamic law as found in the Quran can be construed as conferring new rights on women. In fact, there is a large volume of literature asserting that early Islamic law in Arabia explicitly conferred rights on women.[2] The male-female dynamics in Islam are such that there is equality of the sexes in the spiritual sphere. The Quran implies equality of all believers in terms of equal obligation to pray, to give alms and prohibition from evil. There is no concept of vicarious liability in Islam and individual persons are responsible for their acts and deeds. However, Islam

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[2] See Hussain, Aftab: Status of women in Islam. Lahore 1987, pp.88-140; Khan, Qamaruddin: Status of women in Islam. New Delhi 1990, p.13; Doi, I. Abdur Rahman: Women in shari'ah (Islamic law). London 1989, pp.7-10; Esposito, John L.: 'The changing role of Muslim women'. In Islam and the Modern Age. Vol.7, No.1. Feb. 1976, pp.29-56; Othman, Faisal Haji: 'How Muslim women have been misunderstood by Muslims'. In Islamiyyat. Vol.ii, 1990, pp.25-38; Pickthall, Muhammad Marmaduke: Islamic culture. Lahore 1958, p.134; Hjarpe, Jan: 'The attitude of Islamic fundamentalism towards the question of women in Islam'. In Bo Utas (ed.): Women in Islamic societies-social attitudes and historical perspectives. London 1983, pp.12-23, at p.12.

contains an ambivalent message concerning equality of the sexes. At the higher level, in the individual's relationship with the Creator, there is absolute equality among all Muslims. At the levels of worldly affairs and social relationships between people, there is inequality. Thus, concerning the relationship with a husband, competence of evidence etc., there seems to be gender inequality. This is implied by several verses of the Quran. Thus, verse 2:228 indicates that women have similar rights as men, according to what is equitable, but men have a degree of advantage over them.[3] According to this verse, Allah set men over women as their superiors, but women have the right to care and maintenance.[4]

The basic philosophy behind the differences between men and women, in different positions, is justified on the ground of creation and nature. According to Islam, social laws must be framed in accordance with human nature.[5] Islam qualifies and defines gender equality with the assertion that this is not an absolute and undifferentiated equality but one involving special rights and duties for men and women. Islam does not believe in the conception of sexual equality but regards men and women as complementary to each

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[3] Ali, Abdullah Yusuf (trans.): The Holy Quran. Lahore 1934, p.90.

[4] Reuben, Levy: The social structure of Islam. London 1962, p.92; Siddiqui, Mohammed Mazheruddin: Women in Islam. Lahore 1966, pp.15-24.

[5] Misbah, Mohammad Taqi et al.: Status of women in Islam. London 1990, pp.10-11; Muthhari, Murtada: The rights of women in Islam. Tehran 1981, pp.113-123.

other and thus, as equitable in the private sphere.[6] Islam sees this as natural and idealistic, as men and women are playing different roles for the betterment of the Muslim society or ummah.

It is, of course, very simple to interpret this gender differentiation as deliberate discrimination against women and, as we shall see, equally simple for male chauvinists to justify the superiority of men.

The reasoning behind the supposed superiority of men over women is usually derived from another verse of the Quran. Verse 4:34 states that men are protectors (qawwam) and maintainers of women because they support them from their means.[7] The word qawwam used to be generally interpreted as 'in charge', an authority or ruler or sovereign, which reflects the image of the society.[8] But recently the word has been understood as a provider, a supporter, a manager, a caretaker, a custodian or a guardian.[9] Asghar Ali, who analysed the concept of sexual equality in Islam, has argued that the divine revelation simply says that men are qawwam over women, seeing it as a

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[6] Siddiqui (1966), p.21-22.

[7] Ali (Trans.) (1934), p.190; See also Rahman, Fazlur: 'The status of women in Islam: A modernist Interpretation'. In Minault, Gail and Hanna Papanek (eds.): Separate worlds; Studies of purdah in South Asia. Delhi 1982, pp.285-310, at p.294.

[8] Ali, Asghar: The rights of women in Islam. London 1992, pp.46-47.

[9] Hussain (1987), pp.110-111.

contextual statement and not a normative one.[10] Aftab Hossain has collected material on this and tells us that the word qawwam has been interpreted differently by different authors. Abdullah Yousuf Ali translates the word as 'protector', Pickthall translates it as 'in-charge', Arbury translates it as 'one who manages the affairs of women', Abdul Aziz Jaweesh says that the 'superiority', if any, is not for any natural proficiency in one and deficiency in another, but it is only on account of the liability to maintain.[11] The major argument for male superiority, then, is that men are protecting women, maintaining them or are in charge of women. This is affirmed by male and female writers who state that men claim authority over women because they are invested with the responsibility of taking care of women, financially and otherwise.[12] The shariah provides that even if the woman is wealthier than her husband, the latter is under an obligation to provide for her maintenance. The Hanafi law determines the scale of maintenance by referring to the social position of both husband and wife, whereas the Shafi law only considers the position of the husband and the Shia law focuses on the requirements of the wife.[13]

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[10] Ali (1992), at p.46.

[11] Hussain (1987), p.110.

[12] See Smith, I.J.: 'Islam'. In Sharma, Arvind (ed.): Women in world religions. New York 1987, pp.235-281, at p.239.

[13] Tyabji, Faiz Badruddin: Muslim law. 4th ed. 1968, pp.265-266; Ali, Syed Ameer: Mohammedan law. Vol.ii, 4th ed. Calcutta 1917, p.462; Anderson, Norman: Law reform in the Muslim world. London 1976, pp.132-133.

In a Muslim society, therefore, the man has full responsibility for the maintenance of not only his wife but also his children. At the same time anything a wife earns is her own to dispose of, either to use it herself or to contribute it to the family budget if she wishes.[14]

The statement that men are a degree above women means that authority within the household has been given to the husband in preference to the wife, because a heavier burden has been placed on his shoulder.[15] Perhaps the picture would have been different if females were the maintainers. The Quran is silent on the question of what should happen when men cease to be providers financially, emotionally or otherwise. Therefore it leaves open the question of status of women when they are no longer dependent on men as the providers or breadwinners. As indicated, recent trends show that increasingly families are finding it very hard to live on the husband's income alone and many husbands are failing to provide their normative commitment.

The notion of superiority and authority should be distinguished from the burden to bear responsibility. Superiority and authority of obedience in Islam is only paid to God.[16] But here Islamic traditions have developed yet another ambivalent stance on gender relations. While

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[14] Lemu, B. Aisha and Fatima Heeren: Women in Islam. Leicester 1976, p.18.

[15] Doi (1989), p.41; Muhammad Ali, Maulana: The religion of Islam. Lahore 1973, p.532.

[16] Siddique, Kaukab: The struggle of Muslim women. Kingsville 1986, p.26.

God alone is owed submission in religious terms, socially the male's providing position brings with it a female duty to subordination.

The debate on the creation of women from Adam's rib is a Judeo-Christian tradition intermingled with Islamic tradition without any basis.[17] However, Islamic law mainly gives priority and prerogative to the male Muslims. Well-known examples are the male's right to unilateral divorce, the male's right to marry up to four wives, the male's right to guardianship and custody (above a certain legal age), a son's double share in the parental property and one man being equated with two women in legal testimony. All this denies absolute equality of men and women.

The rights given by different schools under the different sects of Islam (Shia and Sunni) do vary in details. In principle, though, they all subordinate women. For example in the Sunni sects (Hanafi, Maliki, Shafi and Hanbali), only the Hanafi school allows women to marry without a guardian's approval, or not to veil their face and hands and also goes to the extent of allowing them to be judges. All the Sunni schools in principle allow women to have education, the capacity to buy and sell property, to participate in war, to have political rights and to work

[17] See for details Hassan, Riffat: 'Made from Adam's rib: The women's creation question'. In Al-Mushir Theological Journal of the Christian Study Centre. Rawalpindi, Vol.xxvii, No.3, Autumn 1985, pp.124-155.

with men,[18] but these rights are often subject to various restrictions and work within limits.

The tendency was to interpret the Quranic provisions in the light of standards of the prevailing tribal law, resulting in the loss of women's status and position in the family as granted by rules of divine origin.[19] For this reason the perception of statuses of Muslim women in the early period of Islam stands in sharp contrast with their position in later Muslim society. The actual situation of women with their rights and privileges has been far removed from the Islamic ideal.[20]

Fatima Mernissi has argued in her recent work that the main problem of Muslim women's subordination is not rooted in religion or tradition, but in patriarchal influence and arbitrariness which has dominated women for centuries. Mernissi, an Arab woman, writes that when she had finished writing her book, she had come to understand one thing,

> If women's rights are a problem for some modern Muslim men, it is neither because of the Koran nor the Prophet, nor the Islamic tradition, but simply because those rights conflict with the interest of a male elite. The elite faction is trying to convince us that their egotistic, highly subjective and mediocre view of culture

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[18] See in detail Al-Abd Al-Hay, Abdal Khalek A.: Contemporary women's participation in public activities: Differences between ideal Islam and Muslim interpretation with emphasis on Saudi Arabia. Ph.D. Thesis University of Denver, Denver 1983, esp. p.137.

[19] Coulson, Noel and Doreen Hinchcliffe: 'Women and law reform in contemporary Islam'. In Beck, Lois and Keddi Nekki (eds.): Women in the Muslim world. London 1978, pp.37-51, at p.38.

[20] Ahmed, Akbar S.: Discovering Islam-making sense of Muslim history and society. New Delhi 1990, p.185.

and society has a sacred basis.[21]

While we agree with this, we would suggest that Mernissi seems concerned to protect Islamic traditions from the charge of subordinating women. However, these Islamic traditions have, to a large extent, been created by the very same male elite that Mernissi holds responsible for suppressing women. Rana Kabbani in her review of two books on women and Islam points out that Muslim patriarchy is at last being challenged by Arab women. Women are now arguing that men have distorted Mohammed's teachings to entrench the male elite.[22] The patriarchal structure of the Muslim family has been emphasised as the heart of the subordination of women in the Muslim societies.[23] However, patriarchal religious tradition conflicts with feminist ideology, whether Islamic or non-Islamic. In view of the strong influence of particular religious traditions and local authors, we should rather deal with this as an issue within a particular society (see chapter 2.1.3 below) than on a global basis.

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[21] Mernissi, Fatima: Women and Islam: An historical and theological enquiry. Oxford 1991, p.ix.

[22] Kabbani, Rana: 'Reclaiming the true faith for women'. In The Guardian. Saturday May 23, 1992.

[23] Joseph, Suad: Women in the Middle East. Berkely 1985, pp. ; Austin, R.W.J.: 'Islam and the feminine'. In Mac Eain, Denis and Al-Shahi Ahmed (eds.): Islam in the modern world. London and Canberra 1983, p.36; Shaheed, Farida: 'The articulation of patriarchy'. In Zafar, Fareeha (ed.): Finding our way-readings on women in Pakistan. Lahore 1991, pp.135-158.

2.1.2 The negative impact of traditional cultures

Bangladesh, formerly East Bengal and then East Pakistan, shares two of the oldest and richest cultural traditions of the world. On the one hand, it roots back to ancient Indic civilisation and on the other hand to Islamic culture.[24] The crystallisation of the Bengali language from the classical Sanskrit during the Indian medieval period provided the region with a linguistic underpinning for its separate cultural identity.[25] Moreover when the Muslim influence spread to Bengal, the area already had a rich accumulation of Buddhist and Hindu cultures of at least fifteen hundred years and a complete structure of society.[26]

Most of the original converts to Islam and their descendants, who were mostly lower caste Hindus,[27] did not

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[24] Smock, Audrey Chapman: 'Bangladesh: A struggle with tradition and poverty'. In Gillee, Janet Zollinger and Audrey Chapman Smock (eds.): Women-roles and status in eight countries. New York 1977, pp.83-126, at p.83.

[25] Spear, Percival: 'The medieval Hindu kingdoms from the death of Harsha in A.D. 647 to the Muslim conquest'. In Spear, Percival (ed.): The Oxford history of India. Oxford 1958, pp.190-203, at p.197.

[26] Ali, Anwar: 'Muslim mind and society in Bangladesh: An historical retrospect'. In Ali, Asghar (ed.): Islam in South and South-East Asia. New Delhi 1985, pp.185-229, at p.185.

[27] Smock (1977), p.86; Bertocci, Peter J.: 'Bangladesh-composite cultural identity and modernization in a Muslim majority state'. In Stoddard, Phillip H. et al. (eds.): Change and the Muslim world. Syracuse 1981, pp.75-85, at p.75; Sarkar, S.: The swadeshi movement in Bengal 1903-1908. New Delhi 1973, pp.408-409.

give up many of the local rituals and customs. Like all other world religions, Islam has adapted itself to various climates and cultures.[28] As Islam spread beyond the Arab peninsula, many of the customary laws of the converted populations found expression in the body of Muslim law as practised in that area.[29] In the course of time the interaction and clash of Quranic reforms with the strong social customs of new converts brought about new cultural adjustments that eventually lowered women's status.[30]

Islam, by the time of its entry in the subcontinent, already incorporated principles of patriarchal arbitrariness and sexual rigidity not compatible with the letter and spirit of Quranic provisions and many of Mohammed's teachings.[31] Thus, the form in which Islam reached India, more than five centuries after the life of Mohammed and through the aegis of Turks, Afghans and

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[28] Ali (1985), p.226; Ali, Asghar: 'Islamic fundamentalism and communalism in India'. In Ali, Asghar (ed.): Islam in South and South-East Asia. New Delhi 1985, pp.171-197, at p.171. See also on the local nature of Islam, Ahmed, Rafiuddin: 'Conflict and contradiction in Bengali Islam: Problems of change and adjustment'. In Ewing, Katherine P. (ed.): Shariat and ambiguity in South-Asian Islam. Berkeley, Los Angels and London 1988, pp.114-142. For religious tolerance and sharing of customs of East Bengali Muslims with their Hindu neighbours see Evans, Hugh: 'Bangladesh: South Asia's unknown quantity'. In Journal of the Royal Society of Asian Affairs. Vol.xix, Part.iii, Oct. 1988, pp.306-317; Mujeeb, M.: The Indian Muslims. London 1967, p.446.

[29] Smith, Donald Eugene: India as a secular state. Princeton and New Jersey 1963, pp.39 and 53.

[30] Pickthall, Mohammed M.: Cultural side of Islam. Lahore 1966, pp.146-147.

[31] Smock (1977), p.89.

Mughals, clearly accorded women a subordinate religious and social status.[32] The reasons for this cannot be researched within the ambit of the present thesis, but recent work is showing, with particular reference to post-divorce maintenance and polygamy, that earlier liberal Islamic provisions have over time been interpreted to the detriment of women.[33] This happened apparently, as many authors have indicated, through a combination of male-dominated Islamic scholarship and male-centered social development. On the latter point the actual situation of women, their social status and privilege is usually far removed from the Islamic ideal, whether in the tribe, village or city.[34] On the former point, women are seen as helpless captives under men's control.[35]

While focusing on the patriarchal arbitrariness of Islam in India we should also keep in mind that from the very beginning of its history in India, Islam has absorbed beliefs and practices characteristic of and akin to

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[32] Ibid., 85.

[33] Rahman, Fayyaz-ur: Muslim women's right to post-divorce maintenance. Ongoing Ph.D. Thesis, London 1994, SOAS; See also Rehana, Firdous: Discussion on polygamy and divorce by Muslim modernist in South-Asia, with special reference to their treatment of Quran and Sunnah. Unpublished Ph.D. Thesis, London 1990, SOAS.

[34] Ahmed (1990), pp.184-195.

[35] Kamali, M. Hashim: 'Divorce and women's right: Some Muslim interpretation of S. 2:228'. In The Muslim World. Vol.74, 1984, pp.85-99.

Hinduism.[36] This is true about Islam in Bangladesh too. As a way of life, Bengali Islam has taken in local characteristics which make it look different from the ways of Islam elsewhere in the world.[37] Bengali Muslims adhere simultaneously to the principles of Islam and their Bengali culture. To many of them, these two spheres of different ideologies do not pose any conflict and contradiction.[38] But there is always a tension about the proper balance between these two diverging ideologies.[39] When any of the ideologies became dominant, as history reveals, conflicts and contradictions arose.[40] The impact of this can also be seen in legal reforms in the British Indian period when attempts were made to curtail the effect of Hindu customary law on Islamic law (see chapter 3.1.4 below).

This trend can also be felt in Bengali women's lives. A Bengali woman has acknowledged:

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[36] Titus, Murray T.: Islam in India and Pakistan. Karachi 1990, p.156; Ahmad, Aziz: 'Islamic frontiers in Africa and Asia-India'. In Schacht, Joseph and C.E. Bosworth (eds.): The legacy of Islam. Oxford 1974, pp.130-143, at p.133.

[37] Wright, D.: 'Islam and Bangladesh polity'. In South Asia. 1987, Vol.10, No.2, p.15.

[38] Fruzetti, Lina and Akos Oster: 'Muslim rituals: The household rites and the public festivals'. In Kinship and ritual in Bengal: Anthropological essay. New Delhi 1984, pp.180-201, at p.181.

[39] Khan, Zillur Rahman: 'Islam and Bengali nationalism'. In Ahmed, Rafiuddin (ed.): Bangladesh: Society, religion and politics. Chittagong 1985, pp.17-27.

[40] See for details Khan, Muinuddin Ahmed: 'Social and political implications of the Islamic reform movements in Bengal in the nineteenth century'. In Ahmed, Rafiuddin (ed.): Bangladesh: Society, religion and politics. Chittagong 1985, pp.81-94.

> Bengali Muslim women live in a cultural environment which is a combination of Islamic traditions and pre-existing Hindu custom.[41]

Bengalis have historically acknowledged a continuous attachment to the Bengali language and culture; this culture owes more in its development to Hinduism than to Islam, as indicated in the beginning of this sub-chapter. Thus for example, the influence of Hindu customs concerning widow remarriage has obscured the legal right of Muslim widows to remarry.[42] It seems that many widows, particularly those belonging to respectable families, preferred not to marry again due to the impact of Hindu ideas.[43] There is also much evidence that South Asian Muslim marriages are in fact a complex amalgam of the traditional Muslim contract (nikah) and local customary traditions. The rituals of birth are also based on local tradition, very often clearly derived from Hindu notions.[44] Some of these customs illustrate the subordination of women. For example, widows are seen as inauspicious and not to be allowed to participate actively in the rituals of marriage or to wear colourful saris.

The practice of parda or purdah, the seclusion of

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[41] Abdullah, Tahrunnesa Ahmed: Village women as I saw them. Dhaka 1974, p.2.

[42] White, Elizabeth Herrick: Women's status in an Islamic society: The problem of parda. Ph.D. Thesis, University of Denver, Denver 1975, pp.1-152, at p.16.

[43] Ghosh, K.S.: Indian women through the ages. New Delhi 1989, p.47.

[44] Blanchet, T.: Meanings and rituals of birth in rural Bangladesh. Dhaka 1984, pp.75-121.

women for a variety of reasons, is similarly based on Muslim concepts and other pre-Islamic notions of the need to segregate the sexes. We shall discuss this issue in more detail in sub-chapter 2.1.4 below.

It is interesting, perhaps significant, to note that the Muslim tradition provides that the family of the groom should give a dower, payable on demand to the bride, which the Islamic law specifies to be paid to the bride and not to the father.[45] This dower (mahr) system implied that the prestige brought by a chaste woman and by the children she would bear was worth a considerable investment. Women's primary source of prestige, as we shall see in detail in sub chapter 2.2.1 below, was traditionally derived from the ability to bear children.

It appears that at some point within this century, many Bengali communities began adopting a new, prominently Hindu practice whereby the bride's family presents the groom with a dowry and assumes most or all of the costs of the wedding ritual. This practice indicates a further loss of status of the female spouse, who now becomes a minor consideration in the often very commercialised context of marriage arrangements that involve dowry demands (see for details chapter 6.1 below).

Therefore, it would seem to make little difference for women whether people follow traditional Islamic law or rely heavily on local hybrid customs. Even among those Muslims

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[45] Mahmood, Tahir: The Muslim law of India. Allahabad 1987, 3rd ed. p.71.

who purport to follow classical Muslim law, juristic devaluation of the position of women had the clear effect of subordinating women. The same people may not even have been consciously aware of the fact that, by following some aspects of local custom, they were in fact further weakening the position of women. Through the interaction of the two cultures, women came in many ways to be considered as symbols of male status and as emblems of family prestige.[46] Rather than empowering them with their granted official and Islamic rights, they were doubly suppressed.

2.1.3 Patriarchal structures in Bangladesh

The systems of patriarchy in Bangladesh are commonly identified by patrilineal descent and patrilocal residence (i.e. the practice of women living with their husband's kin after marriage).[47] Descent in Bangladesh is mainly organised along patrilineal lines. This patrilineal descent system has direct relevance to the place of women in society. A boy is the perpetuator of the patriline; he will

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[46] Lindenbaum, Shirley: 'The value of women'. Paper presented to the Ninth Annual Conference on Bengali Studies, Columbia University, New York 1973.

[47] For a general analysis of the concept of patriarchy, see Rendall, Vicky: Women and politics. London 1982, pp.15-34; McDonagh, R. and R.R. Harrison: 'Patriarchy and relations of the production'. In Kuhn, A. and A. Walpe (eds.): Feminism and materialism. London 1978, pp.28-29; Barret, M.: Women's oppression today. London 1980, pp.10-11.

continue the family name. By contrast, a girl is of no use in this respect. Her contribution in this sphere will have to be made in some other house. "A bird of passage", "another's property", "a guest in the parent's house", "a thing to be preserved for an outsider", or "a thing which has to be given away" are some of the common descriptions of a daughter.[48] There is a well-known Bengali saying to the effect that educating your daughter is like watering another man's fields.

In the patrilineal and patrilocal kinship system, a son is looked upon as the father's natural apprentice and successor or supporter of the parents in old age. Sons are supposed to build up family prestige and prosperity. A father believes that he will continue to live in this world through his son. All these notions work together to give a special value to the son.[49] The World Fertility Survey of 1983 studied forty developing countries and found that the countries with the strongest preference for a son were Bangladesh, Jordan, Korea, Nepal, Pakistan and Syria.[50]

Patrilineal descent clearly plays an important role in the systematic devaluation of women by its stress on biological paternity as the basis of assigning children and by making women more or less irrelevant in genealogical reckoning. This of course, as we will show in chapter 2.2.1

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[48] Towards Equality. (Report of the Committee on the status of women in India) New Delhi 1974, pp.56-57.

[49] Ibid., p.57.

[50] Mahmuda, Islam: The girl child in Bangladesh: A situation analysis. (UNICEF), Dhaka 1990, p.9.

below, is clearly not the full picture, as women remain the crucial vehicle by which humankind is perpetuated.

The overwhelming majority of the Bangladeshi population follows the patrilineal system of descent. Some tribals in Bangladesh, such as the Garos (in Mymensing) and Khasiyas (in Sylhet) are matrilineal, whereas the Santhals (in Rajshahi) and the Chakmas (in the Chittagong Hill Tracks) are patrilineal, although it is apprised that:

> In all the tribal societies whether Patrilineal or Matrilineal, women seemed to be far more independent than elsewhere in Bangladesh. In the fields, men and women worked side by side, unlike the scene in the rest of Bangladesh.[51]

There seems to be an agreement in the literature that women are more emancipated in tribal societies than in the mainstream population.[52]

In the general population of Bangladesh, according to one anthropologist's interpretation, whereas the birth of a son is heralded with the cry of "God is great", the arrival of a daughter brings only the whisper of the Quranic prayer in her ear.[53] Moreover, one goat is sacrificed in the naming ceremony of the daughter, which is known as akika, but two goats in the case of a son. This difference in response to the sex of a new-born baby is but the foreshadowing of the sharp differences in roles and

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[51] Sobhan, Salma: Legal status of women in Bangladesh. Dhaka 1978, p.45.

[52] Towards Equality (1974), p.57.

[53] See in detail Bertocci, Peter J.: 'Rural communities in Bangladesh: Hajipur and Tinpara'. In Mahoney, Clarence (ed.): South Asia: Seven Community Profiles. New York 1974, pp.81-130.

behaviour patterns that the child will learn and act out later in life. It is evident that mothers frequently exhibit a strong preference for sons because of the realisation that their status within the family and future security, if widowed or divorced, depends upon their sons. As a consequence of this, we find differential treatment of children according to sex. Probably for lack of food and care, the mortality rate for girls under 5 ranges from 35 to 50 per cent higher than that for boys in the same age group.[54]

The social arrangements for patrilocal residence further undermine women's autonomy. After marriage, a woman is effectively cut off from the potential support of her own kin. She is suddenly thrust into a strange environment with people whom she does not know, as marriage is usually arranged by the guardians. A leading writer reports that the bride often becomes little more than a servant to her in-laws and she may not even be given adequate care in her child-bearing period.[55] High maternal mortality results from poor diet, repeated pregnancies, unhygienic

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[54] Mosley, Wiley H. et al.: Demographic characteristics of a population laboratory in rural East Pakistan. Dhaka 1970, p.5.; De Souza, Alfred: 'Women in India and South Asia: An introduction'. In De Souza, Alfred (ed.): Women in contemporary India and South Asia. New Delhi 1980, pp.1-30, at p.23.; Khan, Azizur Rahman and Mahbub Hossain: The strategy of development in Bangladesh. London 1989, p.169; Aziz, K.M.A.: 'Daughters and sons in rural Bangladesh: Gender creation from birth to adolescence'. In Krishnaraj, Maithereyi and Karuna Channa (eds.): Gender and the household domain: Social-cultural dimensions. New Delhi 1989, pp.55-73, at p.56.

[55] Lindenbaum (1973), pp.6-8.

environments and physical abuse.[56]

Paramount to the consolidation of a woman's identity and status amongst her in-laws is the socio-biological role of reproducing the patrilineage.[57] Thus, while the status of women is enhanced by the birth of a male child, the failure to bear any offspring or a male child has many negative effects and may be considered grounds for divorce, as we shall see below (chapter 5.5).

Women's dependency upon and subordination to men is conditioned by a whole range of institutional practices embedded in the family and the kin-group. It is these aspects which provide the constituent elements of the well-documented system of patriarchy in Bangladesh which institutionalises the female subordination of women and their structured dependency on men.[58] It appears confirmed, then, that the main problem of subordination is not really religion or tradition, but patriarchal influence and authority. It is men who have interpreted religion, moulding it to perpetuate the patriarchal domination which has strong links with the issue of gender violence. A legal analysis of violence and cruelty to women in Bangladesh is provided in chapter 6.3 and 6.4 below. It is argued that violence against women is deeply related with the

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[56] Id.

[57] Chen, Martha Alter: A quiet revolution: Women in transition in rural Bangladesh. Dhaka 1986, p.56.

[58] Cain, Mead et al.: 'Class patriarchy and women's work in Bangladesh'. In Population and Development Review. Vol.5, No.3, Sept. 1979, pp.405-438, at pp.406-408.

oppressive structures of the male-dominated values of Bangladeshi society.[59]

Women's rights under Islamic law are often not implemented. Thus, there is evidence that it is usual to deprive women of their granted shares of interests for keeping the patrimony intact.[60] A study of two villages in Bangladesh revealed that 77% of women from families with land did not intend to claim their legal share in their parental property.[61] Sometimes women themselves disclaim their rights of inheritance to maintain a cordial relationship with the natal family, so that they can visit them occasionally on naior. Women's renouncing of inheritance for naior appears to be a fair exchange because their inheritance may be misused by the husband, while naior is women's exclusive vacation.[62] However, the concept of naior is another subtle mechanism of subordination. Naior, as a pretext of allowing an outlet for women to escape from their own household, is denying their right to the parental property. In this social structure of the patriarchal family, awarding married daughters their rightful shares of money or land was often viewed as

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[59] Guhathakurta, Meghna: 'Gender violence in Bangladesh: The role of the state.' In The Journal of Social Studies. Vol.30, 1985, pp.77-90, at p.77.

[60] Rahman (1982), p.298.

[61] Westergaard, Kirsten: Pauperization and rural women in Bangladesh-a case study. Comilla 1983, p.71.

[62] Jahan (1975), p.16; Begum, Najmir Nur: Pay or purdah: Women and income earning in rural Bangladesh. Polmerston North 1987, p.111.

transferring family wealth to an alien family. Thus the Quranic law of fixed shares was viewed as contrary to the existing social structure and was often ignored or circumvented.[63] Moreover, women's of dependance on their natal family in cases of future contingency also plays its part. Thus, although there is an express prohibition of the direct revelation to this effect, women are deprived of their property by men who take advantage of their social position.

As indicated, a recent study of the metropolitan city of Dhaka found that although the Muslim family laws in Bangladesh require husbands to give dower to their wives, 88% of the women in the survey did not receive any dower.[64] A study of Lahore women found that 85% of the wives in the survey received little or no maintenance.[65] Moreover, women's dependance upon men has often been grossly abused and there are plenty of cases on cruelty to women and dowry (see below chapter 6). Thus, the patriarchal argument that women are subordinated by religion is not completely true, as even the rights which are granted in the religious law are often not enforced in a male-dominated patriarchal society. Rather, it seems, the patriarchs of the society

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[63] Levy (1962), p.245.

[64] Akhter, Shaheena: How far Muslim laws are protecting the rights of the women in Bangladesh. Dhaka 1992, p.35.

[65] Zia, Shehla et al.: Muslim family laws and their implementation in Pakistan. Unpublished Research Report, Research Wing, Women's Division, Islamabad, May 1984; Korson, Henry J. and Michelle Maskiell: 'Islamization and social policy in Pakistan'. In Asian Survey. Vol.xxv, No.6, 1985, pp.604-609.

use religion to preserve their dominance.

2.1.4 Seclusion or Purdah

The word "Purdah" or Parda, which literally means curtain, refers to the system for secluding women and enforcing standards of feminine modesty and the preservation of purity.[66] Purdah in its most complete and extreme form has two dimensions: Physical segregation of living space, and concealment of the female face and body. To fulfil the principles of purdah, segregation of living space is achieved by setting aside for women areas of the home compound which are known as zenana and also by reserving enclosed portions of public meeting places and facilities. Concealment of the female face and body, when it is necessary for women to leave the home, can be provided by the portable seclusion of the burkha, a concealing cloak, a garment that totally covers the woman from the top of her head to the bottom of her feet, with slits through which

[66] See in detail Hauswirth, Frieda: Purdah: The status of Indian women. London 1932; Jeffery, Patricia: Frogs in a well: Indian women in purdah. London 1979; Sharma, U.: 'Women and their affines: The veil as a symbol of separation'. In Man. Vol.13, No.1, 1978, pp.220-230; Jacobson, D.: Hidden faces: Hindu and Muslim purdah in a central Indian village. Ph.D. Thesis, Columbia University, Ann Arbor 1973, pp.1-13, at p.12; Thompson, Catherine: 'A sense of sharam: Some thoughts on its implications for the position of women in a village in central India'. In South Asia Research. Vol.2, Nov. 1981, pp.39-53.

she can see.[67] Although the burkha may seem cumbersome, by wearing it a woman can gain mobility without violating purdah restrictions.[68]

Thus, purdah is a system of secluding women, seen as enforcing a high standard of female modesty for the preservation of purity of women, on which the honour of traditional men relies.[69] Its manifestation in traditional Bangladeshi society includes not only restrictions on women's movement without proper dress but also includes purdah of voice, i.e. the female voice should not be heard outside the homestead or bari.[70]

Here it becomes necessary to engage in a brief discussion on the origins of purdah and to probe into the query whether purdah is pre-Islamic. It has been argued by several authors that the seclusion or segregation of women was not an unknown practice in the pre-Islamic age.[71] In many societies, purdah observance had a meaningful correlation to the sense of social prestige and higher status.[72] When Muslims came into the cities of Syria,

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[67] Smock (1977), p.93.

[68] Izzedin, Nejla: The Arab world. Chicago 1953, p.289.

[69] Papanek, Hanna: 'Purdah: Separate worlds and symbolic shelter'. In Comparative Studies in Society and History. Vol.15, No.3, 1973, pp.289-311, at p.289.

[70] Ibid., p.310.

[71] Kabbani (1992), p.37; Levy (1962), p.124; Khan, Mazharul Haq: Purdah and polygamy. Peshawar 1973, p.17.

[72] Raza, S. Musi: 'Changing purdah system in Muslim society'. In Islam and Modern Age. Vol.vi, No.4, Nov. 1975, pp.40-56, at pp.40-51.

Mesopotamia, Persia and Egypt, their women adopted the face veil as a concession to the prevailing custom, so that they would not be misunderstood for women of loose character who remained unveiled. Likewise, the custom of seclusion (harem or purdah) which originally had been practised in Byzantium and Persia, made its way to the Persianised court of Baghdad and eventually gained common acceptance in Muslim lands.[73]

It is important to note here the comment of another leading scholar that the heavy veiling that we see across the Muslim world (and among Muslim communities elsewhere) is certainly not Islamic.[74] This author also argues that it is a relic from Byzantium, which the Arabs took on when they conquered Damascus soon after Mohammed's death seeing fit to ape the conservative custom of the Christian elite which they displaced.[75]

There is a possibility that the concept of purdah in South Asia was further influenced by ancient Hindu notions of the purity of women which work together with Muslim ideas. For example, it is mentioned in the classical epic Mahabharata that women covered themselves completely and Indian dramas of the third century depict upper class ladies veiled.[76] Historically, thus, the practice of purdah

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[73] Ali (1985), p.124.

[74] Kabbani (1992), p.37.

[75] Id.; Levy (1962), p.124; Khan (1973), p.17.

[76] Sengupta, Padmini: Women workers of India. New York 1960, p.134; Indra, M.A.: The status of women in ancient India. Banares 1955, p.272; Mujeeb (1967), p.43.

or the seclusion of women has evolved with the influence of Persian, Arab, Byzantine and Hindu customs, although in all areas it was limited to certain upper classes or elite groups. It is rightly argued by Linda Grant that the veil is pre-Islamic but men have seized the theology and tried to subvert it.[77]

Islamic purdah, as commented by an author, does not interfere with the freedom, nor does it impede the progress of womanhood in Islam, as it does not mean that women should be marooned within the four walls of their houses.[78] The Purdah of burkha can be seen as a liberating factor giving physical mobility and access to public space, although in limitation. Purdah is actually focused on modesty, which depends on female chastity preserving the honour or reputation (izzat) of the man and the whole family.[79] It was further pointed out that in the early days of Islam women went out in veils, expounded Muslim law and jurisprudence, nursed the wounded on the battlefields and led armies against the enemies.[80] As another leading

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[77] Grant, Linda: 'Unveiling the new Muslim-women are embracing Islam but some reject interpretations of the Koran that subjugate them'. In Life and Times. 19th August 1992.

[78] Raza (1975), pp.46-47.

[79] Pastner, C.: 'Gradations of purdah and the creation of social boundaries on a Baluchistan Oasis'. In Papanek, Hanna and Gail Minault (eds.): Separate worlds: Studies in purdah in South Asia. Delhi 1982, p.168 ; Papanek (1975), p.289; Papanek, Hanna: 'Purdah in Pakistan: Seclusion and modern occupations for women'. In Journal of Marriage and the Family. Vol.33, No.3, August 1971, pp.516-529.

[80] Raza (1975), p.47.

scholar perceptively observes:

> When Arab society was productive, creative women participated in its activities and shared in the general strength and well being. When vitality ebbed away and deterioration set in, women suffered along with her community.[81]

In the light of our earlier discussion about the concept of equitable rights in Islam as between the sexes, however, freedom of movement for some women does not prove that women are not subordinated. The case of unusual women, who defy the norms come in this category; they are either very high or very low in status; they may be present in every society. It appears that the ideal type of purdah sanctioned in Islam was developed gradually into an extreme form. The traditional society added one specific feature in the Muslim society, i.e. "purdah of voice and movement".[82] However, it is significant to note that Islam has also admonished the believing men to lower their gaze and to be modest. However, for women it added that they should not display their beauty and ornaments and should draw their veils over their bosoms.[83] A recent work on parda shows that over time the rather mild injunctions to both sexes to be modest in behaviour and dress were turned into a strict system of segregation of the sexes and restrictions on women's activities and movement.[84]

The justification for purdah, beyond the Quranic

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[81] Izzedin (1953), p.302.

[82] Raza (1975), p.49.

[83] Ali (trans.) (1934), pp.904-905.

[84] White (1975), p.23.

verses on modesty which are clearly applicable to both sexes, lies in the assumption that women are vulnerable and unable to protect themselves from the sexual impulses of men. At the same time it implies that men must be protected from the temptation of women. Thus, as men are the weaker sex in this regard, they really are the ones to be veiled.[85]

Female chastity is seen as essential to family honour: in order to protect it, patriarchal structures operate to the effect that women must be kept in a world separate from men, symbolically sheltered from temptation and assault.[86] Thus veiling is said to protect women from the male gaze, from the incitement of lust. This has been described by a scholar as a distorted view of liberation which is derived from patriarchy, as male medieval theology has been exploited to keep women in their place.[87] Thus, simultaneously women are seen as a threat to the male who needs protection from uncontrolled temptation.[88] But why are women, on the one hand, shown as sexually vulnerable and needing protection by purdah, while they are contrarily shown as sexually aggressive and need to be segregated to protect the men? It is undeniable that parda also protects

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[85] Mernissi, Fatima: Beyond the veil-male-female dynamics in Muslim society. Rev.ed. London 1985, p.31.

[86] Papanek, Hanna: 'The women field worker in a purdah society'. In Human Organization. No.23 (Summer 1965), p.160-169.

[87] See Grant (1992).

[88] Papanek (1973), p.36.

women from being a sex object and represents a stance against pornography, sexual harassment and rape.[89] Thus the main purpose of purdah appears to be to avoid zina or illicit intercourse, which reduces a woman and all her attributes to a sex object and makes her feel psychologically weak, leading to lack of confidence and self-esteem. It even disables her, as Lama Abu Odeh points out, from confronting an uncomfortable daily experience.[90]

The rigidity of the purdah observance clearly depends on the economic situation of the family, the age of the woman, and the place in which the family lives. In a poor country like Bangladesh, only the more affluent can provide the conditions enabling their women to withdraw into complete seclusion. This can be done by employing servants to relieve women of household tasks requiring them to leave the house, or by constructing large living quarters to be able to isolate female members from guests, so that even the sound of their voices will not be heard.[91]

In the poorer households, the younger women are more secluded, as the mother or mother-in-law often performs such tasks as searching for firewood and drawing water which would otherwise have brought the younger women into contact with other villagers. By so doing, the older woman is not only able to protect the reputation of her daughter

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[89] Grant (1992).

[90] Odeh, Lama Abu: 'Post-colonial feminism and the veil: Thinking the difference'. In Feminist Review. No.43, Spring 1993, pp.26-37, at p.26.

[91] Papanek (1965), pp.160-169; Jeffery (1979), p.6.

or daughter-in-law,[92] but also the izzat and honour of the family. Although this does not seem to be direct discrimination against such women, this protective attitude makes them to a certain extent immobile. However the city women do not usually (unless they are orthodox) wear a burkha or a veil and they have fewer restrictions placed on their mobility. It is thus rightly commented that social (rather than religious) forces are a major factor in the seclusion of women:

> The existing inequality does not rest on an ideological or biological inferiority, but is the outcome of specific social institutions designed to restrain her power: namely, segregation and legal subordination in the family structure.[93]

Purdah politics have proved to be an effective tool for controlling women and buttressing a patriarchal structure because the division of space does not entail an equal distribution of decision making and authority.[94] Thus purdah is a complex institution that entails much more than restrictions on women's physical mobility and dress. It is used to deny women access to many opportunities in the outside world which would afford economic independence.[95] At the same time it confers upon them social status as a protected group which is thus, by definition, inferior. In

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[92] Abdullah (1974), pp.24-26.

[93] Mernissi (1985), p.19; Shams, Shamsuddin: 'Socio-legal rights of women'. In Islamic and Comparative Law Quarterly. Vol.4, No.iv, 1984, pp.213-226, at pp.220-221.

[94] Afsar, Haleh and Bina Agarwal: Women, poverty and ideology in Asia. London 1989, p.18.

[95] Jeffery (1979), p.121.

theory, it both controls women and provides them with shelter and security. While men have power and authority over women, they are also normatively obligated to provide them with food, clothing and shelter.[96] Thus, while men were held responsible for the maintenance of women, they in turn relied on women to maintain parda or chastity, modesty and purity, which provided a special standing in traditional society.

The economic realities of the difficult present time are working against traditional attitudes to the effect that women should remain in the home and not be part of the public. Increasing numbers of women are having to work to help support the family, often in factories and offices. Such realities are certainly not always liberating for women, who have to struggle with home maintenance along with the pressure of a job. Day-care facilities for children are generally unavailable, and the extended family system which used to afford ready baby-sitting for all the children in the larger family is tending to break up.[97] Thus the so-called modernisation may not be liberating in all spheres. It is also indisputably agreed that in a nuclear family women tend to be more emancipated as they may have a considerable say in family matters and may have much more independence and privilege than in a joint or extended family. Moreover in her father's house, which she

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[96] Cain et al. (1979), pp.434 and 683.

[97] Smith, Jane I. : 'Islam'. In Sharma, Arvind (ed.): Women in world religions. New York 1987, pp.235-281, at p.247.

occasionally visits, a woman has greater mobility (see naior at p.51 above). In her natal family, purdah observance is less strict, she is relieved of her usual household chores and does not have to play the role of docile daughter-in-law or obedient wife.[98]

Even in modern societies, purdah is present, not only in the sense of segregation of sexes but in the sense of women's aversion of gaze or low voice, i.e. purdah of eye or voice (saram).[99] This also avoids the loss of family honour or dignity and thus maintains the appropriate distance from males.[100]

We can see, thus, that women in Bangladesh are subject to clear notions of gender segregation, although there are situational contexts in which women are given much greater freedom of movement. Depending on the personal views of individual women, this will protect them, restrict them, or it may lead to conflicts which end up in case-reports.

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[98] Jahan, Rounaq: 'Women in Bangladesh'. In Women for women -Bangladesh 1975. Dhaka 1975, pp.1-29, at pp.15-16.

[99] Jeffery (1979), pp.5-6.

[100] Thompson (1981), p.39.

2.1.5 The socio-economic and legal sphere and female subordination

Women in Bangladesh are perceived to be degraded to the position of second-class citizens because of their economic, social, political and legal bondages in relation to gender.[101] In the context of our present study, it is important to emphasise the legal elements, i.e. to show how family laws are dominated by the patriarchal system, which in turn has been reinforced by notions of segregation and seclusion. Although this thesis is primarily focused on legal forms of gender discrimination, it is necessary to examine briefly some socio-legal relationships to have a fuller picture of the situation.

The discrimination against women as women depends on many causes. Not only the traditional cultures, patriarchal structures or seclusion are responsible, as discussed earlier, but also the social science literature, T.V., radio, theatre and cinema all depict and perpetuate the inferior status of women. It is thus arguable that an important reason for women's continued subordination is that the social science literature on "Bengali women" deals with such women's inferior status rather than emphasising the importance of traditional female roles. This clearly aggravates the situation. For example, a Bengali scholar

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[101] On gender see Oakley, A.: Sex, gender and society. London 1972; Rubin, Gayle: 'The traffic in women: Notes on the political economy of sex'. In Rieter, Rayna R. (ed.): Towards an anthropology of women. London 1975, pp.157-210.

has simply stated that men dominate all societal spheres, domestic and non-domestic, and that women suffer from thorough discrimination underpinned by social and religious mores.[102] Or as a social scientist says,

> Bengali women, both rural and urban, traditional and modern, live in a social system which sanctifies an unequal and inferior status for women.[103]

Such statements do not reflect reality (see chapter 2.2 below) and may be based on personal opinion rather than fact. To some authors, women are neither expected nor allowed to look after themselves, to possess individuality and to nurture aspirations over and above the ideals of womanhood.[104] Some writers go to the extreme when they state that this female inferiority and perpetual dependence on men emanates from the social belief that,

> A women is physically weak, intellectually poor, mentally inconsistent, timid, irrational and psychologically emotional.[105]

Even a prominent legal expert has identified the root cause of female subordination as women themselves when stating that:

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[102] Hossain, Monowar and Syed Waliullah: 'Some aspect of socio-economic environment in Bangladesh'. Paper presented for seminar on Population Policy of Bangladesh, Dhaka 1975, May 15-25.

[103] Jahan, Rounaq: 'Women in Bangladesh'. Paper presented to the Ninth Congress of Anthropologist and Ethnological Sciences, Chicago, August 1973.

[104] Such uncritical perspectives are reflected in Huq, Jahanara: 'Status of women in Bangladesh'. In Romero, Flerida P. (ed.): Women and the law. Manila 1983, p.18-41.

[105] Islam, Mahmuda: 'Social norms, institutions and status of women'. In Women for Women (ed.): The situation of women in Bangladesh. Dhaka 1979, pp.225-264.

> There have been several studies of late relating to the life style and status of women in Bangladesh, all these studies commented that, though the average Bengali woman particularly in the rural Bengal contributes very significantly to the households, doing labourious jobs day in and day out and no less vital than that done by her close counterparts in the fields, yet her worth, in the eyes not of her father, brothers, and husband, but also her own is low.[106]

Thus, by merely restating perceived notions of traditional cultures, the literature on the position of women perpetuates these subordinating forces and becomes itself part of the negative impact of traditional cultures. It is a sad reflection of the position of women that statements in the literature showing the inferior status of women in Bangladesh are made by women themselves, thus undermining their own sisters. Such an approach does not see the potentialities women have within their domain of the household or the sexual monopoly of birth. It is rightly commented that this damages women:

> This predicament is further exacerbated by practices such as Polygamy, real and symbolised seclusion (purdah), universal distrust of feminine emancipation and blatant flouting of Family Laws Ordinance.[107]

Again, although it seems that discrimination between the sexes does not arise out of discriminatory legislation but from social practices, the actual picture is accurately described by a woman legal practitioner who comments that in the legislation there is a clear trend of "paternalism"

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[106] Sobhan (1978), p.2.

[107] Adnan, Shapan et al.: 'Social change and rural women: Possibilities of participation'. In Hossain, Monowar et al.(ed.): Role of women in socio-economic development in Bangladesh. Dhaka 1977, pp.80-93, at p.82.

which shows women as in need of protection because they are weaker, and not as a "privileged class", so that women's identity becomes submerged with the stronger identity of men.[108] Below, we are giving some instances of protective legislation in the general law; the disparities in family law are discussed in the following chapters.

In the Payment of Wages Act of 1937, it is laid down in section 16(1) that no deduction should be made from the wages of a person under fifteen years or of a woman for breach of contract. In the Workmen's Compensation Act of 1923, it is provided in section 8(1) that where compensation has to be distributed, no payment of a lumpsum as compensation to a women or a person under legal disability shall be made otherwise than by deposit with the Commissioner. One may question the presumption that the law makers consider women as minors or as persons of legal disability. This paternalistic attitude is not doing women any good, rather making them feel weak and fragile.

There are many provisions in different Acts which tend to show the influence of social attitudes and prejudices on the legislature. For example, section 23 of the Bangladesh Shops and Establishments Act 1965, section 22 of the Tea Plantation Labour Ordinance, 1962 and the Factories Act 1934, all lay down that women are not to be employed between the hours of 8 p.m to 6 a.m.or 7 a.m. Does this not imply that women who work in those hours are only housewives or prostitutes? Or does it imply that women

[108] Sobhan (1978), pp.6-9.

workers are to be protected from the clutches of male workers who cannot control their emotions if women work besides them in a night shift? What these Acts could not hide was that the legislature could not avoid adherence to social bondage and myths, though outwardly they show that they are favouring women.

However, there are some Acts which provide privileges to women, although they are rarely enforced. For example, section 47 of the Factories Act of 1965 provides that where there are more than fifty women workers ordinarily employed, there shall be provided and maintained a suitable room or rooms for the use of children (under the age of 6) of such women. The Plantation of Labour Ordinance of 1962 similarly provides, in section 12, that the government may make rules that in every tea plantation where forty or more workers are employed, the employer shall provide and maintain rooms for the use of children of women workers under the age of six years. Other Acts providing maternity leave and benefits are also highly regarded, for example, The Bengal Maternity Benefit Act of 1939 provides under section 3(1)and 3(2) that no employer shall knowingly employ a woman during the six weeks immediately following her date of delivery and also provides that no woman shall work during the six weeks immediately following her date of delivery. However, the reality is that, knowing their rights of maternity, women may ignore them because of their need for survival. This shows the wide gap between the legal provisions and their implications in Bangladesh. It

also shows that the legislature, too, is subordinating women as a class.

In a highly stratified society like Bangladesh, the intersection of gender relations with those of class means that the range of options available to women varies considerably across the social order.[109] While all women's life chances are constrained within sometimes rigidly defined boundaries, women do not by any means constitute an undifferentiated social category. Rural women in Bangladesh are a depressed group that may be regarded usually as being triply effected as follows:[110]

(i) as females vis-a-vis males;
(ii) as being rural vis-a-vis being urban;
(iii) (most of them) as being poor (exploited) vis-a-vis being rich (exploiters).

In rural Bangladesh, the unequal distribution of social power and privilege rests on the ownership of land and not primarily on gender as will be further discussed in chapter 2.2.2 below. The system of gender stratification within households also governs the economic mobility of women, independent of class. Although women as a class are also exploited in the field outside the periphery of family and kinship (see below, chapter 2.2.2 in more detail), it is somewhat surprising to note that lower class women are less submissive and appear less dependent than middle class women. This may be because they do not have any better

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[109] Kabeer, Naila: 'Subordination and struggle: Women in Bangladesh'. In New Left Review. No.168, March-April 1988, pp.95-121, at p.104.

[110] Adnan et al. (1977), pp.80-93.

option. Among the urban squatters, the myth of the male bread-winner is often completely eliminated and the concept of parda in the strict sense is considered a luxury, as a large number of women have no option but to produce their own household earnings. Thus, women who are at the lower end of the social scale contribute far more substantially to the national economy and are much more independent than generally assumed or recognised. Thus, in some sense, poverty is a blessing for women as it offers a chance for them to come out of their seclusion.[111]

The lower middle class women are the worst effected class with regard to exploitation, as they cannot extricate themselves from the social bondages connected to the protection of men. The role conflicts of working women are to a maximum extent found in this class and not in the "lower class".[112]

Thus, the perceived notions of female subordination constantly undermine women and do not recognise the power women have within the patriarchal structure of the society. In the following part of the chapter we will be discussing the significant contribution of women in an attempt to gauge their real power.

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[111] White (1992), p.25.

[112] Rani, Kala: Role conflict in working women. New Delhi 1976, p.178.

2.2 Forces counteracting the perceived notions of subordination of women

To give a more complete and realistic picture of the socio-legal sphere of women's role in society, the forces which counteract the subordination of women need to be analysed here in some detail. Although comparatively little material can be found on the positive aspects of women's roles, it is certain that women and their position can also be seen in a more positive perspective.

This part of the chapter discusses in particular, two aspects of women's power. The first section deals with matriarchal sentiments and the sexual monopoly of birth, women's inherent power to give birth and to act as the major physical and emotional provider for children in their very early and formative years. The second section focuses in more detail on the recent economic contribution of women and projects that many women are building up their own support system.

2.2.1 Matriarchal sentiments and sexual monopoly of birth

It is the opinion of many scholars that matriliny was widespread in India in pre-Aryan days, and that the Aryan patriarchal culture is a superimposed one.[113] The historical evidence confirms that during the Vedic age women enjoyed considerable freedom and equal opportunities with men,[114] although there will be a trend to exaggerate this to uphold the cherished image of the "Golden Vedic age". There is no doubt, however, that women as procreators were highly respected and that as partners in economic activity they played a significant role in decision making. Vedic women, mature and educated, had a say in the selection of their husbands, and widows often remarried.[115] As progeny was considered more important than chastity, as a widow's potential fertility would be wasted, so the argument obviously went in favour of widow remarriages.

Today the ambivalence in attitudes to women, a manifestation of which may be seen in the low status of women in the same communities which also respect and adore the "ideal" wife, mother and daughter (putting aside the

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[113] Towards Equality, p.55.

[114] Thapar, Romila: 'Looking back in history'. In Jain Devaki (ed.): Indian women. New Delhi 1975, pp.5-15, at p.7; Manohar, K. Murali: 'Socio-economic status of Indian women'. In Manohar, K. Murali (ed.): Socio-economic status of Indian women. Delhi 1983, pp.1-30, at p.3.

115 Kuppuswamy: Social change in India. Delhi 1972, p.178.

aspect of Mother Goddess), is attributed to the change from matriarchal to patriarchal systems in South Asian societies.

On the other hand, women are seen as an embodiment of God's power, as the creative power is most obviously working in a woman. From this point it is argued that women are in fact superior to men because of their special power to bear children and nurture, which men do not have. But women are hardly given any credit for it.

The conditioning of the girl-child through psychological brain-washing and socialisation processes which clearly outline the difference between "girl's work" and "boy's work," help women themselves to become strong and militant advocates of the importance of the mother-wife role in a woman's life. However, the conditioning is so complete and so successful that in the final analysis, a woman is routinely proud of her house and is possessive of her kitchen and her larder to such an extent that she refuses her husband and other male members to acquire even the slightest control over these areas.[116]

While women in Bangladesh cannot simply be dismissed as submissive and subordinate, there are real powers behind their veils which are perhaps not so easy to understand. The real picture is that there are women who have complete domination of their husband's income. These women grasp their husband's earnings and decide how and where to spend

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[116] Chatterji, Shoma A.: The Indian women's search for an identity. New Delhi 1988, p.4.

them. Moreover, when there was no banking system, the keys to the sinduk or locker often were in the custody of the wife. At the present time there are families where the wife controls the finance, especially the expenses for the household, but this aspect of women's power is rarely emphasised, perhaps because it would be seen as an attack on the male ego.

Certain people maintain, though, that nature itself has ordained women as goddesses of the home. It is true that in the domain of the household, women are the queen who rules over the kitchen and who is prosperous with children.[117] With regard to the rituals within the households, especially in the rituals of birth as argued by Blanchet,[118] women dominate the scene. Women go outside the boundaries of the official religion and nourish the cultural sphere by local house rituals such as gaye-halud (purification ritual before marriage), mendi (beautification before marriage) and mukhe-vhat (first feeding of solids for a child). This happens also by encouraging spiritual powers. For example if a woman does not become pregnant, she may be taken by another woman to a holy man or saint (known as pir or fakir) and may also be taken to the burial place of a saint (known as mazar) where she is given an amulet within which a verse of the Quran is written, a tabiz, to evict the evil spirits that impede her

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[117] Malladi, Subbamma: Women: Tradition and culture. New Delhi 1985, pp.4-5.

[118] Blanchet (1984), p.106.

fertility. Although it is forbidden in Islam to worship any one other than Allah, these practices are widespread. This shows that women are maintaining and developing their own sphere of religion which is promoted by exclusion from the mosque and can be seen as a protest against male-dominated religious structures. Moreover in a purdah society, the separate worlds for men and women involve sharp division of labour. Men's work is outside the home and women's role inside the home. She is the queen of her own domain.[119] She is the provider of emotional shelter for the children, the early moulder of personality, the instructress in basic religious observances and cultural attitudes.[120] Thus the children's training is accomplished basically by the mother at home. However, these powers of women are seldom acknowledged and the real social position of women is, thus, not recognised, especially by outsiders researching 'oriental' women.

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[119] Minault, Gail: 'Political change: Muslim women in conflict with parda: Their role in the nationalist movement'. In Chipp, Sylvia A. and Justin J. Green (eds.): Asian women in transition. University Park and London 1980, pp.194-203.

[120] Patai, Raphael: Society, culture change in the Middle East. Philadelphia 1969, pp.167-168; Banu, U.A.B. Razia Akter: Islam in Bangladesh. Leiden, New York and Koeln 1992, p.3; Gupta, Sen Sarker: A study of women in Bengal. Calcutta 1970, p.75.

2.2.2 Socio-economic position of women

The position of women in a society cannot be simply attributed to their role in providing progeny. There are many other socio-economic roles of women than the stereotypical ones of mother and wife. The economic roles of women are shaped by socio-economic and political structures. According to an eminent author, these are reflected in women's:

1. Ability to own, or inherit and control, income earning assets;
2. Ability to participate in economic activities;
3. Control over their husband's income, which is usually determined by the level of their education, the age and pattern of their marriage, family structure and residential status;
4. Right and ability to control property.[121]

With regard to the right of women to own or inherit and to control property, the image of Muslim women having no choice other than submission to male dominance has been partially contradicted by Saunders, whose study of women's role in a Muslim society shows that women exercise limited but important power within the marriage relationships as well as in the economic sphere.[122] Islamic law allows women

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[121] Ahmad, Alia: Women and fertility in Bangladesh. New Delhi, Newbury Park and London 1991, p.31.

[122] Saunders, Margaret O.: 'Women's role in a Muslim Hausa town'. In Bourguignon, Erika (ed.): A world of women: Anthropological studies of women in the societies of the world. New York 1980, pp.57-86.

the right to inherit and own property in their own right.[123] However, a Muslim woman is entitled to less than a Muslim man.[124] The alleged reasoning behind this is that men are maintaining women (see already above, p.35).

Next to property in serving the purpose of security is jewellery, which is regarded as an alternative to land. Women may receive jewellery from their parents before their marriage, which may be enhanced with the property or gifts given at the time of marriage. Some women may be given a large quantity of it by their parents at the time of their marriage. The jewellery received from the groom's side may, however, reduce the amount of dower (see in detail chapter 5 below, p.286). Moreover, a detailed field study indicates that men often buy land by selling women's jewellery and then control the income accruing from this land.[125] However, jewellery is still regarded as a reliable form of security for women in their rainy days.

A look at the more recent socio-economic position of women shows that large-scale migration of men to the cities and foreign countries has been creating many female-headed households. Headship rates of women in rural areas are much

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[123] Lateef, Shaheeda: 'In a community'. Paper presented in the seminar on the status of women, held in Dhaka. May 1973, pp.29-34; Serajuddin, Alamgir Muhammad: 'Muslim family law and the legal rights of Muslim women in South Asia'. In Journal of Asiatic Society of Bangladesh (Hum). Vol.xxxii, No.2, Dec. 1987, pp.128-147.

[124] On Islamic succession law see Ali (1917), pp.65-116; Baillie, Neil B.E.: The Mohummudan law of inheritance. London 1874.

[125] Westergaard (1983), p.74.

higher than in the urban ones.[126] These households, although not matriarchal, certainly give more weight to women's decisions and have been described by a Pakistani author as "Matri-weighted households".[127] In fact, the drastic change in women's position within the family and kinship structures are most strikingly evident in the case of female-headed households.[128] It has been argued that there are five situational categories of female-headed households in Bangladesh.[129] They are:

1. Where there is no adult male member because a woman is divorced,deserted or widowed and consequently becomes the main supporter and chief decision maker in the household;

2. Where an adult male member may exist but does not contribute significantly towards supporting the household;

3. Where the earning male member is a transient who does not contribute regularly towards supporting the household;

4. Where the male member is an absentee (migrant to another country) who may send regular remittances but rarely visits the family; and

5. Where the earning member is a surviving son who is subservient to his mother.

Although Ranjana Kumari reported that widowhood was

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[126] Bangladesh Bureau of Statistics: Statistical pocket book of Bangladesh, Dhaka 1987, p.63.

[127] Rahat, I. Naveed: Male outmigration and Matri-weighted households: A case study of a Punjabi village in Pakistan. Delhi 1990.

[128] See for details, Islam Mahmuda: Women heads of households in rural Bangladesh: Strategies for survival. Dhaka 1991, pp.1-81.

[129] Islam, Mahmuda: 'Female heads of households'. A report prepared for UNU, 1987; Hossain et al. (1990), p.42-43.

suggested as the main cause of female headship,[130] Parthasarathy in a survey found a definite link between poverty and female-headedness.[131] It was found that in 1982, 15.4% of households were headed by women in Bangladesh;[132] of these 16.5% were in rural and 6.9% in urban areas.[133] A study of rural women in Bangladesh who were participating in the food-for-work program reveals that fifty per cent of these women were the chief income earners in their families; also, cases of divorced and separated women were more prominent among them.[134]

However, there is a difference between the female-headed households where women are the sole providers themselves as in cases of widowhood, deserted, divorced or separated women and those "matri-weighted households" where the male temporarily emigrated. In the latter case, men are earning wages in the oil-producing countries or in Indian restaurants in overseas, sending remittances to the wife who has more authority, influence and responsibility than

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[130] Kumari, Ranjana: Women-headed households in rural India. New Delhi and London 1989, p.5.

[131] Parthasarathy, G.: 'Rural poverty and female heads of households'. Paper presented at the seminar organized by ISST on "Women's work and development", April 1982; Ranjana (1989), p.5.

[132] Bangladesh Bureau of Statistics: Statistical Year Book of Bangladesh. Dhaka 1986, p.82.

[133] Bangladesh Bureau of Statistics: Bangladesh Population Census 1981: National series, analytical findings and national tables (Ministry of planning, Govt. of Bangladesh). Dhaka 1984, p.33.

[134] De Souza (1980), pp.3-4.

her absent husband in local, domestic and village affairs.[135] However, in these households, women are only de facto heads; the de-jure heads are often men; an attribute of patrilineal and patrilocal societies, which still exercise control over the major resources. This leads to the re-assertion of male dominance with its ambivalent mixture of protection and control.

There is much evidence at the local level that women are building up their own support system. For example, in certain parts of the country women with some capital buy cows and goats and rent them to poor women to raise under share cultivation (barga) arrangements. The tenant gets the milk and the first calf, while the owner gets the subsequent calves and retains ownership of the cow or goat rented out.[136] There are, in the banking system, some credit facilities offered to women under the Bangladesh Small and Cottage Industries Corporation (BSCIC), Bangladesh Rural Development Board (BRDB) and under the Ministry of Social Welfare and Women's Affairs. There are also a few quasi-formal organisations like the Grameen Bank and Swanirvor Bangladesh. They have made impressive progress in extending credit facilities to rural women. Moreover, a number of non-governmental organisation (NGOs) are providing credit facilities to women for promoting

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[135] Rahat (1990), p.13-14.

[136] Hossain, Mahbub and Rita Afsar: 'Credit for women's involvement in economic activities in rural Bangladesh'. In Bangladesh Institute of Development Studies Research Report. No.105, Dhaka, June 1989, pp.1-104, at p.7.

employment and income-generating activities. The major ones are the Bangladesh Rural Advancement Committee (BRAC) and Proshika Manabik Unnayan Kendra.[137] The point which is made here is that when women are given access to credit, they are transforming expenditure-saving activities into income-generating ones and are turning themselves from unpaid family workers to income earners for the household.

It is indisputable that women's role and work in the household is very demanding and strenuous. Recent studies in Bangladesh do not include household work in the labour force,[138] but in 1961 and 1974 household work was included in the labour force surveys.[139] Because of this inadequacy of official statistics regarding women's participation, the extent of female agricultural labour force is shown to have dropped officially from about 92% in 1961, to about 70% in 1974 to 6.5% in 1983/84 to 4% in 1984/85. The variation of definition of labour force used by the surveys is largely responsible for this distortion.[140] Because household and other subsistence activities do not fall under the purview of work or employment, there is a downward distortion which affects the female labour force to the extent that nearly

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[137] Ibid., p.14-15.

[138] Bangladesh Bureau of Statistics: Report on the 1984-85 Labour Force Survey. Dhaka 1986.

[139] Bangladesh Bureau of Statistics: Statistical Year Book of Bangladesh. Dhaka 1987.

[140] Mahmud, Shimeen and Hamid Shamim: 'Women and employment in Bangladesh'. In Bangladesh Institute of Development Studies Research Report. No.127, Oct. 1990, pp.1-66, at p.3.

95% of the active female population of Bangladesh aged ten to sixty-four years are excluded from the civilian labour force, being buried under the definition of "housewives".[141]

The perceived reasoning for women's income earning capabilities is that women's outside work is an indicator of higher female status (see chapter 1, p.8). It has been assumed that the situation of women will be changed when they become more stable in social standing by their income earning capabi
lities and potentialities. A pioneer woman writer extends the analysis of Engels that women's entry into waged labour is a pre-condition for not only greater gender equality but automatic disappearance of any gender inequality.[142] The author thus focuses on the issue that getting women out to work is the key to raising female status in Bangladesh.[143] But, there are numerous problems with this as women have to continue with their domestic responsibilities together with the workload in an income-earning role. Moreover the problem of seclusion is also there. The reasons why women

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[141] Hamid, Shamim: 'Women's non-market work and GDP accounting: The case of Bangladesh'. In Bangladesh Institute of Development Studies Research Report No.116, Dec. 1989, pp.1-48, at p.3; Hamid, Shamim: 'The value of housewives' time in rural Bangladesh'. Paper presented at the 8th Biennial Conference of the Bangladesh Economic Association held in Dhaka, July 1988.

[142] White, Sarah C.: Arguing with the crocodile: Gender and class in Bangladesh. London, New Jersey and Dhaka 1992, p.24.

[143] Ibid., p.25.

are confined in the house are not entirely sociological. They are supported by economic structures. There are limited opportunities for work outside the household in an agrarian economy.[144] However, the rapid growth of many industries, e.g. garment, plastic, pharmaceutical etc. have given some opportunity to women. But it is reported that women enter the employment market on terms different from men as they have lower salaries than their male colleagues.[145]

There is also a massive migration of mostly landpoor and landless families from the rural to the urban centres or towns and cities, where the cash earnings are much higher. But those households which migrated to the cities could not always meet their subsistence requirements on the income of the males alone.[146] Women were pressurised to deploy their labour in market-based activities and to add to the male's income in order to ensure the minimum requirements of survival.[147]

Parda considerations have almost been dispensed with, as women are coming out of their indoor situations and take up outdoor wage employment in factories, fields and other

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[144] Ahmad (1991), p.80.

[145] Hossain, Hameeda et al.: No better option: Industrial women workers in Bangladesh. Dhaka 1990, p.64.

[146] Greely, M.: Rural technology, rural institution and the rural poorest: The case of rice processing in Bangladesh. (CIRDAP), Comilla 1982, pp.128-151.

[147] Ibid., p.137.

public places. It is rightly commented by a scholar[148] that the institution of parda as well as patriarchy, with their traditional restrictions on the income-earning employment of women outside the household, have not proved to be rigid and inflexible barriers when confronted with the exigency of survival.

Women's involvement in economic activities is associated with the feminist argument that it will make them liberated and independent from men. However, as shown earlier, female employment in Bangladesh did not provide women control over main production, landownership or income earned (see chapter 1, p.9).[149] Although women have greater control of certain forms of production, these are usually not significant enough to transform the core relations of male power and female subordination within household structures.[150] Thus, the economic involvement of women by wage labour or otherwise could not create any dent in the patriarchal norms of society.[151]

Recent economic pressures have the effect that more husbands can not maintain their wives and both partners have to work for the survival of the family. However, in

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[148] Oakley (1972), p.18.

[149] Khan, Zarina Rahman: Women, work and values: Contradictions in the prevailing notions and the realities of women's lives in rural Bangladesh. Dhaka 1992, p.198.

[150] Kabeer, Naila: 'Gender, production and well-being: Rethinking the household economy'. In Institute of Development Studies Discussion paper. No.288, May 1991, pp.1-50, at p.20.

[151] Khan (1992), p.198.

accordance with Muslim law and religion, men have full responsibility for the maintenance of their wife and children (see for details chapter 5, p.296). In this context it should be emphasised that more women in Bangladesh should insist that men should fulfil their normative obligations and make thus free women from economic deprivation.

There is no male right in Islam to grasp a wife's income; whatever she earns is her own to dispose of, either she can use it herself or may contribute it to the family budget if she wishes.[152] But in the patriarchal society of Bangladesh, a wife's income is regarded as the husband's or her in-laws' property. Moreover, women in the labour market are being marginalised in a double jeopardy as they are being used as cheap labour with the false notion that this will give them emancipation and enhanced status in the society. Thus, women are sacrificing their life and labour in the workplace and home to strive for gender equality in a society which does not even allow for gender equity. Rather than making big promises about gender equality, the law should assist women to enjoy the fruits of their labour so that they are not economically deprived and victimised.

[152] Lemu (1976), p.18.

CHAPTER 3

THE DEVELOPMENT OF SOUTH ASIAN FAMILY LAW PRIOR TO THE EMERGENCE OF BANGLADESH

This chapter traces in detail the development of family laws in South Asia before the emergence of Bangladesh in 1971. In our coverage of this necessarily huge area of study, we focus on those areas of family law which are of particular relevance to the current concerns of Muslim women in Bangladesh. The main reason for considering these family laws is of course that these laws are, with few exceptions, still in operation in Bangladesh today.

The chapter falls into two major sections. The first focuses on the development of family laws under British rule, while the second and much smaller section concentrates on the period between 1947 and 1971, when Bangladesh was part of Pakistan.

Our coverage of the British period first investigates the contradictory attitudes of the colonialist government towards women, not only concerning issues of family law, but also women's education, universal adult suffrage and prostitution. In chapter 2.1 above, different reasons for the subordination of women were depicted, primarily male domination by patriarchy and other socio-religious factors. In this chapter, the impact of colonisation on women will be shown as an added factor for the subordination of women

in British India. The British interference in the family law is considered in some detail in the next sub-chapter, showing vividly the gradual interference in the indigenous religio-personal laws, contrary to earlier promises of non-interference. Finally we analyse the relevant legislation in this period and examine the common assumption that it liberated women. It is shown that the colonial governments did not fully support many enactments, although they claimed credit for them. The new laws were often enacted as a result of the relentless efforts of Indian reformers and, increasingly, women's organisations. Moreover, it can be shown in many cases that the British administration was not seriously interested to implement the new laws.

Our coverage of the Pakistani period analyses the role of the state in the struggle between traditional and modern views of women's emancipation and touches on the concurrent debates and tensions between different shades of Muslim opinion on the legal status of women.

We have argued that the actual needs of women in South Asia are centred on being protected from economic deprivation and violence. In British India those needs were not defined and the discourse revolved around sexual equality, liberation and independence. In the Pakistani period, new legislation brought in to improve the position of women could not be translated effectively to satisfy the real needs of women.

3.1 Women and family law in British India

In British India, the encroachment of the colonial government on Muslim family law occurred more through cases, while for the Hindu family law it was mainly through specific statutes. The statutes enacted under the Muslim family law, although seen as a significant step to ameliorate the legal status of women, were more concerned with Islamic debates than whether the reforms were beneficial to women.

3.1.1 Women's inequality and British colonialism

The literature on women's issues in the early twentieth century in British India, especially the ideas and images in Bengal, part of which is Bangladesh today, centered round the discussions on tradition.[1] As early as 1904, Begum Rokeya Sakhawat Hossain, the renowned feminist writer, portrayed women as virtual slaves. She showed how women were victimised by the established order and condemned to a status of insignificance as appendages to

[1] Sengupta, Indira Chowdhury: 'Mother India and mother Victoria: Motherhood and Nationalism in nineteenth century Bengal'. In South Asia Research. Vol.12, No.1, May 1992, pp.20-37, at p.20.

their male master.[2] She saw the position of women in India at that time as steeped in ignorance and superstition in their zenana or seclusion.[3] However, rather than law reform, she suggested the emancipation of women through education to challenge the orthodox patriarchal social structure.[4] Like Rokeya, Katherine Mayo's highly sensational, controversial and politically explosive book "Mother India" also entered into gender politics.[5] The picture of women in British India was expressed in that book, and others in the period, as completely subordinated and degraded, with abuses of child marriage and widowhood, premature consummation and pregnancy, female infanticide, purdah, temple prostitution and sati.[6]

Vivid emphasis on the negative aspects of women's issues reflected the general backwardness of the country and also served to legitimise imperial rule.[7] The status of women in Indian society was frequently used to reiterate

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[2] Hossain, Yasmin: 'The Begum's dream: Rokeya Shakwat Hossain and broadening of Muslim women's aspirations in Bengal'. In South Asia Research. Vol.12, No.1, May 1992, pp. 1-19, at p.3.

[3] Hossain, Rokeya Shakwat: 'Stri jatir obonati'. In Kadir, A. (ed.): Rokeya Rachanabali. Dhaka 1973, pp.17-31.

[4] Hossain (1992), p.4.

[5] Mayo, Katherine: Mother India. New York 1927.

[6] Mayo (1927); Mayo, Katherine: Slave of the Gods. London 1933; Cousins, E. Margaret: Indian womanhood today. Allahabad 1941; Billington, Mary Francis: Women in India. London 1985.

[7] For the same effect in the Bengali literature see chapter 2 (above, p.63).

British superiority and to justify colonialism.[8] The British colonial policies with regard to women were ambiguous. The British never had any doubt that Indian women were inferior to men. Their own Victorian notions played a part in structuring gender roles. A number of works have explored and examined the contradictory approach of the British government to the position of women in India.[9] For example, it has been pointed out that the British had an interest in maintaining women's subordination to show that India was not yet ready for self-rule. At the same time, by claiming that they were liberating women in India, the British were demonstrating the superiority of Western culture in terms of relations between sexes.[10] Perhaps the British colonialists believed in a hierarchy of races in human societies, with their own at the top.[11]

Liddle and Joshi also showed that Katherine Mayo's book was used by the British to maintain the oppression of colonialism rather than arguing for the removal of male

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[8] Das, F. Hauswirth: Purdah: The status of Indian women. London 1932, pp.1-2.

[9] See in particular Liddle, Joanna and Rama Joshi: Gender and imperialism in British India'. In South Asia Research. Vol.5, No.2, Nov.1985, pp.147-165; Liddle, Joanna and Rama Joshi: Daughters of independence-gender, caste and class in India. London and New Delhi 1986, pp.24-30.

[10] Liddle and Joshi (1985), p.154.

[11] Id.

dominance.[12] The policy of the British can also be gathered from another work, similar to Katherine Mayo's, where the author states that one of the arguments constantly cropping up in England and America against India's fitness for self-government is that the women of India were treated by Indian men with little respect.[13]

In her controversial book, Katherine Mayo attributed Indian subjugation and slave-like mentality to the organisation of sexuality.[14] Mayo suggested that India's plight was to be blamed on Indian men, whose hands were too weak to hold the reins of government. She reasoned that the cause of their weakness lay in the subordination and abuse they show to their women.[15] But her work was refuted by many Indians as a scandalous libel on their civilisation and character.[16] Mayo's critics have attacked her from different angles. Lajpat Rai emphasised her failure to provide any historical data and stated that up to the middle of the last century the position of Indian women was not worse than that of their European and American sisters.[17] D.G. Mukerji criticised Mayo's work as

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[12] Liddle, Joanna and Rama Joshi: 'Gender and colonialism: women's organisation under the Raj'. In Women's Studies International Forum. Vol.8, No.5, 1985, pp.521-529.

[13] Cousins (1941), p.78.

[14] Mayo (1927), p.22.

[15] Ibid., p.32.

[16] See for example Jha, Monoranjan: Katherine Mayo and India. New Delhi 1971, p.26.

[17] Rai, Lajpat: Unhappy India: Being a reply to Miss Katherine Mayo's Mother India. Calcutta 1928, p.183.

inadequately documented and full of exaggeration.[18] C.S. Ranga Iyer attacked Mayo on her tendency to generalise from specific cases to the whole of India and her failure to note regional differences.[19] Ernest Wood criticised the ethnocentricity of her book and defended India, explaining that it is not true that Indian men do not feel fondness for their wives, they simply do not show their love and affection in public.[20] He also wrote that the position of Indian women in the home is very honorable and prestigious. Thus:

> There is no indignity in her not going out into the world and fighting in the welter of modern competitive systems.....Must we see everything in terms of money and commerce?[21]

The message of "Mother India" aroused intense public feelings in India and abroad and instigated many others to write on women in India, putting the issue itself firmly on the agenda. It also had positive effects on administrators and legislators by making them more sympathetic to legal reforms.[22] The problem of the feminist writers of that period, like Begum Rokeya Shakwat Hossain or Katherine Mayo

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[18] Mukerji, Dhan Gopal: A son of Mother India answers. New York 1928.

[19] Iyer, C.S. Ranga: Father India. London 1927.

[20] Wood, Ernest: An English man defends Mother India: A complete constructive reply to Mother India. Madras 1929, p.31.

[21] Ibid., p.29.

[22] Ramusack, N. Barbara: 'Women's organisations and social change: The age of marriage issue in India'. In Black, Naomi and Ann Baker Cottrell (eds.): Women and world change: Equity issues in development. Beverley Hills and London 1981, pp.198-216, at p.214.

was that they did not define the real needs of women in India. They were only focusing on the subordination of women and searching for solutions in general sexual equality and other Western notions of liberation and independence.

There were well-defined limits around the British government's attempts at improving the position of Indian women. Although it was outwardly claimed that the colonial rule has liberated women, a thorough examination of the facts would reveal that it damaged their interests. One particular issue that has received some attention is whether the British army, especially the British soldiers, posed a problem for women in India as a whole, or specifically for prostitutes. This has excited several authors. It was reported that the British troops had done injury to Indian prostitutes by passing venereal diseases on to them.[23] This allegation was followed by the Indian Contagious Diseases Act of 1868, which tried to give a solution to the spreading of venereal diseases by controlling the prostitutes rather than limiting the access of British soldiers to them. Thus, the Indian Contagious Diseases Act of 1868 enabled people to carry on their evil trade in girls for the benefit of the British soldiers.[24] It appears that the British soldiers' increased demand for

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[23] See Ballhatchet, Kenneth: Race, sex and class under the Raj: Attitudes and policies and their critics, 1793-1905. London 1980, p.79.

[24] Ramabai, Pandita: 'A pioneer of the women's rights movement'. In Manushi. 1980, Vol.5, pp.18-25.

prostitution developed a fear and insecurity in the general population, so that they restricted their women to more seclusion in the zenana. However, not only foreign aggression, but also the social rigidity of child marriage with its necessary consequence of child-widows and the stigma of widow remarriage had created many prostitutes.[25]

Moreover, the intensification of traditional cultural norms during the 19th and 20th century in India may have been the result of political insecurity and the fear to lose one's tradition by interaction with other cultures.[26] The effort to emphasise cultural norms in the face of challenges of British colonialism has seldom been looked into. An interesting American study shows that during the period of British control, purdah was enforced most severely in the Muslim princely states of India.[27] Moreover, the policy of the colonialist government, although based on formal proclamation of non-interference in socio-religious belief, was in fact coupled with proselytisation by the Christian missionaries. This presented a direct challenge to the indigenous people's religious and social beliefs.[28]

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[25] Jayawardena, Kumari: Feminism and nationalism in the third world. London and New Delhi 1986, p.79.

[26] See chapter 2.1.2 above where it has been shown that Bangladesh is an amalgamation of different cultures and traditions.

[27] White, Elizabeth Herrick: Women's status in an Islamic society: The problem of purdah. Ph.D. Thesis, University of Denver, Denver 1975, p.23.

[28] Shridevi, S.: A century of Indian womanhood. Mysore 1965, p.23.

The imported educational system did not have many links to the culture and tradition of the indigenous population; it also did not do anything for the upliftment of rural women. The British education was encouraged by Christian missionaries and English women and spread only among the urban elites.[29] It is perceived that generally the mass of women were illiterate, in the sense that they did not have any formal education. In fact, there was a provision of formal education in religious schools or madrashas for Muslim girls up to puberty and also a system of private lessons, common for upper classes and castes of both Hindu and Muslim girls.[30] Moreover, oral and non-formal instruction by learning about the ancient traditions, religion, history and folklore was prevalent.[31] Further on, the communities gave initiation to practice in traditional arts and crafts.[32] By the Charter of 1913, the East India Company did accept responsibility to formally educate Indian women, but in reality they refused to take direct action on women's education.[33]

It has therefore been argued that one of the reasons

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[29] Shridevi (1965), pp.95-96.

[30] Wies, Muriel: 'Education'. In Baig, Tara A. (ed.): Women of India. Delhi 1958, p.157.

[31] Chattopadhaya, Kamaladevi: Indian women's battle for freedom. New Delhi 1983, p.32.

[32] Id.

[33] Sinha, Niroj: 'Reinforcing second class status of women in India: A study of the impact of religion through education on women's status'. In Swarup, Hemlata and Sarojini Bisaria (eds.): Women, politics and religion. New Delhi 1991, pp.91-112, at p.99.

for the decline in the status of women in the British period was the total disinterest displayed by the rulers of India with respect of educating women, coupled with the policy of discouraging handicrafts, so that many women ceased to be an economic asset of the family.[34]

One other major reason for reducing the economic status of women in this period came about as a result of industrialisation and changes in technology. For example, the introduction of rice mills had devastating effects on the major source of livelihood of women.[35] There was a proverb, "Jar ghore nai dhenki mushall, shay bou-jhir nai kushal", i.e. womenfolk are in a sorry plight in a house that has no husking instrument or dhenki.[36] Thus a major mode of employment for women was taken away by modern technology.

The British colonialists' concept of emancipation of Indian women did not extend to allowing them voting rights. This shows that women were denied not only social and economic rights but also political rights. The right of vote for women was vehemently and explicitly rejected. The South Borough Franchise Report reasoned that it would conflict with the conservatism of the culture, that purdah

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[34] Singh, Indu Prakash: Women's oppression, men responsible. Delhi 1988, p.154; Singh, Indu Prakash: Indian women: The captured beings. New Delhi 1990, pp.78-79.

[35] Mukherji, Mukul: 'Impact of modernisation in women's occupation-a case study of rice husking industry in Bengal'. In The Indian Economic and Social History Review. Vol.20, No.1, pp.27-46.

[36] Krishnamurthy, J. (ed.): Women in colonial India. Delhi 1989.

would make it difficult to implement and it would be premature when so many men were not sufficiently educated to use the vote responsibly.[37] The question of enfranchising women was mooted in India in 1917, at a time when even in England women did not have that right. Adult franchise for women was granted in England only in 1928 and as such the British colonialists were not in a hurry to enfranchise Indian women.[38] Thus the active women of the Indian independence movement attributed their oppression not to men as a group, but generally to custom, resulting from wars, invasions and imperialism.[39] The negative impact of tradition and custom has already been shown as a cause of women's subordination in chapter 2.1.2 above. As a result of women's sacrifice, courageous and organisational activities in the independence movement, the demand for universal adult franchise was instituted at independence.

By the movement of non-co-operation and civil disobedience under the leadership of M.K. Gandhi, a large number of women of all communities came out of purdah and participated in the struggle for freedom from foreign rule.[40] In the late 1920s, women workers actively

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[37] See Everett, Jana Matson: Women and social change in India. New Delhi 1981, p.106.

[38] Thomas, P.: Indian women through the ages. London 1964, p.333.

[39] Forbes, Geraldine: 'Caged tigers: First wave feminist in India'. In Women's Studies International Forum. Vol.5, No.6, pp.525-536, at p.529.

[40] Sharma, Radha Krishna: Nationalism, social reform and Indian women. Patna and New Delhi 1979, p.61; Caplan, Patricia: 'The Indian women's movement-then and now'. In

participated in the Calcutta and Howrah Municipal scavenger's strike of 1928 and the jute mills strike of 1928-29.[41] Women assisted by spreading the boycott of foreign goods, introducing khadi cloth and collected jewellery to use for national funds.[42] Women also participated in selling and distributing prohibited literature.[43] Women saw the movement for national independence and engagement in the women's movement as complementary.[44] But it never occurred to them that they were recruited by the leaders of national Independence only to channel the energies of an emerging women's movement into the political movement. Women were used for demonstrating the untrustworthiness of the imperial rule by putting them in the forefront of processions, giving wide coverage of their arrest and maltreatment by the police to arouse the anger of the people against imperial rule.[45] This theme was projected in numerous articles, pamphlets and speeches. For example, a hand bill of 1930 read:

Women Speaking. Vol.5, No.7, 1981, p.24.

[41] Sarker, Tania: 'Politics and women in Bengal-the conditions and meaning of participation'. In Krishnamurthi, J. (ed.): Women in colonial India. Delhi 1989, pp.231-241, at p.232.

[42] Bondurant, V. Joan: Conquest of violence-the Gandhian philosophy of conflict. Bombay 1959, p.90.

[43] Ibid., pp.81-83.

[44] Liddle (1986), p.40.

[45] Pearson, Gail: 'Nationalism, universalism and the extended female space in Bombay city'. In Minault, Gail (ed.): The extended family: Women and political participation in India and Pakistan. Delhi 1981, pp.174-192, at p.176.

> If you want to save your sisters from being trampled under the hoofs of horses or save their skulls from being cracked by lathi, take oath from today not to use British goods.[46]

There was a wide difference between the goals of the women's movement and the Indian national movement. The women's movement did not only want the liberation from foreign rule but also from male domination.[47] According to Gail Omvedt, the criteria for liberation of women are the following:

> Equal participation in the productive and political affairs of society and freedom from sole responsibility for home and child care.[48]

This, however, would hardly be the agenda of most Indian women at the time. It appears, from this perspective, that the key to women's subordination can be found in their identification with the domestic sphere.[49] This feature of domestic subordination appears to be derived from Engels who compared the marriage agreement to an unequal contract of owner and labourer, with the owner being more powerful and authoritative.[50] This was

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[46] Ibid., p.189.

[47] Liddle (1986), p.40.

[48] Omvedt, Gail: 'Caste, class and women's liberation in India'. In Bulletin of Concerned Asian Scholars (BCAS). Vol. vii, No.i, January-March 1975, pp.43-48, at p.43.

[49] Rubin, Gayle.: 'The traffic in women: Notes on the political economy of sex'. In Reiter, R.R. (ed.): Towards an anthropology of women. New York 1975, pp.157-210.

[50] Engels, Frederick: The origin of family, private property and the state. Moscow 1977, p.228.

supported, among others, by J. Sayers.[51]

Such views taken from foreign writers and concepts caused some confusion. The women's organisations in India perhaps could not perceive this and, influenced by foreign writers, aimed to achieve sexual equality. However, as we have argued, the real need of women in India is not liberation from the family but to have freedom from economic deprivation and violence within it. The Indian women's movement aimed first to remove those customs which were detrimental to women's "dignity and status" (child marriage, purdah, legal disabilities) within the family. They wanted to promote measures which would allow recognition of the distinctive features of womanhood within the family.[52] Women's partial and unreflected involvement meant that they did not frontally attack the official ideology of women.[53]

Soon after independence, South Asian women acquired constitutional guarantees of gender equality in political and economic life and universal adult suffrage. However, it is obvious today that these rights are not fully realised in practice. The struggle for independence did not remain without effects, though. Some of the zenana women who came

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[51] Sayers, J. et al. (eds.): Engels revisited. London 1987.

[52] Majumder, Vina: 'Social reforms movements in India-from Ranade to Nehru'. In Nanda, B.R. (ed.): Indian women: From purdah to modernity. New Delhi and London 1990, pp.41-66, at p.66.

[53] Mies, Maria: 'Indian women and leadership'. In Bulletin of Concerned Asian Scholars (BCAS). Vol.vii, No.1, January-March 1975, pp.56-61, at pp.58-59.

out of purdah and volunteered for active service in the nationalist movement did not return to the seclusion of their homes. However, as we shall see, independence from the British colonialists could not automatically ensure an improvement of women's rights in society.

3.1.2 Interference with personal/family laws[54] in British India

Before the British assumed political responsibility, Muslim law had been administered as the law of the land.[55] The Farman of 1765 granted the Diwani, the right to collect revenue and civil jurisdiction, to the East India Company. In the original form of the Farman, the East India Company was bound to decide causes "agreeably to the rules of Mahomet and the laws of Empire".[56] But this clause disappeared from later versions of the treaty. The law of

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[54] Personal law has a wider scope than family law. Tahir Mahmood points out that Muslim personal law covers the following topics: 'Marriage and its dissolution, family rights and obligations, testamentary and intestate succession, personal property, religious and charitable endowments and pre-emption'. See Mahmood, Tahir: Family law reform in the Muslim world. Bombay 1972, p.167.

[55] Gledhill, Alan: The republic of India. Westport 1970, p.220; O'Malley, L.S.S. (ed.): Modern India and the West-a study of the interaction of their civilization. London 1968, p.110.

[56] Wilson, Roland Knyvet: Anglo-Muhammadan law. 6th ed. London 1930, p.25.

the Moghul Empire was founded on Sharia, Fatwa Alamgiri[57] and Hedaya[58]; these sources were also identified by other authors.[59] The non-Muslims had been governed in matters of their personal laws by their own personal and customary laws.[60] In the early British administration, the imperial rulers more or less continued the Muslim pattern of judicial administration.[61]

It is important to note that there was no specific concern for women at this stage. The main agenda of consideration was protection of religious susceptibilities. It was promised by Warren Hastings in 1772 by Regulation II that the Muslims and Hindus will be allowed to be governed by their own laws in all suits regarding inheritance, succession, marriage, caste and other religious usages or

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[57] A collection of decisions or fatwas made in the reign of Aurengzeb.

[58] Hedaya was translated by Charles Hamilton and first published in 1791. There are complaints about the Hedaya's accuracy see Ali, Syed Ameer: Mohammedan Law. Calcutta 1912, Vol.i, pp.244-254.

[59] Rankin, George Clause: Background to Indian law. Cambridge 1946, p.4; Ali, Syed Ameer: 'Islamic jurisprudence and the necessity for reforms'. In Wasti, Syed Razi (ed.): Syed Ameer Ali in Islamic history and culture. Lahore 1968, pp.223-230, at p.224.

[60] Ramadan, Said: Islamic law and its scope and equity. 1961, p.143; Fyzee, A.A. Asaf: 'Development of Islamic law in India'. In Singh, Attar (ed.): Socio-cultural impact of Islam on India. Chandigarh 1976, pp.107-115, at p.112.

[61] Srivastava, D.K.: 'Personal laws and religious freedom'. In Journal of the Indian Law Institute. Vol.18, No.4, 1976, pp.551-586, at p.555; Fyzee, A.A. Asaf: Outlines of Muhammadan law. 1st ed. Bombay 1949, pp.53-54.

institutions.[62] In the Act of Settlement 1781, the same intention of non-interference of the 1772 Regulation was reaffirmed. Section 17 of the Act of Settlement 1781, directed that:

> In inheritance and succession to land, rent and goods and all matters of contract and dealing between party and party should be determined in the case of Mohammedans and Hindus by their respective laws and usages and where only one of the parties should be Mohammadan or Hindu by the laws and usages of the defendant.

The impact of the Warren Hastings scheme of 1772 was that for the first time the laws were divided into general and personal law. Thus the Act of 1781 was an extension of the 1772 Regulation. A large number of studies cover this issue of non-interference of British colonial rule.[63] Non-interference in religio-personal laws also aimed to protect the colonial political stability.[64] It also appeased certain vested interests of the Zamindars and Taluqdars in relation to customary laws depriving women of their rights of property.[65] In fact, the colonial paradigm for legislation was closely connected with the administration

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[62] Regulation II of Warren Hastings was adopted as the Regulation of 17th April 1780.

[63] See for example Jain (1952), 1st ed. pp.64-69; Rankin (1946), pp.135-160; Derrett (1968), pp.232-269.

[64] Shelat, J.M.: Secularism: Principles and application. Bombay 1972, p.75.

[65] Farroqi, Vimla: 'Muslim women's rights to equality and the problems of today'. In Siddiqui, A. Zakia and Anwar Jahan Zuberi (eds.): Muslim women: Problems and prospects. New Delhi 1993, pp.26-31, at pp.27-28.

of land revenue.[66] The reasons of non-interference did not allow the colonialists to injure the religious susceptibilities of the Indians.[67] But this apparent non-interference was only with regard to the two major religious communities, i.e. Muslims and Hindus.[68] The personal laws of the Christians and Parsis were codified by the British by the Parsi Marriage and Divorce Act, 1865, the Indian Divorce Act, 1869, the Indian Christian Marriage Act, 1872, the Indian Succession Act, 1925 and the Special Marriage Act, 1872. Tahir Mahmood states that the English Matrimonial Causes Act, 1857, has found itself reproduced into these Indian statutes.[69] The argument that significant dissent was not raised when Muslim law was reduced to personal law[70] has been strongly disputed by Indian Muslim scholars or alims. They reasoned that the British policies were forced on the Muslims without their consent as they were mere colonial subjects without any means to protect

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[66] Dhavan, Rajeev: 'Borrowed ideas: On the impact of American scholarship on Indian law'. In American Journal of Comparative Law. Vol.33, No.3, Summer 1985, pp.505-526.

[67] Pearl, David: 'Modernising personal laws in India'. In South Asia Research. Vol.v, No.ii, Jan. 1972, p.148.

[68] Jain, M.P.: Outlines of Indian legal history. 2nd ed. Delhi 1966, p.697.

[69] Mahmood, Tahir: Personal laws in crisis. New Delhi 1986, pp.98-99.

[70] See Schacht, Joseph: An Introduction to Islamic law. Oxford 1964, pp.94-95; Rashid, S. Khalid: 'Impact of colonialism on the sharia in India'. In Islamic and Comparative Law Quarterly. 1983, Vol.iii, No.3, pp.161-176.

their laws.[71]

The judges who were administering justice at this time were either British or Western-trained. There is no evidence in the literature on whether these judges were dedicated to the women's cause. English and other laws and concepts were often introduced by the judges when there was a lack of knowledge of traditional Arabic or Sanskrit texts. Moreover, there was a general difficulty for the judges in properly ascertaining the terms of Islamic law from the authoritative Arabic texts.[72] This led to scholarship on translations and to the compilation of commissioned texts.[73] However, up to 1856 the judges were assisted by law officers, i.e. Muftis or pandits, to declare the rule of law applicable to a case.[74] Thus it was acknowledged that a great part of Islamic law has been modified deliberately or accidentally by the judiciary since 1772, when the East India Company first undertook to administer India directly.[75]

The laws observed in suits on personal laws were the

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[71] See for example Haq, Mushir-ul: Islam in secular India. Simla 1972, p.54.

[72] Coulson (1964), p.155.

[73] Baillie, Neil B.E.: A digest of Moohummudan law. 2nd ed. London 1875; Hamilton, Charles: The Hedaya. Lahore 1975; Macnaghten, W.H.: Principles and precedents of Muhummuden law. Calcutta 1825; Wilson, Roland Knyvet: A digest of Anglo-Muhammadan law. London 1895.

[74] Rankin (1946), p.139; Jung, Ibn. S. Mohamedullah: A dissertation on the administration of justice of Muslim law. Allahabad 1926, p.91.

[75] Derrett (1976), p.514.

personal laws of the individual community. In the absence of any law or usage of the community, justice, equity and good conscience was developed as a major gap-filler.[76] There has been a lively debate on the implications of this maxim.[77]

A significant example of the application of English notions to family law in British India affecting women was the remedy of restitution of conjugal rights. The concept itself is based on Christian ecclesiastical law. Recently, it has been argued that this concept was not properly applied in India.[78] It also caused immense hardship to women. Before, women who refused to join their husbands could stay with their parents in their parental home and were not forced to continue their conjugal life. Restitution of conjugal rights was introduced under the Civil Procedure Code of 1859, but at first it was not clear how it should be enforced.[79] In 1877 under the Civil

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[76] See for details Derrett, J. Duncan: 'Justice, equity and good conscience in India'. In Essays in classical and modern Hindu law. Vol.4, Leiden 1978, pp.8-27, at p.9; Derrett, J. Duncan: 'The role of Roman law and Continental laws in India'. In Essays in classical and modern Hindu law. Vol.3, Leiden 1977, pp.166-196.

[77] See for details Derrett (1978), pp.8-27; Derrett (1977), pp.166-196; Gledhill (1970), p.220; Setalvad, M.C.: The role of English law in India. Jerusalem 1966, p.12; Coulson, N.J.: A history of Islamic law. Edinburgh 1964, p.155; Pearl, David: A Textbook on Muslim law. London 1979, pp.23-34.

[78] Sudhir, Chandra: 'Whose laws?: Notes on a legitimising myth of the colonial Indian state'. In Studies in History. New Series Vol.8, No.2, July-Dec. 1992, pp.187-212, at p.192.

[79] Macpherson, W.: Procedure of the civil courts 1793 of the East India Company. Calcutta 1850, p.20.

Procedure Code (Act XV), refusal of restitution of conjugal rights was made punishable with attachment of property and imprisonment and it was enforced under the civil law of the country.[80] Subsequently in 1908 the British made the punishment of imprisonment discretionary and only in 1923 did they take away the punishment of imprisonment.[81]

According to this law, both the Muslim husband and wife were entitled to the remedy of restitution of conjugal rights.[82] But such a remedy is not actually useful for Muslim women as the husband could always unilaterally or extra-judicially divorce the wife.[83]

There are many valid grounds of defence on the principle of equity[84] as well as in Muslim law. For example, the wife could refuse restitution of conjugal rights on grounds of cruelty, non-payment of prompt dower, or false charges of adultery.[85] However, the assumption of equal rights of men and women to pay costs worked against

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[80] Abdul Kadir v Salima 1886 ILR 8 All 149 (FB).

[81] See for details Engels, Dagmar A.E.: The changing role of women in Bengal 1890-1930 with special reference to British and Bengali discourse on gender. Unpublished Ph.D. Thesis, SOAS, London 1987.

[82] Mahmood, Tahir: The Muslim law of India. 3rd ed. Allahabad 1987, p.84; Tyabji, Faiz Badruddin: Muslim law. 4th ed. Bombay 1968, p.103.

[83] See Bai Jina v Kharva Jina (1907) 31 ILR Bom. 366.

[84] See Moonshee Buzul-ul-Raheem v Shumsoonissa 1867 xi MIA 551. Sofia v Zaheer AIR 1947 All 16.

[85] Saksena, Kali Prasad: Muslim law as administered in India and Pakistan. 3rd ed. Lucknow 1949, pp.85-87; Shabbir, Mohammed: Muslim personal law and judiciary. Allahabad 1988, pp.80-81 and 101-110.

women in practice, as failure to pay the costs would make a wife forfeit her right even when she was successful in a suit for restitution of conjugal rights.[86] The costs of these suits became a control mechanism used by men against women.

By introducing English notions, practice and procedure the British also interfered in the sphere of the personal law of the Muslims and Hindus. This interference became gradually more evident in the case law. This led to the emergence of "Anglo Mohammedan law", which according to some scholars severely distorted the pure Muslim law.[87]

In derogation of the 1772 promise of respect for Hindu and Muslim personal laws, the British rulers gradually claimed that they should introduce laws to improve women's status in British India, especially with regard to family law. Fawcett stated that English law, and the strictness and certainty with which it was applied, was helping to form and reform the conscience of the native populations.[88] Not only the British but increasingly Indian reformers were pressing for legal reforms. The British administrators were supported by Indian social reformers, whose contribution is often overlooked when it is emphasised that reforms were

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[86] For details see Saksena (1949), p.88.

[87] See Ali, (1912), p.1-4 and in detail Mahmood, Tahir: Personal laws in crisis. New Delhi 1986.

[88] Fawcett, Millicent Garrett: 'Infant marriage in India'. In Contemporary Review. Nov. 1890, pp.712-720.

made because of the British impetus.[89] In fact, British support for the emancipation of women was often ambiguous. This will be shown in more detail below when we consider particular Acts.

Most issues of women's rights, especially sati, female infanticide and widow remarriage, were not issues of concern for the Muslim communities, but of the Hindu community. The literature shows concentration of concern about the position of women in Hindu law and society.[90] There were hardly any social movements to bring the issue of oppression of Muslim women to the forefront of social agenda, except perhaps the writings of Begum Rokeya Shakwat Hossain (see above, p.87). Therefore, the British drive for the emancipation of Indian women was mainly directed at Hindu women due to the custom of widow immolation and the treatment of widows generally.[91] The glaring social evils of sati and widow immolation were prohibited by codification.[92] Thus codification in the personal laws was

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[89] See for details Rashid, Abdur: The Islamization of laws in Pakistan-with special reference to the status of women. Unpublished Ph.D. Thesis, London 1987.

[90] Mitter, Dwarkanath: The position of women in Hindu law. New Delhi 1984; Altekar, A.S.: The position of women in Hindu civilization. Benares 1938; Mitre, Trailokyanath: The law relating to Hindu widow. Calcutta 1881; Gupta, A.R.: Women in Hindu society. New Delhi 1982; Almenas-Lipowsky, Angeles J.: The position of Indian women in the light of legal reform. Wiesbaden 1975.

[91] Lateef, Shahida: Muslim women in India. London and New Jersy 1990, p.10.

[92] Sati was abolished in 1829 by the Prohibition of Sati Act. For details see for example, Upreti, H.C. and Nandini Upreti: The muth of sati. Bombay et al. 1991.

started only with regard to those issues which appeared to the British administrators either outworn or not conducive to substantial justice.[93] At the same time, the British administrators were only interested to prohibit the more extreme abuses affecting women and they were not concerned with other reforms to improve the condition of women.[94]

While codification was largely used with regard to Hindu personal law,[95] there was also some codification of Muslim personal law. The Muslim Personal Law (Shariat) Application Act, 1937 is discussed in chapter 3.1.4 below. The only legal reform that explicitly helped Muslim women to safeguard their rights was the Dissolution of Muslim Marriages Act, 1939.[96]

Within the scope of this thesis, only the Acts concerning Muslim women will be analysed. But as discussed in chapter 2.1.2 above, Hindu customs and usages also influenced the customs within the Muslim communities, so many legal reforms affected them similarly. For example, although many Muslims opposed the Child Marriage Restraint Act, 1929 and argued that it should be amended to exempt Muslims statistics showed that child marriage was also a

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[93] Mahmood, Tahir: Muslim personal law: Role of the state in the Indian subcontinent. New Delhi 1977, p.50.

[94] Ramusack (1981), p.199.

[95] See the Caste Disabilities Removal Act, 1850, Hindu Widows Remarriage Act, 1856, Gains of Learning Act, 1930, Hindu Women's Right to Property Act, 1937.

[96] Latifi, Daniel: 'Muslim personal law and judiciary in India'. In Sharma, Ram Avtar (ed.): Justice and social order in India. New Delhi 1984, pp.281-295, at p.287.

problem among Muslims.[97]

The purpose of British-legislative interference in the personal laws was apparently to enhance the rights of women by prohibiting customs and social evils which were affecting their lives. This led to more specific social reform. However, the following chapters show that religious politics, and not the furtherance of the women's cause, was the major issue behind this kind of legislation.

3.1.3 The Child Marriage Restraint Act, 1929

In British India sexual intercourse was legitimate even at the age of ten under section 375 of the Penal Code, 1860. This was seen as a slur on the British name in India as it suggested that sex with any female was permissible in law from the age of ten.[98] The central issue in the debate on the age of consent was not the sharp division between the Indian reformers and orthodox males.[99] Rather, the debate was about British interference with the social customs,

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[97] Engels, Dagmar: 'The age of Consent Act of 1891: Colonial ideology in Bengal'. In South Asia Research. Vol.3, No.2, Nov. 1983, pp.107-131; Siddiqi, Dina M.: 'The articulation of gender ideology and nationalism among Muslims in nineteenth century India'. In Journal of Social Studies. No.57, 1992, pp.50-64, at p.55.

[98] Engels (1983).

[99] Engels (1987), p.184.

especially of the Hindu community.[100] In fact, this was the first major intervention in the privacy of the family law of all religious communities.

Reform was attempted, first of all by an amendment to the Indian Penal Code, 1860. However this was vigorously opposed. By the Indian Criminal Law Amendment Act, 1891 (Act X) section 1, the age of cohabitation was increased to twelve years. The age of consent was raised as a result of the efforts of several Indian reformers especially in Bombay. There were also petitions from women's organisations for the enhancement of the age of consent.

The debate on child marriages became prominent after the age of consent debate and was given more importance after census reports for 1921 were published, showing the high rates of child widows. The census reported that 612 Hindu widows were babies not even 12 months old, 498 between 1 and 2 years, 1280 between 2 and 3 years and 6,758 were between 4 and 5 years of age, making a total of 12,016 widows under 5 years of age.[101] But the colonial administration declined (this time) to sponsor any legislation regarding the age of marriage, arguing that it might impede the ruling of the country.[102] The initiative and impetus for change came from various Indian social reformers backed by those Indians who were elected to the

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[100] Ibid., p.82; Sen, A: 'Hindu revivalism in action-the age of consent bill agitation in Bengal'. In The Indian Historical Review. No.7, 1980-81, pp.160-184.

[101] Legislative Assembly Debates. Vol.iv, 1929, p.4400.

[102] For details see Ramusack (1981), pp.198-216.

central legislative assembly. Thus in 1927 Hari Singh Gour proposed a Bill raising the age of consent to 14 years within marriage and 16 outside marriage. The Indian government appointed an Age of Consent Committee in June 1928, which observed that many girls below that age would automatically be saved from the terrible risk of early widowhood if marriage was deferred to a given age. During the age of consent debate, the opinion was gaining ground that more effective steps should be taken to eradicate early consummation. The Age of Consent Committee reported that growing numbers of women saw that the success of the movement for emancipation largely depended upon the advance in the marriage age.[103] In fact, the Age of Consent Committee itself recommended that in order to deal most effectively with early marriage and consummation, a law should be enacted fixing the age of marriage of girls at 14 years.[104] The Child Marriage Bill was then introduced on 1st February 1927 and after unnecessary delay and long debates, was finally passed on 23rd September 1929[105], was extended to all communities, and came into force on 1st October 1929 as The Child Marriage Restraint Act of 1929.

The primary object of the Act, as the author of the Bill asserted, was to put a stop to child widowhood.[106]

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[103] Report of the Age of Consent Committee 1928-1929: Indian women: Marriage and social status. New Delhi 1984, p.158.

[104] Ibid., p.196.

[105] Legislative Assembly Debates. Vol.v, 1929, p.1240-1315.

[106] Legislative Assembly Debates. Vol.iv, 1929, p.4405.

Premature co-habitation occurred among Muslims as well.[107] Apart from the debate about the protection of girls, there was a parallel struggle over the position of Muslim law. There was some controversy in the Legislative Assembly about whether the Muslims or a big majority of them were against the Bill. There were petitions seeking to exclude Muslims from its ambit. A member of the Central Legislative Council, T.A.K. Shervani argued that the report of the appointed committee showed that the majority of the Muslim witnesses who appeared before the committee were in favour of the Bill.[108] Moreover, another Muslim member, Mian Mohammed Shah Nawaz, stated that the Age of Consent Committee unanimously found that the evil of early marriage and early consummation prevailed among the Muslims of Bengal, who formed 42 per cent of the total Muslim population of the province.[109] Further petitions from the province of Bengal in favour of the Bill substantiated this claim.[110]

As regards the question whether the Bill was un-Islamic, T.A.R. Shervani argued that the Bill was not against the principles of Islamic law as the Quran or the Hadith do not prohibit child marriage.[111] He further argued that the marriage of minors, which is known in Islamic law,

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[107] For evidence see Engels (1983).

[108] Legislative Assembly Debates. Vol.iv, 1929, p.659.

[109] Ibid., p.658.

[110] Ibid., p.423.

[111] Ibid., pp.659-660.

is not based on Islamic principles, but on pre-Islamic customs.[112]

The Act had the wholehearted support of the All Indian Women's Conference (AIWC) and was regarded as their achievement.[113]

The title of the Act itself indicates its lacunae, as it suggests restraint of child marriage and not its prevention or abolition. Penalties and punishments were provided for the male who is over 21[114] years and marries a girl under 14 years, but they were lenient and discretionary.

The parents or guardians who promote, permit or fail to prevent such a marriage are also punished. But where the guardian or parent is a woman, she shall be exempted from punishment of imprisonment, but only a fine shall be imposed [section 6(1) and section 12]. This milder penalty is a concession to women by the legislature indicating paternalistic attitudes in a society which does not recognise equality of the sexes. As a tool in the hands of some male relations, women are not the principal offenders and so are not punished.[115] This is a form of positive discrimination which shows that the law also recognises

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[112] Ibid., p.660.

[113] Annual Report of the AIWC 1930, p.24.

[114] The Muslim Family Laws Ordinance 1961 (under section 12 and 13) later reduced the age limit of males to be penalised for contracting a child marriage from 21 years to 18 years, see for details chapter 3.2.2.

[115] Sastri, L.S.: The Child Marriage Restraint Act, 1929. Allahabad 1988, 4th ed. p.28.

women as the weaker sex.

More important is the issue of validity of a child marriage. Although the parents or guardians or the bridegroom may be punished, there is nothing in the Act to invalidate a child marriage.[116] The significance of the Act, however, was that it raised the minimum ages for marriage for girls to 14 years and for boys to 18 years and criminalised violations.

The objective of the legislators in passing this legislation was perhaps noble, but because of the procedural loopholes the objects of the Act could not be achieved. The Act could only be applied when a complaint of any child marriage was made by a private person, and enforcement depended upon the court's permission to make arrests. Moreover punishment was not adequate as the child marriage remained valid after performance, although certain penalties were prescribed. Further on, cognizance of the crime was limited to one year and to keep the marriage secret for a year, if necessary, was not a difficult problem.

The policy and attitude of the colonial government towards protecting child brides was ambiguous. They did not support the passage of the Act, but did not prevent it. On the one hand, the government claimed to have great respect for womanhood; on the other hand it declared its intention to oppose the Bill, which was an important legislation for

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[116] Mahmood, Tahir: The Muslim law of India. 3rd ed. Allahabad 1987, p.52.

children and girls. Mr.Ramananda Chatterjee stated:

> The abolition of child marriage and child mortality and the raising of the age of consent within and outside marital relations would tend to make Indians a physically, intellectually and morally fitter nation. But British bureaucrats have all along been very unwilling to help Indian social reformers in effecting these reforms by direct and indirect legislation.[117]

Thus, the British colonialist government pleaded that the Act was in advance of public opinion and the responsibility to educate the people rested on the Indians themselves.[118]

The judiciary also erred on the side of leniency in applying the penal provisions of the Act. The efforts of the women's organisations to implement the Act were not significant enough.[119] Thus, the Act failed to fulfil its purpose not only because of the reluctance of the British administrators to enforce the Act, or the orthodoxy of the people to co-operate with it, but also because the nationalist leaders and social reformers were more engrossed in gaining independence than the enforcement of social legislation that would help women. The Child Marriage Restraint Act of 1929 was only discouraging the practice. Since the threat of punishment has failed as an effective deterrent, child marriages persist to this day. As we shall see below in chapter 4, the question of age of

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[117] Chatterjee, Ramananda: 'Indian social reformers'. In Modern Review. Sept. 1927, as cited In Legislative Assembly Debate. Vol.iv, 1929, p.4409.

[118] Ramusack (1981), p.212.

[119] Ibid., p.213.

marriage is still an issue in Bangladeshi law today.

3.1.4 The Muslim Personal Law (Shariat) Application Act, 1937

In British India there was interference at various levels with shariat law, for example the Muslim criminal law and evidence law were abolished.[120] Within the realm of personal law, different states and Muslim communities adopted and evolved their own system of law, with the effect that customary law or the local law was given preference over sharia law.

This issue affected Muslim women, in particular where they were denied some of the Quranic rights to property. Muslim women could seldom exercise their rights of divorce, inheritance or remarriage due to the prevailing customs. The status of Muslim women under the customary law was appalling.[121] For example, with regard to inheritance, the Hindu law was applied, which deprived women of their rights granted under Muslim law. Muslim men connived in this, since it helped them to deprive women of rights. Moreover this situation was being confirmed by legislation. For example, section 5(b) of the Punjab Laws Act of 1872 indicated that in cases where the parties were Muslims, the

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[120] By the Penal Code of 1860 and by the Evidence Act of 1872.

[121] Saksena (1949), p.23.

decision was governed by Muslim law, unless modified by any custom.[122] The latter, however, was normally the case.

For this reason on 26th September 1935, H.M. Abdullah introduced a Bill in the Legislative Assembly to make provision for the application of the Muslim personal law (shariat) to the Muslims.[123] The principal aim of this statutory legislation was to ensure that pure Muslim law should prevail over customary laws.[124] Thus two issues arose for debate, one related to the protection of shariat and the other regarding improvement of the position of Muslim women.

After two years, on 1st April 1937, the Bill was referred to a Select Committee,[125] which presented its report on 1st September 1937 and suggested some amendments.[126] The amendments were, first of all, related to agricultural land which could not come under the purview of the new law. As stated by Mujeeb, the amendments of the Bill made women's rights subservient to the rights of

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[122] For details see Gilani, Rizul Hasan: 'A note on Islamic family law and Islamization in Pakistan'. In Mallat, Chibli and Jane Connors (eds.): Islamic Family law. London 1990, pp.339-346.

[123] Legislative Assembly Debates. Vol.vi, 1935, pp.1968-1969.

[124] Hodkinson, Keith: Muslim family law, a source book. London and Canberra 1984, p.23.

[125] Legislative Assembly Debates. Vol.iii, 1937, pp.2528-2544.

[126] Legislative Assembly Debates. Vol.iv, 1937, p.944.

men.[127]

The Muslim Personal Law (Shariat) Application Act came into force on 16th September 1937.[128] The Act was passed in the Central Legislature stating the following reasons:

> .....the status of Muslim women under the so called customary law is disgraceful.....the introduction of Muslim personal law will automatically raise them to the position to which they are entitled.[129]

Despite such rhetoric, the obvious aim of the Act was to strengthen sharia. The focus was now to ameliorate the condition of women within the framework of Islamisation. In the Legislative Assembly, Mr. Abdul Qaiyum stated that Muslim women have resented strongly the dead hand of customary law which has reduced them to the position of chattels.[130] When a Muslim died, his daughter, sister and wife were thrown into the street and the reversioner in the tenth degree could come and collar all the property.[131] Mr. M.A. Jinnah argued in the Legislative Assembly that the customs and usages had been precariously excluding the female heirs, making them entitled only to maintenance and marriage expenses.[132] He further said that under the

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[127] Mujeeb, M.: Islamic influence of Indian society. New Delhi 1972, p.95.

[128] Legislative Assembly Debates. Vol.v, 1937, pp.1819-1865.

[129] Gazzette of India, Part v (1935), as quoted by Mahmood (1977), p.30.

[130] Legislative Assembly Debates. Vol.v, 1937, p.1427.

[131] Id.

[132] Ibid., p.1832.

Islamic law, the shares were defined and even if a woman got half, she obtained it in her own right and was the sole owner of that share.[133]

The Act refers to and seeks to abolish a custom whereby property received by a female by inheritance or gift or under contract or general law of the land was not her absolute property and would revert back to the heirs of the last male owner.[134] The case-law suggests that the customary laws were abolished. The Privy Council held that the Shariat Law was given preference over the customs and usages.[135]

The subjects with regard to which the Muslims will be governed under the Muslim Personal Law (Shariat) Application Act include marriage (including all its forms), maintenance, dower, divorce (including talaq, ila, zihar, lian, khula, and mubarat), guardianship, maintenance, intestate succession, special property of females (including personal property inherited or obtained under contract of gift or any other provision of personal law), gift, waqfs and trust and trust properties.[136] In cases of testate succession, adoption, wills and legacies, the Act does not ordinarily apply Muslim personal laws unless the

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[133] Ibid., p.1445.

[134] Saksena (1949), p.27; Muhammad v Aman (1889) P.R.31; Kaim Pin v Umar Baksh (1888) P.R.3.

[135] For details see Bhattacharjee, A.M.: Muslim law and the Constitution. Calcutta 1985, p.30.

[136] The Muslim Personal Law (Shariat) Application Act of 1937, Sec.2.

person makes a declaration.[137] Thus customs on these subjects which are not in consonance with the Muslim law are not invalidated; but any person so affected may abandon the custom and adopt the Muslim law.[138]

The Muslim Personal Law (Shariat) Application Act, 1937 could not change the deep-rooted custom of denying women their inheritance. It was rightly stated by Mumtaz Khawar and Farida Shaheed that the continued observance of traditional customs rendered the law quite ineffective.[139] Thus, in Pakistan the West Punjab Muslim Personal Law (Shariat) Application Act, 1948 included agricultural land within the scope of Muslim law and an amendment of this Act in 1951 included testate and intestate succession within its scope. In 1951, the Acts were consolidated into the West Pakistan Muslim Personal Law (Shariat) Application Act, 1962.[140] While in India the debate has continued,[141] in Bangladesh the governing statute is the original Muslim Personal Law (Shariat) Application Act of 1937 with all its

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[137] The Muslim Personal Law (Shariat) Application Act of 1937, Sec.3.

[138] Fyzee, A.A. Asaf: Outlines of Mohammadan law. 4th ed. Delhi 1974, p.59; Saksena (1949), p.28.

[139] Khawar, Mumtaz and Farida Shaheed: Women of Pakistan: Two steps forward and one step backward? London and New Jersey 1987, p.57.

[140] Pearl, David: A textbook on Muslim personal law. 2nd ed. London 1987, p.38.

[141] For details see Mahmood, Tahir: Muslim personal law-role of the state in the Indian subcontinent. 2nd ed. Nagpur 1983, p.100; Ahmad, Furqan: 'The Muslim Personal Law (Shariat) Application (Amendment) Bill 1986'. In Islamic Comparative Law Quarterly. Vol.vi, No.4, 1986, pp.271-273.

limitations.[142]

3.1.5 The Dissolution of Muslim Marriages Act, 1939

The Act provided women in British India, married under Muslim law, the right to apply to a court for a judicial divorce, which was not recognised before, although all schools of Islamic law recognise that a Muslim wife has a right to approach the qadi or court for faskh or judicial dissolution of her marriage.[143]

The basis of the law can be traced in the fourth chapter of the Quran, which deals with wives.[144] Syed Ameer Ali reported that according to Shahih al Bukhari, the power of the kazi to pronounce a divorce is also founded in the express words of the Prophet that if a woman be prejudiced by a marriage, let it be broken off.[145] The various schools of Islamic law accepted the basic principles of dissolution

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[142] See Mahmood, Tahir: 'Personal laws in Bangladesh-a comparative perspective'. In Journal of Indian Law Institute. No.14, 1972, pp.583-589.

[143] For details see Carroll, Lucy: 'Muslim women and judicial divorce: An apparently misunderstood aspect of Muslim law'. In Islamic and Comparative Law Quarterly. Vol.v, No.3-4, 1985, pp.226-245, at p.230.

[144] Holy Quran. iv: 34-35 as cited by Mahmood, Tahir: Muslim personal law-role of the state in the Indian subcontinent. 2nd ed. Nagpur 1983, p.45; Fyzee (1974), p.168.

[145] See Ali, Syed Ameer: Mahommedan law. Vol.ii, 5th ed. New Delhi 1985, p.519.

of marriage but differed on the circumstances in which it should be applied.[146] Syed Ameer Ali stated the differences among schools to dissolve the status of marriage by a qadi or judge.[147] For example, under the Hanafi doctrine, inability to provide maintenance is not sufficient ground for asking for a divorce when the husband does not have sufficient means. Whereas under the Shafi law, inability to provide maintenance, wilful or otherwise, is a cause for the qadi to dissolve the marriage.[148] Thus to secure dissolution, a Hanafi woman, might be tried by a Shafi Kazi, whose pronouncement is also binding on her. This device to select and combine various elements of different schools of law is known as takhayyur or an eclectic choice between parallel rules of the various schools of Islamic law.[149] This selective process of overcoming divergences was hardly followed. Even though the courts in British India were given powers before 1939 to apply the law of one of the schools of Muslim law in a case in which the parties were followers of different schools, on grounds of justice, equity and good conscience, the courts were reluctant to apply the more liberal rules of Maliki law to parties

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[146] Mahmood (1983), p.45.

[147] See Ali (1985), pp.519-533.

[148] Ibid., pp.520-521.

[149] Layish, Aharon: 'Shariah, custom and statute law in a non-Muslim state'. In Cuomo, I.E. (ed.): Law in multicultural societies. Jerusalem 1985, p.102; Coulson N.J.: A history of Islamic law. Edinburgh 1964, p.185.

following other schools.[150] This led to the passing of the Dissolution of Muslim Marriages Act of 1939.

We began to see above that there are differences among the schools of Islamic law concerning the precise grounds which would entitle a Muslim wife to judicial dissolution of her marriage. The Shafi school allows the wife's right to judicial divorce on the grounds of her husband's inability to maintain her, as well as his imprisonment, insanity, or affliction with serious disease. The Malikis, in addition, would allow a wife a judicial divorce if her husband failed or refused to maintain her, had been missing for four years, had abandoned or deserted her, or ill-treated her.[151] The Hanafi school only allowed a wife to apply for judicial dissolution of her marriage for the husband's impotency, insanity and leprosy.[152] However, she could also obtain dissolution of her marriage on the grounds of putative widowhood if her husband had become a missing husband.[153]

Not only are there divergences between the schools with regard to the grounds for the dissolution of marriage, but also differences of opinion within any one ground. For

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[150] Hussain, Syed Jaffer: 'Legal modernism in Islam: Polygamy and repudiation'. In Journal of the Indian Law Institute. Vol.7, 1965, pp.384-398, at p.396. See chapter 3.1.2 for details of the application of this maxim.

[151] See for details Carroll (1985), p.230; Mahmood (1983), p.45.

[152] Nasir, Jamal J.: The Islamic law of personal status. London 1986, p.114; Carroll (1985), pp.230-231.

[153] Coulson (1964), p.185. Later developments on this issue are found below, p.125.

example, the Maliki, Hanbali and Shia schools agree that a woman is entitled to re-marry after four years of her husband's absence, provided permission of the kazi or an order of a court has been obtained before the second marriage. The Shafi school requires that the woman should wait for her husband's return for seven years, after which she can re-marry with the prior permission of the kazi. Within the same school the jurists differ from each other. According to Abu Hanifa, a woman has to wait 120 years for the return of her husband before remarriage. But Muhammed reduced the period to 110 years and Abu Yusuf further reduced it to 100 years.[154] According to Hedaya and Fatwa-i-Alamgiri under the Hanafi law, the wife of a missing husband had to wait for at least 90 years before contracting a second marriage.[155] Thus the Hanafi wife had impossible grounds for the judicial dissolution of her marriage.[156]

In British India, as Hanafi law was dominant, this caused immense hardship to women as the courts denied Muslim women the rights of dissolution available to them under the sharia. The situation became so alarming that women only for the purpose of dissolution of their marriage

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[154] For details see Ahmad, K.N.: The Muslim law of divorce. New Delhi 1984, p.502; Ali (1917), p.118.

[155] Ahmad (1984), p.502.

[156] Anderson, Norman: Law reform in the Muslim world. London 1976, p.39.

renounced their faith.[157] Thus there was a growing demand to reform the laws to ameliorate the status of women; the emerging debate was also influenced by the reforms in other countries.[158] The Muslim community repeatedly expressed dissatisfaction with the view held by the courts.[159] The ulemas issued fatwas supporting non-dissolution of marriage by reasons of the wife's apostasy. The debate only reached its height when cases of apostasy by Muslim women to get rid of their husband began to be reported from different parts of the country.[160] Thus the main reason for the support of the religious scholars and functionaries to the issue was to protect the Islamic ummah rather than to ameliorate the position of women.[161] The ulema found that there was no way out but to secure legislation empowering judges in India to dissolve Muslim women's marriages in specified circumstances.[162] This reasoning of the ulema was

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[157] Mullah, Farduji Dinshad: Principles of Mahomedan law. 10th ed. Calcutta 1933, p.209; Baillie, B.E. Neil: A right of Muhammadan law. 2nd ed. London 1887, p.29; Malik, Vijay: Muslim law of marriage, divorce and maintenance. 2nd ed. Lucknow 1988, p.4; Mahmood (1983), p.48; Qadri, Anwar Ahmad: Commentaries on the Dissolution of Muslim Marriages Act, 1939. Lucknow 1961, p.87.

[158] Schacht (1964), p.104.

[159] Mahmood (1983), p.46; Fyzee, A.A. Asaf: 'Muslim wife's right of dissolving her marriage'. In Bombay Law Journal. Vol.xxxviii, 1936, pp.113-123; Khambafta, K.J.: 'Dissolution of Muslim marriage at the instance of the wife'. In Bombay Law Journal. Vol.xi, 1934, pp.290-291.

[160] Mahmood, Tahir: 'Indian legislation on Muslim marriage and divorce'. In Gangrade, K.D. (ed.): Social legislation in India. Delhi 1978, pp.16-29, at p.20.

[161] Carroll (1985), p.233.

[162] Mahmood (1983), p.46.

based on a book[163] which enumerated in detail the Maliki principles which can be applied to dissolve Muslim women's marriage under specified circumstances.[164] It was also suggested in the book that some Muslim members of the Central Legislative Council should introduce a Bill based on these recommendations.[165] Accordingly the leaders of Jamiat ul-ulema prepared a Bill.

On 17th April 1936 the Bill was introduced by Qazi Md. Ahmad Kazmi, a member of the working committee of the Jamiat ul-Ulema. While the main purpose of the legislation was to protect Islam, in the Legislative Assembly the women's cause was shown as the main issue. While considering the Bill, Mr. Abdul Qaiyum said that the enlightened sections of the community believe that the time has come when a serious attempt should be made to restore all rights which were granted by the Quran to Muslim women.[166] He further said that owing to the attitude of Muslim males and the highhanded manner in which Muslim women are treated, they have been forced in innumerable instances to resort to conversions which were not genuine conversions, but only in order to escape the marital tie.[167]

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[163] Thanvi, Ashraf Ali: Al- Hilat Al-Najija Lil Halilal Al-Ajiza, published in Arabic and Urdu in Delhi 1932.

[164] Mahmood (1983), p.47.

[165] Id.

[166] Legislative Assembly Debate. Vol.i, 1939, p.621.

[167] Ibid., p.622.

On the merit of the Bill, the honourable Sir Md. Zafrullah Khan said that it puts down, in the space of one printed page, the various grounds on which divorce may be obtained by a woman married under Muslim law. The lack of such provision had caused a great deal of distress, misery and suffering in India.[168] He stated further that khula or divorce obtained at the instance of the wife was practically unknown in British-India and, if granted, was confined to the narrowest possible limits. In other Muslim countries, however, the various grounds of khula were freely recognized.[169]

Mrs. K. Radhabai Subbrayan, the only female member of the Assembly, expressed her support for the Bill and ventured to say that this Act would be the beginning for all progressive measures with regard to women.[170]

The statement of the reasons and objects of the Bill indicates the circumstances for which the Bill was passed,

> There is no provision in the Hanafi Code of Muslim law enabling married Muslim women to obtain a decree from the courts dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or certain other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India. The Hanafi jurists, however, have clearly laid down that in cases in which the application of Hanafi Law causes hardship, it is permissible to apply the provisions of the Maliki, Shafi or Hanbali Law. Acting on this principle the Ulemas have issued fatwas to the effect that in cases enumerated in

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[168] Ibid., p.877.

[169] Ibid., p.878.

[170] Ibid., p.878.

> clause 3, Part A of this Bill, a married Muslim woman may obtain a decree dissolving her marriage. A lucid exposition of this principle can be found in the book called 'Heelat-un-Najeza' published by Maulana Ashraf Ali Sahib who has made an exhaustive study of the provisions of Maliki Law under the circumstances prevailing in India may be applied to such cases. This has been approved by a large number of Ulemas who put their seals of approval on the book.
>
> As the courts are sure to hesitate to apply the Maliki Law to the case of a Muslim woman, legislation recognizing and enforcing the above-mentioned principle is called for in order to relieve the sufferings of countless Muslim women.[171]

The Bill became law on 17th March 1939 as the Dissolution of Muslim Marriages Act, 1939 (Act VIII of 1939).

The new Act was an attempt to reinstate liberal Muslim provisions which were not contrary to Muslim law. Under sec. 2 (ii) of the Act a wife is entitled to the dissolution of her marriage when her husband has failed to provide for her maintenance for a period of two years. The entitlement of the wife to maintenance depends on the principles of Muslim law. Under section 2(iv) of the Act, a wife is entitled to the dissolution of her marriage when her husband has failed to perform, without reasonable cause, his marital obligations for a period of three years. Whether the husband is impotent or not has to be decided in accordance with Muslim law. Finally, under section 2(ix) of the Act, a marriage can be dissolved by the wife on any ground recognised as valid under Muslim law. This illustrates the application of Muslim law.

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[171] Gazette of India. Part v, 1938, p.36.

However, there are provisions of the Act which effect substantive changes and in some ways, as claimed by some scholars, contravene the principles of Muslim law. Tahir Mahmood has explicitly described the circumstances in which the husband might have withheld maintenance.[172] In particular, if the wife is nashizah (disobedient) or refractory, under Muslim law she is not entitled to maintenance and so her marriage cannot be dissolved on the ground of the husband's failure to provide maintenance for a period of two years.[173] Further on, it has been held by the courts that a wife who refuses to return to her husband without sufficient cause is not entitled to maintenance.[174] The rulings of the courts are mutually contradictory as they are based on the "fault" theory and contrarily the modern "breakdown" theory.[175] The view that judicial dissolution or faskh can be granted irrespective of the wife's faulty conduct has been criticised by some scholars as it is not in consonance with the principle of Nushuzah under Islamic law.[176]

As we saw under the Hanafi law inability to maintain

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[172] Mahmood (1980), pp.97-101; Mahmood (1987), pp.97-101.

[173] Rahman, Tanzil-ur: A code of Muslim personal law. Vol.i, Karachi 1978, p.288.

[174] Majida Khatoon v Paghalo Mohammad PLD 1963 Dhaka 583; Sardar Muhammad v Nasima Bibi PLD 1966 Lahore 7.

[175] Mahmood (1980), p.101.

[176] Fyzee (1974), p.172.

was not by itself considered as a ground for divorce,[177] whereas under the Act failure to maintain, even on account of poverty, ill-health or imprisonment, is a good ground for the dissolution of the marriage.[178]

On the question whether the wife has a right of dissolution on the ground that the husband is missing, the right of dissolution arises after the expiry of the waiting period. As we saw (above, p.125) under Hanafi law, the wife of a missing husband had to wait for an impossibly long time before contracting
a second marriage. Under Maliki law, however, the period of waiting was only 4 years. The first change regarding this issue was made by the Evidence Act of 1872. Section 108 of the Act provides for a presumption that a person shall be considered to have died if he has not been heard of for a period of 7 years.[179] The Act of 1939 has further reduced the period to 4 years, adopting the Maliki law.

On the ground of cruelty of the husband, there was no dissolution of marriage under the traditional Hanafi law.[180] On the ground that the husband had more wives than one and did not treat them equitably in accordance with the injunctions of the Quran, under section 2 (viii)(f) of the Act, it has been held that if the wife is herself at fault

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[177] Asmat Bibi v Samiuddin, 79 IC 1925 Cal 991; See also Manchanda, S.C: The law and practice of divorce. Allahabad, 4th ed. 1973, p.727.

[178] Zafar Hussain v Mst. Akhbari Begum AIR 1944 Lahore 336.

[179] Mazhar Ali v Budh Singh 1884 ILR All 297 (FB).

[180] Ahmad (1984), p.11.

so that the husband finds it impossible to maintain equal treatment between her and his other wives, she cannot be entitled to dissolve the marriage.[181] But when the husband did not provide any money to one wife while maintaining his other wives, it was held that he had not treated the wives equally.[182]

With regard to the provisions of Muslim law concerning impotency it is for the wife to establish the allegation that her husband is suffering from incapability. But also that she was ignorant of it at the time of marriage.[183] Under section 2(v)(c) of the Act the burden of proof has been shifted to the husband to prove that he has been cured of his defect.

The Act also made substantial changes to the Islamic doctrine of Khiyar al-bulugh or "option of puberty". Before the Act, a minor could repudiate her marriage, which was contracted by her guardian, when she attained puberty. After the 1939 Act, the age of puberty is fixed at the completion of 15 years, irrespective of the actual time of attainment of puberty.[184] This clause eliminates the fight over proof of puberty.[185] Moreover under the traditional Islamic law, a girl could not exercise this option against

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[181] Badrunnisa Bibi v Muhammad Yusuf AIR 1944 All 23.

[182] Mst. Zubaida Begum v Sardar Shah AIR 1943 Lah 310.

[183] Ahmad (1984), p.421.

[184] Mahmood (1980), p.103.

[185] For an example see Mst. Daulon v Dosa PLD 1956 Lahore 712.

the decision of marriage made by her father or paternal grandfather, but only against other guardians. This assumption of the jurists was based on the reasoning that as they were so closely related to the girl, it could be presumed that they must have acted in her best interests.[186] However, this reasoning is not based upon any Quranic prescription or sunnah of the prophet.[187] Moreover the courts have held that the consummation of marriage before the girl attained the age of 15 years did not destroy the option of puberty.[188] Tahir Mahmood points out that it is doubtful whether this is in conformity with Muslim law.[189]

The central question of apostacy has not been elaborated on by the Act. It only states in the fourth section that a Muslim woman's apostacy of Islam shall not dissolve her marriage. The fact is that if the women apostates to become a kitabia (who follow religious books), the marriage remains valid, as Muslim men are entitled to marry a kitabia. But if she apostates to a religion which does not follow a holy book, the marriage is considered void ab initio. However, in the Act the position of a woman

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[186] Ahmad (1983), p.10; Hamilton, Charles (trans.): The Hedaya. 2nd ed. London 1957, p.37.

[187] Siddique, Muhammed Mazheruddin: Women in Islam. Lahore 1952, pp.83-84; Esposito, John L.: Muslim family law in Egypt and Pakistan: A critical analysis of legal reform, its sources and methodological problems. Ph.D. Thesis, Temple University, Ann Arbour, Michigan 1974, p.45.

[188] For an example see Ghulam Sakina v Falak Sher Allah Bakhsh AIR 1950 Lahore, p.45.

[189] Mahmood (1983), p.49.

who was originally a convert to Islam from some other faith remained intact in the sense that any later conversion dissolved her marriage automatically.[190] Thus, the Act has abolished apostacy as a ground for dissolution of marriage by a Muslim woman, taking away a right she already had. Now she must obtain a decree of the court before she considers her marriage dissolved.[191] This shows the conflict of Muslim interests and women's rights.

Thus the Act was passed with many modifications, which was against the wishes of the ulemas who drafted the original Bill[192] and made them disappointed. Their main grievance was that the jurisdiction under the Act was not reserved for Muslim judges to extend the application of the Act to a couple who later become Muslims, to adopt the provisions relating to "option of puberty" to the traditional Hanafi principles and to make the provisions of sec. 4, dealing with the effect of apostacy to confirm the classical Muslim law.[193] In July 1942, Md. Ahmed Kazmi pressed for amendments, but was not successful as the amendments were not acceptable to the Government. Moreover, necessary support for them could not be secured in the legislature. The Ulemas blamed the leaders of the Muslim League in the legislature for giving the Bill a progressive

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[190] Mannan, A.M.: 'The development of the Islamic law of divorce in Pakistan'. In Journal of Islamic and Comparative law. Vol.5, 1974, pp.89-98, at p.92.

[191] Malik (1988), p.72.

[192] Mahmood (1983), p.49.

[193] Mainul, Md.: Jamaiat-al-ulama kya Hay. Delhi 1946.

outlook and for not keeping it within the Islamic framework.[194] Perhaps the leaders of the Muslim League in the legislature were successful in their effort for the passage of the Act as it was a progressive law reform. In this tug of war of Islamisation and modernisation, women-almost by chance-gained some rights which could have been hard to achieve otherwise.

The Act has a very limited scope in the sense that it did not restrict the arbitrary power of the Muslim husband to pronounce talaq or restrict polygamy.[195] Moreover, it has to be asked whether transferring the power of dissolving marriages from the husband and to the judges (who are usually men) would improve the situation. Some scholars think that the delicate matters of family life will create a scandal if they come to open court.[196]

The Dissolution of Muslim Marriages Act of 1939 could not provide equal rights to the spouses with regard to the dissolution of marriage as the wife who could not fulfil the requirements of the specific grounds recognized in the Act did not have any redress.[197] For example, incompatibility of temperament was not considered a valid

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[194] Id.

[195] Singh, Sukhdev: 'Development of the concept of divorce in Muslim law'. In Allahabad Law Review. Vol.5, 1973, pp.117-127, at p.126; Hussain (1965), pp.384-398.

[196] El Arousi, M.: 'Judicial dissolution of marriage'. In Journal of Islamic and Comparative Law. Vol.7, 1977, pp.13-20.

[197] Esposito, John L.: Women in Muslim family law. New York 1982, p.81.

ground for the wife asking for khula divorce, although she foregoes her dower.[198] However the situation changed in 1959 when judicial khul was allowed if the wife was unable to keep the limits ordained by God as envisaged in the Quran, i.e. if in their relations to one another the spouses will not obey God and a harmonious married state as envisaged by Islam will not be possible.[199] This judicial khul without the husband's consent was reaffirmed in 1967 by the Supreme Court of Pakistan by granting a unilateral judicial khul to the wife for incompatibility of temperaments.[200] Thus although the legislative enactments in Muslim law had limitations, the judiciary was trying to be the gapfiller for enhancing the rights of women.

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[198] For an example see Sayeeda Khanam v Muhammad Sami PLD 1952 (W.P.) Lahore 113 (F.B.).

[199] See Balquis Fatimah v Nazm-ul-Qureshi PLD 1959 (W.P.) Lahore 566 (para 42).

[200] Khurshid Bibi v Mohammed Amin PLD 1967 SC 97. For a discussion of judicial khul see, Hinchcliffe, Doreen: 'Divorce in Pakistan: Judicial reform'. In Journal of Islamic and Comparative Law. Vol.ii, 1968, pp.13-25; Carroll, Lucy: 'The Muslim Family Laws Ordinance, 1961: Provisions and procedures'. A reference paper for current research'. In Contributions to Indian Sociology. (NS), Vol.13, 1979, pp.117-143.

3.2 Women and family law in the Pakistan era

The independence from colonialism certainly had a vibrant effect on the whole Indian subcontinent and Pakistan was not an exception to it. This part of the thesis concentrates on the progress of laws concerning women in the new nation. It does not review the changing trends affecting women in education, health, rural development, economic and political status, as done by other authors.[201] It focuses on the progress of women's rights and legal status with reference to legislation within the parameters of family law. It is in this era that some attempts were made to improve the position of Muslim women through law.

The creation of Pakistan as a country for Muslims led to a dilemma concerning policies of law-making. Age-old questions were re-opened. Can man legislate, given that the Quran is God's law? Even the most modernist reformers in Pakistan would find it inconceivable to abandon the Islamic framework and to create secular laws. Instead, the focus shifted to reforms within Islamic law.[202] Thus the debate runs on the line whether the reforms conform with the

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[201] Chipp, Sylvia A.: 'The modern Pakistani women in a Muslim Society'. In Chipp, Sylvia A. and Justice J. Green (eds.): Asian women in transition. University Park and London 1980, pp.204-220; Woodsmall, Ruth Frances: Women in the changing Islamic system. Delhi 1983, (1st ed. Washington D.C. 1960). However the progress of women was rather limited to the urban women's life style. See for details Hafez, Sabiha: Metropolitan women of Pakistan. Karachi 1981.

[202] See for details Coulson, N.J.: Conflicts and tensions in Islamic jurisprudence. Chicago and London 1969.

rights given by Islam. The rights of women under Islam have already been analysed in detail above. The present chapter considers the new legislation in family law produced in Pakistan in 1961 and subsequently inherited by Bangladesh.

3.2.1 Legislation relating to family law in the Pakistan era

We have already seen that the legislation of British India, inherited by the new state, did not significantly enhance the position and status of women. The three dimensionality of legislation consisting of restraining child marriage, enhancing women's rights to divorce and enlargement of women's rights by abrogation of customs was not translated into practice and the grievances of women with regard to family matters were not redressed. Apparently the new regime felt a need to redress the situation of women by reforming the family law. A fresh attempt has been made, in the new state, to reemphasise women's rights by new legislation.

In Pakistan, women have consistently and daringly opposed archaic, anti-women laws which have been imposed on them in the name of religion.[203] In fact it was not religion per se but the distorted picture of it, reinforced by patriarchy and other factors, which was the real

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[203] Bhasin, Kamla and Said Nighat Khan: 'A note on the relevance of feminism for South Asia'. In Finding our way-readings on women in Pakistan. Lahore 1991, pp.201-205, at p.205.

obstacle, as we already saw in chapter 2. Reformation and modification of family laws was an important agenda item on which women were actively campaigning. The All Pakistan Women's Association (APWA) felt that family law was biased to men, specially with regard to the issues of polygamy, talaq and maintenance.[204] It was thought that the unrestricted right of polygamy was being exercised by unscrupulous men; this usually makes the first wife dowerless and destitute. Thus polygamous marriages, according to APWA, severely hinder the progress towards emancipated womanhood.[205] Moreover, APWA felt bitter about the unrestricted right of men to give talaq and also gave importance to the enforcement of maintenance orders.[206]

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[204] Kraushaar, Sylvia Chipp: 'The All Pakistan Women's Association and the 1961 Muslim Family Laws Ordinance'. In Minault, Gail (ed.): The extended family, women and political participation in India and Pakistan. Delhi 1981, pp.263-285.

[205] Pearl, David: 'The legal rights of Muslim women in India, Pakistan and Bangladesh'. In New Community. Vol.5, No.1-2, Summer 1976, pp.68-74; Faridi, Tazeen Begum: The changing role of women in Pakistan. Lahore 1960.

[206] Pearl, David: 'Family law in Pakistan'. In Journal of Family Law. Vol.9, 1969-70, p.171.

3.2.2 The Commission on Marriage and Family Laws

Due to immense pressure from the women's organisations and their sympathisers,[207] the government established a Commission on Marriage and Family Laws on 4th August 1955 to review the situation and suggest necessary changes. The Commission was to decide whether,

> The existing laws governing marriage, divorce, maintenance, and other ancillary matters among Muslims require modification in order to give women their proper place in society according to the fundamentals of Islam.[208]

The primary object of setting up the Commission was to examine whether the existing family law needed any alterations and modifications to enhance the position of women. Professor Coulson has argued that to some degree the Commission was set up to ensure that the existing laws conformed with Islamic principles.[209] But that was not the sole purpose of its formation. According to the Marriage Commission itself,

> The primary object of the Commission was to revive in a slightly modified form the rights,

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[207] Carroll, Lucy: 'Nizam-i Islam: Processes and conflicts in Pakistan's programme of Islamisation, with special reference to the position of women'. In Journal of Commonwealth and Comparative Politics. Vol.xx, No.1, March 1982, pp.55-95, at p.59.

[208] The Marriage and Family Laws Commission Report was published in The Gazette of Pakistan. 20th June, 1956, pp.1197-1232, at p.1197 and is here after referred to as The Report.

[209] Coulson, N.J.: 'Reform of family law in Pakistan'. In Studia Islamica. Vol.7, Sept. 1957, pp.135-155, at p.136.

granted to women by Islam.[210]

The Commission was established with seven members, headed by a former Chief Justice, one representative of the Muslim ulema and included three women experts. The Commission prepared its Report on the basis of a set of questionnaires, which was circulated to the public. The Report itself illustrates the Commission's approach to reform of the law in the interest of the public,

> What is not categorically and unconditionally prohibited by a clear and unambiguous injunction is permissible, if the welfare of the individual or of society in general demands it.[211]

Moreover the Report approached a modernist trend of reform which aimed towards improving the status of women within the family,

> We are of firm conviction that the principles of the Holy Qur'an if rationally and liberally interpreted are capable of establishing absolute justice between human beings and are conducive to healthy and happy family life.[212]

On 30th July 1956, a dissenting note by Maulana Ehteshamul Huq was published in the Gazette of Pakistan.[213] He was a member of the Commission on Marriage and Family Laws, disagreed with most of the recommendations of the Commission and blamed it for distorting Islam.

If we consider the Report of the Marriage Commission

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[210] The Report, p.1203.

[211] Ibid., p.1204.

[212] Ibid., pp.1203-1204.

[213] This will be referred to here after as The Dissenting Note.

and the Dissenting Note of the traditional ulema and other critics, the debate on the traditionalist and modernist approach to the reform of family laws in Pakistan becomes more focused. Below, we discuss the major legal issues concerning women's rights that were taken up by the Commission.

Registration of marriage:

No law or enactment required compulsory registration of Muslim marriages.[214] This caused immense problems for women not only to legitimise their relationship within the family, but also to prove the existence of the marriage itself. Muslim law permits oral marriage and neither official or unofficial registration of marriage is required.[215] The existence of Muslim marriages had to be proved by other factors and in the absence of those factors it had to be presumed.[216] However, voluntary registration of Muslim marriages was recognised in Bengal since the passing of the Bengal Muhammedan Marriage and Divorce Registration Act of 1876.

The Commission recommended the introduction of compulsory registration of marriages, and the adoption of a standard marriage contract. It was argued that the absence of registration of marriage causes complex problems

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[214] Mahmood, Tahir: The Muslim law of India. Allahabad 1982, 2nd ed. p.55.

[215] Ibid., p.56.

[216] Id.

relating to the validity and existence of nikah between certain parties, which arise very frequently in civil and criminal courts.[217] The Commission traced the source of their argument for registration of marriage from the Divine Book itself, which contains an injunction to reduce important transactions to writing.[218] The Commission only extended those transactions in cases of marriage.

In his Dissenting Note, Maulana Ehteshamul Haq did not deny the necessity of registration, as it guards against the possibility of an error of forgetfulness. But he was not in favour of punishments for its contravention. Other traditional writers were more critical about registration of marriage. Maulana Amin Ahsan Islahi has taken a theological view,

> The first consequence will be that all those marriages which are not registered would be illegal and void and the children born because of them would be illegitimate. It is clear on the face of it that this conflicts with shariah.[219]

It is necessary to point out that this criticism is inaccurate, as unregistered marriages would not be void marriages and the children born from this wedlock would be legitimate.[220] The Report did not state that unregistered marriage would be void and was thus clearly in conformity

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[217] The Report, p.1208.

[218] Ibid., p.1229.

[219] Islahi, Amin Ahsan: 'Marriage Commission Report X'rayed'. In Ahmad, Khurshid (ed.): Marriage Commission report X'rayed. Karachi 1959, p.171, (2nd ed. Karachi 1961, under the title Studies in the family law of Islam).

[220] Fyzee, A.A. Asaf: Outlines of Muhammedan law. 3rd ed. Bombay 1964, p.108; Pearl (1969-70), p.173.

with Islamic law.

Age of Marriage:

The debate about minimum marriage ages has already been referred to (see pp.110-116). The Commission was of the opinion that no man under 18 and no woman under 16 shall enter into a marriage contract, which is in conformity with the injunctions of the Holy Qur'an and sunnah.[221] This means that the Commission suggested a higher minimum age for girls; it stood at 14 years under the Child Marriage Restraint Act, 1929.

Maulana Ehteshamul Haq vehemently opposed the fixation of age limits for marriage through legislation. However, he agreed that shariah has neither fixed any age limit nor stipulated any age of puberty for the parties entering into a marriage contract.[222] He wrote:

> Such a measure is not at all in conformity with the injunctions of shariat. It is a pity that persons who claim to be not only Muslims but also renowned scholars and experts in shariat are making a suggestion which is definitely repugnant to the fundamentals of our 'din'.[223]

The critical comment of Maulana Islahi on the point is worth mentioning as he questions the validity of the Commission's reasoning of attainment of maturity. In his view one can not assess generally that on 16 years or 18 years one will attain maturity of thought and intelligence.

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[221] The Report, p.1209.

[222] The Dissenting Note, p.1577.

[223] Ibid., p.1580.

He argued:

> If maturity of thought and intelligence be an essential condition of marriage then perhaps thirty and not eighteen would be the proper age-limit.[224]

Maulana Islahi also argued that the effect of this law would be to make a permissible act prohibited by legislation.[225] Apart from Islamic rhetoric, this approach signifies unwillingness to accept a higher minimum age for women probably for concern about zina.

Divorce by the husband:

In sharia law, the unilateral right of the husband to divorce his wife without the intervention of the court is often exercised arbitrarily and irrationally, making the lives of women miserable. Muslim law places the right in the husband in the expectation that he will take recourse to it rationally and with justice.[226] However, a Muslim husband of sound mind may divorce his wife without any cause whenever he desires.[227] This right of the husband has been described by authors as unfettered and unilateral.[228]

In its extreme, this has led to the talaq-al-bidah pattern of divorce, where a husband pronounces triple divorce at one sitting. This has been regarded as a serious

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[224] Islahi (1959), p.173.

[225] Ibid., p.176.

[226] Mahmood (1982), p.113.

[227] Fyzee (1974), p.150; Mullah (1972), p.293.

[228] Coulson (1969), p 75; Esposito (1980), p.229.

problem affecting women's lives as it is treated as irrevocable and final.[229]

The Commission recommended the abolition of talaq-al-bidah and in addition suggested that talaq-al-hasan[230] should be made obligatory. They emphasised that this is not against the divine revelation or the teachings and the practice of the Prophet.[231]

Maulana Ehteshamul Haq in his dissenting note agreed that the talaq-al-hasan form of divorce was favored by the Prophet and therefore ought to be encouraged:

> We do not propose to give any encouragement to the practice of indiscriminate talaqs either. For this we suggest that talaq, whether pronounced at one sitting or three sittings, should not be permitted without compelling reasons because to keep the way to unrestricted talaq open and to bar its enforcement and execution would be a premium on vice and adultery.[232]

The Maulana seemed to be in favour of talaq with compelling reasons, although he did not emphasise this. The ulema was advocating to check talaq-al-bidah by education and awareness of the law, not by legislation. However, he was not proposing to declare three pronouncement of talaq in one sitting to be ineffective or invalid.[233]

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[229] See, Fyzee (1974); Rahman (1978).

[230] This is the repudiation of marriage by the husband by three pronouncements made during three tuhrs or period of purity. This has been regarded as the most approved form of divorce by the husband. See, Ali (1917); Fyzee (1974).

[231] The Report, pp.1211-1213.

[232] The Dissenting Note, p.1585.

[233] Ibid., pp.1581-1589.

Divorce sought by the wife:

We have already seen (see above, p.122) that the right of dissolution of marriage at the instance of the Muslim wife was not recognised in South Asia and that this led to the reforms of the Dissolution of Muslim Marriages Act of 1939. This Act provided grounds under which Muslim women of South Asia could dissolve their marriage. Under this Act, the case of a wife seeking redress needs to be judicially scrutinised, which is a lengthy procedure, whereas for Muslim men there is no need to assign any reason for divorce.[234] Thus, divorce is easier for Muslim husbands than wives.[235]

On the matter of divorce at the instance of the wife, the Commission expressed the view that no modification of the Dissolution of Muslim Marriages Act of 1939 was necessary. The Commission emphasised that talaq-e-tahweed and khula should be made more certain and precise.

On talaq-e-tahweed the Commission was of the opinion that it is lawful to provide in the marriage contract that the woman shall have the same right to pronounce divorce as the man, if the right to do so had been delegated to her in

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[234] Puri, Balraj: 'Muslim personal law: Questions of reform and uniformity be delinked'. In Economic and Political Weekly. 8th June 1985, pp.987-990, at p.989; Mahmood (1972), p.90; Carroll, Lucy: 'Talaq-i-Tafwid and stipulation in a Muslim marriage contract: Important means of protecting the position of South-Asian Muslim wife'. In Modern Asian Studies. Vol.16, No.2, 1982, pp.277-309, at p.278.

[235] Pearl (1987), p.100; Hodkinson (1984), p.246.

the marriage contract by the man.[236] It was pointed out by an author, while reporting on the Dissenting Note, that Maulana Ehtishamul Huq emphasised that the delegation of the right of divorce by the husband to the wife should not be considered as an absolute right of the wife as described by the Commission.[237] The traditional critics were of the view that when the husband transferred his right of repudiation of marriage, he was left with no power and authority to repudiate it.[238]

The correct exposition of the law has been given by Tanzil-ur-Rahman who noted that if the husband delegates to his wife the right to divorce, his own right of effecting divorce does not lapse, but subsists so long as the wife does not exercise the right.[239]

On khula the Commission recommended that incompatibility of temperament should give the wife a right to demand a divorce.[240] The member critic, however, was of the opinion that the declaration of incompatibility of temperament as a valid ground for dissolution of marriage by khula would throw open the floodgates of talaq and spell moral and social ruin for the society.[241] What he meant to

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[236] The Report, p.1210.

[237] Feroze, Muhammad Rashid: 'The reforms in family laws in the Muslim world'. In Islamic Studies. Vol.i, No.1, 1962, pp.109-130, at p.114.

[238] Islahi (1959), p.187.

[239] Rahman (1978), pp.341-343; Carroll (1982), pp.277-300.

[240] The Report, p.1215.

[241] The Dissenting Note, p.1590.

say, presumably, was that women should not be given a say in decisions about divorce.

Polygamy:

Islamic law permits restricted polygamy with a view to meeting natural eventualities.[242] However, this view has been opposed by some authors.[243] Others have regarded it as an exception to the general rule.[244] This qualified right is being abused in society, putting many women in great trouble. There has been substantial change to this traditional right of polygamy in many Muslim countries of the world. The Tunisian Code of Personal Status of 1956

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[242] Tyabji, Faiz Badruddin: Muslim Law. 4th ed. Bombay 1968, p.46; Pearl, David: A text book of Muslim personal law. London 1987, pp.77-78.

[243] On the controversy of polygamy see for the orthodox and traditional view Ahmad, Khurshid (ed.): Marriage Commission Report x'rayed. Karachi 1959; Khan, M. Mustafa Ali: 'Islamic polygamy: A blessing in disguise'. In Kerala Law Times. Journal 1989(1), 47-58; Haq, Fazlul: 'Polygamy in Islam-misinterpreted and ill-judged'. In Kerala Law Times. Journal 1990 (2), pp.14-18; for the modernist view see Hussain, Syed Jaffer: 'Legal modernism in Islam: Polygamy and repudiation'. In Journal of the Indian Law Institute. Vol.7, 1965, pp.384-398; Rahman, Fazlur: Islam. New York, Chicago and San Francisco 1966, p.221; Hinchcliffe, Doreen: Polygamy in traditional and contemporary Islamic law'. In Islam and Modern Age. Vol.I, No.3, Nov. 1970, pp.13-38; Esposito, John L.: Women in Muslim family law. New York 1985, pp.92-93; Menski, W.F.: 'Comparative legal training in action: A reluctant defence of polygamy'. In Kerala Law Times. Journal 1990 (1), 50-69; Menski, W.F.: 'Crocodile tears and Muslim polygamy in India'. In Kerala Law Times. Journal 1991 (2), 20-24.

[244] Mahmood, Tahir: 'Dissuasive precepts in Muslim family law'. In Aligarh Law Journal. Vol.2, 1965, p.123; Rahim, Abdur: The principles of Muhammedan jurisprudence. Madras 1911, p.85.

prohibited polygamy.[245] There are also restrictions on this right in Egypt[246] and the practice of polygamy in Syria and Iraq has been circumscribed.[247]

With respect to polygamy, the Commission considered it necessary for justice and equity that a man intending to have a second marriage should seek permission from the Family Court, explaining the special circumstances leading to the necessity of such a marriage. He should satisfy the court that equitable treatment to the first wife and all children would be guaranteed.[248] Thus, the Commission was of the opinion that in rare cases the taking of a second wife may be justifiable, but the man should satisfy the court,

> That the first wife is insane or is suffering from some incurable disease or that there are other exceptional circumstances which makes his second marriage an inescapable necessity, and he is not taking a second wife merely because he wishes to marry a prettier or a younger woman than his first wife.[249]

The critics of the Commission did not accept this. Maulana Islahi has given many causes for polygamy from the causes of nature[250] to moral health.[251] The advocates of

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[245] For details see Esposito, John L.: 'Perspectives on Islamic law reform: The case of Pakistan'. In Journal of International Law and Politics. Vol.13, No.2, pp.217-245, at p.220; Nasir (1986), p.115.

[246] See for details, Nasir (1986), p.29.

[247] See Hinchcliffe (1970), pp.20-23.

[248] The Report, p.1230.

[249] Ibid., p.1216.

[250] Islahi (1959), p.209.

the unrestricted right to enter into a polygamous marriage argued that:

> The shariah has made no difference between first, second, third and fourth marriages. It equally allows all of them. If the first marriage requires no order from a court of law, even the third and fourth, what to say of the second marriage, should not be conditioned with procurement of any court order.[252]

These arguments have been countered in the Report itself which states that it is already when a person wishes to marry for a second time that the injunction to do adl or justice between the wives arise.[253] However the problem of adl between wives has been categorised as technical adl.[254]

Mehr:

The reformers did not attempt to reform the system of dower in a thorough fashion to improve the position of women.[255] The Commission recommended that if no details about the mode of payment of mehr are given in the nikahnama, the entire mehr shall be presumed by the court to be payable on demand.[256] It is worth mentioning that in this situation, where no dower is specified, the Ithna

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[251] Ibid., p.208.

[252] Maududi, Syed Abul Ala: 'The family law of Islam (reply to the questionnaire)'. In Ahmad, Khurshid (ed.): Studies in the family law of Islam. Karachi 1961, p.25.

[253] The Report, p.1217.

[254] The Dissenting Note, p.1600.

[255] Esposito (1980), p.227.

[256] The Report, p.1218.

Ashari law presumes that the whole dower is prompt.[257] The case law suggests that in such a situation of unspecified dower the custom or usage of the wife's family should be taken into consideration.[258]

The dissenting member of the Commission did not comment on the recommendation on dower, but emphasised that it is essential to make laws ensuring payment of mehr.[259] The Commission also emphasised that a husband will have to pay the mehr fixed in the marriage contract, however high it may be. They thought that the social custom of fixing an inordinately high sum as mehr without any real intention to pay it would gradually disappear.[260] The critic of the Commission agreed that this high fixing of mehr is an "evil custom" but argued that this social evil cannot be undone by legislation.[261] An author has contrarily pointed out that this excessive dower is a method to check divorces and discourage polygamy in South Asia.[262] This excessive amount of dower is not only a check for unreasonable exercise of talaq but also the only financial security the woman might have after the dissolution of her marriage.

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[257] Ali (1912), p.442; Fyzee (1974), p.139.

[258] Nasiruddin Shah v Amatul Mughni AIR 1948 Lah. 135 F.B.

[259] The Dissenting Note, p.1601.

[260] The Report, p.1218.

[261] Islahi (1959), p.218.

[262] Khan, Md. Najibullah: 'Legislation of sharia'. In Legislation in conflict with fundamental law. Vol.1, Karachi 1971, pp.257-346, at p.318.

Custody:

The Muslim law recognises that a mother is of all persons most desirable to have the custody of a small child, so that proper care and attention can be given to it.[263] There is no Quranic verse fixing the age limit of custody of children and no evidence from the practice of the prophet is recorded. But in the moral sphere it is specified in the Quran that the mother should breast-feed her offspring for two whole years.[264] This moral injunction implies in the ethical sense that the custody in the first instance belongs to the mother.[265] The Hanafi school entrusts the mother to have custody of her daughter until she attains puberty and of her son till he is 7 years of age, while the Shafi and Maliki school entitle the mother to have custody of a female child until her marriage.[266] The right of the mother to the custody of her children continues even when she is divorced by the father of her children, but she forfeits the right by marrying a stranger or by change of religion.[267] If the mother forfeits her right it devolves upon her nearest female relation until the father is

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[263] Rahman, A.F.M. Abdur: Institutes of Mussalman law: A treatise on personal law according to the Hanafite school. Calcutta 1907, p.210.

[264] The Quran. Sura II:223.

[265] Rahman (1907), p.719.

[266] For details see Tyabji (1968), p.216; Rahman (1907), p.718; Fyzee (1974), p.33.

[267] Rahman (1907), p.211.

legally entitled.[268]

In the Indian subcontinent, after the minor attains the specified age, the custody by the mother immediately becomes illegal. The refusal of the mother to hand over the children to the father would amount to removal of the ward from the custody of their rightful guardian under section 25 of the Guardians and Wards Act of 1890.[269]

The Commission argued that it is admissible to propose changes and modifications in the matter of custody of minor children, as the divine origin or the practice of the Prophet did not fix any age limit and some of the Muslim jurists have expressed the view that the matter of age limit in this respect is an open question.[270]

The critic of the Commission cited a hadith on which the Hanafi law of custody is based. It orders children to observe prayers at the age of seven, making it obligatory for the father to start religious education of his children when they attain the age of seven. Hence, he can take over custody of the children at that age.[271] However, the mother is entitled to the custody of a female child, according to the dissenting note, not only up to the age of puberty but up to the time of her marriage.[272]

Other traditional writers did not take recourse to the

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[268] Rahman (1907), p.212; Tyabji (1968), p.217.

[269] Mst. Zebu v Miraj Gul PLD 1952 Pesh 77.

[270] The Report, p.1219.

[271] The Dissenting Note, p.1601.

[272] Id.

modification of the legal age but were in favour of the theory of the welfare of the child and cited illustrations where the mother was given custody when it was in the best interests of the child.[273]

Guardianship:

Under Hanafi law a mother can only be the legal guardian of a minor's property at the death of the father, the paternal grandfather or their executors, provided she is appointed by the court or the father or the paternal grandfather. By strictly following the principle of legal guardianship after the death of the father, the property is often not properly protected.[274]

The Commission suggested that in the absence of the father the Family Court should be able to appoint the mother for the protection and management of the minor's property.[275] The critic was emphasising that only if there is no trustworthy male guardian should the property of the minor be given to the mother.[276]

Maintenance of wives:

Maintenance or nafaqa is a fundamental right of Muslim women created not by any separate contract but by the

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[273] Islahi (1959), p.220.

[274] The Report, p.1221.

[275] Id.

[276] The Dissenting Note, p.1602.

marriage contract or kabinnama itself.[281] Economic support or maintenance of a wife during the subsistence of the marriage is a legal responsibility of the husband in Islam.[282] Thus, a Muslim wife has a right to be maintained by her husband under Islamic law, even if she can maintain herself.[283] If a husband refuses to maintain her, she has a right to sue him under section 488 of the Criminal Procedure Code of 1898. The criminal court can grant an order of maintenance. But the procedure in the criminal court is very complicated and often requires a great length of time. This tends to cause great hardship to women.

The Commission recommended that if the husband neglects or refuses to maintain his wife without any lawful cause, the wife should be entitled to sue him for maintenance in a special Family Court.[284] The Commission also proposed to increase the maximum monthly allowance as maintenance award under section 488 from Rs.100/- to Rs.300/-.[285] In addition the Commission recommended that a wife should be allowed to claim past maintenance for three years prior to the institution of the suit.[286]

The critic of the Commission voiced little opposition to those recommendations. Maulana Ehteshamul Haq said that

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[281] Ali (1912), p.459.

[282] The Quran, ii:29.

[283] Fyzee (1974), p.212; Tyabji (1940), p.317.

[284] The Report, p.1219.

[285] Ibid., p.1220.

[286] Id.

a woman can claim the same maintenance which is fixed by the Qazi or a court, but can not claim her past maintenance.[287]

By analysing the important recommendations of the Commission on Marriage and Family Laws and the criticisms of the conservative ulemas it can be gathered that the real conflict was not so much about the substantive legal changes, but that this was an extended debate of traditionalists and modernists on the principles of Muslim law.[288] The reasoning on both sides followed their view of thinking and tried to justify their arguments. The major issue was supposed to be the emancipation of Muslim women, while the discussion was merely revolving round the religious politics of Islamisation and the ulema's power. This highlighted the conflict of interests about women's rights and Muslim men's interests in the subordination of women. Thus the voices of the opponents were heard,[289] and not of the supporters of reforms. Perhaps for this reason, the government did not have the courage to give immediate effect to the report.[290]

The contradictions of the reforms arose because Islamic family law is intimately connected with religion, so perhaps a bold step could not be taken. N.J. Coulson has remarked that with reference to divorce:

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[287] The Dissenting Note, p.1601.

[288] Pearl (1969-70), p.181.

[289] Ahmad (ed.) (1959); Khan (1971), pp.251-346.

[290] Mahmood (1983), p.165.

> Basically the husband's right of repudiation, which undoubtly occasions the greatest prejudice to woman's status, remains, and the compromise at which the Ordinance aims between the modernist and the traditionalist viewpoints seems on balance to favour the latter.[291]

However, the Muslim Family Laws Ordinance, 1961 the only major family law reform in Pakistan, was a significant piece of reform as it sought to restrict the practice of talaq-al-bidah and required the registration of marriage, restricted polygamy, discouraged hasty divorces and settled maintenance claims by an Arbitration Council.[292] The Muslim Family Laws Ordinance, 1961 was also an attempt within family laws to protect individual women's civil rights; this caused dissatisfaction among the conservative ulema.[293] Although the enactment of the Ordinance was made with good intentions, to promote the interests of women, it also aroused tensions within the society.[294] The discussions prior to the enactment of the Ordinance indicate the divergence of opinion not only among modern and orthodox Muslim scholars but also about the need for improvement of certain rights of Muslim women.

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[291] Coulson, N.J.: 'Islamic family law: Progress in Pakistan'. In Anderson, J.N.D. (ed.): Changing law in developing countries. London 1963, pp.240-257, at p.255.

[292] Esposito (1974), pp.90-91.

[293] Korson, J. Henry and Maskiell Michille: 'Islamization and social policy in Pakistan-the constitutional crisis and the status of woman'. In Asian Survey. Vol.xxv, No.6, June 1985, pp.589-612, at p.604.

[294] Rosenthal, I.J. Erwin: Islam in the modern national state. Cambridge 1965, p.336.

3.2.3 The Muslim Family Laws Ordinance, 1961

After considerable delay, the martial law government under Ayub Khan was bold enough to adopt many recommendations of the Commission. In March 1961 it promulgated the Muslim Family Laws Ordinance, against strong opposition by the ulema, who regarded it as totally un-Islamic.[295] On the other hand, the women activists welcomed the Ordinance and launched a movement in support of it.[296] Men who were modern in their thinking also defended the Ordinance as restoring to Muslim women the rights and protection given to them by the Divine Book itself.[297] The question of modernisation of the Muslim family law has been seen as a necessary condition for women's emancipation[298] but reforms could be achieved within the Islamic framework by counteracting orthodox views.

It is useful to compare and contrast the recommendations of the Marriage and Family Laws Commission and the provisions of the Muslim Family Laws Ordinance of 1961, not only to assess whether the Ordinance was a new

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[295] See for details Ahmad (ed.) (1959), pp.33-34; Mahmood (1983), pp.165-166.

[296] Khawar and Shaheed (1987), pp.58-59; Chipp-Kraushaar, Sylvia: 'The All Pakistan Women's Association and the 1961 Muslim Family Laws Ordinance'. In Minault, Gail (ed.): The extended family. Delhi 1981, pp.263-285.

[297] For example see Mirza, Anis: 'Family Law Ordinance not un-Islamic'. In Dawn. 15 July, 1962.

[298] Rosenthal (1965), p.337.

scheme[299] of Ayub Khan, the then president of Pakistan, who encouraged governmental intervention in family law,[300] but also to determine whether it safeguarded women's interest.

Despite the opposition of a substantial body of critics, the Ordinance implemented the recommendation that the grand-children should represent the position of their demised parent in the property of the propositus under section 4. Some writers have emphasised that this would displace the guiding principle of Islamic law.[301]

The recommendation of the Commission to register all Muslim marriages was effected by section 5 of the Muslim Family Laws Ordinance. Contravention of this provision was made punishable with simple imprisonment for a term which may extend upto three months, or a fine upto one thousand rupees, or with both. Thus the penalties are relatively light and flexible. Notably, failure to comply with the provision did not affect the validity of one's marriage.

The Ordinance also provided for a standard kabinnama which contains certain clauses. These, if agreed upon at the time of marriage, protect the position of the woman by making it possible for the wife to seek enforcement by the

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[299] On this see Pearl (1969-70), p.183; Carroll (1982), p.58.

[300] See in particular Pearl, David: 'Executive and legislative amendments to Islamic family law in India and Pakistan'. In Heer, Nicholas (ed.): Islamic law and jurisprudence. Washington 1990, pp.199-220, at p.205.

[301] For details see Khan (1971), p.296; Mahmood, Tahir: Family law reform in the Muslim world. Bombay 1972, pp.288-289; Anderson, J.N.D.: 'Recent reforms in the Islamic law of inheritance'. In International and Comparative Law Quarterly. Vol.14, 1965, p.358; Mahmood (1983), p.168.

courts in case of contravention of any clauses in the kabinnama. Moreover it also protects women by facilitating recourse to divorce without the intervention of the court. The Muslim Family Laws Ordinance of 1961 has given the option to the husband to delegate the right of divorce by clause 18 in the form of the kabinnama. The wife, if the power to divorce is delegated, has a right to divorce herself extra-judicially.[302] Already before the statutory enactment, this right of delegated divorce was recognised. The Ordinance made this option more readily accessible and gave it official recognition.

Section 6 of the Ordinance deals with polygamy. It made it obligatory for a man desiring to marry a second or subsequent wife to seek in writing[303] the approval of the Arbitration Council.[304] Under section 6(3) of the Ordinance, if the Arbitration Council is satisfied that the proposed marriage is just and necessary,[305] it may grant

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[302] Form II of the Muslim Family Law Rules, 1961 describes the form of the kabinnama as prescribed by rule 8 of these Rules.

[303] Under section 6(2) of MFLO, The person is required to state the reasons for the proposed marriage. The consent of the existing wife or wives to the marriage is also required.

[304] According to Section 2(a) of the MFLO, Arbitration Council means a body consisting of the Chairman and a representative of each of the parties to a matter dealt with in this Ordinance.

[305] According to Article 14 of the Muslim Family Laws Rules, 1961: In considering whether another proposed marriage is just and necessary during the continuance of an existing marriage, the Arbitration Council may, without prejudice to its general powers to consider what is just and necessary, have regard to such circumstances, as the following amongst others:

permission which may be subject to any condition which it deems fit to make. Under section 6(4) applications for revision may be made, by any party to the sub-divisional officer,[306] who is the final court of appeal. If a person contracts another marriage without the permission of the Arbitration Council, he shall be punished under section 6(5)(b) with imprisonment or a fine or both. But the Ordinance, again, did not invalidate those marriages. Thus, if a person marries, in defiance of the Ordinance, the existing wife has a right to claim her dower under section 6(5)(a) and if she wishes she can also make a petition for divorce under the new provision introduced by the Ordinance into the Dissolution of Muslim Marriages Act of 1939.[307]

Section 7 of the MFLO also requires the intervention of the Arbitration Council and seeks to curb unilateral divorces by Muslim men. It states in section 7 (1) that as soon as any man has given talaq, he should send the

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Sterility, physical infirmity, physical unfitness for the conjugal relation, wilful avoidance of a decree for restitution of conjugal rights, or insanity, on the part of an existing wife.

[306] Under section 6(4) of the MFLO. In West Pakistan, the appeal is made to the Collector. In Bangladesh this power of appeal was later transferred to the Court of Munsif under an amendment of 1985 (see chapter 4 below).

[307] Under section 2(ii)(a) of the Dissolution of Muslim Marriages Act 1939, a woman married under Muslim law shall be entitled to obtain a decree for the dissolution of the marriage on the ground that the husband has taken an additional wife in contravention of the permission of the Muslim Family Laws Ordinance, 1961.

Chairman[308] notice in writing of his so doing and send a copy to the wife. The stipulated effect of such notice is to freeze the talaq for 90 days, during which limit the Chairman together with representatives of both parties, tries to reconcile them under section 7(4) of the MFLO. Section 7(3) of the Ordinance seems to indicate that after 90 days the talaq becomes effective unless the parties were reconciled. Any person who does not comply with these provisions is punishable by fine or imprisonment under section 7(2) of the MFLO. Section 7(3) of the MFLO has only purported to convert talaq-al-bidah from an unrevocable and final divorce to a revocable one.[309]

The Arbitration Council was also given powers by the MFLO in another area of family law, i.e. a wife's claim of maintenance. It stated under section 9 (1) of the MFLO that if any husband fails to maintain his wife adequately, the wife may apply to the Arbitration Council, who shall specify the amount which shall be paid as maintenance by the husband. Appeal may be made to the Sub-divisional Officer under section 9(2) of MFLO within 30 days (under section 16 of the Muslim Family Law Rules, 1961) and his decision will be regarded as final.[310] The amount payable

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[308] Chairman under section 2(b) means the Chairman of the Union Council or a person appointed by the central or provincial government or by officer authorised by the government. This provision has been changed in Bangladesh, see Appendix IV, p.454.

[309] Coulson (1963), p.251.

[310] In Bangladesh the right of the Subdivisional Officer for revision has been taken over by the Munsif's Court, projecting the encroachment of the judiciary in the local

as maintenance will be recoverable as arrears of land revenue under Section 9(3) of MFLO.

The recommendation on dower was that when no details of the mode of payment of dower had been specified in the kabinnama, then the entire amount of the dower was considered payable on demand. This has been put into effect by section 10 of the Ordinance which provides that where no details about the mode of payment of dower are specified in the nikahnama, or the marriage contract, the entire amount of dower shall be presumed to be payable on demand.[311] In addition the Ordinance also protects women by raising the minimum age of marriage for girls from 14 to 16 years by making amendments in the Child Marriage Restraint Act of 1929 (Section 12(a)). It has also enhanced women's right by enlarging the option of puberty. The MFLO, by Section 13(b), has extended the limit to 16 years.

The sections of the Ordinance can be regarded as being in conformity to the recommendation of the Commission except sections 6, 7, and 8.

It could be argued that the head of the executive of that time, President Ayub Khan, by giving judicial functions on issues of family law to the Union Council or local administrative personnel, was undermining the role of the judiciary. An examination of sections 6, 7 and 8 of the Ordinance shows that the MFLO was a new scheme which projected the ex-president's philosophy and ideology of law

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administrative sphere. See below, p.228.

[311] See Appendix iv, p.457.

rather than the Report of the Marriage Commission.[312] The Commission was suggesting the desirability of interference of the court in family matters, but the president was more interested to give power to the locally elected men who according to his view would understand the problems of their immediate community best.[313]

In summing up it can be critically commented that the Muslim Family Laws Ordinance of 1961 fell short of the needs and expectations of women's organisations and other social reformers who aspired for the better legal protection of women. The Ordinance did ignore some of the important issues crucial to women, such as khul divorce, custody of children and past maintenance for women, as had been recommended by the All Pakistan Women's Association.[314] Moreover, the procedures in the MFLO are basically concerned with extra-judicial divorce, especially imposing some restrictions over the husband's traditional power of talaq.[315] The unilateral power of talaq was, however, left substantially unimpaired, it was only required that the husband should notify the action to the Council.[316]

The Ordinance was within the ambit of modern versions

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[312] Pearl (1969), p.183.

[313] Ibid., p.182.

[314] Recommendation of Family Laws Ordinance 1961. All Pakistan Women's Association (APWA), Lahore 1961.

[315] Carroll (1978), p.280.

[316] Ibid., p.251; Coulson (1963), p.251.

of Islamic norms. But the Arbitration Councils could not ensure full justice to the aggrieved women in Pakistan. Matters referred to an Arbitration Council would usually be decided in accordance with social norms prevailing in the society.[317] In the patriarchal setting of Pakistan, this form of local dispute settlement could not effectively rescue Muslim women from economic deprivation and violence.

3.2.4 Application of the legislation relating to family law by the courts in Pakistan

One of the aims of our inquiry is to focus on problems of implementation of legislation which purports to benefit women. We have already described the goal and procedures of the legislation relating to family law in Pakistan during the period from 1947 to 1971. This portion of the thesis will focus on the application of this legislation as reflected through the case-law.

There are two types of mechanism available for redress in the cases of personal law. First, a person may institute a criminal suit in a criminal court. For example, under section 488 of the Criminal Procedure Code, 1898 a case for maintenance may be filed. Secondly, a civil suit may be instituted in the civil courts. It is significant to

[317] For details see Pearl, David: 'The impact of the Muslim Family Laws Ordinance in Quetta (Baluchistan) 1966-68'. In Journal of the Indian Law Institute. 1971, pp.561-569, at p.561; Carroll (1978), pp.279-286.

emphasise again that only a small portion of disputes actually comes to the courts. The reasons behind this can not be discussed fully within the ambit of this thesis.

The courts are institutions which could enforce newly created statutory rights which are not recognised by the community. An examination of the family law cases reported after 1961 illustrates this point. The majority of these cases involve the issues of talaq and polygamy under sections 7 and 6 of the Muslim Family Laws Ordinance of 1961 respectively. These two sections had sought to introduce innovations in personal law and were incorporated to assist women against male egoism. Below, we now discuss the major areas of concern.

Registration of marriage

Section 5 of the Ordinance appeared to make it evident that no marriage solemnised under Muslim law should be left unregistered. Mr. Justice Abu Md. Abdullah, in the case of Abdulla v Rokeya Khatoon,[318] held:

> This section makes it absolutely necessary that the marriage solemnised under the Muslim law shall be registered. The solemnisation of marriage if validly effected might not be effected for non-registration of the marriage. But the non-registration of the marriage causes a doubt on the solemnisation of the marriage itself.[319]

Thus, lack of registration does not make the marriage void, but in certain cases it would be difficult to prove

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[318] 21 DLR 1969 213.

[319] Ibid., p.217.

the marriage itself. Thus registration of marriage is useful for women as it gives documentary proof that marriage was solemnised. Illiterate poor women are mostly affected if their marriages are not registered, as they are easily deserted by their husbands. The case-law here has not gone beyond general declarations.

Polygamy

We saw that section 6 of the MFLO only penalises the male in respect of a marriage contracted in contravention of this section by making him liable to imprisonment or fine or both but does not invalidate the marriage itself.[320] The criminal sanctions may not deter many persons from entering into a polygamous marriage.[321] The courts have held that contracting a second marriage during the subsistence of the first marriage without permission as required under the Ordinance is liable to prosecution.[322] Moreover, such a man is not allowed to register the second or subsequent marriage. It has been rightly stated by Justice Ahsanuddin Choudhury,

> Section 6(1) of the Ordinance lays down that no marriage during the subsistence of the earlier marriage without the permission of the Arbitration Council shall be registered. It is

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[320] Ali Nawaz Gardezi v Mohammad Yusuf PLD 1963 SC 51, at p.74; Also in Muhammad Aslam v Ghulam Muhammad Tasleem PLD 1971 Lah 139, at p.142-143.

[321] However, in a later case in Pakistan, criminal sanction has been used even when the first marriage was solemnised in civil form in the United Kingdom, See Fauzia Hussain v Khadim Hussain PLD 1985 Lah 165.

[322] Ahmad Mia v Kazi Abdul Motaleb 23 DLR 1971 118.

> therefore, obvious that a marriage under Muslim law must satisfy the provisions of the Ordinance for its registration. If the provisions are not satisfied, the marriage shall not be registered.[323]

Thus the legal consequence of a subsequent marriage not following the procedure of the Ordinance is only that the subsequent marriage is not registered, the marriage itself remains valid.

Some cases have been on procedural points. Thus, regarding complaints of polygamy, it has been held that a complaint by a Chairman of the Union Council, forwarded by the Deputy Commissioner to the Magistrate amounted to a complaint under the Ordinance.[324]

In essence, however, section 6 MFLO does not effectively protect Muslim women against the whims of a polygamous husband.

Talaq

One of the first cases on divorce was the much noted Supreme Court decision in Ali Nawaz Gardezi v Muhammad Yusuf,[325] where the purpose of section 7 of the Ordinance was re-stated,

> The object of section 7 is to prevent hasty dissolution of marriages by talaq, pronounced by the husband, unilaterally, without an attempt being made to prevent disruption of the matrimonial status. If the husband himself thinks better of the pronouncement of talaq and abstains from giving a notice to the Chairman, he should

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[323] Ibid., p.120.

[324] Muhammad Islam v State PLD 1967 Pesh 201.

[325] PLD 1963 SC.51.

perhaps be deemed, in view of section 7, to have revoked the pronouncement and that should be to the advantage of the wife.[326]

The debate was, inter alia, on the issue whether notice to the Chairman of the Union Council was mandatory. While it has more recently been pointed out by an author that it is argued by some that the introduction of the notice requirement is contrary to the Quran and the sunnah, [327] in the 1960s the courts assumed that notice was mandatory.

On the question whether talaq given without complying with the provisions of the Ordinance is valid, there are now two contrary trends of cases. One trend suggests that the notice to the Chairman of the Union Council is mandatory.[328] A whole line of cases follows this leading case.[329] However, the opposite position is also reflected in the case-law and a number of cases have held that notice is not an essential criterion.[330]

The right of the wife to be notified under section

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[326] Ibid., p.75.

[327] Pearl (1990), p.207.

[328] Ali Nawaz Gardezi v Muhammad Yusuf PLD 1963 SC 51.

[329] State v Tauqir Fatima, PLD 1964 Kar 306; Abdul Aziz v Rezia Khatun, 21 DLR (1969) 733. Abdul Mannan v Sufuran Nessa, 1970 SCMR 854; Muhammad Salahuddin Khan v Muhammed Nazir Siddique, 1984 SCMR 583. For details of the issue see, Carroll, Lucy: 'Talaq in Pakistan: Notification, revocation and the Muslim Family Laws Ordinance'. In Islamic and Comparative Law Quarterly. No.4, 1984, pp.238-247; Carroll, Lucy: 'Talaq in Pakistan: The question of notification again'. In Islamic and Comparative Law Quarterly. No.5, 1985, pp.287-297.

[330] Chuhar v Gulam Fatima PLD 1984 Lah 234; Noor Khan v Haq Nawaz PLD 1982 FSC 265; Md. Rafique v Ahmad Yar PLD 1982 Lahore 825; Marina Jatoi v Nuruddin K. Jatoi PLD 1967 SC 580.

7(1) seems clearly enforceable by the penal sanctions contained in section 7(2).[331] The early cases in Pakistan made it mandatory to supply a copy of the notice of talaq to the wife.[332] However, several later cases arrived at a contrary decision.[333] If the primary object of the Ordinance was to enhance the position of women priority has more recently been given to Islamisation rather than concerns of women.[334] We shall see in chapter 5.5 below that Bangladeshi law now differs significantly from the law of Pakistan in this area.

Other types of dissolution of marriage

Section 8 of the MFLO required the same procedure to be followed in other cases of dissolution of marriage than talaq. In the suit of Mst. Mumtaz Mai v Gulam Nabi,[335] the procedure required in the Ordinance could not be availed of as the suit was filed before promulgation of the Ordinance; the case implies that in khula cases also the same procedure as in section 7 should be followed. In the case of Muhammed Amin v Mst. Surraya Begum,[336] it was held that

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[331] For details see Carroll, Lucy: 'Wife's right to notification of talaq under Muslim Family Laws Ordinance, 1961'. In PLD Journal 1985, pp.272-276.

[332] Inamul Islam v Mst. Hussain Banu PLD 1976 Lah 1466.

[333] See for example M. Zikria Khan v Aftab Ali Khan PLD 1985 Lah 319.

[334] Mahmood (1983), p.164.

[335] PLD 1969 HC 5.

[336] PLD 1969 Lah 512.

the expression "wished to dissolve marriage otherwise than by talaq" includes dissolution sought on the ground of khiyar al-bulugh or option of puberty, as it is in full accord with the phraseology employed in section 2 of the Dissolution of Muslim Marriages Act of 1939.[337] Recently there has been a surge of cases under section 8, but these are not discussed here, as this part of our study is concerned only with Pakistani law till 1971.[338]

Maintenance

Section 9 of the MFLO provides that the Chairman of the Arbitration Council may issue a certificate specifying the amount which should be paid as maintenance by the husband, only if the husband fails to maintain his wife "adequately". In Sardar Muhammed v Mst. Nasima Bibi,[339] it was held that the word "adequately" includes cases of total neglect or refusal. The judges seem to have extended the provisions of the Ordinance as they gave the Arbitration Council power to grant allowances for a period prior to the time of making of application.[340]

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[337] Muhammad Amin v Mst. Surayya Begum PLD 1969 Lah 512, at p.518.

[338] See for details Carroll, Lucy: 'Consensual divorces and the Muslim Family Laws Ordinance, 1961'. In PLD Journal 1987, pp.121-127.

[339] 1967 19 DLR (WP) 50.

[340] Id.

Dower

In Gul Newaz Khan v Maherunnessa Begum,[341] The High Court of Dhaka ruled that since wilful non-payment of maintenance constitutes a ground for divorce, wilful non-payment of dower due on demand entitles a wife to seek a judicial decree of divorce.

Overall, we can see that the courts in Pakistan were implementing the provisions of the MFLO and in some cases extending the meaning of certain provisions. However, the effects of this legislation on the society as a whole seem to have been minimal, as the concern to protect religion was stronger than that of protecting women. The requirement of women in South Asia to have freedom from economic deprivation and violence were not focused on in the judicial decisions. Although some emphasis was given in the MFLO on giving maintenance and dower for wives, the courts were only alerted when there was total neglect and refusal. Moreover it has been argued that the legislation could only affect the elites of the society.[342] Thus, the patriarchal domination of Pakistani family law continued despite some well-sounding legislation and cases which paid lip-service to protecting the needs of women. The law as a whole would not come to the rescue of most women who found themselves confronted with violence and economic deprivation. As we

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[341] 3 PLD 1965 Dacca 274-276.

[342] See for details Carroll, Lucy: 'The reception of the Muslim family laws Ordinance, 1961, in a Bangladeshi village'. In Contributions to Indian sociology. Vol.12, No.2, 1978, pp.279-286; Pearl (1971), pp.561-569.

shall see below, the movement for the independence of Bangladesh also offered women a glimpse of hope of a better future in this regard.

CHAPTER 4

THE DEVELOPMENT OF FAMILY LAW IN BANGLADESH

This part of the thesis gives an overview of the policy debates surrounding the development of family law in Bangladesh, concentrating on the establishment of the Family Courts and their effects on women. Before going into details on legal enactments and case-law, we first consider how women were treated by the legislature in the newly independent country and whether the stated aim to ameliorate women's rights was more than rhetoric. In this light, women's rights in Bangladesh have been analysed within the constitutional framework, indicating the disparity between the personal law and the constitutional rights, showing vividly the internal contradictions within the Constitution between granting legal equality and making special laws for women.

The personal law system is then analysed projecting how the Constitution ensures that the personal law system continues to survive although it is lagging behind some basic principles which have been accepted by the Constitution. The minority laws and their position vis-a-vis uniformity of laws are also given some consideration.

The chapter then concentrates on the recent establishment of Family Courts. Finally, the post-independence reforms in family law are analysed generally

to see whether the legal reforms have actually operated to the advantage of women.

4.1 Women and the legislature

The movement for liberation in Bangladesh accelerated the urge of women towards social and legal emancipation. Women played a significant role in the freedom movement. But the literature primarily portrays women's contribution in the movement as victims of rape by Pakistani soldiers and collaborators, or as women left alone by a freedom-fighter father, brother or husband.[1] It has been reported that nearly 30,000 Bangladeshi women were raped by Pakistani soldiers in their supposed mission to populate this wing of the nation with pure Muslims.[2] To them Bengalis were not Muslims. The amalgamation of Bengali culture and Islamic tradition has already been discussed above and we have seen the unique character of Muslim identity mixed with Bengali culture in Bangladesh (see above, p.43). Perhaps the Pakistanis could not understand this.

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

[2] Kabeer, Naila: 'The quest for national identity: Women, Islam and the state in Bangladesh'. In Institute of Development Studies Discussion Paper No.268, Brighton 1989, pp.1-33, at p.9. A modified version of the article is published in Kandiyoti, Deniz (ed.) Women, Islam and the state. London 1991, pp.77-143.

After independence, the sovereign Democratic Republic of Bangladesh gave new promises to women, acknowledging their contribution in the liberation movement. Speaking to a mass crowd in Dacca in March 1972, the father of the nation, also regarded as the friend of the nation or 'Bangabondhu', Sheikh Mujibur Rahman stated:

> In the past religion has been exploited in order to enslave our mothers and sisters; this will no more be permitted.[3]

He further regretted that, in the past, half of the population of the nation had been confined within the four walls of their houses owing to social prejudices. Acclaiming the appreciable role played by women in the freedom movement, the leader declared that his government would secure that women may enjoy equal rights and privileges with men in free Bangladesh.[4] The stage was, thus, set for an improvement of the legal position of women in the new nation.

The raped women were declared by the leader of the nation, Sheikh Mujibur Rahman, as war heroines, 'Birangona', to make them accepted in the society. But the majority of them were not accepted by the society and it was a problem for the Mujib government to rehabilitate them. Rahnuma Ahmed stated that the existence of the 30,000 raped Bengali women was an embarrassment to Mujib and his

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[3] Rahman, Sheikh Mujibur: 'Women will enjoy equal rights'. In Bangladesh Observer. Dacca 27th March 1972, p.1; See also Da'wat, an Urdu daily. Delhi 29th March 1972, p.3.

[4] Rahman (1972), p.1.

regime.[5] It was reported that the 5% quota of government employment reserved for the rape victims identified them in society.[6] The Mujib government also provided jobs for the wives of freedom fighters who died or were crippled, but could not improve the overall status of women.[7]

During 1975-1981 the regime of president Ziaur Rahman, starting with the United Nation's international women's year, integrated more women in the development process. Under him a separate full-fledged Ministry of Women's Affairs was set up and reserved seats for women in Parliament were increased from 15 to 30.[8] These reserved seats were not open to election but were filled by nomination of the majority party, which was simply another means to increase the powers of the ruling party.[9] There seems to be some agreement in the literature that the real cause for the mobilisation of women was not only to legitimise elite rule but to acquire more aid from the donor agencies by giving (some) attention to women.[10] It

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[5] Ahmed (1985), p.48.

[6] For details see Huda, Sigma: 'Women and law: Policy and implementation'. Paper presented at a seminar on 'Women and law' organised by Women for Women, Sept. 13-15, 1987, Dhaka.

[7] Ahmed (1985), p.48; Kabeer (1991), p.125.

[8] Kabeer (1991), p.127.

[9] White, Sara C.: Arguing with the crocodile: Gender and class in Bangladesh. London, New Jersey and Dhaka 1992, p.15.

[10] Ahmed (1985), p.49; Kabeer (1991), p.127; White, Sara C.: 'Women and development: A new imperialist discourse'. In The Journal of Social Studies. No.48, April 1990, pp.90-111, at p.103.

has been argued more recently that the government and the non-governmental organisations (NGOs) used women's issues as a potential source of funding.[11] But the positive impact of this was that women's issues in Bangladesh were slowly coming to the limelight, paving a way for incorporating more women into the development process. The government under president Ziaur Rahman also wanted to improve the legal position of women and the Dowry Prohibition Act of 1980, for example, was enacted for that purpose. The Act is discussed in detail in chapter 6.2.1 below.

The rule under president Hussain Muhammed Ershad, during 1982-90, continued the policy of president Zia to incorporate the women in development (popularly known as WID) program by making use of this hidden resource through employment.[12] However, incentives of foreign aid were attached to it. Some legal measures were devised in this period, supposed to advance women's welfare and to deter crimes against women by more severe punishments, particularly the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 and the Family Courts Ordinance, 1985. Details of these enactments are discussed further below. The role of the government in islamising the state needs to be discussed in this context, particularly when the constitutional amendments are analysed. Because of this Islamic trend, the government did not ratify the UN

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[11] White (1992), pp.15-16.

[12] Kabeer (1991), p.128.

Convention on All Forms of Discrimination Against Women of 1979 in full and reserved certain clauses which conflicted with the sharia.

The present democratic government since 1991, under the country's first woman prime minister, Begum Khaleda Zia, is following the policy of her predecessors to mobilise more women in the employment market. New forms of urban employment in the garment, plastic and pharmaceutical industry, in particular, have become available since the 1980s; this gave women more opportunities to enter wage labour. In the professional sphere, too, women are more involved now, not only as teachers and nurses, which is typically supposed to be more fitted for them, but there were already 52 lady judges in the judiciary in 1992.[13] This shows that there is some pressure toward sexual equity and a re-evaluation of the stereotyped concepts about subjugating women. However, in family law this pressure is creating confusions and contradictions, as women do not enjoy absolute equality. Further, in social reality, women are not even given those rights which are granted under the Islamic and official family law. In this context, radical change outside the Islamic framework, as recently argued for by the outspoken feminist Taslima Nasreen, will only provoke the male-dominated society to turn towards more

[13] This was stated by the Law Minister in a workshop on 'Uniform Family Code and problems of enforcement of equal rights of women in Bangladesh: Legal policy and social dimension'. The workshop was held on Sept. 22 and 23, 1992 jointly organised by Bangladesh Institute of Law and International Affairs (BILIA) and the Mahila Parishad. Its proceedings are not published.

conservatism. It is doubtful how much emancipation of women will be achieved by such provocative writing. However, Taslima Nasreen's brave efforts to criticise the whole system have given her much publicity and international attention.[14] At the same time, her case offers a chance for the fundamentalists to take these issues up for their own campaigns to win power.[15] Khaleda Zia's government denies her charges and has banned one of her books, entitled Lojja, for offending Muslim sentiments and fanning communalism, but it has not acted against the writer to the extent demanded by the extremists. This indicates that the government approves, in principle, of gradual changes of attitudes in society towards giving women their granted rights. But not many effects can so far be seen in practice. Thus, apart from some pro-women legislative activity, there has been little useful progress for the women in Bangladesh in this sphere. The attempts to improve the status of women which have been taken by the politicians have remained largely rhetoric and did not reduce the domination of males. It remains to be seen to what extent the various measures could protect women from economic deprivation and violence.

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[14] To show how wide circles this has drawn see, Rettie, John: 'Bangladesh's threatened writer wins police guard but no champions'. In The Guardian. Friday 10 Dec. 1993; 'Fundamentalists call for feminist's hanging'. In Leicester Mercury. 19.11.93; McGirk: 'Life in a cage for feminists who dared to tell the truth'. In The Independent. Wednesday 2 March 1994.

[15] The Guardian. 10 Dec. 1993.

4.2 The constitutional framework of women's rights in Bangladesh

In fulfilment of his promise to women, the father of the nation stipulated fuller participation of women in the national life by confirming it in the Constitution of Bangladesh, which came into effect on 16 December 1972, exactly one year after independence from Pakistan. Under article 10, one of the fundamental principles of state policy states:

> Steps shall be taken to ensure participation of women in all spheres of national life.[16]

This shows that women's rights were not at par with those of men so far and that some efforts were made by the Constitution to tackle this disparity. Under article 8 of the Constitution, the fundamental principles of state policy are laws fundamental not only to the governance of Bangladesh but they are also to be applied by the state in the making of laws. However, according to article 8(2) of the Constitution of Bangladesh, the fundamental principles are not judicially enforceable or justiceable as fundamental rights.

The fundamental rights granted under part three of the Constitution specifically deal with women. Article 28 states:

> 28. (1) The state shall not discriminate against any citizen on grounds only of religion, race,

[16] This was substituted from socialism and freedom from exploitation by the Proclamations Order No.1 of 1977.

caste, sex or place of birth.

(2) Women shall have equal rights with men in all spheres of the State and public life.

(3) No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution.

(4) Nothing in this article shall prevent the state from making special provisions in favour of women or children or for the advancement of any backward section of citizens.

Thus while providing equal rights for women in several respects, although only in the public sphere and not in the private sphere, the legislature could not pull them out of the typical stereotyped image depicting women as the weaker sex in need of protection. They categorised women with children and the backward sections of the population, reserving the rights of the state to make any special provision for the advancement of such backward sections of the population. This paternalistic attitude of the legislature can also be found in other provisions of the Constitution. Article 29 states:

29. (1) There shall be equality of opportunity for all citizens in respect of employment or in the service of the Republic.

(2) No citizen shall, on grounds only of religion, race, caste, sex or place of birth, be ineligible for, or discriminated against, in respect of any employment or office in the service of the Republic.

(3) Nothing in this article shall prevent the state from-

(a) making special provision in favour of any backward section of citizens for the purpose of securing their adequate

representation in the service of the Republic;

(b) giving effect to any law which makes provision for reserving appointments relating to any religious or denominational institution to persons of that religion or denomination;

(c) reserving for members of one sex any class of employment or office on the ground that it is considered by its nature to be unsuited to members of the opposite sex.

While providing for equality of opportunity to women, the Constitution under article 29(3)(c) has explicitly given the right to the state to reserve certain employment and offices to men alone, if they are seen as unsuited to women. This urge of the legislature can also be gathered in other provisions of the Constitution. Thus, 15 seats were reserved for women under Article 65(3); this was increased to 30 seats in Zia's regime in 1990.[17] Further, in exercise of these provisions the government reserved 10% of all new recruitment in the public sector for women.[18]

These articles of the Constitution perpetuated the conventional view that women are inferior and therefore need protection.[19] Thus, although generally the Constitution promises equality of the sexes, there are

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[17] This was done by the Constitution (Tenth Amendment) Act xxxviii of 1990. The effect of this was not to give more power to women but to strengthen the authority of the ruling party, since these women were to be nominated (see above, p.178, footnote 8).

[18] Chaudhury, Rafiqul Huda and Nilufar Raihan Ahmed: Female status in Bangladesh. Dhaka 1980, at p.20.

[19] For India see Sarkar, Lotika: 'Status of women: Law as an instrument of social change'. In Journal of the Indian Law Institute. 1983, Vol.25, No.2, pp.262-269, at p.267.

disparities of the sexes within it.[20] This paternalistic attitude towards protecting women as the weaker sex has already been discussed (see above, p.65).

It is apparent from this that the legislature recognises the unequal status of women in Bangladesh, although they outwardly claim that the Constitution ensures sexual equality. Salma Sobhan rightly observed that,

> The tenor of all these provisions read as a whole makes it obvious that the drafters of the Constitution could not fail to acknowledge tacitly the fact of the inequality present in the status of women.[21]

However, the author has blamed the female section of the population for undermining their own potentialities. By blaming women, the author has victimised them more (see for the same reaction on the writing of other authors, above p.63). We are arguing, on the contrary, that such statements reflect social attitudes and that women themselves are not conscious of their hidden powers which are not recognised by the society.

One of the causes of the subordination for women was projected to be the attempt to use religion to police women's behaviour (see chapter 2, p.39). One can see how this affects women when the Constitution itself has a

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[20] See for details Sobhan, Salma: Legal status of women in Bangladesh. Dhaka 1978, pp.4-6; Bangladesh: Strategies for enhancing the role of women in economic development. Washington DC 1990, pp.18-20; Chaudhury, Rafiqul Huda and Nilufar Raihan Ahmed: 'Women and the law in Bangladesh: Theory and practice'. In Islamic and Comparative Law Quarterly. Vol.viii, No.4, Dec. 1988, pp.275-287, at p.275; Chaudhury and Ahmed (1980) pp.18-33.

[21] Sobhan (1978), p.5.

religious colour. Bangladesh, after independence, accepted secularism as one of the pillars of its socio-political structure. However, the secular Constitution did not have any direction for a Uniform Civil Code to bring at par all the personal laws as was done under article 44 of the Indian Constitution (see below, p.193).[22]

The Constitution of Bangladesh was amended in 1977 by president Ziaur Rahman, deleting the principle of secularism from the Constitution and replacing it by 'absolute trust and faith in Almighty Allah' under article 8 of the Constitution. It has been claimed that this was done for financial considerations, basically to have more aid from Arab and Middle-East countries.[23] But in 1988, President Ershad went so far as to islamise the state by a further constitutional amendment to make Islam the state religion by the famous eighth amendment. Under article 2A, it declares:

> The state religion of the Republic is Islam, but other religions may be practised in peace and harmony in the Republic.

The part of the eighth amendment which amended article 100 and gave power to the state to decentralise the High Court Division of the Supreme Court was challenged by writ petitions and was declared void by the celebrated judgement

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[22] Pearl, David: 'Bangladesh: Islamic laws in a secular state'. In South Asia Review. Vol.8, No.1, 1974, pp.33-41, at p.33.

[23] Guhathakurta, Meghna: 'Gender violence in Bangladesh: The role of the state'. In The Journal of Social Studies. No.30, 1985, pp.77-90, at p.85.

of the eighth amendment case.[24] However, the other part of the eighth amendment which declares Islam as the state religion, although contested by women's organisations as contravening the Constitution and United Nations Conventions, was not made void.[25] Several women's organisations opposed it, as it would make women more vulnerable to discriminatory laws.[26] To them it was also an attempt to amalgamate religion with politics to strengthen the authority of the orthodox people to police women's behaviour.[27] It was also reported that the women's organisations were arguing that the Amendment is taking away the spirit of the liberation movement and the guarantees of freedom of speech, thought and women's rights of independent Bangladesh.[28] The women's organisations were fearing that this amendment will strengthen the orthodoxy of religion, putting them back in seclusion.

Overrall, the constitutional framework of Bangladesh purports to protect the rights of women, but it does not go

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[24] See for details, Anwar Hossain Chowdhury v Bangladesh and Others C.A. No.42 of 1988, Jalaluddin v Bangladesh and Others C.A. No.43 of 1988 and Ibrahim Shiekh v Bangladesh and Others C.P.S.C.A. No.30 of 1989 arising out of Writ petitions No.1252, 1176 and 1283 of 1988; 'Constitution 8th Amendment case judgement'. In Bangladesh Legal Decisions. Dhaka 1989 (special issue).

[25] Kabeer (1989), p.32; White (1990), p.95.

[26] An active women's organisation called 'Naripokho' challenged this part of the amendment in the court but was not successful. Other organisations, such as Mahila Parishad, Democratic Forum, Hindu Boidho Aiko Forum also argued against it.

[27] Kabeer (1989), p.32.

[28] Holiday. 19.4.88.

far enough, nor do the constitutional guarantees mean much in the private sphere.

4.3 The personal law system and women's rights

The legal system of Bangladesh consists of the general law and the personal or the family law of the religious communities. The diversity of this system was created by interference from the British colonial rulers and codification of the general law (for details see chapter 3 above). Personal laws based on religion are the only laws which are different for different communities. All other laws are supposed to be common for all citizens under the Constitution. While as we saw, the Constitution ensures equality of the sexes only in a formal sense, the disparity of the sexes can be felt more in the religious family laws which are the main focus of this study. Why does the constitutional protection of equality of sexes not extend to family law? This is a central controversy in all South Asian laws. However, it is not the main focus of the present thesis. While, there is much literature on this issue in India.[29] A brief attempt is made here to understand the problem in the context of Bangladesh. First of all, the Constitution of Bangladesh states under article 149 that all existing laws shall continue to have effect

[29] See for details Mahmood, Tahir: Personal laws in crisis. New Delhi 1986, pp.3-48, at p.21.

but may be amended or repealed by laws made under the Constitution. Thus, the personal laws as existing laws continue to have effect and it is doubtful whether the Constitution can override the personal laws. Secondly, the constitutional clause of sexual equality [under article 28(2)] only applies to the public sphere and is not applicable to the private sphere. Thirdly, personal laws can not be considered inconsistent with the Constitution when one of the fundamental rights [under article 28(1)] provided by the Constitution is that the state shall not discriminate against any citizen on the ground of religion. This provision ensures freedom of religion and also safeguards the personal laws based on religion. Fourthly, the directive principles of state policy, fundamental for the governance of the country, although not judicially enforceable or justiceable, do give preference to the religion of the majority of the population. As we saw above, by the Proclamation Order No.I of 1977 under president Ziaur Rahman, Bangladesh has emphasised the element of Islam. Article 8 states,

> (1) The principles of absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice, together with the principles derived from them as set out in this part, shall constitute the fundamental principles of state policy.
>
> (1A) Absolute trust and faith in the Almighty Allah shall be the basis of all actions.

This shows that the Constitution itself is biased towards religion. Under article 7 it is stated that it is the supreme law of the land and any law which is

inconsistent with it shall be void.[30] The Constitution is the supreme law as it reflects the will of the people and all laws are to be tested on the touchstone of the Constitution.[31] Finally, article 26 of the Constitution provides that all laws inconsistent with the fundamental rights shall be void. But there are discriminatory laws in the personal law system which are inconsistent with the fundamental rights. Will the Constitution make those laws void? No attempt has as yet been made to examine whether this differential treatment offends against the provisions of the Constitution.[32] However, it will be against the fundamental principles of state policy and fundamental rights to abrogate the personal laws of the different communities.

Gender equality in the Constitution of Bangladesh also has some adverse effects. Thus it became obvious, while analysing the family law cases, that the judiciary are upholding the Constitution, especially the equality clause, in restitution of conjugal rights cases. This can be used to refuse husbands to force wives to continue marital life without their desire, but vice versa it is acting against the women's interests, as wives also could not force their

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[30] For a discussion on the supremacy of the Constitution of Bangladesh see, Monsoor, Taslima: 'Supremacy of the Constitution'. In The Dhaka University Studies-Part-F. Vol.2, No.1, June 1991, pp.123-135.

[31] Ibid., p.135.

[32] See in detail Ahmed, Sufia and Jahanara Choudhury: 'Women's legal status in Bangladesh'. In Women for Women: Research and Study Group (ed.): Situation of women in Bangladesh. Dacca 1979, pp.185-331.

husbands to continue marital life (see for details below, p.251).

The whole matrix of these problems lies in the complex system of laws in Bangladesh. While the minority laws have been marginalised, potential conflicts arise between the majority Muslim personal law and the general state law. The Muslim personal law in the new state also partly constituted a legacy inherited from the British Indian and Pakistani period, made applicable to Bangladesh by the Bangladesh (Adaptation of Existing Bangladesh Laws) Order, 1972. Moreover, the personal law system of the Muslims with regard to marriage, divorce and succession is generated by Islamic law, whose application is regulated by the Muslim Personal Law (Shariat) Application Act 1937 (see above, p.117). But in matters of wills, legacies and adoption under section 3 of the Muslim Personal Law (Shariat) Application Act 1937 the Muslims of Bangladesh are subjected to local custom and usage, unless a person declares that he or she should be subjected to Islamic law. There has been no amendment to the Act. The West Pakistan Muslim Personal Law (Shariat) Application Act 1962 which amended the 1937 Act, did not extend to erstwhile East Pakistan and present Bangladesh.[33] It was never much publicised that in Bangladesh life estates may be created in favour of Muslim women under the customary law, or

[33] See above, p.121. See also Mahmood, Tahir: Family law reform in the Muslim world. Bombay 1972, p.247; Mahmood, Tahir: 'Personal laws in Bangladesh-a comparative perspective'. In Journal of the Indian Law Institute. Vol.14, No.4, pp.583-589, at p.586.

testate succession may be opened in favour of women, as such settlements are still lawful in Bangladesh. This might reduce the disparity of traditional Muslim law with regard to intestate succession. Moreover, there are differences of the local law within Bangladesh; in particular the tribal matrilineal laws are more sympathetic to women than the local patrilineal law. There is much scope for further study on this. Thus, the personal law system of Bangladesh is not only based on Muslim law but also on customary or local law, which may be utilised to benefit women who have unequal rights in the traditional Muslim law. At the same time, generally, customs can be shown to disadvantage women (see above, p.44).

In the field of Muslim personal law there have been many reforms in Bangladesh (for details see below p.194). But for the minority laws, the British colonial enactments or even pre-British laws are retained in the personal laws of the Hindus, Christians, Buddhists, Parsis and Sikhs. Even for the Hindus who are the largest of the minority communities (nearly 13% of the whole population) the personal law is outmoded and in need of reform.[34]

There is a recent trend in Bangladesh to take steps for uniformity of all personal laws by introducing a Uniform Family Code. Women's organisations are very active in this regard. As we saw, there is no provision in the

[34] Menski, Werner F. and Tahmina Rahman: 'Hindus and the law in Bangladesh'. In South Asia Research. Vol.8, No.2, Nov. 1988, pp.111-113; Sobhan (1978), p.32; Choudhury and Ahmed (1980), p.33.

Constitution of Bangladesh like article 44 in India to secure for the citizens a Uniform Civil Code. In Bangladesh the omission in the Constitution of a directive to introduce a Uniform Civil Code provides the constitutional authority for the continuation of the present system.[35] It has been argued that the scope for uniformity of family laws in Bangladesh is more than in India because of its greater homogeneity and compactness.[36] But the possibility for uniformity of family laws in Bangladesh is also doubtful. The reforms of family law in Bangladesh as analysed in this thesis suggest that the country is heading towards a new model of uniformity of procedural law and not uniformity of the substantive law of the different communities (see below, p.195).

The reforms made in Muslim family law in Bangladesh did not go outside the periphery of the Islamic framework. This keeps the equilibrium between society and law. The emphasis, therefore, must now be on the improvement and enforcement of the existing personal laws and, thus, on providing gender equity.

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[35] Pearl (1974), p.34.

[36] Menski, Werner F.: 'The reform of Islamic family law and a uniform civil code for India'. In Mallat, Chibli and Jane Connors (eds.) Islamic family law. London 1990, pp.253-293, at p.289.

4.4 Reforms to family law in independent Bangladesh

This part of the chapter gives a general overview of all the family law reforms in independent Bangladesh which aimed to enhance the legal status of women in Bangladesh. In the next section of this chapter, we analyse in detail the reforms regarding the establishment of Family Courts in Bangladesh, exploring whether the aims or intentions of the law makers to ameliorate the status of women were achieved.

The development of family laws in South Asia shows generally that the aim of reforms was not so much to emancipate women but that concern with religious politics has been dominant. The personal law system of Bangladesh has seen hardly any substantial change in contrast to the changes in the general law regarding violence against women, dowry, cruelty and the establishment of Family Courts. Men as law makers have been blamed for not making substantial reforms in the discriminatory features of the religio-personal laws, as this would weaken their own interests.[37] In fact the major portion of family law reforms made in Bangladesh was in the general law effecting all the communities. Legislative enactments in Bangladesh have been made on the issues of restraining dowry by the Dowry Prohibition Act, 1980, prohibition for cruelty to women by the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 and establishment of Family Courts by the

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

Family Courts Ordinance 1985 which are general law affecting all communities. Only the issue of registration of marriage and divorce has been tackled for the majority of the population by the Muslim Marriages and Divorces (Registration) Act, 1974. However, there is a demand for registration of marriage and divorce in all communities as it is becoming more widely recognised that non-registration works against the interests of women. This might be regarded as a modified version of achieving uniformity of family laws in Bangladesh. We are regarding it as a better method of uniformity as it does not generate agitation, conflict and tension in the communities concerned because only procedural uniformity is effected, while substantive rights are not curtailed.

The legal reforms of family law in Bangladesh have also included many amendments to existing legislation. Prominent among them are the Child Marriage Restraint (Amendment) Ordinance, 1984, the Dissolution of Muslim Marriages (Amendment) Ordinance, 1986, the Dowry Prohibition (Amendment) Ordinances of 1982, 1984 and 1986, the Cruelty to Women (Deterrent Punishment) (Amendment) Act, 1988, the Muslim Family Laws (Amendment) Ordinances of 1982, 1985 and 1986, the Muslim Marriages and Divorces (Registration) (Amendment) Ordinance, 1982 and the Family Courts (Amendment) Act 1989. If the purpose of some of these amendments was to give more protection to women, this was not achieved completely, but attempts have been made to make the Acts and Ordinances more effective. The amendments

of these Acts will be discussed in chapters 5 and 6 below when the respective areas of the law will be analysed.

In Bangladesh the ambivalence of the government to enhance the rights of women under family law can be gathered by analysing the different Acts and Ordinances, which were enacted at different times. On the surface, the Acts show that they are ameliorating the status of women. But in fact, in social reality, the legislature could not put themselves out of the patriarchal interpretation of the laws. For example, there are still no laws which state that the minimum age of marriage of males and females are at par; girls have always an earlier age of marriage. However, laws enacted after independence to enhance the position of women signify that the legislature is now more sympathetic to women. On the other hand, there is a growing reluctance against the effective implementation of such laws. The main obstacle that lies in the way of the practical application of the legal rights of women in Bangladesh is primarily the inherent contradiction of attitudes that persist in a male-dominated society.[38] Thus, whatever legal rights women may have officially, they are not necessarily being recognised by the society.

The Dowry Prohibition Act of 1980 which forbids or prohibits anyone from demanding, giving or taking dowry is the most noteworthy of the reforms in family law in Bangladesh. But inspite of this legislative move dowry still remains a major cause of domestic violence against

[38] Ahmed and Jahanara (1979), p.287.

women in the country. Perhaps, if the Act had prohibited dowry by making it void its effectiveness could be enhanced. The scrutiny of the case law suggests that the law is not being properly implemented (see chapter 6, below).

The Cruelty to Women (Deterrent Punishment) Ordinance, 1983 seeks to deter serious forms of cruelty to women with severe punishment. This Ordinance punishes a person with imprisonment for life or provides death penalty for kidnapping or abducting women, trafficking in women and attempting to cause death or for committing rape. Because of lack of data it seems that it cannot be analysed whether this deterrent punishment is of any help to reduce crimes against women. Moreover, the Acts did not always introduce completely new ideas. For example, the Cruelty to Women (Deterrent Punishment) Ordinance of 1983 merely repeated the prohibition of certain offences already prohibited in the Penal Code of 1860. However it enhanced the punishments and tied them to other offences committed against women. Similarly the Family Courts Ordinance of 1985 (discussed in detail below, pp.210) did create Family Courts with special procedures and lesser formalities but relied on the existing Assistant Judges Courts and did not create separate Family Courts. The Family Courts could not try all the issues of family law, which created confusions and inconsistencies (see below, p.218). Moreover, although the Family Courts introduced new procedures, it was not a summary procedure moving far away from the adversary system

(see below p.207).

It is not imputed here that the laws did not enhance the position of women in Bangladesh. Rather, the Acts had little direct impact on women in Bangladesh. However, these Acts also drew public attention to the growth of violence against women and put women's issues more firmly on the national agenda. It also reminded the male section of the population of the rights of women, which acts as a deterrent to treat them as chattel. Thus, the reforms are appropriate to the patriarchally dominated legal framework of Bangladesh. The real problem is lack of enforcement of the legal reforms. This shows that the time has come to understand the real needs of women in Bangladesh, which is not to acquire gender equality in family law but to claim their granted rights by achieving gender equity.

4.4.1 The Family Courts Ordinance, 1985

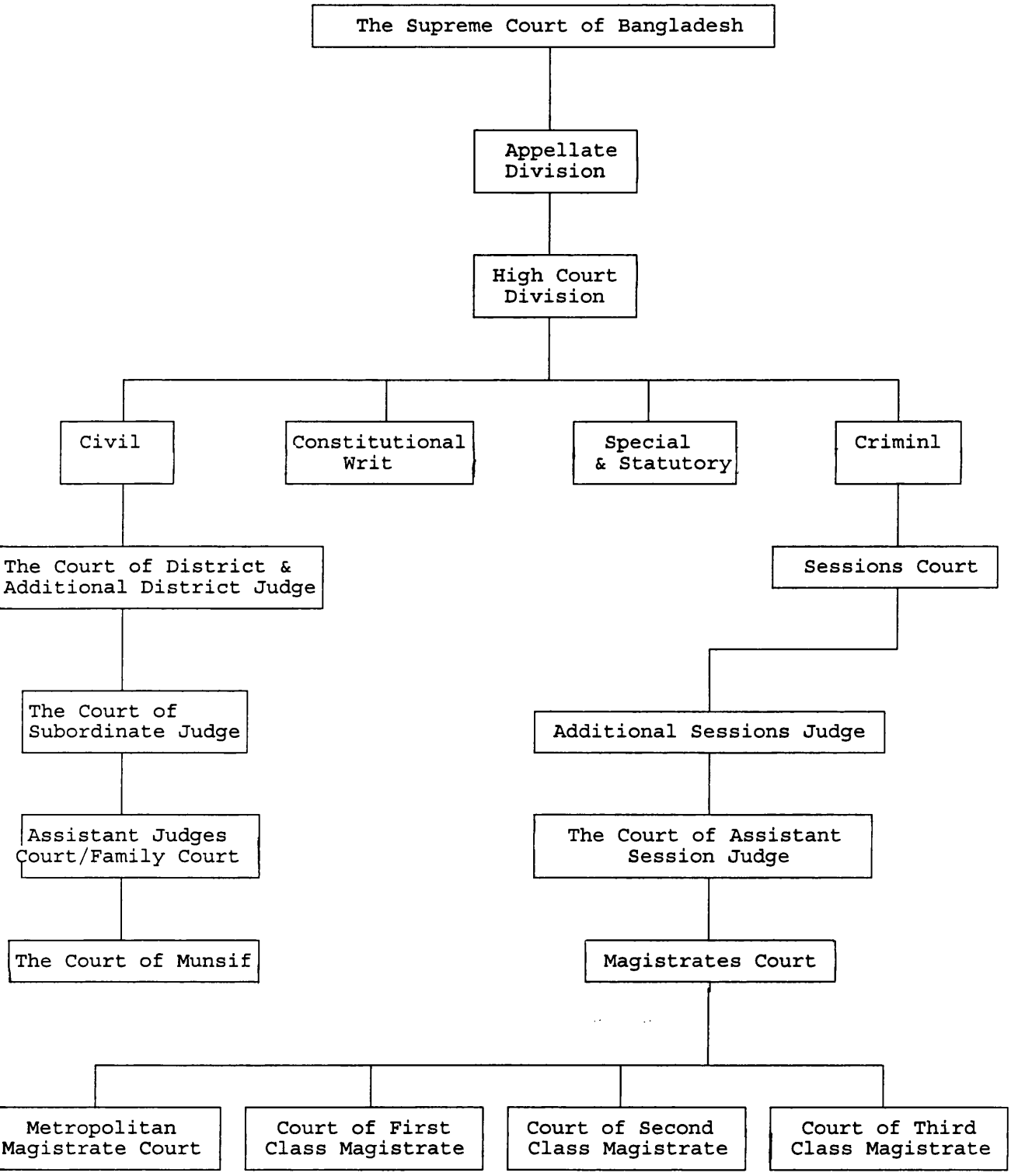
The establishment of Family Courts by the Family Courts Ordinance, 1985[39] was a significant step in legal reforms with reference to the legal status of women in Bangladesh. The concept of family courts was first introduced in America.[40] The idea of Family Courts soon spread and can be found in most American states and also in other countries.

For convenience of understanding, a chart of the hierarchy of the civil and criminal courts in Bangladesh is given below, not only to show the position of the Family Courts in the hierarchy of the court system in Bangladesh, but also to provide an overview of the whole judicial system.

[39] Published in the Bangladesh Gazette on 30.3.1985.

[40] For details see Schaffer, I.D.: 'Family Courts-reconsideration invited'. In Family Law -in the last two decades of the twentieth century. Cape Town 1983, pp.191-212.

HIERARCHY OF COURTS



At the apex of the hierarchy of courts in Bangladesh is the Supreme Court, which is comprised of the Appellate Division and the High Court Division. The Appellate Division hears and determines appeals from the judgements of the High Court Division. The High Court Division decides appeals from the courts subordinate to it. The civil courts under the High Court Division, according to hierarchy, are the Court of District and Additional District Judge, then the Court of Subordinate Judge; the lowest tier in the civil jurisdiction is the Court of Munsif. The criminal courts under the High Court Division are the Sessions Court and the Magistrates Courts, with different tiers within themselves.[41]

In the chart shown above we have emphasised the civil and criminal jurisdiction and have given their hierarchy as we are concerned only with their jurisdiction. But there are also a number of other courts and tribunals of special jurisdiction.[48]

In Bangladesh, the Family Courts Ordinance, 1985 came into effect from 15.6.1985. Under section 4(1) of the Ordinance there were to be as many Family Courts as there were Courts of Munsifs. Thus, under section 4(2) all Courts of Munsifs became Family Courts for the purpose of the Ordinance. This provision has been amended by section 2 of the Family Courts (Amendment) Act, 1989 by which Family

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[41] For the functions of the courts in Bangladesh see Hoque, Azizul: The legal system of Bangladesh. Dhaka 1980, pp.41-57.

[48] For details see ibid., pp.57-64.

Courts are upgraded to 'Assistant Judges Courts'.[49] Thus, all Courts of Assistant Judges shall be Family Courts after the 1989 amendment.

Under section 5 of the Family Courts Ordinance, 1985 the Family Courts will have exclusive jurisdiction to try and dispose of suits relating to dissolution of marriage, restitution of conjugal rights, dower, maintenance, guardianship and custody. Thus, the Family Courts have no jurisdiction to entertain other issues of family law as for instance inheritance, partition, gift or wakf.[50] Further, the jurisdiction of the Family Courts includes only the civil jurisdiction regarding these issues. If any criminal offence arises, it necessarily falls under the Criminal Courts or the Magistrate Courts.

The Family Courts Ordinance under section 5 gave exclusive jurisdiction to the Family Courts to try and determine maintenance cases. But the Magistrates Courts are still entertaining those suits. Thus, at present, there is a controversy whether Magistrate courts still have the jurisdiction to entertain applications claiming maintenance under section 488 of the Criminal Procedure Code, 1898 as the government or the judiciary has not taken any step to resolve it.[51] This needs a detailed analysis of section 5

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[49] Choudhury, Obaidul Huq: Hand book of Muslim family laws. Dhaka 1993, p.2.

[50] Choudhury, Alimuzzaman: The Family Courts Ordinance 1985 and other personal laws. Dhaka 1987, p.2.

[51] Rahman, Md. Mojibur: Muslim o' paribarik ain porichiti. Netrokona 1989, p.65.

of the Family Courts Ordinance, 1985. The section states:

> Subject to the provisions of the Muslim Family Laws Ordinance, 1961 a family court shall have exclusive jurisdiction to entertain, try and dispose of any suit relating to, or arising out of, all or any of the following matters, namely:
>
> (a) a dissolution of marriage
> (b) restitution of conjugal rights
> (c) dower
> (d) maintenance
> (e) guardianship and custody of children.

From the language of the section it seems that the Magistrates Courts have lost their jurisdiction to try cases for maintenance. We could justify our argument by comparing this section with section 5 of the West Pakistan Family Courts Act, 1964. The Bangladesh Ordinance of 1985 is actually an almost identical copy of the Pakistani Act. Section 5 of the Pakistani Act runs as follows:

> Subject to the provisions of the Muslim Family Laws Ordinance, 1961 and the Conciliation Courts Ordinance, 1961 the Family Courts shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in the schedule.

The Schedule comprises:

> 1. Dissolution of marriage
> 2. Dower
> 3. Maintenance
> 4. Restitution of conjugal rights
> 5. Custody of children
> 6. Guardianship.

The only literal difference between the sections is that in the Pakistani Act the Family Courts are allowed to entertain, hear and adjudicate any matter which is described in the schedule. Whereas, by the Bangladeshi Ordinance, the Family Courts are allowed to adjudicate any suit which is described in the section. The term 'suit'

generally and usually means matters of a civil nature and not criminal cases. But the term 'matter' obviously includes civil and criminal cases. From the above argument, as discussed in the judgement of Adnan Afzal v Sher Afzal,[52] it can be gathered that the Pakistani Act has ousted the jurisdiction of the Magistrates Courts to entertain maintenance cases. The Pakistani Act, by a state amendment, has also clarified that the government may invest any judge of a Family Court with powers of a Magistrates Court to make an order for maintenance under section 488 of the Criminal Procedure Code, 1898.[53] Later on, probably to avoid confusion, section 488 of the Criminal Procedure Code, 1898 has been omitted from the Code itself.[54]

In India also the Family Courts Act, 1984 specifically provided that a Family Court has jurisdiction under section 7(2) of the Act over new maintenance cases.[55] Section 7(2) of the 1984 Indian Act states that,

> .....a Family Court shall also have and exercise-
>
> (a) the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal

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[52] PLD 1969 SC 187.

[53] Punjab Act xiv of 1973.

[54] By the Federal Laws (Revision and Declaration) Ordinance, xxvii of 1981.

[55] For details of new cases on maintenance see now Menski, W.F.: 'Maintenance for divorced Muslim wives'. In Kerala Law Times. Journal 1994(1), pp.45-52.

Procedure, 1973 (2 of 1974)....[56]

The Bangladeshi Ordinance has been silent with regard to the jurisdiction of the Magistrates Court to entertain maintenance cases under section 488 of the Criminal Procedure Code, 1898. It is not clear why in Bangladesh the jurisdiction of the Family Courts has not been clarified in the statute itself.

The issue at hand in the context of Bangladesh has not been resolved by the courts of the country either. It could not be argued that Adnan Afzal v Sher Afzal[57] applies in Bangladesh, since Pakistan's West Pakistan Family Courts Act of 1964 only extended to West Pakistan. But in Abdul Khaleque v Selina Begum,[58] the High Court Division of the Supreme Court held that the provisions made in the Family Courts Ordinance, 1985 have ousted the jurisdiction of the Magistrates Court to entertain an application for maintenance as it was a matter to be dealt with by the Family Courts. The underlying reasoning for this, as Justice Abdul Bari Sarkar stated, is:

> The purpose of the Family Courts Ordinance was to provide a speedy forum for disposal of all family matters in the same forum, instead of in different forums both in the civil and the criminal courts as it was before. There will be anomaly and multiplicity of proceedings and practical difficulties will arise, if, in spite of the establishment of the Family Courts by Ordinance No.XVIII of 1985, the Magistrates continued to entertain cases for maintenance u\s

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[56] For details see Sugathan, N.: The Family Courts Act, 1984. Cochin 1992, p.9.

[57] PLD 1969 SC 187.

[58] 42 DLR (1990) 450.

488 CrPC.[59]

It is indisputable that the civil issues falling under section 5 of the Ordinance come under the exclusive jurisdiction of the Family Courts. In Abdur Rahman v Shahanara Begum,[60] it was held that pending cases in any civil court other than the Family Court in matters within the exclusive jurisdiction of the Family Court may continue in that court if filed before the Family Courts Ordinance came into force. It was also decided that there is no bar under that Ordinance to withdraw or discontinue a pending case from any other court and filing a fresh suit for the same relief in the Family Court.[61] The plaintiff-opposite party had found it convenient to file the case in the Family Court. This projects that Family Courts may be more accessible to women, as the Ordinance provided for speedy disposal of cases filed in a Family Court. The object of the establishment of Family Courts for the summary disposal of cases was also made apparent in this case, as the male petitioner was required to pay compensatory cost of 2500 taka to the opposite party for abusing the process of the court by delay and it was also directed that the trial court, i.e. the Family Court, should dispose of the suit within three months and should not grant unnecessary adjournments, as the Ordinance provides for speedy and

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[59] Ibid., p.452.

[60] 43 DLR (1991) 599.

[61] Ibid., p.600.

summary disposal of the cases.[62]

With this objective for speedy disposal of cases, a further Amendment was made to the Ordinance. The Family Courts (Amendment) Act, 1989 made explicit provision for expeditious judgements, emphasising the intention and aim of passing the original Ordinance. Under section 8(i) of the Family Courts (Amendment) Act, 1989 a new provision was added by which the Family Court may, on the prayer of the defendant and for good cause shown, fix another date not beyond 21 days for the presentation of his defence. Under section 9(ii) of the Family Courts (Amendment) Act, 1989, where the plaintiff appears and the defendant does not appear when the suit is called for hearing, only if it is proved that the summons or notice was served on the defendant without sufficient time to enable him to appear and answer on the day fixed for his appearance, the Family Court shall postpone the hearing of the suit to a future date not exceeding 21 days. Further on, section 13(ii) provides that on conclusion of trial, if compromise or reconciliation is not possible, the Family Court shall pronounce judgement either at once or on some future date not beyond 7 days, of which notice shall be given to the parties or their agents or advocates. Thus, it cannot be denied that the amendment was necessary so that family disputes are tried without delay. Whether the cases are disposed of in accordance with the new law remains to be further analysed.

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[62] Ibid., p.601.

The Family Courts Ordinance, 1985 is the only law relating to family matters which offers an opportunity for the conciliatory settlement of disputes. The role of the Family Court judges is of vital importance for attempting such reconciliation between the parties. Similar provisions for reconciliation can be found in India, where the Family Courts Act, 1984 provides under sections 9, 10(3) and 21(2)(c) the procedure to be followed by the Family Court judges for the settlement of disputes.[63] In fact, the Family Court system was rooted in a social welfare philosophy to establish a link between the legal and social sciences.[64] But the Family Courts are courts of law applying legal principles and not a social service bureau which utilises the authority of the law.[65] However, it is compatible for a Family Court to function as a court while at the same time carrying out social objectives so long as those objectives recognize the importance of adherence to legal principles.[66] In the Family Courts Ordinance, 1985 there are clear provisions for the reconciliation of the parties.

Emphasis on the settlement of disputes, if there is any reasonable possibility, is found under section 10 of

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[63] See for details Bakshi, P.M.: 'Family courts judge's role in trial and settlement'. In The Lawyers. Vol.6, No.16, Oct. 1991, pp.16-19, at p.16.

[64] Schaffer (1983), p.194.

[65] Gordon, William C.: 'The family court: When properly defined, it is both desirable and attainable.' In Journal of Family Law. Vol.14, No.1, 1975, pp.1-30, at p.5.

[66] Ibid., p.7.

the Family Courts Ordinance, 1985. According to section 10, after the written statement is filed, the Family Court will fix a date not more than 30 days later for a pre-trial hearing of the suit. In that pre-trial hearing, the Family Court will attempt to effect a compromise or reconciliation between the parties after examining the plaint, written statement, summary evidence and documents under section 10(3). On conclusion of the trial, another attempt is made to effect a compromise or reconciliation between the parties before the pronouncement of the judgement (section 13). Thus, the actual intention of the legislature seems to be that the Family Courts should act as conciliators and mediators for the reconciliation between the parties so that the couple may have a happy conjugal life.

It must be noted here, however, that no evidence of such attempts could be found in the large number of unpublished Family Court judgements which was collected and analysed. Perhaps a more detailed study of the Family Courts procedure could clarify whether the judges are actually trying to reconcile the parties. However, one commentator found that this compromise procedure of the Family Courts is only extending the life of the suit and is an extra burden to the Family Courts where a large number of cases are awaiting disposal.[67]

It was thought that the establishment of Family Courts was a significant step for women's emancipation. It seems

[67] Rahman, Md. Motiur: 'Legal aspects and social problems of Muslim Family Laws Ordinance and Family Courts Ordinance'. In 41 DLR (1989) Journal, pp.21-22, at p.22.

that this is not completely true. As there are really no separate Family Courts and the Assistant Judges Courts which are to act also as Family Courts are already overburdened with cases, they could not take utmost care to handle family issues. In India the Family Courts Act, 1984 established special Family Courts for every area in the state comprising a city or town where the population exceeds one million [section 3(a)].[68] The Family courts of Bangladesh could have been much more effective if they were totally separate courts.

There were provisions in the Family Courts Ordinance, 1985 which were especially helpful to women in Bangladesh, although they may be applicable to both sexes. Under section 11(1) of the Ordinance, a Family Court may, if it deems fit, hold the whole or any part of the proceedings in camera. The Family Court will also hold the proceedings in camera at the request of both parties under section 11(2). This will assist women to maintain their parda or seclusion and will also avoid their fear of social stigma, preventing that their private affairs be open to the public.

Under section 22 of the Ordinance, the court-fees to be paid on any plaint presented to a Family Court were to be a nominal 25 takas for any kind of suit. This certainly has a positive impact on the women of Bangladesh, as less financial burden will give them more accessibility to the

[68] Sugathan (1992), p.4. This has led to calls for more such courts. See Narayan, R. Lakshmi: 'The Family Courts Act, 1984-a critical appreciation'. In Kerala Law Times. Journal 1992 (2), pp.21-24, at p.24.

courts. But the incidental costs of the lawyers' fees, typing etc. are very high and beyond the reach of the general public, let alone most women.

The Family Courts Ordinance, 1985 is a self-contained law, as clear provisions have been made for the institution of suits, issuance of summons, filing of written statement, pre-trial hearing, hearing and execution of decree. The Ordinance does not depend on any other law for its procedure. Under section 20 of the Ordinance, the Evidence Act, 1872 or the Civil Procedure Code, 1908, except for its sections 10 and 11 (stay of suits and res judicata) do not apply to proceedings before the Family Court.

In Md. Maqbul Ahmed v Sufia Khatun and Others,[69] it was held that the Family Courts Ordinance, 1985 is a special law which also provides the procedures to be followed by the Family Courts. The provisions of Order 39 Rule 1 of the Civil Procedure Code, 1908 granting a temporary injunction will not be applicable to such cases. The facts of the above case show that the petitioner (the husband) filed a suit for restitution of conjugal rights in the Family Court at Ramgonj against the wife and others under the Family Courts Ordinance, 1985. The petitioner also filed an application for temporary injunction under Order 39 Rule 1 of the Civil Procedure Code of 1908, restraining his wife from marrying any other person during the pendency of the suit. The wife contended that the husband used to torture her and was a man of loose morals,

[69] 40 DLR (1988) 305.

so that she had no alternative but to sever the marital tie on 29.7.85, notice of which had been served to the husband and the local Chairman of Ramgonj. The Family Court, by its order dated 26.12.85, rejected the petitioner's prayer for an injunction. The petitioner then appealed to the court of the District Judge, who also dismissed the appeal. The petitioner's application to the High Court Division of the Supreme Court was also rejected.

Although the Family Courts could not grant temporary injunctions, they surely could give temporary or ad-interim orders. In Captain Shamsul Alam Chowdhury v Shirin Alam Choudhury,[70] it was decided that since the word 'order' has not been defined in the Ordinance, it cannot be read to mean only a final order. This imputes that the Family Court can also make interim orders.

The Ordinance did not provide in detail how a court will entertain the issues before it. This causes anomalies, as for instance in maintenance it could be said that there is no limit to the amount or quantum of maintenance, as provided under section 488 of the Criminal Procedure Code, 1898. It is shown further below, when the substantive issues are dealt with in detail (see pp.307-309), that this is causing confusion, as the Family Courts can now allow any amount of maintenance. However, this is parallel to Islamic law and advantageous to women as it gives an opportunity to secure an enhanced amount of maintenance, depending on circumstances.

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[70] 43 DLR (1991) 297.

Under section 9(4) of the Ordinance, where on the day fixed for the hearing the defendant appears and the plaintiff does not, the court shall dismiss the suit. An author looked at this provision from the perspective of social reality and argued that, if the plaintiff is the wife who alleges something against her husband, she can easily be threatened in many ways to prevent her from appearing in the court and it is then not justified that her case should be dismissed.[71] It is indisputable that such situation might arise, but Guhathakurta was not aware that under section 9(5) the plaintiff may, within thirty days of the making of the order of dismissal, apply to the court to set aside the order on satisfying the court that there was sufficient cause for her non-appearance and the court shall then appoint another date for proceeding with the suit.

Under section 17 of the Family Courts Ordinance, 1985, an appeal could only be preferred from a judgement, decree or order of a Family Court to the District Judge's Court for specific issues. In Moinuddin v Amina Khan Majlish,[72] it was held that the District Judge's Court being a civil court, the provisions of the Civil Procedure Code, 1908 would apply to the proceedings before it. It was further clarified by the High Court Division of the Supreme Court that there is no scope for thinking that the District Judge's Court referred to in the Family Courts Ordinance is

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[71] Guhathakurta (1985), p.84.

[72] 42 DLR (1990) 483.

a persona designata of a Family Court.[73]

The court of appeal under the Ordinance is not competent to remand a suit to the trial court, i.e. Family Court. It was held in Hosne Ara Begum v Md. Rezaul Karim,[74] that the scheme of the Family Court is quick disposal of a case between husband and wife and for such purpose, under section 20 of the Family Courts Ordinance, 1985, provisions of the Evidence Act, 1872 and the Civil Procedure Code, 1908 have been excluded. The court of appeal can only decide the appeal and has no power to send the case on remand to the Family Court.[75]

Appeal as provided under section 17 of the Ordinance is only allowed in cases of dower which exceed 5000 taka and for dissolution of marriage on the ground of cruelty under section 2(viii)(d) of the Dissolution of Muslim Marriages Act, 1939 and not on any other grounds of dissolution of marriage under the Act. This is a limitation which should be altered. It is discouraging women to bring suits for the dissolution of marriage on all other grounds, as the verdicts of the Family Courts are final and cannot be challenged in higher courts, whereas on other issues of family law which are not dealt within Family Courts, women have the opportunity to appeal. This also projects the hidden agenda that issues concerning women are finally decided, with certain exceptions on questions of dower and

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[73] Ibid., pp.484-485.

[74] 43 DLR (1991) 543.

[75] Ibid., p.546.

cruelty, at the lower end of the judiciary. This shows that these vital issues of women and family are not given adequate importance as the higher courts are only concerned about those cases which could be challenged. It should be mentioned that there is no provision of second appeal or revision to the High Court, so that conflicting decisions on the same issue do not have any platform to be resolved. Because of this limited scope for appeal some conflicting decisions are already remaining unresolved. The most affected areas are, significantly, maintenance and dower (see in detail chapter 5 below, pp.286-289 and 307-310). Thus, in one sense the decisions of the Family Courts (except where there is scope for appeal) can be regarded as the law. But what happens when different Family Courts have different decisions on the same point, depending on the facts and circumstances of the case? Then what is the law? Thus, there must be some scope for appellate jurisdiction erecting precedents for the Family Courts to be followed.

It is interesting to unravel the fact that Bangladesh actually has got some kind of uniformity of laws in family law, as the whole spectrum of the family issues of all the communities falls under the same Family Courts under the Family Courts Ordinance, 1985. Although the Ordinance does protect, under sections 5 and 23, the Muslim Family Laws Ordinance, 1961, it is not necessarily an Ordinance for only the majority of the community, i.e. the Muslims. The Ordinance is concerned with the family law issues of all the communities. But by protecting the law of the majority

of the community only and overriding all other laws under section 3 of the Ordinance it has caused not only unfairness but many anomalies.[76] Thus, in the Divorce Act, 1869, a divorce decree requires under section 17 confirmation of the decree by the High Court. But the Family Courts Ordinance, 1985 gave exclusive jurisdiction to the Family Courts under section 5 to try and entertain these issues without any confirmation from the higher courts. This seems to be an interference with the minority law, but not the majority law.

It has been provided under section 23(2) of the 1985 Ordinance that a divorce decree passed for a Muslim marriage can not escape the formalities and procedures under the Muslim Family Laws Ordinance of 1961. This makes the procedure more elaborate for Muslims, although it seems that they have two options. For example, after one obtains a decree for the dissolution of marriage from the Family Court it is sent to the Chairman of the Arbitration Council under the Muslim Family Laws Ordinance, 1961 to complete the necessary procedure.[77] But controversies arise when there is a conflict between the two official laws. For instance, a marriage which could not be dissolved in the Family Court may be validly broken under the Muslim Family Laws Ordinance of 1961 or vice versa. However, there are

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[76] Chaklader, A.H.: 'Is the Family Courts Ordinance, 1985 another name for statutory quixotism?'. In 38 DLR (1986) Journal, pp.19-21, at p.19.

[77] Ibid., p.20; See also Haq, Md. Nurul: Paribarik Adalot ain o' alochona. Dhaka 1990, p.118.

situations where a man just follows talaq-al bida, i.e. pronounces three talaqs in one sitting and does not follow the official law (see for details below, p.259).

A real problem arises when the decree of the dissolution of the marriage has been sent to the Chairman of the Arbitration Council within seven days of the passing of the decree under section 23(2) of the Ordinance to proceed as an intimation of talaq, the wife appeals to the District Judges Court and the decree is set aside by the Appellate Court. Will the marriage be dissolved under the Muslim Family Laws Ordinance of 1961? Or will the parties continue to lead a marital life according to the Appellate Court's decision? Such controversies arise as there is no provision in the Ordinance requiring the Chairman of the Arbitration Council to wait for the judgement of the Appellate Court. Moreover, by providing for an appeal under section 17 only for the ground of cruelty [under section 2 (viii)(d)] of the Dissolution of Muslim Marriages Act, 1939 and dower the minority communities do not have any relief of appeal under the Family Courts Ordinance, 1985 for dissolution of marriages for cruelty, which is unfair to the members of other religions. For this reason some argue that the Family Courts Ordinance, 1985 is intended for the Muslims only.[78]

From the above discussion it is sufficient to understand that the Family Courts Ordinance of 1985 is a beneficial enactment, but its effectiveness must be made

[78] Rahman (1989), p.22.

viable by enlarging its scope to allow other reliefs concerning women, with a right of appeal on all issues to the higher courts. The analysis of the provisions as a whole suggests that the Ordinance brought only procedural changes and did not effect any substantive rights. It is, however, opening a new avenue for creating uniformity of the family laws in Bangladesh (see for details above, p.195).

The Family Courts have exclusive jurisdiction of the issues described in the Ordinance and can entertain no other issues. It is suggested that a separate and independent Family Court should be established which should deal with all family and personal matters. The Family Court should have two jurisdictions, one civil and the other criminal, so that all the issues could be handled by it, expanding the limitations of issues given under the present section 5 of the Family Courts Ordinance of 1985. At present, dowry or cruelty to women still fall under the jurisdiction of Magistrates Courts.

The consolidation of jurisdiction over all family-related issues into one court would benefit the litigants, legal practitioners and the court system itself.[79] It was recommended in a workshop on the Uniform Family Code that the power given to the Magistrates Courts under section 488 of the Criminal Procedure Code, 1898 to entertain maintenance cases should be transferred to the Family

[79] Gordon (1975), p.10.

Courts.[80] This could solve the issue whether the Family Courts are entitled to try and entertain maintenance cases. Giving also criminal jurisdiction to the Family Courts will make the process more expeditious.

Where more than one court has jurisdiction over family issues, it often results in inconsistent approaches, delays and discrimination.[81] While in criminal courts the litigants can not claim more than 400 taka for maintenance, in the Family Court there is no limit of maintenance and they can achieve more. Moreover, the Magistrates Courts have the power to issue warrants of arrest to a husband who evades summons or fails to pay maintenance instalment or dower money.[82] But the Family Courts does not have this coercive jurisdiction. Thus, Family Courts should have criminal jurisdiction also to make the whole process more expeditious and easy. This enlargement of the jurisdiction of the Family Courts would certainly enhance the effectiveness of the Ordinance and would help women in Bangladesh to bring out their grievances and to seek protection against violence and economic deprivation by men.

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[80] See Footnote 13 above for details of the workshop.

[81] Gordon (1975), p.11.

[82] Rahman, Shiekh Shamsur: 'Family Court and Muslim family law'. In 40 DLR (1988) Journal, pp.24-26, at p.26.

4.4.2 Overview of the reforms to pre-independence family laws in Bangladesh

We have already discussed the reforms with regard to marriage, divorce and intestate succession and related issues in British India and the Pakistani period (see above, chapter 3); these are applicable in Bangladesh but have been amended after independence in Bangladesh. As such, there are areas of the law in which Pakistani law and Bangladeshi law now differ. The present section gives a brief overview of the reforms made to pre-independence family laws in Bangladesh. This covers some minor amendments about which is not necessary to write in detail in chapters 5 or 6.

In the field of child marriage, the Child Marriage Restraint (Amendment) Ordinance 1984 has increased the legal minimum ages of marriage. The Child Marriage Restraint Act, 1929 had sought to restrain the solemnisation of marriages of children below the age of 18 for the boy and 14 years for the girl. The MFLO 1961, section 12 had raised the girl's age to 16 years. The Amendment of 1984 raised the legal marriage ages for both sexes, for the male to 21 years and for the female to 18 years and prescribed punishments to anyone marrying below that age.[83] Under section 4, substituted by the Child Marriage Restraint (Amendment) Ordinance 1984, the

[83] It is to be noted that this is the same in India since the Child Marriage Restraint (Amendment) Act of 1978.

following is provided:

> Punishment for male adult above twenty-one years of age or female adult above eighteen years of age marrying a child- Whoever, being a male above twenty-one years of age, or being a female above eighteen years of age, contracts a child marriage shall be punishable with simple imprisonment which may extend to one month or with fine which may extend to one thousand taka, or with both.

Under the Child Marriage Restraint Act, 1929 there was a difference between a "child" (female below the age of 14; male below the age of 18) and a "minor" (person of either sex below the age of 18). Under the Act as now amended in Bangladesh, the definitions of "child" and "minor" are identical. A girl below 18 is both a child and a minor, as under section 3 of the Majority Act of 1875 every person domiciled in Bangladesh shall be deemed to have attained majority when he shall have completed the age of eighteen years. But a boy below 21 is a child under the Child Marriage Restraint (Amendment) Ordinance of 1984 and a major from 18 years under the Majority Act of 1875. But the punishment given in the 1929 Act is identical to that in the amended version of the Act of 1984. The difference is that until the 1984 Bangladeshi amendments, the female spouse was not liable to punishment. Now a female spouse over 18 is made liable for punishment if she is married to a man under 21. Thus a girl who has just turned 18 and who is married to a boy a few months short of being 21, commits an offence for which the girl may be jailed and fined, while her husband is not amenable to any punishment, although her parents or guardians would be. This is discrimination against the female section of the population

as they are subject to punishment from an earlier age than the men. Moreover, under section 6(1) of the 1929 Act, which prescribed punishment to the parents or guardians of a minor who contracted a child marriage, it was also specifically provided that no parent who is a woman shall be punishable with imprisonment. This provison is not deleted by the amendment. Thus now the bride over the legal age of 18 years is liable to punishment for marrying a bridegroom under 21 but her mother or mother-in-law are not to be punished by imprisonment.[84] Actually there was no punishment either by imprisonment or fine for the females in the original statute.[85] But now the bride can be imprisoned and fined for marrying a man below the legal age. This penalty on the bride was introduced perhaps as an oversight, or to avoid zina or problems with runaway couples. It looks like a misfired attempt to introduce sexual equality.

Whether a bride should bear such punishment at all in the social context of Bangladesh is an interesting issue. In rural Bangladesh girls are disadvantaged, secluded and are not allowed to have their own independent opinion about whom they will marry, as marriage is often arranged by their parents.

In a village study in Bangladesh it was reported that in the case of a son's marriage his consent is regarded as

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[84] See Caroll, Lucy: 'Recent Bangladesh legislation effecting women'. In Islamic and Comparative Law Quarterly. Vol.V, No.3-4, Sept.-Dec. 1985, pp.255-264 at p.257.

[85] Zafar Khan v Mohd. Ashraf PLD 1975 Lahore 234, at p.235.

necessary but in the case of a daughter's marriage, she is invariably expected to obey her father's decision.[86] However, it is doubtful whether field studies by male researchers talking to men could actually avoid male bias.[87] Moreover, they may have simply failed to reveal the extent to which women have always been able to exercise a certain amount of control, both within and beyond the domestic unit.[88] It appears correct to re-state generally that women of all classes in Bangladesh are subjected to patriarchy; for the rural women the effects will be more oppressive.[89] Thus, it is not reasonable that rural women should bear criminal liability in such cases.

Practically, the Child Marriage Restraint Act of 1929 has never been truly effective, particularly in the rural areas where even today such marriages are quite common, retaining the parda and the honour of the patriarchal family. This shows the schism or dichotomy between law and life.[90] Does this not also reveal that the state by its law

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[86] Taniguchi, Sinkichi: 'Society and economy of a rice producing village in northern Bangladesh'. In Studies in socio-cultural change in rural Bangladesh. No.3, Tokyo 1985, pp.1-78, at p.23.

[87] On this see Donnan, Hastings: 'Marriage, migration and minorities: South Asian ethnography in Ireland-the case of Pakistan. In South Asia Newsletter. No.3, August 1989, pp.5-7.

[88] See Donnan, Hastings: Marriage among Muslims: Preference and choice in Northern Pakistan. Delhi 1988, pp.81-83.

[89] Cain, Mead et al.: 'Class, patriarchy and women's work in Bangladesh'. In Population and Development Review. Vol.5, No.3, Sept. 1979, pp.405-438, at p.432.

[90] Singh, Indu Prakash: Women, law and social change in India. New Delhi and London 1989, p.65.

is unable to change the folkway?[91] However, the raising of ages of marriage in the statutory legislation appears to have had some impact in the upper or middle strata of society, where the indirect effect of giving more education to the girl child has led to higher marriage ages.

A serious obstacle for the effective implementation of the legislation is that a marriage actually solemnised between children is treated as valid by the Child Marriage Restraint Act, 1929 itself as well as under Islamic law.[92] All that is to be feared then is getting caught violating the Act. There is no proper enforcement agency to catch defaulters, nor are people's ages easy to prove where births are normally not registered.[93]

It was held in Mst. Bakshi v Bashir Ahmed,[94] that if a girl below the age of 16 years is married in violation of the Child Marriage Restraint Act of 1929, such marriage does not become void although the adult husband contracting the marriage or the persons who have solemnised the marriage may be held criminally liable. Another lacuna of the legislation is the non-cognizable character of the

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[91] See also Schur, Edwin M.: Law and society-a sociological view. New York 1968, p.127.

[92] See Anderson, Norman: Law reform in the Muslim world. London 1976, pp.103-104; Mahmood, Tahir: Muslim personal law. New Delhi 1977, pp.51-53.

[93] Sobhan, Salma: 'Women's issues in Bangladesh'. In Law Asia. Vol.2, 1982-83, pp. 254-258, at p.257.

[94] 22 DLR (1970) SC 289.

offence, which has been amended in India.[95] Attempts should be made in Bangladesh to amend the law in tune with India to make the Act more rigorously effective. Moreover, it would be highly applauded if special provisions were made for appointing child marriage prevention officers to enforce the legislation, as was done in the Child Marriage (Gujarat Amendment) Act of 1963.

As the legal age for marriage has been raised to 18 years for females in Bangladesh there has been a corresponding change in section 2(vii) of the Dissolution of Muslim Marriages Act, 1939 regarding the 'option of puberty' to the effect that a girl having been given in marriage by her father or other guardian before she attained the age of 18 years, can repudiate the marriage before the age of 19 years. This was done by the Dissolution of Muslim Marriages (Amendment) Ordinance 1986 whose only purpose was to increase the age for the option of puberty [under section 2 (vii)]. What about the cases, however, where a child marriage was contracted by the guardians between 1984 and 1986? Will such a child have the option of puberty? Even though the amendment does not disclose whether it acts retrospectively, there is a case under the original Act, holding that section 2 of the Act applies with retrospective effect.[96]

Finally, the Muslim Family Laws Ordinance 1961 has

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[95] By section 3 of the Child Marriage Restraint (Amendment) Act 1978.

[96] Manak Khana v Mst. Mulkham Banu AIR 1941 Lah. 167.

been amended in Bangladesh in 1982, 1985 and in 1986 but these were really administrative reforms to bridge procedural gaps. By Section 2 of the Muslim Family Laws (Amendment) Ordinance of 1982 the jurisdiction of the Ordinance was extended to Bangladesh. It is curious that this jurisdiction was only clarified after eleven years of independence. Cases in this period already applied the Muslim Family Laws Ordinance, 1961 when it was formally not applicable to Bangladesh.

By section 4 of the Muslim Family Laws (Amendment) Ordinance of 1982, the penalty for polygamy without the permission of the Arbitration Council under section 6(5)(b) was changed from 5,000 Rupees to 10,000 taka, which is its equivalent amount in Bangladeshi currency.

Section 3 (a) of the amending Ordinance of 1982 gave a new definition of the Chairman of the Arbitration Council as:

> 'Chairman' means Chairman of the Union Parishad or Paurashava or a person appointed by the Government in the Cantonment areas to discharge the functions of Chairman under this Ordinance.

The necessity for this change had arisen because of the Bangladesh Local Councils and Municipal Committees (Dissolution and Administration) Ordinance (P.O.7 of 1972), by which the existing local Councils and Municipal Committees of the former East Pakistan were dissolved. This created a procedural gap and certain anomalies arose. Persons were even not punished for entering a polygamous marriage without taking permission from the Arbitration Council, as there was no legal authority from which such

consent might be taken.

In the case of Tahera Begum v Farukh Miah,[97] the Appellate Division of the Supreme Court upheld the decision of the High Court that, as at the time of the second marriage, i.e. in 1975, there was no person or legislative authority to constitute the Arbitration Council from whom the accused was required to take permission for contracting another marriage, he could not be convicted for an offence under section 6(5) of the Ordinance.[98]

Meanwhile, after the judgement of the High Court division in the case of Farukh Miah v Tahera Begum,[99] the Ordinance was amended hurriedly to correct this perceived procedural gap and the Chairman of the Arbitration Council was defined.[100] This Amendment to the Ordinance was actually superfluous, as the Government had in fact, by an Extra-Ordinary Gazette notification on 18th November 1972, appointed the Administrators of Union Panchayat, Shahar Committees and Paurashavas to perform all the functions as provided under the Muslim Family Laws Ordinance of 1961 within their respective areas. The Notification of the Government No. S-1/4R-1/72/532-18th November, 1972 states:

> "In exercise of the power conferred by article 6 of the Bangladesh Local Councils and Municipal Committee (Dissolution and Administration) Order, 1972, the Government is pleased to appoint the

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[97] 35 DLR (1983) AD 170.

[98] Ibid., p.173.

[99] BLD 1981 165.

[100] In Section 3 of the Muslim Family Laws (Amendment) Ordinance of 1982, as cited on the previous page.

Administrators of Union Panchayat, Sahr Committees and Pourashavas to perform all the functions as provided under the Muslim Family Laws Ordinance 1961 and the Rules made thereunder within their respective areas."

The existence of this Notification was only revealed in the case of Ayesha Sultana v Shahjahan Ali,[101] where the Court found that the Government had in fact appointed persons as Chairmen of the Arbitration Council and the husband ought to have taken their permission before contracting the subsequent marriage.

To clear the ambiguity of terms, the Muslim Family Laws (Amendment) Ordinance of 1985 substituted the whole section of definition (under section 2) of 'Arbitration Council', 'Chairman' 'Municipal Corporation', 'Paurashava' and 'Union Parishad. Under section 3 of the Muslim Family Laws (Amendment) Ordinance of 1985, which amends section 6(4) of the original Ordinance, application for the revision of the order of an Arbitration Council would be made to the Munsif and not to the Sub-Divisional Officer. His decision shall be final and shall not be questioned in any court. This projects that the power to settle family disputes is being taken over by the judiciary; it may also reflect failure of the original plan of the Ordinance to settle family disputes at the local level of administration (see above, p.164-165).

By the Muslim Family Laws (Amendment) Ordinance of 1986 a new section was inserted (section 11A) to specify the place of trial. Section 11A states:

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[101] 38 DLR (1986) HCD 140.

> Notwithstanding anything contained in any other law for the time being in force, an offence under this Ordinance shall be tried by a court within the local limits of whose jurisdiction-
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> (a) the offence was committed, or
> (b) the complainant or the accused resides or last resided.

The amendments show that there is a policy of encouraging disputes to come up to the court. The idea to resolve them though the local administration, regarding the courts as the last resort, is fading. This shows that the judiciary are increasingly taking over the local, informal sphere. This indicates that the legal system of Bangladesh is giving more preference to the judicial system than the informal methods. Whether the courts are actually better for the women's cause than the local arbitration remains to be seen when various issues of family law are discussed in detail in the following chapters.

CHAPTER 5

FAMILY LAW AND WOMEN IN BANGLADESH

The aim of this chapter is to assess comprehensively to what extent the legislative enactments in family law, especially on marriage laws and marriage-related issues, have contributed to giving women in Bangladesh better protection from economic deprivation and violence. The laws concerning registration of marriage and divorce, restitution of conjugal rights, polygamy, dissolution of marriage, dower, maintenance, custody and guardianship are analysed in this chapter. The laws concerning dowry and cruelty to women are discussed in detail in chapter 6.

This chapter also focuses on the question whether women in Bangladesh stand to benefit from judicial activism. Along with the trend for more modern legislation in Bangladesh, this indicates a clear manifestation of a new sensitivity in issues involving the welfare of women, particularly protecting them from abuse.[1] One example of such recent judicial activism would certainly be the provocative judgement delivered by Justice S.M. Hussain in

[1] Malik, Shahdeen: 'Saga of divorce women: Once again Shah Banu, maintenance and scope for marriage contracts'. In 42 DLR (1990) Journal, pp.34-40, at p.39.

Nelly Zaman v Giasuddin Khan,[2] where he held that the concept of forceful restitution of conjugal rights by the husband against an unwilling wife has become outmoded and does not fit in with the public principle and policy of equality of all men and women. This might be a consequence of social changes in Bangladeshi society, as women's contribution to the national economy is now being better valued and recognised. However, this outlook of the judiciary is only indicated in a few family law cases and is not a general tendency.

This chapter also seeks to examine, through the analysis of cases, the attitude of the Judges in the Courts of Bangladesh to the question of family law reform. Have the Courts been influenced in their interpretation of the statutory provisions by the patriarchal sentiments of society? How far are the judges achieving an extension of the sphere of sharia to influence the condition of women? It is, therefore, also discussed in this thesis whether the lower courts, specially the Family Courts, are applying the traditional rules or deviating from them to give women more rights.

The fieldwork for this thesis involved collection of unreported decisions of the Family Courts of Dhaka (for details see above, p.23). Before discussing cases on a particular issue, it is useful to demarcate its salient features in Islamic law and its reworking by the modern reforms to know the correct position of the legal matrix

[2] 34 DLR (1982) 225.

within which such family issues are adjudicated and determined in Bangladesh today. It seems accepted that law as an instrument of social change can be analysed by examining the legislation and the judgements of the judiciary to bring about social justice.[3] This will also allow us to consider whether the modern legal apparatus of reforms is finding expression in social reality and how beneficial the modern reforms have been to women in practice.

We have already given a chart of the judicial system of Bangladesh to clarify the hierarchy of the different courts (see above, p.200), with its two jurisdictions, civil and criminal, depending on the nature of the case. The family issues which are of a criminal nature are under the jurisdiction of criminal courts but the civil cases come to the Family Courts. The Family Courts are the Additional Judges Courts under section 4 of the Family Courts Ordinance, 1985 (for details see above, p.202).

The officially reported cases are only cases of the High Court Division or the Appellate Division of the Supreme Court; thus, unless a case goes to the appellate stage, it is not reported. However, the unreported cases are significantly important in family issues as in Family Courts appeals are only allowed in cases of dower over 5000 taka and on the ground of cruelty under section 17 of the Family Courts Ordinance, 1985 (see above, p. 213). The

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[3] Sarkar, Lotika: 'Status of women: Law as an instrument of social change'. In Journal of the Indian Law Institute. Vol.25, No.2, 1983, pp.262-269, at p. 265.

decisions of the Family Courts conclusively determine all issues except those where there is a scope for appeal (see chapter 4, p.214). Thus, unless unreported cases are examined, the effect of the legislation and of judicial interpretation at local level cannot be determined.

5.1. Registration of marriage

Although in Islam marriage is a civil contract and not a sacrament, it is a religious and a sacred covenant.[4] Marriage in South Asia requires many rituals and involves not only the parties or their families but also the community.[5] In Bengali Muslim communities, apart from the legal significance of marriage, the ceremonial requirements involving the community are also indispensable.[6] In this context, marriage can be regarded as a social contract.

The rituals of Muslim marriage in Bangladesh are

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[4] Nasir, Jamal J.: The status of women under Islamic law and under modern Islamic legislation. London 1990, p.3; Esposito, John L.: Women in Muslim family law. New York 1982, p.16; Jung, Mahomed Ullah Ibn S.: A dissertation on the Muslim law of marriage. Allahabad 1926, p.1; Mahmood, Tahir: The Muslim law of India. 1st ed. Allahabad 1980, p.47.

[5] The same effect of customary norm or adl can be found in marriage in Malaysia, see for details, Mat, Ismail Bin: Adat and Islam in Malaysia: A study in legal conflict and resolution. Ph.D. Thesis, Temple University, Ann Arbour 1985, pp.210-216.

[6] The case law on dissolution of marriage in Bangladesh indicates that the main reason for the break-up of marriage is not usually because of the parties themselves, but due to the disagreements between the families.

indisputably influenced by Hindu models. This reflects the impact of tradition on the Muslim community in Bangladesh and illustrates the continuity of local traditions (see above p.44). The rituals of marriage are regarded as an important part of the community's culture and traditions. The comparison of the rituals of Hindu marriage and Bengali Muslim marriage at once show that there are many similarities; especially the gaye holud or the rite of smearing turmeric on the body of the bride and groom seems to be alike.[7] Although the rituals may not have the same significance of religious auspiciousness as in Hindu marriage, they are performed with great respect. In fact, the rituals as performed in public involve the community to recognise the marriage and can be regarded as the social registration of marriage.

This begs the question that when Muslim marriages in South Asia already have religious and social approval, what is the necessity of registration? Is it merely bureaucracy? It is important for a modern state to have accurate information or statistics of its members; to know which members of the population are married and to whom, is one of them. This bureaucratic aim can only be fulfilled by some form of registration of marriage. There is a section of people who reject registration on the ground that it is

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[7] For details of Bengali Hindu marriage rituals see Fruzetti, Lina M.: The gift of a virgin: Women, marriage and ritual in a Bengali society. New Jersey 1982, pp.75-79; On modern developments generally see Menski, Werner F.: 'Change and continuity in Hindu marriage rituals'. In Killingley, S.Y. (ed.) Hindu ritual and society. Newcastle 1991, pp.32-51.

only a bureaucratic set-up for the denial of rights to persons who are co-habiting without marriage.[8] From this perspective, proof of co-habitation should be enough to establish the status of marriage. Indeed, the well-known concept of presumption of marriage comes into play.

Sharia does not prescribe any particular form of marriage ceremony except the essential elements of ijab and qabul, the presence of two witnesses, the promise to pay mahr and the marriage contract or the kabinnama. The contractual agreement between the parties may be made orally, although the Quran recommends important transactions to be in writing. Marriage was also regarded important in the sense of involvement of two individuals for life.[9] There is no need for registration in a Muslim marriage as it is not made obligatory in the Quran or the sunnah.[10] On the other hand, there are no prohibitive sanctions against registration of marriage also.[11] Thus, registration is not a constituent condition to be fulfilled for the validity of the marriage under Islamic law. The requirements of registration are considered to be legal restrictions for various kinds of protection, including prevention of denial of the marriage and establishment of

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[8] Gandhi, Nandita and Nandita Shah: The issues at stake-theory and practice in the contemporary women's movement in India. New Delhi 1992, p.230.

[9] Esposito (1982), p.16.

[10] Mahmood, Tahir: The Muslim law of India. 2nd ed. Allahabad 1982, p.56.

[11] Rahman, Tanzil-ur: A code of Muslim personal law. Vol.i, Karachi 1978, p.88.

paternity.[12] Compulsory registration of marriages appears to be an attempt to check not only child marriages and polygamy but also to confirm whether the parties have capacity to marry and have given proper consent to the marriage. This may prevent the chance of fraud and abuse of the relationship. In a study on divorce in the Rangpur and Dinajpur areas of rural Bangladesh, it was shown that 75% of divorced women thought that as their marriage was not registered, they had been divorced very easily, without any scope for challenging their husbands in the court for payment of dower and maintenance for the iddat period.[13] Registration of marriage is a documentary proof, in the light of which the husband can not avoid paying dower and maintenance, which could in turn prevent divorce by the husband. But the above study reveals that women in rural areas of Bangladesh are simply not aware of the fact that marriage without registration is also enforceable in the court of law. However, the study also found that 25% of the registered marriages also ended in divorce.[14] Thus, registration of marriage is indeed a legal duty but its omission does not affect the validity of the marriage, nor does registration protect women from divorce. There are cases in the Family Courts where the parties may not have

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[12] El Alami, Dawoud Sudqi: The marriage contract in Islamic law-in the shariah and personal status laws of Egypt and Morocco. London 1992, p.83.

[13] Why marriages break up: A study on divorce in rural Bangladesh. (Rangpur and Dinajpur Rural Sevices-RDRS, World Service and USAID) Dhaka 1990, p.15.

[14] Id.

their marriage registered but are married under the sharia. We could not find any cases challenging the validity of marriage where there was no registration. Perhaps the issue did not arise as the people are not aware of registration or they are aware that registration alone cannot give validity to their marriage.

The need and urgency of registration of marriage arises, perhaps, in view of the demoralisation of a society in which religion is no longer sufficient to provide effective sanctions. Society also turns a blind eye to the problem of proof of marriage, especially the need to protect women from being deprived of their rights. Registration of marriage other than being reliable proof of marriages (see case law on Pakistan, above, p.167) ensures legitimacy and strengthens inheritance rights for women and children. A man has less option to deny a marital relationship where there is proof of registration. Further, the frequency of desertion of women could be checked.

In South Asia, registration of marriage is merely prima facie evidence of a Muslim marriage, which may be rebutted by other evidence.[15] Voluntary registration of marriages and divorces was recognised in Bengal as early as 1876 by the Muslim Marriage and Divorce Registration Act of 1876 (Bengal Act 1 of 1876) (see above, p.142). In the case of Imamuddin v Sukkor Ali Mollah and others,[16] it was held

[15] Rahman (1978), p.87.

[16] 26 DLR (1974) 56.

that a very old kabinnama registered under the 1876 Act established the legitimacy of the daughter and such a document could be relied on for such purposes.

In 1961, by section 5 of the Muslim Family Laws Ordinance of 1961, registration of marriages appeared to have been made compulsory and penalties were provided for its contravention (see for details, above, p.160). In Ahmed Mia v Kazi Abdul Motaleb, it was held that it is evident that no marriage solemnised under section 5 can be left unregistered, as this is required by the Muslim Family Laws Ordinance, 1961.[17] But in fact, an early study showed 30% of marriages remained unregistered.[18] The study was based on 577 respondents, consisting of Chairmen, members and secretaries of Union Councils, Marriage Registrars and villagers. The sample was drawn from 32 unions of 8 culturally distinct areas of East Pakistan. A more recent study in two districts of Bangladesh found that only 25% of rural marriages are registered.[19] The unreported cases on issues of family law also showed that in most instances the marriage is held in accordance with sharia and not under a registered deed (see below, pp.290,303 and 304). There is

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[17] 23 DLR (1971) 118.

[18] See Qader, S.A.: 'Modernization of an agrarian society: A sociological study of operation of the Muslim Family Laws Ordinance and the Conciliation Courts Ordinance in East Pakistan'. In Rural Sociology Research Report. No.1, (Bureau of Agricultural, Statistical and Sociological Research, Agriculture University), Mymensing 1968.

[19] Why marriages break up: A study on divorce in rural Bangladesh (Rangpur and Dinajpur Rural Service-RDRS and USAID), Dhaka 1990, p.15.

a need to know better how many marriages are registered in Bangladesh to reflect to what extent the official law, i.e. the Muslim Marriages and Divorces (Registration) Act 1974 is being implemented. This can only be done by detailed fieldwork, which was unrealistic for this study. However, an inquiry of the particulars of the Act and the case-law is attempted below.

In independent Bangladesh, the Muslim Marriages and Divorces (Registration) Act 1974 has superseded the provisions of registration of marriage under the Muslim Family Laws Ordinance 1961 and the Muslim Marriage and Divorce Registration Act (Bengal Act 1 of 1876).

Section 3 of the Muslim Marriages and Divorces (Registration) Act of 1974 made it compulsory to register Muslim marriages in accordance with the provisions of the Act. Contravention of the provision of registration was made punishable under section 5(2) with simple imprisonment for a term which may extend to three months or with fine which may extend to 500 taka or with both.

The Muslim Marriages and Divorces (Registration) (Amendment) Ordinance, 1982 gave a second proviso to section 4 of the Muslim Marriages and Divorces (Registration) Act, 1974 empowering the court to extend, curtail or otherwise alter the limits of any area for which a Nikah Registrar had been licensed. This amendment of the Act is merely bureaucratic as it only defines the jurisdiction of the Nikah Registrar.

The necessity of registration of marriage can be felt

if we examine the relevant cases. In the unreported case of Beauty Begum v Md. Sekander Ali,[20] the defendant had married the plaintiff according to Islamic sharia but he did not register the marriage under section 5(2) of the Muslim Marriages and Divorces (Registration) Act 1974. The Family Court reasoned that the defendant had intentionally avoided to register the marriage. The reasoning behind this, as the court ascertained, was that the defendant had a first wife and did not want to give certainty and rights to the second wife. However, the defendant had given a promise to register the second marriage, which he had not fulfilled for the last fourteen years. Thus, it was held that the defendant was liable to the penalties provided under section 5(2) of the 1974 Act. This shows that men are marrying without any registration to avoid giving rights to women. But there is not enough evidence to ascertain how frequently men are marrying without registration or whether only bigamists are doing it to maintain a dual relationship.

Registration of marriages can also protect other rights of women. The right of divorce by the wife may be strengthened if marriage is confirmed by a registered deed. In the celebrated case of Nelly Zaman v Giasuddin Khan,[21] the right of a wife to exercise a delegated divorce if the power is vested in the registered kabinnama was considered. The terms of the registered kabinnama had two conditions,

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[20] Petition Suit No.564 A-6 of 1988 (unreported).

[21] 34 DLR (1982) 223.

one of mutual recrimination and the other of the husband's inability to maintain her. The court held that as there was sufficient recrimination between the parties, it legitimised the registered right of the wife to divorce. Thus registration of the marriage makes the realisation of the right to divorce much easier.

The right to dower can also be protected from abuse and fraud when it has been expressed in a registered deed. In the case of Anjuman Ara v Md. Abdur Rashid,[22] it was held by the Family Court that when kabinnamas are not registered, the parties can change the amount of dower money. Moreover, it puts an extra burden on the court to ascertain the correct amount. In the above case, the dower money was changed by the husband from 5001 taka to 501 taka. Such abuse may be prevented by registration of the kabinnama. Thus, registration should be the norm of every marriage in Bangladesh, not only for the sake of certainty of the marriage but also to enhance the position of the wife. If unregistered marriages were to be denied judicial relief in the courts, only then would this law be seriously implemented.[23] This was apparently the case in Egypt and Tunisia.[24] But it would be outside the framework of the sharia principles and against the attitudes of Bangladeshi society to make registration of marriage the only proof of

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[22] Family Suit No.9 of 1981 (unreported).

[23] See to this effect, Esposito (1982), p.84; Anderson, Norman: Law reform in the Muslim world. London 1976, pp.103-104.

[24] Esposito (1982), p.90.

marriage.

As the law stands at the moment, registration of marriage is compulsory but is not an essential ingredient without which the marriage can be impaired. While, the state has its own agenda for registration, for women it gives scope for protection and security of documentary evidence, but in practice the current law does not protect women well enough.

5.2 Registration of divorce

The purpose of registration of divorce has not been emphasised in the literature as much as registration of marriage. This does not imply that registration of divorce is not important. In fact, the demand for compulsory registration of marriages of all communities in India has been made together with the demand for registration of non-judicial divorce.[25] The reasoning behind the non-significance for the registration of divorce is not probed into. Perhaps the male law makers are not in favour of making concessions in this area.

In Bangladesh, the provisions under section 6 of the Muslim Marriages and Divorces (Registration) Act of 1974 did not make registration of divorce compulsory. This means that this Act simply re-enacted the provisions of the

[25] Diwan, Paras: Law of marriage and divorce. 2nd ed. Allahabad 1991, p.133.

Muslim Marriage and Divorce Registration Act of 1876 for voluntary registration of divorce. There is no provision in the Muslim Family Laws Ordinance of 1961 or the Muslim Marriages and Divorces (Registration) Act of 1974 for the maintenance of registers of divorces.

Under section 6(1) of the Muslim Marriages and Divorces (Registration) Act of 1974 a Nikah Registrar may register any divorce effected under Muslim law after satisfying himself of the happening of the event, if application is made for such purpose. The Nikah Registrar may refuse to register a divorce and the person or persons who applied for such registration may make an appeal to the Registrar under section 6(4). The order passed by the Registrar is final.

The Nikah Registrar shall not register a delegated divorce or talaq-e-tahweed unless under section 6(3) of the 1974 Act proper documentation is provided that the delegated right has been registered under the Registration Act, 1908 (xvi of 1908) or by production of the attested copy of an entry in the register of marriages showing that such delegation has been made. Men giving talaq do not have to prove any document, whereas women have to go through the procedure of proving the document of delegation. This seems to be an extra burden on women. It is not certain why women are not given the right to effect registration of delegated divorce unless the delegation is registered when the marriage itself is valid without registration under Islamic law. What if this right was given in a kabinnama which is

not registered? If the wife is entitled to her delegated right even when the kabinnama is not registered, then it is not justified that she should bear this extra burden. This elaboration of the procedure goes against women. However, where the Nikah Registrar refuses to register such divorce, the remedy of appeal to the Registrar, provided under section 6(4), also applies.

If the law had provided that a divorce will not be effective unless it is registered, perhaps only then its importance would be felt. But this cannot be possible where there is continuing scope for talaq, and statutory enactment only requires to give notification of talaq to the local Chairman which is an issue under the Muslim Family Laws Ordinance, 1961 (see in detail above, p.162). But legislation may be made by which the Registrars may refuse registration of divorce unless efforts for reconciliation between the husband and wife have been completed.[26] This might mitigate the sufferings of women from the unilateral talaq (see below, p.259) and polygamy (see below, p.252). It has been suggested that the registration of divorce, if made compulsory, with the consent of both parties, will take away the arbitrary and capricious impulses of unilateral divorce by the husband.[27]

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[26] Mahmood, Tahir: 'Progressive codification of Muslim personal law'. In Islamic law in modern India. Delhi 1972, pp.80-98, at p.86;

[27] Minattur, Joseph: 'On the magic of monogamy and similar illusions.' In Mahmood, Tahir (ed.): Islamic law in modern India. Delhi 1972, pp.157-166, at p.164.

Thus, registration of marriage or divorce is not under sharia but is a civil obligation which is regarded by the judges as a requirement of good order which should be fulfilled in the interest of the public.[28] The registration of marriage is seen as compulsory but the registration of divorce remains voluntary. Since the compulsory obligation extends only to registration of marriages and not divorces, failure for registration of divorce does not make the person liable to penalty under the provisions of the Muslim Marriages and Divorces (Registration) Act of 1974.

We could not find any reported or unreported cases on the registration of divorces. The issue of divorce itself is discussed in chapter 5.5 below.

5.3 Restitution of conjugal rights

The early law on restitution of conjugal rights has already been discussed (see above, p.105). It was argued that although this remedy is allowed to both husband and wife, its Anglo-Indian development has strengthened the already strong position of a Muslim husband. However, there are grounds of defence which can be used by the wife to refuse the forced restoration of her conjugal life. Payment of prompt dower is one such defence, which acts as a condition

[28] Layish, Aharon: Women and Islamic law in a non-Muslim state-a study based on decisions of the sharia courts in Israel. Jerusalem 1975, p.191.

precedent to the husband's claim for restitution of conjugal rights.[29] The courts, before the independence of Bangladesh, seemed to be not very appreciative of these defences (see above, p.106). The shift in the attitude of the judiciary can be gathered if we consider the cases reported after the emergence of Bangladesh. After independence, in cases on restitution of conjugal rights, judges have forcefully advanced social welfare arguments against orthodox canonical precepts. The leading example here is Justice S.M. Hussain's potent pronouncement in Nelly Zaman v Giasuddin Khan.[30] He commented:

> A reference to article 28(ii) of the constitution of Bangladesh guaranteeing equal rights of women and men in all spheres of the state and public life would clearly indicate that any unilateral plea of a husband for forcible restitution of conjugal rights as against a wife unwilling to live with her husband is violative of the accepted state and public principle and policy.[31]

This shows that the judges are beginning to use the constitutional provisions of equality to give women more rights in the arena of personal law. In his unprecedented judgement, Justice S.M. Hussain has elucidated dicta of restitution of conjugal rights as not being physically enforceable and executable through any process of law. He stated:

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[29] Shabbir, Mohammad: Muslim personal law and judiciary. Allahabad 1988, pp.104-110; Haq, Mohammed Nurul: 'The effects of legislation and judicial decision on the Muslim law of dower'. In Dhaka University Studies-Part A. Vol.45, No.1, June 1988, pp.93-111.

[30] 34 DLR (1982) 221.

[31] Ibid., p.225.

> It may be specially mentioned that by lapse of time and social development the very concept of husband's unilateral plea for forcible restitution of conjugal rights as against a wife unwilling to live with her husband has become outmoded and does not fit in with the accepted state and public principle and policy of equality of all men and women being citizens equal before law entitled to equal protection of law and to be treated only in accordance with law as guaranteed in Article 27 and 31 of the Constitution of Bangladesh.[32]

This appeared to be the first step to burying the stereotyped conceptions of the wife as property of the husband, beginning to look upon women as human beings having their own rights in marital relationships. This was in consonance with the equality clauses of the Constitution (see above, p.182). However, bringing sexual equality into family law has been creating some confusion (see already above, p.1). Moreover, the constitutional clause of sexual equality under article 28(2) only applies to the public sphere and is not applicable to the private sphere (see already above, p.183). However, the judges of the Family Courts are only applying Article 27 and 31, i.e. that all citizens are equal before the law and are entitled to equal protection of law. The judge further stated, while comparing the equality of men and women, that:

> In the husband's unilateral plea for forcible restitution of conjugal rights as against a wife unwilling to live with her husband, there is no mutuality and reciprocity between the respective rights of the husband and wife, since such plea for restitution of conjugal rights is not available to a wife as against her husband apart from claiming maintenance and alimony.[33]

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[32] Ibid., p.224-225.

[33] Ibid., p.225.

The prayer for the restitution of conjugal rights was not allowed by the court, in the above case, on the ground that the marriage had already been dissolved by the exercise of the right of delegated divorce by the wife.

In a recent decision by the High Court division of the Supreme Court in Hosne Ara Begum v Rezaul Karim,[34] it was rightly observed that the wife has under Islamic law a right to refuse the conjugal rights of the husband if she is treated by him with cruelty or if there is failure to pay prompt dower.[35] Thus, physical and mental torture of the wife was not only held to be an offence punishable with imprisonment and fine but it also gave a valid ground to the woman to refuse restitution of conjugal rights to the husband.

Our analysis of the unreported cases from the Family Courts of the capital city of Dhaka confirms this position. An examination of the unpublished cases clearly reveals that Nelly Zaman's case is being used as a precedent in these lower court cases.

In Alahi Baksh v Rafeza Khatun,[36] a lady judge (Jasmine Anowar) did not allow the plaintiff to restore his conjugal life on the basis of the reasoning given in the judgement of Nelly Zaman v Giasuddin Khan.[37] The Family Court reasoned that the decree will be infructuous if the

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[34] 43 DLR (1991) 543.

[35] Ibid., p.545.

[36] Family Suit No.34 of 1988 (unreported).

[37] 34 DLR (1982) 221.

Court directed restitution of conjugal rights on an ex-parte hearing and will be in contravention of Articles 27 and 31 of the Constitution of Bangladesh.

In Khondakar Shafiqul Huq Masud v Farida Begum and others,[38] the same lady judge did not grant the plaintiff the claim for restitution of conjugal rights on the same constitutional reasoning. The Family Court held that it is out of question to allow the plea if the wife fears death. Further on, the court ascertained that the marriage itself had been legally dissolved by the exercise of delegated divorce by the wife.

In Md. Abdus Samad Khan v Nasima Bilquis,[39] Justice Md. Abdul Momen also directed that the husband was not entitled to get any decree for restitution of conjugal rights as the marriage had already been dissolved by the wife's exercise of delegated divorce.

In Mst. Fatima Begum v Mohammed Golam Hossain,[40] Justice Monjurul Basith did not allow the plaintiff to restore the conjugal rights on the ground that one can not be forced to continue conjugal life. The court, however, ascertained that the marriage between the parties subsisted. The talaq purported to have been given by the husband was not in accordance with the provisions of section 7(1) of the Muslim Family Laws Ordinance 1961. The notice of talaq was given, in the above case, to an

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[38] Family Suit No.18 of 1990 (unreported).

[39] Family Suit No.13 of 1992 (unreported).

[40] Family Suit No.61 of 1991 (unreported).

unauthorised person and not to the persona designata, i.e. the Chairman of the Union.[41]

In Md. Abdul Karim v Muhsina Tabassum,[42] Justice Monjurul Basith did not grant the husband's prayer for the restitution of conjugal rights. The reasoning behind this judgement was also based on the judgement of Nelly Zaman's case that the husband cannot restore conjugal rights against an unwilling wife.

Finally, in Anjuman Ara v Md. Abdur Rashid,[43] the argument of Nelly Zaman's case was upheld by the Family Court when the lady judge, Jasmine Anowar, did not allow the plaintiff to restore her conjugal life. It was also held in this case that the marriage between the parties subsisted as the talaq had not been given in accordance with section 7(1) of the Muslim Family Laws Ordinance 1961. The court granted the claim of prompt dower and maintenance to the plaintiff.

Thus, the unpublished judgements of the Family Court of the Dhaka district with regard to the issue of restitution of conjugal rights indicate that the recent progressive judgements of the higher judiciary have had effects on the lower tier of the judiciary. Our examination of the cases on restitution of conjugal rights shows that there is no gender discrimination to apply the principle that no force can be used to continue one's conjugal life

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[41] For details, see also below, p.255.

[42] Family Suit No.142 of 1990 (unreported).

[43] Family Suit No.97 of 1990 (unreported).

as held in the case of Nelly Zaman. This seems to indicate that these courts are encouraging a modernist approach in the legal culture of Bangladesh. In referring here to whether the judges are male or female, we are not imputing that only the lady judges of the Family Court are pronouncing enlightened judgements. In fact, irrespective of gender, the Family Court judges, at least in cases of restitution of conjugal rights, are bringing modern insights into family law. Thus, restitution of conjugal rights can be used by the wife when the husband denies the wife a divorce which she wants. However, the plea of equality in restitution of conjugal rights cases may also work against women's interests, as wives could also not force their husbands to continue marital life with all its obligations. Thus, deserted and abandoned wives have been losing their remedy to reconcile with their husbands and to continue with their marital life. One could almost go as far as saying that this law underwrites desertion, but this might be an unintended result.

5.4 Polygamy

Polygamy in Islamic law is a qualified right by which a Muslim man is permitted to marry up to four wives.[44] Recently there has been a lively debate about whether the right was allowed as a general rule or as an exception for natural calamities.[45] It has been argued already that the permission to have polygamous marriages abuses women and their rights (see for details, p.149). In the Pakistani period, by the promulgation of the Muslim Family Laws Ordinance 1961, the right of polygamy has been curtailed by providing some form of administrative assent before a second or subsequent marriage (see for details above, p.161).

In Bangladesh, too, in accordance with the Muslim Family Laws Ordinance 1961, before a man marries for a second or subsequent time, he must obtain the permission of the Chairman of the local administrative body, i.e. Chairman of the Union Parishad, Pourashava or administrator of the Municipal Corporation. The Arbitration Council, comprising such Chairman of the local administrative body and representatives of both parties, can only allow the husband to remarry if the members are satisfied that the

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[44] Faiz, Badruddin: Muslim law. Bombay 1968, p.46; Pearl, David: A textbook on Muslim personal law. London 1987, 2nd ed. pp.77-78.

[45] See above p.149, footnote 243 for the relevant details.

marriage is just and necessary as required under section 6(3) of the Ordinance. In considering whether a second or subsequent marriage is just and necessary, the Arbitration Council is bound by the rules of the Ordinance and the provisions of the Muslim Family Law Rules, 1961.[46] The courts of Bangladesh are also permitting a second or subsequent marriage only on the general ground that it is just and necessary. In Makbul Ali v Munwara Begum,[47] it was noted by the court that the Ordinance did not prohibit polygamy but allowed it under certain circumstances.[48] The court enumerated the grounds as referred to in the Rules of the Ordinance. Among these grounds, physical and mental infirmity of the existing wife or wives are the primary ones which allow a Muslim husband to remarry. It remains a fact that the husband has to justify his claim through the permission of the Arbitration Council. However, sometimes the procedural impediment of taking permission from the Arbitration Council itself is becoming the principal obstacle in reducing polygamy. In Tahera Begum v Farukh Miah,[49] the Supreme Court did not punish the accused for contracting a second marriage without the permission of the legislative authority in the misconception that there was no authority from which he could have obtained such

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[46] For details see above, p.161. For the full text of the Rules see Appendix V.

[47] 39 DLR (1987) 181.

[48] Ibid., p.183.

[49] 35 DLR (1983) Ad 170.

permission. This shows the lack of link between legislature and judiciary (see for details, above, p.226). In Ayesha Sultana v Shajahan Ali,[50] the Court held,

> The accused respondent having taken the second wife without the permission of the Arbitration Council the offence under section 6(5)(b) of the Muslim Family Laws Ordinance, 1961 was committed by him.[51]

The cases on polygamy indicate that Muslim husbands in Bangladesh may be punished if they do not follow the procedure of the Ordinance regarding the required permission from the Arbitration Council under section 6(5). In the case of Ahmad Mia v Kazi Abdul Motaleb,[52] one of the first cases on this issue, it was decided by the court that the contracting of a second marriage during subsistence of the first marriage without permission, as required under section 6(5) of the Ordinance, is liable to be prosecuted.[53]

In the case of Abul Basher v Nurun Nabi,[54] the High Court division of the Supreme Court described the intention of the law-makers to insert the section on polygamy in the Ordinance when it stated:

> It seems that the legislative intent of section 6 of the Muslim Family Laws Ordinance, 1961 is to restrict the practice of polygamy and to permit it only in cases where it appears reasonable to the Arbitration Council.

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[50] 38 DLR (1986) HCD 140.

[51] Ibid., p.143.

[52] 23 DLR (1971) 118.

[53] Ibid., p.120.

[54] 39 DLR (1987) HCD 333.

In the above case the High Court referred the case back to the trial judge for determining whether the husband had obtained the requisite permission from the Arbitration Council before contracting the second marriage. This indicates that the judges are emphasising that the permission of the Arbitration Council is mandatory.

The unreported cases of the Family Courts of Dhaka reveal that the root cause of nearly all the cases for restitution of conjugal rights and realisation of dower and maintenance lies in polygamy. In Mst. Fatima Begum v Mohammad Golam Hossain,[55] the plaintiff wife prayed for the restoration of her conjugal life as her husband had married again and neglected her. The Family Court did not allow the plaintiff to have her conjugal rights restored as no one can force anybody to lead a conjugal life, but ascertained that the marriage subsisted. Thus, the new law, as we saw, can also work against women and protect men. Moreover, suits for restitution of conjugal rights usually arise to control women. Whenever the wife gives divorce to her husband, he challenges it by filing a suit for restitution of conjugal rights.[56]

In Mst. Angari Begum v Md. Iqbal Rashid,[57] the plaintiff wife prayed for the realisation of prompt and deferred dower on the ground that her husband had married

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[55] Family Suit No.61 of 1991 (unreported).

[56] An example would be Khondakar Shafiqul Haq Masud v Farida Begum and others, Family Suit No.18 of 1990 (unreported).

[57] Family Suit No.61 of 1991 (unreported).

for the second time without the requisite permission from the Arbitration Council. The court granted the plea.

Scrutiny of the cases reveals that the Islamic prerogative right of the husband to marry for a subsequent time has been curtailed by applying the provisions of the Ordinance. The Ordinance did not directly effect the substantive rights of the husband but circumscribed that right by imposing technical and procedural impediments. Earlier, the provisions of the Ordinance failed usually to provide any real results, perhaps because the Arbitration Councils, composed usually by males, were very often not unwilling to give permission to remarry although it was merely a formality.[58] Thus, a man marrying for a second time only needed to apply to the Arbitration Council for consent. But now, if the Arbitration Council does not give consent and a man marries for a second or subsequent time, he is liable to be prosecuted and punished. Moreover, the wife can claim her full dower and can also dissolve the marriage, under section ii(a) of the Dissolution of Muslim Marriages Act of 1939, if the husband has taken an additional wife without permission.

There is no evidence that violations of such procedure can make the second marriage void.[59] From the cases on polygamy it is evident that even though the husband does not seek permission from the Arbitration Council, the polygamous marriage is valid. Thus, the statutory

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[58] Ahmed and Jahanara (1979), p.304.

[59] Sobhan (1978), p.24.

impediments are not enough to safeguard wives from the husband's unlimited polygamous marriages. In the Hindu community in Bangladesh too, the practice of polygamy is not uncommon; moreover, there is no statutory barrier in such cases.

5.5 Dissolution of Marriage

There are, generally speaking, three types of dissolution under Muslim law, dissolution by the death of either party, dissolution by act of the parties and dissolution by judicial process or faskh.[60]

The dissolution of marriage by judicial process or faskh has been discussed when we analysed the Dissolution of Muslim Marriages Act of 1939 (see above, p.122). The dissolution of marriage by an act of the parties has also been discussed before, including later developments in the Pakistani period under the Muslim Family Laws Ordinance of 1961 (see above, p.162).

The judicial developments in Bangladesh regarding dissolution by act of the parties, for example talaq by the husband, show that there are some instances where the statutory enactments, by strictly adhering to the procedural technicalities, are favouring women to continue their marriage. On the other hand, this is putting women in

[60] Fyzee (1974), p.154.

a dilemma, as in the eyes of the official law their marriage subsists but according to Islamic law and the society they are divorced when the husband has pronounced talaq three times in one sitting. The problem arises because of the continuation of the irregular form of talaq known as talaq al-bida, which has been referred to as a deviation from the divine principles.[61] The concern of the Commission of Marriage and Family Laws and later the enactment of section 7 of the Muslim Family Laws Ordinance 1961 was to change this instantly effective form of talaq (see above, p.162), but this was not entirely successful.

Cases of talaq, khula and talaq-e-tahweed are all dissolution by the act of the parties. While the former is the unilateral right of the husband, the latter is the complementary right of the wife where she has to make some sacrifice or depends on the desire of the husband to delegate. The cases of talaq, khula and talaq-e-tahweed in Bangladesh are important to consider whether women are actually deprived of rights granted under Islamic law.

[61] Mir-Hosseini, Ziba: Marriage on trial-a study of Islamic family law, Iran and Morocco compared. London and New York 1993, p.37.

5.5.1 Talaq

In the talaq cases, by rigorously following the procedural technicalities and the precedent of Ali Nawaz Gardezi v Mohammad Yusuf,[62] non-judicial dissolution of marriage by talaq-al-bidah was being disregarded. Without notice to the Union Council or Upazila Chairman, a divorce would not be effective. This remains the official law of Bangladesh.[63] It has also been argued by Western authors that the requirement of notice is mandatory as without it the talaq itself is invalidated.[64] The Family Court decisions in Bangladesh confirm the position that without notice to the Arbitration Council, the talaq will not be effective. As we saw (above p.170) in Pakistan, more recently the Supreme Court has ruled that notice of divorce to a Union Council Chairman under section 7 of the Muslim Family Laws Ordinance, 1961 is against the shariah and the Constitution of Pakistan.[65] Still more recently, further cases have supported this position (see above, p.170). This seems not

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[62] PLD 1963 SC 51.

[63] Choudhury, Obaidul Huq: Hand book of Muslim family laws. Dhaka 1993, p.63; Haq, Md. Nurul: Paribarik Adalot ain o alochona. Dhaka 1990, p.136.

[64] Pearl, David: A text book of Muslim personal law. 2nd ed. London 1987, p.111; Anderson, J.N.D.: 'Reforms in the law of divorce in the Muslim world'. In Studia Islamica. Vol.xxxi, 1970, pp.41-52, at p.51; Hodkinson, Keith: Muslim family law-a source book. London and Canberre 1984, p.223.

[65] Carroll, Lucy: 'Talaq and polygamy: Some recent decisions from England and Pakistan'. In Islamic and Comparative Law Quarterly. Vol.v, No.3-4, 1985, pp.226-245.

to be the position in Bangladesh possibly because there is no express trend of islamisation in family law. It appears to protect women better by following the reforms enunciated by the statutory enactments.

In Mst. Fatima Begum v Muhammad Golam Hossain,[66] the Family Court ascertained that the marriage between the parties subsisted as the talaq given by the husband was not in accordance with section 7(1) of the MFLO.

In Anjuman Ara v Md. Abdur Rashid,[67] the Family Court also held that the talaq of the husband did not affect the marriage as it was not given as required under section 7(1) of the Muslim Family Laws Ordinance, 1961. Thus, the strict interpretation of section 7 of the Muslim Family Laws Ordinance, 1961 protects women officially. But it is not taken into consideration what will happen to such women if in society they are regarded as divorced but in accordance with official law their marriage persists.

In Mst. Roksana Begum v Md. Abdul Khair,[68] the defendant could not prove that he had given talaq to the wife and was liable to pay maintenance. The court did not accept the social fact that he had given talaq in the traditional way, gave more preference to the statutory enactment and regarded it as an incomplete talaq. This has protected the woman, as otherwise she would have been worse off financially. On the other hand, there are a large

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[66] Family Suit No.61 of 1991 (unreported).

[67] Family Suit No.97 of 1990 (unreported).

[68] Family Suit No.96 of 1991 (unreported).

number of occasions where the women are simply deserted or thrown out of their homes. How is the judiciary or the society protecting them? Even when the courts are arguing that these talaqs are incomplete and invalid, the Muslim women in Bangladesh are in a difficult situation as remain unsure about their marital status. In the eyes of the society they are divorced by talaq, but in the official legal system they are not divorced.[69] Thus, the statutory impediment of giving notice to the Arbitration Council sometimes works against women as they may be legally married under the official law but the society does not accept that and considers them as divorced by talaq.

In Md. Kutubuddin Jaigirdar v Nurjahan Begum,[70] as notice had not been served to the relevant Chairman, the talaq was held invalid. The plaintiff-respondent Nurjahan Begum brought this suit against her husband for a declaration that the marriage between her and her husband had been dissolved as a result of the exercise of the delegated power of divorce by her. She also used an alternative prayer that if the court found that the marriage tie between them had not been legally dissolved, then the court should grant a decree for dissolution of their marriage. This is a heavily contested suit which shows the trouble women have to face to free themselves from the marital bond. The facts of the case were that the

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[69] Ahmad, Husna: Divorced yet married: The position of Bangladeshi women between English and Bangladeshi law. LL.M. Essay (unpublished) London SOAS 1991, p.5.

[70] 25 DLR (1973) 21.

plaintiff Nurjahan Begum was married to the defendant Kutubuddin Jaigirdar on 27th July 1965 according to Muslim law. The defendant executed a kabinnama in which the dower amount was fixed at Rs.10,000,00 of which Rs.5,000 was prompt dower; the delegated power of divorce was given to the plaintiff. The defendant's father was against this marriage and drove the couple out of his house and they stayed for some time in the plaintiff's father's house. During this period it was found that the husband was ill-tempered, arrogant and cruel by nature and the life of the wife became miserable due to his assaults and cruel conduct. Their relationship became very strained and finally the husband agreed to divorce her by writing. The talaqnama was registered on 17.6.66. Subsequently, the husband instituted a suit for restitution of conjugal rights and for a permanent injunction purporting to restrain the wife from taking another husband. The court decreed that although the marriage had been dissolved by talaq by the husband, as no notice had been given under sections 7 or 8 of the Muslim Family Laws Ordinance 1961, the marriage bond was still subsisting and the talaq was invalid. An appeal was made by the wife to the Court of District Judge who dismissed the appeal with the modification that the wife should be restrained from marrying for the second time till a valid divorce was obtained. On 21.7.67 the wife exercised her delegated power of divorce and instituted a suit with the prayer to declare that by the exercise of the delegated divorce their

marriage had been dissolved. But the trial court dismissed the suit on the ground that there was no excercise of delegated divorce by the plaintiff and no notice. On appeal, three years later the appellate court terminated the marriage on a new ground, that of khula (see below, p.269). On second appeal by the husband, the court dismissed the appeal with the modification that the decree for dissolution of marriage was substituted by a decree declaring the marriage dissolved by the exercise of the delegated power of divorce by the wife.

This case not only projects the long procedure a woman may have to go through to have her marriage terminated and the confusions existing because of the various forms of divorce in Islamic law, but also the problem of the official law not being accepted by the society. Justice D.C. Bhattacharya himself stated:

> Whatever might have been the circumstances under which the defendant pronounced talaq, it does not appear, on an examination of the said circumstances, that either the plaintiff or her father had ever any doubt as to the effectiveness of the said divorce, as will appear from the fact that the father admittedly arranged a second marriage for his daughter to be solemnised on 30.4.67 and also from the fact that the plaintiff made a statement before the Subdivisional Magistrate of Sadar, Sylhet in a proceeding under the Code of Criminal Procedure, on 25.9.67 that she was unwilling to go with her former husband as she had already been divorced by him. In this context, it is most improbable that a Muslim girl would desire to live with a person who was no longer her husband because of the talaq given by him.....[71]

This part of the judgement proves that whatever are

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[71] Ibid., pp.36-37.

the procedural technicalities of the enactments, the attitude of the people still centers on the talaq al-bidah concept, i.e. whenever a talaq has been pronounced, it is valid per se and is considered final.

The same situation arose in Abdus Sobhan Sarkar v Md. Abdul Ghani,[72] where the absence of notice invalidated the delegated divorce but the decision explained the role of the Arbitration Council in talaq cases. The case was filed under sections 6, 7 and 9 of the Muslim Family Laws Ordinance 1961. The facts of the case were that an application was brought by Abdus Sobhan Sarkar under section 561A of the Criminal Procedure Code, 1898 for the quashing of proceedings in a case pending in the Court of Magistrate at Shirajgonj brought by Md. Abdul Ghani against him and a woman named Shakitannessa. In that case Md. Abdul Ghani complained that Shakitannessa is his legally wedded wife and claimed that Abdus Sobhan Sarkar had married her during the subsistence of their marriage. Abdus Sobhan Sarkar and Shakitannessa filed a petition before the learned Magistrate for dropping the case alleging that Shakitunnessa had married Abdus Sobhan Sarkar after she had divorced herself in exercise of the delegated power of divorce in the kabinnama. They alleged that the delegated divorce was approved by the Arbitration Council which also gave permission to Shakitannessa to marry again. But the Magistrate Court rejected the petition and hence reference was made to the Appellate Court. In appeal the petition was

[72] 25 DLR (1973) 227.

dismissed on the ground that the Arbitration Council had no power to approve the divorce or to permit her to marry again. Justice Sayem stated:

> It will also appear that although sub-section (4) of section 7 provides that within thirty days of the receipt of written notice of pronouncement of a talaq the Chairman is required to constitute an Arbitration Council which is to take all steps necessary for reconciliation, nothing has been said in the section or anywhere else in the Act providing as to what will happen if under receipt of such a written notice of the talaq the Chairman does not constitute an Arbitration Council or if the Arbitration Council so constituted does not take any steps to bring about reconciliation between parties. Failure of the Chairman to constitute an Arbitration Council or that of a duly constituted Arbitration Council to take necessary steps to bring about reconciliation is thus inconsequential.[73]

The court thus, held that as far as talaqs were concerned the Arbitration Council had no function except to take steps to bring about reconciliation between the parties and nothing more. The functions of the Arbitration Council in talaq cases have already been discussed (see above, p.163). It appears that the only required criterion is to give notice of talaq to the Arbitration Council. This procedural impediment is generally working to protect women when they do not desire to have their marriage dissolved. But sometimes it acts negatively, prolonging an unwanted marriage and preventing the woman from marrying again, which has become the cause of untold misery, the consequence of which might be alarming with accusations of zina against the wife.

It appears that there is a brighter side of talaq than

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[73] Ibid., p.229.

other forms of divorce, as the wife is entitled to her dower and sometimes the liability to pay dower may restrain the husband to give divorce. However, the husband may persuade the wife to a khula divorce to evade the payment of dower (see below, p.272). Moreover, usually, even if a husband gives notice to the Chairman, he does not pay the dower or maintenance for the iddat. It was suggested by a lawyer in Bangladesh that the notice of talaq under section 7 of the Muslim Family Laws Ordinance, 1961 should compulsorily accompany a bankdraft payable to the wife for the dower and the maintenance for the iddat.[74] Thus, Chairmen would not accept notices of divorce without dower and iddat money. The suggestion, if achieved, would solve many problems of Muslim women in Bangladesh. On the other hand, men would simply avoid to give notice of the divorce to the Chairman and rely on sharia, or even simple desertion. At present, this area of the law is quite confused and women are not offered the best possible protection.

[74] Rahman, Sheikh Shamsur: 'Family Court and Muslim Family Laws Ordinance'. In 40 DLR Journal (1988) pp.24-26.

5.5.2 Khula

Dissolution of marriage by khula is defined as an agreement between the parties to dissolve the marriage by the wife's foregoing of dower.[75] The 'judicial khul' has abolished the husband's consent criteria (see above, p.136). But the compensation paid by the wife, usually by restoration of her dower, has remained intact.

In khula cases in Bangladesh, the courts are only reiterating the position in Pakistan that the consent of the husband is not a required criterion, as has been done in the celebrated case of Khurshid Bibi v Mohammad Amin.[76] But the judges are using a social argument rather than saying that Khurshid Bibi is a precedent. Perhaps on the basis of Khurshid Bibi, the judges wanted to create a new principle.

In Hasina Ahmed v Syed Abul Fazal,[77] a potent pronouncement has been made by Justice S.M. Hussain that by this khula form of divorce, women now enjoy higher social rights with the change of time. The court stated:

> This divorce by way of khula if not obtained with the consent and agreement between the parties, can, by analogy, be obtained from a Court of law before whom the case of dissolution of marriage is pending.[78]

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[75] Jung (1926), p.52; Rahman (1978), p.513.

[76] PLD 1967 SC 97.

[77] 32 DLR (1980) 294.

[78] Ibid., p.297.

The above case clearly indicates the trend of the judiciary to initiate new egalitarian principles in Muslim family law on the ground of changing situations of the society. The court stated,

> It must be observed that the courts while adjucating on family dispute and administering personal law shall take into account not only the factual and the legal position and questions involved in a particular case but also consider the social dynamics when the concept of law is changing in a changing society. Previously decades before where a wife's claim for a divorce could be resisted for well-established reasons it cannot be resisted for the self-same reason because of the very basic fact that with the changing society women are coming of their own and their independence of mind and will must be respected while considering the legal and contractual obligation in marriage between man and woman as such.[79]

This decision shows that the judge is accepting the new social environment which has brought a change in the attitudes of women in Bangladesh. He wants to see this applied in family law cases. The court held that as the husband had falsely charged the wife with adultery, the wife was entitled to a decree for dissolution of marriage. Moreover, the court held that as the wife had explicitly expressed her willingness to part with her dower in consideration of a divorce, this should be accepted.

The type of attitude the courts should have to decide cases was also commented on by the Appellate Division of the Supreme Court. The court reasoned that it would be beneficial in a changing society if the courts concerned took a modernist and egalitarian view as has been done in

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[79] Id.

the celebrated case of Khurshid Bibi v Mohammad Amin.[80] This projects that Bangladeshi jurisprudence is building on Khurshid Bibi's case and reflecting a new outlook of the judiciary through it. However, by blindly following Khurshid Bibi's case, courts are sometimes abandoning the plaintiff's case and making out a new case instead.

In Md.Kutubuddin Jaigirdar v Nurjahan Begum,[81] the facts of the case, in a nutshell, were that first the husband gave talaq to the wife but because of the procedural difficulties the court of first instance did not accept that (see above, p.262). Then the wife exercised the right of delegated divorce and instituted a suit for a declaration that the marriage was dissolved, with an alternative prayer of dissolution on the ground of cruelty, which was also rejected (see above, p.262). On appeal, the appeal court abandoned the plaintiff's own case of cruelty [under section 2(viii)] of the Dissolution of Muslim Marriages Act of 1939) and made out a new case of khula, being carried away by the decision of the Supreme Court of Pakistan in Khurshid Bibi's case. On second appeal in the Supreme Court Appellate Division, the Appellate Division of the Supreme Court did not grant khula, as the evidence on record did not support the claim, and the wife did not forego her dower. The plaintiff wife herself had asserted in the course of her testimony, 'I retain my right of dower' ('amar moharanar dabi akhono ache'). This statement

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[80] PLD 1967 SC 97.

[81] 25 DLR (1973) 21. See already above, p.261.

is completely inconsistent with the right of khula obtained by the decree. The Supreme Court held that the suit as framed and the evidence as led did not entitle the plaintiff to have a decree dissolving the marriage in khula form. Moreover, in the plaint, the wife was claiming the right of divorce in her alternative prayer on the ground of cruelty of conduct under section 2(viii) of the Dissolution of Muslim Marriages Act of 1939. No case of khula divorce was made out in the pleading of the wife. Justice D.C. Bhattacharya of the Supreme Court stated:

> In the said circumstances it was the clear duty of the said court not to abandon the plaintiff's own case and make out a new case for her in its stead.[82]

This questions the attitude of the judges. Why are they interested to deviate in a clear case of cruelty and turn it into a case of khula? Is it for the benefit of women or to deprive women of their rights of dower? The determined position of the plaintiff that she would not forego her right of dower should have denied the judiciary the mandate to turn her case into a case of khula.

In Muhammad Siddiq v Mst. Ghafuran Bibi,[83] a prayer for converting the suit for dissolution of marriage, originally based on habitual cruelty, into a suit for divorce by way of khula at an appellate stage before the Supreme Court was not permitted. The facts of the case were that the wife's suit for dissolution of marriage on the

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[82] Ibid., p.28.

[83] 25 DLR (1973) SC 1.

ground of habitual cruelty and non-maintenance had been dismissed by the trial court. On appeal, the dismissal order was confirmed by the Appellate Court. On second appeal, the High Court took the view that even if the wife's appeal failed, the husband would not be in a position to take back the wife forcibly since the relationship between the spouses was very strained. In these circumstances the High Court felt justified in allowing the appeal and granting a dissolution of marriage by way of khula. Against this the husband appealed before the Supreme Court. It was decided that as there was no prayer made in the plaint for dissolution of marriage by way of khula, the High Court had acted illegally, as the husband was not given any opportunity to rebut the evidence. This shows that the High Court was transforming a case of cruelty into a case of khula. It is not clear whether this attitude is to sympathise with the women's cause, to give women their rights or to take away their rights. However, the Supreme Court sent the case back on remand to amend the plaint and to decide whether the wife was entitled to such form of dissolution.

A khula divorce, perhaps, as the court reflects, is the key to freedom for many Muslim women. But the case law reveals that the higher courts are turning other cases of dissolution into a case of khula to deprive women of their right to dower and to protect the financial interest of men. Moreover, from the practical point of view, a woman may be pressurised by her husband to give khula to avoid

the payment of dower which he has to give when using talaq.[84] Some Muslim men are now refusing to give talaq to their wives contemplating that their wives will give khula when they can not bear any more and will thus free them of their liability to pay dower. There is no attempt made to mitigate this unfairness. Thus, judicial khul could actually be taking away an important right of the Muslim women. It is yet to be clarified why the courts are encouraging 'judicial khul' more than any other grounds of dissolution. Is it another game to deprive women of their rights, or giving freedom to men from their duty to pay dower? However, the judicial device of khula is also hard to achieve and proceedings could drag on for 6 to 10 years, as was indicated by a court of Pakistan in Tahera Begum v Saleem Ahmed Siddiqui.[85]

The situation in Bangladesh has changed after the enactment of the Family Courts Ordinance of 1985, as the special proceedings of the Family Courts are supposed to lead to an expeditious judgement. Still it usually takes a year or more to get a decree, as was evident in the case of Mst. Roksana Begum v Md. Abul Khair,[86] where the maintenance case needed nearly one year and ten months to come to a decision (filed in May 1991, judgement in March

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[84] Carroll, Lucy: 'Mahr and Muslim divorcees right to maintenance'. In Journal of the Indian Law Institute. Vol.27, No.3, July-September 1985, pp.487-495, at p.494; Carroll (1982), p.277.

[85] PLD 1970 Karachi 619, at p.620.

[86] Family Suit No. 96 of 1991 (unreported).

1993). Execution of the decree is yet another matter.

Thus, the dissolution of marriage by khula potentially operates against women as it deprives them of their right of dower for their freedom from an undesirable marriage. Why women should always make concessions and compensations for their freedom, and not their partners, is yet to be understood.

5.5.3 Talaq-e-tahweed

One of the most potent legal weapons in Muslim women's possession is the right of delegated divorce or talaq-e tahweed.[87] This is a conscious effort of the female spouse or her guardian to balance the male matrimonial power.[88] This right has been regarded by the judges of British India as conditional and not an absolute option, depending on being reasonable and not opposed to public policy.[89] However, conditional delegation was always recognised to be perfectly valid if the condition or contingency specified in the kabinnama was fulfilled.[90] The Muslim Family Laws

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[87] On the new study of the subject see Shaham, Ron: 'Judicial divorce at the wife's initiative: The Sharia Courts of Egypt, 1920-1955'. In Islamic Law and Society. Vol.1, No.2, August 1994, pp.217-257.

[88] Carroll (1982), p.278.

[89] Ibid., p.279.

[90] Ali, Syed Ameer: Mahommedan law. Vol.ii, 4th ed. Calcutta 1917, p.556.

Ordinance of 1961 has provided the option to delegate the right of divorce in the form of the kabinnama itself (see in detail, above, p.161). But it would have been beneficial to the women of Bangladesh if the stipulations of the delegated divorce had been expressly written into the kabinnama, giving women a broader choice at the time of need. However, sometimes the stipulations are handwritten in the kabinnama by the guardians of the parties.

The case law in Bangladesh suggests that women are benefitting from this device of delegated divorce. In Nasima Bilkis v Md. Abdus Samad Khan,[91] the plaintiff alleged that on the ground of cruelty, negligence to observe marital obligation and demand of dowry she had given divorce to the defendant by the delegated power of talaq-e-tahweed on 2.6.91 and the talaqnama had been registered. The Family Court held that the right was exercised in accordance with strict compliance of the terms and conditions of the delegation. Examining the conditions of this delegated power, which stated that it could be exercised 'if there is maladjustment at any time' ('moner omil hoile jokhon ichcha'), the court arrived at the conclusion that there existed maladjustment between the parties.

In Monowara Begum v Md. Hannan Hawlader,[92] the facts of the case state that the wife divorced the husband by talaq-e-tahweed and registered the divorce to make the

[91] Family Suit No.12 of 1992 (unreported).

[92] Family Suit No.15 of 1989 (unreported).

dissolution more confirmed.

In Khondakar Shafiqul Huq Masud v Farida Begum and others,[93] the Family Court did not allow the husband to restore his conjugal rights as the marriage itself had been effectively dissolved by the exercise of talaq-e-tahweed by the wife.

In Md. Kutubuddin Jaigirdar v Nurjahan Begum,[94] the Appellate Division of the Supreme Court held that although the lower Appellate Court had found that the marriage tie between the plaintiff and the defendant had been dissolved as a result of the exercise of the delegated power of divorce by the wife, it did not make the necessary declaration that the marital tie had already been dissolved. The Supreme Court not only rectified the decree of the lower appellate court but substituted the decree for dissolution of the marriage on other grounds by a decree declaring that the marriage had been dissolved by the exercise of the delegated power of divorce by the wife.

In the renowned case of Nelly Zaman v Giasuddin Khan,[95] too, the court ascertained that the wife had exercised her delegated right of divorce or talaq-e-tahweed legally. The court held that it had been stipulated in the kabinnama that the wife could exercise this right if there was mutual recrimination between the parties. As there was sufficient recrimination between the parties it granted the

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[93] Family Suit No.18 of 1990 (unreported). See above, p.249.

[94] 25 DLR (1973) 21.

[95] 34 DLR (1982) 223. See above p.246.

right to the wife.

The device of talaq-e-tahweed is more beneficial to women as it does not come into effect immediately if the contingency arises, as a talaq would, but allows the wife to consider her options. When she has the situation under control and then decides to effect a divorce, she may exercise the right at her discretion. Thus, she is not automatically divorced without her will as is done by talaq.[96] Moreover, by this method of inserting stipulations in the marriage contract, the wife could be provided separate maintenance and residence if the contingencies of polygamy or cruelty arise.[97] This would resolve many of the problems for deserted women when the husband marries again or she is to suffer the agony or difficulties of living with a co-wife.

The case law indicates that progress has been made especially in the cases of delegated divorce where by the device of talaq-e-tahweed women are entitled to dissolve their marriage easily. As we saw, in khula cases women are sacrificing their right of dower in exchange for a divorce. In talaq cases, although men are legally obliged to give women dower and iddat money, this is rarely observed. Thus, Bangladeshi divorce law, overall, does not protect women well from economic deprivation and violence and the way forward, it appears, is more widespread and creative use of stipulations in the marriage contract.

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[96] For details see Carroll (1982), pp.284-285.

[97] For details see Malik (1990), pp.35-40.

5.6 Custody and guardianship

The Muslim law and statutory evolution regarding custody and guardianship have already been discussed (see above, pp.153 and 155). Traditionally, the right of guardianship of children is always vested in the father.[98] The judiciary in Bangladesh is not giving enlightened judgements in cases of guardianship. They are mainly following the conservative line of interpretation of not recognising a woman as a natural guardian of her children. But the cases on custody in Bangladesh protect women more, as they exhibit mothers' rights of custody of young children as almost an absolute right. Enlightened pronouncements in the cases of custody of young children have encouraged mothers to claim custody beyond the conventional limitations relying on arguments about the welfare of the child. The modern trend of judgements started, in fact, from the Pakistani period.

In the case of Mst. Fahmida Begum v Habib Ahmed,[99] it had been held that the courts in Pakistan can ignore the rules in textbooks on Muslim law, since there was no Quranic or traditional text on the point. Further on, the court concluded that it would be permissible to depart from the rules stated in those textbooks if on the facts of a given case its application was against the welfare of the

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[98] Anderson, J.N.D.: 'The eclipse of the patriarchal family in contemporary Islamic law'. In Family law in Asia and Africa. London 1968, pp.221-234, at p.222.

[99] 20 DLR (1968) WP 254.

minor.[100] There are many judgements supporting this claim of departing from traditional Muslim law as stated in the textbooks, as the rules propounded in different textbooks on the issue are not uniform.[101]

The cases of custody shows that the judiciary in Bangladesh is deciding the issue on the paramount consideration of the welfare of the minor. In Md. Abu Baker Siddique v S.M.A. Bakar and others,[102] on the strength of precedents in the Pakistani period, the Appellate Division ruled,

> It is true that, according to Hanafi school, father is entitled to the hizanat or custody of the son over 7 years of age. Indisputably, this rule is the recognition of the prima facie claim of the father to the custody of the son who has reached 7 years of age, but this rule which is found neither in the Quran nor Sunnah would not seem to have any claim to immutability so that it cannot be departed from, even if circumstances justified such departure.[103]

It was further held in the above case that the welfare of the minor was assumed to be the determining factor which the court regards as 'paramount consideration', even though the opinion of well-known jurists may not be followed. Thus, the rules of custody propounded in Hanafi law may be departed from in permissible circumstances, in consideration of the minor's welfare. In the above case, the mother was preferred to be the guardian of the minor.

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[100] Ibid., p.257.

[101] See for example Zohra Begum v Latif Ahmed Monawar 17 DLR (1965) WP 134.

[102] 38 DLR (1986) AD 106.

[103] Ibid., p.114.

The facts of the case were that the mother, being a doctor, was considered better suited to look after the minor than the father, especially in view of the illness of the minor. The Appellate Division conclusively determined that,

> Facts as mentioned above clearly point out that the welfare of the boy requires that his custody should be given to the mother or that she should be appointed as his guardian.[104]

But this is only a rare case where a woman as a specific individual was recognised as having the right to custody when her own ability and interest to help the child was greater than that of her husband. This was probably, not a plan of the father to get rid of a handicapped child, using the convenient fact that the mother was a doctor; actually, the mother wanted to have custody of the child.

Generally, the socio-economic conditions of women have the effect of not favouring their cases and the preconceived idea remains that women are unable to maintain their children. It is a fact that the primary legal responsibility to maintain the child remains with the father and the issue is only the care and control of the person and property of the child. The image that a mother is unable to maintain the child is sustained perhaps to protect men's own patriarchal interest.

Sometimes the traditional rule has been restated and given a patriarchal interpretation to deprive women of their rights. In the custody case of Gulfam v Gazala Parvin

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[104] Ibid., p.115.

and others,[105] the Family Court decided that although the minor son had not arrived at the predetermined age of 7 years, the custody of the boy should go to the father because the mother had remarried. The court, on the other hand, emphasised that the father's remarriage did not affect the issue of appointing him as the custodian of the minor boy even at this tender age. The court relied on the book of Muslim law by Gazi Shamsur Rahman,[106] which reflects orthodox concepts. This judgement seems to reflect an inclination towards orthodox Muslim law. But, in fact the judgement does not follow Muslim law, as otherwise it would have given custody of the small child to the nearest female relation of the mother. Thus, the classical orthodoxy is being reinterpreted sometimes to take away the already granted rights of women.

It is an established fact that a mother is normally seen as better qualified to care for the child in his or her tender years and that committing the custody to her is of advantage to the child.[107] But, in Dr. Rashiduddin Ahmed v Dr. Quamarunnahar Ahmed,[108] the High Court considered it to be in the best interests of the children to place them in the interim custody of their father while the issue was

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[105] Family Suit No.45 of 1992 (unreported).

[106] Rahman, Gazi Shamsur: Paribarik Adalot Adhadesh. Dhaka 1978, p.62.

[107] Rahimullah Choudhury v Mrs. Sayeda Helali Begum 20 DLR (1968) 1. See Ali, Syed Ameer: Mahommedan law. Vol.II, Calcutta 1917, p.293.

[108] 30 DLR (1978) 208-211.

finally settled in the lower court. The High Court decided on the ground that the father had been taking care of the children for nearly a year while their mother was in England. To put the children in the custody of the mother now would upset their settled lives.[109] But the question remains whether it is for the paramount consideration of the welfare of the children to deprive them of the care of their mother or whether the courts are actually taking advantage of the modern doctrine of the child's welfare to deprive women of the already very limited rights granted to them. Thus, it is very easy for the judiciary to deprive women of their rights by the doctrine of 'best interests of the child' where there are no firm criteria to evaluate what are those interests.

The situation seems, however, favourable in the lower courts as reflected in the four unreported custody cases collected from the Family Courts of Dhaka city. A mother is usually given custody of the child during his or her infancy or tender age in accordance with Muslim law.[110] Moreover, in the lower court, i.e. Family Court, there is a case where a mother is also given custody of minors even above their tender years.[111] This seems to reflect sensitisation of the judiciary to give more rights to women. There is also an unreported case in which the mere

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[109] Ibid., p.210.

[110] Mst. Noorjahan Khanam v A.T.M. Mamoonur Rashid, Family Suit No.96 of 1992 (unreported).

[111] Syed Nurul Haq v Anjuman Ara Begum, Family Suit No.106 of 1989 (unreported).

application of the traditional law is described as a breakthrough. In Abul Bashar v Md. Ufazuddin,[112] the facts and circumstances of the case were that the father of the minor boy was staying abroad and the minor had been born and brought up in his maternal grandfather's house in the care of the maternal grandmother, even while his mother was alive. Considering these facts and circumstances, the court granted the maternal grandmother custody of the boy up to the predetermined age of 7 years. The court reasoned that the welfare of the boy was of paramount importance. But the court did not indicate that they were in fact only following Muslim law, where the maternal grandmother substitutes the position of the mother in the tender years of the child.

In other cases of guardianship, the courts are deciding the issue on the predetermined norms of Islamic law, i.e. giving paramount importance to the right of the father. In the case of Akhtar Jahan Taniya v The State,[113] the Court decided that the mother's guardianship was lost by operation of law as soon as she remarried another person who was not related to the minor girl within the prohibited degree or who was a stranger.[114] In the absence of the father, the guardianship of the child devolves to the grandfather and the mother is not entitled to be the

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[112] Family Suit No.15 of 1991 (unreported).

[113] BLD (1986) 281.

[114] Ibid., p.283.

guardian.[115] Thus, even when there are some cases of custody where mothers are given custody of the children above the pre-determined age, the guardianship of the property of the minor is retained according to the traditional conception of Muslim law.[116]

In Rehanuddin v Azizun Nahar,[117] the High Court Division of the Supreme Court agreed with the decision of the District Judge in this case:

> The learned District Judge has found that although the appellant was the natural guardian under the Muslim law, the mother in facts and circumstances of the case was entitled to be appointed as the guardian.[118]

The District Judge had ascertained at the first instance that the facts and circumstances of the case reveal that the mother was not treated well by her in-laws and apprehended that the minor boy would also be treated in the same manner. On appeal the High Court agreed that the mother should be entitled to be appointed guardian but did not allow her to be guardian on the gound that she, being young (26 years), might remarry and sent the case back to decide the issue afresh.

The cases, except a few unusual ones, suggest that the father's guardianship of the property of the minor is dominant. Patriarchal attitudes towards women are clearly

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[115] Syed Nurul Haq v Anjuman Ara Begum, Family Suit No.106 of 1989 (unreported).

[116] Id.

[117] 33 DLR (1981) 139.

[118] Ibid., p.140.

evident here, in particular the belief that the interests of the minor will suffer at the hands of the mother, or the common notion that mothers cannot maintain the property of the minor prevails. This is another way to subjugate women by undermining their credibility. However, as we saw, in some rare cases mothers were appointed guardian of their children with reference to their best interests. These mothers, as specific individuals, were given recognised rights in guardianship cases when their own ability to help the child was greater than that of the father.[119] The financial position of the mother is considered by the court, whereas the primary responsibility of maintenance under the Islamic law lies with the father. Thus, the patriarchal ideal generally survives in cases of guardianship and males are, in particular, regarded as the natural guardian of the property of the minor.

5.7 Mehr or Dower

The legal position as regards the issue of dower remains the same in Bangladesh as it was after independence from Pakistan. It has been argued before that the division of dower into prompt and deferred creates anomalies and sometimes reduces the amount of dower if the husband can falsely prove that the prompt dower has been paid (see

[119] A reported example is Md. Abu Baker Siddique v S.M.A. Bakar and others, 38 DLR (1986) AD 106.

chapter 3 above, p.151). In the Pakistani period, the dowers which were not specified were regarded as to be realised in full on demand under the Muslim Family Laws Ordinance of 1961 (see above, p.164). This is still the law in Bangladesh.

Islamic law does not fix any maximum amount of dower, but makes it obligatory for the husband to pay whatever amount has been specified and whatever amount is assessed if not specified.[120] Fixing of excessive amounts of dower is being used in South Asia as a means to control and check the husband's unilateral and unlimited power of divorce, as he has to pay the full amount of dower at the time of divorce. But it also acts as a status matter, in which case there is no intention to pay the stipulated amount in full.[121] Attempts have been made to curb the fixation of excessive amounts of dower in India which go against the interests of Muslim women, but no similar provision has been made in Pakistan or later in Bangladesh. There has been some confusion over dower and dowry after the Dowry and Bridal Gifts (Restriction) Act of 1976 in Pakistan, but this has now been clarified.[122]

We saw earlier that it was found in a study of the metropolitan city of Dhaka that 88% of Muslim wives did not

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[120] Mahmood, Tahir: Muslim personal law-Role of the state in the Indian subcontinent. 2nd ed. Nagpur 1983, p.62; Diwan, Paras: Dowry and protection to married women. New Delhi 1988, p.42.

[121] Esposito (1982), p.24; Pearl, David: A textbook on Muslim law. Ist ed. London 1979, p.59.

[122] Ibid., p.57; Pearl (1987), pp. 62-63.

receive any dower at all (see above, p.5). If this is the situation in the capital city, one can anticipate an alarming situation in the rural remote areas. Why are women not receiving their legal right of dower? To inquire into this one has to probe into the causes for not giving dower. Here the same causes for which the women in Bangladesh are being subordinated come in, as women are dominated in the patriarchal family and in the wider socio-religious arena. What needs to be ascertained here, in particular, seems to be whether the women's right to dower is being enlarged or reduced by local customary conventions.

The examination of Bangladeshi cases clearly shows that the right has been curtailed by reducing the amount to be paid by the customary concept of usool (paid), i.e. by jewellery or other items given to the women in the ceremony of marriage. It is significant to point out that this concept of usool in Bangladesh is different from the concept of usul or customary practice under Islamic law.[123] The indigenous concept of usool in Bangladesh means that at the time of marriage the bridegroom's party asserts that a portion of dower has been paid by jewellery or other valuable goods. This might be noted down in the kabinnama. However, the bride's party usually does not ascertain at the time of marriage whether the claim is genuine because they want the ceremony to go on uninterrupted. But the claim might later prove to be false, taking away a potential right of dower of the woman. Moreover, presents

[123] On usul under Islamic law see Rahman (1978), p.10.

given at the time of marriage in the form of jewellery or otherwise, when included as a part of the dower, are reducing it. When the presents are made in public at the time of marriage, there is clearly an element of show of status, rather than concern for the financial protection of the women.

The cases reveal that whether any portion of dower is actually paid or not, if it is mentioned in the registered kabinnama, the courts tend to reduce the amount of dower by the alleged usool. Thus, in Mst. Razia Akhter v Abul Kalam Azad,[124] the Family Court gave preference to documentary evidence. In the registered kabinnama it was mentioned that a part of the dower had been paid as usool at the time of marriage. The court did not further inquire whether it had actually been paid. The same situation arose also in Mst. Hafeza Bibi v Md. Shafiqul Alam,[125] where the Family Court only allowed the claim for dower after reducing the total amount by the usool as specified in the registered kabinnama.

The concept of usool can also be found in cases where the registered kabinnama did not specify that a part of dower has been paid by the husband at the marriage ceremony. In a recent case the Family Court presumed,

> The plaintiff comes from a middle class family, her father is a lecturer in a college and the defendant is a teacher in a school. Considering the social economic structure of our society it is very unlikely that a wedding in this

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[124] Family Suit No.193 of 1989 (unreported).

[125] Family Suit No.28 of 1992 (unreported).

> background would take place without any jewellery or ornament from the bridegroom. In these circumstances I consider that there is some truth behind the claim of the defendant in this respect. Therefore, I would allow only half the dower money to the plaintiff.[126]

In Monawara Begum v Hannan Hawladar,[127] the court orthodoxly decided that the wife was no longer entitled to dower as the jewellery given by the husband constituted her dower. This concept of usool as substituting dower with jewellery and other valuables is actually reducing the right of dower of women. However, it is admitted that the Quran does not stipulate that dower should be in cash. The problem in Bangladesh is that outwardly it is shown that the dower is paid in kind, whereas actually it may not have been paid. It is rarely inquired whether the valuables are actually paid or whether it tallies with the amount reduced from the dower.

When usool is registered in the kabinnama, it is easier for the courts to reduce the dower, as found in many other cases. In Mst. Roksana Begum v Md. Abul Khair,[128] the facts of the case show that the defendant claimed he had given talaq to the plaintiff, which he could not prove in the Family Court. The Family Court decided that the marriage subsisted. The Family Court also held that when in the registered deed it is expressed that a part of the dower money has been paid in the form of jewellery at the

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[126] Mst. Mahsina Tabassum Shirin v Abdul Karim, Family Suit No.9 of 1992 (unreported).

[127] Family Suit No.15 of 1989 (unreported).

[128] Family Suit No.96 of 1991 (unreported).

marriage ceremony, there is no ground not to reduce the amount of dower. The court allowed only the prompt dower.

Sometimes the courts are not only regarding jewellery but also household ware and apparels as substitutes of dower. But, how do such items give security to women as to be a part of dower? In Nasima Bilkis v Md. Abdus Samad Khan,[129] the Family Court regarded ware and apparels as the usool and further reduced the amount of dower after deducting the jewellery. Moreover, the defendant contended that the plaintiff waived the dower in the wedding night. The court, however, held that the defendant's contention did not bear any truth.

It is significant to point out that this imposed tradition to waive dower in the wedding night is another customary practice forced on women to deprive them of their right of dower. Under Islamic law, a wife can forego or gift her dower which is known as hiba al-mahr and the husband can increase the dower after marriage.[130] The customary tradition suggests that if the wife foregoes her dower in the wedding night it is good for the couple. It is significant to point out that there is no customary tradition putting pressure on the husband to increase the dower. This confirms what we know, namely that the customary traditions have a patriarchal interpretation and restrictive effects on women. However, under Islamic law the wife making the remission must act freely and must not

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[129] Family Suit No.12 of 1992 (unreported).

[130] Ali (1917), Vol.ii, p.462; Tyabji (1968), p.99.

be influenced. In an earlier case in Pakistan, it was held that if the wife remits her dower just to retain the affection of the husband she is not allowed to forego her dower.[131] We could not find any reported or unreported case of this kind in Bangladesh.

In Mst. Shahida Begum v Md. Mahbub Hossain,[132] the plaintiff asked for the full amount of dower, i.e. prompt and deferred dower. The facts of the case were that the parties were married by a registered kabinnama on 3.2.90 and the dower was fixed at 75,001 taka, out of which 5,000 taka were mentioned as having been paid under usool. The Family Court granted the plaintiff's prayer for full prompt and deferred dower after deducting the amount paid as usool, on the reasoning that the defendant had effectively given talaq to the plaintiff on 21.10.91.

In Margubater Rouf v A.T.M. Zahurul Haq Khan,[133] the plaintiff prayed for the realisation of dower and maintenance. The facts of the case show that the parties were married in accordance with sharia on 20.10.88. The dower money was fixed in the registered kabinnama at 300,000 taka. The plaintiff stated that her marriage was duly consummated but the defendant denied it. The Family Court held that the contention of the defendant that the marriage had not been consummated did not hold good as

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[131] Shah Banu v Iftekhar Md., PLD 1956 Kar 363.

[132] Family Suit No.112 of 1991 (unreported).

[133] Family Suit No.1 of 1992 and Family Suit No.3 of 1992 (analogous hearing) (unreported).

there was no obstacle in the way of the defendant from being intimate with the plaintiff. She was, therefore, entitled to dower. Although there was no medical evidence, the court reduced the amount of dower to 100,000 taka and did not go into details on how the major portion of the dower had been paid by the defendant. Perhaps the same customary concept of paying up or usool by jewellery and other ware and apparels curtailed the amount.

This case also seems to contain evidence of another recent custom of taking dower as a status-enhancing device, which is to stipulate huge amounts of dower without any intention to pay this (the same situation is found in the context of dowry, see chapter 6 below, p.319).[134] Under Islamic law there is a concept of assummat, where a large amount of dower may be announced in public, whereas privately the parties agree to a smaller amount.[135] The effect of this can be felt in another case.

In Mst. Meherunnahar v Rahman Khondakar,[136] the plaintiff asked for the realisation of her dower which was fixed at 90,111 taka by a registered kabinnama. The Family Court ascertained that no portion of the dower money had been paid as usool and that the plaintiff was entitled to the full amount. The facts of the case reveal that the plaintiff herself stated that the marriage had not been

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[134] Mahmood, Tahir: The Muslim law of India. Allahabad 1982, p.77.

[135] Hodkinson (1984), p.137.

[136] Family Suit No.24 of 1987 (unreported).

consummated. The Family Court, while deciding whether the plaintiff was entitled to the full amount of dower, attempted a theological discussion that in the Quran it is expressly written that the amount of dower should be that amount which the husband is able to give whenever the wife demands it. The court deduced that according to religion and the theologians, the amount should not be more than the ability of the husband warranted. It was held that it should not be more than the annual income of the husband. The court, thus, reduced the specified amount of dower granted by the registered kabinnama to 50,000 taka on the ground that the defendant, being a lawyer who is completely dependent on his senior, would not be able to pay a higher amount. It is significant to note that the reduction of the dower money to 50,000 taka was first suggested by a few lawyers in a conciliation or shalish and the parties agreed to it. But as the defendant failed to pay anything, the suit arose. The Family Court, thus accepted the compromise amount arrived at by the shalish and attempts to give it religious legitimacy.

There are cases where the courts are enterprising and go into detail whether the husband actually paid the dower. Ambia Khatoon v Md. Yasin Bepari[137] is a suit for the realisation of dower and maintenance. The facts of the case in a nutshell are that the parties were married on 7.7.87 and the dower was fixed at 50,000 taka, of which half was prompt and the other half deferred. The defendant, to evade

[137] Family Suit No.98 of 1990 (unreported).

the payment of dower, was relying on out-of-court settlement and agreements. He contended that he had paid the full amount of dower (50,000 taka) fixed in the registered kabinnama by a compromise in a non-judicial stamp paper. The defendant also stated that he had paid a large part of the dower (30,000 taka) as usool at the time of the marriage. The Family Court rejected these claims of the defendant as being contradictory in itself and held that this showed he was attempting to evade payment. The court ascertained that as the marriage between the parties subsisted, the plaintiff was entitled only to her prompt dower, i.e. 25,000 taka.

Sometimes the courts allow the full amount of deferred dower, even when the marriage subsists.[138] Similarly, in Mst. Angari Begum v Md. Iqbal Rashid,[139] the Family Court granted the wife the full amount of deferred dower from the husband when the marriage subsisted. In this case, while marrying for the second time, he did not marry in accordance with section 6(5) of the MFLO of 1961. The Court seemed to take its reasoning from section 6(5)(a) of the Muslim Family Laws Ordinance of 1961 (see below, Appendix IV, p.456) .

This shows that this statutory enactment can be applied by the judges as a protection for wives in a

[138] Mst. Khadeza Begum v Md. Nurul Islam, Family Suit No.9 of 1987 (unreported).

[139] Family Suit No.61 of 1991 (unreported).

polygamous marriage.[140]

The cases in Bangladesh on the issue of dower indicate that, on the one hand, there is evidence of growing support and protection of women by allowing the wives to have their right of dower. On the other hand, there are attempts to reduce the amount of dower by different customary conventions. However, dower does act as a bar for the husbands to refrain from divorcing their wives; evidence shows less cases of talaq than khula. This seems to indicate also that not many talaq cases go to court because men just talaq their wives and the wives do not see any point in challenging this unfettered and unilateral right of their husbands. On the other hand, it might be that there are not more talaq cases as the husbands refrain from giving divorce, thus forcing wives to go for judicial khul. In that case the husband will not only be freed from the payment of deferred dower but also gets in return what he might have given to the wife during the marriage.[141] Even though this financial side of the husband's willingness for judicial khul was clearly pointed out, it was never emphasised in Bangladesh. Moreover, dower also contributes to desertion, as husbands who cannot divorce their wives and pay for it just desert them. It must be emphasised in this context that desertion has become an acute problem in Bangladeshi society.

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[140] See also above, p.252.

[141] Hinchcliffe (1968), p.24.

The cases on dower in Bangladesh highlight the contrast between theory and practice. In dower cases, the payment is a legal obligation, whereas in social practice the question of payment arises only at the instance of divorce. For example, in khula cases the right of dower is relinquished to end an undesired marriage. The fact remains that in social reality women rarely get any portion of their dower unless the husband is adamant to give talaq. Sometimes the social position of female litigants who are economically dependent influences the claim for dower as the last financial support. Thus, the theoretical right of women's potential power of demanding dower does not exist in practice. It was already mentioned earlier (see above, p.5) that in Dhaka itself 88% of the Muslim wives did not receive any dower. This is proof of the patriarchal arbitrariness of Bangladeshi society which regard women's claims to dower as challenging the existence of the patriarchal system itself, despite the fact that it is an Islamic obligation.

5.8 Maintenance or nafaqa

Maintenance of a wife during the subsistence of the marriage is a legal obligation of the husband in Islam.[142] Islamic law grants a Muslim wife a right to maintenance from her husband not only during the subsistence of the marriage but also reasonably after dissolution of the marriage.[143] There is no controversy that the husband is liable to maintain the wife during the three months of iddat period, but there is a considerable controversy whether the maintenance extends beyond the iddat period. It has been specifically provided in the Quran that the divorced women shall wait for remarriage for three monthly periods and that for divorced women maintenance should be provided on a reasonable scale.[144] Muslim juristic opinion is to the effect that the injunction of the Quran does not go beyond the iddat period.[145]

In South Asia the jurists have also argued that the husband should provide maintenance during subsistence of marriage and during the iddat period.[146] This was, perhaps, because in Islam after dissolution of marriage the parties

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[142] The Quran, ii:29.

[143] The Quran, 2:228 and 2:241.

[144] The Quran, 2:228 and 2:241.

[145] Rahman, Fayyaz-ur: Muslim women's right to post divorce maintenance. Ongoing Ph.D. Thesis, SOAS, London 1994.

[146] Fyzee (1974), p.186; Diwan (1985), p.130.

are entitled to remarriage and the woman returns to her natal family.[147] Moreover, according to Islamic law, the deferred dower is seen as the safeguard for divorced women. However, we have seen that women in Bangladesh are usually deprived of their deferred dower. But what happens to those women whose natal family can not provide for them? There is no state welfare system in South Asian countries as in the West. In India it has been argued that maintenance after divorce is an obligation of the ex-husband on the basis of the argument provided in the original sources.[148] From the women's viewpoint it is seen that the wife who has spend her whole life and labour for her husband's household, which was not rewarded, should not just be turned out of her house without any subsistence. In Bangladesh these problems are not articulated yet, as even maintenance during marriage and iddat money is sometimes not given.

The circumstances where a wife is not entitled to maintenance have already been described when the effects of the Dissolution of Muslim Marriages Act of 1939 on Muslim law were analysed (for details see above, pp.122).

The law of maintenance in Bangladesh is an amalgam of codified law, local traditions and the traditional Muslim

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[147] Mahmood, Tahir: Personal laws in crisis. New Delhi 1986, p.87.

[148] In the celebrated case of Shah Bano (Mohd. Ahmed Khan AIR 1985 SC 945) in India the court allowed post divorce maintenance. See for details, Naseem, Mohammad Farogh: The Shah Bano case: X-rayed. Karachi 1988; Ali, Asghar (ed.): The Shah Bano controversy. Bombay 1989. For the current developments under the Muslim Women (Protection of Rights on Divorce) Act of 1986 see Menski (1994), pp.45-52.

law. The quantum of maintenance is regulated under the schools of Muslim law by considering different circumstances. The Hanafi law determines the scale of maintenance by referring to the social position of both husband and wife, whereas the Shafi law only considers the position of the husband and the Shia law focuses on the requirements of the wife.[149] Bangladesh mainly follows Hanafi law but the cases do not reveal that the courts are taking into consideration the social position of both husband and wife while ascertaining the amount of maintenance.

The statutory law regarding the issue is found under section 9 of the Muslim Family Laws Ordinance of 1961 (see already above, p. 163). Thus, the Arbitration Council could issue a certificate specifying the amount which the husband has to pay as maintenance. There are no specified rules by which the quantum of maintenance could be determined. The amount of maintenance to be paid as determined by the Arbitration Council. If not paid in due time, it could be recovered under section 9(3) of the Muslim Family Laws Ordinance as arrears of land revenue (see above, p.164).

The only development that has been made in Bangladesh relating to the law of maintenance is that revision against the certificate of the Arbitration Council is done by the Munsif Courts, i.e. the lowest tier of the judiciary under the Muslim Family Laws (Amendment) Ordinance of 1985

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[149] Tyabji (1968), pp.265-266; Ali (1917), p.462; Anderson (1976), pp.132-133.

(Ordinance xiv of 1985) (see for details above, p.228).

This brief discussion shows that the issue of maintenance is an amalgam of substantive Muslim law and procedural statutory legislation. The case law in Bangladesh shows whether the courts are deviating from the traditional Muslim law or are giving more preference to the statutory legislation. The two are not different but in statutory law, emphasis has been given to the procedures for strict compliance with the Muslim law. However, sometimes more importance is given to the procedures than the substantive law.

In a fairly recent reported case on maintenance, the High Court shows itself to be static and does not deviate from the traditional concept of providing past maintenance unless the claim is based on specific agreement or a decree of a court. In Rustom Ali v Jamila Khatun,[150] the High Court Division of the Supreme Court did not grant the past maintenance allowed by the lower Court as the wife was not staying with her husband. Thus the husband, with his sexual rights over the wife, controls residence in his marital home. Where the wife refuses to cohabit, she becomes a disobedient wife or nashuzah, which was in this case regarded as a prima facie cause for not allowing maintenance.[151] Muslim law only allows the wife maintenance if she is staying in her father's house, when the husband

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[150] 43 DLR (1991) HCD 301.

[151] On the traditional law see Mahmood (1982), pp.76-79; Tyabji (1968), pp.263-267.

did not request her to come to his house, or it would involve danger or risk of her life or health to remove her from her father's house.[152] The court did not consider the conditions which compelled the wife in Rustom Ali v Jamila Khatun,[153] to stay separate. This conveys an impression of unsympathetic attitude towards women and also exhibits a strong desire to control women's movement. The court only allowed maintenance from the date of institution of the suit till three months after the decree for dissolution of marriage, i.e. during the period of her iddat.

However, in Hosne Ara Begum v Md. Rezaul Karim,[154] the High Court Division of the Supreme Court ordered the husband to pay maintenance even when the wife left the husband's residence. The wife was living away from the matrimonial home on the ground of cruelty. Perhaps, the evidence of cruelty of the husband made the court considerate towards the wife.

Eleven unreported judgements on realisation of maintenance in the Family Courts of the capital city of Dhaka were gathered. The cases are usually brought for the realisation of dower and maintenance together. Because the rift between the parties had already started, a maintenance claim is the only weapon women have to restore their position or at best to have some relief from economic constraints. The cases on the issue of dower as a

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[152] Ali (1917), p.461.

[153] 43 DLR (1991) HCD 301.

[154] 43 DLR (1991) 543.

fundamental right of Muslim women have already been discussed. The cases on maintenance show that the Family Courts are strictly applying the traditional Muslim law and are not considering the socio-economic condition of women in a sympathetic light.

In Ambia Khatoon v Md. Yasin Bepari,[155] the facts of the case were that the plaintiff and the defendant were married on 7.7.87 and their marriage was registered under a registered kabinnama which also mentioned dower of 50,000 taka and stipulated that the wife was entitled to maintenance in a respectable manner. The Family Court ascertained that the marriage subsisted and rejected the claim of the defendant that he had paid maintenance. The court decided that, as it was stipulated in the registered kabinnama, the plaintiff was also entitled to past maintenance when she was co-habiting with the defendant, i.e. from 7.7.87 to 6.4.88. However, the court did not allow maintenance for the time when the plaintiff was not living with the defendant. This implies that the courts are interpreting the fact that a plaintiff is not living with the husband as tantamount to refusal to perform marital obligations.

Other judgements are revolving in a similar trend and do not differ both within the metropolitan area and outside it. Thus it cannot be claimed that the cases in the metropolitan area of the Dhaka district are depicting a modernist approach on this issue.

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[155] Family Suit No.98 of 1990 (unreported).

In Monawara Begum v Md. Hannan Hawladar,[156] the Family Court of the village Madhurchar in the Dohar upazila of the Dhaka district did not allow the wife maintenance on the ground that she was not present in her in-law's house while her husband was working abroad. This means that the judges are concerned for the presence of the wife in the matrimonial home, not only for the performance of the marital obligations. This is further evidence that judicial attitudes are influenced by stereotyped concerns about controlling women's movement. In the above case, what was the wife expected to do in the in-laws' house? The parties were married under a registered kabinnama on 18.2.83 with a dower of 30,000 taka and the delegation of the right of divorce to the wife. The plaintiff pleaded that the husband left the country in 1987 for a job in the Middle-East and she was treated cruelly by her mother-in law and was compelled to leave the matrimonial home. It had been held in a very old case[157] that the wife is not entitled to maintenance in such a situation, as quarrels and disagreement with her mother-in-law did not constitute a legal reason for her to leave her husband's house. The court may have based the judgement on this case, although there is no reference to any case law. On the other hand, the court was relying on the wrong or fault of the plaintiff and not the defendant's staying abroad. This might itself be the effect of the patriarchal notions

[156] Family Suit No.15 of 1989 (unreported).

[157] Mohammad Ali Akbar v Fatima Begum, AIR 1929 Lahore 660.

influencing the attitude of the judge. The court ascertained that the wife had left her husband's residence without his permission, as she could not produce any letter showing that her husband had given approval for her to leave the residence. Thus, absence of documents in such situations could deprive the wife of her rights. The court decided that she was not entitled to maintenance during the subsistence of the marriage. Perhaps the traditional concept of disobedience or nashuzah was a basis of this judgement also, although it was not explicitly mentioned in the judgement. The court held that as the wife had divorced her husband by the power of delegated right of talaq-e-tahweed, she was only entitled to her maintenance for the iddat period (1,200 taka for three months, i.e. 400 taka per month). This situation could be tackled if the right of separate residence and maintenance for such illtreatment or differences had been stipulated in the kabinnama, as in a much older case.[158]

In Mst. Roksana Begum v Md. Abul Khair,[159] the basic facts of the case were that the plaintiff and defendant were married under Islamic sharia on 10.2.88 with the dower money mentioned as 50,000 taka in the kabinnama. The defendant claimed that he had given talaq to the wife but he could not prove it in the court. The court therefore held that the talaq was not effective (see above, p.260). The court decided that the defendant must pay maintenance

[158] Sabed Khan v Bilatunnissa Bibi, AIR 1919 Calcutta 825.

[159] Family Suit No.96 of 1991 (unreported).

of 1,000 taka per month to the plaintiff for the time when the proceedings were conducted, i.e. from the date when the suit was filed to the date of judgement (May 1991 to March 1993), and within thirty days of the judgement. The court also directed the husband to pay the monthly maintenance to the wife within the first 10 days of the month.

In Mst. Razia Akhter v Abul Kalam Azad,[160] a suit for the realisation of dower and maintenance, the parties were married under Islamic sharia on 11.6.87 and a son had been born from the wedlock. The court ascertained that the defendant gave talaq on 5.1.89 when the plaintiff was not residing in the defendant's house. The son was born on 2.6.89. The court granted the woman maintenance for the iddat period, i.e. until the son was born five months after the talaq. This extension of the period of maintenance is in line with traditional Islamic law and the statutory enactment. Islamic law provides for this extension of iddat period of maintenance to ascertain the legitimacy of the child. Under section 7(5) of the Muslim Family Laws Ordinance of 1961, if the wife is pregnant at the time of talaq, it is not effective unless the pregnancy ends. Thus, the judgement only gave minimal protection to the woman till the baby was born but follows the letter of the law.

In Mst. Hafeza Bibi v Md. Shafiqul Alam,[161] the plaintiff and defendant were married under a registered kabinnama on 9.7.86 with the dower money fixed at 50,001

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[160] Family Suit No.193 of 1989 (unreported).

[161] Family Suit No.28 of 1992 (unreported).

taka. The defendant gave talaq to the plaintiff on 18.11.91. The court did not grant maintenance to the wife during the subsistence of the marriage, as she was not obedient to her husband. One of the main criteria of her disobedience was that she was staying away from her husband. However, the court allowed maintenance for the iddat period.

In Mst. Meherunnahar v Rahman Khondakar,[162] the Family Court squarely applied the classical Muslim law that when the marriage is not consummated, the wife is not entitled to any maintenance.[163] The facts of the case were that the parties were married under the Islamic sharia on 7.3.85 but after a few months, in September 1985, she was sent back to her father's house and on 25.5.87 the marriage was dissolved by talaq. The court rejected the allegation of the defendant that the wife had venereal disease but decided that talaq was effectively given. The court ascertained that the defendant had failed to provide maintenance to the plaintiff but did not allow maintenance to the wife as she herself had stated that there was no consummation of the marriage. Although the facts and circumstances showed the opposite, the court ruled that admitted facts need not be proved. It was evident that the plaintiff (wife) lied in the court about not having intercourse with her husband. But why did she lie? Was the

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[162] Family Suit No.24 of 1987 (unreported).

[163] See Ali, Ameer Syed: Mohammedan law. Vol.II, Calcutta 1917, p.463.

force of female seclusion (lojja or sharam) even stronger than her claim for maintenance? There is a strong sentiment of female seclusion of lojja and sharam working within women of Bangladesh, so that they do not like their private affairs to be opened in public. However, such attitudes of women are never analysed in a court of law (on the notion of sharam as parda see above, p.62).

In Mst. Shahida Begum v Md. Mahbub Hossain,[164] the plaintiff prayed for the realisation of maintenance only for the iddat period. The facts of the case state that the parties were married on 3.2.90 and the kabinnama was registered. After leading a conjugal life for eight months, the defendant gave the plaintiff talaq on 21.10.90. The defendant alleged that the plaintiff had married him while her marriage was already subsisting with another man and she did not have a good moral character. The court rejected these defences as the defendant could not prove any of them sufficiently. The court held that as the defendant had given talaq to the plaintiff, she was entitled to maintenance for the period of iddat.

In Mst. Fatima Begum v Mohammed Golam Hossain,[165] the court held that the wife was entitled not only to maintenance for the present time but also past maintenance for the last seven months, as there was an agreement to pay maintenance in the negotiation or shalish in the Commissioner's office. This shows that the courts are also

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[164] Family Suit No.112 of 1991 (unreported).

[165] Family Suit No.61 of 1991 (unreported).

considering other contracts than the kabinnama to ascertain the maintenance and, in particular, that they are willing to build negotiated settlements into their decisions.

In Mst. Angari Begum v Md. Iqbal Rashid,[166] the parties were married on 6.11.89, fixing the dower money at 20,000 taka. The court found that the marriage subsisted and granted the wife maintenance not only for the time when the proceeding was going on (the suit was instituted on 6.4.91 and ended on 5.1.92) but long before that (from 1.8.90 to 5.1.92) and also ordered the defendant to pay further maintenance to the plaintiff within the first week of each month. The court fixed the monthly amount of maintenance at 800 taka.

It is important to point out that it can not be gathered from the judgements whether the courts are following the traditional doctrine of taking into consideration the social position of the parties for ascertaining the quantum of maintenance or what principle they are following to ascertain the precise amount of maintenance. In the kabinnama, maintenance is usually regarded as to be given in a respectable manner (bhodrochito hare). But it is not expressed how much maintenance can be regarded as respectable.

In some cases, where the husband is residing abroad, the Family Courts are granting a higher scale of

[166] Family Suit No.52 of 1991 (unreported).

maintenance. In Margubater Rouf v A.T.M. Zahurul Haq Khan,[167] a suit for the realisation of dower and maintenance, the facts of the case disclose that the parties were married on 20.10.88 and the marriage was registered. In the kabinnama the dower was fixed to the extent of 300,000 taka, which might be for show of status or security for the wife. The plaintiff pleaded that the defendant left for abroad and did not provide any maintenance for her. The defendant alleged that the plaintiff was having an affair with another man and was unwilling to lead a conjugal life with him. The reasons behind this might be the migration dilemmas arising when husbands work abroad, as well as the social disapproval of the wife living without her husband. The husband gave talaq to the wife on 25.2.90. The court decided that, as talaq had been given effectively, in accordance with the Muslim Family Laws Ordinance 1961, no marriage subsisted and the wife was entitled to maintenance during the iddat period. The court reasoned that the wife was not entitled to any maintenance during the subsistence of the marriage as she was not willing to have conjugal relations with the husband. But it is interesting to note that the court ascertained 40,000 taka (nearly 650 pounds) as the maintenance of the wife for three months, i.e. 13,000 taka per month, whereas in similar cases only 600 to 1,000 taka per month were given. It may be assumed that the court was

[167] Family Suit No.1 of 1992 and Family Suit No.3 of 1992 (analogous hearing) (unreported). See also above, p.290.

here taking into account the financial ability of the husband, who was working abroad. Alternatively, it was compensating the wife for the fact that matrimonial cohabitation ceased not due to her fault, but the husband's absence abroad.

However, in Nasima Bilkis v Md. Abdus Samad,[168] the maintenance for the iddat period was ascertained as 2,500 taka per month when the husband was not working abroad. It cannot be gathered from the judgement why the court awarded such an high amount. The facts of the case are that the parties were married on 23.3.90 by a registered kabinnama. The plaintiff, alleging her husband's cruel behaviour, was living in her father's house from 19.7.90. The defendant persuaded the plaintiff to stay with him and the plaintiff stayed for seven days and then came back to her father's house again on 17.3.91 with the same allegation. The plaintiff divorced the defendant on the basis of her delegated power of divorce on 2.6.91 and registered the talaqnama. The Family Court decided on the evidence of a letter of the plaintiff's father that the relationship of the parties was not harmonious and so the plaintiff was not entitled to maintenance during the subsistence of the marriage not even for the seven days when she was staying with the defendant. But the Family Court decided that the plaintiff was entitled to maintenance for the iddat period.

In cases on maintenance, the courts do not provide for past maintenance unless stipulated in the kabinnama, nor

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[168] Family Suit No.12 of 1992 (unreported).

post-iddat period maintenance to divorced Muslim wives. In Bangladesh, women have to rely on other techniques to secure some post-divorce maintenance. One writer has suggested a hopeful trend towards adoption and enforcement of clauses in the marriage contract or kabinnama which would clearly and in unambiguous terms provide for maintenance, as this offers protection against arbitrary and capricious subjugation.[169] However, in practice the execution of maintenance decrees is very difficult as the husbands evade to pay maintenance, hide and cannot be located. Even when they are traced, they might not have any possessions or may falsely conceal them. It is recommended that the sanctions of the Family Courts could be strengthened by providing them with a criminal court's power to attach the property of husbands to pay maintenance to the wife. It has already been suggested that the powers of the Family Courts should be enhanced in this regard (see above, p.218).

There are three problems which continually crop up in all maintenance cases. Firstly, there is the question of quantum of maintenance, i.e. how do the law and the Family Court arrive at an adequate sum? It has been shown in the discussion of the cases that there is no firm policy, although sometimes the husband's income is taken into consideration. Secondly, the problem is more acute, as husbands evade to pay maintenance in the majority of cases. The only sanction left to the wife is to execute the decree

[169] Malik (1990), p.39.

as arrears of land revenue, which is also not difficult for the husband to escape. Moreover, men in the patriarchal society of Bangladesh have the advantage to use social harassment, family slander and, in the extreme, physical threat so as not to implement the law. This is another element of the patriarchal arbitrariness which is the result of male authority in society. Finally, husbands have the potential to disclaim the legal marriage or unilaterally repudiate it by talaq or, more easily, to simply desert the wife.

Thus, the present chapter has shown in various ways that women in Bangladesh do not enjoy full freedom from economic deprivation in the sphere of family laws. The next chapter will analyse in more detail how women fare with particular reference to freedom from violence.

CHAPTER 6

DOWRY AND CRUELTY TO WOMEN

This chapter extends the examination of the issues of family law and women in Bangladesh by focusing mainly on disputes concerning dowry and cruelty to women. As we noted before, violence against women has reached the stage of a national problem in Bangladesh. In the sphere of domestic violence, cruelty to women for dowry and other causes has become a grave issue.[1] In fact, dowry deaths have become an everyday happening in South Asia.[2]

We have argued throughout that the real need of women in Bangladesh is to be protected from violence and economic deprivation. While dowry problems involve both aspects of the need, i.e. freedom from economic deprivation and violence, cruelty against women may only involve the aspect

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1. Islam, Mahmuda: 'Women studies in Bangladesh: An overview'. In South Asia News Letter. Center for Asian Studies Amsterdam and Documentation Center on South Asia, Leiden, No.4, Dec. 1989, pp.1-4, at p.1.

2 The Guardian. 28th July 1980, p.5; Choudhury, Neerja: 'Burning of the bride'. In New Internationalist. No.81, p.27; Vyas, Neena: 'A mother's crusade'. In Kishwar, Madhu and Ruth Vanita (eds.): In search of answers: Indian women's voices from Manushi. London 1984, pp.206-207; Singh, Indu Prakash and Renuka: 'Dowry: How many more deaths to its end?'. In Sood, Sushma (ed.): Violence against women. Jaipur 1990, pp.311-319; Grover, Kanta: Burning flesh. New Delhi 1990, pp.20-23; Kumari, Ranjana: Brides are not for burning-dowry victims in India. New Delhi 1989; Ekelaar, John: 'Scream silently, or the neighbour will hear'. In The Lawyers. Vol.6, No.4, April 1991, pp.4-11.

of protection from violence. Demands for reforms to control these problems were already made earlier and the Dowry Prohibition Act, 1980 and the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 were enacted in response to growing evidence of cruelty against women. We try to assess here whether this legislation has been beneficial to women and seek to find out whether women are actually able to use the legal remedies available under these new statutes.

The issues studied in chapter 5 above fell under the exclusive jurisdiction of the Family Courts but dowry murders and cruelty to women are criminal offences under the jurisdiction of the criminal courts. We have already suggested that this family-related criminal jurisdiction should be transferred to the domain of the Family Courts so that every aspect of family law would be under one jurisdiction (see above, p.218).

The chapter has three major aims. First, to identify the problem of dowry and cruelty to women in law and in society; then to discuss whether the new legislation introduced to curb these social evils was successful or not and finally to examine, through reported and unreported cases, to what extent the legislation has effected actual practice in Bangladesh.

While this chapter also explores the relationship between the statutory enactments and social practice, as reflected in reported and unreported cases, it must be emphasised again that by far not all dowry and cruelty cases come up to the courts. Some tables of crimes against

women in Bangladesh are given to ascertain the immensity of the problem. These tables show generally that cruelty and violence against women have tremendously increased in Bangladesh.

6.1 Confusions about the dowry problem

There is considerable debate about what constitutes dowry in its various forms. The confusion is more acute as in the societal context dowry is differently defined than in anti-dowry law. In a patriarchally-dominated social context dowry refers to property given to the bridegroom and his family but the anti-dowry law regards it as the exclusive property of the bride. The modern phenomenon of dowry, property given or agreed to be given to the bridegroom or his relatives, does not tally with the earlier concepts of brideprice and with the customary concepts of giving property to the bride herself.

Dowry and brideprice have received substantial attention in the anthropological literature. In fact, there is now a large volume of ethnographic and theoretical literature on dowry and bride-price.[3] Much of this

[3] See for example Srinivas, M.N.: Some reflections on dowry. Delhi 1984; Rajaraman, Indira: 'Economics of bride-price and dowry'. In Economic and Political Weekly. No.18, 1983, pp.275-279; Goody, Jack: 'Bridewealth and dowry in Africa and Eurasia'. In Goody, Jack and S.J. Tambiah (eds.): Bridewealth and dowry. Cambridge 1973, pp.1-58; Tambiah, S.J.: 'Dowry and bridewealth and the property right of women in South Asia'. In Goody, Jack and S.J. Tambiah

literature concerns the problems of the wide-spread switch from bride-price to dowry as marriage prestations.

The relationship of dowry with female inheritance concerns especially the Hindu law of stridhanam, which is outside the scope of this thesis.[4] However, dowry in its modern perception in the context of Bangladesh is discussed here. The dowry system is not recognised in the religion or the law of the Muslim societies but has spread into it.[5] Conversely, Islamic law provides dower to enhance the position of women. Why should Muslim women, who are supposed to be protected by dower, become victims of dowry? While recent scholars have admitted the fact that dowry has spread to the Muslim communities, they have largely ignored the position of Muslim women within this discourse.

It is important to note that until now authors confuse dower with dowry.[6] Perhaps the aspect of women's property

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(eds.): Bridewealth and dowry. Cambridge 1973, pp.59-169; Ahmed, Rahnuma and Shamsunnahar Milu: 'Changing marriage transactions and the rise of the demand system in Bangladesh'. In Journal of Social Studies. No.33, 1987, pp.71-107; Upadhya, Carol Bayack: 'Dowry and women's property in coastal Andhra Pradesh'. In Contributions to Indian Sociology. Vol.24, No.1, 1990, pp.29-59; Kumari (1989), pp.1-87; Grover (1990).

[4] On stridhanam see Pathak, J.K. and B.K. Sharma: Law of stridhanam. Allahabad 1992.

[5] Sivaramayya, B.: Inequalities and the law. New Delhi 1984, p.66; Latifi, Danial: 'Muslim personal law and Indian judiciary'. In Sharma, Ram Avtar (ed.) Justice and social order in India. New Delhi 1984, pp.282-325, at p.283; Diwan, Paras: 'The dowry prohibition law'. In Journal of the Indian Law Institute. Vol.27, No.4, 1985, pp.564-571.

[6] El Alami, Dawoud Sudqi: The marriage contract in Islamic law: In the Shariah and the personal status laws of Egypt and Morocco. London, Dordrecht and Boston 1992, p.107; Awasthi, S.K. and U.S. Lal: The law relating to dowry

or stridhanam in Hindu law and dower as the exclusive property of the wife are seen as synonymous. When dowry is regarded as stridhanam or pre-mortem inheritance for women, contradictions arise and the equation of dowry with stridhanam has been disputed by several authors.[7] They argue that the situation is absolutely reverse, as dowry is not a gift to the wife or her exclusive property but the property of her in-laws. But the anti-dowry law states that property given as dowry belongs to the wife. Why is dowry seen differently by the society and the law? It seems that the law-makers have not taken full account of the modern phenomenon of dowry and did not include its broader aspects.

The modern phenomenon of dowry in South Asia is its abuse as an inducement for a man to marry a woman or, with the same effect, demands of dowry payments by a man or his family. The result is a tendency to regard it as a groom-price, which is distinguished from the traditional kanyadan (gift of the virgin) or bride-wealth.[8] This modern feature of dowry means the transmission of large sums of money, jewellery, cash, and other goods from the bride's family to

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prohibition. Allahabad 1992, p.13.

[7] For example Herseman, Paul: Punjabi kinship and marriage. Delhi 1981, pp.242-247; Madan, T.N.: 'Structural implications of marriages in North India: Wife givers and wife takers among pandits of Kashmir'. In Contributions to Indian Sociology. Vol.9, No.2, pp.218-243.

[8] On this see Tambiah (1973), p.62.

the groom's family.[9] The emergence of dowry and the switch from brideprice have been explained by some authors as the cause of the decline of the earning capabilities and productivity of women.[10] According to this view the system of dowry is closely linked with women's role in productive activities. Where women are regarded as an unproductive burden, a dowry is given to the bridegroom's side to compensate them. However, the present spread of dowry cannot be explained only with variables like non-participation of women in economic activity. There are authors who refute this claim altogether, viewing the spread of dowry as parallel to developments elsewhere in the world identifying it with class formation under capitalist development.[11] Moreover, it is evident that women in Bangladesh are becoming more active and economically independent (see above, p.6) and it is quite clear that dowry demands and payments are primarily linked to status acquisition. While the issue of dowry in an economic framework has instigated a lively debate, it is outside the periphery of this thesis.[12]

The institution of dowry has been seen by Jamila Verghese in relation to the social attitudes in South Asia

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[9] Srinivas (1982), pp.10-11.

[10] For example Rajaraman (1983); Srinivas (1984).

[11] Upadhya (1990), p.34.

[12] See for details, Sambrani, Rita Bhandari and Sreekant Sambrani: 'Economics of brideprice and dowry-i'. In Economic and Political Weekly. 9th April 1983, pp.601-603; Aziz, Abdul: 'Economics of brideprice and dowry-ii'. In Economic and Political Weekly. 9th April 1983, pp.603-604.

which give preferential treatment to sons, enhanced by statutory regulations.[13] It is true that patriarchal society reserves special treatment for sons as they are expected to provide for their indigent parents (see above, p.47). But according to more recent case-law in India under section 125 of the Criminal Procedure Code of 1973 daughters are equally liable for the maintenance of their aged parents.[14]

Dowry is a new phenomenon for the Muslim communities in Bangladesh, with enlarged effects after independence. For the Hindu community also, its impact was not so widespread before liberation. It is significant to note that after independence a nouveau riche class who formerly belonged to the lower strata came into power.[15] This spectrum of people willingly gave dowry to the prospective grooms from higher classes of the society to become a part of that class. Nevertheless, hypergamy was only one variable for the causation of the dowry system.[16] This

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[13] Verghese, Jamila: Her gold and her body. New Delhi 1980, pp.157-158.

[14] See for details Carroll, Lucy: 'Anti-dowry legislation in Pakistan and Bangladesh'. In Islamic and Comparative Law Quarterly. Vol.iii, No.4, Dec. 1983, pp.249-260, at p.259. The leading case on this in India is Dr. Mrs. Vijaya Manohar Arbat v Kashirao Rajaram Sawai and another AIR 1987 SC 1100.

[15] Kirkpatrick, Joanna: 'Themes of consciousness among educated working women of Bangladesh'. In Park, L. Richard (ed.): Patterns of change in modern Bengal. Michigan 1979, pp.127-147, at p.127.

[16] For details of hypergamy and dowry in an Indian context see Van der Veen, Klaas W.: I give thee my daughter: A study of marriage and hierarchy among the Anavil Brahmins of South Gujarat. Assen 1972; Blunt, E.A.H: The caste

seems to be more prominent in the caste system of Hindu society as there is a tendency towards hypergamy.[17] However, the tendency of hypergamy by dowry has also spread to the Muslim community in Bangladesh.[18] Although there is supposed to be no class system in the Muslim society of Bangladesh, even in the supposedly homogenous peasant community significant distinctions of wealth, status and power exist.[19]

Some authors in Bangladesh are claiming that dowry has become an essential criterion for marriage in every community and is near universal in Bangladeshi society.[20] The simple gesture of jamai ador or special affection shown to the bridegroom has been transformed to the shape of daabi or demand by the bridegrooms. Even poor men are taking this chance of exploiting the bride's family to improve their fate from poverty and unemployment.[21] This is making marriage a commercial transaction, giving more value to property and money than the bride herself.

Thus, the recent emergence of dowry among Bangladeshi

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system of Northern India with special reference to the united province of Agra and Audh. Delhi 1934.

[17] Blunt (1934), p.70.

[18] Rahman, Muhammed Motiur: 'Joutuk ain prosonghe'. In 41 DLR (1989) Journal 51-53.

[19] See for details Bertocci, Peter J.: 'Community structure and social rank in two villages in Bangladesh'. In Contributions to Indian Sociology. No.vi, Dec. 1972, pp.28-51.

[20] Ahmed (1987), p.71.

[21] Ibid., p.101.

Muslims is more due to simple greed and commercialisation of marriage than the impact of traditional culture, the urge of hypergamy and the undermining of the women's productive role. To one author, the present dimensions of the dowry evil are the result of increasing industrial culture and the fascination for material prosperity, i.e. to get rich overnight, to possess the latest gadgets of comfort and luxury and the display of wealth.[22] The impact of men coming into contact with a wider cash economy by going abroad has also been shown to be a significant variable for their raised expectations in marriage.[23] The effect of dowry is so strong that even in England, where many of the immigrants are from South Asia, the same dowry problems occur.[24] Very recently, it was reported in a Bengali weekly in London that there was a warrant issued from Bangladesh against the First Secretary of the Bangladesh High Commission for physical and mental cruelty to his wife as dowry demands were not met by his father-in-law.[25]

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[22] Raijada, K.K.: 'Dowry deaths, suicides and bride burning'. In Indian Socio-Legal Journal. Vol.xv, No.1 and 2, 1989, pp.87-98.

[23] For details see Ahmed, Rafiuddin: 'Migrations from Bangladesh to the Middle East: Social and economic costs to the rural people'. In Israel, Milton and N.K. Wagle (ed.): Ethnicity, identity, migration: The South Asian context. Toronto 1993, pp.105-122; Kabeer, Naila: 'Subordination and struggle: Women in Bangladesh'. In New Left Review. No.168, 1988, pp.95-121, at p.104.

[24] Menski, W.F.: ' English family law and ethnic laws in Britain'. In Kerala Law Times. Journal 1988 (1), pp.556-566, at p.566.

[25] Notun Din. London 11th-17th February 1994, p.24.

Dowry deaths are a common phenomenon in South Asia. These deaths of women are usually caused by the same persons who are legally and socially enjoined to protect them, i.e. their husband or in-laws. It has been rightly pointed out that dowry deaths are a gruesome reminder of the authoritativeness of patriarchy.[26] In one study, dowry demands have been identified as one of the major causes of murder of women in Bangladesh.[27] The authors have established their finding by a table gathered from different media sources, showing that almost 50% of all murders of women in Bangladesh in the years 1983-84 were for dowry causes. This table is given on the next page.

[26] Singh and Singh (1990), pp.311-312.

[27] Akanda, Latifa and Ishrat Shamim: Women and violence. Dhaka 1984, p.5.

Table - 1[28]

Percentage of motive by cause of murder of women in Bangladesh in the year 1983-1984

Cause of Murder	Motive of murder											
	Theft		Property rights		Family Quarrel		Dowry Demand		Gratification of sex		Total	
	N	%	N	%	N	%	N	%	N	%	N	%
Beating					7	39	14	54			21	36
Physical torture	2	67	1	50	4	22	9	34			16	27
Use of sharp weapon	1	33			5	27			2	18	8	14
Hanging									4	36	4	7
Use of fire arms			1	50	1	6					2	3
Use of acids							2	8			2	3
Rape									5	46	5	8
Administration of poison					1	6	1	4			2	3
Total	3		2		18		26		11		60	

The table shows that there are different motives of murder, theft, property rights, family quarrels, dowry demands and gratification of sex and and also identifies the causes of murder, a gruesome list of violence against women. The table also projects that the largest number of

[28] This table is taken from ibid., p.4.

murders, 26 out of 60 in the year 1983-84 were for the cause of dowry demands. It does not disclose those dowry murders which are dressed up as accidents or suicide or which are hidden under 'family quarrel'; this might have increased the percentage of murder for dowry even more. The task also depicts that dowry deaths by fire are not as common in Bangladesh as in other South Asian countries.

As to the methods of killing women for dowry, 54% given for beating and 34% for physical torture add up to a gruesome 88% of deaths by direct physical violence, while the remaining 12% of deaths were caused by use of acids and poison. It is remarkable that particularly the use of acids is reserved for dowry victims. Clearly, the table exhibits that dowry murders are now a serious problem in Bangladeshi society; necessary steps should be taken to curtail this social evil.

As the roots of the problem of dowry appear to be socio-economic, remedies can only be achieved by changes of attitude in society; this can be attempted by legislation, but will need to be supported by education and legal awareness. The parents of a bride should understand that by giving dowry they may not be giving their daughter any happiness; it has been claimed that it is only increasing her misfortune.[29] The parents of the bride are not in fact giving the dowry to their daughter but to their son-in-law and his family; this increases greed for more dowry.

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[29] Kishwar, M.: 'Dowry: To ensure her happiness, or to disinherit her?' In Manushi. No.34, 1986, p.9.

Parents should rather safeguard their daughters from economic deprivation and violence by educating them about their rights within marriage.

6.2 Dowry and the law

India was first in South Asia to make an attempt to control the dowry problem by passing the Dowry Prohibition Act of 1961. Subsequently, Pakistan made relevant legislative enactments, which significantly were only applicable for the Western wing of the country.[30] After independence in Bangladesh the problems of dowry became so horrendous that activist women and some enlightened males were demanding legislation to stamp out this social evil. It was not considered right to treat women as a commodity to be transferred in marriage for consideration of property and money when the religious and official family laws did not regard women as chattels. Moreover, the Constitution of Bangladesh apparently provides sexual equality. The commodisation of women was seen as neo-patriarchy, which should not be tolerated any longer (for the system of patriarchy in Bangladesh see already above, p.46). Under such pressure, the government passed the Dowry Prohibition

30 The relevant Acts of West Pakistan are, The West Pakistan Dowry (Prohibition Display) Act of 1967, The North-West Frontier Province Dowry Act of 1972 and the Dowry and Bridal Gifts (Restriction) Act of 1976.

Act of 1980.[31]

6.2.1 The Dowry Prohibition Act, 1980

There are no published Parliamentary debates or report of a Commission to evaluate why the Dowry Prohibition Act, 1980 was introduced. However, this is the case for all Acts and Ordinances passed in Bangladesh. Perhaps that is why such legislation is regarded as 'cost free legislation'.[32] The author reports that legislation was not difficult to make as in the four years from 1980-84 there were about 273 Acts and Ordinances promulgated by the executive.[33] Nevertheless, the question of Parliamentary debates or appointing a Commission does not arise, as the Act in question is almost identical with the Dowry Prohibition Act, 1961 of India. One small difference between these two Acts is that in the Indian Act the punishment of imprisonment for the offence is for a maximum period of 6 months, whereas in the Bangladeshi Dowry Prohibition Act, 1980 there is a maximum of 1 year.[34] However, subsequently

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[31] Published in the Bangladesh Extraordinary Gazette, dated 26th Dec. 1980. The text of the Act is found in Appendix VII, below, p.472.

[32] Sobhan, Salma: 'Cost-free legislation? An evaluation of recent legislative trends in Bangladesh relating to women'. In Lawasia. Vol.4, 1985, pp.153-161.

[33] Ibid., pp.158-159.

[34] Carroll (1983), p.256.

in India the Dowry Prohibition (Amendment) Ordinance, 1984 has increased the penalty for dowry to a maximum of 2 years and in the Dowry Prohibition (Amendment) Ordinance, 1986 the penalty has been increased to a maximum of 5 years and a fine which shall not be less than 1500 rupees or the amount of the value of dowry whichever is more.[35] In Bangladesh the penalty has also been increased and now extends up to a maximum of 5 years and not less than 1 year under the Dowry Prohibition (Amendment) Ordinance, 1986 (see below, p.330).

The other difference is with regard to the limitation of the value of gifts given by any person other than a party to the marriage to either party to the marriage not in consideration of the marriage. The Bangladesh Act limits the value of such gifts to five hundred taka, while the Indian Act does not give any limit except prescribing that such gifts should not be given in consideration of the marriage.[36] Originally the Indian Bill, before passing through Parliament, had a restriction of 250 rupees as a limit on the value of gifts; this was not adopted in the

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[35] See for details Jain, Kiran B.: 'The Dowry Prohibition (Amendment) Act, 1984: A brief historical and comparative study'. In Islamic and Comparative Law Quarterly. Vol.vi, No.2-3, 1986, pp.181-189; Jain, Kiran B.: 'The Dowry Prohibition (Amendment) Act, 1986'. In Islamic and Comparative Law Quarterly. Vol.vi, No.4, 1986, pp.263-270; Jaswal, P.S. and Nishtha Jaswal: 'Anti-dowry legislation in India: An appraisal'. In Journal of the Indian Law Institute. Vol.30, No.1, January-March 1988, pp.78-87, at pp.80-81.

[36] Under explanation I of section 2 of both Acts.

Act.[37] But now, in India, there are rules regulating the presents.[38]

Section 2 of the Dowry Prohibition Act of 1980 of Bangladesh prohibits the giving or taking or demanding of dowry at or before or after the marriage as consideration of the marriage.[39] Any contravention of these provisions under section 3 and 4 will be an offence punishable with imprisonment for a maximum term of one year, or a fine of a maximum of 500 taka or both.[40] Section 4 also provides that no court shall take cognizance of any offence except with the previous sanction of an officer authorised by the government. The Dowry Prohibition (Amendment) Ordinance of 1982 allowed a person to proceed with a complaint without the prior sanction of a government officer (see below, p.329).

Dowry as defined under section 2 of the Act includes any property which is given, or which is agreed to be given, whether directly or indirectly, by one party to the marriage to the other party, or by the parents of one of the parties, or by any other person, to the other party to

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[37] Achar, M.R. and T. Venkanna: Dowry Prohibition Act. 2nd ed. Allahabad 1986, p.23.

[38] See the Maintenance of List of Presents to the Bride and Bridegroom Rules, 1985.

[39] This has been amended to 'at the time of marriage or at any time' by the Dowry Prohibition (Amendment) Ordinance of 1984 (see below, p.329).

[40] The Dowry Prohibition (Amendment) Ordinance of 1986 extended the penalty to imprisonment from a maximum of one year to a maximum of five years, and not less than one year (see below, p.330).

the marriage. This clearly shows an attempt to create a tight definition of 'dowry'. The explanation to section 2 declares that the presents made at the time of marriage to either party to the marriage in the form of any articles whose value does not exceed 500 taka shall not be regarded as dowry unless they are made in consideration for the marriage. This presumes that gifts whose value does not exceed 500 taka are not deemed to be dowry unless made in consideration for the marriage.[41] This also contemplates that if the value of the gift exceeds 500 taka, it must have been given as consideration for the marriage.

The Dowry Prohibition Act of 1980, under section 6, provided for the transfer to the bride of any dowry received. If the dowry was not transferred to the bride within the stipulated period as provided under section 6(1), the person who had appropriated it was to be punished with imprisonment for a maximum period of one year or penalised by fine for a maximum of 5000 taka or by both [under section 6(2)]. It was also specifically provided by section 6(2) that such punishment should not relieve the person from the obligation to transfer the property taken as dowry to the bride. This expressly indicated that if any property was given as dowry it was the exclusive property of the bride. Under section 6(3) of the Act if the woman entitled to the property of the dowry died before receiving it, the heirs of such woman were entitled to claim it from the person holding it. This anti-dowry law regards dowry as

[41] Carroll (1983), p.256-257.

women's property but, as we indicated above society counts it as the property of the bridegroom and his family (for details on the confusions over dowry see above, p.314).

Bangladesh has recently seen many amendments in the dowry law. These were initiated for filling certain gaps in the Dowry Prohibition Act of 1980 and to make it more effective. However, the amendments in 1984 have also taken away an important right of property of the women in Bangladesh, so it is doubtful whether the legislative amendments actually operate towards the protection of women.

By the Dowry Prohibition (Amendment) Ordinance of 1982 the proviso of section 4 was omitted, thus allowing a person to proceed with a complaint for offence of dowry without the prior sanction of a government officer. This measure helped to gain access to the protective legal mechanisms.

The Dowry Prohibition (Amendment) Ordinance of 1984 extended the definition of dowry to 'any property or valuable security given at the time of marriage or at any time', which substituted the earlier 'at, before or after marriage' for the purpose of ensuring that loopholes were closed.

But the amendment of 1984 deleted section 6 of the Dowry Prohibition Act 1980 which had provided that any dowry given for the benefit of the wife or her heirs and received by any person, was to be transferred by such person to the woman within a specified period of time.

Although this section was rarely invoked, it did confer an important right on a woman whose family had provided a dowry. As a result of the deletion of section 6, there is now not only a lacuna in Bangladeshi law on the issue of dowry, but the amendment has also taken away an important right of women to acquire property.[42] This looks like another step to subjugate women. What happens now to any dowry which is in fact given? After 1984 the law appears to be completely silent about this question. The Dowry Prohibition (Amendment) Ordinance of 1986 did not fill the gap created by deletion of section 6 of the Act. However, it made the penalty for giving or taking dowry tougher by extending the punishment of imprisonment from a maximum of one year to a maximum of five years, with a minimum of one year imprisonment. The offence of dowry had been cognizable, bailable and non-compoundable under section 8 of the Dowry Prohibition Act of 1980. By the Dowry Prohibition (Amendment) Ordinance of 1986 the offence has been made non-cognizable, non-bailable and compoundable by substituting the previous section 8, which enlarges the effectiveness of the Act.

These Amendments as analysed and commented upon above show the attempt of the legislature to enhance the effective implementation of the Act. However, the amendments have also taken away an important right of the

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[42] Carroll, Lucy: 'Recent Bangladeshi legislation affecting women: Child marriage, dowry, cruelty to women'. In Islamic and Comparative Law Quarterly. Vol.v, No.3-4, Sept.-Dec.1985, pp.255-264, at p.260.

women to own property, thus depriving women economically. We have argued that the primary need of women in Bangladesh is to be protected from economic deprivation and violence. Thus, section 6 of the Dowry Prohibition Act of 1980 should be re-introduced to protect women from economic deprivation. The effects and application of the Act are analysed below through cases to consider how far the Act is effective.

6.2.2 Cases on Dowry

Some years ago, it was reported by a weekly Bengali magazine that there were nearly 22,000 dowry cases pending in Bangladeshi courts.[43] It has also been reported that many women in Bangladesh are filing divorce petitions to escape torture at the hands of in-laws for failing to meet the expectations of dowry.[44] The validity of these reports is not beyond doubt; there are a huge number of cases of dowry. It is difficult to give a full survey of cases on dowry from the whole of Bangladesh, as there are not many reported cases from the higher courts. The unreported cases contain a large volume of cases of different Magistrates Courts, as each administrative area has such a court. However, it is possible to give an overview of the problem

[43] Khaborer Khagaj. March, Dhaka 1990, p.18.

[44] Ghosh, K.S.: Indian women through the ages. New Delhi 1989, pp.46-47.

through reported and some unreported cases to reflect the application of the provisions of the Dowry Prohibition Act of 1980. Cruelty and murder for dowry under the Cruelty to Women (Deterrent Punishment) Ordinance of 1983 are discussed in a separate section below.

The reported cases concerning the issue of dowry have primarily struggled with the definition of dowry, whether what is claimed as dowry constitutes dowry under the Dowry Prohibition Act of 1980 or whether such demands were made as a consideration for the marriage to fulfil the condition of the Act. This shows that the cases were more concerned with technicalities in the application of the Act rather than the protection of women.

The first published case in Bangladesh is that of Mihirlal Poddar v Zhunu Rani Shah,[45] where the High Court in Dhaka held that the demand for dowry was not a consideration for the marriage and hence it was not a demand for dowry. However, the High Court in Barisal, on almost identical facts, preferred the opposite conclusion three years later in the case of Rezaul Karim v Mosammat Taslima Begum.[46] It has been suggested that these conflicting decisions on dowry need to be resolved by the Supreme Court of the country.[47] In Rezaul Karim v Mosammat Taslima Begum, the court defined the meaning of dowry and

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[45] 37 DLR (1985) 227.

[46] 40 DLR (1988) 360; BLD 1989 35.

[47] See for details Malik, Shahdeen: 'Conflict of decisions need resolution'. 42 DLR (1990) Journal 55-57.

interpreted that dowry as it appears under section 2 of the Dowry Prohibition Act, 1980 is defined to mean any property or valuable security given or agreed to be given at or before or after the marriage as consideration for the marriage.[48] Thus dowry contemplates transfer of property or valuable security at the time of marriage or even before the marriage was solemnised.[49]

The court also reasoned in Rezaul Karim v Mossammat Taslima Begum that the expression "in consideration for the marriage" should be given an extended meaning, since otherwise the whole scheme of the Act prohibiting demand of dowry by the husband would be frustrated and will become redundant.[50] Thus as the court reasoned,

> Demanding money or other valuable security from the wife or her relations by the husband after she is married for giving her the status of a wife namely, maintaining her as a wife, protecting her as a wife and giving her a shelter would amount to demanding money in consideration of the marriage.[51]

The court also gave an extended meaning of "marriage" as defined in section 2 of the Dowry Prohibition Act, 1980. Marriage, as the court elucidates, means and includes,

> not only the ceremony of marriage but also the newly created legal status for both husband and the wife, to be continued, asserted and recognised to be available always in everyday life, till death separates one from the other or

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[48] 40 DLR (1988) 360, at p.362; BLD 1989 35, at p.36.

[49] Id.

[50] 40 DLR (1988) 360, at pp.362-363; BLD 1989 35.

[51] Ibid., p.362.

till the marriage subsists.[52]

Marriage is not only a ceremony, as the court opines but the creator of a status which continues during the marriage and does not create any consideration in terms of money or property except that which is expressed in the kabinnama.

Thus, the popular interpretation of the definition of dowry has been obtained in a judicial decision. It is argued here that the wording under section 2 of the Dowry Prohibition Act, 1980 "in consideration of the marriage" should be amended to "in connection with the marriage" as amended in India in 1984. This will help to resolve the confusion over whether a particular dowry is demanded in consideration for the marriage and conclusively determine it to be dowry if it is in connection with the marriage, thus covering the present loopholes of the Act. It has been mentioned earlier that the Amendment of the Act in Bangladesh in 1984 has already made a significant improvement by extending the meaning of dowry demanded or given or agreed to be given at any time before or after the marriage (see above, p. 329).

We could not find any cases challenging the deletion of section 6 of the Dowry Prohibition Act of 1980 by the Dowry Prohibition (Amendment) Ordinance in 1984. This has deprived women of the possibility of acquiring property by dowry. Perhaps there are no cases as it is well-known to women that dowry is not a right under Islamic law. However,

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[52] Id.

anti-dowy law is effective otherwise, as there is some evidence of punishment for demanding and taking dowry.[53]

6.3 Cruelty and violence against women: An overview

Crime against women is not a novel issue but in the early 1980's, in the wake of dowry and related problems, violence against women has increased enormously in South Asia and is now regarded as an important social problem.[54] The same effect can also be felt in Bangladesh after independence. It was reported that cruelty towards women in recent years has increased threefold compared to the overall incidence of violence and is now a great social problem.[55] However, violence against women is a trend which is deeply related with the oppressive structures of the patriarchal values in society as discussed. It has been argued that popular support against gender violence should be generated based on the fact that women are human beings or citizens of the country and not on conventional lines of equating women

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[53] See for details Rezaul Karim v Mosammat Taslima Begum 40 DLR (1988) 360; BLD 1989 35.

[54] Prasad, B. Devi: 'Dowry related violence towards women: A sociological perspectives.' In Sood, Sushma (ed.): Violence against women. Jaipur 1990, pp.293-309, at p.294.

[55] Sobhan, Salma et al.: The status of legal aid services to women in Bangladesh. Dhaka 1992, p.5.

with reproduction or as dependents to be protected.[56] It seems that the concern is more about whether public support for women's concern is initiated in conventional or modern ways than the protection of women against violence itself. Clearly, the need of the hour is to protect women from violence. If traditional or conventional frameworks of reference have the potential to protect women, there should not be any controversy about their use.[57]

Offences against women have taken modern aggravated forms, which were more or less absent in the past, as for example acid throwing or murder for dowry (see the table at p.322). Crimes against women have risen after independence, as morality has diminished after the nine months of liberation war.[58] The causes for the increase are similar to the increase of dowry; in many cases, dowry itself is the cause. Women in Bangladesh are facing not only aggravated forms of conventional crimes but also new types of crimes.

Official statistics from the reports of the Police Headquarters in Bangladesh were collected by a renowned lady lawyer, Rabeya Bhuiyan. Her material exhibits a horrifying picture of the quantum of violence and cruelty

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[56] Guhathakurta, Meghna: 'Gender violence in Bangladesh: The role of the state'. In The Journal of Social Studies. Vol.30, 1985, pp.77-90, at p.77.

[57] Kiswar, Madhu: 'Women's organisations: The pressure of unrealistic expectations'. In Manushi. No.59, 1990, pp.11-14.

[58] Akanda and Ishrat (1984), p.2.

against women in Bangladesh.[59] The tables are shown below:

TABLE - 2

A Statement of violence and cruelties against women in Bangladesh from 1986-1988[60]

Year	1986	1987	1988
Rape	433	380	344
Trafficking against women and children	10	16	85
Acid burn	22	13	16
Assault and hurt	97	52	44
Dowry offences with murder	16	24	46
Total	578	485	535

The table shows that in the year 1986 there were 433 rape cases but in 1987 there were 380 and in the next year it was further reduced to 344 cases; in trafficking against women and children in 1986 there were 10 cases, in 1987 there were 16 cases but in 1988 this increased to 85 cases. The cases of acid burn decreased from 22 in 1986 to 13 in 1987 but increased again to 16 in 1988; the cases of assault and hurt were reduced from 97 cases in 1986 to 52 in 1987 and 44 in 1988. Most significantly, dowry cases

[59] Bhuiyan, Rabia: Aspects of violence against women. Dhaka 1991.

[60] Ibid., p.51

with murder increased from 16 in 1986 to 24 in 1987 and further increased to 46 in 1988. This table does not necessarily reflect that crimes, except dowry and trafficking, are increasing but indicates generally that the amount of different crimes against women is so high that the time has come to introduce measures to eradicate them.

TABLE - 3

A statement of crimes against women of Bangladesh in the year 1989[61]

Types of violence	No.of cases	Charge sheet	Final Report	Under investigation	Punishment	Acquittal	Under Trial
Acid-burning	39	36	3	-	1	2	33
Hurt	51	46	5	-	1	3	42
Dowry	112	89	22	1	1	6	82
Rape	361	284	62	5	10	11	263
Other types of cruelty	537	420	100	17	5	20	395
Total	1090	875	192	23	18	42	815

The above table, for the year 1989 alone, shows a significant overall increase in crimes against women. Under the various entries, which are not quite the same as in previous years, the numbers of cases are much higher,

[61] Ibid., p.52.

especially for dowry, acid burning and rape. In this one year, there were 1090 cases of crimes against women, of which 815 are under trial, 42 accused were acquitted and only 18 accused were punished. However, this is not a complete picture; as we have indicated, the majority of cases are not reported at all. Moreover, these official figures are claimed to be under-reported.[62]

A report published in a daily newspaper in Bangladesh stated that only in the months of April and May 1989, 72 women became victims of different kinds of violence. Out of these 72 women, 18 were killed, 14 died due to torture by their husbands, 4 were killed for dowry, 3 were raped, 3 were kidnapped, 7 suffered acid burn, 5 committed suicide and 9 were rescued from the clutches of traffickers.[63] These alarming figures of increase of crime against women are also evidence that the new legislation with deterrent punishment alone is not enough to eradicate such crimes from society.

The lack of proper reporting is not only because of the inadequacy of government officials but also because women themselves are reluctant to report crimes against them for fear of repeated violence, honour or loss of face of their families and for the fear that they will be turned out of their matrimonial home. However, when a wife decides to seek a divorce, she often reports such violence. There is not much scholarly literature on domestic violence in

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[62] Ibid., p.50.

[63] The Daily Inquilab. Dhaka 14.6.1989.

Bangladesh and the official statistics do not give us a full picture of the incidence of violence against women. This vacuum can only be filled by further research on the issue.

6.4 Cruelty to women and the law

There is growing concern that a large number of women are subjected to inhuman torture, physical and mental cruelty. In fact crime against women in Bangladesh has increased to an alarming point and every day stories of torture and cruelty against women are reported in the dailies.

The Cruelty to Women (Deterrent Punishment) Ordinance of 1983, a very important law concerning women, was promulgated to act as a deterrent to cruelty towards women. This legislation brought tougher provisions to deter crimes against women. However, it appears that the Ordinance could not minimise crimes against women; if it did, this is not projected in any of the literature. There are no government surveys detecting that crime against women has declined. But the cases certainly show that many women are coming to the courts to seek relief under the Cruelty to Women (Deterrent Punishment) Ordinance of 1983.

In the present sub-section, we first consider the provisions of the Cruelty to Women (Deterrent Punishment) Ordinance of 1983 and then analyse the case-law under it. However, some cases under the Penal Code of 1860 are also discussed as we must see the Cruelty to Women (Deterrent

Punishment) Ordinance of 1983 as an extension of the Penal Code, 1860.

6.4.1 The Cruelty to Women (Deterrent Punishment) Ordinance, 1983

This Ordinance seeks to deter serious forms of cruelty to women with severe punishment. The Cruelty to Women (Deterrent Punishment) Ordinance, 1983 punishes a person with imprisonment for life or provides death penalty for kidnapping or abducting women, trafficking in women and attempting to cause death or for committing rape. It seems that it cannot be analysed for lack of data whether this deterrent punishment has been of any help to reduce crimes against women. However, the case-law reveals that complainants are keen to apply the Ordinance to give more severe punishment to the accused.

It needs to be asked why the urgency arose to enact a new Ordinance when the Penal Code, 1860 was supposed to provide penalties for crimes against women. In essence, it seems offences in aggravated form were not adequately covered under the Penal Code, 1860. For example, rape was already there as an offence in the Penal Code, but rape added with murder was not included. Under section 7 of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 when the person committing rape murders the woman or, while committing rape, causes death to the woman, he is punished

with imprisonment for life or with rigorous imprisonment for a term which may extend to 14 years and shall also be liable to fine. Under section 8 of the Ordinance, in the same situation, for attempting the offence, the offender is punished with imprisonment for life or with rigorous imprisonment for a term which may extend to 14 years and also with fine. Thus, the new Ordinance did extend the circumstances of the Penal Code, 1860 as before it rape with murder was not included.

Some cases compare the provisions of the Penal Code, 1860 and the Cruelty to Women (Deterrent Punishment) Ordinance, 1983. For example, in State v Khalilur Rahman,[64] it was held by the criminal court that it is devilish cruelty to kill a woman for dowry but it was beyond the court's jurisdiction to try this case as it could not be tried in an ordinary criminal court but in a special tribunal (see below, p.348). But why should different types of crime against women have to be instituted in different courts? Is this to show more justice towards women? In fact this is creating more confusion in the minds not only of the women but also their pleaders and even the judges.

If the 1983 Ordinance creates such confusion, would not simple amendments of the Penal Code, 1860 have achieved the same results? Or was the legislature more concerned to make a new law to give more emphasis on women's protection from violence? We have seen that it is impossible to give a clear answer. Still, the need of women in Bangladesh to

[64] 41 DLR (1989) 1; BLD 1989 43.

be safeguarded from violence is reflected in the enactment of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983.

The 1983 Ordinance was further amended by the Cruelty to Women (Deterrent Punishment Amendment) Act 1988, which made the penalty for trafficking in women under section 5 tougher by stating that the punishment will not be less than 7 years. Moreover a new section 8(a) was added giving the same punishment for attempting to kidnap or abduct or trafficking in women as for the actual kidnapping or abduction.

The legislature also made amendments to the Penal Code, 1860 to deter the growth of crimes against women. The offence of acid throwing in women's faces became so common that the legislature had to take immediate action; a new section was inserted by the Penal Code (Second Amendment) Ordinance, 1984. The new section 326A, provides punishment of death, transportation for life and fine for voluntarily causing grievous hurt in respect of both eyes, head or face by means of a corrosive substance.[65]

To reiterate, the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 may be regarded as an extension of the Penal Code, 1860 to accommodate grave offences which are not covered by it. It may have an impact on the sentiments of the male population to know that they will be punished if they disobey the law and be cruel to women, but there is no evidence of it. However, it was found while

[65] Bangladesh Statutes 37 DLR (1985) 144.

analysing the cases that even legal practitioners are still confused about the application of the new law. Thus, there should be more research on the effects of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 and it seems correct to assert that men should be made more aware of this law to protect women from violence.

6.4.2 Cases on cruelty and violence against women

Cruelty to women takes different forms and manifestations. It may be grave and gruesome as murder, rape, trafficking, acid throwing or take milder forms in mental cruelty and mental torture. Some of the forms of cruelty to women are briefly discussed through examples from recent cases to expose the gravity and enormity of these offences in Bangladeshi society. Detailed exposition of the issues could form the subject of a separate thesis.

There are recent cases of cruel murders of women. Two out of an enormous amount of cases are discussed here in which the accused were actually punished, which is a rare occasion.

In the highly publicised murder case of Kh. Ehteshamuddin Ahmed @ Iqbal v Bangladesh and Others,[66] the material facts found by the trial court on evidence led by the prosecution were that the victim Saleha Begum was

[66] BSCR 1980 239.

married to the accused Kh. Ehtashamuddin Ahmed alias Iqbal on 7th December, 1975. The accused lived with his family and had got a large amount of dowry from the parents of the victim. He received nearly 1.5 lakh taka from his mother-in-law for construction of a house. Monwara Begum was a maid servant of the family and the only eye witness in the case. Illicit connection grew between the accused and Monwara Begum and they had occasional sexual contact. On April 11, 1978 at about 11 A.M. when the victim went out of the house, the accused took Monwara to the bedroom and after shutting the door from inside, was having sexual intercourse with her when the victim suddenly returned and, finding the bedroom closed from inside, knocked at the door. After the door was opened by the accused, the victim entered the bedroom and, finding Monwara in the room, accused her husband of having an illicit connection with her. Monwara tried to go out of the room but the victim caught hold of her. Then the accused hit the victim on the head with a heavy wooden piece and the victim fell on the carpet. Monwara rushed to the second floor and informed the accused's mother Syeda Begum. The mother of the accused immediately came to the room, found the victim lying on the ground and tried to revive her but did not succeed. The accused, who was a medical student, examined the pulse of the victim and declared that she was dead. The mother of the accused went upstairs and the accused then took a blade from the dressing table and attempted to cut the victim's throat. Monwara tried to stop him but the accused slapped

her and threatened her with the same consequence if she tried to stop him. The accused then cut the throat of the victim to show that it was a case of suicide. The accused was sentenced to death and was executed. He was only punished for killing his wife and was not punished for zina. The case also shows that dowry was an issue, but this was not highlighted by the court.

In another recent case, State v Munir Hussain @ Suruj and Others,[67] the court found that the accused husband had dragged his wife-victim's body and thrown it in a deserted drain after injuring her severely with a sharp weapon while they were on a journey on the Dhaka-Chittagong highway. The court gave the accused the death penalty for this horrendous murder. On appeal, the order was maintained. Following the murder there was much public agitation and the media also took a big role in reflecting the ideas of the people about justice for violence against women Finally, the execution has recently been carried out.

Apart from murders or attempts to murder, other serious offences against women have also increased. The issue of torture and murder of women for dowry falls under section 6 of the Cruelty to Women (Deterrent Punishment) Ordinance of 1983 (for details see above, p.342). Murder, attempt to murder and causing grievous hurt are also criminal offences under the Penal Code of 1860. The difficulty in detecting dowry murders is that they can

[67] Title Suit No.121 of 1985 in the Court of Second Subordinate Judge, Dhaka (unreported).

easily be fabricated as accidents and suicides.[68] Some cases of grievous hurt or murder for dowry are analysed below to illustrate the impact of this alarming situation.

In State v Abdul Jabbar and others,[69] the victim Sufia, a girl of 15 years, was married to the accused. After she came to her in-laws' house they demanded money from her father. The poor father was unable to fulfil their demand. During the month of Ramadan on 19.6.84, at night when Sufia's husband was not at home (his absence was apparently intentional), she went to bed with her sister-in-law after she had taken the late night meal (shehry) to fast but she could not sleep as she could guess some evil plan to attack her. She tried to escape from the house but was caught by her in-laws; with the help of a sharp cutting object (boti) they cut her throat. Luckily for her, the throat was not fully cut but considering her dead they threw her at a near-by pond. In such condition she was discovered by a woman who came to take water from the pond. For months the victim fought for her life in the hospital and even though she was saved she could not eat or talk properly. Both the accused brother-in-law and her mother-in-law could not be sentenced to adequate punishment due to lack of evidence. However, they were both sentenced to ten years' imprisonment after review by the Chief Martial Law Administrator.

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[68] Carroll (1985), p.263.

[69] D.M. Case No.793 of 1983 (unreported).

In State v Khalilur Rahman,[70] at about 3 P.M. on 12.9.84 the accused Khalilur Rahman assaulted his wife Peara Begum severely with a balikucha (an instrument for sharpening knives) for non-payment of the balance of 600 taka out of the dowry of taka 4,000 agreed to be given at the time of marriage. Peara Begum died on the spot as a result of the injuries. In view of the case made in the First Information Report and the evidence, the Sessions Judge observed that it is a 'devilish cruelty' to kill a woman for dowry and it was beyond his jurisdiction to try it as an ordinary criminal case.[71] It should be noted that under the Ordinance of 1983 the offences under it should be tried under a Special Tribunal under the Special Powers Act, 1974. The case was sent back to be registered as a special tribunal case and the death reference was rejected. This shows that some cases of cruelty to women may not be tried in the ordinary criminal courts but under special tribunals. But it is yet to be understood whether by transferring those cases from the original criminal courts women will be benefitted more, or whether this is another way to corner women.

In the case of Salema Khatoon v The State,[72] it was held that the offence of dowry under the Cruelty to Women (Deterrent Punishment) Ordinance of 1983 is a demand for property or valuable security from the victim wife or her

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[70] BLD 1989 43; 41 DLR (1981) 1.

[71] BLD 1989 43, at pp.44-45; 41 DLR (1989) 1, at p.3.

[72] 38 DLR (1986) 348; BLD 1989 73.

guardian or any other relation as consideration for the marriage at any time after the marriage by causing or attempting to cause death or grievous hurt to the victim wife. The word used in section 6 of the Cruelty to Women (Deterrent Punishment) Ordinance of 1983 (see Appendix VIII, p.476) is "husband" and a person does not become the husband of a woman until the marriage has taken place.

Thus the husband of the victim woman or the husband's parents or guardian or any relations are liable for the offence within the ambit of the above section. In the explanation to section 6 dowry as under the Cruelty to Women (Deterrent Punishment) Ordinance,1983 must be in consideration for the marriage at any time after marriage. This is different from the Dowry Prohibition (Amendment) Ordinance, 1984 where the definition of dowry is extended to any demand made before or after the marriage. This loophole in the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 gives a chance to the husband or his guardians to escape liability. Thus, the offence of dowry violence under the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 should be subject to the same definition as under the Dowry Prohibition (Amendment) Ordinance, 1984. This could be achieved by amending the word 'husband' in section 6 of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 to 'would-be husband'.

In Firoza Begum v Hormuz Ali,[73] it was held that mere allegation made by the wife that her husband (the accused)

[73] 40 DLR (1988) 161.

had beaten her while demanding dowry and ousted her from the house, in the absence of any allegation that the accused had caused or attempted to cause death or grievous injury to her, meant that the case did not come within the mischief of section 6 of the Ordinance. This shows that the judges are not regarding beating for demanding dowry as sufficient evidence of cruelty under the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 unless the beating is grievous. The significant observation of this case is that even if it does not fall under the Cruelty to Women (Deterrent Punishment) Ordinance of 1983, it eventually comes under the Dowry Prohibition Act of 1980 and is punishable. But it is doubtful whether the victims or their pleaders are aware of this. Otherwise, why did they claim under the Cruelty to Women (Deterrent Punishment) Ordinance, 1983? Was the party or their pleader aspiring for more severe punishment? This shows that the application of the Acts and the Ordinances are not yet realised in full in Bangladesh even by lawyers.

Apart from dowry murders there are other crimes against women which need to be highlighted. Margina v The State,[74] is a case under sections 4, 5 and 9 of the Cruelty to Women (Deterrent Punishment) Ordinance of 1983. The victim Margina, a girl of ten years of age, was kidnapped by women traffickers and raped by a gang of miscreants. The Police recovered Margina and sent her to judicial custody but did not investigate the case properly. This came out in

[74] P.S. Case No.10 of 1988 Khalispur (unreported).

the dailies and there was public pressure for re-investigation. Margina gave a statement that the case was not at all investigated and the case was then sent for re-investigation.

In Rani Dhar @ Babita v The State,[75] the victim Gita Rani, a girl of thirteen years and a student of class nine, was kidnapped by the accused armed miscreants from her home. The miscreants then entered India in order to sell the victim and send her to Pakistan, but they were caught by the Indian Police. The Indian Border Police then handed her to the Bangladesh Rifles. Two accused were caught by the Bangladesh Police and are now under trial.

In Ananda and others v The State,[76] the prosecution failed to prove the charge of abetment punishable under section 366 of the Penal Code and section 4(b)(c) of the Cruelty to Women (Deterrent Punishment) Ordinance of 1983 against the accused Ananda. The court held that in the instant case there was nothing on the record to show that Ananda was a partner in any conspiracy which resulted in the abduction of the victim girl by another man.[77]

In Manindra Kumar Malakar v The State,[78] it was held that the kidnapping of a women for unlawful purpose when she is above 16 and below 18 and no force has been used to go with the accused will not be an offence under section

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[75] P.S. Case No.3 of 1987 Fulgazi (unreported).

[76] 41 DLR (1989) 533.

[77] Ibid., p.537.

[78] BLD 1990 HCD 120.

4(b) of the Cruelty to Women (Deterrent Punishment) Ordinance of 1983. This is one of the loopholes of the Ordinance, as unlawful purpose was present and the victim was a child (under the Child Marriage Restraint (Amendment) Ordinance, 1984) and a minor. The age of consent for marriage under the Child Marriage Restraint (Amendment) Ordinance of 1984 is 18 years, whereas the consent for unlawful purpose is considered to be 16 years and above. The same situation arises with the age of rape of the wife, which is 13 years and below under section 376 of the Penal Code, 1860.[79] Thus, if a husband rapes his wife above that age limit it does not fall under the category of rape. Such inconsistencies of the legislation should be amended to make this legislation more effective.

The most common domestic violence against women in Bangladesh is wife battering. The general notion in the rural areas is that the husband has a right to a certain level of force to be used against the wife. However, the situation is not the same in the urban population. Even the rural women are now not prepared to tolerate any violence. In fact, some cases of wife battering end up in divorce initiated by women.

In Mst. Ameena Begum v Ali Hassan,[80] the plaintiff was married to the defendant on 9.8.85 by a registered kabinnama. The plaintiff alleged that her husband was of ill temperament and was habituated to alcohol (neshakhor).

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[79] Bhuiyan (1991), p.44.

[80] Family Suit No.41 of 1990 (unreported).

The plaintiff also alleged that on 20.2.90, the defendant came home drunk and battered her and turned her out of the matrimonial home. A further allegation against the defendant was that he was impotent, as they did not have any children during their marital life, which was confirmed by a doctor. The plaintiff divorced the defendant by her delegated power of divorce on 6.5.90 and sent notice of it to the defendant. The plaintiff, thus, was praying for a declaration that their marriage was dissolved. The Family Court held that the plaintiff was entitled to a declaration that the marriage is dissolved as her own allegations showed that she was not inclined to continue marital life with the defendant and one can not force her to do that against her wishes. This case, without saying so, follows the principle and precedent of Khurshid Bibi (see above, p.136).

Cruelty to women has different aspects. An allegation or false charge of adultery of the wife by the husband is also cruelty under the state law. It is to be noted that lian or a false charge of adultery is also a ground for dissolution of marriage under the Islamic law.[81]

In Hasina Begum v Syed Abul Fazal,[82] the Court held that consistent and repeated allegations about the wife's involvement with another person are definitely 'cruelty' within the meaning of section 2 viii(a) of the Dissolution

[81] For details see Ali, Syeed Ameer: Mohammedan law. Vol.ii, New Delhi 1985 (reprint), pp.525-528.

[82] 32 DLR (1980) 294.

of Muslim Marriages Act of 1939. It was further held in the above case that if the husband treats his wife with cruelty of conduct, even if such conduct does not amount to physical ill-treatment but only mental torture, it is tantamount to 'cruelty'.

In Runa Laila v Javed Kaiser,[83] the complainant, a famous singer of the country, filed a suit for divorce on the grounds of mental cruelty. The court allowed her plea. In Firoza Khatun v Nazrul Islam,[84] the plaintiff was the daughter of a well-to-do person and the defendant exacted money from her father on various pleas. The plaintiff continued her studies despite all mental and physical cruelties caused to her by the defendant and won the Presidential honour for her performance as a head teacher. The defendant joined his wife in the same school as assistant head teacher but became jealous of the plaintiff's position and started giving false allegations against her. He also tortured her physically, so that she became ill. Finally she could bear no more and divorced the defendant and filed a suit for the declaration of divorce. In the trial the defendant brought their young daughter to depose against the immoral character of her own mother and the daughter was weeping all along the trial. The court allowed the divorce. It is interesting to note that in nearly all cases of domestic violence leading to divorce

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[83] Title Suit No.121 of 1985, in the Court of the Second Subordinate Judge, Dhaka (unreported).

[84] Title Suit No.26 of 1988, in the Court of Second Assistant Judge, Dhaka (unreported).

the common allegation of the husband is that the wife is of bad character, unfaithful and a thief who has eloped with the saris and ornaments belonging to the husband.[85] It is indeed true that the phenomenon of cruelty and violence against women is seen as a necessary concomitant of the patriarchal order.[86]

In a recent decision by the High Court division of the Supreme Court in Hosne Ara Begum v Rezaul Karim,[87] it was rightly observed that the appellate court below was guided by the archaic concept of absolute dominion of the husband over the wife treating her as chattel, forgetting that under the Muslim law several rights were granted to the wife, including the right to refuse the conjugal domain of the husband if treated by him with cruelty or failure to pay prompt dower.[88] The Supreme Court also extended the meaning of cruelty as defined under sec. 2(viii) of the Dissolution of Muslim Marriages Act of 1939 not only to include physical assault and cruelty of conduct but conduct which does not amount to physical assault or cruelty in the literal meaning. As the Supreme Court held, in a well-to-do family compelling the wife to do domestic work can be seen as physical and mental torture. However, the Supreme Court ascertained, on considering the evidence found by the trial

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[85] Bhuiyan (1991), p.27.

[86] Parihar, Lalita: 'Battered wife syndrome: Some socio-legal aspects'. In Sood, Sushma (ed): Violence against women. Jaipur 1990, pp.35-44, at p.36.

[87] 43 DLR (1991) 543.

[88] Ibid., p.545.

court (Family Court), that the wife was also subject to physical and mental torture and was under apprehension that she might be killed if she returned to her husband's house. Thus, physical and mental torture of the wife was not only held to be an offence punishable with imprisonment and fine but it also gave a valid ground to the woman to refuse restitution of conjugal rights to the husband (see above, p.248).

It is widely acknowledged that only a fraction of all cases of cruelty and violence against women come up to the courts. But when such cases have come under judicial scrutiny, judges of the criminal courts have appeared sympathetic towards women's causes and are trying to give proper redress to women. The main problem of crimes against women is that it is very difficult to detect them, especially in the sphere of domestic violence. The detection of domestic violence is made more difficult by the fact that it happens within the four walls of the domestic arena. The reasons for the apathy in adjudication on domestic violence depend on several factors: the reluctance of the police to become involved in marital disputes; traditional values and culture and the fear of the wife herself to complain against her husband.[89] Moreover, the women who are braving the consequences to come to the court cannot be sure that they are getting adequate relief. Is the punishment to their husbands worth their grievances and efforts? A recent study has shown it

[89] Bhuiyan (1991), p.31.

is not useful to complain in dowry cases.[90] The suppressed problems which arise in the aftermath of the decree of the court are never taken into consideration. What happens to a wife who leaves her husband and does not have a place to live or money to buy food? The legal system of Bangladesh does not take into account such social problems.[91] Thus, the demand of women in Bangladesh to be protected from violence also involves concern for freedom from economic deprivation. The two issues are intricately linked.

[90] Akanda and Ishrat (1990), p.37.

[91] Parihar (1990), p.37.

CHAPTER 7

CONCLUDING ANALYSIS

The first principal purpose of this chapter is to summarise the issues involving the different paradigms of family law in this dissertation. The prospects for further, more detailed and fieldwork-based research are examined in the second sub-section. Finally, the concluding part of this chapter considers what recommendations may be made to protect women in Bangladesh better against violence and economic deprivation.

7.1 Dialogue of the issues

This thesis has argued that the actual need of women in Bangladesh concerns protection from economic deprivation and violence. Our analysis of the recent legal developments in Bangladeshi family law stresses that the real needs of women have not been given enough priority in the family law.

Bangladeshi women constantly face restrictions in a male-dominated patriarchal society. The needs and demands of women in this society, we have argued, are not focused on gender equality but on sexual equity. Thus, the concept of gender equality in the public sphere is distracting from the discourse about the real needs of women in family law

and in society. The general law and the Constitution are premised on sexual equality, while the family law provides only equitable rights. The limited literature on women and law in Bangladesh confuses this, missing significant points of the realities of women's lives in a patriarchally-dominated society. We are suggesting that sexual equity can be meaningfully developed by better enforcement of the existing legal rights.

The main theme of this thesis is that women in Bangladesh need to be protected from economic deprivation and violence. These needs of women have not been adequately reflected in the legislation or judicial decisions. At the same time, first in British India, then in Pakistan and now in Bangladesh, the respective legislatures have been claiming that they wanted to ameliorate the position of women, particularly of Muslim women. In British India, legal reforms regarding the restraint of child marriages, women's right to divorce and the restriction of customary laws had some positive impact on the status of Muslim women. In the Pakistani period (1947-71), mainly by the Muslim Family Laws Ordinance of 1961, procedural impediments were introduced to disentangle the law from customary patriarchal influences. For example, the husband's right of unilateral talaq was supposed to be restricted by procedural requirements. The judiciary appeared to assist women and famous cases like Khurshid Bibi v Mohammad Amin[1] and Ali Nawaz Gardezi v Muhammed

[1] PLD 1967 SC 97.

Yusuf[2] were taken as precedents also by the Bangladeshi judiciary. But there are doubts now whether this worked entirely to the advantage of women or was even taking away important rights of women by not considering the implications of the new law within the established patriarchal setting.

In contemporary Bangladesh, too, steps have been taken to give women more rights within the Islamic framework by introducing new legislation. Family law reforms were portrayed as attempts to find a solution for several definite social problems, prominently violence against women in relation to dowry demands. Important legislation like the Dowry Prohibition Act of 1980, The Cruelty to Women (Deterrent Punishment) Act of 1983, the Muslim Marriage and Divorces (Registration) Act of 1974 and the Family Courts Ordinance of 1985 was enacted. But in each case, it was not sufficiently well analysed how the new laws would actually fit into the socio-cultural system of Bangladesh. A case in point was the new rule, introduced by the Dowry Prohibition (Amendment) Ordinance of 1984, that any dowry paid should not be the property of the bride. Surely, anybody who knows about the realities of Bangladeshi society would immediately understand that this would inevitably work against the interest of women and would strengthen patriarchal mechanisms of suppression. Families would continue to give presents to their daughters on marriage and as long as the distinctions between dowry

[2] PLD 1963 SC 74.

and other marriage prestations are not clearly drawn, the new law could not have any beneficial effect.

Legal reforms continue to have little or no impact on the remote poor rural communities in Bangladesh. Where legal reforms do not reach the people, the question of its efficacy does not even arise. Within the constitutional framework of Bangladesh, it should be argued that ways need to be found to make legal reforms in family law available to all sections of the population and to strengthen their use to give all women of Bangladesh the chance to benefit from better rights than the patriarchal society would seem to offer.

In our analysis of reported and unreported family law cases from Bangladesh we found that the judicial decisions in this sphere do not expressly discuss the need to protect women from economic deprivation and violence. However, some decisions signify concern of the higher courts not only about giving general emphasis on women's rights but also about the need to protect women from cruel treatment and deliberate economic deprivation. We found a significant difference here between the reported judicial decisions of the higher courts and the unreported judicial decisions of the lower courts or the Family Courts, in which patriarchal notions seem to remain a dominant force. In addition, recent legal developments in Bangladesh continue the trend of undermining women's legal position by judicial interpretations which appear to be technically correct but are in fact working against women. Thus in Nelly Zaman v

Giasuddin Khan,[3] reliance on equality before the law clearly disadvantages female petitioners seeking restitution of conjugal rights.

Interestingly, however, the judgements of the lower criminal courts in cases involving violence against women disclose more intense judicial concern about the need to protect women from cruelty and murder. This reflects that safeguarding women's physical existence is a matter of concern for the judiciary and gives rise to the hope that not only cases of aggravated violence will motivate the judiciary to protect the interests of women.

The Family Courts of Bangladesh have now become the main repository of family law issues, as very few cases actually come up to the higher courts. To make a full assessment of how the law is developing today, a detailed study of unreported cases from various parts of the country would be necessary (see section 7.2 below). In the present thesis, this could not be done. However, the prevailing impression from the reported case-law that modern Bangladeshi family law has benefitted from judicial activism, protecting the interests of women, may need to be revised in the light of more detailed research focusing on local litigation patterns. Our own limited research of unreported case studies provided many examples of insufficient protection of women and shows that there is a need for more systematic activisation of the judiciary and better sensitisation of all judicial personnel for the

[3] 34 DLR (1982) 225.

needs of women.

For example, several of the maintenance cases (see above, pp.307-310) showed that the judiciary is not following the sharia law nor any definite pro-women policy to determine the amount of maintenance for deserted wives. Further, as indicated above, application of the concept of 'judicial khul' in Bangladesh is in effect also working against the interests of women, taking away the right of dower for Muslim women. Most of the analysed dower cases reflected the attitudes of the patriarchal society and lack of judicial alertness in preventing deliberate economic deprivation of women, especially through uncritical application of the local customary concept of usool (see above, pp.286-289).

The case-law of Bangladesh also suggests that, through delegated divorce by the method of talaq-e-tahweed, more women are now able to dissolve their marriages with relative ease. However, this does not mean that women, even from liberal urban backgrounds, face no social stigmas attached to dissolving their marriages. Their friends and family will try to persuade them to go back to their husbands.[4] This shows that liberal legal reforms by themselves do not solve social problems. While the effect of the law may be to make divorce at the instance of the

[4] For further details on this see Bhuiyan, Rabia: 'Divorce is difficult'. In Akanda, Latifa and Roushan Jahan (eds.): Collected Articles. (Women for Women), Dhaka 1983, pp.54-58; Jahan, Roushan: 'Hidden wounds and visible scars'. In Agarwal, Bina (ed.): Structures of patriarchy. New Delhi 1988, pp.216-226, at p.219.

wife easier, the nub of the problem arises after dissolution. What is the position and status of the divorced wife? Can she survive alone in a conservative patriarchal society? What about financial constraints?

It is a fact that dissolution of marriage gives rise to many practical issues which are neither considered by the legislature nor the judiciary. One could, in a sense, say that life after divorce is not a matter for the law. But it is apparent that the socio-economic consequences of marital breakdown have an important impact on the legal position of spouses and the options available to them. In India, some detailed studies have shown the economic dependency of women on matrimony. In particular, women often have nowhere to go after divorce if support from the parental home is not forthcoming.[5] Lower middle class women, in particular, had to depend on their natal family.[6] Such studies also reveal that women feel a strong sense of helplessness after divorce, as neither their parental home nor their husband's home seems to belong to them as of right.[7] However, legally this should not be the position of Muslim women of Bangladesh, as they have a right under the sharia to a share of the parental property, although not to the same extent as their brothers. Clearly, the influence of local patriarchal customs and traditions is helping to

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[5] Dhagamwar, Vasudha: Women and divorce. Bombay and New Delhi 1987, p.99; Mehta, Rama: Divorced Hindu women. Delhi 1975, p.119.

[6] Id.

[7] Dhagamwar (1987), p.101.

deprive Bangladeshi women of their rights.

Much controversy surrounds the question whether there is judicial bias towards men. It may be expected that the effects of a male-dominated patriarchal society have an impact on the courts. But some judicial decisions are remarkably enlightened and can be seen as a departure from the patriarchal mould. There are also many judgements, however, in which the courts are interpreting the legislation only on the basis of orthodox concepts and fail to give effect to the underlying social purpose of the legislation.

In family matters, courts are often used as the last resort when other attempts of conciliation and mediation have failed. This is not only because litigation involves financial liabilities but is certainly also due to the fact that stigma is attached to bringing private issues into the public sphere. Sometimes there is no backing from the natal family to assist a woman, as litigation would impair the family's honour and dignity. Moreover, because of the known fact that court procedures are dilatory, few women feel inclined to bring family disputes to the court. It seems that the Family Courts have made some difference to this but are still not expeditious enough.

It is very difficult to ascertain the social class of the litigants from judgements which only contain the name and place of residence of the parties. However, sometimes the facts themselves disclose the social and economic status of the parties by stating their occupation and

education. From such information it can be gathered that the women in Bangladesh who come to court can be divided basically into two categories. The first group belongs to the higher or middle classes who are economically independent. Such women can afford to have the courage to face the stigma attached to litigation. The second category of women come from the lower classes and tend to utilise the courts in desperation and generally with the expectation of financial benefit. To them the slim hope of financial gain is probably more important than protecting the social taboos of honour or izzat of the patriarchal family and the limitations of parda.

The social reality reflected in the case-law shows that more women, in both categories, are now coming up to the Family Courts with their grievances after passing through all the obstacles of social bindings, seclusion and financial constraints, with the aspiration that they will get justice at last. They know they cannot get justice in the panchayat or the village court or the local administrative body, as these institutions are usually dominated by orthodox males.

If we ask how effective the judgements of the Family Courts are in practical life and whether the rights given to women in the decisions are actually achieved in social reality, we must admit that there is a dearth of information and that further research is needed. A related pertinent question is whether the enlightened judgements of the courts are actually accepted by the society. Even when

liberal or pro-women judgements are pronounced in matrimonial law, it is important to recognise that the patriarchal society will not accept them unless there is a substantial change in the traditional attitudes of the people, especially among males. This can be felt mostly in relation to child marriage and dowry, as few people observe the official law in the rural areas and it is freely violated without anyone ever challenging this in a court of law.

Overall, the judicial decisions on family law in Bangladesh, both in the higher courts and in the Family Courts and lower criminal courts reveal that the judges are, to some extent and in certain areas, giving enlightened decisions. Where these come from a higher court, they have generally been taken as precedents by the lower courts. It could be argued that this trend, if generally applied, will gradually bring about a better understanding of sexual equity and the needs of women to be protected from economic deprivation and violence. In countries like Bangladesh, it seems that no useful purpose for constructive law reform is served by radical judgements which treat people as independent individuals beyond the context of family life.

While the potential impact of enlightened judgements on society should not be underestimated, it is too simple to assume that court decisions by themselves can change the social realities for most women. Court activity and the involvement of sensitised judges may help to establish that

institutions like the Family Courts are the right platform to protect women from economic deprivation and violence. For the meaningful realisation of sexual equity in patriarchal societies like Bangladesh, law and society have to interlink at all levels in a complex process of working out what this equity should mean in any particular situation. So far, the evidence of continuing and in fact growing atrocities against women seems to suggest that the law may be ready to tackle grave abuses of women's rights, but society lacks at times the moral strength to protect women from economic deprivation and violence.

In a legal thesis, it seems appropriate to conclude that a better sensitised judiciary could lead the development of Bangladeshi family law into the right direction. Clearly, as we have shown, the existing law does not require major reforms to provide an effective support mechanism for enlightened judicial pronouncements. The onus remains on society to reconsider the impact of traditional patriarchal notions and to examine whether the treatment of women in Bangladesh today passes the test of fulfilling the needs of women to be protected from violence and economic deprivation.

7.2 Prospects for future studies

The present thesis has taken an overall view of the family law in Bangladesh and it has not been possible to incorporate detailed fieldwork to research the impact of family law reforms at the local level. It is quite obvious that future studies on specific issues in family law are desirable and necessary to arrive at more detailed assessments. The following themes, in particular, offer themselves for further research:

1. The dilatory procedure in the Family Courts. It would be useful to assess what changes have been made in practice by the Family Courts Ordinance, 1985 with regard to the actual time needed to produce decrees, to what extent lawyers continue to be involved in litigation before the Family Courts and whether the public impression of the futility of legal action has been affected by the Ordinance.
2. A detailed case study may be made on the effects of judicial decisions, inquiring whether the decrees are actually executed in practice. This will explore the social reality of women in Bangladesh and enable us to assess the impact of judicial pronouncements in society.
3. There could be a study on the patterns of out-of-court settlement and on the effects of local arbitration or shalish on women, particularly as such informal settlements are now recognised by the Family

Courts in Bangladesh. It could be analysed in detail to what extent such informal settlements are working against women and how they could be made more useful in the protection of the interests of women.

4. The property ownership structure and its impact on women in Bangladesh could be the focus of a detailed study. It should show how women are actually being disinherited from property by securing the ties with their natal family. In particular, the local custom of naior, and its implications in this respect, deserve to be researched.

5. There should be further study on the effects of economic independence on women's lives. It should be investigated whether working outside the home has improved the position of women within the home, as tentatively suggested by this thesis, or whether this is an illusion. This kind of work could also focus on whether extreme poverty curtails the social constraints on women's participation in paid work. Some implications of this are shown in this thesis.

6. There could also be a useful work linking the discussion about maintenance rights of women and succession, suggesting that women should not be deprived of their property rights just because they are maintained by their husbands. Linked to this, research on ways to enforce the right of maintenance, so that women are not so easily deserted and economically deprived, would be desirable.

7. Further studies should be conducted about the extent of legal awareness of women in Bangladesh. This will establish the extent to which women in Bangladesh have knowledge of the legal provisions and the methods of enforcement of their rights. Recommendations should be made about how better awareness could be created. Specific studies could be devised also to ascertain whether women in Bangladesh know the legal provisions which concern them most, such as validity of their marriage, grounds of divorce and ownership of property.

7.3 Recommendations

It follows from section 7.1 above that the existing legislation on family law in Bangladesh does not lack the potential to protect women from economic deprivation and violence. We have also seen that the judiciary has been able to pronounce enlightened judgements in some instances.

Since we have argued that a major onus for improving the position of Bangladeshi women lies on society, recommendations could be made about how social reforms could work towards better protection of women against violence and economic deprivation. Clearly, the main impediment in the way of freedom for women from violence and economic deprivation in Bangladesh is the discrepancy

of liberal legal concepts tending towards equitable rights and of traditional attitudes persisting in a male-dominated society.[8] Thus, it is suggested here that new law is not the answer, but there need to be changes within the social sphere. Men, in particular, should be conscious of their duties to protect women from violence and economic deprivation. Everybody in society should be aware that it is morally unacceptable to treat any woman with cruelty or to deprive her of economic assets or entitlements by illegal and illicit means.

In the present thesis, we need to concentrate on the legal sphere. It is reiterated here that the existing family law of Bangladesh could, after some amendments, fulfil the requirements for better protection of women.

In particular, there must be proper enforcement of the family law reforms and of judicial decisions. The reluctance of the law enforcing agencies to assist women should be eliminated as far as possible. This can be felt most obviously in cases of domestic violence, where despite the threat of deterrent punishments offences against women have increased, the police are not inclined to interfere in household affairs and many women faced with violence are left unprotected.

The operation of the judicial process in Bangladesh, with few exceptions, works against the interests of women.

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[8] Ahmed, Sufia and Jahanara Choudhury: 'Women's legal status in Bangladesh'. In Women for women: Research and Study Group (ed.): The situation of women in Bangladesh. Dhaka 1979, pp.285-331, at p.287.

To benefit the concerns of women within the judicial process, they should be involved more directly or indirectly as police officers, judges, prison officers and lawyers. Women should not be in fear of custodial rape in police stations. In reaction to evidence from Pakistan that 72% of women in custody had been physically or sexually abused,[9] women police stations have been introduced there. This model of women police stations should be adopted in Bangladesh, as custodial rape is also a problem there. Moreover, custodial rape should be included in the definition of the offence of rape under the Penal Code, 1860.[10]

It is interesting to note that there are already 52 lady judges in the judiciary, some lady police officers and prison officers and significant numbers of women lawyers. The large participation of women in universities and law colleges allows for hope that in the near future the judicial system of Bangladesh will be more sympathetic towards protecting women from economic deprivation and violence. However, it could not be substantiated in this study that lady judges have been making significant contributions towards the protection of women. Lady judges, too, are appointed from the elites of the society who may be unable to understand the real needs of poor litigants.

As indicated above, to protect women from economic

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[9] Goodwin, Jan: 'Jailed for being raped'. In Marie Claire. No.70, June 1994, pp.54-62.

[10] See already Bhuiyan, Rabia: Aspects of violence against women. Dhaka 1991, p.44.

deprivation and violence, a few amendments to the family law of Bangladesh can be suggested. An attempt is made here to identify those aspects which may help to give better protection to women in Bangladesh. While this list does not claim to be comprehensive, it relates to the major points of possible action identified in the main body of the thesis.

1. Prevention officers should be employed to detect defaulters of the Child Marriage Restraint Act of 1929. The necessary amendments to the Act could be introduced very simply and there are Indian precedents for this. Moreover, since it continues to be difficult to ascertain individuals' age at marriage because of the absence of any reliable registration procedure for births, more emphasis should be given to proper registration at birth.

2. It should be publicised that every marriage solemnised under Muslim law should be compulsorily registered under the Muslim Marriages and Divorces (Registration) Act of 1974. There should be amendments to the Act to make also Muslim divorces compulsorily registered, thus giving more security of status to women. At the same time, the law must continue to take account of the existence of unregistered divorces.

3. It could be suggested that the marriage certificate or kabinnama should automatically provide for delegated divorce. Our case studies revealed that judicial khul is taking away an important right of women. Such divorces, if made extra-judicial by law, will have the same practical

importance as talaq. Also, the hustle and expenses of going through the judicial process will not be there and cannot, therefore, operate to the disadvantage of women. Further on, if incompatibility of temperament is made a ground for dissolution of marriage with other grounds under the Dissolution of Muslim Marriages Act of 1939, the pressure on women to give khula would disappear and they would no longer need to return their dower.

4. Suggestions were made in India that the control of the person and property of a minor should be placed in one person, either male or female, with the prime consideration of the welfare of the child.[11] A parallel suggestion is made here in the context of Bangladesh to give the mother, along with the father, the right to guardianship, thus changing the paramount right of the father as the natural guardian.

5. In the Dowry Prohibition Act of 1980, the old section 6, which provided women rights to possess dowry property given by their parents, should be re-introduced.

6. The Family Courts should be separated from the Assistant Judges Courts and should bear an independent identity. Also, Family Courts should be a higher court of the judiciary and should not be left at the lower end of the judiciary. To protect women better against violence and economic deprivation, the Family Courts should also have powers of the criminal courts and the necessary amendments

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[11] Towards Equality: Report of the committee on the status of women in India. New Delhi 1974, p.128.

for this purpose should be made to the Family Courts Ordinance of 1985.

7. Better access to law should be provided for women. While the Family Courts themselves have been a way forward to facilitate access to the law for women, as it only takes 25 takas to file a suit in such courts, this is not the end of litigants' worries. Incidental expenses and lawyers' fees are far too expensive for an ordinary individual of Bangladesh, let alone poor women. Women are, thus, often denied their right at law due to financial constraints, even when they have a good claim.

8. The law faculties of the universities could initiate legal aid clinics to give on-the-spot advice to women and to provide legal literacy programs. Such initiative was effectively taken by the Faculty of Law, University of Delhi.[12]

9. Shelter should be provided for women who are victims of violence and have no natal family to support them. It is suggested that those refuges should be anonymous so that husbands or in-laws will not know the whereabouts of the women and will not get a chance to harass them. It should be mentioned that Mahila Parishad, a major women's organisation in Bangladesh, has opened up shelters for women to spearhead their campaign against dowry and

[12] Singh, S.P.: 'Report of the legal aid clinic, faculty of law, University of Delhi.' In Delhi Law Review. Vol.12, 1990, pp.163-164.

violence against women.[13]

10. Other than provisions for proceedings *in forma pauperis* under the *Civil Procedure Code*, 1908 and for court-appointed counsel in capital cases, no official legal aid facilities are known to be available in civil and criminal cases in Bangladesh.[14] As proper legal aid is not provided officially, it is suggested here that Family Courts should allow the litigants to plead their own cases. It appears that in India, Family Courts are not a legal battle ground for the interests of the privileged but a court where the litigants themselves plead for their redress.[15] If the same strategy was adopted in Bangladesh, it might give more women easier access to law.

11. There are many voluntary legal aid centers in Bangladesh, giving women opportunities not only to have judicial redress, but also legal literacy, *shalish* or mediation.[16] As we saw, a major limitation of *shalish* is that it does not have the same sanction or authority as the Family Courts and the parties may simply avoid to appear.[17]

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[13] Kabeer, Naila: 'The quest for national identity: Women, Islam and the state in Bangladesh'. In *Institute of Development Studies Discussion Paper*. No.268, Brighton Oct. 1989, pp.1-42, at p.30.

[14] Committee on legal services to the poor in the developing countries: *Legal aid and world poverty*. New York, Washington and London 1974, p.189.

[15] Diwan, Paras: 'The family courts.' In *Journal of the Indian Law Institute*. Vol.27, No.1, 1985, pp.101-109, at p.102.

[16] Sobhan Salma et al.: *The status of legal aid services to women in Bangladesh*. Dhaka 1992.

[17] *Ibid*., p.27.

However, as an out-of-court settlement, local arbitration or shalish on women's issues is increasingly recognised by the Family Courts in Bangladesh. But, as we pointed out, sometimes legal aid services like the shalish are providing women a considerably lesser remedy than would be granted to them by the Family Courts, even allowing accused men to escape punishment.[18]

12. One of the underlying reasons to enact the Family Courts Ordinance of 1985 in Bangladesh was to reconcile the parties and to go away from the adversarial model. Our analysis of cases could not uncover whether such attempts at reconciliation were actually made by the Family Courts. A more detailed study may clarify this point. But the Family Courts Ordinance of 1985 is the only law relating to family matters where there is an opportunity for the settlement of disputes.

13. In the legal system of Bangladesh today, family matters are entrusted to the Additional District Judge's Courts, with judicial personnel well-versed in ordinary civil matters but not necessarily in family law. The Family Courts should be separate courts with special expertise to facilitate the solution of family problems, rather than being a legal battleground in which the parties and their pleaders are more engaged in winning and defeating a legal action than in working towards the protection of women from economic deprivation and violence.

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[18] Ibid., p.30.

TABLE OF CASES

NAME OF THE CASES AND CITATION	PAGE
A. REPORTED CASES	
1. Abdul Aziz v Rezia Khatun 21 DLR (1969) 733	170
2. Abdul Kadir v Salima 1886 ILR 8 All 149 (FB)	106
3. Abdul Khaleque v Selina Begum 42 DLR (1990) 450	205
4. Abdulla v Rokeya Khatoon 21 DLR (1969) 213	167
5. Abdul Mannan v Sufuran Nessa 1970 SCMR 854	170
6. Abdur Rahman v Shahanara Begum 43 DLR (1991) 599	206
7. Abdus Sobhan Sarkar v Md. Abdul Ghani 25 DLR (1973) 227	264
8. Abul Basher v Nurun Nabi 39 DLR (1987) HCD 333	254
9. Adnan Afzal v Sher Afzal PLD 1969 SC 187	204,205
10. Ahmad Mia v Kazi Abdul Motaleb 23 DLR (1971) 181	168,238,254
11. Akhtar Jahan Taniya v The State BLD (1986) 281	282
12. Ali Nawaz Gardezi v Mohammad Yusuf PLD 1963 SC 51	168,169, 170,259,359
13. Ananda and others v The State 41 DLR (1989) 533	351
14. Asmat Bibi v Samiuddin 79 IC 1925 Cal 991	131
15. Ayesha Sultana v Shajahan Ali 38 DLR (1986) HCD 140	228,254

16. Badrunnisa Bibi v Muhammad Yusuf
AIR 1944 All 23 132

17. Bai Jina v Kharva Jina
31 ILR (1907) Bom 366 106

18. Balquis Fatimah v Nazm-ul-Qureshi
PLD 1959 (W.P.) Lahore 566 136

19. Captain Shamsul Alam Chowdhury v
Shirin Alam Choudhury
43 DLR (1991) 297 212

20. Chuhar v Gulam Fatima
PLD 1984 Lah 234 170

21. Dr. Mrs. Vijaya Manohar Arbat v
Kashirao Rajaram Sawai and another
AIR 1987 SC 1100 318

22. Dr. Rashiduddin Ahmed v
Dr. Quamarunnahar Ahmed
30 DLR (1978) 208 280

23. Farukh Miah v Tahera Begum
BLD 1981 165 227

24. Fauzia Hussain v Khadim Hussain
PLD 1985 Lah 165 168

25. Firoza Begum v Hormuz Ali
40 DLR (1988) 161 349

26. Ghulam Sakina v Falak Sher Allah Bakhsh
AIR 1950 Lahore 45 133

27. Gul Newaz Khan v Maherunnessa Begum
3 PLD 1965 Dacca 274-276 173

28. Hasina Begum v Syed Abul Fazal
32 DLR (1980) 294 267,353

29. Hosne Ara Begum v Rezaul Karim
43 DLR (1991) 543 214,
248,300,355

30. Imamuddin v Sukkor Ali Mollah and others
26 DLR (1974) 56 237

31. Inamul Islam v Mst. Hussain Banu
PLD 1976 Lah 1466 171

32. Kaim Pin v Umar Baksh
(1888) PR 3 120

33. Kh. Ehteshamuddin Ahmed @ Iqbal v
Bangladesh and Others
BSCR 1980 239 344

34. Khurshid Bibi v Mohammed Amin
PLD 1967 SC 97 136,
267,269,359

35. Majida Khatoon v Paghalo Mohammad
PLD 1963 Dhaka 583 130

36. Makbul Ali v Munwara Begum
39 DLR (1987) 181 253

37. Manak Khana v Mst. Mulkham Banu
AIR 1941 Lah 167 225

38. Manindra Kumar Malakar v The State
BLD 1990 HCD 120 351

39. Marina Jatoi v Nuruddin K. Jatoi
PLD 1967 SC 580 170

40. Mazhar Ali v Budh Singh
1884 ILR All 297 (FB) 131

41. Md. Abu Baker Siddique v
S.M.A. Bakar and others
38 DLR (1986) AD 106 278,284

42. Md. Kutubuddin Jaigirdar v
Nurjahan Begum
25 DLR (1973) HCD 21 261,269,275

43. Md. Rafique v Ahmad Yar
PLD 1982 Lahore 825 170

44. Md. Maqbul Ahmed v Sufia Khatun and Others
40 DLR (1988) 205 211

45. Mihirlal Poddar v Zhunu Rani Shah
37 DLR (1985) 227 332

46. Mohammad Ali Akbar v Fatima Begum
AIR 1929 Lahore 660 302

47. Moinuddin v Amina Khan Majlish
42 DLR (1990) 483 213

48. Moonshee Buzul-ul-Raheem v Shumsoonissay
1867 xi MIA 551 106

49. Mst. Bakshi v Bashir Ahmed
22 DLR (1970) SC 289 224

50. Mst. Daulon v Dosa
PLD 1956 Lahore 712 132

51. Mst. Fahmida Begum v Habib Ahmed
20 DLR (1968) WP 254 277

52. Mst. Mumtaz Mai v Gulam Nabi
PLD 1969 HC 5 171

53. Mst. Zebu v Miraj Gul
PLD 1952 Pesh 77 154

54. Mst. Zubaida Begum v Sardar Shah
AIR 1943 Lah 310 132

55. Muhammad v Aman
(1889) PR 31 120

56. Muhammad Aslam v Ghulam Muhammad Tasleem
PLD 1971 Lah 139 168

57. Muhammad Islam v State
PLD 1967 Pesh 201 169

58. Muhammad Salahuddin Khan v
Muhammed Nazir Siddique
1984 SCMR 583 170

59. Muhammad Siddiq v Mst. Ghafuran Bibi
25 DLR (1973) SC 1 270

60. Muhammed Amin v Mst. Surraya Begum
PLD 1969 Lah 512 171,172

61. M. Zikria Khan v Aftab Ali Khan
PLD 1985 Lah 319 171

62. Nasiruddin Shah v Amatul Mughni
AIR 1948 Lah. 135 (F.B.) 152

63. Nelly Zaman v Giasuddin Khan
34 DLR (1982) 225 231,240,246,
248,275,361

64. Noor Khan v Haq Nawaz
PLD 1982 FSC 265 170

65. Rahimullah Choudhury v
Mrs Sayeda Helali Begum
20 DLR (1968) 1 280

66. Rezaul Karim v Mosammat Taslima Begum
40 DLR (1988) 360
BLD 1989 35 332,333,335

67. Rehanuddin v Azizun Nahar
33 DLR (1981) 139 283

68. Rustom Ali v Jamila Khatun
43 DLR (1991) HCD 301 299,300

69. Sabed Khan v Bilatunnissa Bibi
AIR 1919 Cal 825 303

70. Salema Khatoon v The State
38 DLR (1986) 348
BLD 1989 73 348

71. Sardar Muhammad v Nasima Bibi
PLD 1966 Lahore 7
(1967) 19 DLR (WP) 50 130,172

72. Sayeeda Khanam v Muhammad Sami
PLD 1952 (WP)
Lahore 113 (FB) 136

73. Shah Banu v Iftekhar Md.
PLD 1956 Kar 363 290

74. Sofia v Zaheer
AIR 1947 All 16 106

75. State v Khalilur Rahman
41 DLR (1989) 1
BLD 1989 43 342,348

76. State v Tauqir Fatima
PLD 1964 Kar 306 170

77. Tahera Begum v Farukh Miah
35 DLR (1983) AD 170 227,253

78. Tahera Begum v Saleem Ahmed Siddiqui
PLD 1970 Karachi 619 272

79. Zafar Hussain v Mst. Akhbari Begum
AIR 1944 Lahore 336 131

80. Zafar Khan v Mohd. Ashraf
PLD 1975 Lahore 234 222

81. Zohra Begum v Latif Ahmed Monawar
17 DLR (1965) WP 134 278

B. UNREPORTED CASES

1. Abul Bashar v Md. Ufazuddin
   Family Suit No. 15 of 1991 — 282

2. Alahi Baksh v Rafeza Khatun
   Family Suit No.34 of 1988 — 248

3. Ambia Khatoon v Md. Yasin Bepari
   Family Suit No.98 of 1990 — 292,301

4. Anjuman Ara v Md. Abdur Rashid
   Family Suit N.9 of 1981 — 241,250,260

5. Beauty Begum v Md. Sekander Ali
   Petition Suit No.564 A-6 of 1988 — 240

6. Firoza Khatun v Nazrul Islam
   Title Suit No.26 of 1988 in the Court
   of the Assistant Judge, Dhaka — 354

7. Gulfam v Gazala Parvin and others
   Family Suit No.45 of 1992 — 279

8. Khondakar Shafiqul Huq Masud v
   Farida Begum and others
   Family Suit No.18 of 1990 — 249,255,275

9. Margina v The State
   P.S. Case No.10 of 1988 Khalispur — 350

10. Margubater Rouf v A.T.M. Zahurul Haq Khan
    Family Suit No.1 of 1992 and
    Family Suit No.3 of 1992
    (analogous hearing) — 290,308

11 Md. Abdul Karim v Muhsina Tabassum
   Family Suit No.142 of 1990 — 250

12. Md. Abdus Samad Khan v Nasima Bilquis
    Family Suit No.13 of 1992 — 249

13. Monowara Begum v Md. Hannan Hawlader
    Family Suit no.15 of 1989 — 274,288,302

14. Mst. Ameena Begum v Ali Hassan
    Family Suit No.41 of 1990 — 352

15. Mst. Angari Begum v Md. Iqbal Rashid
    Family Suit No.61 of 1991 — 255,293,307

16. Mst. Fatima Begum v
    Mohammed Golam Hossain
    Family Suit No.61 of 1991 — 249, 255,260,306

17. Mst. Hafeza Bibi v Md. Shafiqul Alam
Family Suit No.28 of 1992 287,304

18. Mst. Khadeza Begum v Md. Nurul Islam
Family Suit No.9 of 1987 293

19. Mst. Mahsina Tabassum Shirin v Abdul Karim
Family Suit No.9 of 1992 288

20. Mst. Meherunnahar v Rahman Khondakar
Family Suit No.24 of 1987 291,305

21. Mst. Noorjahan Khanam v
A.T.M. Mamoonur Rashid
Family Suit No.96 of 1992 281

22. Mst. Razia Akhter v Abul Kalam Azad
Family Suit no.193 of 1989 287,304

23. Mst. Roksana Begum v Md. Abdul Khair
Family Suit No.96 of 1991 260,
272,288,303

24. Mst. Shahida Begum v Md. Mahbub Hossain
Family Suit No.112 of 1991 290,306

25. Nasima Bilkis v Md. Abdus Samad Khan
Family Suit No.12 of 1992 274,289,309

26. Rani Dhar @ Babita v The State
P.S. Case No.3 of 1987 Fulgazi 351

27. Runa Laila v Javed Kaiser
Title Suit No.121 of 1985 in the Court
of the Second Subordinate Judge, Dhaka 354

28. State v Abdul Jabbar and others
D.M. Case No.793 of 1983 347

29. State v Munir Hussain @ Suruj and Others
Title Suit No.121 of 1985 in the Court of
Second Subordinate Judge, Dhaka 346

30. Syed Nurul Haq v Anjuman Ara Begum
Family Suit No.106 of 1989 281,283

TABLE OF STATUTES

TITLE OF STATUTES	PAGE
1. The Act of Settlement 1781	102
2. The Bangladesh (Adaptation of Existing Bangladesh Laws) Order, 1972	22,191
3. The Bangladesh Local Councils and Municipal Committees (Dissolution and Administration) Ordinance,1972	226
4. The Bangladesh Shops and Establishments Act 1965	66
5. The Bengal Maternity Benefit Act of 1939	67
6. The Bengal Muhammedan Marriage and Divorce Registration Act of 1876	142
7. The Child Marriage (Gujarat Amendment) Act, 1963	225
8. The Child Marriage Restraint (Amendment) Ordinance 1984	195, 220,221,352
9. The Child Marriage Restraint Act of 1929	109,110, 112,116,144, 164,220,221, 223,224,374,
10. The Civil Procedure Code, 1859	105
11. The Civil Procedure Code, 1877	105
12. The Civil Procedure Code, 1908	211, 213,214,377
13. The Criminal Procedure Code of 1973	318
14. The Criminal Procedure Code, 1898	156,166, 202,204,205, 212,218,264
15. The Cruelty to Women (Deterrent Punishment Amendment) Act, 1988	195,343,

16. The Cruelty to Women (Deterrent Punishment) Ordinance,1983 — 11, 26,179,194, 197,313,332, 340,341,342, 343,344,346, 348,349,350, 351,352,360

17. The Dissolution of Muslim Marriages Act of 1939 — 109, 122,124,129, 135,147,162, 172,214,217, 225,256,257, 269,270,297, 353,355,375

18. The Dissolution of Muslim Marriages (Amendment) Ordinance 1986 — 195,225

19. The Divorce Act, 1869 — 216

20. The Dowry and Bridal Gifts (Restriction) Act of 1976 — 285

21. The Dowry Prohibition Act, 1980 — 11, 26,179,194, 196,313,324, 325,327,328, 329,330,331, 332,333,334, 350,360,375

22. The Dowry Prohibition Act, 1961 — 324,325,333

23. The Dowry Prohibition (Amendment) Ordinance of 1982 — 195,327,329

24. The Dowry Prohibition (Amendment) Ordinance of 1984 — 195,326, 327,329,334, 338,349,360

25. The Dowry Prohibition (Amendment) Ordinances 1986 — 195, 326,327,330

26. The Evidence Act of 1872 — 117, 131,211,214

27. The Factories Act, 1934 — 66

28. The Factories Act of 1965 — 67

29. The Family Courts Act of 1984 — 204,208,210

30. The Family Courts (Amendment) Act 1989 195,201,207

31. The Family Courts Ordinance, 1985 23,24,179, 195,197,199, 201,202,203, 205,206,208, 209,210,211, 213,214,215, 216,217,218, 232,272,360, 369,376,378

32. The Guardians and Wards Act of 1890 154

33. The Indian Christian Marriage Act of 1872 103

34. The Indian Contagious Diseases Act of 1868 92

35. The Indian Criminal Law Amendment Act of 1891 111

36. The Indian Divorce Act, 1869 103

37. The Indian Succession Act, 1925 103

38. The Majority Act, 1875 221

39. The Matrimonial Causes Act, 1857 103

40. The Muslim Family Laws (Amendment) Ordinances 1982 195,226

41. The Muslim Family Laws (Amendment) Ordinance of 1985 195,228,298

42. The Muslim Family Laws (Amendment) Ordinances 1986 195,228

43. The Muslim Family Laws Ordinance, 1961 158,159, 160,161,165, 167,203,215, 216,217,225, 226,227,238, 239,243,244, 249,250,252, 254,257,258, 259,260,262, 264,266,273, 285,293,298, 304,308,359

44. The Muslim Family Law Rules, 1961 161,163,253

45. The Muslim Marriage and Divorce Registration Act of 1876 237,239,243

46. The Muslim Marriages and Divorces (Registration) Act, 1974 — 195,239, 240,242,243, 245,360,374

47. The Muslim Marriages and Divorces (Registration) (Amendment) Ordinance, 1982 — 239

48. The Muslim Personal Law (Shariat) Application Act, 1937 — 109,117,119, 120,121,191,

49. The Registration Act,1908 — 243

50. The Parsi Marriage and Divorce Act, 1865 — 103

51. The Payment of Wages Act of 1937 — 66

52. The Penal Code of 1860 — 27,110, 340,341,342, 343,346,373

53. The Penal Code (Second Amendment) Ordinance, 1984 — 343

54. The Plantation of Labour Ordinance, 1962 — 67

55. The Punjab Laws Act, 1872 — 117

56. The Special Marriage Act, 1872 — 103

57. The Special Powers Act, 1974 — 348

58. The Tea Plantation Labour Ordinance, 1962 — 66

59. The Tunisian Code of Personal Status, 1956 — 149

60. The West Pakistan Family Courts Act, 1964 — 203,205

61. The West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 — 121,191

62. The West Punjab Muslim Personal Law (Shariat) Application Act, 1948 — 121

63. The Workmen's Compensation Act, 1923 — 66

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APPENDICES

APPENDIX - I

THE CHILD MARRIAGE RESTRAINT ACT 1929

(Act No.xix of 1929)

An Act to restrain the solemnisation of child marriages.

Whereas it is expedient to restrain the solemnisation of child marriages; it is hereby enacted as follows:

I. SHORT TITLE, EXTENT AND COMMENCEMENT -(1) This Act may be called the Child Marriage Restraint Act, [1929].

(2) It extends to the whole of Bangladesh and applies to all citizens of Bangladesh wherever they may be.

(3) It shall come into force on the 1st day of April, 1930.

2. DEFINITION -In this Act, unless there is anything repugnant in the subject or context -

(a) "child" means a person who, if a male, is under [twenty one][1] years of age, and if a female, is under [eighteen][2] years of age;

(b) "child marriage" means a marriage to which either of the parties is a child;

(c) "contracting party" to a marriage means either of the parties whose marriage is or is about to be thereby solemnised;

(d) "minor" means person who [if a male][3] is under [twenty-one][4] years of age,[and if a female is under eighteen years of age][5]

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[1] Substituted vide S.2(a) of Ordinance 38 of 1984.

[2] Id.

[3] Vide S.2(b) of Ordinance 38 of 1984.

[4] Id.

[5] Id.

(e)[6]"Municipal corporation" means the Municipal corporation constituted under the Chittagong Municipal Corporation Ordinance, 1982 (XXXV of 1982), or the Dhaka Municipal Corporation Ordinance, 1983 (XL of 1983), or the Khulna Municipal Corporation Ordinance, 1984 (LXXII of 1984), within whose jurisdiction a child marriage is or is about to be solemnised;

(f) "Paurashava" means the Paurashava constituted under the Paurashava Ordinance, 1977 (XXVI of 1977), within whose jurisdiction a child marriage is or is about to be solemnised; and

(g) "Union Parishad" means the Union Parishad constituted under the Local Government (Union Parishad) Ordinance 1983 (LI of 1983); within whose jurisdiction a child marriage is or is about to be solemnised.

3 (Omitted)[7]

4.[8] Punishment for male adult above twenty-one years of age or female adult above eighteen years of age marrying a child -

Whoever, being a male above twenty-one years of age, or being a female above eighteen years of age, contracts a child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand taka, or with both.

5. PUNISHMENT FOR SOLEMNISING A CHILD MARRIAGE -Whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand taka or with both, unless he proves that he had reason to believe that the marriage was not a child marriage.

6. PUNISHMENT FOR PARENT OR GUARDIAN CONCERNED IN A CHILD MARRIAGE -(1) Where a minor contracts a child marriage, any person having charge of the minor, whether as a parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnised, shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand taka, or with both:

Provided that no woman shall be punishable with

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[6] Clauses (e) (f) and (g) were added by S.12(I)(c) of Ordinance viii of 1961 read with S.5(a) of Ordinance xiv of 1985.

[7] Section 3 has been omitted by section 3 of Ordinance No.38 of 1984.

[8] Section 4 substituted vide section 4 of Ordinance No.38 of 1984.

imprisonment.

(2) For the purpose of this section, it shall be presumed, unless and until the contrary is proved, that where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnised.

7. IMPRISONMENT NOT TO BE AWARDED FOR OFFENCES UNDER SECTION 3 -Notwithstanding anything contained in section 25 of the General Clauses Act, 1897, or section 64 of the Bangladesh Penal Code, a court sentencing an offender under section 3 shall not be competent to direct that, in default of payment of the fine imposed, he shall undergo any term of imprisonment.

8. JURISDICTION UNDER THIS ACT -Notwithstanding anything contained in section 190 of the Code of Criminal Procedure, 1898, no court other than that of a Magistrate of the First Class shall take cognizance of, or try, any offence under this Act.

9. MODE OF TAKING COGNIZANCE OF OFFENCE -No court shall take cognizance of any offence under this Act [except on a complaint made by the Union Council, or if there is no Union Council or if there is no Union Parishad or Paurashava or Municipal Corporation[9] in the area, by such authority as the Government may in this behalf prescribe, and such cognizance shall in no case be taken] after the expiry of one year from the date on which the offence is alleged to have been committed.

10. PRELIMINARY INQUIRIES INTO OFFENCE UNDER THIS ACT -The court taking cognizance of an offence under this Act shall unless it dismisses the complaint under section 203 of the Code of Criminal Procedure, 1898, either itself make an inquiry under section 202 of that Code, or direct a Magistrate of the first class subordinate to it to make such inquiry.

11. (Omitted)[10]

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[9] Added by section 12(I)(c) vide Ordinance VIII of 1961.

[10] Section 11 has been omitted by section 12(5), of Ordinance VIII of 1961. The omitted section ran as follows: "Power to take security from complainant-(1) When the court takes cognizance of any offence under this Act upon a complaint made to it, it may for reasons to be recorded in writing, at any time after examining the complainant and before issuing process for compelling the attendance of the accused, require the complainant to execute a bond, with or without sureties, for a sum not exceeding one hundred rupees as security for the payment of any compensation which the complainant may be directed to pay under section

12. POWER TO ISSUE INJUNCTION PROHIBITING MARRIAGE IN CONTRAVENTION OF THIS ACT -(1) Notwithstanding anything to the contrary contained in this Act, the court may, if satisfied from information laid before it through a complaint or otherwise that a child marriage in contravention of this Act has been arranged or is about to be solemnised, issue an injunction against any of the persons mentioned in sections 3,4,5 and 6 of this Act prohibiting such marriage.

(2) No injunction under sub-section (1) shall be issued against any person unless the court has previously given notice to such person, and has afforded him an opportunity to show cause against the issue of the injunction.

(3) The court may either on its own motion or on the application of any person aggrieved rescind or alter any order made under sub-section (1).

(4) Where such an application is received, the court shall afford the applicant an early opportunity of appearing before it either in person or by pleader; and if the court rejects the application wholly or in part, it shall record in writing its reasons for so doing.

(5) Whoever knowing that an injunction has been issued against him under sub-section (1) of this section disobeys such injunction shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to one thousand taka or with both.

Provided that no woman shall be punishable with imprisonment.

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250 of the Code of Criminal Procedure, 1898, and if such security is not furnished within such reasonable time as the court may fix, the complaint shall be dismissed.

(2) a bond taken under this section shall be deemed to be a bond taken under the code of Criminal Procedure, 1898, and Chapter XLII of that Code shall apply accordingly."

APPENDIX - II

THE MUSLIM PERSONAL LAW (Shariat) APPLICATION ACT1937

(Act No.XXVI of 1937)[1]

An Act to make provision for the application of the Muslim Personal law (Shariat) to Muslim in [Bangladesh].[2]

Whereas it is expedient to make provision for the application of the Muslim Personal Law (Shariat) to Muslim in [Bangladesh][3]; it is hereby enacted as follows:-

1. SHORT TITLE AND EXTENT -(1) This Act may be called the Muslim Personal Law (Shariat) Application Act, 1937.

[(2) It extends to the whole of (Bangladesh)[4]]

2. APPLICATION OF PERSONAL LAW TO MUSLIMS -Notwithstanding any custom or usage to the contrary, in all question (save questions relating to agricultural land) regarding inter state succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula, and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties and wakfs (other than charities and charitable institution and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

3. POWER TO MAKE A DECLARATION -(1) Any person who satisfies the prescribed authority-

(a) that he is a Muslim, and

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[1] For Statements of Objects and Reasons, see Gazette of India, 1935, Part.V, p.136, and for Report of Select Committee, see ibid., 1937, Part.V, p.235.
This Act has been applied to the partially excluded areas of the Mymensingh district from the 20th January, 1944, see Bengal Government Notification No.131-F, dated the 15th January 1944.

[2] Subs. by Act VIII of 1973, as amended by Act LIII of 1974 (with effect from the 26th March 1971) for "Pakistan".

[3] Ibid., sub section (2).

[4] Id.

(b) that he is competent to contract within the meaning of section 11 of the Contract Act, 1872, and

(c) that he is a resident of [Bangladesh],[5]

may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of [the provision of this section],[6] and thereafter the provisions of section 2 shall apply to the declarant and all his minor children and their descendants as if in addition to the matters enumerated therein adoption, wills and legacies were also specified.

(2) Where the prescribed authority refuses to accept a declaration under sub-section (1), the person desiring to make the same may appeal to such officer as the [Government][7] may, by general or special order, appoint in this behalf, and such officer may, if he is satisfied that the appellant is entitled to make the declaration, order the prescribed authority to accept the same.

4. RULE-MAKING POWER -(1) The [Government][8] may make rules to carry into effect the purpose of this Act;

(2) In particular and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:-

(a) for prescribing the authority before whom and the form in which declarations under this Act shall be made;

(b) for describing the fees to be paid for the filing of declarations and for the attendance at private residences of any person in the discharge of his duties under this Act; and for prescribing the times at which such fees shall be payable and the manner in which they shall be levied.

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

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[5] Subs. by Act VIII of 1973, as amended by Act LIII of 1974 (with effect from the 26th March 1971), for "Pakistan".

[6] Subs. by Act XVI of 1943, section 2, for "this Act".

[7] Subs. by Act VIII of 1973, as amended by Act LIII of 1974 (with effect from the 26th March 1971) for "Provincial Government".

[8] Id.

5. [Dissolution of marriage by court in certain circumstances.][9]

6. [Section 6.][10]

[9] Repealed by the Dissolution of Muslim Marriages Act, 1939 (VIII of 1939).

[10] Sec.6 was ommitted by Act viii of 1973, as amended by Act LIII of 1974 (with effect from 26th March 1971).

THE DISSOLUTION OF MUSLIM MARRIAGES ACT 1939
(Act No.VIII of 1939)

Received the assent of the Governor-General on the 17th March 1939 (Published in the Gazette of India dated the 25th March 1939)

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

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

1. (1) **SHORT TITLE AND EXTENT** -This Act may be called the Dissolution of Muslim Marriages Act, 1939.

(2) It extends to the whole of Bangladesh.

2. GROUNDS FOR DECREE FOR DISSOLUTION OF MARRIAGE -A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely-

(i) That the whereabouts of the husband have not been known for a period of four years;

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

(iia) that the husband has taken an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance, 1961;[1]

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

(iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;

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[1] Inserted by section 13(a) of the Muslim Family Laws Ordinance (VIII of 1961).

(v) that the husband was impotent at the time of the marriage and continues to be so;

(vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;

(vii) that she, having been given in marriage by her father or other guardian before she attained the age of [eighteen][2] years, repudiated the marriage before attaining the age of 19 years;[3]

Provided that the marriage has not been consummated;

(viii) that the husband treats her with cruelty, that is to say,-

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(b) associates with women of evil repute or leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstruct her in the observance of her religious profession or practice, or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunction of Quran;

(ix) on any other ground which is recognised as valid for the dissolution of marriage under Muslim law;

Provided that-

(a) no decree shall be passed on ground (iii) until the sentence has become final;

(b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the court that he is prepared to perform his conjugal duties, the court shall set aside the said decree; and

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[2] Substituted for the word 'fifteen' by sec. 13(b) of the Muslim Family Laws Ordinance (VIII of 1961).

[3] Substituted by Ordinance XXV of 1986-vide sec. 2.

(c) before passing a decree on ground (v) the court shall, on application by the husband, make an order requiring the husband to satisfy the court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the court within such period, no decree shall be passed on the said ground.

3. NOTICE TO BE SERVED ON HEIRS OF THE HUSBAND WHEN THE HUSBAND'S WHEREABOUTS ARE NOT KNOWN -In a suit to which clause (i) section 2 applies -

(a) the names and the addresses of the persons who would have been the heirs of the husband under Muslim law if he died on the date of the filing of the plaint shall be stated in the plaint;

(b) notice of the suit shall be served on such persons; and

(c) such persons shall have the right to be heard in the suit;

Provided that paternal uncle and brother of the husband, if any, shall be cited as a party even if he or they are not heirs.

4. EFFECT OF CONVERSION TO ANOTHER FAITH -The renunciation of Islam by a married Muslim woman on her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage:

Provided that after such renunciation, or conversion the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in section 2:

Provided further that the provisions of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.

5. RIGHTS TO DOWER NOT TO BE AFFECTED -Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of marriage.

6. REPEAL OF SECTION 5 OF ACT XXVI OF 1937 -This section repeals section 5 of the Muslim Personal Law (Shariat) Application Act (XXVI of 1937).[4] Section 5 of the Muslim Personal Law (Shariat) Application Act, 1937 -runs as follows:.

Dissolution of marriage by courts in certain

[4] Repealed by Act XXV of 1942.

circumstances -

The District Judge may, on petition made by a Muslim married woman, dissolve a marriage on any ground recognised by Muslim Personal Law (Shariat).

APPENDIX - IV

THE MUSLIM FAMILY LAWS ORDINANCE 1961

(Ordinance No. VIII of 1961)

[An Ordinance to give effect to certain recommendations of the Commission on Marriage and Family Laws]

Whereas it is expedient to give effect to certain recommendations of the Commission on Marriage and Family Laws;

Now, therefore, in pursuance of the Proclamation of the seventh day of October 1958, and in exercise of all powers enabling him in that behalf, the President is pleased to make and promulgate the following Ordinance;

1. SHORT TITLE, EXTENT, APPLICATION AND COMMENCEMENT -(1) This Ordinance may be called the Muslim Family Laws Ordinance, 1961.

(2) It extends to the whole of Bangladesh[1] and applies to all Muslim citizens of Bangladesh wherever they may be.

(3) It shall come into force on such date as the Government,[2] may, by notification in the official Gazette, appoint in this behalf.[3]

2. "DEFINITIONS"[4] -In this Ordinance, unless there is anything repugnant in the subject or context -

(a) "Arbitration Council" means a body consisting of the Chairman and a representative of each of the parties to a matter dealt within this Ordinance;

Provided that where any party fails to nominate a representative within the prescribed time, the body

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[1] Substituted by Ordinance 21 of 1982.

[2] Id.

[3] 15th July 1961 (Gazette of Pakistan, 1961 Extraordinary p.1128).

[4] Substituted by Ordinance XIV of 1985 vide sec.2 under heading definitions (a) to (f).

formed without such representative shall be the Arbitration Council;

(b) "Chairman" means -

(i) the Chairman of the Union Parishad;

(ii) the Chairman of the Paurashava;

(iii) the Mayor or Administrator of the Municipal Corporation;

(iv) the person appointed by the Government in the Cantonment areas to discharge the functions of Chairman under this Ordinance;

(v) where the Union Parishad, Paurashava or Municipal Corporation is superseded, the person discharging the functions of such Parishad, Paurashava or Corporation or, as the case may be, appointed by the Government to discharge the functions of Chairman under this Ordinance;

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

(c) "Municipal Corporation" means the Municipal Corporation constituted under the Chittagong Municipal Corporation Ordinance, 1982 (XXXV of 1982), or the Dhaka Municipal Corporation Ordinance, 1983 (XL of1983), or the Khulna Municipal Corporation Ordinance, 1984 (LXXII of 1984), and having the jurisdiction as prescribed;

(d) "Paurashava" means the Paurashava constituted under the Paurashava Ordinance, 1977 (XXVI of 1977), and having in the matter jurisdiction as prescribed;

(e) "Prescribed" means prescribed by rules made under section 11;

(f) "Union Parishad" means the Union Parishad constituted under the Local Government (Union Parishads) Ordinance, 1983 (LI of 1983), and having in the matter jurisdiction as prescribed.

3. ORDINANCE TO OVERRIDE OTHER LAWS, ETC. -(1) The provisions of this Ordinance shall have effect

notwithstanding any law, custom or usage.[5]

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

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

5. OMITTED BY ACT LII OF 1974.

6. POLYGAMY -(1) No man, during the subsistence of an existing marriage, shall expcept with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage contracted without such permission be registered [under the Muslim Marriage and Divorces (Registration) Act 1974 (LII of 1974)].

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

(3) On receipt of the application under sub-section (2, the Chairman shall ask the applicant and his existing wife or wives each to nominate a representative, and the Arbitration Council so constituted may, if satisfied that the proposed marriage is necessary and just, grant, subject to such conditions if any, as may be deemed fit, the permission applied for.

(4) In deciding the application the Arbitration Council shall record its reasons for the decision, and any party may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision [***] to the Munsif[6] concerned and his decision shall be final and shall not be called in

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[5] The words after the words usage of section 3 of original section "and the registration of Muslim marriages shall take place only in accordance with those provisions" have been omitted by Act LII of 1974.

[6] The word "Sub-Divisional Officer" has been substituted by the word "Munsif" vide section 3 of Ordinance No. XIV of 1985.

question in any court.

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

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

(b) on conviction upon complaint be punishable with simple imprisonment which may extend to one year, or with fine which may extend to ten thousand taka[7] or both.

7. TALAQ -(1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife.

(2) Whoever contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year or with fine which may extend to ten thousand taka[8] or with both.

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

(4) Within thirty days of the receipt of notice under sub-section (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

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

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[7] Sub-section 5 in clause (b) of section 6 for the words "five thousand rupees" the word "ten thousand taka" have been substituted vide amendment section 4 of Ordinance No. 21 of 1982.

[8] Sub-section 2 in section 7 for the words "five thousand rupees" the word "ten thousand taka" have been substituted vide amendment by section 5 of Ordinance No. 21 of 1982.

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

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

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

(2) A husband or a wife may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision of the certificate, to the Munsif[9] concerned and his decision shall be final and shall not be called in question in any court.

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

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

11. POWER TO MAKE RULES -(1) The Government may make rules to carry into effect the purpose of the Ordinance.[10]

(2) In making rules under this section, the Government may provide that a breach of any of the rules shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to five thousand taka or with both.[11]

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[9] Substituted by Ordinance XIV of 1985 section 4.

[10] Substituted by Ordinance 21 of 1982.

[11] Id.

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

11A. PLACE OF TRIAL[12] -Notwithstanding anything contained in any other law for the time being in force, an offence under this Ordinance shall be tried by a court within the local limits of whose jurisdiction -

(a) The offence was committed; or

(b) The complainant or the accused resides or last resided.

12. AMENDMENT OF CHILD MARRIAGE RESTRAINT ACT, 1929 (XIX OF 1929) - In the Child Marriage Restraint Act, 1929 (XIX of 1929

(1) in section 2 -

(a) "child"[13] means a person who, if a male, is under twenty-one years of age, if a female, is under eighteen years of age;

(b) In clause (c), the word "and" shall be omitted; and

(c) In clause (d), for the full stop at the end a comma shall be substituted, and thereafter the following new clause be added, namely:-

(e) "Municipal Corporation"[14] means the Municipal Corporation constituted under the Chittagong Municipal Corporation Ordinance 1982 (XXV of 1982, or the Dhaka Municipal Corporation Ordinance 1983 (XL of 1983), or the Khulna Municipal Corporation Ordinance, 1984 (LXXII of 1984), within whose jurisdiction a child marriage is or is about to be solemnised;

(f) "Paurashava" means the Paurashava constituted under the Paurashava Ordinance 1977 (XXVI of 1977), within whose jurisdiction a child marriage is or is about to be solemnised; and

(g) "Union Parishad" means the Union Parishad constituted under the Local Govt. (Union Parishad)

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[12] Inserted by Ordinance 24 of 1986 vide section 2.

[13] Vide section 2(a) of Ordinance 38 of 1984.

[14] The original sub-section 12(1)(e) run as follows:
"e" "Union Council" means the Union Council or the Town or Union Committee constituted under the Basic Democracies Order 1959 (PO No.18 of 1959) within whose jurisdiction a child marriage is or about to be solemnised.

Ordinance, 1983 (LI of 1983), within whose jurisdiction a child marriage is or is about to be solemnised.

(2) Section 3 shall be omitted;

(3) "4.[15] Punishment for male adult above twenty-one years of age or female adult above eighteen years of age marrying a child-whoever, being a male above twenty-one years of age, or being a female above eighteen years of age, contracts a child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand taka, or with both.

(4) In section 9, after the words "under the Act", the words "except on a complaint made by the Union council, or if there is no Union Parishad[16] or Paurashava or Municipal Corporation in the area, by such authority as the Government may in this behalf prescribe, and such cognizance shall in no case be taken" shall be inserted; and

(5) Section II shall be omitted.

13. AMENDMENT OF THE DISSOLUTION OF MUSLIM MARRIAGE ACT 1939 (VIII OF 1939) -In the dissolution of Muslim Marriage Act, 1939, (VIII of 1939), in section 2, -(a) after clause (ii), the following new clause (iia) shall be inserted, namely-

(a) "that the husband has taken an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance, 1961"; and

(b) In clause (vii), for the word "fifteen" the word "sixteen" shall be substituted.

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[15] Substituted vide section 4 of Ordinance No.38 of 1984.

[16] see Ordinance XIV of 1985 section 5.

APPENDIX - V

THE MUSLIM FAMILY LAWS RULES[1] 1961

Preliminary

1. These rules may be called the Bangladesh Muslim Family Laws Rules, 1961.

2. In these rules, unless there is anything repugnant in the subject or context,-

(a) "Form" means a form appended to these rules;

(b) "Local area" means the area under the jurisdiction of a Union Council;

(c) "Ordinance" means the Muslim Family Laws Ordinance, 1961 (VIII of 1961);

(d) "Section" means a section of the Ordinance; and

(e) "Union Council" has the same meaning as defined in the Ordinance.

3. The Union Council which shall have jurisdiction in the matter for the purpose of clause (d) of section 2, shall be as follows, namely -

(a) in the case of an application under sub-section (2) of section 6, it shall be the Union Council of the Union or Town in which the existing wife, or where there are more wives than one, the wife with whom the applicant was married last, is residing at the time of his making the applicantion;

(b) in the case of a notice of talaq under sub-section (1) of section 7, it shall be the Union Council of the Union or town in which the wife in relation to whom talaq was pronounced was residing at the time of the pronouncement of talaq; and

(c) in the case of an applicantion under section 9, it shall be the Union Council of the Union or town in which the wife is residing at the time of her making the application, and where application under that section is made by more than one wife, it shall be the Union Council of the Union or Town in which the wife who makes the application first is residing at the time of her making the application.

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[1] These rules were published in the Dhaka Gazzette on July 11th, 1961

4. (1) Where a non-Muslim has been elected as Chairman of a Union Council, the Council shall, as soon as may be, elect one of its Muslim members as Chairman for the purpose of the Ordinance.

(2) Any party to the proceedings before an Arbitration Council, who considers the Chairman to be interested in favour of the other party, may, with reasons to be recorded in writing, apply for the appointment of a different Chairman, to the Assistant Judge[2] who, on behalf of the Government[3] may, if he thinks fit, appoint any other member of that Council as Chairman for the purpose of the Ordinance. the Assistant Judge shall stay the proceedings before the Arbitration Council until he has disposed of such application.

5. (1) The Chairman shall conduct the proceedings of an Arbitration Council as expeditiously as possible.

(2) Such proceedings shall not be vitiated by reasons of a vacancy in the Arbitration Council, whether on account of failure of any person to nominate a representative or otherwise.

(3) Where a vacancy arises otherwise than through failure to make a nomination the Chairman shall require a fresh nomination.

(4) No party to proceedings before an Arbitration Council shall be a member of the Arbitration Council.

(5) All decisions of the Arbitration Council shall be taken by majority, and where no decision can be so taken, the decision of the Chairman shall be the decision of the Arbitration Council.

6. (1) Within seven days of receiving of an application under sub-section (2) of section 6 or under sub-section (1) of section 9, or a notice under sub-section (1) of section 7, the Chairman shall, by order in writing, call upon each of the parties to nominate his or her representative, and each such party shall, within seven days of receiving the order, nominate in writing a representative and deliver the nomination to the Chairman or send it to him by registered post.

(2) Where a representative nominated by a party dies, or is, by reason of illness or otherwise, unable to attend

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[2] The words "Sub-Divisional Officer" was substituted by the word "Munsif", Subsequently by the words Assistant Judge vide section 3 of Ordinance No.14 of 1985.

[3] The word "Provincial Government" was substituted for the words "Government" vide Ordinance No.21 of 1982.

the meetings of the Arbitration Council, or wilfully absents himself from such meetings, or has lost the confidence of the party, the party may, with the previous permission in writing of the Chairman, revoke the nomination and make within such time as the Chairman may allow, a fresh nomination.

(3) Where a fresh nomination is made under sub-rule (2), it shall not be necessary to commence the proceedings before the Arbitration Council de novo unless the Chairman, for reasons to be recorded in writing, directs otherwise.

7. (1) Any person, who is not below 25 years of age and who possesses sufficient acquaintance with the Arabic language and the Muslim law of marriage and divorce and who is of good character, may apply in writing to the Union Council for the grant of license to act as Nikah Registrar under section 5. Every such application shall be accompanied by two certificates that he possesses sufficient acquaintance with the Arabic language and Muslim laws of marriage and divorce, signed by two Muslim gentlemen of respectability and position, and two certificates of good character from persons of respectability and position, and shall contain the following particulars:

(a) Name and usual signature of the applicant, date of application and address in full-

(b) Age of applicant-

(c) Profession or present employment of the applicant with present salary or pension, if any-

(d) Father's name, profession and address-

(e) Present family residence of the applicant-

(f) Whether the applicant has a masonry house for office-

(g) If previous employment under Government, details of past service of the applicant; and if ever dismissed from any post, particulars of the fact-

(h) Name and address of the persons from whom certificates are obtained and attached to the application-

(i) Whether the applicant is acquainted with Arabic, Persian, Urdu, Bengali or English- and

(j) Whether the applicant is acquainted with Muslim laws and hold any certificate from any Government or Private Madrasah (stating its name)-

(2) Every such application shall be considered at a meeting of the Union Council; and if the Union Council, after making such enquiries as it may consider necessary, is satisfied that the application is fit and proper for the grant of a license to him in Form I, subject to the conditions specified therein. In granting a license, the Union Council shall give preference to applicants having Alim, Fazil, or Title certificates from a recognised Madrasah:

Provided that, in the case of a person who at the time of the commencement of the Ordinance was already exercising the powers of Mohammedan Registrar under the Bengal Muhammadan Marriage and Divorce Registration Act, 1876, the Chairman of all such Union Councils over which such Mohammedan Registrar was exercising such jurisdiction, may grant him a licence to perform the duties of Nikah Registrar under the Ordinance within their respective Unions, if he so applies.

(3) A Nikah Registrar shall pursue his avocation, as such, from a fixed place within his jurisdiction easily accessible to the residents of the local area.

(4) Leave may be granted to the Nikah Registrar by the Chairman of the Union Council who may issue a temporary license to a person having requisite qualifications under sub-rule (1), only for the period of the absence on leave of the permanent incumbent:

Provided that, in the case of a nikah Registrar who has been granted licence to act as Nikah Registrar by more than one Union Council, leave may be granted to such Nikah Registrar by the Assistant Judge[4] concerned, or, in his absence, by the Circle Officer.[5]

(5) A licence granted under this rule shall be permanent and revocable only when the Nikah Registrar contravenes any of the conditions of the licence granted under this rule, or is found to be guilty of a breach of any of the provisions of the rule, or of any misconduct. The Union Council shall have the power to revoke the licence only after regular proceedings in this behalf. Any Nikah Registrar aggrieved by any such order of revocation may prefer an appeal to the Government within 30 days from the date of the order of revocation.

(6) If any Nikah Registrar to whom a licence has been granted contravenes any of the conditions of such licence,

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[4] The words "Sub-Divisional Officer" was substituted by the word "Munsif" (now Assistant Judge) vide section 3 of the Muslim Family Laws Ordinance No.XIV of 1985.

[5] The word "Circle Officer" are not in existence.

he shall be punishable with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred taka or with both:

Provided that no prosecution under the sub-rule shall be initiated except upon a complaint from the Chairman of the Union Council concerned.

8. (1) The Union Council shall on payment of such cost as may be determined by the Government,[6] supply every Nikah Registrar a bound register of nikah namas in form II, and a seal bearing the inscription "The seal of the Nikah Registrar of ward.....* (x)..... in .....** (y)....."

(2) Each register shall contain fifty leaves, consecutively numbered, each leaf having a nikah nama, in quadruplicate, and the number leaves shall be certified by the Chairman.

(3) Notwithstanding the payment of cost under sub-rule (1), the register and the seal shall remain the property of the Union Council.

9. (1) For the registration of a marriage registered under section 5, the Nikah Registrar shall be paid by the bridegroom or his representative a registration fee of two taka or when the dower exceeds two thousand taka a fee calculated at the rate of one taka for every thousand or part of thousand taka of such dower, subject to a maximum fee of twenty taka.

(2) Of the fees received under sub-rule (1), the Nikah Registrar shall retain for himself eighty percent and shall pay the remaining twenty percent to the Union Council.

(3) Where dower consists of property other than money, or partly of such property and partly of money, the valuation of the property shall, for purposes of fees under sub-rule (1), be the valuations settled between the parties to the marriage.

(4) An extra commission fee of 4 taka shall be payable to a Nikah Registrar, for himself visiting any place other than his office for the registration of marriage, in addition to a travelling allowance at the rate of 50 paisa per mile for the distance actually travelled.

10. (1) The Nikah Registrar shall, in the case of a marriage solemnised by him, fill in Form II, in quadruplicate, in the register, the persons whose signature are required in the Form shall then sign, and the Nikah

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[6] The words "Provincial Government" were substituted by the word "Government" vide Ordinance No.21 of 1982.

Registrar shall then affix his signature and seal thereto, and keep the original intact in the register.

Provided that in the case of an illiterate person his thumb impression, and not any other mark, shall be taken, and his name shall be recorded at length who shall also sign his name in attestation that thumb impression was affixed in his presence.

(2) The duplicate and triplicate of the nikah nama filled in as aforesaid, shall be supplied to the bride and the bridegroom respectively, on payment of fifty paisa each, and the quadruplicate shall be forwarded to the Union council.

(3) If any person required by this rule to sign the register refuses so to sign, he shall be punishable with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred taka or with both.

11. (1) Where a marriage is solemnised in Bangladesh by a person other than the Nikah Registrar, such persons shall fill in Form II, to be had loose on payment of such price as may be determined by the Government, the person whose signatures are required in the Form shall then sign, and the person solemnising the marriage shall then affix his signature to the Form and ensure delivery; as expeditiously as possible, of the same together with the registration fee to the Nikah Registrar of the Ward where the marriage is solemnised.

(2) If any person required by this rule to sign the register refuses so to sign, he shall be punishable with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred taka or with both.

12. (1) In the case of marriage solemnised outside Bangladesh by a person who is a citizen of Bangladesh, such person shall ensure delivery of Form II, filled in accordance with the provisions of rule 10 to the consular officer of Bangladesh in or for the country in which the marriage is solemnised, for onward transmission together with the registration fee to the Nikah Registrar of the Ward of which the bride is a permanent resident, and in case the bride is not a citizen of Bangladesh, the Nikah Registrar of the Ward of which the bridegroom is such resident.

(2) In the case of a marriage solemnised outside Bangladesh by a person who is not a citizen of Bangladesh the bridegroom, and where only the bride is such citizen, the bride, shall, for purposes of filling in, as far as may be, Form II, be deemed to be the person who has solemnised the marriage under sub-rule (1).

13. On receipt of Form II under rule 11 or rule 12, the Nikah Registrar shall proceed in the manner provided in rule 10, as if the marriage had been solemnised by him.

Provided that, except where the marriage has been solemnised within his jurisdiction, it shall be necessary for the Nikah Registrar to obtain the signatures of the necessary persons.

14. In considering whether another proposed marriage is just and necessary during the continuance of an existing marriage, the Arbitration Council may, without prejudice to its general powers to consider what is just and necessary, have regard to such circumstances as the following, amongst others:

Sterility, physical infirmity, physical unfitness for the conjugal relation, wilful avoidance of a decree for restitution of conjugal rights, or insanity, on the part of an existing wife.

15. An application under sub-section (1) of section 6 for permission to contract another marriage during the subsistence of an existing marriage shall be in writing, shall state whether the consent of the existing wife or wives has been obtained thereto, shall contain a brief statement of the grounds on which the new marriage is alleged to be just and necessary, shall bear the signature of the applicant, and shall be accompanied by a fee of twenty-five taka.

16. (1) An application for the revision of a decision of an Arbitration Council, under sub-section (4) of section 6 or of a certificate under sub-section (2) of section 9, shall be preferred within thirty days of the decision or of the issue of the certificate, as the case may be, and shall be accompanied by a fee of taka two.

(2) The application shall be in writing, set out the grounds on which the applicant seeks to have the decision or the certificate revised, and shall bear the signature of the applicant.

17. All proceedings before an Arbitration Council shall be held in camera unless the Chairman otherwise directs.

18. (1) The quadruplicate nikah nama forwarded by the Nikah Registrar under sub-rule (2) of rule 10 shall be preserved in the office of the Union Council until such time as the register containing the originals, is, on being completed, deposited by the Nikah Registrar in such office.

(2) The completed register so received shall be preserved permanently.

(3) In the office of the Union Council there shall be prepared and maintained an index of the contents of every register, and every entry in such index shall be made, so far as practicable, immediately after the Nikah Registrar has made an entry in the register.

(4) The aforesaid index shall contain the name, place of residence and father's name of each party to every marriage, and the dates of the marriage and registration.

(5) The Sub-Divisional Officer[7] of the local area shall inspect and audit the records and accounts of the Nikah Registrar from time to time in course of their visit.

19. (1) Subject to the previous payment of the fees prescribed in sub-rule (2) and (3), the index and the register shall at all reasonable times, be open to inspection at the office of the Union Council by any person applying to inspect the same and copies of entries in the index and the register, duly signed and sealed by the Chairman, shall be given to all persons applying for such copies.

(2) The fee for the inspection of an index or register shall be fifty paisa.

(3) The fee for a certified copy of all or any of the entries relating to a marriage shall be-

(a) for those in an index .....fifty paisa.

(b) for those in a register .....two taka.

20. All fees payable under these Rules, except under rule 16, shall be paid in cash on obtaining proper receipt.

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[7] The Sub-Divisional Officer was substituted by the word "Munsif" vide section 3 of the Muslim Family Law Ordinance, Ordinance No.XIV of 1985, Subsequently it has been renamed as Assistant Judge.

THE MUSLIM MARRIAGES AND DIVORCES (REGISTRATION) ACT 1974

(Act No. LII of 1974)

An Act to consolidate and amend the law relating to Registration of Muslim marriages and divorces.

Whereas it is expedient to consolidate and amend the law relating to registration of Muslim marriages and divorces;

It is hereby enacted as follows:

1. SHORT TITLE AND APPLICATION -(1) This Act may be called the Muslim Marriages and Divorces (Registration) Act, 1974.

(2) It applies to all Muslim citizens of Bangladesh wherever they may be.

2. DEFINITIONS -In this Act, unless there is anything repugnant in the subject or context-

(a) "Inspector-General of Registration" and "Registrar" respectively mean the officers so designated and appointed under the Registration Act, 1908 (XVI of 1908);

(b) "prescribed" means prescribed by rules made under this Act.

3. REGISTRATION OF MARRIAGES -Notwithstanding anything contained in any law, custom or usage, every marriage solemnised under Muslim law shall be registered in accordance with the provisions of this Act.

4. NIKAH REGISTRARS -For the purpose of registration of marriages under this Act, the Government shall grant licenses to such member of persons, to be called Nikah Registrars, as it may deem necessary for such areas as it may specify;

Provided that not more than one Nikah Registrar shall be licensed for any one area.

Provided further that the Government may, whenever it deems fit so to do, extend, curtail or otherwise alter the limits of any area for which a Nikah Registrar has been licensed.[1]

[1] Added by the Ordinance XLIX of 1982.

5. MARRIAGES NOT SOLEMNISED BY NIKAH REGISTRARS TO BE REPORTED TO THEM -(1) Every marriage not solemnised by the Nikah Registrar shall, for the purpose of registration under this Act, be reported to him by the person who has solemnised such marriages.

(2) Whoever contravenes the provision of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to three months, or with fine which may extend to five hundred taka, or with both.

6. REGISTRATION OF DIVORCES -(1) A Nikah registrar may register divorces effected under Muslim law within his jurisdiction on application being made to him for such registration.

(2) An application for registration of a divorce shall be made orally by the person who has or have effected the divorce;

Provided that if the woman be a pardanashin, such application may be made by her duly authorised Vakil.

(3) The Nikah Registrar shall not register a divorce of the kind known as talaq-i-tafweez except on the production of a document registered under the Registration Act, 1908 (XVI of 1908), by which the husband delegated the power of divorce to the wife or of an attested copy of an entry in the register of marriages showing that such delegation has been made.

(4) Where the Nikah Registrar refuses to register a divorce, the person or persons who applied for such registration may, within thirty days of such refusal, prefer an appeal to the Registrar and the order passed by the Registrar on such appeal shall be final.

7. MANNER OF REGISTRATION -The Nikah Registrar shall register a marriage or divorce in such manner as may be prescribed.

8. REGISTERS -Every Nikah Registrar shall maintain separate registers of marriages and divorces in such forms as may be prescribed and all entries in each register shall be numbered in a consecutive series, a fresh series being commenced at the beginning of each year.

9. COPIES OF ENTRY TO BE GIVEN TO PARTIES -On completion of the registration of any marriage or divorce the Nikah Registrar shall deliver to the parties concerned an attested copy of the entry in the register, and for such copy no charge shall be made.

10. SUPERINTENDENCE AND CONTROL -(1) Every Nikah Registrar shall perform the duties of his office under the superintendence and control of the Registrar.

(2) The Inspector-General of Registration shall exercise a general superintendence over offices of all Nikah Registrars.

11. REVOCATION OR SUSPENSION OF A LICENCE -If the Government is of the opinion that a Nikah Registrar is guilty of any misconduct in the discharge of his duties or has become unfit or physically incapable to discharge his duties, it may, by order in writing, revoke his licence, or suspend his licence for such period, not exceeding two years as may be specified in the order.

Provided that no such order shall be made unless the Nikah Registrar has been given a reasonable opportunity of showing cause why that order should not be made.

12. CUSTODY OF REGISTERS -Every Nikah Registrar shall keep safely each register maintained by him under section 8 until the same is filled, and shall then or earlier if he leaves the district or ceases to hold a licence, make over the same to the Registrar for safe custody.

13. INSPECTION OF REGISTERS -Any person may, on payment of prescribed fee, if any, inspect at the office of the Nikah Registrar or of the Registrar any register kept in such office or obtain a copy of any entry therein.

14. POWER TO MAKE RULES -(1) The Government may, by notification in the official Gazette, make rules to carry into effect the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for-

(a) qualifications to be required from persons to whom licences under section 4 may be granted:

(b) fees payable to a Nikah Registrar for registration of a marriage or divorce:

(c) any other matter for which rules are required to be made.

15. AMENDMENT OF MUSLIM FAMILY LAWS ORDINANCE, 1961 (VIII OF 1961) -In the Muslim Family Laws Ordinance, 1961 (VIII of 1961)-

(a) in section 3, in sub-section (1), the comma and words, "and the registration of Muslim marriages shall take place only in accordance with those provisions" shall be omitted;

(b) section 5 shall be omitted;

(c) in section 6, in sub-section (1), for the words "under this Ordinance" the words, comma, figures and brackets "under the Muslim Marriages and Divorces (Registration) Act, 1974 (LII of 1974)" shall be substituted.

16.REPEAL -The Muslim Divorce Registration Act, 1876 (Beng. Act I of 1876), is hereby repealed.

17. PROVISION RELATING TO EXISTING NIKAH REGISTRARS -All Nikah Registrars licensed under the Muslim Family Laws Ordinance, 1961 (VIII of 1961), before the commencement of this Act, shall be deemed to have been licensed as Nikah Registrars under this Act.

APPENDIX - VII

THE DOWRY PROHIBITION ACT 1980

(Act No.XXXV of 1980)[1]

The following Act of Parliament received the assent of the President on 26th December, 1980 and is hereby published for general information:

An Act to prohibit the taking or giving of dowry in marriages. Whereas it is expedient to make provision to prohibit the taking or giving of dowry in marriages:
It is hereby enacted as follows:

1. SHORT TITLE AND COMMENCEMENT-

(1) This Act may be called the Dowry Prohibition Act, 1980.

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

2. DEFINITION -In this Act, unless there is anything repugnant in the subject or context, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly-

(a) by one party to a marriage to the other party to the marriage, or

(b) by the parents of either party to a marriage or by any other person to either party to the marriage or to any other person; at the time of marriage or at any time[2] before or after the marriage as considered for the marriage of the said parties but does not include dower or mehr in the case of persons to whom the Muslim Personal Law (Shariat) applies.

Explanation I -For the removal of doubts, it is hereby declared that any presents made at the time of marriage by any person other than a party to the marriage to either party to the marriage in the form of any articles the value of which does not exceed five hundred taka, shall not be deemed to be dowry within the meaning of this section, unless they are made as consideration for the marriage of the said party.

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[1] Published on 26.12.80 in the Bangladesh Gazette (extraordinary).

[2] In section 2 the words "at or" have been substituted by the words "at the time of marriage or at any time" vide Ordinance No.LXIV of 1988- Sec.2.

Explanation II -The expression "valuable security" has the same meaning as section 30 of the Penal Code (Act XLV of 1860)

3. PENALTY FOR GIVING OR TAKING DOWRY -If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable with imprisonment which may extend to five years and shall not be less than one year, or with fine, or with both.[3]

4. PENALTY FOR DEMANDING DOWRY -Any person, after the commencement of this Act, demands, directly or indirectly, from the parents or guardian or a bride or bridegroom, as the case may be any dowry he shall be punishable with imprisonment which may extend to five years and shall not be less than one year, or with fine, or with both.

[4]* * * * *

5. AGREEMENT FOR GIVING OR TAKING DOWRY TO BE VOID -Any agreement for giving or taking of dowry shall be void.

6.[5]* * * * *

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[3] In section 3 and 4 for the words and commas "one year or with fine which may extend to five thousand taka or with both" the word and commas "five years and shall not be less than one year or with fine or with both" has been substituted vide section 2 of Ordinance No.xxiv of 1986.

[4] The Proviso of section 4 was omitted by section 2 of Ordinance No.XLIV of 1982. The original proviso ran as follows:
"Provided that no court shall take cognizance of any offence under this section except with the previous sanction of an officer authorised by the Goverment or of such officer as the Goverment may, by general or special order, specify in this behalf".

[5] Section 6 was omitted by Ordinance LXIV of 1984- Sec.3. of the original section ran as follows-

6. DOWRY FOR THE BENEFIT OF THE WIFE OR HER HEIRS -(1) When any dowry is received by any person other than the woman in connection with whose marriage it is given, that person shall transfer it to the woman-
(a) if the dowry was received before marriage, within one year after the date of marriage; or
(b) if the dowry was received at the time of or after the marriage, within one year after the date of its receipt; or
(c) if the dowry was received when the woman was a minor, within one year after she has attained the age of eighteen years; and pending such transfer, shall hold it in trust for the benefit of the woman.
(2) If any person fails to transfer any property as

7. COGNIZANCE OF OFFENCES -Notwithstanding anything contained in Criminal Procedure Code 1898, (Act V of 1898).

(a) no court inferior to that of a Magistrate of the first class shall try any offence under this Act;

(b) no court shall take cognizance of any such offence except on complaint made within one year from the date of the offence;

(c) it shall be lawful for a Magistrate of the first class to pass any sentence authorised by this Act on any person convicted of an offence under this Act.

8. OFFENCE TO BE NON-COGNIZABLE, NON-BAILABLE AND COMPOUNDABLE -Every offence under this Act shall be non-cognizable, non-bailable and compoundable.[6]

9. POWER TO MAKE RULES -(1) The Government may, by notification in the official Gazette, make rules for carrying out the purpose of this Act.

(2) Every rule made under this section shall, as soon as may be after it is made, be laid before Parliament and if Parliament, before the expiry of the session in which it is laid, agree in making any modification in the rule or agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of effect as the case may be, subject that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

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required by sub-section (1) and within the time limited thereof, he shall be punishable with imprisonment which may extend to one year, or with fine which may extend to five thousand taka, or with both; but such punishment shall not absolve the person from his obligation to transfer the property as required by sub-section (1).
(3) Where the woman entitled to any property under sub-section (1) dies before receiving it, the heirs of the woman shall be entitled to claim it from the person holding it for the time being.
(4) Nothing contained in this section shall effect the provisions of section 3 or section 4.

[6] In section 8 words "bailable and non-compoundable" have been substituted by the words "non-bailable and compoundable" vide section 4 of Ordinance XXVI of 1986.

APPENDIX - VIII

THE CRUELTY TO WOMEN (DETERRENT PUNISHMENT) ORDINANCE 1983

(Ordinance No. LX of 1983)

An Ordinance to provide for deterrent punishment for cruelty to women. Whereas it is expedient to provide deterrent punishment for cruelty to women and for matters connected therewith;

Now, therefore, in pursuance of the Proclamation of the 24th March 1982, in exercise of all powers enabling him in that behalf, the Chief Martial Law Administrator is pleased to make and promulgate the following Ordinance-

1. SHORT TITLE AND APPLICATION -(1) This Ordinance may be called the Cruelty to Women (Deterrent Punishment) Ordinance, 1983.

(2) It shall apply to all citizens of Bangladesh wherever they may be and to any other person living for the time being in Bangladesh.

2. ORDINANCE TO OVERRIDE OTHER LAWS -The provisions of this Ordinance shall have effect notwithstanding anything contained in any other law for the time being in force.

3. DEFINITION -Words and expressions used in this Ordinance shall have the same meaning as in the Penal Code (Act XLV of 1860).

4. PENALTY FOR KIDNAPPING OR ABDUCTION OF WOMEN FOR UNLAWFUL OR IMMORAL PURPOSES, ETC. -Whoever kidnaps or abducts any woman of any age-

(a) with intent that such woman shall be employed or used for the purpose of prostitution or for any unlawful or immoral purpose or knowing it to be likely that such woman shall be employed or used for any such purpose; or

(b) with intent that such woman may be compelled, or knowing it to be likely that she will be compelled to marry any person against her will; or

(c) in order that such woman may be forced or seduced to illicit intercourse or knowing it to be that she will be forced or seduced to illicit intercourse shall be punishable with imprisonment[1] for life or with

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[1] The word "imprisonment" was substituted for the word "transportation" by Act No.37 of 1988, section 2.

rigorous imprisonment for a term which may extend to fourteen years and shall also be liable to fine.

5. PENALTY FOR-TRAFFICKING IN WOMEN -Whoever imports or exports, or sells, lets to hire or otherwise disposes of, or buys, hires or otherwise obtains possession of, any woman of any age with intent that such woman shall be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such woman will be employed or used for any such purpose shall be punishable with [death or with imprisonment for life or with rigorous imprisonment for a term which may extend to fourteen years and shall not be less than seven years][2] and shall also be liable to fine.

Explanation I -When a woman is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such woman shall, until the contrary is proved, be presumed to have disposed of her with the intent that she will be used for the purpose of prostitution.

Explanation II -Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a woman shall, until the contrary is proved, be presumed to have obtained possession of such woman with intent that she will be used for the purpose of prostitution.

6. PENALTY FOR CAUSING DEATH, ETC. FOR DOWRY -Whoever, being a husband or parent, guardian or relation of the husband of any woman, causes or attempts to cause death or grievous hurt to that woman for dowry shall be punishable with death or with imprisonment[3] for life or with rigorous imprisonment for a term which may extend to fourteen years and shall also be liable to fine.

Explanation -In this section "dowry" means any property or valuable security demanded from the wife or her parent, guardian or any other relation as consideration for the marriage, but does not include dower or mahr in the case of a person to whom the Muslim Personal Law (Shariat) applies.

7. CAUSING DEATH IN COMMITTING RAPE, ETC. -Whoever in committing or attempting to commit rape, causes death to

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[2] The words under section 5 "punishable with transportation for life or with rigorous imprisonment for a term which may extend to 14 years have been substituted vide section 3 of Amendment Act 37 of 1988.

[3] The word "transportation" under section 6 has been substituted by "imprisonment" vide section 4 of Amendment Act 37 of 1988.

the woman or after committing rape murders the woman, shall be punishable with death or with imprisonment[4] for life and shall also be liable to fine.

Explanation -A person shall be deemed to have caused death to a woman in committing or attempting to commit rape if the woman raped or in respect of whom the attempt to commit rape was made dies as a result of rape or hurt caused at the time of committing or attempting to commit rape.

8. ATTEMPTS TO CAUSE DEATH OR CAUSING GRIEVOUS HURT IN COMMITTING RAPE, ETC. -Whoever, in committing or attempting to commit rape, attempts to cause death or causes grievous hurt to the woman shall be punishable with imprisonment[5] for life, or with rigorous imprisonment for a term which may extend to fourteen years, and shall also be liable to fine.

[8 A.[6] ATTEMPTS TO COMMIT OFFENCES UNDER SECTIONS 4 AND 5 - Whoever attempts to commit an offence punishable under section 4 or section 5 or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall be punishable with the punishment provided for the offence.]

9. ABETMENT OF OFFENCES -Whoever abets any offence punishable under this Ordinance shall if the act abetted is committed in consequence of the abetment, be punishable with the punishment provided for the offence.

10. AMENDMENT OF ACT XIV OF 1974 -In the Special Powers Act 1974 (XIV of 1974), in the schedule, after paragraph 4A, the following new paragraphs shall be inserted namely:

> "4B. Offences punishable under the Cruelty to women (Deterrent Punishment) Ordinance 1983 (LX of 1983).
> 4C. Offence punishable under section 376 of the Penal Code (XLV of 1860).

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[4] The word "transportation" has been substituted by the word "imprisonment" vide the Amendment Act 37 of 1988.

[5] Id.

[6] A new section 8A has been inserted vide section 7 of the Amendment Act 37 of 1988.