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Codification of Muslim Personal Law in Bangladesh: Problems and prospects

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Abstract

Bangladesh is a country that is multi-racial and multi-religious. The majority of the population is Muslim. Family disputes such as marriage, divorce, maintenance, guardianship, inheritance, and so on are dealt with under various Personal Laws. Women's repression, domestic abuse, guardianship, and other concerns have all been addressed by the state through a variety of laws that apply to everyone. Advocates for family law reform commonly employ legal arguments based on Islamic law, implying or explicitly accepting the Islamic categorization of family law. This "reform from inside" tactic has gained popularity in recent years, and the arguments have become more ambitious, particularly as women's groups have become more visible and vocal. The reasons for this approach range from religious to pragmatic and include activists' and lawmakers' personal beliefs as well as public antipathy to what appear to be Western, secular family law rules. But sometimes our laws have abruptly deviated from the ambit of sharia law resulting in discrimination towards women and inconsistency most of the time. To remove such inconsistency and bringing back the justice reform in a way of codification is needed in the family law in our country.

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Introduction

In Muslim-majority countries, family law has changed significantly over the past century, and the process is currently unfolding with both intensity and controversy. This change has been referred to as reform, which is defined as the alteration of current family laws based on or supported by Islamic legal principles to improve the rights of women and children. Bangladesh is a country with multiple races and religions. The majority of the population is Muslim. Personal Laws address family issues such as marriage, divorce, child support, child custody, guardianship, and so forth. The state has addressed women's oppression, domestic violence, guardianship, and other issues through a variety of universally applicable legislation. Advocates for the codification of family law frequently employ legal arguments based on Islamic law, implying or explicitly accepting the Islamic category of family law. This reform strategy has risen over the past few years, and the arguments have become more ambitious as women's groups have been more visible and vocal ^[1]. Reasons for this approach range from religious to pragmatic, and include the personal opinions of activists and legislators as well as broad opposition to what appear to be Western, secular family law norms. In the majority of instances, however, our policies have deviated from the scope of sharia law, resulting in discrimination against women. We must abolish such anomalies and reintroduce justice in our nation's family law. Regarding the application of Muslim Family Law in Bangladesh, a number of contradictory scenarios exist. Despite the fact that the legislation specifically states that sharia shall be applicable throughout the country, there are serious obstacles to its implementation. In Bangladesh, there is a contradiction between people's practices, the law, and sharia. The sharia is frequently misunderstood by the populace.

¹ A.W.M Abdul Huq, 'Section 4 of the Muslim Family Laws Ordinance, 1961: A Critic' (2010) 1(1) NUJL accessed 18 November 2021

In these circumstances, there is an urgent need for reform and codification of the laws, as they are in stark opposition with the sharia.

Relationship between Sharia and Law

Islamic law is a divine law. It has been established based on the religion of Islam that is the complete code of life. "Islamic Law" refers to the diverse legal systems that have been and continue to be produced with the objective of being in accord with the Islamic faith. Islamic legal systems operate in multiple and sometimes discontinuous ways. Usage of the singular term "Islamic Law" should not be understood as suggesting the absence of legal polycentricism (multiple groups and institutions generate Islamic law) or legal pluralism (Within Islamic Societies, since Islamic and Non-Islamic legal systems coexist). There are significant historical and substantive distinction between "Islamic Law and Muslim Legalities" (the legal systems in use by Muslims). "Islamic Law" juristic interpretations (fiqh) of divine law (Shariah) "Muslim Legalities (the legal systems in use by Muslims). Muslim legalities refers to either state law (where Muslims are the majority or minority) or the legal practices of non-state Muslim Communities. The key distinction between these two overlap categories is that Islamic texts. In comparison, Muslim legalities are generated by an interpretive process anchored in a state or other legal system that may or may not have a Muslim majority. The Muslim personal Law (shariat) Application Act, 1937 has already mentioned the scope of application of sharia law in Bangladesh^[2]. According to section 2 of the Muslim Personal Law (shariat) Application Act, 1937 will be answered the questions in regarding intestate succession, special property of females, marriage dissolution of marriage, maintenance, dower, guardianship, gift, trusts and waqf^[3]. It will be the Muslim personal law or the sharia. In Bangladesh there many statutory regarding Muslim family law which has been adopted by the state but it is matter of great sorrow that some of them are ambiguous and some of them are very old where in the modern world Muslim family law has codified in compliance with Sharia law.

Inconsistency between Sharia Law and Statutory Laws

1) Muslim Marriage

a) Age

In Bangladesh, any marriage between a female under the age of 18 and a male under the age of 21 is considered a child marriage, according to the law^[4]. Sharia, on the other hand, stresses the achievement of puberty when it comes to the ability to contract marriage. As a result, in Bangladeshi law, someone who is still capable of contracting marriage under Sharia law may be termed a "child." Despite the fact that the age of majority for both males and females is 18 years under distinct statutory laws, the legal age of contracting a marriage differs for males and females in Bangladesh^[5]. As a result, there is potential for legislative adjustments to the marriage age, and any changes will be governed by Sharia Law.

b) Consent

Furthermore, forced marriage is prohibited in Islam. As a

result, the age of puberty or majority must be met in order to ensure that the man or woman is of legal age to consent to the marriage and avoid forced marriage. Marriage between a woman (or a guy) who has not given her consent is forbidden in Islam. When a young woman complained that her father had forced her to marry without her consent, the Prophet Mohammad (SAS) told her that she may approve or cancel the marriage. Bangladeshi law stipulates that free consent is required for a legitimate marriage. A woman cannot be compelled to marry unless she willingly consents. To have the impact of a lawful marriage, a free consent must be given in front of at least two witnesses and then duly signed. As previously stated, one can only freely consent after he or she reaches the age of marriage in accordance with the prevailing legislation. If a guardian completes the marriage before that age, it is subject to approval by either spouse upon reaching the required age and being properly recorded; otherwise, it will not be considered a marriage in the eyes of the law^[6]. However, there are several instances in rural areas when women are forced to marry against their choice or against their guardians' intentions, and laws are unable to prevent such unions. As a result, laws to prevent forced marriage, which is illegal by Sharia, must be adopted.

c) Option of Puberty

Another scenario in which there are some contradictions is that option of puberty. While Bangladeshi law enables a girl to repudiate a marriage offered by a guardian when she is 18 and up to 19 years old if the marriage has not been consummated in the interim, Sharia law allows both boys and girls to disavow a marriage provided by a guardian once they reach puberty. As a result, some discrepancies between Sharia and statutory rules may need to be addressed.

d) Nikahnama/ Marriage Contract

Another concern is the "Nikahnama," or marriage contract. A provision called "Special Condition: if any" is included in the marriage deed. The provision gives the women in a marriage a lot of leeway in terms of their demands. However, no legislation specifies what can or cannot be included in the clause. As a result, the column is usually left empty. Thus, the State should create such legislation in collaboration with Sharia in order to appropriately employ the provision as a weapon to safeguard a wife from her husband's arbitrary actions. The fact that a Muslim marriage is treated as a civil contract by the courts means that the prospective spouses and/or their guardians can establish the parameters of the marriage contract within 'reasonable' bounds, giving the wife legal rights that she would not have under general Muslim law. Clause 17 of the nikahnama clearly shows how clauses in a Muslim marriage contract can be utilized to guarantee and defend a wife's place in Bangladesh. In the lack of clear rules, some people are prone to forming their own opinions on what to accept as a condition in a marriage requirement, while others become reluctant to use the provision. As a result, either the requirement in column 17 stays inconsistent with Sharia or it remains blank. As a result, a clear rule addressing clause 17 in the Sharia context is required^[7].

² Dr Muhammad Ekramul Haque, Muslim Family Law Sharia and Modern World (First Edition, 2015, London College of Legal Studies South) 38

³ Muslim Personal Law (shariat) Application Act, 1937

⁴ Ballobibaho Nirodh Ain, 2017

⁵ The Majority Act, 1875

⁶ Dissolution of Muslim Marriages Act 1939, s 2(vii)

⁷ Professor Dr. Muhammad Ekramul Haque's lecture

2) Stipulations in the Marriage Contract

Marriage is considered as 'ibadat'. Marriage in itself is agreement of contractual nature. In a famous case of Pakistan named '**Khurshid Bibi**' it is said that marriage is a contract of civil nature. Inserting stipulations is recognized under both sharia and statutory law. A stipulation cannot be added which violates both sharia and statutory law. In our society men holds more rights than women. Inserting stipulations has given a chance to curtail the absolute power of the husband. A husband can give Talaq at any time that includes no-fault of the woman. When a woman get talaq she gets nothing except 3 months of maintenance. Marriage stipulations the scope where she can insert stipulations that his husband cannot take second wife until she alive or she will get a specific portion if she get divorce. But in Bangladesh there is no statutory law where specify the matter. Only clause 17 of '**Kabinnama**' is the scope where a girl can insert stipulation according to her wish. As a result absolute power of husband will be minimized and perfectly balanced.

3) Divorce

In Bangladesh, any type of talaq, including talaq-al-bida, is legal. Different kinds of talaq are not differentiated under the Muslim Family Laws Ordinance of 1961. When it comes to divorce, however, Sharia clearly favors the Sunnah form of talaq. By legalizing all forms of talaq in 1961, it created a slew of problems. It has made pronouncing the word talaq considerably easier and less challenging. The talaq statutes of the MFLO from 1961 need to be modified to outlaw talaq that is not in conformity with the Sunnah, as well as **talaq-al-bida**.

For example, Egypt does not recognize the legitimacy of **talaq-al-bida** since it considers all forms of talaq al bida to be irrevocable. In Islamic law, the husband has ultimate control over his wife, to the extent that he can unilaterally and extrajudicially end the marriage by speaking the verbal divorce term (talaq). Under terms of divorce power, in Islamic law, only men have the unilateral right to divorce, and no acceptable grounds are necessary. This is a purely male-dominated arbitrary power. The wife has no such right, and she is unable to stop her husband from using it. However, if the divorce case goes to court, jurists have devised a number of hypotheses that may be accepted as grounds for divorce. A wife may seek divorce for a variety of reasons, including the husband's prolonged absence without notice, prolonged imprisonment, inability to provide support for his wife, impotence, and so on. Either spouse may seek divorce, but only via legal channels, in cases of chronic illness, insanity, deceptive misrepresentation during the marriage contract, desertion, and so on. A wife may only divorce her husband for no reason if the power of divorce is specified in the marriage contract, and this sort of divorce is known as '**Delegated Divorce**,' in which the right of divorce is delegated to the wife by her husband during the marriage. Marriage can also be dissolved by mutual consent and that is known as **Khul** in the technical term of sharia law. Nonetheless, the preceding debate has demonstrated that a Muslim woman does not have the same right to divorce as a male. Arbitration in divorce disputes is provided for under the Muslim Family Law Ordinance of 1961. The Arbitration Council, on the other hand, cannot postpone the husband's talaq, despite the fact that it is arbitrary and irrational, and can

only postpone the divorce in the hope that the parties might reconcile ^[8].

A husband's divorce, for example, will not take effect until he has given notification of the divorce to the chairman of the local administrative institution - Union Parishad - and the husband has ninety days to reverse it. The failure to notify the Chairman of the husband's divorce is a criminal offense. In the case of a divorce granted by the wife, the provisions of the Ordinance apply mutatis mutandis. The divorce will not be finalized until the Chairman receives notification and 90 days have passed.

The husband might give his wife the right to divorce either unconditionally or conditionally. This is known as **talaq-i-tawfeez**, which refers to a situation in which a condition is set, and the wife can divorce her husband if the condition is met. For a divorce to be complete, the procedure described above must be followed. The Ordinance also made it illegal to proclaim a divorce three times. Divorced couples can now remarry without going through the formalities of a third-party marriage. Although this is unquestionably a significant legal achievement, many of its rules are inapplicable in situations where individuals live outside the reach of legal recourse.

"Any man who intends to divorce his wife should, as soon as possible after the pronouncement of talaq in any manner whatever, give the Chairman notice in writing of his doing so, and shall submit a copy thereof to the wife," the law states. The rule might be interpreted to mean that any type of talaq issued by the husband under any conditions is lawful. It puts the basic goal of Sharia law in jeopardy in several ways. Despite the fact that Hanafi law permits a divorce to be granted even if it is declared under any conditions, several modern progressive Muslim nations have implemented legislation restricting the ways of talaq.

Any talaq issued while drunk is null and invalid in Egypt, for example. Although a husband must take specific measures to complete a talaq in Bangladesh, there are no laws governing the standards that must be followed for a talaq pronounced by a husband to be lawful. Because such a clause does not exist, any talaq given by a spouse is valid regardless of the circumstances. As a result, measures to address this issue should be considered. The registering of talaq is another change that might be incorporated into Bangladesh's legal framework. New restrictions on talaq registration might be implemented. Although the Muslim Marriages and Divorces (Registration) Act, 1929, requires talaq to be recorded, the effect of non-registration on the legality of the talaq is not addressed here. As a result, such a clause might be amended within the Sharia framework.

4) Maintenance

A Muslim woman is entitled to be maintained by her husband until the conclusion of three periods of menstruation or the end of pregnancy, whichever is longer, after the marriage has been terminated. Maintenance at that era is not accessible among them since the notion of Iddat is not acknowledged by other religious communities. Both genuine and illegitimate sons are entitled to maintenance until they reach puberty, while only legitimate females are entitled to maintenance until they marry, according to Muslim Law. But current legal framework is not enough for ensuring it in proper way. The law is vague and also the amount of maintenance is not specified.

⁸ Muslim Family Law Ordinance of 1961

However, in many progressive Muslim countries there is provision for maintenance indicating the amount also. In Turkey, they have enacted law clearly saying that the amount of maintenance shall be upon the social status of the spouse. This kind of provision can help redressing the oppression against woman.

5) Property Rights of Woman

Women's rights in Bangladesh have been protected by a number of legislations. According to recent research, the educational and salary disparities between men and women are narrowing. Various studies, however, reveal that legislation relating to women's rights are ineffectual due to culturally unfavorable attitudes about women's rights, a lack of strong governance, and some socioeconomic circumstances. Discrimination against women is still a topic of discussion. Historically, women have been assigned less importance than males. Women in Bangladesh face a variety of challenges in achieving their rights. The main problem is that they have an unreasonable and constrained right to seek for resources. In Bangladesh, social norms and culture typically disregard women's rights. Women have less access to financial assets, healthcare, and education than males do. Women of Hindu and Christian faiths are included. Bangladeshi women have been excluded from reaching financial independence due to traditions and socio-cultural norms. Despite the fact that the society's inheritance processes are expected to follow Shari'ah law. Our society always neglects the rights of the woman both from the parental side and also from the husband's side. Lack of clear legislative document, woman is getting more vulnerable towards achieving their rights. In this field Muslim Family Law needs huge reforms ensuring the right of the woman.

Codification of Muslim Personal law: Problems and Prospects

To erase the discrimination and conflict Bangladesh has been adopted many family laws. But unfortunately, most of them are not codified and are not up to date. Among them many laws are not given any clarification in compliance with sharia law. As a result, those laws are ambiguous and problematic in its nature. The state should take several measures to erase the unclarified point and make those laws more reliable. Codification of laws is very necessary to eradicate the conflict. The inconsistencies and anomaly between sharia and law have been discussed above in details. For example, regarding marriage, any marriage between a female under the age of 18 and a male under the age of 21 is considered a child marriage, according to the law. Sharia, on the other hand, stresses the achievement of puberty when it comes to the ability to contract marriage. As a result, there is potential for legislative adjustments to the marriage age, and any changes will be governed by Sharia Law. Regarding dissolution of marriages, although a husband must take specific measures to complete a talaq in Bangladesh, there are no laws governing the standards that must be followed for a talaq pronounced by a husband to be lawful. Because such a clause does not exist, any talaq given by a spouse is valid regardless of the circumstances. As a result, measures to address this issue should be considered. The registering of talaq is another change that might be incorporated into Bangladesh's legal framework. New restrictions on talaq registration might be implemented. Although the Muslim Marriages and Divorces (Registration) Act, 1929, requires talaq to be recorded, the

effect of non-registration on the legality of the talaq is not addressed here. As a result, such a clause might be amended within the Sharia framework.

Thus, the state should take several measures to erase the unclarified point and make those laws more reliable. Codification of laws is very necessary to eradicate the conflict.

Findings

1. There is serious conflict regarding the age of marriage between sharia and the law. This conflict has made the laws ambiguous and inapplicable.
2. Laws in Bangladesh has impliedly justified forced marriage which is the serious violation of the sharia.
3. The stipulation clause in the marriage contract is unclear and creates confusion.
4. The laws in Bangladesh allows the Bida form of divorce as it recognizes all marriage in any form whatsoever.
5. The laws in Bangladesh are unclear regarding maintenance and child care.
6. In the absence of proper laws and lack of awareness, women in Bangladesh get deprived of their right of inheritance.

Recommendations

1. A new law regarding marriage, divorce, maintenance, rights of women, rights of men should be codified.
2. The conflicts between the laws and sharia must be removed in the codified new law, and the laws must be consistent with the sharia.
3. A system should be introduced to make the women aware of their rights which they can write in their marriage contract.
4. A new law specifically dealing with inheritance laws should be introduced.

Conclusion

Bangladesh needs to codify its Muslim family laws. If we look into other Muslim countries, they have already codified their laws in compliance with sharia to make it more reliable. But in Bangladesh there are considerable gaps in statutory laws regarding numerous areas of marriage and divorce, however, as noted previously, there are countless opportunities to incorporate new features to better women's current standing. In addition to Sharia law, Bangladesh's Muslim Family law restrictions can be reformed by incorporating progressive legislation from other Muslim countries. Adoption of Sharia-compliant laws would be simple to execute and would protect the lives of women in a number of scenarios, thereby enhancing their marital life.

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