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Research Monograph

On

Right to Divorce by a Bangladeshi wife under Different Personal Laws : A Critical Analysis

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CERTIFICATION

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Sir,

It is a great pleasure for me to submit the thesis on "***Right to Divorce by a Bangladeshi wife under Different Personal Laws : A Critical Analysis***'' While I doing this thesis, I have tried my level best to make this project paper to the latest standard. I think that thesis paper will fulfill your requirement and pleased you. I, therefore, hope that you would be kind enough to go through this thesis paper for evaluation.

I am always be ready for clearance of any part of my thesis.

Thanking you

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ACKNOWLEDGEMENT

It is a gratification for me to submit The Thesis ***Right to Divorce by a Bangladeshi wife under Different Personal Laws : A Critical Analysis*** I hope that Thesis Paper will fulfill your expectation. I therefore, that you would be kind enough to through this paper for evaluation. At first I thanks to almighty of Allah for gave ability to make this research. The contribution and encouragement of my teachers who assisted me for this research are gratefully acknowledged. Specially I would like thanks to my respectable course teacher Lecturer & Coordinator **Md. Abdul Alim** for his encouragement.

DECLARATION

This is Sumi Akter, LLM2203027014, Student of Sonargaon University (SU). Declaring that this Thesis Paper on ***Right to Divorce by a Bangladeshi wife under Different Personal Laws : A Critical Analysis*** the stated topic has only been prepared for the partial fulfillment of the course Final Dissertation Course.

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ABSTRACT

The core topic of this study is to discuss the way to establish an equal and equitable divorce law for man and women of every community. It will also discuss the drawbacks of existing personal and statutory laws enacted for met up those drawbacks. The study runs firstly with rudimentary discussion relating to divorce and its effect on relationship on husband wife children and kinsfolk. Different religious laws have different says about the nature of divorce, its effect, power to divorce. These laws have also different says regarding procedure to dissolve the marriage. Firstly provisions provided by the Muslim law are discussed .Then the discussion is made over Hindu personal laws and over Christian personal laws with a wide discussion over legal development of all these three.

There exist critical situation under these provision which are scrutinized by documentary analysis. The study tries to find out answer of mostly debating issues regarding divorce law. Then it is looking forward to reforms planning made by different sector their demands, expectations. It also shows the attempt of govt. and law commission report in this regard. There are some social problems of the proposed planning of reform by enacting a uniform family code. So for ensuring better public interest some major changes are recommended without shacking of feelings and faith of people.

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Chapter 1

INTRODUCTION

1.1 Introduction

Divorce is an institution only a few weeks later in origin than marriage." – Voltaire. All major religions have their own laws, which govern divorces within their own community, and there are regulations regarding divorce in inter-faith marriages. Hindus, including Buddhists, Sikhs and Jains, are governed by the Hindu Marriage Act, 1955; Christians by the Indian Divorce Act, 1869; Parsis by the Parsi Marriage and Divorce Act, 1936; and Muslims by the Dissolution of Muslim Marriages Act, 1939. Civil marriages and inter-community marriages and divorces are governed by the Special Marriage Act, 1954.

Under all the Indian Personal laws, dissolution of marriage is based on guilt or fault theory of divorce. It is only under the Hindu Marriage Act, 1955, the Special Marriage Act, 1954 and the Parsi Marriage and Divorce Act, 1936 that divorce by mutual consent and on the basis of irretrievable breakdown of marriage are also recognized. Further, under Muslim law, the husband as the right to unilateral divorce. In order, to make the law more equitable the Dissolution of Muslim Marriages Act, 1939 provides a woman married under Muslim law with the option of seeking divorce on certain fault grounds.

As the field of Personal Law is a vast field so I have restricted the scope of this research paper to the fault ground theory of divorce under Indian personal law. The research paper analyzes the common aspects between the provisions of the various personal law statutes and further look at the legal implications of these.

This research paper will also look at the elements of difference between the various statutes, keeping in mind the feasibility of trying to resolve such differences in order to come up with a single, comprehensive law, at least as regards divorce.

1.2 Objective:

When the problems between husband and wife reach towards a devastating situation, the divorce happens. Then after the breaking up of marriage some urgent tasks confront everyone in the family- husband, wife, children and kinfolk. They must adjust to the new unexpected situation and try to make the future life easy. But most of the cases women comparatively have to face serious difficulty. So I will try to find out the reasons of problems and expectable solution, the lacuna of laws and the process, how it can be fulfilled to ensure equitability and equality among parties.

1.3 Methodology:

This research monograph will be conducted mostly by qualitative method. Because the researcher will go through different laws including personal law of different communities , statutory laws, writing of scholars, commentaries by an analytical way. Besides books relating to divorce and its effect, journals, articles etc. will be studied. Then to a great extent this work will depend on Case Study and legal decision given by marriage. But it also cannot provide absolute equality, eminent judges. For better solution comparison among development of different personal laws of different countries will be made. To furnish solution of the problem the researcher will analyze recommendations made by different study groups and also by law commission.

Chapter 2

RUDIMENTARY DISCUSSION ON DIVOURCE LAW

Divorce (or the dissolution of marriage) is the final termination of a marital union, canceling the legal duties and responsibilities of marriage and dissolving the bonds of matrimony between the parties (unlike annulment, which declares the marriage null and void). Divorce laws vary considerably around the world, but in most countries it requires the sanction of a court or other authority in a legal process. The legal process of divorce may also involve issues of alimony (spousal support), child custody, child support, distribution of property, and division of debt.

2.1 Divorce and relationships:

Research done at Northern Illinois University on Family and Child Studies suggests that divorce can have a positive effect on families due to less conflict in the home. There are, however, many instances where the parent-child relationship may suffer due to divorce. Financial support is many times lost when an adult goes through a divorce. The adult may be obligated to obtain additional work to maintain financial stability. In turn, this can lead to a negative relationship between the parent and child. The relationship may suffer due to lack of attention towards the child as well as minimal parental supervision.[1] Studies have also shown that parental skills decrease after a divorce occurs; however, this effect is only a temporary change. "A number of researchers have shown that disequilibrium, including diminished parenting skills, occurs in the year following the divorce but that by

[1] .[School of Family, Consumer, and Nutrition Sciences (Miller, 2003)]

two years after the divorce re-stabilization has occurred and parenting skills have improved.[2]

In a study done by the American Psychological Association on a parents‟ relocation after a divorce, found that a move is a long-term effect on children. In the first study done amongst 2,000 college students on the effects of parental relocation relating to the well-being if their children after divorce , researchers found major differences. In divorced families where one parent moved, the students received less financial support from their parents compared with divorced families where neither parent moved. These findings also imply other negative outcomes for these students such as more distress related to the divorce and did not feel a sense of emotional support from their parents. Although the data suggests negative outcomes for these students whose parents relocate after divorce, there is not enough research that can alone prove the overall well-being of the child.[3]

2.2 Effects of divorce on children:

Sociologists know little about the effects on children younger than two or three years of age. Children from age range from 3–5 years old may often mistake the divorce of their parents as their own fault. Older children experience feelings of anger, grief, and embarrassment.[4] There is nothing worse, for most children, than for their parents to denigrate each other” Parents simply do not realize the damage they do to their children by the battles they wage over them. Separating parents rarely behave reasonably, although they always believe that they are doing so, and that the other party is behaving unreasonably." – Sir.

[2] [Santrock, John W. Adolescence. pp 147-81. 2003].
[3] ["September 2003, Vol. 34, No. 8 Print version: page 18". Apa.org. Retrieved 2012-03-27.]
[4] [http://extension.unh.edu/family/documents/divorce.pdf]

Nicholas Scott (President of the family division of the High Court)[5]. Although not the intention of most parents, putting children in the middle of conflict is particularly detrimental. Examples of this are: asking children to carry messages between parents, grilling children about the other parent's activities, telling children the other parent does not love them, and putting the other parent down in front of the children. Poorly managed conflict between parents increases children's risk of behavior problems, depression, substance abuse and dependence, poor social skills, and poor academic performance

2.3 Divorce Under Existing Religion:

Divorce is highly discouraged in all the existing religion in Bangladesh such as in law of Muslim, Hindu, Christian and Buddhist. A peculiarity that exists in this country is that one's religious rules can be subservient to the secular laws in many aspect of marriage and divorce. There is no uniformity among different communities on this personal matter.

2.3.1 Divorces in Muslim Law:

In pre-Islamic Arabian society, divorce was considered as the absolute, unlimited and unilateral right of the husband. However in Islam, modern jurists contend that the husband can`t exercise the power of the Talaq arbitrarily Irrationally or unreasonably.

Then if they return to obedience, do not seek for a wag against them, indeed, Allah in most High, Great. And if you fear breach between then two of them, appoint an arbiter from his family and an arbiter from her family. If they desire to set things a right, Allah will bring about reconciliation between them; Allah is knowing, aware. (4:34-35)

[5] . [http://www.bbc.co.uk/news/education-11380470]

2.3.1.1 Modes of Dissolution of Muslim Marriage:

The dissolution of marriage tie can take place in the following modes.

- By death of the parties.
- By Act of the parties.

2.3.1.2 By Act of the Husband:

Only for act of the husband marriage may be dissolved by four ways.

(a) Talaq:

Talaq is further divided into two forms. These are

1. Talaq-e-Ahsan

If only one revocable talaq is pronounced during the perid of unconsummated purity and the husband does not revoke it during the iddah period then the talaq becomes effective after the expry of iddah.A talaq thus becomes effective is known as talaq ahsan. When a husband repudiates his wife by a single pronouncement in a period of tuhr (Purity i.e. when the wife is free from her menstrual courses) during which he has not had intercourse with her and leave her to the observance of the iddat period, it will be executed and will become irrevocable after iddat period.

2.Talaq-e- Hassan.

Again when a husband pronounces Talaq, at the end of tuhr of his wife of one time and repeatedly after her 2nd and 3rd period or tuhr and within this period they become abstain from sexual intercourse will be irrevocable and executed.

(b) Talaque Bidyat:

It is also called bain talaque, which means irrevocable talaq. Under this form talaq becomes effective immediately after the pronouncement of talaq. As for example, a man says to his wife. I have given you talaq bain. This talaq is irrevocable and the husband has no right to retract.

(c) I'la:

I'la or vow of continuance: I'la means to swear. Legally speaking, I'la means when a husband swears that he will not have sexual intercourse with his wife and if he abstains

from it for four months or more and then Talaq becomes effective. The Holy Quran states that “Those who forswear their wives must wait four months; then if they change their mind, lo! Allah is forgiving, merciful”.[6][6]

(d) Zihar:

Zihar literally means comparison. The word „Zihar‟ is derived from the word Zahir meaning back. Legally, it signifies the act of a husband comparing his wife to any of his female relations with whom the marriage is prohibited on account of consanguinity or fosterage. Zihar by itself does not dissolve the marriage, but the wife becomes unlawful to the husband without expiation. For example, if the husband compares his wife with his sister and says “ you like my sister”

2.4 Divorce By Wife

According to Prophet Mohammad (S.A.W), "If a woman be prejudiced by a marriage, let it be broken off" [i]. It is of essence in Islamic Law that women are given proper opportunity to divorce their husbands if they are not able to perform their marital ties. Generally there are two ways in which a woman can divorce her husband. First through a mutual agreement between husband and wife i.e., Khula and Mubarat. Secondly, through a judicial decree by filing a suit against the husband in court of law i.e. under the Dissolution of Muslim Marriage Act, 1939.[ii]

Muslim Law provides for various kinds of divorce that Muslim women can give to Muslim men:

Khula:

Khula means literally to take off clothes and hence to lay ones authority over a wife. Under Muslim Law, a marriage can be terminated either at the will of husband or wife or by a mutual agreement by the two. If the marriage is dissolved at the request of husband then it is known as Talaq.

[6] .[Al-Quran; 2: 226]

Similarly, the wife can also divorce her husband if she is satisfied that the two of them are not able to perform their matrimonial ties. The Muslim woman can release herself from the marital tie by giving up some property in consideration for which the husband is to give her a Khula and when they have done this a Talaq-ul-bain would take place.[iii]

Valid conditions of Khula are:

There must be a common consent of both husband and wife.

Some Iwad must be given by wife to her husband.

For Khula to take place it is necessary that some Iwad (return consideration) should be given by wife to her husband. Under Khula, a marriage can be dissolved by an agreement between husband and wife for a consideration paid or to be paid by wife to her husband. Such an agreement if the wife alone is desirous is called Khula and if both husband and wife are desirous is called Mubarat.

When the husband and wife are not able to live happily together and are apprehensive that they cannot observe the bonds prescribed by the divine laws, then a right is conferred to the wife to get her released from the marital ties. The concept of consideration is a necessary precondition for the validity of Khula.

Since the wife is interested to break her marital tie and leave her husband then she must pay a consideration to her husband as compensation and she can also forgive full or part of her dower money. However, if the consideration is not paid to the husband by his wife than he cannot be compelled to comply with the agreement of Khula and he can ask for restitution of conjugal rights.

Khula is a conditional divorce in which the wife is at liberty to purchase her freedom from her husband if she comes to the conclusion that it is not possible for them to live as

husband and wife. Khula is at the instance of wife in which she agrees to pay a consideration in return of which her husband would release her from the marital ties.

LIAN:- Under Muslim Law, a woman is guaranteed a right to divorce her husband if he falsely and baselessly charges her with adultery and this doctrine is known as Lian. The Quran and Hadith both guarantee a right of divorce to a Muslim wife if her husband is imputing a false unchastity to her character. If a man is charging his wife with adultery then he must prove the allegations made by him and if he is not able to prove it then the wife has a right to divorce him under the doctrine of Lian.

The objective behind this doctrine is to punish the husband for falsely alleging the charge of adultery upon his wife. In India, a Muslim wife can also bring a suit for defamation against her husband as a ground for false charge of adultery.

In Z Hussain v. Ummat Ur Rahman,[iv] it was held that a Muslim wife is entitled to bring a suit for divorce against her husband and can obtain a decree on the ground that the latter falsely charged her with adultery.

In Rahima Bibi Case,[v] it was held that a Muslim wife can sue her husband for divorce on the ground that he had falsely charged her with adultery.

Under the doctrine of Lian, a mere charge levied by the husband will not automatically dissolve the marriage, a dissolution decree by court of law is essential to put an end to the marital ties. The charge of adultery by a husband against his wife can only be established by a direct testimony of 4 witnesses from the nature of offence. However, the case in which clear and direct evidence is present is extremely rare.

Talaq-E-Tafweez:

It is also known as Delegated Divorce. The delegation of power to dissolve is technically called tafweez. Tafweez means to make someone the owner of an act which appertains to the person making the tafweez. Talaq-e-tafweez is one of the most important forms of divorce under Muslim Law because it gives to Muslim women a right to divorce their husband without going to court of law.

In this form of divorce a Muslim male can delegate his power of repudiation of marriage to a third person or to his wife also. He can delegate his own right of pronouncing divorce to his wife. It is a delegation by the husband of the power of Talaq to the wife designing her to give the effective sentence.

Tafweez is of 3 kinds:

Ikhtiyar (choice): It means giving her the authority to talaq herself.
Amr-bi-ya: It means leaving the matter in her own hands.
Mashiyat (pleasure): It means giving her the option to do what she likes.

Under Muslim Law, a husband and wife can enter into agreement at the time of marriage that this shall be the duty of husband to maintain his wife and if he is not able fulfill his promise then the wife is at liberty to dissolve the marriage. Under certain conditions a wife can pronounce divorce upon her provided first that the option is not absolute and secondly that the conditions are necessary and are not opposed to public policy.

A delegated divorce can be given by a person who has attained the age of majority and of sound mind. In delegated divorce the age of majority is determined by Muslim law and not by Sec.3 of The Majority Act [vi]. In delegated divorce the husband can delegate his power of divorce to any other person including his wife also. The husband possesses the power to appoint another person as his Vakil. He can also appoint a third person to

divorce his wife on his behalf. But the husband still possesses the power to divorce his wife even after he delegated his power to any other person.

In Hamidoollah v.Feizunnisa, [vii] it was held that under Muslim Law, a husband may give to his wife the power to divorce herself from him according to the form prescribed by that law for divorce by the husband.

2.5 Dissolution Of Muslim Marriage Act, 1939:

In 1939, an act was passed to secure the rights of Muslim women. The Dissolution of Muslim Marriage Act, 1939 was passed to provide various grounds to enable Muslim women to divorce her husband. Women generally faced many difficulties in their matrimonial relations for which they have no remedy. To solve these problems the Act of 1939 enabled the Muslim women to divorce their husband.

Sec.2 (ix)[viii] of the said act states that a woman married under Muslim law shall be entitled to obtain a decree for dissolution of her marriage on any one or more of the grounds mentioned in the act. This act states that it is lawful for a Muslim wife to dissolve her marriage on any of the recognized grounds in the act. But the wife cannot dissolve the marriage herself, she has to obtain a decree from the court of law and the marriage can be dissolved only if the court has passed the dissolution decree.

Various grounds on which a Muslim wife can claim dissolution of her marriage are [ix]:
Whereabouts of husband not known:
A woman married under Muslim Law is entitled to obtain a decree for dissolution of her marriage if the whereabouts of her husband is not known for a period of 4 years. However, it is of essence of that lady not to marry for 6 months after the decree is passed. The reason for this is that if her husband appears within 6 months and is willing to perform his marital obligations and the court is satisfied then the decree may be set aside by the court.

Failure to maintain wife or negligence on part of husband:

A woman married under Muslim Law in entitled to obtain a decree for dissolution of her marriage if her husband has neglected her or has failed to provide her maintenance for a period of 2 years. Under Muslim Law it is essential that the husband is duty bound to maintain his wife and if he fails to maintain her then the wife can sue him for divorce.

Imprisonment of husband:

A woman married under Muslim Law in entitled to obtain a decree for dissolution of her marriage if her husband has been sentenced to imprisonment for duration of 7 years or upwards.

Failure to perform marital obligations:

A woman married under Muslim Law in entitled to obtain a decree for dissolution of her marriage if her husband has failed to perform his marital obligations for a period of 3 years. But it is of essence that he may have failed to perform his marital obligations without a reasonable cause.

Impotency:

A woman married under Muslim Law in entitled to obtain a decree for dissolution of her marriage if her husband has been impotent at the time of marriage and continues to be so. In this case the burden of proof is upon the husband to prove that he is not impotent. The husband can satisfy the court within a period of 1 year that he is no longer impotent. If the court is satisfied then it can set aside the dissolution decree.

Insanity, Leprosy and Venereal Disease:

A woman married under Muslim Law in entitled to obtain a decree for dissolution of her marriage if her husband has been insane for two or more years or has a leprosy which may be curable or incurable or has a venereal disease which may be curable or incurable and may be of any duration.

Option of puberty:

A woman married under Muslim Law in entitled to obtain a decree for dissolution of her marriage if she has been married before she attained the age of 15 by her father or any other legal guardian.

Cruelty:

A woman married under Muslim Law in entitled to obtain a decree for dissolution of her marriage if her husband treats her with cruelty. Cruelty has been a ground for divorce even before this act. A Muslim is always given the right to divorce her husband if she has been meted with cruelty.2.3.1.3 By act of the wife:

The power to divorce may be delegated to the wife herself or to a third person. This is called Tafweez. This delegation may be absolutely or conditionally and it may be for once only or for a time or for permanently.[7] The power so delegated to the wife is irrevocable and it can be exercised even after the institution of a suit against her for restitution of conjugal right. Delegation of power may be given at the time of marriage or at any time after the marriage contract.

2.6 By Mutual Consent:

Marriage may also be dissolved by mutual agreement between the parties. These are–

(a) Khula:

Khul is another type of dissolution of a marriage by mutualconsent of the spouses. Khula signifies an agreement entered into for the purpose of dissolving a connubial connection in lieu of a compensation paid by the wife to her husband out of her property. Holy Quran says about khula- “It is not lawful for you (husband) to take from them (wives) anything of what you have given them: except (in case) when both fear that they may not be able to keep the limits of Allah, in that case it is not sin for either of them if she ransoms herself on payment.

[7] [PLd, 1963; Dhaka 602]

(b) Mubarat:

Mubarat is the best form of dissolution of marriage by mutual consent of the husband and wife. It is a mode of mutual release or discharge which leaves each party without any claim upon the other. Here both parties desire dissolution of marriage.

2.6.1 Dissolution by Judicial Process:

Dissolution of marriage can take place by judicial process in the following cases.

(a) Lion or Imprecation

It is a mode of dissolution of marriage, which signifies testimonies confirmed by oath, on the part of a husband and a wife in case of the former accusing the latter. Holy Quran states and those who accuse their own wives and there is no witness except they themselves then he should in the name of Allah swear four times that he is telling the truth and for the fifth time he will say that may Allah`s curse be upon him if he is false. And the punishment is warded off from her if she in the name of Allah swears four times that he is false and for the fifth time she will say that the wrath of Allah be upon her if he is telling the truth.[8]

(b) Fask or judicial Rescission:

The word fask means annulment or abrogation. It comes from a root, which means the right of Qadi or judge to annul a marriage contract on the application made by the wife. It is therefore, the dissolution or recession of the contract of marriage by judicial decree.

[8] [Al Quran, 24:6-9].

2.6.2 Option of puberty or Khyar-ul-Bulug :

Islam allows a child marriage under the guardianship (waliyat). If the husband or wife was minor at the time of marriage, he/she can approve or repudiate it after attaining puberty. This is called option of puberty or Khyar-ul-Bulug.

2.6.3 Dissolution on ground of apostasy:

According to Islamic law, an apostasy is a treasonable offence. The marriage of a Muslim male and female shall stand dissolved on apostasy.

2.7 Wife's Power: (talaaq-i-tawfid)

A wife does not have any power of her own to dissolve a marriage. She can dissolve a marriage by herself only if the husband had delegated the power to her before the head. This is known as talaq-i-tawfid or delegated talaq. Thus, the existence of such power to be in the hands of the wife completely depends on the contract between husband and wife. If there were any stipulations regarding delegation of such power by husband and wife inserted in the marriage contract, only then the wife would be able to dissolve the marriage by exercising that power without resorting to either the husband or the court. In Bangladesh Column 18 of the kabinnama is about delegation of power of talaq by a husband to his wife and column 19 is about whether husbands' power of talaq has been curtailed in any way.

2.7.1 Divorce Procedure For Muslim Wife in Bangladesh

According to section 8 of the Muslim Family Laws Ordinance, 1961, if the wife gets right to divorce by delegation, she may exercise such right in the same manner as the husband (provided in section 7) so far applicable.

Moreover, Under the Dissolution of Muslim Marriages Act, 1939 a wife shall be entitled to obtain a decree for dissolution of her marriage under Section 2 of the Act. The grounds for a decree for dissolution of marriage under this section are as follows:

- If the husband has been missing or not found for four years
- If for 2 years the husband has failed to provide his wife maintenance.
- If the husband has been sentenced to or imprisoned for 7 years or more
- If the husband has failed to perform a marital obligation for 3 years or more
- If the husband was impotent or continue to be so.
- If the husband has failed to fulfill marital responsibility for 3 years or more
- If the for period of 2 years the husband has been insane and suffering from any other critical diseases
- If the wife was been married off before the age of 18 years and she repudiates the marriage before attaining 19 years of age.
- If the wife is being treated with cruelty by her husband which includes:
    - Habitual assault or physical torture
    - leading an immoral life
    - forces the wife to lead an immoral life
    - disposes of wife from her property
    - obstructing her in performing religious activities
    - does not treat his wife equally like the other wives (If the husband has several wives)

Or any other ground as provided in Muslim Law.

Moreover, The Muslim Marriages and Divorces (Registration) Act, 1974 mentions about registrations of Muslim marriage and divorce. As per section 6 of the Act, A registrar may register a divorce under Muslim Law on the application being made to him for registration.

In addition to this, when a wife has delegated the power to divorce her husband (Talaq-i-Tawfid), proof of such delegation shall be produced to the Registrar to register this type of divorce.

2.7.2 Divorce in Hindu Law:

Divorce is not known to the general Hindu law. The reason is that a marriage from the Hindu point of view creates an indissoluble tie between the husband and the wife. Neither party therefore, to a marriage can divorce the other unless divorce is allowed by custom.[9] There is no rule of Hindu law which forbids the subsistence of a marriage. One of the parties to which is a non-Hindu. The law does not refuse to recognize a conjugal union merely by reason of a difference of religion. Manu laid down, neither by sale or desertion can a wife be released from her husband. Let mutual fidelity till death.[10]

2.7.3 Divorce in Christian Law:

Among Christians also marriage is a sacrament. Jesus proclaimed that husband and wife are not twain but are one. [Mathew, 19:6]. He prohibited separation which is a logical corollary of the theory of unity of man and wife. Jesus stated, "I tell you, then that any man who divorces his wife, even though she has not been unfaithful commits adultery if he marries some other woman.[11]

[9] . [Kudomce V Jouceram (1978) 3 cal, 305]
[10] [Manu ix 49-101].
[11] [Mathew, 19:8,9]

CHAPTER THREE

LEGAL DEVELOPMENT OF DIVORCE LAW

3.1 In Muslim Law:

The history of Islamic Law teaches that there is a difference between Shariah (The infallible and unchangeable law revealed to the prophet) and fiqh (interpretations of the Shariah derived by man through the process of religious and legal science. Fiqh, the Islamic law applied in Muslim nations, has constantly evolved over the centuries and has never been fixed.[12] The fact that each Muslim nation has a different law demonstrates that these laws cannot be the revealed Shariah, but rather are fiqh as interpreted and codified by humans. As such thelaws can be reformed to better reflect the Quran and better serve Muslim communities today. For example, in January 2000, Egypt enacted a law that allows women to obtain a divorce (Khul) on the grounds of incompatibility. Instead of the wife having to wait for judges to decide her application based on conclusive proof and independent corroboration of her husband ill-treatment or physical abuse, the divorce is granted upon the wife's return of her mahr (dower). The Tunisian personal status code 1956 abolished all forms of divorce outside the court based on Quranic passages. The supreme court of Pakistan in 1967 used the same passages to expand women's right of divorce, ruling that a court could enforce Khula‟ against a husband's will whenever a judge determined that a harmonious marriage was not possible.

[12] [BARAZA , A sisters in Islam Bulletin, Vol. 1 , 2005 p.1]

3.1.1 in Bangladesh

By the enactment of the dissolution of Muslim Marriage Act, 1939 there made some important changes in the grounds of Divorce. It is expedient 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.

Under section (2) of the Dissolution of Muslim Marriage Act, 1939, a Muslim woman will be entitled to obtain a decree of divorce for the following grounds namely –

(İ) That the whereabouts of the husband have not been known for a period of four years.

(II) That the husband has neglected or has failed to provide for her maintenance for a period of two years.

(III) That the husband has taken an additional wife in contravention of the provisions of the Muslim family laws ordinance, 1961.

(IV) That the husband has been sentenced to imprisonment for a period of seven years or upwards.

(V) That the husband has failed to perform, without reasonable causes, his marital obligations for a period of three years.

(VI) That the husband was impotent at the time of the marriage and continues to be so.

(VII) That the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease.

(VIII) That she, having been given in marriage by her father or other guardian before she attained the age of eighteen years [substituted for the word sixteen by section 2 of the dissolution of Muslim marriage (Amendment) ordinance, 1986], repudiated the marriage before attaining the age of nineteen [substituted for the word eighteen, Ibid] Provided that the marriage has not been consummated.

(IX)That the husband treats her with cruelty, that is to say-

- Habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or
- Associates with women of evil repute or leads an infamous life, or
- Attempts to force her to lead on immoral life, or
- Disposes of her property or prevents her exercising her legal right over it, or
- Obstructs her in the observance of her religious profession or practice, or
- If he has more wives than one, does not treat her equitably in accordance with the injunctions of the AL - Quran.

(X) On any other ground which is recognized as valid for the dissolution of marriage under Muslim law. Provided that –

- No decree shall be passed on ground of imprisonment until the sentence has become final.
- 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

authorized 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

- before passing a decree on ground impotency 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.

3.1.2 Effect of conversion to another faith :

The renunciation if Islam by a married Muslim woman or her conversion to a faith other than Islam shall not itself operates 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.

3.1.3 Procedure for dissolution of Muslim marriage:

Section (7) of the Muslim family laws ordinance,1961 states about the procedure of dissolution of Muslim marriage. The section (7) states that (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 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 on which notice under subsection (1) in 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 brining about 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 subsection (3) of the pregnancy, whichever be later, ends.

(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.

3.1.4 Dissolution of Marriage otherwise than by talaq :

Section (8) of the Muslim family laws ordinance, 1961 states that 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, mutandis mutatis and so far as applicable, apply.

3.2 Dissolution of Hindu Marriage:

The Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946 declares that a woman may claim for maintenance even after living in separation but no dissolution of marriage is possible in Bangladesh. But from 1955 dissolution of marriage is possible in India. Section (13) of the Hindu Marriage Act, 1955 States that

(1) any marriage solemnized, whether, before or after the commencement of this Act, May, on petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party.

(I) has after the solemnization of the marriage had voluntary sexual intercourse with any person other than his or her spouse; or

(II) has after the solemnization of the marriage, treated the petitioner with cruelty or

(III) has disserted to the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition or

(IV) has ceased to be a Hindu by conversion to another religion etc.

(V) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner can`t reasonably be expected to live with the respondent.

(VII) has been suffering from a virulent and incurable form of leprosy or

(VIII) has been suffering from venereal disease in a communicable form;

(IX) has renounced the world by entering any religious order.

(X) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it that party been alive.

(1-A) Either party to a marriage whether solemnized before or after the commencement of the Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground.

(I) that there has been no resumption of cohabitation as between the parties to the marriage for a period of [one year] or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties or.

(II) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground.

(I) in the case of any marriage solemnized before the commencement of this, Act that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner. Provided that the either case the other wife is alive at the time of the petition or

(II) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; or

(III) that in a suit, a decree or order as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards. Or

(IV) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

3.3 In Christian Law:

Section (10) of the Divorce Act, 1869 makes a development in Christian divorce law giving right of dissolving marriage, when it is necessary both to husband and wife. Husband or wife may make petition for dissolution of marriage.

When husband may make petition

Any husband may present a petition to the court of civil judge, praying that his marriage may be dissolve on the ground that his wife, has since the solemnization thereof, been guilty of adultery.

When wife may make petition:

Any wife may present a petition to the District court or to the High Court praying that her marriage may be dissolved on the ground that since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion and gone through a form of marriage with another women, or has been guilty of incestuous adultery, or of bigamy with adultery or of marriage with another woman with

adultery, or of rape, sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a Mensa et Toro or of adultery coupled with desertion, without reasonable excuse, for two years or upwards. Every such petition shall state as distinctly as the nature of the case permits, the fact on which the claim to have such marriage dissolved is founded.

CHAPTER FOUR

CRITICAL ANALYSIS ON DIVORCE LAW

4.1 In Muslim Law :

(a) In point of arbitrariness

Muslim personal law gives right to both husband and wife to dissolve the marriage if they believe that they would not live together. Quran ensures that the divorce is not arbitrary since arbitrariness is remedied by making the procedure of divorce spread over almost a period of three months during which he has the right to revoke the divorce. He is not to expel the wife from his house during this period, so that he may have second thought and the door of reconciliation remains open. After the divorce given by one or two pronouncements attains finality, the divorced couple retains a right to remarry. In such a situation there made an attempt to make balance the right of wife by section (7) of Muslim family law ordinance, 1961. This section states about giving notice to the chairman and chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the patties and the Arbitration Council shall take all steps necessary to bring about such reconciliation. The expression „Chairman and Arbitration Council‟ are defined in s.(2) of the ordinance. It is not necessary to reproduces these definitions. It would suffice to note that in accordance with the Quranic text it consists of a representative of each of the parties. Al-Quran states that and if you fear a breach between them two (husband and wife), then appoint an arbiter from his folk and an arbiter from her folk. If they both desire amendment, Allah will effect harmony between them. [Al-Quran 4:35].

(b) In point of good cause

There is a debate on the main form of talaq i.e. Talaques Sunnah or approved form. Some said that by this form of talaq husband may dissolve the marriage tie at his wish. So in Islamic divorce law it is a good question. Can a husband divorce his wife without a good cause? A large and influential body of jurist regard pronouncement of talaq as prohibited except for necessity, e.g., adultery of the wife. The Mutazilas have consistently held that divorce is not permissible without the court sanction.

In support of their views they argue that Allah has considered it to be most detestable and asked for appointment of arbiters to settle marital discord.[13] The Radd-Ul-Muhtar says that divorce is permitted only when the wife is impious or guilty of misconduct or the husband cannot fulfill his marital duties and obligations. It further says: If there is no legal cause for talaq,. such as would render it mubah, then it must be considered unlawful; for Allah says [in the Quran] that your women are obedient to you, you must not seek separation from them.[14] In the same way the Multeka states that a husband has the legal right to dissolve the marriage if the wife makes the matrimonial life miserable by her indocility or bad character but in the absence of serious reasons he can`t justify a divorce from the religious and legal point of view. "If he abandons his wife or put her away from simple caprice, he draws upon himself the divine anger, for the curse of Allah", said the prophet, rests on him who repudiates his wife capriciously." Although the Hanafis, Malikis, Shafi is and the greater part of the Shias consider divorce to be permitted, they also say that a divorce without any cause is morally and religiously abominable. Abu Hanifa holds that if there is no urgent need for divorce, it is haram or forbidden.[15]

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[14] .[Syed Ameer Ali, Mohammedan Law,Vol, II, 472]

[15] [Syed Ameer Ali, Mohammedan Law, Vol,II, 473]

Having regard to the spirit underlying the law of divorce in the Quran and Sunnah, it is obvious that a Muslim husband cannot divorce his wife without a just cause. But the law as developed by the Hanafi jurists overlooked the basic Quranic norms and considered divorces uttered without any necessity or reasonable grounds as good in law. It was then left to some eminent British Judges of the Indian High Courts to further disort and ridicule the Muslim law of divorce. W.H. Machnaughten states categorically that „there is no occasion for any particular causes of divorce and mere whim is sufficient." [W.H. Macnaughten's principles and precedents of Muhammedan Law (calcultta, 1825] is considered to be a work of great authority by Fyzee, see his outlines, 492. In Sarabai V Rabiabai (1905) ILR 30 Bombay, 53, Batchelor, J., observed picturesquely that a divorce without any cause is "good in law, though bad in theology."[16] In the leading case of Ahmad Kasim Molla V Khatun Bibi, AIR 1933 Calcutta 27 the court was required to decide whether the wife had been validly divorced. Her lawyer argued that a husband could not divorce a wife without a just cause. Following Macnaughten and Batchelor, J., Costello, J., held that "any Mahommedan may divorce his wife at his mere whim and caprice."[17]

In 1978 in a revolutionary judgment in the unreported case of Jiauddin Ahmed V Anwara Begum.[18] deceided on 31 March 1978. The case has been published by keith Hodkinson in Muslim Family law, 259-271 and by Tahir Mohamood in Islamic CIQ, 2 (1982), 38-53]. Baharul Islam, J, of Gauhati High Court wholly rejected costello. J."s decision in Ahmad Kasim Molla"s case. Here Anwara Begum filed an application for maintenance and the Husband claimed to have divorced her by talaq. One of the issues before the court was whether the wife had been validly divorced under Muslim law. In a detailed Judgment Baharaul Islam, J., reviewed the relevant verses of the Quran, the commentaries on them and the opinions of some eminent modern scholars and jurists and

[16] [Alamgir Muhammad Serajuddin, Sharia Law and society, Asiatic society of Bangladesh, 1999, p. 191-192.]

[17] In the leading case of Ahmad Kasim Molla V Khatun Bibi, AIR 1933 Calcutta 27

[18] [Criminal Revision 199 of 1977]

showed that these sources did not support the observations of Macnaughten and Batchclor, J. As to the decision of Costello J., in Ahmed Kasim Molla's case, be held: Costello, J. in 59 Calcutta 833 has not, with respect, laid down the correct rule of talaq. In my view the correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters one from the wife's family the other from the husband's. If the attempts fail, talaq may be effected. [Alamgir Muhammad Serajuddin , Shari"a Law and Society.[19]

(c) In point of remarriage

In case the divorce is final as a result of three pronouncements of husband can remarry his earlier wife only after she marries another person and he divorce her or dies.

But section 7 (6) of the Muslim family laws ordinance, 1961 removes this obstacles of reunion, 1961 removes this obstacles of reunion. It states that 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.

(d) In point of right of women

Another important point is that the Quran confers power on her to claim separation or divorce by Khula. The Sariah also allows her to seek dissolution of marriage on various grounds through a court of law. The Dissolution of Muslim Marriage Act, 1939 contains all the grounds. Whatever may be the feelings of the husband towards his wife, he is enjoined to be kind to his wife in divorce and separation too, to pay her maintenance and to be generous to her after the divorce is final .Not only this, the divorced wife is not

[19] Asiatic Society of Bangladesh, [192-193]

bound to suckle the child born of her union of with the husband. She must be paid for suckling the child. [20]

(e) On point of talaq- e- bidyat

Marriage in Islam is a mere contract, it is not a sacrament, but integration of the family is its primary aim. It ensures that integration and happiness by teaching the virtues of love and affection, the equality between the spouses, respect for one another and kindness. It condemns divorce as the most abhorrent of all things made lawful by Allah and provides a procedure for it, which if followed in letter and spirit can restore between the husband and the wife harmony, co-operation and accord.

All the objections against the law of divorce in Islam are due to the perpetuation of talaq-i-bidat which finds no sanction in Quran and Sunnah.[21] The difference of view about the legitimacy of talaq in a bid'at form is not new. It has been existing since earliest times. It was held legal by some for all times and illegal by others. Among this latter category are those who treat it to be completely ineffective and there are others who treat three divorces pronounced at the same time as one divorce. Again there are those for whom the intention of the pronouncer of three simultaneous divorces is the determining factor whether the number of divorces to be pronounced was intended to be three or only one. Ibn Taimiya who declared it to be without any basis in the Shariah traced its origin to a ruling of Hazrat Umar. [Fazlur Rahman, The of women in Islam, 305] Following the spectacular conquest of Arabs Medina and Mecca were flooded with women captured in wars. Owing to this abundance of women, many men divorced their wives a number of times, each time revoking the divorce and thus torturing them. To stop this practice Hazrat Umar decreed that if any person divorced his wife three times, his divorce would be irrevocable and take effect instantly. It was thus a punitive measure taken by Hazrat

[20] [Hussain, Justice Aftab, 1987, 566.]
[21] [Hussain, Justice Aftab 1987, 568]

Umar in a special situation but soon it was universally accepted by the jurist.[22] Attempts have been made to justify the effectiveness of this form of talaq on the basis of a fiqh principle. It is to the effect that prohibition presupposes the existence of what is prohibited. There can be no prohibition unless what is prohibited is identified and exist. Nahi (prohibition) pertains to restraint from that which is prohibited and which the person who is prohibited, is empowered to do. If he stops doing it he is entitled to its reward but if he advances towards it he would be liable to be punished for it. If what is prohibited is done its effectiveness, is not prohibited in shariah if the object of prohibition is not inherent in what is prohibited. One of the examples given in support of the prohibition is that after its commission theft does take effect; its effectiveness can not be denied though the offence so committed is punishable in law. The divorce pronounced in the bida'at form is therefore effective, though it is punishable. Other instances are slightly different nature. Buying and selling after the call to Friday prayer is prohibited but such sale is legally effective between the seller and the purchaser. In talaq the prohibition is on account of something not inherent in divorce but it is on account of extension or protraction of iddat or creation of doubt about the period of iddat or the closure of the door of making reparation or amends in case of regret for the thing done. Its enforcement is not therefore prohibited.[23] But in a recent judgment of far-reaching consequences, a division bench of the Bangladesh High Court, The Daily Banlglabazar Patrika vs District Magistrate, Naogaon delivered on January 1, 2001 Justices Mohammad Gholam Rabbani and Nazmun Ara Sultana in writ petition no 5897 of 2000, has ruled that the utterance of the word talaq thrice, in one sitting, by an estranged Muslim husband would not constitute a valid and legally permissible divorce.[24]

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[22] [Alamgir Muhammad Serajuddin, Sharia law and society, 1999, 190-191].

[23] [Al Mabsoot by Sarakhsi, Printed Egypt, 1324
Hijra, vol. 6, pp. 57-58] [Status of women in Islam, Justice Aftab Hussain, Law Publishing company, 1987, p. 591 -592]

[24] [Anees Ahmed, STOR, Economic and Political Weekly February 24, 2001]

4.2 Analysis of Hindu law:

Hindu family laws do not permit divorce under any circumstance. There is no conceivable way a man and woman can part ways once they have taken their vows, even if the decision to divorce is mutual. However in some communities divorce is allowed by custom and the courts enforce such customs provided they fulfill the requisites of a valid custom. [25]Generally Hindu women even, if her life is destroyed by her husband cannot seek divorce. Namrata, a Bangladeshi Hindu, asked for a glass of water, her husband instead gave her a glass of acid. Today, her mouth and throat are destroyed. She eats through a feeding tube .Having already spent her life savings. Yet Narata cannot divorce her husband due to Bangladesh's Hindu family laws.[26] By contrast, in India, by virtue of the Hindu marriage Act, 1955 both the husband and wife has the right to go to court and seek dissolution of the marriage. By virtue of section (13) of the 1955 Act, the accepted grounds for seeking divorce include cruelty, adultery, desertion, insanity or incurable disease and so forth. Section (12) provides additional grounds available to wife, that being impotency of the husband. Section 13(2) (4) provides that a Hindu women seek divorce on the ground that her marriage (whether consummated or not) was solemnized before she attained the age of 18 years. By virtue of section 13(B) of Marriage laws (Amendment) Act, 1976, a further ground for divorce is now available, that is divorce by mutual consent. Thus it is quite clear that compared to India, the law regarding divorce for a Hindu woman in Bangladesh is rife with unfairness and is badly in need of modernization. There is widespread support for introducing the provision of divorce in Hindu marriage. A survey carried out by the South Asian institute of Advanced legal and Human Rights Studies (SAILS) shows that of a total of 175 Hindu people interview, 125 supported the right to divorce, 45 were against it and 5 had no response.[27]

[25] [Sankaralingam Vs Subban 1894 ILR 17, Mad, 479]
[26] [Reported by Aruna Kashyap, RAISINA HILL... leading India, www.raisinahill.org oct-3]
[27] [Dr.Shahnaz Huda, "Combatting Gender Injustice: Hindu laws in Bangladesh" (Dhaka SAILS, 2012)]

4.3 Analysis of Christian Law:

In Christian personal law, divorce is allowed on limited grounds for both men and women, but the grounds are far more restrictive for women. Men can divorce if they allege their wife committed adultery. Wives, on the other hand, must prove adultery plus other acts to secure a divorce. Such act include: conversion to another religion, bigamy, rape, sodomy, description for two years, or cruelty. Charges of adultery are particularly humiliating for women in Bangladesh's conservative society. "Couples often trade false allegations of adultery, desperate to get a divorce. But these are especially damaging for women. Said Dr. Faustina Pereira, director of BRAC Human Rights and Legal Aid Services . There is broad consensus from all quarters for change and nothing should hold the government back from reforming Christian law."[28]

4.4 Law commissions report on framing of uniform family code :

The law commission on July 18, 2005 published a report on the possibility of framing out of a uniform family code for all communities of Bangladesh relating to marriage, Divorce, Guardianship, Inheritance etc. After considering different aspects it recommended that all these religious or personal laws of all communities are sensitive, complex of diverse origin. It is impossible to bring uniformity in these differing laws for purposes of incorporation in a common family code. Any such attempt is likely to cause injury to the religious sentiment of the people of the country.

[28] . [Bangladesh: Discriminatory Family Laws Fuel Female Poverty Sep. 17, 2012]

4.5 Attitude of Religious Communities :

The opposition to reform mainly derives from religiously conservative quarters. All religious persons of all the religion are not ready to accept major changes at a time. Additionally a large part of Hindu community feels them marginalized by Bangladesi legal order and look at any move toward reform with suspicion. There is a significant division among Bangladesi Hindu community when it comes to the question of amending personal family law systems. There are those who actively support family law codification and reform and also those who are putting up substantial resistance. From 2011 an initiative has been taken by stakeholders including activist and religious leader to develop a draft law on family maters. The pressure group The Women Coalition for the preparation of Hindu Marriage Law (Hidu Bibaho Ain Pronoyon Nari Jot) has asked for reforms in the line of compulsory marriage registration and equal right in marriage and divorce.) [Shah Ali Farhad, Reform of Laws on Hindu Marriage and Related areas in Bangladesh :A Legal take on A Very Social Issue]

4.6 Judicial Activism:

Alamgir Muhammad Serajuddin in his book judicial Activism and family law in Bangladesh, describe the role of judges to settle the dispute and fulfill lacuna of family laws in Bangladesh. He says that judges not only interpreted and apply the law but they also make the law. The courts should take notice of the changed social and economic context in interpreting the meaning of law and determining the rights of the parties. In Fuzlunbi V Khader Vali, AIR 1980 SC 1730 a case concerning maintenance right of divorced wife, Krishna Iyer, J., the most out spoken exponent of judicial activism. Says that law can`t remain static . It must change with the changing mores of society. The judges must consciously seek to mould the law so as to serve the needs of the time. Then by applying judicial activism if the judges apply their minds reasonably considering all the situations, family laws can be more effective to solve the existing problems.

4.7 Findings :

Section (7) of Muslim family laws ordinance 1961 lays down the procedure for execution of divorce which is Mutatis mutandis applicable for all forms of dissolution of marriage.

- The husband has the power to delegate power to divorce to some third person or to the wife by virtue of this provision enumerated in the 18th column of kabinnama. This provision empowers a Muslim wife to obtain her freedom from a failed or broken marriage without the intervention of any court.
- A Muslim wife is allowed to claim divorce in the court on some specific grounds laid under the Muslim Marriage Dissolution Act 1939
- The Christian spouses are also entitled to dissolve their marriage through court under the provision dealt in the divorce Act 1869. Though the Christian women are given power to divorce but it is highly discriminatory. As per existing law, a husband can seek divorce on ground of adultery. On the other hand, a Christian wife seeking divorce must not only prove adultery, but it must be accompanied by many other allegations i.e. cruelty, desertion, change of religion.
- Law commission in a final report on 19, 2006 proposed amendments of the divorce Act 1869 to abolish this discrimination by recommending common grounds of seeking divorce by the spouses.
- But there is no security in case of Hindu women in Bangladesh. S Akhter and ASM Abdullah write that when it comes to legislative reforms in Bangladesh the position of Hindu has received little attention when compared to the position of Muslim women. Such neglect on part of law has also greatly affected socio – economic lives of Hindu women. [Shah Ali Farhad, Reform of Laws on Hindu Marriage and Related areas in Bangladesh :A Legal take on A Very Social Issue]

4.8 Recommendation

There have been several set of proposal for reforming Hindu family laws made by the various stakeholders over the recent years, principal among which has been those made by the law commission undertook an exhaustive study on validity of reforming Hindu family laws. Besides recommendations is more or less the same line have been made by the Human Rights Congress of Bangladesh Minorities (HRCBM) (an international campaigning movement dedicated to protecting human rights in Bangladesh especially those of Minorities) and "Coalition for the preparation of a Draft Hindu Marriage Law." (initiative taken by Manusher Jonno Foundation, Bachte Shekha and 17 NGOs) [Shah Ali Farhad, Reform of Laws on Hindu Marriage and Related areas in Bangladesh :A Legal take on A Very Social Issue] Law Commission after seeking the assistance of many individuals and organizations concerned with and having expertise in Christian law who proved to be of great help in the commission‟s work. Amongst the organizations are National Council of Churches Bangladesh (NCCB), Bangladesh Christians Lawyers Association (BCLA), and South Asian Institution of Advanced Legal Human rights Studies(SAILS).After considering all their opinions Law Commission submitted a final report on February 19, 2006 and proposed amendment of the divorce Act 1869.As per existing law a husband can seek divorce on ground of adultery. But wife seeking divorce must not only prove adultery but it must be accompanied by many others allegations i.e. cruelty, desertion, change of religion etc. Law Commission proposed to abolish this discrimination by recommending common grounds of seeking divorce of the spouses. Law Commission also recommended inclusion in the Act of a new provision for divorce by mutual consent.

CHAPTER FIVE

CONCLUSION

5.1 CONCLUSION

The personal laws relating to divorce are so much diverse among different communities in Bangladesh. All these religious laws come from different faith, different sources and customs. So it is not easy, as reported by the then law commission in 2005, to make a Uniform Family Code. But public benefit is the best source of law. We should do that what will serve public interest highest. The Law Commission reported at July 18, 2005 law of marriage, divorce, guardianship, maintenance, inheritance etc. of all the communities of Bangladesh are different from each other in nature and in their manners of application. All these religious or personal laws are based on religious injunctions, faith and beliefs. More so, the personal laws of all communities are sensitive, complex and divers origin. It is impossible to bring uniformity in these differing laws by way of modification or reforms for purpose of incorporation in a Common Family Code. Any such attempt is likely to cause injury to the religious sentiment, faith and beliefs of the people of the country."

So after considering whole practical situation and keeping in mind public interest and social need for ensuring equality, equitability existing divorce laws should be reformed. Right to divorce given by Muslim law to the husband and wife is not equal. There is some arbitrariness exercised by husband. But that apparent arbitrariness controlled by adding provision for making up of arbitrary council as referred in The Muslim Family Law Ordinance 1961 and also in the Quran. In Hanafi law presence of witness is not necessary even if the wife is absent, talaq would be effective. But in Shia law there is some security in part of wife.

Under Shia law a man can`t divorce his wife without the presence of witness. As the Muslim marriage is not a sacrament but a social contract. So to make a social contract more effective this provision of presence of witness may be inserted to all part of Muslim. If such provision is inserted into existing law then the arbitrariness would be controlled and the contract would acquire more legal validity. In case of Talaq – e - bidyat the provision for punishment should be make harder so that everyone be careful about their act and its consequences. Christians have the right to dissolve their marriage if it is impossible to continue the relationship under The Divorce Act 1869. But the right given to the wife is complicated to get by legal procedure. So to ensure equality it must be liberalized. The recommendations by the law commission made a way to solution. The grounds are known just need to take attempt. The most sufferer group is Hindu women. They have no right to claim divorce although their lives are ruined by oppression committed by husband.

They retain comparatively worst position than women of different other communities existing in Bangladesh. Muslim and Christian women have right to divorce though with some difficulties. But Hindu law is totally silent. In India they took much progressive steps regarding this. The Marriage Act 1955 renders them (both male and female) right to dissolve marriage and also specifies the grounds. The Act also specifies some additional grounds for women only. So urgent steps should be taken to build an effective legal frame work in this sector . The matter of hope is that govt. of Bangladesh recently enacted Hindu Marriage Registration Act 2012. The Act still falls short of the many demands of women’s rights activists in the country who are campaigning for a separate law governing Hindu marriages and divorce. Necessary reforms not included in the Act including a prohibition on polygamy, allowing divorce, and compulsory marriage registration. Thus it is clear compared to India law relating to right to divorce of Hindu women in Bangladesh is rife with unfairness and is badly in need of modernization. There is widespread support for introducing provision of divorce in Hindu marriage.

A survey carried out by South Asian Institute of Advance Legal and Human Right Studies (SAILS) of a total of 175 Hindu people interviewed, 125 supported the right to divorce, 45 were against it and 5 had no response.[29] The discussed areas have to be reformed as soon as possible. It is a demand of time .It is not a question of if, but, when. In researcher's opinion the when is now. Even if some resistance is met those will have to be faced. Major social overhauls inevitably face many obstacles. But barriers and impediments should not deter us from denying law to perform one of its principle function: being the tool of implementing social change.

[29] . [Dr. Shahnaj huda, "Combating Gender Injustices: Hindu Laws in Bangladesh" (Dhaka : SAILS, 2012)]

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