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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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Subject: Submission of Research Monograph on" Right to divorce by a Bangladeshi wife under different personal laws: A critical analysis.

I do hear by please to submit the research Monograph on the topic Right to divorce by a Bangladeshi wife under different personal laws: A critical analysis. An Appraisal from the perspective of Bangladesh . It is a great pleasure to work on such important topic. This Research work has been done according to the requirements of the Sonargaon University for the fulfilment of my LL.M (Master's) course under the Department of Law.

I respectfully acknowledge your guidance, leadership and help for the preparation of this paper. It is worthwhile to mention that there might be some errors and mistakes in my report due to limited time and knowledge. I am still at learning stage. So I respect that you will pardon my unintentional mistakes in preparing this paper.

Supervisor's Certificate

This is to certified that the Research Monograph on **Right to divorce by a Bangladeshi wife under different personal laws: A critical analysis. Appraisal from the perspective of Bangladesh.** is prepared by Md. Kamruzzaman ID No.: LL.M2203027004 for partial fulfillment of the requirement of the Program: LL.B (Hon's) from Sonargaon University, Dhaka. It also certified that the research work has been carried out under my supervision and intensive guidance.

It is to be certified that this research work is original and suitable in its style and contents for submission and fulfillment of his LL.M (Master's).

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I express my sincerest gratefulness to Almighty **'Allah'** for his kindness on me in accomplishing this research monograph. I express my heart-string gratitude to my 'Honorable' and distinguished cooperative supervisor **MD ABDUL ALIM**, Department of Law, Sonargaon University, Dhaka who inspirit and guide me throughout the work. He provide me resources that I needed to carry out the work and gave me important guidelines whenever I was in a Dilemma.

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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 i.e. 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 publicinte rest some major changes are recommended without shacking of feelings and faith of people.

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CHAPTER1: INTRODUCTION:

1.1Central Focus

This research aims to find out the problems faced by parties to a divorce especially by women under existing personal laws. It will also concentrate to the lacuna of laws, natureof problems and mode of solutions. There are different religions in Bangladesh withdifferent faith, culture and different sources of personal laws. So whether a UniformFamily Laws can be made for all religion, the researcher will try to analyze it.After the breaking up of marriage tie some urgent task confront everyone in the Family,husband, wife, children and kinfolk . Especially the wife becomes worst sufferer if thedivorce is unexpected to her. Again if she is bound to dissolve the marriage, most oftimes she has to face some critical procedure so these situations must be examined torender them proper justice. Besides only the Muslim women and Christian women in a very little scope to get justiceecan exercise right to divorce. But the major minority who constitute about 15% of total population has no right to divorce. Hindu women can not divorce her husband even if herlife is spoilt by him. So this research will seek the solution to get rid of such helplesssituation and will try to show the way to reform existing lacuna of laws which would beeffective for all communities.

1.2 Problem in a Wider Context

Marriage is a very foundation of civil society and no part of the laws and institutions of astate can be more important to its subjects than these which regulate the manner and conditions of forming and if necessary of dissolving the marriage contract. [Lord

Westbury‟ s speech (1868) L.R., 3H.L, 55] in show V Gould

In Our country marriage, dissolution of marriage and other related issues are disposed of by personal law s along with some other related statutory laws. But how much these laws are sufficient to provide equitable solution to the parties is under question. Islamic law first recognizes the necessity of divorce. It is sometimes suggested that the greatest defect of the Islamic system is the absolute power given to the husband to divorce his wife without cause. Dower to some extent restricts the use of this power. But experience shows that greater suffering comes from irresponsible exercise of this right. Besides the comment of some other scholar regarding the issue is Islamic law as interpreted and practiced by the

Hanafi school has become one side engine of oppression in the hands of the husband.[Syed Ameer Ali, Mohammedan Low, Vol -II, page 409-10]Though Muslim women are given right to divorce by *Khula* and *Talaq-e- tafwiz* but inmain form of t*alaq* men are given absolute right.

In Hindu personal law, under their spirituo -rational sentiment, Hindu societywas always opposed to the idea of divorce. A marriage from the Hindu point of viewcreates an indissoluble relation between the husband and wife. Neither party to amarriage could divorce the other unless it was allowed by custom. [Kudomee v Jotecram,(1878) 3,c,305] [Sankaralingam v Subban (1894) 17, M 479]Manu, the Hindu law giver laid down,,, Neither by sale nor desertion can a wife be released from her husband. Let mutual fidelity till Death.‟[Manu(X 49.101)].

Where the marital life is full of sufferings, which force to dissolve marriage but law does not permit .This is so oppressive.

Similarly Christian personal law does not permit Divorce. Jesus says and

“Whoever divorces his wife and marries another, commits adultery against her and if a

woman divorces her husband and marries another, she commits adultery. [mark 10: 11-12] Section 10 of the Divorce Act, 1869 states the provision of dissolution of Christian marriage . But it also can not provide absolute equality .Such situation encourages me to study about the matter. So that an equitable and highly expectable solution can be found out.

1.3 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 newun expected 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 befulfilled to ensure equitability and equality among parties.

1.4 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 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.

1.5 Frame work

The objective of the present research is to find out solution against injustice practiced ,especially towards women under existing law relating to divorce. Therefore first chapter of the study deals with central focus, problem in a wider context, methodology and chapter framing for the whole study. Chapter 2 focused on rudimentary discussion over divorce, its effect, provision regarding divorce under different personal law contained in the concerned holy religious book. Chapter 3 discuss about legal development in case of religious system of divorce, its effect and lacuna. Chapter 5 will conduct with critical analysis regarding the actual situation comparing with practice that is how much equality and equitability is ensured. Lastly findings of the whole study will be inserted and then researcher will go for conclusion.

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 requiresthe sanction of a court or other authority in a legal process. The legal process of divorcemay 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. [School of Family, Consumer, and Nutrition Sciences (Miller, 2003)]

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 a

disequilibrium, including diminished parenting skills, occurs in the year following thedivorce but that by two years after the divorce re-stabilization has occurred and parenting skills have improved”.[Santrock , John W. Adolescence. pp 147-81. 2003].

In a study done by the American Psychological Association on a parents‟ relocation after a divorce, found that a move is a long-term affect 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 divorcedfam ilies where one parent moved, the students received less financial support from their parents compared with divorced families where neither parent moved. These findingsalso imply other negative outcomes for these students such as more distress related to thedivorce and did not feel a sense of emotional support from their parents. Although thedata 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.["September 2003, Vol. 34, No. 8 Print version: page 18". Apa.org. Retrieved 2012-03-27.]

2.2 Effects of divorce on children

Sociologists know little about the effects on children younger than two or three years ofage. 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, andembarrass ment. There is nothing wor se, 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 Nicholas Scott(President of the family division of the High Court)

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

.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 rule

s 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, unlimitedand unilateral right of the husband. However in Islam, modern jurists contend that thehusband cannot exercise the power of *Talaq* arbitrarily, irrationally or unreasonably. (Tahir Mahmood, 1982,114). When divorce becomes permissible, is stated by *Allah Taala* in the following *ayah*.,, And as for those women, on whose part you fear stubbornness,(first) admonish them; then refuse to share their beds; and (finally) beat them (lightly).

Then if they return to obedience, do not seek for a wag against them, indeed, Allah inmost 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)

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 *Talaq-e-Ahsan* and *Talaq-e- Hassan*. 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.

Again when a husband pronounces *Talaq*, at the end of *tuhr* of his wife of onetime 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 talaqu*, which means irrevocable *talaq*. Under this form *talaq* becomes effective immediately after the pronouncement of *talaq*. As for example, aman says to his wife. I have given you *talaq bain*. This *talaq* is irrevocable and thehusband 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". [*Al-Quran*; 2: 226]

(d) Zihar:

Zihar means Injurious 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 become sun lawful to the husband without expiation.

2.3.1.3By 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 befor once only or for a time or for permanently. [PLd, 1963; Dhaka 602] The power so19delegated 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.

2.3.1.4 By Mutual Consent:

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

(a) Khula **:**

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) any thing 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. [*Al-Quran,* 2:229].

(b) Mubarat:

It is a mode of mutual release or discharge which leaves each party without anyclaim upon the other. [Hedaya, p. 116]. Here both parties desire dissolution of marriage.

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 byoath, 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. [Al*Quran,*24:6-9].

(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.

2.3.2 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. [Kudomce V Jouceram (1978) 3 cal, 305]. 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. [*Manu* ix 49-101].

2.3.3 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 commitsadultery if he marries some other woman. [*Mathew*, 19:8,9].

CHAPTER 3: 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*, theIslamic law applied in Muslim nations, has constantly evolved over the centuries and has never been fixed. [BARAZA , A sisters in Islam Bulletin, Vol. 1 , 2005 p.1]. The fact that each Muslim nation has a different law demonstrates that these laws can not be there vealed *Shariah,* but rather are *fiqh* as interpreted and codified by humans. As such the laws 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 *(Khula)* 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 ‟s 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.

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 –

(I) 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 sevenyears 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 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 saiddecree; and

 before passing a decree on ground impotency the court shall, on application by the husband, m ake an order requiring the husband to satisfy the courtwithin 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 operate to dissolve her marriage .Provided that after such renunciation, or conversion the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in section (2).Provided further that the provisions of this section

shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.

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 not 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 themarriage for a period of one year or upwards after the passing of a decree forrestitution of con jugal 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 there of, 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 men sa et to 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 4: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 brining about a reconciliation between the patties and the Arbitration Council shall take all steps necessary to bring abut 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

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 contain shall 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 begenerous to her after the divorce is final. Not only this , the divorced wife is not bound to suckle the child

born of her union of with the husband. She must be paid for suckling the child. [Hussain, Justice Aftab, 1987, 566.]

(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 person who is prohibited, is empowered to do. If he stops doing it he is entitled to itsreward 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 ofthe 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 *bidat '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 x tension 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. [Al Mabsoot by Sarakhsi, Printed Egypt, 1324Hijra, vol. 6, pp. 57-58] [Status of women in Islam, Justice Aftab Hussain, Law Publishing company, 1987, p. 591-592]But in a recent judgment of far-reaching consequences, a division bench of theBangladesh High Court, The Daily Banlglabazar Patrika vs District Magistrate, Naogaonde livered on January 1, 2001 Justices Mohammad Gholam Rabbani and Nazmun AraSultana 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. [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. [Sankaralingam Vs Subban 1894 ILR 17, Mad, 479].

Generally Hindu women even, if her life is destroyed by her husband can not 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 can not divorce her husband due to Bangladesh

‟Hindu family laws. [Reported by Aruna Kashyap ,RAISINA HILL... leading India, www.raisinahill.org oct-3]

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 interviwed,125 supported the right to divorce, 45 were against it and 5 had no response. [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 plusother 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.” [Bangladesh: Discriminatory Family Laws Fuel Female Poverty Sep. 17, 2012]

4.4 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 orto 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 ofMuslim 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.

4.5 Reforms Proposals:

 There have been several set of proposal for reforming Hindu family laws made bythe 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. The present commission fully agrees with the above recommendation.

4.6 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.

4.7 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 marriageregistration and equal right in marriage and divorce.) [Shah Ali Farhad, Reform ofLaws on Hindu Marriage and Related areas in Bangladesh :A Legal take on A Very Social Issue]

4.8 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 not 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.

CHAPTER 5: CONCLUTION

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 isimpossible 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 not 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. There commendations 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 a 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. Asurvey 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. [Dr. Shahnaj huda, “Combating Gender Injustices: Hindu Laws in Bangladesh” (Dhaka : SAILS, 2012)]

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.

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