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Research Monograph

On

"Critical Analysis on Legislative Changes of Family Courts in Bangladesh"

Research Paper submitted in partial fulfillment of the requirements of the degree of LL.M (1 year) under Sonargaon University

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LETTER OF TRANSMITTAL

Date:10th January,2024 To

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Subject: Submission of Research Monographon "Critical Analysis on Legislative Changes of Family Courts in Bangladesh"

Sir,

It is a great pleasure for me to submit the research monograph on the topic of **"Critical Analysis on Legislative Changes of Family Courts in Bangladesh"** While researching I tried my best to make this research monograph to enough standard. I hope that this paper will fulfill your expectation.

I therefore, hope that you be kind enough to go through this paper for evaluation.

Yours sincerely,

_____

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DECLARATION

I hereby do solemnly declare that the work presented on this thesis report has been carried out by myself and has not previously submitted to any other institution. I have presented the work, does not infringe any copyright.

I further had borne to indemnify the University against any loss or damage arising from infringement of the foregoing obligations.

The views and opinions expressed in this research are absolutely mine except those

Which I have quoted. I do not claim that my views are correct from every point of view. There may be shortcomings and wrongs and only I am responsible for those.

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SUPERVISORCERTIFICATION

This is to certify that the thesis on **"Woman and Children trafficking in Bangladesh perspective"** has been conducted by **Md. Motaleb Hossain, LLM 2301028022** in partial fulfillment of the requirements for the Degree of LL.M. (Masters) from Sonargaon University (SU). The thesis has been conducted under my benevolent guidance and supervision and is recorded as a bona fide work carried out successfully

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Sagor Hossain

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All praises be to ALLAH (SWT) who sustained my life in good health and sound mind throughout my entire study period in this country.

Without ALLAH (SWT)'s grace and mercy this piece of work would not have seen the light of the day. —ALHAMDULILLAH.

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Lastly, I pray my special gratitude to the role of different people whose name have not been mentioned but contributed towards research monograph, my study and personal life.

ABSTRACT

Thisdissertationisfocusedonthe CriticalAnalysisonLegislativeChangesofFamily Courts in Bangladesh. It is not unknown that a gaping loophole in the Bangladesh Judiciary is the backlog of cases. The number of family matters cases being filed in the Supreme Court and lower court in Bangladesh, Further, pertinent to note here is that Marriage as an institution has become the subject of great judicial scrutiny. With this aim, this paper has tried to discuss present law, definition, legal effects, existing problems related to dissolution of marriage, dower, and restitution of conjugal rights, maintenanceand guardianship,pretrailproceeding:mediation,institutionofsuitsand proceedings. The aim of the writing is to show the weakness in the jurisdiction of family court in our country. Law is above to all. If the law is use in proper way not only family disputes but also all disputes must be solve. To solve the every disputes enforcement of law and clearance of justice is important. In my research I try to give in depth discussion about the family courts in Bangladesh. It has further attempted to recommend some possible solutions to the identified flaws of this system.

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Chapter 1
INTRODUCTION

Introduction

Family Court is a division of the British Columbia Provincial Court. Other divisions ofthe ProvincialCourtdealwithcriminal,trafficandsmallclaimsmatters.Provincial Court judges hear family law cases, youth and adult criminal cases, and small claims cases. Depending on your community, there might be a separate courtroom where family law cases are heard, or family law cases might be heard in one of the regular courtrooms on a particular dayof the week. Usuallythere is a dayeach week or every other week when the court will hear a list of family law and child protection cases. Fromthat concept familycourts are establishedbytheFamilyCourts Ordinance1985 to serve the purpose of quick, effective and amicable deposal of some of the family matters. FamilyCourtdeals with alimitednumberofFamilyLaws.Thefamilycourts jurisdiction is limited. This research I discussed various laws relating to family matters, present situation of the family courts, various problems of the judges of family courts.

The purpose of establishment of FamilyCourts in Bangladesh was to ensure a quick, effective and amicable disposal of some of the family matters, which the traditional civil courts had failed to successfully deal with. Unfortunately, the noble aim of introducing Family Courts has not been expectantly achieved though already more than two decades have passed after the courts‘ coming into operation. There are many and diverse type of reasons behind such letdown. Given the socio-economic grounds, the procedural as well as substantive loopholes in the ordinance and related laws are not negligible. Besides, there are some misconceptions. This article Endeavour‘s to examine those confusions, uncertainties and misconceptions in the light of judicial decisions of the country‘s higher courts. Hence, this article can be a tremendoushelpformanypracticinglawyersandactingjudges.However,theprime

purpose of this study is to bring these issues firstly to the lawyers‘ and judges‘ authorities that can make the lawyers and judges conscious, can seek judicial interpretation from the highest judicial authority of the land; secondly to the legislative authority that can amend the laws to the necessary extent.[1]

Statementoftheproblem

The establishment of the Family Courts in Bangladesh was a landmark step, which was the long felt demand of the people. Before the establishment of the FamilyCourts all litigations relating to family matters and other issues were adjudicated by the ordinary civil courts. The Family Courts had been established by the Family Courts Ordinance 1965. Now the courts are working in everydistricts of Bangladesh. However, the courts are facing different problems, as mentioned under:-

- Scarcityof thejudge
- Ineverycourt the samejudgetrials civil and familymatters
- Corruptionof thestake Rolders
- Therearenopropermediation facilities

Thisresearchseekstoconcentrate ontheaboveproblems.

ObjectivesofResearch

The main objective of the research is to review of the activities of the Family Courts in Bangladesh. These objectives as given below:-

(I)Toexaminethe lawsrelating tofamily courts

(ii) Toanalyzethepresent situation ofthefamilycourts

(iii) Tofocus on theproblems of thefamilycourts

[1] [http://www.assignmentpoint.com/arts/law/family-courts-bangladesh.html, Last visited, 2 November,2023].

ResearchMethodology

This research is conducted by following the method of documentary analysis for achieving the inimitable outcome. This research work historical and interviewing. Apart from this historical method and interview will be followed.

SourcesandMaterials

In order to complete my research from various sources. I have collected materials from books, journals, internet, and law reports and responds data.

Importanceof the Research

Researchplaysanimportantroleinrecommendingsolutionstotheexisting problems. This research will clarify the problems of the family courts in Bangladesh. It also analyzes the present condition of the family courts in Bangladesh. This research will also clarify the problems of the family courts judges. It will try to give a clearscenario of the present conditions of the family suits. Finally this research will be helpful for the protection of rights of women's in family.

Review of Literature

There are many books, journals and articles related to my research topic. Some of the relevant books and articles are reviewed bellow

(1) Obaidul Huq Chowdhury's, Hand book of Muslim Family Laws, Fifth Edition (1997), published by Esrarul Huq Chowdhury, Dhaka.

Thisbookcontainsdifferentaspects ofFamilyCourtsOrdinance1985.

This book discuss very brief. It writes down the section of the Family Courts Ordinance 1985 and analyze with some case reference. There is nothing else in this book.

(2) Professor A. A. M. Moniruzzaman, Islamic Jurisprudence and Muslim Ain, First Edition January 2002, Shams publications, Nilkhet, Dhaka- 1205.

Thisbook contains thefollowingtopics of Muslim Familylaws:-

Sources of Muslim law, pre- Islamic custom and Muslim law, sources of Muslimlaws and description, Inheritance and division of property, general principles ofMiras, Hanafi law relating inheritance will, gift etc.

ThisbookanalyzesthehistoricalbaseofMuslimfamilylaws. Itdidnotgivetheclear concept of the family court law.

(3) Shaheda Begum, Muslim law and Family Courts, First edition February 1994, Published by Bangla Academe, Dhaka.

This book focuses on the various aspect of the Muslim law and Family courts like……

Marriage and legal rights of women, Marriage and dower, Maintenance of women under Muslim law, Divorce under Muslim law, dowryand dowryprohibition Act etc. This book has given the sufficient guidelines for the preservation of women rights. Ti would be very helpful for my research.

Scopeof theStudyandLimitation

This study is conducted on only the family courts in Bangladesh. The scope of this research is verylimited.This research will define theproblems ofthefamilycourts in Bangladesh. It will also analyze the problems of the judges and the condition of family suits.

Chapter2

GeneralConceptofFamilyCourtandIts History

Introduction

Family court, which has been established in the country more than twenty years ago. Family Court is a division of the British Columbia Provincial Court. Other divisions oftheProvincialCourtdealwithcriminal,trafficandsmallclaimsmatters.Provincial Court judges hear family law cases, youth and adult criminal cases, and small claims cases. Depending on your community, there might be a separate courtroom where family law cases are heard, or family law cases might be heard in one of the regular courtrooms on aparticulardayofthe week. Usuallythereis adayeach week orevery other week when the court will hear a list of family law and child protection cases. Fromthat concept familycourts are establishedbytheFamilyCourts Ordinance1985 to serve the purpose of quick, effective and amicable deposal of some of the family matters. Family Court deals with a limited number of Family Laws. The family court's jurisdiction is limited. This research I discussed various laws relating tofamily matters, present situation of the family courts, various problems of the judges of family courts.[2]

GeneralConceptofFamily Court

Bangladesh gained independence from Pakistan in 1971 and therefore shares with Pakistan the legislation promulgated prior to 1971, there are many Acts, Ordinance made after the independence of Bangladesh. Similarlya Familycourt was established by the *Muslim Family Law Ordinance of 1961*Although after the *Muslim FamilyLaws Ordinance, 1961* came into force on 15th November 1961, the legislature of the WestPakistanenactedthe*WestPakistanFamily Courts Act,1964*inpursuance of the

[2] [https://www.google.com/search?q=family-court-in-bangladesh&ie=utf-8&oe=utf-8,Lastvisited, 2 November, 2023].

recommendationofthecommissiononmarriageandfamilylawswhichstressedupon setting up of such special courts for the expeditious settlement and disposal of disputes relating to marriage, maintenance, custody of children and for other matters connected therewith. But unfortunately in the East Pakistan no such laws wasenacted. Enactment of the *Family Court Ordinance 1985*, which was published in the Bangladesh gazette on the 30th March, 1985 and was given effect from 15th November, 1985 bynotification bythe Government in undoubtedlya step in the right direction.[3]

Establishment of Family Courts was on the one hand an expression of our sophisticated legal thought, on the other hand, an acknowledgement that our traditional civil courts had failed to successfully deal with the suits relating to family affairs. FamilyCourts were establishedbythe *FamilyCourts Ordinance1985*to serve the purpose of quick, effective and amicable disposal of some of the family matters. This purpose, though not perceptible from the preamble of the Ordinance, is evidentin different places of the body of the Ordinance. The anxiety of the framers of the Ordinance for the said speedy disposal of the family cases is palpable in fixing only thirty days for the appearance of the defendant[2], in providing that if, after service of summons, neither party appears when the suit is called on for hearing the court may dismiss the suit.

The purpose is again manifest in providing a procedure for trial of cases in camera if required for maintaining secrecy, confidentiality and for effective disposal of some complicated and sophisticated matters which may not be possible under normallawoftheland.Oncemore,the*CodeofCivilProcedure1908*exceptsections 10 and 11 *and the Evidence Act 1872* have not been made applicable in the proceedingsundertheFamilyCourtswhichisanothersignthatindicatestheconcern

[3] [http://www.assignmentpoint.com/arts/law/family-courts-bangladesh.html, Last visited, 2 November,2023].

of the lawmakers to dispose of the family matters in congenial atmosphere of the FamilyCourt, which was proven to be absent in the lengthyprocedure of civil courts. Before establishing the present Family Courts, there were no separate courts in Bangladesh for adjudicating disputes in relation to family matters. The inherited colonial system of this country is itself an impediment in expeditious trial procedure. In many cases, as a result, the aggrieved persons are being deprived of their right to get judicial relief

Unfortunately, the noble aim of introducing Family Courts has not been expectantly achieved though already more than two decades have passed after the courts‘ coming into operation. There are many and diverse type of reasons behind such letdown. Given the socio-economic grounds, the procedural as well as substantive loopholes in the ordinance and related laws are not negligible.Responding to these loopholes a drastic amendment was made to the Ordinance in 1989 yet, the law is not flawless, resulting in giving rise to some confusions and uncertainties. Besides, there are some misconceptions.

Dissolutionofmarriageor Talak

The dissolution of marriage under Muslim law is detailed in sections 307 and 308. Under Muslim law, the contract of marriage may be dissolved in any one of the followingways:(i)bythehusbandathiswill,withouttheinterventionofthecourt;

(ii)bymutualconsentofthehusbandandwife,withouttheinterventionofthecourt;

(iii) by a judicial decree at the suit of the husband or wife. The wife cannot divorce herself from her husband without his consent unless such right is given to wife in the *NikahNama*. This type of talak is known as *talak-e-toufiz*. When the divorce is affected by mutual consent, it is called *khula*or *mubara'at* according to the terms of the contract between the parties.[4]

[4] ShahdeenMalik,_MuslimLaw andLaw Reform,‘*BangladeshJournalof Law*,Vol.1,Dhaka, Bangladesh, p.56.

The dissolution of contract of marriage by the husband at his will without the intervention of the court is called talak. Talak may be oral or in writing. To talak orally husband with sound mind pronounces a few words willfully, which are expressed or well understood as implying divorce, and since pronouncement behaves accordingly. Talak in writing or talaknama is the written document of oral talak. The deed may be executed in the presence of the kazi, or the wife's father or of other witnesses.However,thedeedshouldbeincustomaryformandproperlysuperscribed and addressed so as to show the name of the writer and person addressed. A wife can dissolve the contract of marriage with the intervention of the court on the grounds: (i) the whereabouts of the husband are unknown for a period of four years; (ii) failure of the husband to provide for the maintenance of the wife for a period of two years; (iii) sentence of imprisonment on husband for a period of seven years or more; (iv) failure withoutreasonablecausetoperformmaritalobligations;(v)impotenceofhusband;
(vi) insanity of husband or his suffering from virulent venereal disease; (vii) repudiation of marriage by wife; (viii) cruelty of husband; and (ix) marriage without her consent. This divorce is called talak-e-taufiz. According to Ameer Ali, ―the reforms of Prophet Mohammadmarked a new departure in his history of Eastern Legislations. _Prophet Mohammad restrained the power of divorce and gave to the woman the right of obtaining separation on reasonable grounds[5]

Whether divorce is traditional or non-traditional depends upon the woman's state of ritual puritywhen the man pronounces the formula and his manner of reciting the formula. During menstruation and confinement after childbirth a woman isritually impure, and she does not become pure again until her situation changes and she performs the major ablution (ghusl). For the traditional divorce to take place, she must be in a state of ritual purity and her husband must not have had sexual intercoursewithherduringherlastmenstrualperiod(thisconditionisaddedfor

[5] Aqil Ahmed and DR. I. A. khan, *the text book of Mohammedan Law*, 21st ed. (Allahabad: Central Law agency, 2004), p.163.

reasons of precision, even though sexual intercourse during that time is forbidden) or from the time she performed the major ablution after her period or confinement.

According to the Shi'is, if the woman is in the state known as mustaraba (i,e,, she is approaching menopause, her menstrual period is delayed, and she may or may not be pregnant), the husband must wait three months in order to determine her condition, and onlythen can he divorce her. The man must pronounce the formula on three separate occasions separated by a specific period of time, as explained below. recognizes pronouncement of talaq in any from whatsoever., section 7(1). *HefzurRahman v.ShamsunNahar Begum and others.*

According to Justice Kamal, The *Muslim Family Laws Ordinance 1961* when interpreted in the light of Article 8 & 8(la)of the constitution presumes Iddat as laid down in the Quran. *HefzurRahman v. ShamsunNahar Begum and others*.[6]

RestitutionofConjugalRights

The concept of matrimonial remedies is an indigenous part of Muslim, Christian,Jews and Parsi religions, a marriage under Muslim law is essentially a contract and a suit for restitution of conjugal rights would be a suit for the specific performance of the terms of the marriage contract. When either the husband or wife has without lawful cause withdrawn himself or herself from the societyof the other the aggrieved party may bring a suit for restitution of conjugal rights[7]In *MunsheeBuzloorRaheem v Shumsoonissa Begum,* it was said that where a wife without lawful cause ceases to cohabit with her husband, the husband may sue the wife for restitution of conjugal rights.[8]

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6 *HefzurRahmanvShamsunNaharBegumandothers,*4BLCAD50.P.45.

7 Dr. BorhanUddin Khan ‗*Personal Laws in Bangladesh: the need for substantive Reforms*‖ in the DhakaUniversityStudiesPart-F,Journalofthefaculty oflaw,Vol15num 1November2004, p.108.

8 *MunsheeBuzloorRaheemv.ShumsoonissaBegum*(1867)11M.I.A.551.

The husband may sue against the wife for restitution of conjugal life if the wife, without lawful cause, ceases to cohabit with her husband. This suit is maintainable only against legally married wife. However, a husband cannot file sucha suit if the contract of marriage is dissolved.When a wife without lawful causeceases to cohabit with her husband, the husband may sue the wife for restitution of conjugal right. *MoonsheeBuzlurRuheem v.Shumsoonnissa Begum*.Restitution of conjugal rights is at the courts discretion and the plaintiff must prove that he hascome to the court with clean hands. Where he has married two wives he must prove that he is treating both the wives in equal footing. *MakhanBibi v. Muhammad Wazir Khan.* The restitution of conjugal right is a reciprocal right thus it is neither discriminatory nor violative of any of the provisions of the Constitution. *Md. Chan Mia v.Rupnaha.*

The wife may refuse to live with her husband and admit him to sexual intercourse so long as the prompt dower is not paid. Bailli. If the sues her for restitution ofconjugal rights beforesexual intercoursetakes place, nonpayment ofthe dower is complete defense to the suit, and the suit will be dismissed. If the suit is brought after sexual intercourse has taken place with her free consent the proper decree to pass is not a decree of dismissal, but a decree for, restitution conditional on payment of prompt dower. *AdulKadir v. Salima* (*1886).*

Dower(mohr)

Allah has said that ―Except for these all others are lawful provided ye seek (them in marriage) with gifts from your property –desiring chastity, not lust.‖[9]The word generally used for dower in the Holy Quran is ‗ajr‘ meaning reward and a gift that is given to the bride. In fact, ajr is that in which there is gain but no loss. The word saduqatisalsoonceusedintheHolyQuransosignifythenuptialgiftandother

[9] Al-Quran , Surah AL-Nisa(the Women), iv: 24, Tanzil-ur- Rahaman, A code of muslimPersonal law, vol. 1 Karachi, Pakistan, p. 218.

words from the same root signifying dower or sudaq. The word ‗mahr' is used in Hadith to signify dower or nuptial gift.

According to AbdurRahim,―It is either a sum of money or other form of property to which the wife becomes entitled by marriage. It is an obligation imposed by law on the husband as a mark of respect for the wife.‖[10]

According to Mulla: Dower is a sumof money or other property which the wife is entitled to receive from the husband in considerationproceeding from the husband for contract of marriage. It is an obligation imposed by low upon thehusband as a mark of respect to the wife. Moreover, the obligation to pay dower does not arise by any express agreement among the parties.[11]

Mahmood J in Abdul Kadir vs. Salima,givesthe bestdescriptionthenatureof dower. He observes: ―Dower, under the Muhammadan Law, is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage and even where no dower is expressly fixed at the marriage ceremony, the law confers the right of dower upon the wife as a necessary effect of marriage.[12]

Where more than two years have passed since the demand for payment of prompt dower was made the wife would obviously be entitle to a decree for dissolution of marriage on the ground of failure to maintenance for two years.

Maintenance

Therearesomeimportantdefinitionofmaintenanceisgivenbellow:-

AccordingtoHedaya,―Allthosethingswhicharenecessarytothesupportoflife, such as food, cloths, and lodging; many confine it solely to food.‖[13]

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10 SayedkhalidRashid,*Muslimlaw,*4th ed.(Lucknow:EasternBookCompany),p.83.

11 ShaukatMahmood, *Principles and Digest of Muslim Law*, 6th ed.(Lahor: Caravan Press, 2002) P. 47.

12 *MahmoodJinAbdulKadirv.Salima*,2 DLR.230.

13 Fatawa-i-Alamgiri.Vol.1p.732,AqilAhmed,p.229.

AccordingtoFatawa-i-Alamgiri,―Maintenancecomprehendsfood,raimentand lodging, though in common parlance it is limited to the first.‖

Themainprinciples of maintenancemaybe recountedthus:

(1) Apersonisentitled tomaintenanceif hehasno property

(2) Isrelatedtotheobligor withinprohibitdegrees,oristhewifeor child, and

(3) Theobligorinpositiontosupport him.

Maintenance is the monetary support that a wife, children, parents, and grand children can claim as a matter of legal right on the husband, parents, son, and grandfather respectively to maintain their livelihood. It includes food, clothing, lodging, medical support for the adults (in applicable cases), and also includes other necessary expenses for mental and physical well being according to their respective status in society. Grounds by which the obligation is imposed on a person in order of gravity are: (a) marriage, (b) kinship, and (c) inheritance. A father is bound to maintain his sons until they have attained puberty and his daughters until they are married.[14]

Maintenance defined: Maintenance includes food, clothing and lodging. The definition of maintenances is not exhaustive. The word includes other necessary expenses for mental and physical well being of a minor, according to his status in society. Educational expenses were included in the definition in *Ahmedullah v.MqfizUddin Ahmed*.[15]

Maintenance of wife and children: after divorce wife is entitle to maintenance up to iddat period; *Shah Azmallah v.Imtiaz Begum*. Which extends to three months; *MithaKhanv.HemayetBibi*.Whereawiferefusedtolivewiththehusbandand

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[14] AsafA.A.Fayzee,*OutlinesofMuhammadanLaw*,4th ed.(Delhi:OxfordUniversityPress,1974), p.150.

[15] *Ahmedullahv.MqfizUddinAhmed*4DLR613.

perform marital obligations without valid reason, husband is not bound to maintainher. Past maintenance cannot be claimed by children unless already fixed by court. [16]*Section3oftheOrdinanceof1985*onlymeansthatiftherearеprovisionsinthe ordinance which are different from or are in conflict with the provisions of any other law then the provisions of the said Ordinance will prevail. Section 3 does not debarthe application of limitationActtosuitsfile under the Ordinance of 1985. The factthat the *Ordinance of 1985* speaks of 'suit',"plaint"Written statement', 'decree', etc.clearlyattractstheLimitationActundersection29(2)thereof.*JamilaKhatunv Rustom All*.[17]

GuardianshiporCustodyof Children

In all cases father, if alive, is the natural guardian of the person and property of his minor child. In absence of father, the responsibility shifts to mother, and in case of absence or inability of mother grandfather or the nearest relation of the parents becomes guardian of the person and property of the minor. Even the government can be the guardian of the person and property of the minor in demanding situation. Prior to promulgation of *Family Court Ordinance 1985*, district judges were appointed the guardian of person and property of a minor, which is now vested on the concerned assistant judge of the Family court. All application for appointment of a guardian of thepersonorpropertyor both ofminorareto beunder *theGuardians and Wards Act, 1890.* However, a prospective guardian may start working as a guardian of the minor as per Muslim law even before getting judgment of the court.[18]

Family courts resolve problems arising out of the five above mentioned problems. A person may, on payment of twenty five taka, prefer a plaint to be presentedtoaFamilycourt.Thejudgecanpassthejudgmentanddecreeagainst

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16 *MithaKhanv.HemayetBibi*11DLR(WP)17.

17 *JamilaKhatunv.RustomAll*48DLR(AD)110.

18 SayedkhalidRashid,*Muslimlaw*,4th ed.(Lucknow:EasternBookCompany),p.107.

which appeal petition may be filed with the district judge's court provided the judgment does not relate to (a) the article 2(8) of the *Dissolution of Muslim Marriage Act, 1939* (*Act VIII of 1939)* or (b) for dower not exceeding five thousand taka.

An appeal against the judgment, decree or order of a Family court shall be preferred within thirty days of the passing of the judgment, decree or order excluding the time requiredforobtainingtruecopiesthereof.TheHighCourtDivisionmay,eitheronthe application of any party or of his own accord transfer any suit under this Ordinance from the Family court to another court within the local limits of its jurisdiction. A Familycourt shall be deemed to be district court for the purposes of guardianship and custody of children.

The provisions of this Ordinance shall have priority over other concerned rules, provided that does not affect the personal law or the religious law prevailing in the country. These rules are applicable for the adherents of those religions in which dissolution of marriage is accepted. This court shall conduct the trial and shall pass thejudgmentasperreligiousprovisions.However,thisOrdinanceshallnotaffectany of the provisions of *Muslim Family Law Ordinance of 1961*.[19]

[19] *MuslimFamilyLawOrdinanceof1961.*

Chapter3
LawsrelatingtoFamilyCourts

Introduction

Bangladesh gained independence from Pakistan in 1971 and therefore shares with Pakistan the legislation promulgated prior to 1971, there are many Acts, Ordinance made after the independence of Bangladesh. Similarlya Family court was established by the Muslim Family Law Ordinance of 1961. Family law is the area of the law that deals with one of the most central and personal aspects of society of the family. Although the precursor of family court was really child or juvenile court, the framers of family court probably could not have fathomed it would become a tribunals for every family related dispute as it exists today.

It is evident that the setting up of these family courts was a dynamic step so far as reducing the backlog and disposing of cases while ensuring that there is an effective delivery of justice goes. The Bangladesh court s system is divided into two levels. There are the subordinate courts and the Supreme Court, both of which hear civil and criminal cases. The subordinate courts operate at district level and are the courts first instance. They are divided into civil and criminal courts. There are specialized tribunals for example; labor and tax issues and family court has jurisdiction over personal status matters, which are governed by a person‘s religious affiliation.

FamilyCourtsinBangladeshan Overview

ItisnotunknownthatagapingloopholeintheBangladeshJudiciaryisthebacklogof cases. The number of family matters cases being filed in the Supreme Court andlower court in Bangladesh, Further, pertinent to note here is that Marriage as an institution has become the subject of great judicial scrutiny. There are a number of judicial provisions dealing with marriage and its various aspects. The result is that, in additiontothevariousadvantagesthattheselegalprovisionsmayprovide;the

privacyofthisinstitutionhasbeenthreatened.AsperstudiesconductedinDhaka,40 % of marriages are heading towards divorce. There are issues like alimony which become the topic of great controversyand cause harassment to families. What further becomes a problem is that personal issues get intertwined with the legal issues and lead to the unnecessary prolonging of the disposal of these cases. The younger generation, being made a scapegoat in the changing times due to the ensuing cultural war between Conservatives and Liberals, wastes its useful youth in the precincts of the litigating corridors of the family courts, criminal courts and magistrate courts waiting in long queues being expectant of receiving justice.

The Family Courts Ordinance, 1985 was part of the trends of legal reformsconcerning women. Because of the building pressure from various institutions lobbying for the welfare of women all over the country, the Act was expected to facilitate satisfactory resolution of disputes concerning the family through a forum expected to work expeditiously in a just manner and with an approach ensuring maximum welfareofsocietyand dignityofwomen. Prevalenceof gender biased laws and oppressive social practices over centuries have denied justice and basic human rights to Indian women. The need to establish the Family Courts was established by ***The Family Courts Ordinance, 1965***

To this background, a significant development has been the recent setting up of the Family Court in Bangladesh. Though such courts

have been set up and are functioning in other districts, the setting up of a familycourt in the Bangladesh is a significant development and a step which was necessary to be taken. The main purpose behind setting up these Courts was to take the cases dealing with family matters away from the intimidating atmosphere of regular courts and ensure that a congenial environment is set up to deal with matters such as marriage, divorce, alimony, child custody etc. As mentioned earlier, an effective way oftackling the problem of pendency is to improve the efficiency of the system rather thanchanging thesystem altogether. Asignificant stepis to makeuseoftheavailable humanresource.ThesefamilycourtsatBangladeshareequippedwithcounselorsand

psychologists who ensure that the disputes are handled by experts who do not forget that while there may be core legal issues to be dealt with; there is also a human and psychological dimension to be dealt with in these matters. The role of the counselors is not limited to counseling but extends to reconciliation and mutual settlement wherever deemed feasible.

ProcedurefollowedbytheFamilyCourts

The FamilyCourts are free to evolve their own rules of procedure, and once a Family Court does so, the rules so framed over ride the rules of procedure contemplatedunder the Code of Civil Procedure. In fact, the Code of Civil Procedure was amended in order to fulfill the purpose behind setting up of the Family Courts.

Special emphasis is put on settling the disputes by mediation and conciliation. This ensures that the matter is solved by an agreement between both the parties andreduces the chances of any further conflict. The aim is to give priority to mutual agreement over the usual process of adjudication. In short, the aim of these courts isto form a congenial atmosphere where family disputes are resolved amicably. The cases are kept away from the trappings of a formal legal system. The shackles of a formal legal system and the regular process of adjudication causes unnecessary prolonging of the matter

and the dispute can worsen over time. This can be a verytraumatic experience for the familiesandleadtopersonalandfinanciallosses thatcanhave adevastatingeffecton human relations as well. This again points to the importance of having guidance counselors and psychological experts to deal with such matters.

TheActstipulatesthatapartyisnot entitledtoberepresentedbyalawyerwithoutthe express permission of the Court. However, invariablythe court grants this permission and usually it is a lawyer which represents the parties. The most unique aspect regarding the proceedings before the Family Court are that they are first referred to conciliation and only when the conciliation proceedings fail to resolve the issue successfully,themattertakenupfortrialbytheCourt.TheConciliatorsare

professionals who are appointed by the Court. Once a final order is passed, the aggrieved party has an option of filing an appeal before the High Court. Such appeal is to be heard by a bench consisting of two judges.

FunctionandJurisdictionoftheFamilyCourtinBangladesh

The Family Courts‘ main purpose is to assist the smooth and effective disposal of cases relating to family matters. However, like any other system there are certain issues which become a matter of concern when it comes to the working of these courts.Onesuchissueis thatofcontinuity. Forexample,inthefamilycourtsatTamil Nadu, the counselors are changed every three months. Thus, when cases stretch for a period of time which is longer than this, the woman or the aggrieved person has to adjust with new counselors and their story has to be retold several times.

However, familycourts were established bythe FamilyCourt ordinance 1985to serve ofthepurposeofquick,effectiveandamicabledisposalofsomeofthefamilymatters. The anxiety of the framer for the said speedy disposal of the family case ispalpable in fixing only 30 days for the appearances of the dependant, in providingthat if, after service of summons neither party appears when the suit is called on forhearing the court may dismiss the suit. The purpose is again manifest in providing a procedurefortrialofcasesincameraifrequiredformaintainingthesecrecy, confidentialityandforeffectivedisposalofsomecomplicatedandsophisticatedmaters which may not be possible under moral law of the land.

By the Family Courts Ordinance 1985 the family courts get hold of exclusive jurisdictionforexpeditioussettlementanddisposalofdisputesinonlysuitsrelatingto dissolution of marriage, restitution of conjugal rights, dower, maintenance, guardianship and custody of children. The courts began working all over the country except in the hill districts Rangamati, Bandarban, and khagrachhari. Soon after the court began functioning, questions raised whether the family courts would deal only with the familymatters of Muslim communityor of all communities. The uncertainty lastedforalongtimeuntilin1998aspecialhighcourtbenchofthesupremecourtin

a path finding judgment removed all the question regarding family court‘s jurisdiction. Every lawyers and judges dealing with family court are supposed to be aware of the judgment. But the common people for whose benefit the courts have been constituted seem still uninformed about the great decision relieving the justice-seekers in the family courts harming uncertainty.

Section 5 of the Family Courts Ordinance 1985 speaks about the jurisdiction of the familycourts which reads as: ― subject to the provisions of the Muslim FamilyLaws Ordinance 1961 a family courts shall have exclusive jurisdiction to entertain , try and dispose of any suit relating to, or arising out of, all or any of the following matters, namely……

[a] dissolutionof marriage;

[b] Restitutionofconjugal rights;

[c] Dower;

[d] Maintenance;

[e] Guardianshipandcustodyof children‖

Conclusion

It is evident that the setting up of these family courts was a dynamic step so far as reducing the backlog and disposing of cases while ensuring that there is an effective delivery of justice goes. However, as aforementioned, there are still matters of concern which plague these courts. The issues relating to the functioning of these courts is to be seen in total, as quoted in the examples relating to the procedural as well as substantive aspects of the problems. There are many controversial and debatable issues such as engaging a lawyer due to the specific provisions of the Family Courts Act.

Chapter4

PresentsituationoftheFamily Courts

Introduction

Establishment of Family Courts was on the one hand an expression of our sophisticated legal thought, on the other hand, an acknowledgement that our traditional civil courts had failed to successfully deal with the suits relating to family affairs. Family Courts were established by the Family Courts Ordinance 1985. 1, to serve the purpose of quick, effective and amicable disposal of some of the family matters. This purpose, though not perceptible from the preamble of the Ordinance, is evident in different places ofthebodyoftheOrdinance. The anxietyofthe framers of the Ordinance for the said speedy disposal of the family cases is palpable in fixing only thirty days for the appearance of the defendant.2,in providing that if, after service of summons, neither party appears when the suit is called on for hearing the court may dismiss the suit.3,The purpose is again manifest in providing a procedure for trial of cases in camera if required for maintaining secrecy, confidentialityand for effective disposal of some complicated and sophisticated matters which may not be possible under normal law of the land. Once more, the Code of Civil Procedure 1908 except sections 10 and 11 and the Evidence Act 1872 have not been made applicable in the proceedings under the Family Courts4 which is another sign that indicates the concern of the lawmakers to disposeof the familymatters in congenial atmosphereof the Family Court, which was proven to be absent in the lengthy procedure of civil courts. Unfortunately, the noble aim of introducing Family Courts has not been expectantly achieved though already more than two decades have passed after the courts‘ coming into operation. There are many and diverse type of reasons behind such let down.

VariousproblemsinFamily Courts

VariousproblemsinFamilyCourtsaregivenas follows:-

TheUnacknowledged Problem

There are many problems with therapeutic jurisprudence in the family courts, which now runs the gamet from all manner of alternate dispute resolution procedures, to excessive guardian ad item practices, to various court-ordered therapies, to extensive psychological opining and forensic evaluation in court cases. One of the problems with the rise of therapeutic jurisprudence and the placement of non-legal systems and non-legal professionals into the courts has been the subtle denigration of long-established precepts of lawyer independence and due process. One of the many ways this happens in the family courts has been, ironically, through the introduction of subtle and often unrecognized conflicts of interest afflicting lawyers‘ representations of their clients, created through the common development of multidisciplinary collegial relationships and business referrals, both informally and through the very multidisciplinary organizations which are promoting therapeutic jurisprudence ideas. The conflicts of interest arise because most lawyers represent different kinds ofclients on ideologically oppositional sides in different cases. The typical family lawyersometimesrepresents thewife,sometimesthehusband,sometimesthe―good guy‖,andsometimesthe ―badguy‖.If alawyercomingintoacaserunsup againstan expertwithwhomhehasareferraloremployment relationshipinothercasesandthat expert takes a position adverse to the lawyer‘s client in the new case, the lawyer will have a very difficult time adequately representing his client. Appropriate representationmayrequirethelawyertostrenuouslyobjecttotheexpert‘s testimonyor even the expert himself. But if the lawyer needs the good will and cooperationofthatsameexpertinconnectionwiththelawyer‘sotherclients‘pending cases, he cannot do that because he may put those other cases at risk. The legal community, even in urban areas, is limited and often close-knit. Lawyers in the same area of practice regularlyencountereach other in different cases. Thepool offorensic expertsandguardiansadlitem(GALs)tendstobeevensmaller.Therepeated

association time and again of these specialists in cases means that at any time and from time-to-time any given one of them may show up on the ―wrong side‖ of a lawyer‘s case — and simultaneously also be on the ―right side‖ of other of the lawyer‘s cases, whether as a hired expert or a court-appointed expert. This creates many of the same dilemmas that ordinary client conflict-of-interest issues do.

How the Conflicts of Interest Affect the Lawyers and Their Clients' Cases

Lawyersinthesepositionswillbetemptedtorationalizetothemselves,aswellas maintain the posture in the community at large, that the expert‘s opinions, even when theyareadverseto his client, arescientificallyvalid even when theymaynot be, even if they are deeply flawed orcompletely specious. Theselawyers may rationalize tothemselvesthatthevalidityofthescienceitselfisnottheirresponsibilitybecause, after all, lawyers are not ―scientists‖. The lawyer who naively or purposefully steps downthepathofmultidisciplinarypractice,regularlyexchangingreferralsand engaging in other closeassociations with nonpayercase participantssimply cannot avoid encountering this problem. Lawyers and these other participants in the system have very different roles. When lawyers directly hire paralegals, experts, and othersto assist them, there is not as much of a potential conflicts problem, even when these individuals are independent contractors. First, their work is covered by attorney work product unless and until they testify. Second, because they were hired by the lawyer, they are subject to the same conflict of interest rules as is the hiring lawyer, as far as their involvement in other cases and with other people. This is not true, however, inthe case of ―independent‖ experts, such as custodyevaluators and guardians ad item. Theseindividualswhorenderopinions―forthecourt‖asso-called―court-appointed experts‖ are avery differentmatter.These samekindsof conflictsalsodonotarise when lawyers engage in professional relationships with other lawyers who regularly areontheopposingsidesofcases,becauseunlikethelawyercolleagues,the practitioners of therapeutic jurisprudence are actually case participants— witnesses andevenparties.Althoughostensiblyworking―forthecourt‖,theyarenotakinto

neutral judges or magistrates, bailiffs or other courthouse personnel. None of these truly neutral courthouse persons advocates for a position in a case, testifies as a witness, or participates as a party proper as do some GALs. Contrary to the rhetoric, court-appointed evaluators and opining GALs are not neutral participants in the system. Even if they initially were hired under that rubric, once their reports are rendered, and their opinions formed and ready to be given, they have become advocates for one or the otherside or issue in a case. Thus, at a point, theyare, just as any party would be, pointedly in favor of certain outcomes, and adverse to others.The routine broad involvement of these expert witnesses thus must be recognized by the legal profession as the egregious misjudgment it is, fostering legal ethical violations that must be addressed by state bar ethics rules. Ironically, the problem is worse for lawyers who are not ideologues, because these lawyers are more likely to advocate for different client perspectives. Such a lawyer confronts an unresolvable dilemma when an expert the lawyer is relying on in one case takes a similar position, including one that may lack scientific merit, against another of the same lawyer‘s clients in a different case. Because the expert andthe lawyer have been, are currently, or will be in cahoots in these other cases, the lawyer is placed into a conflict, unable zealously to discredit the expert when that is necessary to protect his current client. Bar ethics rules must address this. The legal profession actually does recognize that the experts themselves have the same temptation to manipulate their opinions to please those lawyers with whom they have ongoing relationships and receivereferrals. This undoubtedly contributes to yet more corruption of the judicial system, and even has led to calls to banish these third parties (see e.g. Margaret Hagen‘s Whores of the Court, Regan Books, 1997). Nevertheless, lawyers have not, as agroup, either recognized or acknowledged how these practices have affected theirown ethics and practices.

Dowryand Maher

Oneofthe worst problems related to marriagein Islam in thecontext ofoursocietyis the issue of dowry. So much of abuse against women is related to this matter. Muchof it is because lack of misunderstanding about Islam, lack of education, and lack of effective law enforcement.Maher, mutually agreed upon by parties to marriage, isan Islamic requirement. Maher is to be offered by the groom. There is no restriction on what or how much Maher can/should be. However, it is desired that it should be according to groom‘s ability, and subject to BRIDE‘s consent. Maher can/should also serve as an economic protection for the wife. Given the abuses that exist in our society, the following are important considerations:Maher should not be an exorbitant amount that the groom can‘t afford; Maher should be paid off at the timeof marriage; Maher is for the BRIDE, not her parents or relatives and therefore,Maher should be transferred to BRIDE; Bride ought to be fully informed about the offered Maher and her explicit consent should be sought. As far as dowry – marriage gift sought/demanded by grooms from brides‘ side – is simply UNISLAMIC. Our dowry related problems are exacerbated by the fact that bride‘s parents often try toget a specific groom by offering high dowry to the groom‘s side. While any gift,given by anyone or any side, must be treated differently, any elicitation/demand has noIslamicvalidityandvigorouseducationisneededinthisregardtobringthismatter to the limelight of society.

Chapter5

ProblemsoftheJudgesoftheFamilyCourts

Introduction

Problems and solutions are interrelated between one another. All sides of every state organ are not free from problems, similarly judiciary part of the state are not free. It has many problems. In this chapter of my research I discuss various problems of the judges and I try to give the overall discussion various problems of the judges in Bangladesh.

Multiplicitiesofthesuits

Multiplicity of the family suits is one of the most burning problems in the administration of justice in the Bangladesh. The main reasons of the multiplicity of the suits are as follows-

a) Over population

The area of Bangladesh is 147570 sq. m. but the population of it is about 160millions.Sothedensityofthepopulationtherearemanycasesareopenineveryyear, most of the cases are family matters. For that reason judges are facing manyproblems.

b) Lengthyprocessof trial

The delay in litigation is equally known to all and nevertheless it may sound inconsistentwithdueprocessoflaw. Thefactremainsthattheverycases aremisused and abused in order to delay cases for an indefinite period and ultimate success in the cause often proves false. Now, law is an effective weapon in the hands of the state to mitigate the social needs by ensuring proper justice in time. Such effort of law is liable if justice fails to mitigate the misery of the mass people due to delay in litigation only and the faith in justice can never be instilled in the mass people if the statedoesn‘tensurethespeedyprocessofjustice.Inthefieldofjustice,delayin

litigation is traditionally practiced in our country as like at the same time as denying dueprocess oflaw.Theresult is that cases arepiled up in all thecourts hugelydayby day. Basically, the delay in litigation is incredibly practiced in civil courts. A number of causes seem to be responsible for creating this crippling situation in thewayof our justice. An attempt has been made here to pinpoint some of the causes and suggest measures to remove them. It also seen that the lawyers may not be ready to argue the case and hence regularly submit _time petitions'. So, frequent taking of time by the lawyers must be stopped.

c) Lessnumbersof thefamilycourts

Less numbers of the family courts is one of the reasons of multiplicity of the judges. There is no enough family courts room in every district. So lots of cases are pending in every year's especially family matter.

d) Lessnumbersofthe judge

Judges are not available in every Family court. With Family matters lots of cases are open in every day. One judge of every Family court is not able to deal those cases so the multiplicity of the suits is being high day by day.

e) Lackof thefamilylaws

The prevailing family laws are not exhaustive to solve the family suits. It depends on other laws. The purpose of the family Courts Ordinance is to provide for speedy disposal of family matters by the same forum. Provisions made in the Family Courts Ordinance have ousted the jurisdiction of the Magistrate to entertain application for maintenance which is a familycourt matter. A complete opposite view to the effect is that the Criminal Courts as usual way entertain a case filed under section 488 of the Code of Criminal Procedure for maintenance. To dissolve this issue the Court considered (i) section 3 of the Family Courts Ordinance which provides that the provisions of this Ordinance shall have effect notwithstanding anything contained in any other law for the time being in force, (ii) section 4 which provides that all courts ofAssistantJudgesshallbetheFamilyCourtsforthepurposeofthisOrdinance,and (ii)section5thatprovidesthattheFamilyCourtsshallhaveexclusivejurisdictionto

entertain, try and dispose of any suit relating to the subjects enumerated in thissection that includes maintenance. The Court held that these sections clearly indicate the ouster of the jurisdiction of other courts in dealing with the matters enumerated in section 5 of the Ordinance. The husband may sue against the wife for restitution of conjugal life if the wife, without lawful cause, ceases to cohabit with her husband. This suit is maintainable only against legally married wife. However, a husband cannot file such a suit if the contract of marriage is dissolved.

f) Lackof expertlawyer

The expert lawyer on family laws is not available in our country. The lawyers do not want to solve the problem by alternative way.The philosophy of Alternate Dispute Resolution systems is not well tothe lawyers as well as to the judges. In adeveloping country like Bangladesh with major economic reforms under way within the frame-work of rule of law, strategies for swifter resolution of disputes for lessening the burden on the Courts and to provide means for expeditious resolution of disputes, there is no better option but to strive to develop alternative modes of dispute resolution by establishing facilities for providing settlement of disputes through arbitration, conciliation, mediation, negotiation, etc. Litigation does not always leadto asatisfactoryresult. It is expensivein terms oftimeand money. A case wonorlost in court of law does not change the mindset of the litigants who continue to be adversaries and go on fighting in appeals after appeals. In June 2000, formalizedADR was introduced in Bangladesh by means of court annexed judicial settlement pilot projects, in an effort to decrease delays, expenses, and the frustrations oflitigants laboring through the traditional trial process. The pilot program began in a collaborativeeffortwith ISDLSinaseriesof Bangladeshilegalstudiesof Californian ADR systems. Three Pilot Family Courts were established in the Dhaka Judgeship, which exclusivelyused judicial settlement to resolve family cases including: divorce, restitution of conjugal rights, dower, maintenance and custody of children. An amendment to the Code of Civil Procedure was not necessarydue to an existing 1985 FamilyCourtsOrdinance,whichauthorizedthetrialjudgetoattemptreconciliation

between parties prior to and duringtrial. Thepilot courts were staffed by30 Assistant Judges selected from all over Bangladesh, lawyers and non-lawyers, who were given training by a United States mediation expert. During this assignment, the Assistant Judges were relieved of all other formal trial duties107.

g) Complexityofthefamilylaws

The dissolution of marriage under Muslim law is detailed in sections 307 and 308. Under Muslim law, the contract of marriage may be dissolved in any one of the followingways:(i)bythehusbandathiswill,withouttheinterventionofthecourt;

(ii)bymutualconsentofthehusbandandwife,withouttheinterventionofthecourt;

(iii) by a judicial decree at the suit of the husband or wife. The wife cannot divorce herselffromherhusbandwithouthisconsentunlesssuchrightisgiventowifein the*Nikah Nama*. This type of talak is known as*talak-e-toufiz*. When the divorce is affected by mutual consent, it is called *khula*or*mubara'at*according to the terms of the contract between the parties.

The dissolution of contract of marriage by the husband at his will without the intervention of the court is called *talak.* Talak may be oral or in writing. To talak orally husband with sound mind pronounces a few words willfully, which are expressed (*saheeh*) or well understood as implyingdivorce, and since pronouncement behaves accordingly. Talak in writing or*talaknama*is the written document of oral talak. The deed may be executed in the presence of the kazi, or the wife's father or of other witnesses. However, the deed should be in customary form and properly super scribed and addressed so as to show the name of the writer and person addressed. In Muslim law, the wife too has limited right to divorce her husband judicially. A wife can dissolve the contract of marriage with the intervention of the court on thegrounds:(i)thewhereaboutsofthehusbandareunknownforaperiodoffouryears;

(ii) failure of the husband to provide for the maintenance of the wife for a period of two years; (iii) sentence of imprisonment on husband for a period of seven years or more; (iv) failure without reasonable cause to perform marital obligations; (v) impotenceofhusband;(vi) insanityofhusbandorhissufferingfromvirulentvenereal

disease; (vii) repudiation of marriage by wife; (viii) cruelty of husband; and (ix) marriage without her consent. This divorce is called *talak-e-taufiz*.

h) Dependenceofthepooroninformaljusticessystem

We have observed that the poor face problems in accessing formal justice systemsand tend to use informal systems. Apart from serious crimes like murder, rape and acid violence, which are less frequent, majority of the problems that the poor experience consist of family matters, petty disputes, petty theft, sexual abuse etc. Usually a formal Court does not consider these cases because of the insignificance of their nature and the Enormity of their amount of more serious cases. Often, thesepetty cases, if filed in a formal court, are redirected to the Village Court (VC). However, a particular characteristic of these apparently insignificant problems is that from being insignificant they can gain significance and may potentially cause probable injury to the people involved. If resolved earlier through village court or informal systems then the bigger problems (severe injury, violence etc.) could have been averted if they were nipped in the bud. The opinion of the rural people is unanimous here- problems should be forestalled at the first sign of it, not after the damage is done. According to them, court

Onlyconsidersproblems whentheyreachtheextreme,whereastheextremestagecan be prevented if addressed properly in the primary stages through local level institutions (Ali and Alim, 2005; World Bank-BRAC ongoing research on justice, 2006).However,thelocallevelinformaljusticeinstitutionsandprocessesarenotfree of problems. The next section describes the constraints that the poor face when they try to access justice through informal institutions.

ThePrimeObjectofFamilyCourt

Family court was established in the country in 1985 to deal with the dissolution of marriage, Restitution of conjugal rights, Dower, Maintenance, Guardianship and custody of children. Earlier these issues were dealt with by the civil courts following theCodeofCivilProcedureaswellasbytheMagistratecourtsfollowingbythe

Code of Criminal Procedure. But these courts, overburdened with huge case logs, were unable to dispose of the suits timely. This untimely disposal of suit not only entailed an immense sacrifice of time, money and talent, but also perpetuated the family tension. Unfortunately, suit for relief turned to curse for the family. Thus, delayindisposingthesuitswaserodingthepeople‘strustandconfidencein thecourt. Hence, thepurposeoftheestablishment of Familycourts was to administerquick and effective disposal of disputes in the family affairs and to restore people‘s trust and reliance on courts. Keeping in view the special purpose of the family courts, the *Family courts Ordinance 1985* prescribes a special procedure, which, among others, fixes only thirty days for the appearance of the defendant, and provides that if after service summons, neither party appears to consent the suit the court may dismiss the suit. [20]

Mediation as a traditional alternative dispute resolution mode turned toanother place for exercise of power and domination by the local elite. As a matter of fact, disposing of disputes through mediation was and is the prime object of establishing of the Family Courts.

ProcessofMediation

Roles

a) Mediator

The mediator's primary role is to act as a neutral third party who facilitatesdiscussions between the parties. In addition, the mediator can contribute to theprocess ensuring that all necessary preparations are complete.

b) Parties

The role of the parties varies according to their motivations and skills, the role oflegaladvisers,themodelofmediation,thestyleofmediatorandtheculturein which

[20] [https://books.google.com.bd/books?id=TJgtBQAAQBAJ&pg=PA10&lpg=PA10&dqMediation the=prime=object-of-the-family-court source, Last visited, 2 November, 2023].

the mediation takes place. Legal requirements may also affect their roles Party-Directed Mediation (PDM) is an emerging approach involving a pre-caucus between the mediator and each of the parties before going into the joint session. The idea is to help the parties improve their interpersonal negotiation skills so that in the joint session they can address each other with little mediator interference.[21]

c) Authority

One of the general requirements for successful mediation is that those representingthe respective parties have full authority to negotiate and settle the dispute. If this is not the case, then there is what Spencer and Brogan refer to as the "empty chair" phenomenon,that is, the personwhoought to bediscussingtheproblem is simplynot present.

d) Arrangement

Theparties'firstroleistoconsenttomediation,possiblybeforepreparatoryactivities commence. Parties then preparein much the samewaytheywould forother varieties of negotiations. Parties may provide position statements, valuation reports and risk assessmentanalysis.Themediatormaysupervise/facilitatetheirpreparationandmay require certain preparations.

e) Disclosure

Agreements to mediate, mediation rules, and court-based referral orders may have disclosure requirements. Mediators may have express or implied powers to direct parties to producedocuments, reports and othermaterial. In court-referred mediations parties usually exchange with each other all material which would be available through discoveryor disclosure rules were the matter to precede to hearing, including witness statements, valuations and statement accounts.

[21] [https://en.wikipedia.org/wiki/Mediation#Process,Lastvisited,25November,2023].

TheUnacknowledged Problem

There are many problems with therapeutic jurisprudence in the family courts, which now runs the gamete from all manner of alternate dispute resolution procedures, to excessive guardian ad item practices, to various court-ordered therapies, to extensive psychological opining and forensic evaluation in court cases. One of the problems with the rise of therapeutic jurisprudence and the placement of non-legal systems and non-legal professionals into the courts has been the subtle denigration of long-established precepts of lawyer independence and due process. One of the many ways this happens in the family courts has been, ironically, through the introduction of subtle and often unrecognized conflicts of interest afflicting lawyers‘ representations of their clients, created through the common development of multidisciplinary collegial relationships and business referrals, both informally and through the very multidisciplinary organizations which are promoting therapeutic jurisprudence ideas. The conflicts of interest arise because most lawyers represent different kinds ofclients on ideologically oppositional sides in different cases.[22]

Over Population.

Multiplicity of the family suits is one of the most burning problems in the administration of justice in the Bangladesh the area of Bangladesh is 147570 sq. m. but the population of it is about 160 millions. So the density of the population there are many cases are open in every year, most of the cases are family matters. For that reason judges are facing many problems.[23]

LengthyProcessof Trial

The delay in litigation is equally known to all and nevertheless it may sound inconsistentwithdue processoflaw.The factremainsthattheverycasesare misused

[22] [https://www.google.com/search?q=Assignment+Point.htm&ie=utf-8&oe=utf-8,Lastvisited,10 July,2023].

[23] [http://bdlaws.minlaw.gov.bd/pdf_part.php?id=682,Lastvisited,18July,2023].

and abused in order to delay cases for an indefinite period and ultimate success in the cause often proves false. Now, law is an effective weapon in the hands of the state to mitigate the social needs by ensuring proper justice in time. Such effort of law is liable if justice fails to mitigate the misery of the mass people due to delay inlitigation only and the faith in justice can never be instilled in the mass people if the state doesn‘t ensure the speedy process of justice. In the field of justice, delay in litigation is traditionally practiced in our country as like at the same time as denying due process of law.

LessNumbersof theFamilyCourtsandJudges

Less numbers of the family courts is one of the reasons of multiplicity of the judges. There is no enough family courts room in every district. So lots of cases are pending in every year‘s especially family matter. Problems and solutions are interrelated between one another. All sides of every state organ are not free from problems, similarly judiciary part of the state are not free. It has many problems Judges are not available in every Family court. With Family matters lots of cases are open in every day. One judge of every Family court is not able to deal those cases so themultiplicity of the suits is being high day by day.[24]

LackoftheFamilyLaws

The prevailing family laws are not exhaustive to solve the family suits. It depends on other laws. The purpose of the family Courts Ordinance is to provide for speedy disposal of family matters by the same forum. Provisions made in the Family Courts Ordinance have ousted the jurisdiction of the Magistrate to entertain application for maintenance whichisafamilycourtmatter.Acompleteoppositeviewtotheeffectis

[24] ShahdeenMalik,_MuslimLawandLawReform,*‘BangladeshJournalofLaw*,Vol.1,Dhaka, Bangladesh, p.64.

thattheCriminalCourtsasusualwayentertainacasefiledundersection488ofthe *Codeof Criminal Procedure,1898*formaintenance.[25]

LackofExpertLawyer

The expert lawyer on family laws is not available in our country. The lawyers do not want to solve the problem by alternative way.The philosophy of Alternate Dispute Resolution systems is not well tothe lawyers as well as to the judges. In adeveloping country like Bangladesh with major economic reforms under way within the frame-work of rule of law, strategies for swifter resolution of disputes for lessening the burden on the Courts and to provide means for expeditious resolution of disputes, there is no better option but to strive to develop alternative modes of dispute resolution by establishing facilities for providing settlement of disputes through arbitration, conciliation, mediation, negotiation, etc. Litigation does not always leadto a satisfactory result. It is expensive in terms of time and money.

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(ii)bymutualconsentofthehusbandandwife,withouttheinterventionofthecourt;
(iii) by a judicial decree at the suit of the husband or wife. The wife cannot divorce herself from her husband without his consent unless such right is given to wife in the NikahNama. This type of talak is known as talak-e-toufiz. When the divorce is affected by mutual consent, it is called khulaor mubara'at according to the terms of the contract between the parties.[26]

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[25] *CodeofCriminalProcedure,1898,*s.*488.*

[26] Aqil Ahmed and DR. I. A. khan, *The text book of Mohammedan Law,* 21st ed. (Allahabad: Central Law agency, 2004), p. 163.

The dissolution of contract of marriage by the husband at his will without the intervention of the court is called talak. Talak may be oral or in writing. To talak orally husband with sound mind pronounces a few words willfully, which are expressed or well understood as implying divorce, and since pronouncement behaves accordingly. Talak in writing or talaknama is the written document of oral talak. The deed may be executed in the presence of the kazi, or the wife's father or of other witnesses. A wife can dissolve the contract of marriage with the intervention of the court on the grounds: (i) the whereabouts of the husband are unknown for a period of four years; (ii) failure of the husband to provide for the maintenance of the wife for a period of two years; (iii) sentence of imprisonment on husband for a period of seven yearsormore;(iv)failurewithoutreasonablecausetoperformmaritalobligations;
(v) impotence of husband; (vi) insanity of husband or his suffering from virulent venerealdisease;(vii)repudiationofmarriagebywife;(viii)crueltyofhusband;and
(ix)marriagewithouther consent.Thisdivorceis calledtalak-e-taufiz.[27]

Lackoflegal Awareness

Still today, most people of rural Bangladesh are unaware of their legal rights. Dowry is a common phenomenon in village and the villagers just do not know that giving or receiving dowry is prohibited by the law. Every now and then, the women come tothe NGO legal aid offices to file charge against her husband for battering. In almost all cases, the reason is, failure to pay dowry .The actual meaning of ―Denmohor‖ (dower) is not yet understood by women and most of them failed to collect it in time. For its patriarchal nature, traditional Salish fails to provide justice in these cases and NGOscannotprovide legalhelpincase of dowryrelatedincidentsuntiltheyrenamed

[27] GaziShamsurRahman,*Islamiclaw*,1sted.(Dhaka:Islamicfoundation,1981),p.194.

itas―Bhoronposhon‖(maintenance).Thus,withacaseofdifferentnature,legalaidis provided but the problem of dowry does not end.[28]

Case study

Dhaka, 11 September 2009 (IRIN) – When parents in Bangladesh fail to come upwith a promised dowry for their newly married daughter‘s things can get nasty. He started beating me,‖ 22-year-old Shopna Rani said of her new husband, just hours before dying of her injuries at a Dhaka hospital: Her parents had reneged on apromise to paythe dowry. According to the Hong Kong-based Asian Legal Resource Centre such cases in Bangladesh are nothing new. ―This is a social cancer. It continues unabated and everybody suffers,‖ Mohammad Ashrafuzzaman, an ALRC programmer officer, told IRIN.Dowry related violence including torture, acid attacks and even murder and suicide also stigmatizes women, the group says. In the first half of2009,119casesofdowry-relatedviolence,including78deaths,werereported,said Ain O Salish Kendro (ASK), a local NGO working for human rights. In 2008, 172 womenwerekilledandthefigurefor2007was 187,ASKsaid,addingthattherewere at least five reported cases of women committing suicide in the first half of this year when dowries went unpaid.―There are terrible stories of suffering,‖.

Conclusion

This chapter is mainly discussed about present situation of the family courts, various problems in family courts, dower and Maher and some case study related to thefamily courts. I work on this chapter I get important information about the family courts.

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[28] ShahedAhmedChowdhury,*Women'sRightstoDissolutionofMarriageinIslam'*, MaimulAhsanKhan, ed.,Womens Rights in Islam *(*Dhaka: TheNahar Light Foundation, 2009).

Chapter 6

CONCLUSION

MajorFindingof the Study

The major finding of the study is known more and more about family courts in Bangladesh. That is very important for me as a law student. I have in poor concept about family courts. For the purpose of my research I learn more and more and get lots of information about family courts. I also find out this topic various problems of the family courts, present situation of the family courts, and what‘s a type ofproblems judge‘s faces in the proceeding of trials? I also try to find out various laws relating to family matters and discussion various cases relating to family problems.

Recommendations

So the chapter 1 to 5, I discuss various terms, information, laws, and problems of the family courts and proceeding of the trial relating to family courts. Finally I want to give some recommendation, which as given bellow…….

1. Thereis neededin depthdescription onthe lawof familycourts.
2. Cameraintrialshouldbe activated.
3. The system of the enforcement of the decree of the judgment is needed to easy and fast.
4. Taking evidence is very vital procedure in family courts. Who can record the admission out of the order that admission should be described in a proper and legal way?
5. Alternative dispute resolution should be active to solve any familymatters.
6. Thepeople should be aware about the consciousness about the right of the judgment.
7. Thespecial trainingforthejudges should be needed.

8. Anyinterferenceshould bedeactivated at thetimeof anyfamilytrial.
9. Thesystem of thetrial ofthe familydispute should bereformed.
10. Thejudiciarysystem shouldbeactivated.
11. Cameraintrialshouldbe activated.
12. The system of the enforcement of the decree of the judgment is needed to easy and fast.
13. Taking evidence is very vital procedure in family courts. Who can record the admission out of the order that admission should be described in a proper and legal way?
14. Alternative dispute resolution should be active to solve any familymatters.
15. Thepeople should be aware about the consciousness about the right of the judgment.
16. Thespecial trainingforthejudges should be needed.
17. Anyinterferenceshould be deactivated at thetimeof anyfamilytrial.
18. Thesystem of thetrial ofthe familydispute should bereformed.
19. Thejudiciarysystem shouldbeactivated.
20. Compulsoryprovisionof registrationofmarriage needtobeintroduced.
21. Right to divorce or dissolution of marriage through the intervention of the court of law.

Conclusion.

Law is above to all. If the law is use in proper way not only family disputes but also all disputes must be solve. To solve the every disputes enforcement of law and clearance of justice is important. In my research I try to give in depth discussionabout thefamilycourts in Bangladesh. FirstlyItryto findout various problems ofthe family courts and secondly I analysis it with my best. Finally we always respect our law, obey the law and try to enforcement in proper way.

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