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Sonargaon University (SU)
সোনারগাঁও ইউনিভার্সিটি (এসইউ)

Research Monograph

On

"Critical Analysis of Legislative Changes of Family Matters in Bangladesh"

Research Paper submitted in partial fulfillment of the requirements of the Master of Laws (LLM) under Sonargaon University

Submitted To:

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Date of Submission: 7th July, 2025

LETTER OF TRANSMITTAL

Date: 7th July, 2025

To

Dr. A.S.M Tariq Iqbal

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Subject: Submission of Research Monograph on "Critical Analysis of Legislative Changes of Family Matters 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 Matters 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 or evaluation.

Yours sincerely,

_____

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DECLARATION

I hereby 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 opinion 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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SUPERVISOR CERTIFICATION

This is to certify that, the thesis on **"Critical Analysis on Legislative Changes of Family Matters in Bangladesh"** has been conducted **by Md. Ekhtakharul Alam Hasib,** LLM2402031015 in partial fulfillment of the requirements for the Master of Laws (LLM) 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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ACKNOWLEDGEMENT

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".

I wish to express a sincere appreciation to sir Dr. A.S.M Tariq Iqbal, Professor, Department of Law, Sonargaon University (SU) my research monograph supervisor, advisor, mentor and person whom I admire as a professional man for his benevolent support and guidance to finish this thesis and accomplish my Master of Laws (LLM) study. Actually, he is my real guide for study purpose matter.

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

This dissertation is focused on the Critical Analysis on legislative Changes of Family Matters 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 discus present law, definition, legal effects, existing problems related to dissolution of marriage, dower, and restitution of conjugal rights, maintenance and guardianship, pre trial proceedings: mediation, institution of suits and proceedings. The aim of the writing is to find the loopholes in the area of family law in our country. Law is above all. If the law is use in proper way not only family disputes but also all disputes must be solved. To solve every dispute enforcement of law and clearance of justice is important. In my research I try to give in depth discussion about the family laws in Bangladesh. It has further attempted to recommend some possible solution to the identified problem of laws of this system.

Contents of the Research	
Chapter I	**Page No.**
Introductory	**01-03**
1.1 Introduction	01
1.2 Purpose of research	02
1.3 Research methodology	02-03
1.4 Limitation of the study	03
1.5 Abstract of the chapter	03
Chapter II	
Historical Background	**04-07**
2.1 Basic Concept of family law	04-05
2.2 Family courts Ordinance 1985 and Family Courts Act 2023	05
2.3 Universal of Family code	05
2.4 Exiting Family law in Bangladesh	05-06
2.5 Necessity of uniform family code	07
Chapter III	
Muslim Family law in Bangladesh	**08-19**
3.1 Introduction	08
3.2 Marriage	08-10
3.3 Dower	10-11
3.4 Divorce	11-15
3.5 Maintenance	15-17
3.6 Guardianship	17-18
3.7 Inheritances	19
Chapter IV	
Hindu Family law in Bangladesh	**20-27**

4.1 Introduction	20
4.2 Marriage	20-21
4.3 Maintenance	21-23
4.4 Divorce	23-24
4.5 Adoption	24-25
4.6 Guardianship	25-26
4.7 Inheritances	26-27
Chapter V	
Christian Family law in Bangladesh	**28-34**
5.1 Introduction	28
5.2 Marriage	29-30
5.3 Dissolution of marriage	30-31
5.4 Maintenance	31-32
5.5 Guardianship	32
5.6 Inheritance	32-34
Chapter VI	
Universal family code a need of time	**35-39**
6.1 Introduction	35
6.2 Universal Family code within the ambit of the Constitution	35-36
6.3 Comparative study on existing religious personal or family laws	37-38
6.4 Universal family code for Bangladesh perspective	38-39

Chapter VII	
Constitutional Guarantees	**40-44**
7.1 Right to Equality	40-41
7.2 Right to Non-Discrimination	41-42
7.3 Right to equal protection of law	42
7.4 Right to Equality of Opportunity in Employment	42-43
7.5 Right to Life and Personal Liberty	43
7.6 Right to privacy	43

7.7 Right to Freedom	43
7.8 Right against Exploitation	44
Chapter VIII	44
Evaluation and Reform of Family law	**45-54**
8.1 Issues of Concern	47-52
8.2 Gaps Regarding Fulfillment of commitments	52
8.3 Government and NGO Initiatives to Reform Family Law	52-54
Chapter IX	
Recommendations	**55-60**
9.1 Findings problem	55
9.2 Recommendation	55-58
9.3 Conclusion	59-60
Bibliography	**61-63**

TABLE OF ABBREVIATION

&	And
AD	Appellate Division
AIR	All Indian Report
Art.	Article
BLD	Bangladesh Legal Decision
CEDAW	Committee on the Elimination of Discrimination against Women
DLR	Dhaka Law Report
HCD	High Court Division
i.e.,	Est
Ibid	Ibidem
Ltd.	Limited
P	Page
SC	Supreme Court
v.	Versus
FCA 2023	Family Courts Act 2023

Chapter I

Introductory

1.1 Introduction:

The family laws in Bangladesh are a part of civil law under the judiciary and legal system. It's a branch of law that deals with analytical perspective to many different topics under the civil law which are considered in need of reform based on changes in family dynamics and the social spheres of the country.

Family law is one of the many components necessary for a consistent, efficient and non-discriminatory legal system. Universality and consistency in delivery of justice is a vital factor in achieving gender equity and national development. The premises for proposing a Universal family law or Uniform family system of personal laws is to ensure gender justice and equality.

A uniform system of personal governance envisions functioning in a society in which areas of non-religious autonomy and social control are equally recognized. It further envisages leaving spiritual and some moral issues to individuals, while always keeping areas of state regulation well defined. A way to achieve this would be to treat one's opinion regarding one's relation with the transcendent as essentially private in nature. It also treats the expression of that opinion or religious belief, which may involve certain tangible acts or omission, as transcending the private into the sphere to the public or the state and thus be subject to regulation but the state. In order words, the personal for a uniform code of personal law make a case for the distinction between public and private law morality. It eliminates the confusion arising from the mistaken use of the concept of freedom of conscience and freedom of religion synonymously. It distinguishes each of these freedoms separately, as separately guaranteed by the Constitution of Bangladesh. It protects the right of every citizen which is guaranteed by the Constitution in the personal or family spheres.

1.2 Purpose of the Research:

The purpose of establishment of Family Courts in Bangladesh wasto 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 introducingFamily Courtshas not been expectantly achieved though alreadymore than two decades have passed after the courts' coming intooperation. There are many and diverse type of reasons behind suchlet down. Given the socio-economic grounds, the procedural as welllas substantive loopholes in the ordinance and related laws are notnegligible.

The main objective of this dissertation is to discuss on the need to evaluation and reform the Family law in Bangladesh for the better protection of people's right. The purpose of this research to explores the demand for positive changes in family laws and for the protection of rights in such way by which equality and justice in the family have become possible. At the same time an attempt is made to evaluate the sociological aspect of family laws in Bangladesh. The scope of this research includes the areas of information required to collect and analyze regarding the reforms under family law in Bangladesh.

1.3 Research methodology:

The methodology to conduct this research work comprises of various methods. The method of preparing the research is on the basis of data collection from different sources like different books, web sites, journals and articles that are written by the of national level. In order to move further, I have also used internet as medium of resources which had helped me to complete this research successfully. Internet has availed a lot of information and resources without which this research could have not been completed. This research monograph is not basic one. It is a liberty-based monograph. The whole research has been done in an organized way. Firstly, the necessary chapters have been selected and then I made every possible effort to collect information required for each chapter. The following methods are followed for preparing this research paper:

- Planning the whole research paper.
- Dividing the research paper into chapters.
- Taking advice from honorable Research Supervisor regarding the collection of websites.
- Discussing with the concern Supervisor.

- Updating and modifying paper for several times.
- Preparing the dissertation research paper.
- Study with concern Supervisor.

1.4 Limitation of the study:

Every research study has some limitation in true sense. So, this research monograph is not the exception of these limitations and limitations reduce the scope of the study. This research paper requires information about the family laws in Bangladesh. Books are not available or easily found in this topic and there are no sufficient documents in this topic. There are also not enough books for this topic in our University library. As I am doing such a difficult job for the first time and with immature mind, my incapability of understanding the matter deeply and analyzing it in proper way has also been a limitation of Research paper.

Though resources and articles on the internet were found but many of them could not be accessed as payment had to be made by credit cards in order to view those articles.

1.5 Abstract of the chapter:

This research paper elaborated the topic of "Critical Analysis of Legislative Changes of Family Matters in Bangladesh" into nine chapters. Through those chapters this paper tries to establish the practical problematic scenario of family laws in the context of Bangladesh and recommend solutions. In chapter two it deals with the historical background and the concept of family laws and its necessity for the people of Bangladesh. In chapter three it discusses about Muslim Family laws in Bangladesh. In this paper gender inequality in case of marriage, divorce, maintenance, dower, guardianship, inheritance etc. has been shown. In chapter four this paper highlights existing Hindu family laws and statutes and its discriminating approach. In chapter five, it contains Christian personal laws and its application and acceptance within the Christian communities. In chapter six this paper focused on the application of Universal family code in Bangladesh by a comparative study on the different family laws existing in Bangladesh.

In chapter seven of this paper, we discussed about the constitutional guarantees. Chapter eight highlights the evaluation and reform of family laws in Bangladesh. In chapter nine this paper gives some recommendation in the support of harmonization of personal laws of Bangladesh.

Chapter II

Historical Background

The laws by which Bangladesh is governed are not wholly indigenous. The legal system of Bangladesh has a combined influence of Indian, Moghul and English legal imprints. Bangladesh is a multi-religious and multi-racial country. Most of the people of Bangladesh are Muslims. There are also Hindus, Christians, Buddhists and some other indigenous tribes. For this reason, marriage, divorce, maintenance, custody of children, guardianship, inheritance etc. are dealt separately by each religious community's 'religious personal law' system.

Personal laws or family laws are those laws that govern a particular religious community and are consonant with the belief of that community. These family laws encompass important area of a person's life such as birth, marriage; divorce, maintenance, custody of children, guardianship, inheritance etc. are dealt with under different personal laws. The idea of a family law for all citizen of the state, irrespective of religious belief, gender, place of origin or birth, in consonance with the ideal of the constitution of Bangladesh and human rights which comes from this disparity of treatment on the basis of gender and religion. The application of these disparate laws could be remedied through the adoption of a distinct set of laws uniformly applicable to all the citizen of Bangladesh. Its main objective would be to provide legal remedy to any party, male or female, Muslim, Hindu, or Christian on an equal footing in all matters relating to the personal sphere and family matter. It would aim at eradicating the present disadvantage faced by people who seek legal recourse against injustices in the context of family relation. For present purposes, a uniform personal code is proposed as a viable tool for persons belonging to Muslim, Hindu, Buddhist and Christian religious group.

2.1 Basic Concept of family law:

Family law is a multi-faceted area of law which deals with family relations. Family law includes establishment of family and domestic relationships, marriage, termination of marriage, maintenance, custody, property division etc. Family law exists within the legal system of country.

Generally family law is different laws related to the family issues of the citizen of a country. Broadly, family law means those formal and informal laws related to family matters such as marriage, divorce, maintenance, ownership, inheritance, guardianship, custody of children etc. which influenced the people of a country.

Family laws or codes ore ruled largely by the statute and these laws are different from one country to another country. A family court hears cases related to family disputes. In Bangladesh there are different family laws for Muslims, Hindus, and Christians.

2.2 Family courts Ordinance 1985 and The Family Courts Act 2023:

The establishment of family courts by the family courts ordinance, 1985[1] was a significant step in legal reforms with reference to the legal status of women. The concept of family courts was first introduced in America. The idea of family courts soon spread and can be found in most American states and also in other countries.The Parliament of Bangladesh has recently passed the Family Courts Act 2023 (hereinafter referred to as FCA 2023) by repealing the Family Courts Ordinance 1985 (hereinafter referred as to Ordinance 1985) which had previously been regulating the procedures related to the Family Courts of Bangladesh.

2.3 Universal of Family code:

At present most of the country have a different religious citizen who follows their own family code. Universal family code is such family code which is followed by everyone of a country.

Universal family code means a personal law which is followed by every citizen of a country whatever is his religion. Under universal family law people of different religion have to follow a single personal law for their family matters in personal and social life. So, it can be said that universal family code is single family for law all in case of succession/inheritance, preemption (in purchase of land), land acquisition, marriage, divorce, maintenance of family.

In Bangladesh people of different religion reside peacefully. The government of Bangladesh may try to make such a family law which will cover all family matters of every citizen of this country.

2.4 Exiting Family law in Bangladesh:

State has enacted several laws with general application to all to deal with the family matters. The following laws generally cover the personal laws relating to the four religious' communities:

Muslim

a. The Muslim personal laws Application Act 1937
b. The Dissolution of Muslim marriage Act 1939
c. The Muslim Family Laws Ordinance 1961
d. The Muslim family rules 1961

[1]Published in the Bangladesh gazette on 30.3.1985.

e. The Muslim marriage and divorce (Registration) Act 1974
f. The Marriage and divorce (Registration) Rules 1975

Hindu

a. Hindu widow's Remarriage Acts 1856
b. Hindu Disposition of Property Act 1916
c. Hindu laws Inheritance (Removal of disabilities) Act 1929
d. Hindu law of Inheritance (Amendment) Act 1929
e. Hindu Women's Right of property Act 1937
f. Hindu Marriage Disabilities Removal Act 1946
g. Hindu Married Women's Rights to Separate Residence and Maintenance Act 1946

Christians

a. The Divorce Act 1869
b. Christian Marriage Act 1872
c. The Married Women's property Act 1874
d. Succession Act 1925

Buddhists

The Buddhist in Bangladesh have no distinct personal law of their own. They followed the Hindu religious laws and custom in spite of the fact that they renounced the Hindu religion, provides the basis for discussing Buddhist personal laws together with those of the Hindus. Before independence of Bangladesh the Buddhist of East Pakistan were governed by the principle of Hindu law. There is no evidence that the Buddhist community has governed by a separate personal law.

In recent years the legislative instruments which allow certain laws to be uniformly applied in the personal matters of all citizen in Bangladesh. These laws are including:

a. Nari-O-Shishu Nirjatan Daman Ain 2000
b. The Dowry Prohibition Act 2018
c. The Family Courts Act 2023
d. The Guardian and Wards Act 1890
e. Child Marriage Prohibition Act, 2017

2.5 Necessity of uniform family code:

Bangladesh is a country with several different religious and belief systems. The accepted principle of law is that personal belief systems and laws must be in conformity with the constitution. Article 25 of the Constitution of Bangladesh guaranteed every person to equality before law and equal protection of law. Article 28 of the constitution says that 'the state shall not discriminate against any citizen on ground only of religion, race, and sex or birth place.'[2] No set of laws can violate these Articles, which essentially protect the religious freedom of Different person or Communities.

With multiple belief systems, come multiple ideological conflicts. To live together in concurrence with such diversity, we need to have uniformity at some level so as to avoid such conflicts. What we need is a universal family code in the form of a sophisticated, harmonized system that skillfully uses the personal laws and yet achieves a measure of uniformity. The universal family code should be such that does not go against the essence the core or fundamental belief of any particular religion and it will not go against the religious freedom which is guaranteed by the Constitution.

[2] Article 28 , The Constitution of Bangladesh

Chapter III

Muslim Family laws in Bangladesh

3.1 Introduction:

Muslim Family Law synonymous with the Arabic *muamalat*, which means rules and regulations of social life, or the rules that regulate the day-to-day life of a person. In other words, the rules that a person should follow in his/her personal and social life are collectively called *muamalat*. Thus, Muslim Law means the personal and social laws of Muslims.

In Bangladesh, the rules of Muslim law are applied to succession/inheritance, preemption (in purchase of land), land acquisition, marriage, divorce, maintenance of family law etc. to have an idea about the Muslim law one must analyze the purpose and operation of the *Shariah* laws which is the laws ordained by Allah that provides guidelines for the Muslim society. Muslim personal laws consist of laws relating to marriage, divorce, maintenance of families, divorce, guardianship, inheritance of property.

Muslim law is essentially the revealed will of Allah, a divine ordained system which guides a Muslim state and control a Muslim community. In Bangladesh power of the courts to apply Muslim law is derived from and regulated party by statues, and mostly but legislation.

3.2 Marriage:

Marriage is one of the oldest institutions in the history of human civilization. Marriage is regarded as the union of two soul for love and two bodies for procreation and legislating children. In Islam or Muslim law marriage is a contract and not a sacrament.

In Arabian word marriage means *Nikha*. Marriage literally means living together. In Muslim law marriage has a definite legal meaning. It is a contract for the legalization of children and protection of children and protection of children. Ameer Ali said that marriage is an institution ordained for the protection of society and order that human being may guard themselves from foulness and unchastity. The Holly Quran describes, in Chapter 4, verses 21, that marriage is a scared covenant between man and woman. Marriage among the Mohammadan is not a sacrament but purely civil contract and thoroughly solemnized generally with recitation of certain verses from the Quran. In Islam marriage is a contract which has for its object the right of enjoyment and legalizing generation.[3] It brings unity to the lives of husband and wife

[3] Sheikh Burhan-ad-din Ali, Hedaya. Charles Hamilton, p-25

themselves and for the family they raise. It is also instituted to bring solace to human life and to meet one of the prime and original necessities of men.[4] For Muslim marriage is a sacred act and a step towards a better, purer and happier life. According to the jurist, a contract of marriage may be either (a) valid (Shahi) or (b) irregular (fasid) or (c) void (batil). Hence under this system, except valid marriage, all forms of marriages either void or irregular are considered as void. Valid or sahih marriage is one which is absolutely in accordance with the law and free from any kinds of defect. Asaf A AFyzee said that 'A marriage which conforms in all respects with the law is termed sahih, i.e., 'correct', in regard to legal requirements. In order to be a valid marriage, it is necessary that there should be no prohibition affecting the contracting parties.A marriage between man and women may be either lawful or unlawful. There are some restrictions or prohibitions as to marriage which may be permanent or temporary. If they are temporary the marriage is irregular. However, such a marriage can be made valid by removing the prohibitions for which the marriage is unlawful.

The following marriages are regarded as irregular marriages-

i) A marriage without witness
ii) A marriage with a woman undergoing *iddat*
iii) A marriage with a fifth wife
iv) A marriage prohibition by different religion
v) A marriage with two sisters.

Void or batil marriage is one which is against perpetual and absolute prohibition and is therefore, unlawful in itself and void ab initio.[5] It is the semblance of marriage without reality. Thus, marriage with mother, sister, mother-in-law, foster mother or any other women prohibited on the ground of blood relationship, affinity or fosterage is void; because the prohibition hare is perpetual and absolute. [6] Void marriage is totally unlawful which does not create any mutual right and obligation between the parties and there exists no rights of dower, maintenance, inheritance etc. Marriage among Mohammedan is not a sacrament but purely a civil contract, and thoroughly solemnized generally with recitation of certain verses from the Quran.[7]

[4] N.B.E. Baillie, A Digest of Mohummadan Law,P.4

[5] Dr. Muhammad Faiz-ud-din, A text Book on Islamic law, Shams Publications, Nilkhet, Dhaka p.89

[6]Ameer Ali, Mahommedan Law, Vol.II, 4th edition; New-Delhi P.302

[7] Abdul KadirvsSalimaBibi (1886) J Mahmood

Justice S.A. Rahman says- 'Marriage among Muslims isn't a sacrament but in the nature of a civil contract. Such a contract undoubtedly has spiritual and moral overtones and undertones but legally, in essence, it remains a contract between the parties which can be subject of dissolution for good cause.'[8]

3.3 Dower:

Dower is a sum of money that the man agrees to pay the women in the time of marriage. The idea is to provide some financial security for the wife. Often, this amount is not paid right away or is payable upon divorce.

Dower is an English term which is known as Mahr in Arabic. In pre-Islamic period mahr was used to signify gifts given to the parents of the wife. At present dower is given to the wife on marriage either by agreement between the parties or by operation of law. According to Amir Ali, Mahr is a consideration which belongs absolutely to the wife. The Holly Quran says "And gives women the Mahr freely."

In the case of Saburunnessa vs Sabdu Sheikh AIR 1934, Cal. HC held that Muslim marriage is like a contract where wife is the property and Mahr is the price or consideration. However, it is also true that non-payment of Mahr does not void the marriage, so Mahr is not purely a consideration.

Dower is an essential requirement of a Muslim marriage. Thus, it is obligatory for the husband to pay dower to wife upon marriage. A wife has an unrestricted right to demand Mahr or dower from husband. Mahr may be regarded as a consideration for connubial intercourse by way of analogy to the contract for sale.[9] It provides the woman with the right to resist the husband until Mahr is paid. This right is akin to the right of lien of a vendor upon sold goods while they remain in his possession and so long as the price for the goods has not been paid. Right to dower precedes cohabitation.[10] Thus, a wife can refuse consummation of marriage until Mahr is paid.

A dower can also be secured by an agreement just like any other debt. In Syed SabirHussainvs. FarzandHussain, a father stood surety for payment of dower by his minor son. After his death, hid estate was held liable for the payment of his son's dower.

[8]KhurshidBibivs Muhammad Amin, PLD (1967)

[9] Abdul KadirvsSalima AIR 1980, J Mahmood

[10]SmtNasra Begum vsRizwan Ali, AIR 1980

There is no maximum limit on the amount of dower. But it can't be less then minimum lay down by the law. According to Hanafi Law it is 10 Dirham. The lowest amount mentioned Hadith is a ring of iron. Under shia law there is no lowest or highest limit of dower. Thus,these minimums have now become obsolete and the amount of dower entirely upon other consideration such as circumstances of the husband and wife. Dower, once fixed can be increased by the husband and decreased by the wife.

In Bangladesh the amount of dower is sometime fixed at a higher rate in consideration of the fact that the husband will not divorce his wife for fear of payment of dower.

Broadly there are two kinds of dower: (a) Specified (Mahr I Musamma) and (b) Unspecified or Proper (Mahr I misl).

The dower that has been agreed upon by the parties at the time of marriage is called specified dower. Such a dower can be settled before marriage, at the time of marriage, or even after the marriage. In case of a minor or a lunatic, the guardian can fix the amount of dower. Dower fixed by the guardian is binding upon the son and after attaining puberty or majority, he cannot take the plea that he was not a party to it.

A husband can settle any amount as dower to his wife, even if that leaves nothing to the heirs. For those Muslims who are so poor that they cannot even pay dhirams, they can teach the wife Quran in lieu of paying Mahr. Specified dower can be divided into two categories:

Prompt (Mu Ajjal) Dower: Prompt dower means that the dower which is payable immediately upon the marriage on demand. The wife has a right to refuse cohabitation with the husband until she is paid the dower on her demand. If the wife is a minor, the guardianship can refuse to allow the wife to be sent to the husband until dower is paid. Prompt dower does not become deferred after consummation and the wife has the right to demand and sue for it any time.

3.4 Divoece:

Married couples should make their best efforts to continue their marital relations in cordiality and happiness. But sometimes it becomes impossible for a couple to maintain aviable relationship. In these cases, the Muslim law takes a very reasonable view of such situation and instead of forcing the couple to stay together, it permits a divorce.[11] (Sharia law)

Islam therefore, insists upon the subsistence of marriage and prescribes that breach of marriage contract should be avoided. Under Muslim law the divorce may take place by the act the parties themselves or by a decree of the court of law. However, in whatever manner the divorce is affected it has not been regarded as a rule of life. In Islam, divorce is considered as an exception to the status of marriage. Islam has permitted the provision of divorce so that both of them can lead a better life.[12]

When the relationship between the husband and the wife deteriorates and there is no way to improve is then and then only divorce or dissolution of marriage contract is permitted. The prophet declared that among the things which have been permitted by law, divorce is the worst.

Among the books of Muslims law including that Baillie, Wilson, Tyabji, Ameer Ali, Mullah and Saksena, the best classification of divorce has been given by Fyzee.[13] His method of classification is more scientific and it has been adopted here with little additions.

It is clear and natural that with the death of husband and wife the marriage tie comes to an end. When the wife dies, husband can remarry immediately, but in case of husband's death wife has to wait till the expiry of certain period.

Talaq in its primitive sense means demission. In its literal meaning, it means "setting free", "letting loose", or taking off any "ties or restraint". In Muslim Law it means freedom from the bondage of marriage and not from any other bondage. In legal sense it means dissolution of marriage by husband using appropriate words. In order words talaq is repudiation of marriage by the husband in accordance with the procedure laid down by the law. In HannefavsPathummal, Khalid, J., termed this as "monstrosity". Among the Sunnis, talaq may be express, implied, contingent constructive or even delegated. The talaq, falls into two categories.

Talaq-us-sunnat is considered to be in accordance with the dictates of Prophet Mohammad. It may be in the most approved form, *i.e*., simply an approved form.[14]***Talaq-i-sunnat*** has two forms:

Ahsan: It consists of a single pronouncement of divorce made in the period of *tuhr* (purity, between two mensruations), or at any time, if the wife is free from menstruation, followed by abstinence from sexual intercourse during the period of *iddat*. The requirement that the

[12] Syed Qutab, Fizilail Quran, vol 4, P.95

[13] Syed Khalid Rasid, Muslim Law, Third edition; Eastern Book Company, Loucnow P.98

[14] Syed Khalid Rashid, Muslim Law, Third edition; Eastern Book Company, Loucnow p.100

pronouncement be made during a period of *tuhr* applies only to oral divorce and does not apply to talaq in writing.

Hasan: In this the husband is required to promote *talaq* three times during three successive *tuhr* s. If the wife has crossed the age of menstruation, the pronouncement of it may be made after the interval of a month or thirty days between the successive pronouncements. When the last pronouncements should be made at a time when no intercourse has taken place during the period of *tuhr*.

It came into vogue during the second century of Islam. It has two forms: (i) the triple declaration of *talaq* made in a period of purity, either in one sentence or in three, (ii) the other from constitutes a single irrevocable pronouncement of divorce made in a period of tuhr or even otherwise. This type of *talaq* is recognized by the Shias. This form of divorce is condemned. It is considered heretical, become of its irrevocability.

In *Ila,* the husband takes an oath not to have sexual intercourse with his wife. Followed by this oath, there is no consummation for a period of four months. After the expiry of the fourth month, the marriage dissolves irrevocably. But if the husband resumes cohabitation within four months, *Ila* is cancelled and the marriage does not dissolve. After the expiry of the fourth month, the wife is simply entitled for a judicial divorce. If there is no cohabitation, even after expiry of four months, the wife may file a suit for restitution of conjugal rights against the husband.

In this mode the husband compares his wife a woman within his prohibited relationship e.g., mother sister etc. The husband would say that from today the wife is like his mother or sister. After such a comparison the husband does not cohabit with his wife for a period of four months. Upon the expiry of the said *Zihar* is complete. After the expiry of fourth month the wife has some rights:i) The husband observes fast for period of two months, or, he provides food at least sixty people, or, he frees a slave.

Talaq-i-tafweez or delegated divorce is recognized among both, the Shias and the Sunnis. The Muslim husband is free to delegate his power of pronouncing divorce to his wife or any other person. He may delegate the power absolutely or conditionally, temporarily or permanently. A permanent delegation of power is revocable but a temporary delegation of power is not. This delegation must be made distinctly in favor of the person to whom the power is delegated, and the purpose of delegation must be clearly stated. The power of *talaq* may be delegated to his

wife and 'this form of delegated divorce is perhaps the most potent weapon in the hands of a Muslim wife to obtain freedom without the intervention of any court.[15]

By mutual consent:

They are two forms of divorce by mutual consent but in either of them, the wife has to part with her dower or a part of some other property. The word *Khula*, in its original sense means 'to draw' or 'dig up' or 'take off' such as taking off one's clothes or garments. It is that the spouses are like clothes to each other and when they take *Khula* each takes off his or her clothes, i.e., they get rid of each other. In law it is said to signify an agreement between the spouses for dissolving a connubial union in lieu of compensation paid by the wife to her husband out of her property. The husband has no power of cancelling the *Khul*on the ground that the compensation has not paid. The compensation can be anything but usually it is *Mahr.*

In *mubara*t, both the parties desire divorce. Thus, the proposal may emanate from either side. In mubarat both, the husband and wife are happy to get rid of each other. Among the Sunnis when the parties to marriage enter into a *mubarat* all mutual rights and obligations come to an end. It requires that both the parties must bona fide find the material relationship to be irksome and cumbersome. Among the Sunnis no dissolve specific form is laid down, but the Shias insist on a proper form. The intention to dissolve the marriage should be clearly expressed. In the Muslim law *mubarat* is irrevocable.

If the husband levels false charges of unchastity or adultery against his wife then this amounts to character assassination and the wife has got the right to ask for divorce on these grounds. Such a mood of divorce is called *Lian*. However, it is only a voluntary and aggressive charge of adultery made by the husband which, if false, would entitle the wife to get the wife to get the decree of divorce on the ground of *Lian.*

Faskh means annulment. It refers to the power of Kazi to annual marriage on the application of wife. The law of Faskh is founded upon Quran 'if a woman be prejudiced by a marriage. Let it be broken off.'

Divorce under Muslim Family Laws Ordinance 1961

The Muslim Family Laws Ordinance 1961 provides the rules of divorce under clause 7(1) that says that any person who wished to divorce his wife should, after pronouncing '*talaq*' inform it

[15]Asaf A. A. Fyze; Outlines of Muhammadan Law; 4th edition; Oxford University press.YMCA Library building; Jai Sinf road, New Delhi

to the chairman (of Union Council) in writing and deliver a copy thereof to the wife. Clause 7(2) says, a *talaq* shall not be effective before the expiry of ninety days form the day of serving the notice to the Chairman.

Divorce under Dissolution of Muslim Marriage Act 1939

According to the Dissolution of Muslim Marriage Act 1939, a Muslim woman can apply for divorce under certain circumstances. These are:

i) When her husband is absconding or the whereabouts of him are not known for a period of four years or more;

ii) When her husband fails to pay for her maintenance for a period of two years;

iii) When her husband is imprisoned for a period of seven years;

iv) When she repudiates the fact of marriage; and

vi) When she finds that her husband is impotent, cruel, insane, or an apostate.

3.5 Maintenance:

Maintenance is not only one of the subject matters of the Quran and *Sunnah* but also an important matter for the state. Several enactments are there relating to maintenance. Maintenance is an English term which is known as *nafqah* in Arabic. Maintenance is the language of law, signifies all those things which are necessary to the support of life.[16] It includes foods, cloths, loading etc but does not include luxuries like hair-dye, lipstick.[17]Durr-ul-Mukhtar said that '*Nafaqa* literally means that which a man spends over his children; in law it means feeding, clothing and lodging; in common use it signifies food.'[18] Maintenance also includes the expenses required for ensuring the mental and physical well-being of a minor that suits his/her social status. Educational expenses are also included in maintenance.

There are three cases for which it is incumbent on one person to maintain another-marriage, relationship and property.[19] The highest obligations arise on marriage. It is obligatory for a Muslim to maintain his wife and Children.[20]

[16]ShethBurhan-ud-Din Ali,Hedaya, translated by Charles Hamilton, P.140

[17] Aziz Ahmed, Islamic Law in Theory and Practice, P.20

[18] Syed Khalid Rasid, Muslim Law, Third edition; Eastern Book Company, Loucnow P.156

[19]Dr. Muhammad Faiz-ud-Din, A text Book on Islamic Law, Shams Publications, Nilkhet.Dhaka. P.145

[20] Syed Khalid Rasid, Muslim Law, Third edition; Eastern Book Company, Loucnow bid

The first obligation of maintenance arises on marriage and then arises out of blood relationship. According to Muslim law the following persons are entitled for maintenance of Wife, Children, Parents, Other relation

Under Muslim law maintenance is due to the wife from the husband as a recompense for the matrimonial restrain and one of the necessary and inherent conditions of the marriage contract.

It is incumbent upon the husband to supply his wife with food, clothing and lodging if she surrenders herself to himself to him although she be a Muslim or infidel, poor or rich, grown-up or young.[21] Muslim husband is lawfully bound to provide maintenance to his wife as long as she is faithful to him and obey his reasonable orders. When he has more than one wife, he must behave equally in respect of maintenance.

Even if the wife happens to be comparatively poor, it is still the duty of the husband to meet the family expenses, including the personal expenses of his wife.

A father is bound to bear the expenses of his children, if they are minors or if they are poor. He is also responsible to maintain his widowed or divorced daughter.

The children have a natural claim on their parents, because they have bought them into this world. Every child has the right to food, food shelter, clothing, medical care and schooling. Parents have a legal duty to ensure that children are provided with these. But they are not bound to provide separate maintenance for a minor who refuse to live with him without reasonable cause.

Duration of Child maintenance

In terms of the children's Act, a child is a person under the age of 18years. If the child is above the age of 18years and is in need of financial assistance, her or she has a right to claim financial support from his parents.

Maintenance of a child stop once the child becomes self-supporting. If the child marries, his or her spouse is responsible for maintenance.

It has been stated in the holy Quran "And that you be kind to your parents. "Following this verse, it has been accepted without any difference of opinion that it is incumbent upon Muslin to provide maintenance to his father mother grandfather, grandmother, if they are ion necessitous

[21]Ameer Ali, Mahommedan Law, Vol.II, 4th edition; New Delhi P.405

circumstances. The Quran command, "Make good behavior with them (parents) in this world.[22](Al-Quran. 31:15)

Muslim Family Law Ordinance, 1961:

Section 9 of this ordinance said that, "If any husband fails to maintain his wife adequately, or where there are more wives then one, fails to maintain them equitably, the wife, or all or any of the wives, may in addition to seeking any other legal remedy available apply to the chairman who shall constitute an Arbitration Council to determine the matter, and the Arbitration Council may issue a certificate specify the amount which shall be paid as maintenance by the husband.[23]

3.6 Guardianship:

The Holly Quran is the basis of the law relating to guardianship. Guardian means a person who takes care of and provides maintenance to his/her children. However, anybody who takes care of or maintains can be a guardian. Guardianship is the acts of a guardian through which he/she discharges his responsibilities in that capacity.

The term guardianship means the right to control the movement and action of a person who is unable to take care of himself and to manage his own affair owing to his/her mental defect or who is minor. It extends to the custody of the person and the power to deal with the property of the ward.[24]

Minor is a person who does not attain the age of puberty according to Muslim law and is under 18 years according to Majority Act 1875.

The right of *hizanat* or custody of male child below 7 years and a female child till she attains puberty belongs to the mother or a near female relatives. They are- mother, mother's mother, Father's mother, full sister, uterine sister, consanguine sister etc.

The mother is, of all persons, the best entitled person to the custody of her infant children during the connubial relationship as well as after its dissolution. In the absence of female

[22]Ameer Ali, Mahommedan Law, Vol. II, 4th edition; New Delhi P.405

[23] Available in http://www.vakilno1.com/saarclaw/pakistan/muslim_family_laws_ordinance.htm,access Date on 30/03/2013

[24]Abdur Rahim, Muhammadan Jurisprudence, P.344

relatives, the right of custody belongs to the following male relatives are father, father's father, full brother, consanguine brother, full Brother's son etc.

After a boy has attained seven years or a girl has attained puberty the right to his or her custody belongs to the father, because at that age they are to be educated and to be protected, which cannot be provided by the women.[25]

When a minor is owner of movable or immovable property, a guardian is necessary to manage it. Muslim law prescribes certain persons in order of priority who can be a guardian of a minor's property. The guardian of property of minor may be classified as follows-

The legal guardian, also known as natural guardian, according to Muslim law, is the father or father's father or any executor appointed by father or father's father and none else. A legal guardian has power to sell or pledge the movable property of the minor for the minor's imperative necessities.

Guardian appointed by the court:

The court is entitled to appoint a guardian. In the absence of legal guardian for the protection, control and preservation of minor's property. The court may declare a guardian if it considers necessary for the welfare of the minor.[26]

De facto guardian:

A de-facto guardian is a person who is not legal guardian or guardians appointed by the court, may place himself in the position of a guardian by intermeddling with the property of the minor. He is such a person who takes continuous interest in the welfare of the minor's person or in the management and administration of his property without any authority of law.

The prophet (peace be on him) said, "Marriage is committed to the paternal kindred."[27] The father is entitled to give his children of both son and daughter in marriage without their consent, until they attain puberty. A guardian of marriage can give in marriage his minor child. The guardian of marriage must be Muslim and sound mind.

[25] Dr. Muhammad Faiz-ud-Din, A text Book on Islamic Law, Shams Publication, Nilkhet, Dhaka P.137

[26]Section 17, The Guardians and Wards Act 1890.

[27] Cited in Fyzee's, Outline of Muhammadan law, P.208

[26] Sahih al-Bukhari, Volume 8, Book 80 Laws of Inheritance, Number 724

3.7 Inheritance:

Islamic law of inheritance is the exact and scientific law. The Muslim jurists have great importance on it to teach the people Muslim about it. Inheritance is considered as an integral part of *Shariah* Law and its application in Islamic society is mandatory.

Muslim inherit from one another as stated in the Holy Quran "there is a Share for men and a share for women from what is left by parents and those nearest related, weather, the puberty be small or large-a legal share.[28](An-Nisa 4:7) In relation to inheritance, the Prophet Muhammad Said "give the *Fariad* (the shares of the inheritance that are prescribed in the Quran) to those who are entitled to receive it. Then whatever remains, should be given to the closet male relative of the deceased.[29]

Liabilbites of the Heirs:

According to Islamic Inheritance Law, the inheritance is subject to a few liabilities or responsibilities that must be fulfilled by the beneficiaries or heirs the liabilities or responsibilities that must be performed in order of the following priorities is Pay funeral and Expenses, pay debts, Execute the testamentary will of the deceased (which can only br maximum of one third of the property).

Muslim law plays a significant role in the cultural and lifestyle of the Bangladeshi people. The large majority of people in Bangladesh is Muslims. Islam is the complete code of law to control the legal rights and obligations of its citizen.

The right of the people in Bangladesh is defined by the principle of Sharia through Muslim personal Law. But the right of women in Bangladesh is the inherent contradiction of attitude that permeates the male oriented society. Women are always deprived from not only their legal right but also religious right which is determined by the Muslim law. Although Muslim personal law has immensely improved the statues of women in several directions, society as a whole maintained the inequalities that still remained.

Chapter IV

Hindu family law in Bangladesh

4.1 Introduction:

Hindu law is the second largest religious affiliation in Bangladesh which converging 10.5 percent of the population. Hindu women's rights are in general overlooked in case of marriage, divorce, maintenance, inheritance etc. After 1947 old Hindu law prevailed and dayabhaga system of Hindu Law remained in Bangladesh.

Originally the term Hindu comes from the word Sindha which is the name of a river. Actually, Hindu is a person who follows Hindu religion in any of its form. The law followed by the Hindus or any person related with Hindu people, is called Hindu law. Hindu law is more religion than secular in character. The Hindus belief that their law is of divine origin and to them is positive law emanated from the Deity.

4.2 Marriage:

Hindu Law marriage is the last of the ten sacraments and is a tie, a sacred tie, a tie which can never be broken. Even death cannot break this relation of husband and wife which is sacred and religious. It is not only a sacrament but also a contract.

Marriage according to Hindu law is a holy union for the performance of religious duties.[30] It is not a contract; the mere fact, therefore, that a marriage was brought about during the minority of either party thereto, does not render the marriage invalid.[31] According to Vedas, A marriage is the union of flesh with flesh and bone with bone. It is more religious than a secular institution. All men are enjoyed to marry for pro-creating a son necessary for the continuation of the line of paternal ancestors and for offering 'pindas'.

It is observed that in Hindu Law, maaraige was sacrament, a union, an indissoluble union of flesh with flesh, bone with bone to be continued even in the next world. Marriage is a symbol of union of a male and female. It is an alliance between a man and a woman recognized by law.

4.2.1 Requirement of marriage:

[30]Sundrabat v Sbivanarayana (1908), 32 bom 81

[31]Pursbotamdas v pursbotamdas (1837) 21 bom 23, 30-31.

According to Hindu law, a marriage can take place between the two consenting individuals of opposite sex, who are of sound mind and bride is more than eighteen years of age and the groom is more than twenty-one years of age. One must also know that even if the marriage take place between a girl and a boy who have not attained the required age, the marriage remains valid.

A marriage cannot take between the prohibited categories of marriage that is Sapinda relationships. Sapinda relationship means blood relationship. The spouses should not be connected to each other through blood relationship. Two persons are said to be 'sapindas' of each other if one is a lineal ascendant of the other within limits of sapinda relationship, or if they have a common lineal ascendant who is within the limits of sapinda relationship with reference to each other.

Window Remarriage is not permitted under Hindu law but permitted statuary law. The marriage of Hindu window is now expressly legalized by the Hindu widow remarriage act 1856 in Bangladesh.Window gets remarriage under statuary law however a window marry again cannot retain the property of her previous husband.

4.3 Maintenance:

The right of maintenance arises from the concept of in undivided family. The head of such a family is bound to maintain its member and their wives and their children. All member of a joint family whatever be their status and whatever be their age are entitled to maintenance.

Maintenance is the support of the group of persons who should be maintained, is the approved means of attaining heaven, but hell is the man's option if they suffer; therefore, he should carefully maintain them. The aged parents, a various wife, and an infant child must be maintained even by doing a hundred. It is a right to get the necessities which are reasonable.

Section 3 of the Hindu adoptions and maintenance act 1956 defines maintenance according to it maintenance include, in all cases provision for food, clothing, residence, education and medical attendance and treatment and in the cases of an unmarried daughter, also the reasonable expenses of an incident to her marriage.

Under Hindu law the liability of a Hindu to maintain other arises in some cases from the more relationship between the parties independently of the possession of any property.[32] The first liability called personal liability or absolute liability. And the second is limited liability.

[32]Savitribai v Laxmibai (1878) 1 bom 573

The obligation of a Hindu to maintain his relation is personal in character and arises from the very existence of the relation between the parties. A Hindu was under a legal obligation to maintain his wife, minor sons, unmarried daughter and aged person.

4.2.1 Persons Entitled to maintenance:

The Karta of a joint family is under a legal obligation to maintain all the male member of the family and their children. According to Hindu Law the following persons are entitled to maintenance:

Son: A father is personally liable to maintain his minor son. Under Mitaksharaan adult son also is entitled to maintenance out of the joint family property. But under Dayabhaga Law a father is not bound to maintain his adult son either out his separately property or out of ancestral property.[33]

Daughter: A father is bound to maintain his unmarried daughter. After his death they are entitled to be maintained out of his estate.

Parents: A son is under a personal obligation to maintain his aged parents. He is bound to maintain them even if he inherited no ancestral property.

Wife and widow: A wife or window is entitled to maintenance out of the property of her husband or late husband as the case may be.

Sister: An unmarried and widowed destitute sister must be maintained by the heir, out of the assets of the joint family.

Brother: there is so many obligations to maintain a brother, even though a minor.

4.3.2 Window right of Maintenance:

If the husband dies then she will be maintaining out of the husband estate. A window does not lose her right of maintenance out of the estate of her husband, even though she may have lived apart from him in his life time without any justified cause.[34] But if the husband left no estate, then her father-in-law as he is morally bound to maintenance. On the death of father-in-law, she acquired a legal right to be maintained out estate.

[33]Ammakannu v Appu (1888) 11 Mad 91

[34]Surampalli v surampalli (1934) Mad, 401

4.3.3 Maintenance under Hindu adoption and maintenance Act 1956:

The right of a wife for maintance is an incidence of the status or state of matrimony and a Hindu is under legal obligation to maintain his wife. According to section 18 of Hindu adoption and maintenance Act, 1956, the Subject to the provision of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime. A Hindu wife shall be entitled to live separately to live separately from her husband without forfeiting her claim to maintenance (a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause,(b) if he has treated her with such cruelly as to cause a reasonable apprehension in her mind that it will harmful or injurious to live with her husband;(c) if he is suffering from a virulent form of leprosy;(d) if he has any other wife living.(e) if he keeps a concubine in the same house in house which his wife is living or habitually resides with a concubine elsewhere (f) if he has ceased to be Hindu by conversion to another religion;(g)if there is any other cause justifying her living separately.A Hindu wife shall not entitled to separately residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.[35]

4.4 Divorce:

In the literal "Divorce" means legal separation of two persons of the opposite sex who desire to respect and honors each other, No system of divorce is available in Hindu law. According to Dayabhaga law divorce is not possible expect on a very limited ground of chastity of wife.

Divorce for Hindus is not possible in Bangladesh. Hindu marriage is incapable of dissolution. The Hindu woman have ordered no circumstances may recourses to bring suit for dissolution of marriage. While Hindu man has several wives, there is no stipulation for the equal treatment with any of them, as is the case in Islam. Nor is a husband the equal treatment of any one of his wives ground for relief for dissolution.[36]But there are some grounds for sedation under the Hindu Married Woman right to separate residence and Maintenance Act, 1946 which are- if he is suffering from any loathsome disease not contracted from her, if he is guilty of such cruelly towards her which is unsafe for to live with him, if he is guilty of desertion, that is to say, of abandoning her consent or against her wish, if he marries again, if he changes his religion, any other just table cause.

[35] Available in http//punjabrevenue.nic.in/hadoptact%281%29.htm visited on 1/04/2013

[36]Fuastina Pereira, The Fractured Scales, P 42

An important condition to the application of these grounds is that the Hindu married woman must be chaste and continue to practice for religion and comply with decree of a complement court for the restitution of conjugal rights. In reality the third ground severely qualifies the right provided to a Hindu woman. Each time she institutes a suit claiming separate residence and maintenances the entire husband has to do is institute a suit for restitution of conjugal rights. Then she is placed with the burden of having to show good cause each time for not complying with it.

4.5 Adoption

Adoption is the transplantation of a son from the family in which he is born to another family where he is given by the natural parents by way of gift. The power of a Hindu family female a adopt a son is very much restricted in Bangladesh.

Adoption is a legally recognized mode of affiliation as the son of person, of one who in fact was not his son. If a person hands over his son forever to another person who has no son, this migration is called adoption in Hindu law. It is taking of son of son as a substitute of mail issue.

According to menu a son in castle and affectionately disposed whom his father or mother or both give of calamity, is known as the adopted son.

4.5.1 Conditions of adoption:

Any Hindu, male or female, having a sound mind is eligible to adoption, however, there are some conditions that need to be fulfill, such as:

(1) If she already has a child, be it by blood or adoption, you are not allowed to adopt another child of the same gender.
(2) She cannot adopt a son if she already has a Hindu son, sons' son, or sons'son's son, be it biological or adopted. In the same way s/he cannot adopt a daughter if has aa Hindu daughter or son's daughter.
(3) If he is a married Hindu male wanting to adopt a child, the concept of his spouse is essential. The same applies to an adult female of sound mind looking for forward to adopt a child.
(4) Court permission is not required is not required in case of in-country adoption. This is because adoption is considered as a private act between biological and adoption parents.

Woman can adopt if they have the consent of their husband. Woman who are unmarried can adopt as well as long as they are not a minor. However, if a woman were to adopt a son, the woman must be twenty-four years of age or older. If the child is adopted and there are more than one wife living in the household, then the senior wife is classified as the legal mother of the adopted child.

The adopted child can be either male or female. The adopted child must be fall under the Hindu category. The adoptee needs also to be unmarried; however, if the particular custom or usage is applicable to the involved parties then the adoptee can be married. The child can be age of sixteen or older, unless again it is custom or the usage is applicable to the involved parties. An adoption can only adopted child still residing in the home. In particular, if a son were to be adopted then the adoptive father or mother must have a legitimate or adopted son still in the house.

Adoption is like removing a tree with its root from one place and planting it at another place. After adoption, the adopted child loses all its ties with the natural family and is teated like a born child in the adoptive family.

4.6 Guardianship

In Hindu the father is the natural guardian of two children and after his death, mother is the natural guardian of the children and none else can be the natural guardian of minor children. Testamentary guardians were also introduced in Hindu Law. It was also acceptable that the supreme guardianship of the minor children vested in the State as parents' patria and was exercised by the courts.

Guardian means a person having the care of the person of another or of his property or of both.[37] No person other than father and mother has the absolute right to guardianship of a minor under Hindu Law. A guardian is a person who takes care of a minor of another person or of his property and includes, natural guardian, guardian appointed by the will of the minor's father or mother, guardian appointed or declared by a court, a person empowered to act as such by or under any enactment relating to any Court of Wards.

Guardian Appointed by the court

The court is empowered to appoint guardian under the Guardians and wards act 1890. The High Court also have inherent jurisdiction to appoint guardians but this power is exercised sparingly.

[37] Section: 4, Guardian and Ward Act. 1890

Under the Guardians and Wards Act, 1890, the jurisdiction is conferred on the District Court: The District Court may appoint or declare any person as the guardian whenever if considers it necessary in the welfare of the child. In appointing a guardian, the court takes into consideration various factors, including the age, sex wishes of the parents and personal law of the child. The welfare of the children is of paramount consideration.

The guardian appointed by the court is also known as certified guardian. Power of certified guardians is controlled by the guardian and Wards Act 1890. There are a very few acts which he can perform without the prior permission of the court. A certificated guardian from the date of his appointed is under supervision, guidance and control of the court.

A de facto guardian is a person who takes continuous interest in the welfare of the minor's person in the management and administration of his property without any authority of law. He is neither a legal guardian, nor a testamentary guardian nor a guardian appointed by the court. A d facto guardian is important when a Hindu child has no legal guardian, there would be no one who would handle and manage his estate in Law and thus without a guardian the child would not receive any income for his property.

Mother can be the guardian of her minor ligament child only if the father is dead or otherwise is incapable of acting as guardian. The mother is the natural guardian of the minor illegitimate children even if the father is alive. According to Hindu law if father of a child is alive then mother rights of guardianship excluded.

4.7 Inheritance

A Hindu woman's position under the Hindu law of inheritance is much worse than of her Muslim counterpart. A Bangladeshi Hindu woman's right to inheritance is non-existent. Under the Dayabhaga law, the right to inherit arises on the heir's capacity to confer salvation to the souls of the paternal and maternal ancestors through those who live.

Only five classes of women inherit according to Dayabhaga school of Hindu law. They are according to preference: wife, daughter, mother, father's mother. But these women inheriting only when living, that is they are owner with limited rights and on their death the property would pass to the nearest male heir of the decreased male owner and not to the heirs of the decreased owner and not the heir of the female heirs. The woman or women inheriting when living can sell the property only for limited legal necessity. A widowed, sonless or childless daughter with sons is the inferiors. While married daughter with daughter and childless daughter are excluded.

In Bangladesh, the limited right of life estate or widows' estate accord to a woman, is sometimes referred to as her inheritance, although this is an anomaly within the strict understanding of term inheritance, legacy or birth right. The Hindu woman right to claim their inheritance is but a right limited over a certain amount of property to be enjoyed only during a woman's lifetime. A widows life estate generally means that she is not entitled to alienate immovable property inherited by her but only that she has the power of disposal of the income of property. The only time she can alienate her life-interest is for necessary like physical want. Hindu woman acquires merely a limited estate, over which she has restricted power of alienation and on her death or surrender; it reverts to the line of the last male owner.

In India radical changes as regards Hindu Law have been made but in Bangladesh the ancient pre-1947 laws have remained in Force. The issue avoided as a sensitive minority issue. Even the leaders of this community don't take any major attempt to address the problem.

If we read articles 10,19,27,28 and 29, we see that there is no bar in our constitution to change or reform personal laws of other communities rather it encourages the Government to remove social and economic disparities among the citizens. In fact free democratic environment.

I think, we have to build awareness among the Hindu about the limitations of their personal laws. We should try to make them understand that for their own interest reforms in Hindu Laws are needed.

Chapter V

Christian Family law in Bangladesh

5.1 Introduction:

The Christian came to Bangladesh in the early sixteenth century. Their entry into this country was through Chittagong. In Bangladesh 0.3% people are Christians. The laws governing the Christian community of Bangladesh are a continuation from the laws of the latter half of the nineteenth to the first half of the twentieth century. [38]The explanation for their continued existence until now lies in the fact that Christian community in Bangladesh is very small.

The High Court Division of the Supreme Court and District Courts exercise jurisdiction over the Christian population with regard to their personal laws. This jurisdiction extends to all matrimonial suits, including divorce. For granting relief to the parties, the Courts rely upon the principles which are conformable to the principles and rules of Divorce and Matrimonial causes of England. Just as in Europe and North America, Christians in Bangladesh may as matter of conscience follow the laws and rules of the religious bodies to which they belong. But the state does not require them to do so. They are free to come before the civil courts to adjudicate matrimonial and other matters.

Personal Laws for Christian in Bangladesh:

(a) The Divorce Act 1869

(b) Christian Marriage Act 1872

(c) The Married Woman's Property Act 1874

(d) The Guardian and Wards Act, 1872

(e) Succession Act 1925

(f) Child Marriage Prohibition Act, 2017

(g) The Code of Canon Law (only for Catholics)

[38]Ain o ShalishKendro, AinerKotha, Christian ParibarikAin; second editor- December:2004

5.2 Marriage:

In Christianity marriage is a sacrament and therefore not easily voidable, as it a purely social contract between parties. For civil purposes, Christian marriage in Bangladesh is governed by the Christian Marriage Act of 1872. Catholic parties to marriage are governed by the dual authorities of the Cone of Canon Law and the Christian Marriage Act, 1872.

The Code of Canon Law recognizes the minimum age of consent to be 16 for boys and 14 for girls. No minimum age for marriage is set out in the civil law governing Christian. In case of providing consent to the marriage of a minor, there is noticeable discrimination in recognizing only the father as the primary legal guardian of the child.[39]Section 19 of the Christian Marriage Act 1872, states: "The Father, if living, of any minor, or, if the father be dead, the guardian of the person of such minor, and in case there be no guardian, then the mother of such minor may give consent to the minor's marriage." This Section plainly excludes a mother's right to give or withhold consent in the marriage of her minor child in the presence of not only the father but also the legally appointed guardian.

5.2.1 Marriage according to Christian Marriage Act of 1872:

Marriages of Christians, who are Bangladeshi citizens, are solemnized under the provisions of the Christian Marriage Act of 1872. In specific terms, marriage between two persons, one or both of whom is or are Christians, is solemnized by a person who has received, Episcopalian ordination, or a Minister of Religion licensed under this Act. Marriage as such should be solemnized in presence of a marriage Registrar or by any other person appointed/licensed under this Act. Any person intending Marriage is requires to make a declaration by appearing before a Minister of Religion to the effect that he/she finds no impediment of kindred or affinity or other lawful hindrance to such marriage, and is also required to give a notice to the Minister of Religion with necessary particulars. The Minister thereafter issues a certificate that a notice has been given. After the issuance of such a certificate, marriage between the persons named in the certificates may be solemnized in presence of two witnesses according to such forms or ceremonies as the Minister thinks fit. All marriages solemnized by a Minister, except in respect of marriages of Native Christians, arc to be registered.

A Christian marriage can also be solemnized by a Marriage Registrar in accordance with the formality of giving a notice in presence of at least two witnesses. Without the consent of the

[39] Sultana Kamal, ParibarikaineBangladesherNari, Arko, Lalmatiya Dhaka-1207, second edition-2010, P.91

guardian, marriage between one and both of the minors cannot he solemnized in presence of a Marriage Registrar. Marriages between Native Christians solemnized by a clergyman, or Minister of Religion, or a Marriage Registrar, are to the registered in a separate book of register. There is an age limit for marriages between native Christians. In addition, a native Christian having a husband/wife still alive cannot marry another native Christian.

5.3 Dissolution of Marriage:

The only marriage the Roman Catholic Church regards as sacramental indissoluble is that which is (a) between two baptized persons; and (b) consummated. The dissolution in fa2vour of faith is only available when at least one party to the marriage is baptized. While adultery does not entitle the innocent party to an annulment it does entitle the innocent party to a separation. Non-consummation is not a ground for annulment, but it may be ground for dissolution. Under medieval canon law the legitimacy of the children of an invalid marriage depended on the ground of invalidity. By the eighteenth and nineteenth century the only consequence of illegitimacy under Roman Catholic canon law was ineligibility for the priesthood (but dispensations were freely given). The Divorce Act of 1869, based on the then existing British law, which' influenced by ecclesiastical law. was promulgated in undivided India by the British.[40]

Section 10 of the Divorce Act, 1869, lays down the grounds upon which a suit! Dissolution of marriage between Christian parties may be sought. Under the Divorce Act a Christian man can obtain a divorce from his wife on the grounds of adultery alone. But for a Christian woman the ground of adultery is not enough. She must prove that her husband has been guilty of one of the following areincest, bigmy, Rape, Sodom, Bestiality, adultery couple with such cruelty as would have entitled her to divorce a *mensa et thorn*, Adultery coupled with desertion for two years or more. Section 11 of Divorce Act provides that the paramours shall be made a co-respondent in the suit. But this provision is only open to the husband. In the case of *TapanNath v. Bihha Bath* 33 DLR 293 (1981), it was held- "In a suit for divorce by a Christian husband on the ground of adultery with his wife, the adulterer is to be made a party.....in the instant suit the alleged adulterer has not been made a co-respondent to the petition and there is nothing on record to show that leave of the court in this regard was prayed for and obtained ... the suit cannot proceed and the entire proceeding appears to be misconceived."The grounds upon which a husband can pray to be exempted from naming the alleged paramour are when he claims:

[40]Fuastina Pereira, The Fractured Scales (The search for a Uniform personal code), first edition 2002; 16, Southern Avenue, Calcatta.

(i) That the respondent is leading the life of a prostitute, and that the petitioner knows of no person with whom the adultery has been committed.
(ii) That the name of the alleged paramour is unknown to the petitioner, although he has made due efforts to discover it.
(iii) That the alleged paramour is dead.
Moreover, under Section 34 of this Act a husband may sue for the damages, not by way of punishment but for compensation for the loss of his wife. This issue of divorce or judicial separation is a particularly difficult area for most Christians in Bangladesh. Until September 2001, the situation of Christians in India had been identical to that of Christians in Bangladesh, Christians constitute the smaller, and therefore, politically insignificant, minority in the country and is burdened by antiquated laws that seriously hinder resolution of day-to-day matrimonial hardships. Christians in Bangladesh are caught up in a peculiar quandary between civil law and church (canon) law. They face a continual struggle between adherence to a moral teaching that is inherently suspicious of secular systems, and their necessity to benefit from civil remedies provided by secular forums, for resolution of their matrimonial difficulties.[41]

5.4 Maintenance:

The similarities of Muslim and Hindu personal law systems on maintenance are reflected in the case of Christian woman. Under Christian law the term 'alimony[1] is used in lieu of maintenance, although the two are not strictly equal. Here, too, the main basis for a woman's both to alimony *pendents lite,* and also to costs when she defends a suit brought against her for adultery, even though she does not succeed in her suit. Moreover, the sum of alimony pending suit cannot exceed one-fifth of the husband's average net income. This arbitrary sum often proves inadequate, particularly where the real income of the husband is concealed.

5.4.1 Maintenance in Divorce Act, 1869:

A Christian woman can claim maintenance from her spouse through criminal proceeding or civil proceeding. Interested parties may pursue both criminal and civil proceedings, simultaneously, as there is no legal bar to it. In criminal proceedings, religion of the parties does not matter at all, unlike in civil proceedings.

[41]FuastinaPereira, The Fractured Scales (The search for a Uniform personal code), first edition 2002.16 Southern Avenue, Calcatta

If a divorced Christian wife cannot support her in the post-divorce period she need not worry as a remedy is in store for her in law. Under S.37 of the Divorce Act, 1869, she can apply for alimony/ maintenance in a civil court or High Court and, husband will be liable to pay her alimony such sum, as the court may order, till her lifetime. The Divorce Act, 1869 which is only applicable to those persons who practice the Christianity religion inter alia governs maintenance rights of a Christian wife. The provisions are the same as those under the Parsi law and the same considerations are applied in granting maintenance, both alimony pendente lite and permanent maintenance.

Section 125, Order for maintenance of wives, children and parents.- (1) If any person having sufficient means neglects or refuses to maintain his wife, unable to maintain herself, or his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is by reason of any physical or mental abnormality or injury unable to maintain itself, or his father or mother, unable to maintain himself or herself,a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct.

5.5 Guardianship of Children;

Section 39 to 44 of the Divorce Act, 1869; deal with the guardianship of children. These follow the common law doctrine in considering the father as the natural guardian, but with the important provision that the court has complete discretion and that the welfare of the child is of paramount consideration. The Act requires, however, that the Child be brought up in its father's faith and a mother may be deprived of her right to guardianship if it is likely that the child will not be so brought up. What ingredients would constitute the child's welfare is determined by Section 17 of the Guardians and Wards Act, 1890, which is uniform to all citizens.

5.6 Inheritance:

Inheritance of the property of the Christian citizens of Bangladesh is regulated bythe relevant provisions of the Succession Act of 1925. For example, when a Christian die leaving no will, his or her property devolves upon the surviving husband or widow, lineal descendants and kindred. By a valid contract made before the marriage, a widow may exclude herself from the share of

her husband's estate. Where a Christian dies intestate leaving a widow or husband and lineal descendants, one third of his or her property goes to the widow or husband, and two thirds to the lineal descendants. Where a widow or husband, other than a widow or husband of a Native Christian who left no lineal descendant, is surviving the intestate, he or she will get property up to the value of taka five thousand and in the residue, if any, his or her above share in the property of the deceased.

Where an intestate die surviving him or her by a child or children his or her property belongs to his or her surviving child, if there is only one, or is divided equally among all the surviving children. Where an intestate die leaving no surviving child but leaving a grandchild or grand-children, his or her property goes to his or her surviving grandchild, if there is only one, or is divided equally among all the surviving grand-children. But where an intestate die leaving a child or children, or grandchild or grand-children by a predeceased child or children, etc, all of them shall inherit the property left by the intestate as if the predeceased child or children was or were surviving the intestate.

Where an intestate leaves no lineal descendants, but his or her father is living, his order property shall go to the father. Where an intestate's father is dead but mother, brother and sister are living, they succeed to the property in equal share, but children of a predeceased brother or sister also get shares in such property to the extent of their father or mother. Where only the mother of the intestate is living, without brother, sister, or children of any brother or sister, the entire property will go to the mother. Where intestate leaves neither lineal descendants, nor father nor mother, his or her property goes equally to the brother sister, and children of the predeceased brother or sister who also get equally the share of their parents as if they were living. Where the intestate has left neither lineal descendant, nor parents nor brother nor sister, the property goes equally among those of his or her relatives who are of nearest degree of kindred to him or her.

A Christian woman is in a much better capacity in the case of inheritance than a Muslim or Hindu woman. She is protected under two Acts simultaneously. The Married Women's Property Act, 1874, provides that the wages or earnings of any married woman remain her separate property. Section 31 of the Succession Act, 1865, makes the mutual right of husband and wife identical. In the absence of a will, the Succession Act, 1925, governs matters of inheritance. A Christian widow inherits, in the presence of lineal descendants, one-third of her husband's estate. In the absence of lineal descendants and the presence of kindred, she inherits one-half of the property. In the absence of both the lineal descendants and kindred the widow inherits all the property. Siblings, male and female, inherit equally with one another or with lineal descendants of deceased siblings. A daughter is entitled to two-third of an estate in the presence of a widow

and absence of other siblings and/or lineal descendants. In the absence of all of them, the daughter inherits the entire property. When kindred, lineal descendants and father are absent, she inherits the entire estate.

This succession Act, 1925, goes a long way in portraying what a uniform law of succession could be. Almost all of the rules of devolution encompassed by this Act pass the list of equity and fairness. This Act is based on the original (Indian) Succession Act of 1865, which itself was based on principle laid down by English courts. These principles were modified and adapted to suit the social conditions of the subcontinent.

In Bangladesh Christian community is one of the minor communities. If there is any dispute created with personal matters like marriage, divorce, alimony, guardianship etc. then they can make application into the family court. But there are some limitation and discrimination found in the Christian personal law which is the direct violation of the constitution. For this reason, the existing Christian personal law of this country should be reform or harmonize with other religious personal law in such a manner that will diminish or remove the inequality.

Chapter VI

Universal family code a need of time

6.1 Introduction:

A universal system of personal law governance envisions functioning in a society in which areas of non- religious autonomy and social control are equally recognized. There are several vital concerns about the demand for legal uniformity in the personal sphere. One of the most valid questions in this regard is on the ultimate value and feasibility of such a code. Other concerns range from the precept of immutability of divine laws to scepticism about the acceptance, success or implementation of such a code. Some have argued that science religious personal laws arc beyond the regulatory ambit of the constitution they should be treated as a class of their own. Others have argued that the attempt to codify and bring uniformity is a positivist and 'Western' mode of achieving legal regularity.[42]

The constitution of Bangladesh gives some guarantees to the people which create incongruities with the personal law. These incongruities can be reminded through a uniform system of Governance or a code of law. Weather the materialization of such a system would, in fact, empirically as well as politically, be a pragmatic response to the problem may need to be assessed critically given the ground reality of inequalities in the personal sphere, which impact on the national agenda as well, a uniform legal system or code of law could be a plausible redress.[43]

6.2 Universal Family code within the ambit of the Constitution:

The religions laws which are used interchangeably with personal or family laws apply only to adherents of a particular religion and discriminate sharply between men and women. The bifurcation is a result of a contradiction that many religious-personal laws currently existing in Bangladesh are inconsistent with the equality provisions of the Constitution.

Article 10 of the Constitutionof Bangladesh states that step shall be taken to ensure participation of women in all spheres of national life; Article 7(2) and 26 declare void any law inconsistent

[42]FuastinaPereira, The Fractured Scales (The search for a Uniform personal code), first edition 2002.16 Southern Avenue, calcatta

[43]*Ibid* P.131

with the Constitution. Article 28 declares that the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.

The Constitution makes a valuable distinction between freedom of conscience or thought, which falls within the 'private' sphere, and freedom of religion, which private in nature, is subject nevertheless to some degree of state control. Both freedoms are fundamental rights. But while the former is guaranteed absolutely, the latter is conditional in nature. Thus, while Article 39(1) of the Constitution guarantees freedom of thought and conscience, Article 41(1) affixes the condition that every citizen has the right to profess, practice or propagate any religion subject to law, public order and morality. The rights of every religious community or denomination to establish, maintain and manage its religious institutions are all subject to the same conditions.[44]

The Constitution removed the state from sponsoring any individual faith, morality or conscience; and on the other hand, made the state the guardian of moral principles common to all religions and even the non-religious. Thus, in matters of religion, freedom of expression or profession of faith, the state comes in only when any of the actions resulting from such freedoms in any way injuries, adversely affects or has the power to affect adversely the fundamental civil rights of others. This limited role is clear from the conditions by which the state is bound, in Article 41. Article 41(1) does not limit state intervention in cases of religious practice that detrimentally affects other people in their right to hold, profess or propagate belief. The courts have been able consistently to delineate where propagation of faith ends and where detriment due to such propagation begins.

In Jibendro Kishore case[45] the court held:

‘Every person has the right to profess, practice and propagates his religion and every sect of religious denomination has the right to establish, maintain and manage its religious institutions, through the law may regulate the manner in which religious is to be professed, practiced and propagated.’

The situation in Bangladesh aspires not only to respect and tolerate the rights of particular religious groups, but also to maintain harmonious co-habitation of all such groups on the basis of collective good. Both the preamble and the specific provisions of the Constitution are adequately explicit as to the aspiration.

[44] *Ibid* P.136

[45] *ibid*

6.3 Comparative study on existing religious personal or family laws:

The personal laws of marriage, divorce, guardianship, maintenance, inheritance etc. of all the communities including the tribal communities of Bangladesh are different from each other in nature and in their manner of application.

Marriage: Under Muslim law marriage is a contract between man and women. A Muslim marriage is solemnized by proposal and acceptance in presence of two male or one male and two female witnesses. On the other hand, marriage under Hindu law is a sacrament and not a contract. Christian marriage is solemnized in accordance with the provisions of the Christian Marriage Act, 1872 the rules, rites, ceremonies and customs of the Churches in Bangladesh. Marriage of the Buddhist is mostly arranged through consent of parents and the wedding is solemnized in the bridegroom's house by pronouncing some religious and social mantras.

Dower: Dower is an essential ingredient of the Muslim marriage which the wife isentitled to receive from (her husband. But it is not essential or required for both Hindusand Christians in the time of marriage.

Dowry: In some cases, dowry is a part of marriage ceremony under Hindu law. It is socially sanctioned by the Hindus. But under Muslim law it is not required. In Bangladesh giving or taking dowry is punishable by law for all the communities.

Maintenance: Maintenance is a mandatory element under Muslim law. A woman is entitled to maintenance from her husband as of right. According to Hindu law maintenance known as ‘alimony’. It is also mandatory for the women under both Hindu and Christian law.

Divorce: Divorce is unknown in Hindu law. In Hindu law marriage is regarded as an indissoluble union between husband and wife: So, neither party to a marriage can divorce the other. On the other hand, divorce is allowed in Muslim law. A Muslim husband may, whenever he wishes, divorce his wife without any cause but the wife may divorce her husband only when such power of divorce is delegated to her by her husband. In Bangladesh divorce is one of the areas in which inequality between husband and wife persists. The divorce is allowed in Christian community according to the provisions of Divorce Act, 1869. So, differing divorce systems cannot be amalgamated under a Common Family Code.

Adoption: According to Hindu law only men have the right to take a male child in adoption. Women have no right to adopt any child. There is no recognition of the concept of adoption and it is in Muslim law. On the other hand, under Christian law right to adopt is recognized and encouraged.

Guardianship: In Muslim law a father, if alive, is the natural and legal guardian of the person and property of his minor child. In Hindu law father is the natural. Guardian of the death of the father mother is the natural guardian. The matter of is also governed by the provisions of Guardian and Wards Act, 1890, which is applicable to all citizens.

Inheritance: The Muslim law of inheritance prescribes specific share for each individual nearest relation including female heirs in the property left by a deceased person. The distribution of property of deceased Muslim person is made according to the principle that within the limits of each class of heirs, the nearer in degree excludes the more remote. On the other hand, in Hindu Law the Dayabhaga school of law governs the system of inheritance for Hindus in Bangladesh. The Hindu women get only i in the property. In respect of stridhan (women's property) a Hindu woman can deal with her property in any way she likes. On the other hand, the Succession Act of 1925 governs the matters of inheritance in the case of the Christians.

The marriage, divorce, dower, adoption, maintenance, guardianship and inheritance systems of Muslims, Hindus, Christians and Buddhists of our country are quite different from each oilier. These differing systems cannot be amalgamated in a universal family code.

6.4 Universal family code for Bangladesh perspective:

Universal family code is the larger debate in Bangladesh, armed with expertise on cultural relativism, constitutionalism, political and economic foretelling that can answer this m its finality. Until now advocacy for a universal personal law has been limited to a number of organizations and social activists. The issue is far from properly debated on the ground. There is as yet no concrete general consensus either in favor of such a universal law or against it. Even the proponents of a universal personal law arc far from evaluating the options for an elective or mandatory family law. In this sense much more inquiry is necessary to gauge a steady forum from which to lobby legislative enactment of such a law. But the ground scenario docs not negate the principle upon which the argument for uniformity stands. The main objective of the proposed code, which is to achieve equality between all citizens, irrespective of sex or religion, falls directly within the aims and objects set out in preamble of the Constitution which provides for fundamental rights and freedoms, including Article 41 in this part, which guarantees the right to practice, profess and propagate religion.

The hypothesis of a Universal Family Code could not be given any legal coverage in our country where four different religions and their respective codes of life are pracnc^ lhc determinant factors in their respective family affair, The religious laws of different communities of Bangladesh differ from each other in their origin, base, faith and beliefs. Whenever the laws of

Bangladesh admit the operation of Muslims, Hindus, Christians and Buddhists are determined by their personal laws. It is therefore, be impossible in our country to make substantial changes in these laws to make room for a Universal Family Law in Bangladesh.

All the religious of personal laws are based on religious injunctions, faith and beliefs. More so, the personal laws of all communities are sensitive, complex and of diverse origin. It is impossible to bring uniformity in these differing laws by way of modification or reforms for purposes of incorporation in a Universal Family Code. Any such attempt is likely to cause injury to the religious sentiment, faith and beliefs of the people of the country. It is also violation of fundamental right given under Article 41. On the other hand, when a classification is made on the religious grounds or discriminate between men or women in religious grounds, it can be made unconstitutional under Article *27.* The unequal provisions for men and women in personal sectors are also clear violation of Article 28. The advocacy for universal personal code aims to achieve equality for all citizens in the disputed matters in their personal sphere, irrespective of their sex, place of birth, religion, or marital status. It may be cause of injury to the religious sentiment, faith and beliefs of the people of different communities so that state should reform the existing laws and pass a special enactment which would be helpful to remove gender inequality.

The aim of uniform personal legislation is to achieve systematic and consistent justice in the citizens' personal sphere; to achieve a neutral forum where like cases would be treated alike; a forum equally accessible to all citizens for disputed matters in their personal sphere, irrespective of their sex, place of birth, religion, or marital status; a form of justice where its delivery is certain and consistent, without being predisposed in favor of one party. Each of these aims, when materialized through statute, becomes enforceable as guaranteed rights under the Constitution. In consequence, all laws or actions which are inconsistent with the fundamental principles of the Constitution are void to the extent of their inconsistencies.

Chapter VII

Constitutional Guarantees

The Constitutions of Bangladesh, India and Nepal guarantee equality of status and opportunities to men and women. More over the States are empowered by the Constitutional provisions for making provisions both general and special for the welfare of women.

The Constitutions of these three selected countries guarantee various fundamental rights irrespective of sex. A woman as a citizen of the country enjoys these rights. The following fundamental rights are available for both men and women.

7.1 Right to Equality:

"Equality before law" has a place in almost all the written Constitutions that guarantee fundamental rights. Both the expressions have also been used by the UDHR[46]These terms have been adopted from the English Constitution, which implied absence of special privilege in favor of any person. It provides that all citizens are equal before the law and thus implies "equality of treatment in equal circumstances.[47]e.g., application of the same law alike and without discrimination to all persons similarly situated.

The formula as stated in the relevant Articles of the Constitutions of Bangladesh, India and Nepal contain the English concept of equality before law and the American concept of equal protection of law. But the concept is not independent and severable in their application and will be found to overlap each other.[48] But it is a guarantee against discrimination both hi conferment of privileges and imposition of liabilities.[49]In fact the concept "Equality before law" derived from the English Constitutional law follows from the 'rule of law.' The latter connotes the undisputed supremacy of law. This supremacy of law is for giving security to the rights of individual who are the citizens of a democratic State.[50]Every modern State, at least theoretically has accepted the principle of equality before law. Its acceptance is found in the provisions of the

[46]The Universal Declaration of Human Rghts, 1948, Art. 7: "All are equal before the law and are entitled without any discrimination to equal protection of the law."

[47] Dicey, Law of the Constitutio, 10th edition, P.49

[48]Jagannath Prasad v. State of U.P., AIR 1961 SC 1245.

[49]Dr. Nurul Islam v. Bangladesh (1981) 33 DLR (AD) 201.

[50]Mahmudul Islam, Constitutional Law of Bangladesh (Dhaka: Bangladesh Institute of Law and International Affairs, 1995), p.67. Laxminarayan v. Collector, AIR 1956MB 163.

mostofthe written Constitutions.[51]Generally, equality before law meant that among the equals law shall be equal and shall be equally administered. There shall not be any special privilege for the reason of birth, creed etc.

The case *of Sheikh AbdusSaburv. Returning officer*[52]it was observed that:

"Equality before the law does not mean absolute equality of man, which is physically impossible, but the denial of any special privileges by reason of birth, creed or the like, in favor of any individual and also the equal subjection of all individuals' and classes to the ordinary law of the land administered by the ordinary law courts. The Appellate Division of the Supreme Court of Bangladesh further observed: "Equality ' before law" is not to be interpreted in its absolute sense to hold that all persons are equal in all respects disregarding different conditions and circumstance in which they are placed or special qualities and characteristics which some of them may possess but which are lacking mothers."[53]

Though personal laws existing in South Asian countries, provided that, male and female are not of 'equal status' in terms of inheriting property. Butthe Indian Supreme Court observes that in case of division of property after the death of the father, sons, wife and daughters are entitled to inherit his estate including alienated property eventhough the wife and daughters are under the customary laws incompetent to challengethe alienation.[54]The Constitution of Bangladesh further provides that women shallhave equal rights with men in all spheres of State and of public life.[55]

7.2 Right to Non-Discrimination:

The Constitutions of Bangladesh, India, and Nepal prohibit classification of citizen on grounds of only religion, race, caste, sex or place of birth. Discrimination indicates an unjust, unfair or unreasonable bias in favored one and against other.[56]The general meaning of 'discriminated against' is to 'make an adverse distinction with regard to distinguish unfavorable from others[57]Article 28(1) of the Constitution of Bangladesh provides that state shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth. This Article corresponds to Article 15(1) of the Indian Constitution and Article 11(3) of the Nepali

[51]Islam, op. cit, 88.

[52]Islam, Ibid.

[53]Sheikh AbdusSabur v. Returning Officer (1989) 9 BLD (AD) 25 at 35.

[54]Mashan v. Taj Ram AIR 1980 SC558; Giani Ram v. Ramjilal AIR 1969 SC 1144.

[55] Art. 28 (2)

[56]BishnuCharan panda v. State of Orissa (1982) 54 Cut LT 337.

[57]*KathiRaning v. State of Saurashtra* (1952) SCR435 (442); *Jonaba Dalia Parveen v. Bangladesh Biman Corporation* (1996) 16 BLD (HCD) 357

Constitution. According to Durga Das Basuthe scope of the Article 15 of the Indian Constitution is very wide. Article 15(1) reads "The State Shall not discriminate against any citizen on grounds of only religion, race, caste, sex, place of birth or any of them," The plain meaning of the prohibition is that no person belonging to a particular religion, cast, sex etc. shall be treated unfavorably by the State when compared with persons of any other religion or sex merely on the ground that she belongs to the particular religion or sex.[58]But discrimination will not be unconstitutional if there is any other ground or consideration for the differential treatment in addition to those prohibited by the Article.[59]

7.3 Right to Equal Protection of Law:

Right to equal protection of law is an important fundamental right Article 31 of the Bangladesh Constitution provides that right to protection of the law and to be treated in accordance with law is the inalienable right of every citizen. This is also applicable for the person residing in Bangladesh for the time being. And no action detrimental to the life, Liberty, body, reputation or property of any person shall be taken in accordance with law. Article 140 of the Indian Constitution provides: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." Article 11(1) of the Nepali Constitution also provides that"... No person shall be denied the equal protection of the laws.

In *MofizurRahman*v. *Bangladesh*[60]the Appellate Division of the Supreme Court of Bangladesh observes that "every action affecting a citizen's right must be taken in accordance with law or under the authority of law and not according to the whims of the person in authority or under any executive fiat."

7.4 Right to Equality of Opportunity in Employment:

The Constitution provides equality of opportunity for all citizens in respect of employment or office in the service of the Republic and prohibits discrimination or ineligibility on grounds only of religion, race, caste, sex or place of birth.[61]

[58] Ibid.

[59]*Yusuf v. State of Bombay* AIR 1954 S.C 321.

[60] (1982)34 DLR (AD)321.

[61]Bangladesh Constitution, Art.29(1) and 29(2); Indian Constitution, Art.16 and Nepal Constitution, Art. 12(2)(e).

Article 16(1) of the Constitution of India provides equality of opportunity in matter relating to employment or appointment to any office of the state.[62] The right to equality is only in employment or appointment under the State. This relates to the matter of recruitment, promotion, wages, termination increments, leave, gratuity, pension, age of retirement, etc. But this equality is amongst the equally placed persons, equality amongst the same class of persons and not amongst different classes of persons.[63] The Constitution lists specific grounds on which citizens are not to be discriminated against each other. These are religion, race, caste, sex, descent, place of birth etc. Gender based discrimination is specifically prohibited by the Constitution.Sex shall not be the sole ground of ineligibility for any post.

7.5 Right to Life and Personal Liberty:

The Constitutions of Bangladesh, India, and Nepal guarantee right to life and personal liberty. Article 32 of the Constitution of Bangladesh reads:"No person shall be deprived of life or personal liberty saves in accordance with law." This Article corresponds with Article 21 of the Constitution of India and Article 12(1) of the Constitution of Nepal.

The very objective of the provision is that no man (human being) can be subjected to any physical coercion that does not admit of legal justification. It means that no member of the Executive is entitled to interfere with the liberty of a citizen unless she can support her/his action by some provision of law.[64]

Therefore, when the State or any of its agents deprives an individual of his/her personal liberty, the law should justify such action and the procedures prescribed by such law have to be observed "strictly and scrupulously.[65]

7.6 Right to Privacy:

Except as provided by the law, the right to privacy of the person, house, prop! document, correspondence, or information of anyone is inviolable.[66]This relates to Article 43 of the Bangladesh Constitution and Article 21 of the Indian Constitution.

[62] Art. 16(1): "There Shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state."

[63]Anjani Kant, Women and the Law (New Delhi: A.P.H. Publishing Corporation, 1997), P.142

[64] Ram Narain v. State of Bonbay, (1952) S.C.R. 652.

[65]The Constitution of Nepal, Art. 22

[66]Anjani Kant, Ibid.,144.

7.7 Right to Freedom:

Articles 36 to 41 of the Bangladesh Constitution provide for citizen right to freedoms of movement assembly, association, thought and conscience, and expression; profession or occupation religion; and property. These articles provide that subject to any reasonable restrictions imposed by law, public order and morality in the public interest or in the public order or public health or the State, friendly relations with foreign States or in relation to contempt of court, defamation or enticement to offense as the case may the citizen or people residing in Bangladesh for the time being are entitled to enjoy the rights mentioned above.

These rights relate to Articles 12, 17 and 19 of the Constitution of Nepal. These, except right to religion and right to property corresponds to Article 19 of the Constitution of India.

7.8 Right against Exploitation:

As mentioned earlier Article 21 of the Constitution of India guarantees right to life and personal liberty. But "Right to life" does not merely mean animal existence. Itmeans something more, e.g. the right to live with dignity.[21] Thus, rape is a crime against basic human rights and is also violate of the victims right to life guaranteed in Art. 21.[67]Art. 23 of the Constitution has categorically prohibited "traffic in human beings and begging and other similar forms of forced labour Similarly, Art. 24prohibits employment of child (including a female child) below the age of 14 years any factory or mine or in any other hazardous works. The Constitution of Nepal also prohibits "Traffic in human beings, slavery, serfdom or forced labour in any form ...[68]Any contravention of the provision shall be punishable by law. Unhopefully, the Constitution of Bangladesh does not prohibit "traffic in human being" directly. But it prohibits all forms of forced labour[69]which is a major consequence of trafficking. Besides, Art. 18(2) of the Constitution provides for the State for adopting "effective measure to prevent prostitution" which is also a consequence of trafficking.

[67]*BodhisattwaGautam*v. *SubhraChakraborty*(Ms) (1996) 1SCC 490 (499-500).

[68] Art.20

[69] Art.34

Chapter VIII

Evaluation and Reform of Family law

The State has enacted several laws with general application to all to deal with disputes like repression of women, domestic violence, guardianship, etc. In addition to the codified Personal Laws, many family disputes are resolved through local customs, practices and various methods of informal dispute resolution including Shalish (a traditional form of dispute resolution). The Personal Laws of the indigenous people have not been codified till date. As a result, they tend to resolve most of their family disputes according to customs, traditions and age-old practices. The Parliament of Bangladesh has recently passed the Family Courts Act 2023 (hereinafter referred to as FCA 2023) by repealing the Family Courts Ordinance 1985 (hereinafter referred as to Ordinance 1985) which had previously been regulating the procedures related to the Family Courts of Bangladesh. Although, quite unfortunately, the parliament couldn't live up to the public expectation, rather failed to resolve pre-existing shortcomings, challenges and utter clumsiness of the Ordinance 1985 as apart from a few new provisions the FCA 2023 is pretty similar to the said flawed Ordinance.There are two significant changes have been brought by FCA 2023 related to Bangladesh Family Courts' procedures, such as increasing the court fee of family court cases and enhancing the definition of family appellate court. Section 25 of FCA 2023 has increased the family court cases court fee to BDT 200 from BDT 25 and after the FCA 2023 comes into force appeals against the decree of Family Trial Courts can be brought to the Courts of District Judges including to any courts of other judges equivalent to district judges, e.g., Woman and Children or Labor Courts, which will help to reduce the burden of cases. Other than that, the FCA 2023 has permitted to adduce witness evidence in the court through affidavit without being present at the trial, which has been newly added to the family courts procedures by Section 13(6) of the FCA 2023. Moreover, previously according to Section 17 (2) (b) of the Ordinance 1985, no appeal shall lie from a decree passed by a Family Trial Court for a dower not exceeding BDT 5000. The FCA 2023 has repealed the said provision of the Ordinance 1985 and increased the dower amount to not exceeding BDT 50000 in relation to appeal. However, unfortunately, even after passing the FCA 2023 challenges and shortcomings of the previous Ordinance 1985 still remain in relation to Family Courts' jurisdiction, who can seek redress from the family court re. Restitution of marital rights, issues related to parents' maintenance and post-divorce maintenance, and absence of Alternative Dispute Regulation (hereinafter referred to as ADR) option in the appellate stage. According to Section 5 ofFCA 2023, the Family courts

have the jurisdiction to try and dispose of any suit related to matters, such as dissolution of marriage, restitution of conjugal rights, dower, maintenance and guardianship and custody of children, which remains the same as the Section 5 of the previous Ordinance 1985. But there are various important aspects of family life and family law which remained out of the jurisdiction of the family courts even after the commencement of the FCA 2023, such as marriage, adoption, will, hiba, succession, maintenance of parents, and so on. However, according to the High Court Division of Bangladesh Supreme Court, the family courts can deal with any matter "relating to or arising out of" dissolution of marriage, restitution of conjugal rights, dower, maintenance and guardianship and custody of children; Md Chand Miah vs Rupnahar cited in 51 DLR 1999 (HCD) 292. Therefore, the Family Courts have a wide jurisdiction over the family matter and the interpretation of Section 5 of FCA 2023 should not be done in a rigid manner. For example, the validity of the marriage can be dealt with by the Family Courts as decided by the High Court in the above-mentioned case. Besides, genuineness of the kabinnama was scrutinized by the family court in Shafiqul Huq v Mina Begum 54 DLR (2002) 481 and in Abdul Hashem vs Mahmuda Khatun 64 DLR (2012) 494 Justice Emdadul Haque stated that S 5 of the Ordinance 1985 impliedly empowers the family courts to try and dispose of matter related to child legitimacy if it arises out of the matter of guardianship and custody of children. Moreover, the confusion related to who can come to the family court for restitution of marital rights still remains unsettled even after the commencement of the FCA 2023 similar to the repealed Ordinance of 1985.

Previously, there was a well-settled judicial rule that only a husband can come to the family court for restitution of conjugal rights. But, in Nelly Zaman vs Giasuddin Khan, the court ruled that the husband suing for the forcible restitution of conjugal rights against an unwilling wife is outmoded, untenable, and incompatible if considered in relation with the constitutional principles of equality before law and under Art. 27 and equal protection of law under Art. 31 for both men and women. Despite such a commendable decision from the judiciary, the parliament couldn't clarify the said dilemma through FCA 2023 which is disappointing.

Another potential failure of parliament in passing the new FCA 2023 is related to keeping no window open for ADR in the appellate stage. The parliament has passed the new FCA 2023 with the new provision i.e., Section 18 and 19 related to appeal cases against family trial courts' decision to reduce the pressure on the district judges, which is commendable. But, reducing the increased backlog of cases in the judiciary should've been addressed by the parliament by inserting explicit provisions related to ADR even in the appellate stage through FCA 2023. Whereas the parliament has inserted Section 89C to the Code of Civil Procedure 1908 through

amending act i.e., The Code of Civil Procedure (Amendment) Act 2006 to incorporate ADR at the appellate stage of civil cases to reduce the backlog of cases, but the parliament has not shown any interest to add ADR mechanism to resolve family disputes.

Although Section 10 of the previous Ordinance of 1985 and Section 11 of the newly enacted FCA 2023 both contain similar provisions related to pre-trial proceedings keeping an interpretational window open to use ADR in family disputes before going to the Family Trail Court there is no provision related to ADR in the appellate stage that could've been added through FCA 2023.Scenario of Women's Status under the Personal /Customary Laws Women enjoy a discriminations status under all major religions in Bangladesh including Islam, Hindu, Buddhism and Christianity. Although fresh reforms have been affected in personal laws to eliminate gender discrimination in other Countries, the law makers in Bangladesh are yet to demonstrate its success towards any workable initiative to bring about a significant change in its legal system which would establish a society on the basis of gender equality and justice. The Muslims claim that Islam has placed women in an honorable place. However, the grim reality is that women are perceived and groomed to assume roles and responsibilities invented exclusively for them by their male counterparts. The condition of Hindu & Buddhist women is worse than the women belonging to other communities in Bangladesh. The Christian women in Bangladesh are comparatively in better position. Christian women and men are treated equally in terms of inheritance of ancestral property, marriage, dissolution of marriage and adoption. Around 50 tribal groups are currently residing in Bangladesh. Though majority of the indigenous communities are governed under different religious laws, they have some independent customs regarding family matters also. The scenario of women`s status will be reflected in our next discussion.

8.1 Issues of Concern:

Marriage:

Age: The Child Marriage Restraint Act, 2017 have fixed the eligibility age to contract marriage as 21 years for men and 18 years for women. Unless this age is attained at the time of marriage, such marriage will constitute child marriage. According to the law, anyone charged with the offence of aiding, abetting and encouraging a child marriage shall be punishable with simple imprisonment. Since the Child Marriage Restraint Act, 2017 is applicable to all citizens irrespective of religion; the minimum age requirement is applicable for the Muslims as well as people professing other faiths.

Consent: Against the backdrop of a male-dominated society which treats women as subordinates, women are seldom encouraged to make an informed decision including choosing a spouse and to consent freely at the time of marriage. Parents tend to impose their decisions regarding marriage on the bride and under coercion the bride gives consent to marry the man chosen by her guardians.

Witnesses: According to the Shariah, two male or one male and two female witnesses are necessary for contracting a valid marriage. According to the Evidence Act, both male and female have been accorded equal status. In Hindu law, witness at marriage is not necessary. However, male priest officiating at marriage is considered witness for legal proposes. Notably, a Hindu woman does not have any scope of being witness. Amongst Christians, witness is required for valid marriage and male and female stand on an equal footing.

Dower Money: In accordance with its historic background and eternal meaning, the dower money concept undermines the dignity of woman though some people argue that dower is a token of respect for women and essential for their economic security. Unlike Islam, other personal laws do not recognize the concept of dower money payable to wife.

According to existing law of Bangladesh Muslim marriages must be registered. The statute imposes liability to register the marriage on the bridegroom and the marriage registrar. Hindu and Buddhist marriages do not require registration. Christian marriage is registered in the book kept in the Church and non- registration is not punishable.

Polygamy / polyandry: According to the Shariah, Muslim men are allowed to keep up to four wives at a time with the consent of previous wife. A Hindu male, on the other hand can keep as many wives at a time as he wishes. Law prohibiting polygamy is yet to come. There is no bar for the Christian, Hindu and Buddhist men to solemnize more than one marriage at a time.

Hilla Marriage: When the divorce becomes irrevocable and the couple in dispute desires to cohabit again, a fresh marriage between them becomes mandatory. However before remarrying her husband, the wife is required to marry a third person and such kind of intermediate marriage (hereinafter called as hilla marriage) has to be consummated. The issue of hilla marriage often instigates violence against women and should be abolished immediately. Unfortunately, it has neither been prohibited nor abolished completely. With the completion of pronouncement of triple talak, according to Section-7 of MFLO, 1961 hilla marriage becomes obligatory for the wife if the couple wants to cohabit again. The concept of hilla marriage is absent in other religious communities

Divorce/ Separation:

By Mutual Consent:Section-7 of the 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. Khula and mubarah are the two forms of divorce by mutual consent though in both cases, the husband has been vested with unfettered power and the wife's status has been reduced to a divorcee. In the context of hula however, the wife has to relinquish the claim of dower. Talaq-E-Taufiz The husband has the power to delegate his exclusive right of pronouncing divorce to some third person or to the wife by virtue of this provision enumerated in the 18th column of kabinnama (marriage contract). This provision empowers a Muslim wife to obtain her freedom from a failed or broken marriage without the intervention of any Court.

Contested Divorce: A Muslim wife is allowed to claim divorce in the Court on some specific grounds laid under The Muslim Marriage Dissolution Act, 1939. Both the Christian spouses are entitled to dissolve their marriage through Court under the provision dealt in the Divorce Act, 1869. There is no legal provision for divorce by mutual consent or contest for the Hindus and the Buddhists. Hazong (indigenous tribe) women enjoy the right to divorce though they claim themselves to be followers of Khatrio of Hindu religion.

Right to Separate: Residence and Maintenance As there is no scope for a Hindu married woman to divorce or marry another person, by virtue of Section 2 of The Hindu Married Women's Separation and Maintenance Act, 1946 she is entitled to separate residence and maintenance from her husband on any one of the seven grounds provided in the statute. However, the Hindu married woman seeking maintenance for separate residence should be able to prove her chastity and continue to practice her religion.

A divorce is required to be registered under Section 6 of The Muslim Marriage and Dissolution of Marriage (Registration) Act, 1974. The statute does not make the registration of divorce mandatory and silent about consequence of non- registration. The Divorce Act, 1869 which is applicable for the Christians does not lay down any provision for the registration of a confirmed decree for dissolution of marriage. As there is no scope of divorce, registration thereof is beyond question among the Hindus and Buddhists.

Fatwa and its Social Implications:

Fatwa is a religious injunction and a deadly weapon for repression of women in particular used by religious fundamentalists that has negative consequences inducing women to commit suicide. Surprisingly however, no new law prohibiting or intending to control Fatwa has been introduced. The Prevention of Repression against Women and Children Act which has been amended a couple of times is also silent about Fatwa and does not address it as a punishable offence.

Maintenance:

Maintenance during Iddat: Period After termination of marriage, a Muslim wife is entitled to be maintained all kinds living expresses by her husband till the expiration of three terms of menstruation or to the end of pregnancy whichever is longer. Since the concept of Iddat is unrecognized in other religious communities' maintenance during that period is not available among them.

Maintenance for Children: According to the Muslim Law both legitimate and illegitimate sons are entitled to maintenance until they attain puberty; whereas only legitimate daughters are entitled to maintenance until they are married.

Restitution of Conjugal Rights: The Hindus, the Muslims, the Buddhists and the Christians can apply to the Family Courts for the restitution of conjugal rights. No gender discrimination is identified in this context. According to the Divorce Act, 1869, either spouse may sue for restitution of conjugal rights. Some milestone judgments have also come from the apex Court regarding restitution of conjugal rights.

Guardianship and Custody of Children:

Contested Custody Cases: According to Islamic Jurisprudence, the father is the natural guardian of the children. After his death guardianship accrues upon the paternal grandfather and the paternal grandfather's executor. A Muslim mother can never be the legal guardian of her children. Instead of guardianship, she can claim the custody of her son until he is seven years of age and of her daughter until she is eighteen years of age. If there is a breach of this duty by a unilateral act of the father or anybody on his behalf, the aggrieved mother has the right to move

before the High Court Division under Article 102 of the Constitution for immediate custody of the children which may be ordered in their interest and welfare. The law however stipulates that the father continues to be the children's legal guardian even if the mother is granted custody through the Courts.

By virtue of The Guardian and Wards Act, 1890, the doctrine of welfare of children has assumed importance and over the past decades a visible shift has been noted in the application of judicial mind in matters relating to custodianship.

No technical division as to guardianship and custody of children exists under Hindu or Christian personal laws. However, although The Guardian and Wards Act, 1890 is uniformly applicable to all citizens, the Hindu and Christian personal laws are yet to evolve accordingly.

Right to Property:

Women from all communities excepting the Christians suffers from discrimination with regard to claiming their right to property. According to the Golden Rule of the principle of law of inheritance for the Muslims, female co-sharer gets half of a male of same grade i.e. husband gets ½ and ¼ in two capacities while wife gets ¼ and 1/8 in the same capacities respectively. Brothers and sisters inherit at 2:1 ratios.

A Bangladeshi Hindu woman's right to inheritance is non-existent. In Bangladesh the limited right of life estate4 or widow's estate accorded to a women, is sometimes referred to as inheritance, although this is an anomaly within the strict understanding of the term inheritance. However, a Hindu widow is not entitled to alienate the immovable property inherited by her.

A Christian woman is in a comparatively better position under the law of inheritance than a Muslim or Hindu woman given she is entitled to inherit equally as that of her brother. The Married Women's Property Act, 1874 provides that the earnings of any married women remain her exclusive and separate property.

Adoption:

According to Hindu law, only men have the right to take a male child in adoption. Hindu women have no right to adopt. Right to adopt is recognized and encouraged in Christian law. The concept is prohibited in Muslim law. As a State party to the CEDAW, Bangladesh is under obligation to take all appropriate measure to eliminate discrimination against women and to

ensure on the basis of equality of men and women the same rights and responsibility with regard to adoption of children5. No legislative initiative has been taken to ensure that the right to adopt is open to all irrespective of gender or marital status.

State Commitments:

According to its enunciation in the 5th periodic report to the United Nations on implementation of CEDAW, Bangladesh is committed to:

• remove incompatibilities between personal laws and the Constitution.

• withdraw reservation from articles 2 and 16(1) (c) of CEDAW.

• improve the women's economic and social empowerment condition with a view to facilitating the process of eliminating dowry, polygamy and early marriages.

• prepare the society for ensuring greater acceptance of measures taken for reformation of personal / religious laws while the Government endorses the need for undertaking measures for fresh reforms in Shariah and Personal Laws.

8.2 Gaps regarding fulfillment of commitments:

A wide gap between commitments made by Bangladesh and their implementation has been identified in this report. No initiative to remove incompatibilities between personal laws and the Constitution has been taken as yet. Articles incorporated in Parts I & II of the Constitution dealing with fundamental principles of State policy and fundamental rights provide for gender equality in public life but remains silent about private life.

8.3 Government and NGO Initiatives in Effecting Reforms in the Family Law: The Ministry for Women and Children's Affairs assigned to implement different programs in 64 Districts and 396 Sub-Districts of Bangladesh for empowering women at the grass roots level and for improving socio-economic status of women. However, the Government is yet to demonstrate its interventions with regard to effecting reforms within the family laws on the basis of gender equality. The National Women's Development Policy was reviewed several times but it is yet to be implemented in its letter and spirit given the resistance from different vested the recent interest groups. The past caretaker Government formulated the National Women's Development Policy 2008 with the objective of amending existing laws and enacting new laws on the basis of gender equality. The policy includes raising maternity leave from four months to

five months, enacting new laws to ensure equal opportunity for women, ensuring women's security at national, social and family level, empowerment of women in political, social and economic sector and ensuring that women are entitled to equal rights as that of men concerning property, employment, market and business. The Ministry for Women and Children's Affairs and civil society groups has engaged in programs on legal literacy and awareness around social evils emanating from dowry, polygamy and child marriages. Recently, the Government has provided gender training to a number of government officials. The Women and Children Repression Prevention Act was also amended in 2003 with inputs from the civil society.

Welfare of Children has been evolved and over the past decades a noticeable shift is seen in judicial attitudes in the matter of custodianship. In AmirulBorChoudhury V. Nargis Sultana 19 BLD (HCD) 213 (1999), the Court held that father's remarriage is a disqualification and awarded custody to the mother. The Court observed that it appears that the defendant petitioner (father) has got married again and as such the welfare of the twin sons will not be protected in the hands of the step mother. In Sharon Laily Begum's case[70] (this case was brought to court by Ain o ShalishKendro) mentioning a citation from Ameer Ali that 'the milk of a Muslim mother is not more nutritious than that of a Christian mother', a family court granted full custody of four minor children aged between five and fourteen years to the mother, a British Christian citizen. A High Court bench held that custody and guardianship of minors cannot be settled by a private compromise or even by arbitration.[71] In a recent case FarzanaAzad V. SamudraEjajulHaque[72]where the petitioner instituted a Writ Petition of habeas corpus, a Division Bench of the High Court ordered to put the minor children under the custody of their mother. No technical division as to guardianship and custody of children exists under Hindu or Christian personal laws. Even though the Guardian and Wards Act, 1890 is applicable to all citizens, the Hindu and Christian personal laws are yet to evolve accordingly. With regard to the right of guardianship, the High Court has shown an affirmative approach in SyedaShamsunnahar's case[73]where the mother's right to guardianship has been recognized.

In a claim of restitution of conjugal rights against the wife, the Court interpreted that unwillingness to live with the husband cannot be claimed on the ground of want of mutuality

[70]Abdul Jalil V. Sharon Laily Begum, family suit no. 145 of 1995 and family suit no. 183 heard analogously and judgment delivered by the Family Court on 1st April 1999. 50 DLR (AD) 55 & 1998 BLD (AD) 21.

[71]Mst. Tahera Begum v. Saleem Ahmed Siddique, PLD 1970 Karachi 619.

[72] W.P. No. 770 of 2007, 60 DLR (January, 2008)

[73]SyedaShamsunnaharVsMd.Khorshed Anwar Khan 10 MLR (HC) 2005 page-148-150,

between them. It is also a violation of principle of equality between men and women as laid down in Article 28(2) of the Constitution.[74] In comparison to the disputes pertaining to family matters adjudicated upon by the Courts, a few number of test cases have been initiated which has enabled the court to render progressive interpretation concerning women's right to inheritance and succession.

[74] Nelly Zaman Vs. Giasuddin-34 DLR (HCD) 1982, Page-221

Chapter IX

Recommendations

9.1 Findings problem:

1. Family court jurisdiction includes polygamy and Dowry Prohibition Act. Family Courts Judges are not enough delegated with the power of magistrate 1st class.
2. Family Courts are not separated.
3. Family cases are not disposed of within a specified period, time.
4. The importance of dower in the Mohammedan law is not Considered totally, when an appeal arise against the judgment dower with regard to dower of the Family Courts, provision is made to deposit 50% of the decretal amount to the Family Courts. This provision will considerably reduce harassment of deprived wives and pave the way for realizing the dower. In case of misappeal 20% decretal amount to be deposited.
5. In case of dissolution of marriage necessary amendments are not made with regards to the Dissolution of Marriage Act. The power to dissolute a marriage is not equal for both husband and wife.

9.2 Recommendations

1. The Government of Bangladesh should take concrete steps to withdraw reservations to Article 2 and 16 (1) (c) of CEDAW.

2. The National Women's Development Policy (2008) should be implemented at right earnest and steps should be taken to mobilize public opinion in favor of the policy.

3. The Government needs to build consensus amongst concerned stakeholders including the policy makers, civil society groups, media and the general public to adopt a Uniform Family Code in order to protect the rights of all Bangladeshi women within the family. To this end, a Consultative Group should be formulated at the national and local level with representatives from the civil society, rights activists, media and the legal community including ethnic, indigenous and minority groups.

4. The Child Marriage Restraint Act 2017 should be reviewed and amended with a view to ensuring that child marriage practices are reduced if not eliminated. Accordingly, the law should provide for stringent punishment including imposing a fairly large amount of fine as well as a longer term of imprisonment for those aiding, abetting and encouraging child marriages.

5. Registration of all marriages, whether civil or religious should be made mandatory and a uniform registration form should be introduced for all marriages.

6. Adequate infrastructure arrangements including logistic support and budget should be made available for strengthening the work and record maintained by the Marriage Registrars to prevent child marriage and polygamy. Polygamy should be made a punishable offence under the Women and Children Repression Prevention Act.

7. The Government should endeavor to include a chapter on Family Laws and gender in the Social Science curriculum of High Schools so that the young generation has a better gender orientation which in turn would empower women to negotiate their rights and entitlements.

8. The Chittagong Hill Tracts Regulation (Amendment) Act, 2003 should be made effective by notification through Official Gazette and necessary infrastructure and logistic support should be provided for establishment of Family Courts in the Chittagong Hill Tracts.

9. The jurisdiction of the Family Courts should be extended to address disputes relating to inheritance, adoption, registration of birth, marriages and death, prevention of dowry and domestic violence so as to provide an efficacious forum for adjudication of family disputes.

10. The Government of Bangladesh should take appropriate steps for enacting an effective legislation combating domestic violence in consultation with women's rights activists and civil society groups.

11. Right to adopt should be open to all irrespective of gender or marital status and welfare of child and competence of adoptee should be the basis for consideration.

12. Discrimination regarding guardianship and custody of children between father and mother should be abolished and the government should take measures to ensure the equitable right of the mother.

13. Men and women should have equal rights to seek divorce or dissolution of marriage. Enabling legislation should be in place to facilitate remarriage of both spouses after dissolution of marriage.

14. Hilla marriage and Fatwa should be prohibited and stringent penal provisions should be incorporated in the Women and Children Repression Prevention Act to abolish such practices.

15. Procedural amendments should be effected in the Family Courts Ordinance in the following areas:

a. Provisions should be made regarding qualification of Family Court judges. Just mere Assistant Judgeship should not be the only criteria for becoming a Family Court judge. Rather considerable length of experience and other relevant skills in dealing with family matters may be made mandatory for recruitment of Family Court judges.

b. To ensure more amicable settlements in the Family Court provisions may be made in the Ordinance regarding the following:

(i) In addition to conciliation and compromise, other ADR mechanisms such as mediation and counseling may be included in the Ordinance. For example, in Malaysia counseling is a first step in handling family disputes.

(ii) Panels of mediators and counselors may be prepared for referral of family disputes. While preparing the list of mediators and counselors' emphasis shall be given to include social welfare experts, counselors, psychologists and medical professionals for the services.

(iii) Provisions may be made for referral of family disputes to other Family Court judges or panel of mediators/counselors at any stages of the case, including whenever both parties intend so.

(iv) Mediation guidelines should be adopted as regards qualification of mediators, mediation process to be carried out, time line for completion of mediation, payment for mediation services, enforcement of mediated settlement etc. It may be noted that to earn trust of the people, mediation process should be made least intrusive and fair and adopt a party controlled procedure for dispute resolution.

(v) Long-term arrangements should be made for training and accreditation of judges, mediators and counselors before their enlistment in the panels.

(vi) The same judge should not be allowed to hear a case which he tried to mediate. It is always feared that exposure of judges to the litigants may affect the neutrality of the judiciary. In some cases it may be possible for the litigants to establish personal rapport with the judge which might

affect the process of fair justice. Some also think that the judge may not feel comfortable hearing a case which s/he mediated unsuccessfully.

(vii) Funds may be allocated from the Government Legal Aid scheme to compensate services of the mediators and family court counselors.

(viii) NGOs, civil societies may be encouraged and engaged in supplementing family dispute process, e.g. NGOs and members of the civil society may assist the disputants through imparting information, assisting in filing a complaint and arranging legal aid services.

(ix) Various forms may be developed for simplification of family dispute processes. For example, in Malaysia a divorcee may file her complaint by simply filling a form. Family Affairs Consultants usually help them in filling up such forms.

c. To ensure recovery of decrial amount through civil as well as criminal proceeding the conjunction "or" appearing between Section 16(3) (a) and (b) may be replaced with "and". This will allow recovery of the detrital amount through civil as well as criminal proceedings.

d. To expedite installments for the payment of decrial amount provisions may be made for allowing payment through four equal installments a year instead of leaving it unlimited as in the case of the ArthaRinAdalat (Amendment) Ain, 2003.

e. To activate the Arbitration Council the Chairmen of the Council should give training on counseling and conciliation and members of the Arbitration Council should provide reasonable remuneration for their services. If adequately trained in Muslim personal laws and equipped with the skills of counseling and conciliation, the Arbitration Council could conciliate marital disputes rather efficaciously and positively.

f. The minimum amount of dower should be fixed and its prompt payment should be ensured in the event of non-maintenance of wife consequent upon separation and divorce, if it is not paid earlier28 or Failing reconciliation the Chairman be empowered to postpone the effectiveness of the divorce until the husband secures payment of dower and iddat maintenance of the wife. This may benefit women to a great extent and also reduces the rate of arbitrary divorce by the husband.

g. Motivate lawyers to participate in ADR and encourage their clients for amicable settlement of family disputes

9.3 Conclusion:

Harmonizations among the personal laws can co-ordinate different personal laws by eliminating major differences and creating minimum requirements or standards. No doubt, such confusions, uncertainties, misconceptions and difference of opinions are thwarting the Family Courts. And these should not be allowed to run anymore. Logically, there may be differing opinions as to how them is conceptions should be removed, or the confusion resolved, or uncertainties eradicated. But it is expected that there will be none to oppose the necessity of doing so. Therefore, keeping in view the purpose of establishing the family courts, all the concerned authorities should, separately as well as collectively, take necessary steps regarding this immediately.

As is evident from the above studyon the seven topics, there is no confusion regarding jurisdiction of Family Courts, camera trial or regarding filing of suit relating to dower and custody of children and guardianship; what is there is only the misconception. But it is clear that there is enough scopes for confusion regarding amendment of plaint, interlocutory Order and application of CPC in the Family Courts, as there are contradictory opinions on these issues, and apparently there is no specially attentive decision of the Appellate Division clarifying the actual legal positions of those issues, as was done in PochonRikssi Das VsKhuku Rani Dasi and otherscase which clarified the legal position as to Family Court jurisdiction and dual option for filing suits for dower, guardianship and custody of children. As to execution of the decree, the provisions of the Family Courts Ordinance are not as clear as needed. The issue that when a judgment debtor suffered imprisonment for failure to pay decretal money, whether he would be exempted from the unpaid decree money for which he suffered imprisonment, or that decree-money would be recoverable through further execution process, is still unclear. The judges and lawyer society seem grossly divided on the issue.

In Bangladesh the rights of women is always violated because of male dominating family or personal laws. For this reason the provision of equality before law of the Constitution has been violated. If we try to abolish this discriminating provision from the personal laws, it may cause of injury of the sentiments of other communities of Bangladesh and also cause of violation of another article which is guaranteed Freedom of religion. A family law in Bangladesh focuses upon substituting or combining the existing personal laws and replacing them with a single

system which is not possible in the contracts of Bangladesh. So that for the well-being of all citizen of Bangladesh we should harmonize the personal law in such a way that the provision of equality before law and freedom religion is not violated and is accepted by all the citizen of Bangladesh. By harmonization of personal laws existing in Bangladesh we can eliminate major differences and create minimum requirements or Standards of it.

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