

INTERNATIONAL CONVENTIONS AND FAMILY LAWS IN BANGLADESH WITH REFERENCE TO ISLAMIC LEGAL PRINCIPLES

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Abstract

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As a matter of international concern, the legal issues on the family have been well founded in various international conventions such as United Nations Declaration of Human Rights (UNDHR), Convention on Elimination of all Discrimination against Women (CEDAW) and many others to regulate marital relationships, procedural requirements and their rights and obligations. Though these conventions establish general guidelines to indicate the importance of human rights in the context of family relationship based on the equal rights between men and women,¹ the application of those provisions will subject to national and domestic laws of respective countries including Bangladesh where the laws that govern family relationships for both Muslims² and non-Muslims³ are well codified.

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1. INTRODUCTION

Article 16 of United Nations Declaration on Human Rights (UNDHR) states the fundamental right to marry; (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during the marriage and at its dissolution; (2) Marriage shall be entered into only with the free and full consent of the intending spouses.

The provision recognises that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. Therefore as soon as a person is legally entitled, he or she has the right to marry and have a family. The reason for having such a provision is to protect the human right to marry and establish a family of his or her choice. The purpose is to avoid forced marriage which is customarily practised in certain countries. However, the argument on the right to marry has been extended in some countries as to include the recognition by the state of same-sex marriages, a familial relationship such as cohabitation which has been given legal recognition either in statutory forms or judicial decisions.⁴ As far as Bangladeshi law is concerned, those relationships are not recognised as a marriage under the current family laws. The law provides that the marriage must be between a male and female and any marriage solemnised contrary to the above requirement is null and void.⁵

The right to marry and establish a family as envisaged in UNDHR is further strengthened by the United Nations Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962) on the premise that the participating countries should take all appropriate measures with a view to abolishing such customs, ancient laws and practices by ensuring, inter alia , complete freedom in the choice of a spouse, eliminating completely child marriages and the betrothal of young girls before the age of puberty, establishing appropriate penalties where necessary and establishing a civil or other register in which all marriages will be recorded.⁶ Based on the above objectives the Convention provides a few provisions in relation to the requirement of consent, setting the minimum age of marriage and compulsory registration of marriages. Those provisions states;

Article 1

1. No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law.

2. Notwithstanding anything in paragraph 1 above, it shall not be necessary for one of the parties to be present when the competent authority is satisfied that the circumstances are exceptional and that the party has, before a competent authority and in such manner as may be prescribed by law, expressed and not withdrawn consent.

Article 2

States Parties to the present Convention shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses.

Article 3

All marriages shall be registered in an appropriate official register by the competent authority.

In response to the above provisions, Bangladeshi law has incorporated those requirements in both family law statutes through the impact on the validity of marriage varies depending on the general principles governing specific elements of marriage requirements. Generally, in the case of Islamic Family Law, both consent of the girl and the guardian is required for the legal recognition of the marriage.⁷

With regard to the age of marriage, the law provides for a minimum age of marriage of 21 years for male and 18 years old for female. The marriage that takes place below the minimum age does not render the marriage void in Islamic Family law but strongly discouraged and it is a punishable offence.⁸

2. CONVENTION ON ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

CEDAW is one of the convention that directly affects family law and family relationships through the main objective of this convention is to remove discrimination between genders. It equally applies the same in the context of a husband and wife relationship which has been addressed in article 27.

The most significant move is reflected in the incorporation of the word gender in the Bangladesh Constitution⁹ in response to public demand and to prove the government's commitment towards gender issues when ratifying International conventions. Being the highest law in the country, the formulation of future policies and law must be streamlined with gender issues i.e non-discrimination.¹⁰ Prior to the ratification of the international convention, the National Policy on Women provide directions for the government to make more policies and laws for women and children. The focus is to guarantee equal sharing of resources, information, opportunities and benefits of development for both men and women and to integrate women in all sectors of development in accordance with their capabilities and needs so as to enhance their quality of life, eradicate poverty and eliminate illiteracy, and ensure a peaceful and harmonious and prosperous nation.¹¹

In pursuant to the above aspiration and by agreeing to the commitments set forth in the Beijing Platform for Action at the UN Fourth World Conference on Women (1995), a few more policies are being formulated to enhance the national machinery for women's advancement, increase women's participation in decision-making, safeguard women's rights to health, education and social well-being and remove legal obstacles and gender discriminatory practices. The Platform of Action also emphasises that women share a common concern that can be addressed only by working together in partnership with men towards the common goal or gender equality around the world. This commitment is in line with the National Policy on Women as set forth earlier and the promotion of greater female participation in various sectors such as labour force, business and entrepreneurial activities that have been incorporated in the Ninth Bangladeshi Plan. Other commitments include reducing poverty and violence against women and reviewing laws and regulations to promote the status of women.

The above policies remain significant as the driving force for the incorporation of women in any future planning as well as in allocating financial resources and formulating policies and laws that are women-friendly. It can be seen that many laws and policies have been regulated in response to feedback from various agencies suggesting reforms on matters that affect women including the protection of women's rights and interests.

3. RATIFICATION OF CEDAW

Bangladesh became a party to CEDAW subject to the understanding that the provisions of the Convention are not in conflict with the provisions of the Constitution of Bangladesh. Based on that premise, reservation is made to several provisions that are perceived to be in conflict with the national laws as an interpretation of equality in CEDAW seems to suggest a literal one.¹² These reservations to articles 2 (f), 5 (a), 7 (b), 9 and 16 of the aforesaid Convention are significant to Muslim society as Shariah law is one of the major sources of law. The reasons for the reservation are briefly explained below;

a. Article 2 (f) imposes obligations on the State party to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices, which constitute discrimination against women. The reservation to this article is based on the premise that such measures must not be contrary to Shariah law, custom and other policies already in practice in Bangladesh.

b. Article 5 (a) requires the State party to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudice and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. The reservation is based on the fact it would be difficult to remove certain cultures that are already imbued in the society.¹³ The same applies to Shariah law on the division of inheritance property for Muslims where the proportion is based on *Quranic* distribution.

c. Article 7 (b) demands greater participation of women in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government. This reservation is due to certain posts such as Mufti and Imam who are appointed among qualified male.¹⁴

d. Article 9 (1) obliges the State to grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. (2) States Parties shall grant women equal rights with men with respect to the nationality of their children.

In relation to article 11, Bangladesh interprets the provisions of this article as a reference to the prohibition of discrimination on the basis of equality between men and women only.

4. AREAS OF INCOMPATIBILITY WITH CEDAW AND THE LEGAL REFORM

There are areas of Islamic law that are perceived to be incompatible with CEDAW on the basis that they discriminate the rights of women. Those laws are pertaining to polygamous marriage, guardianship or *wali* for men, and other matters pertaining to rights and responsibilities to provide maintenance.¹⁵ While the pressure to remove all reservations is mounting, the Islamic law experts have to respond to grievances by women for lack of legal enforcement in dealing with law abuse rather than the substantive law itself. Responses to these grievances are discussed below.

4.1 Legal and judicial status on polygamy

The current stand of the Muslim countries including Bangladesh on the legal status of polygamy is best explained by understanding the sociological aspect of this law. The practice of polygamy in Islam is a modified version of the pre-Islamic period where men could take an unlimited number of wives. After Islam, the practice was retained on the basis of *maslahah* (public interest) in order to encourage social justice in helping girls who were left as orphans and women who had become widows.¹⁶ In order to avoid exploitation of these girls and widows, the law permitted Muslims to take more than one wife with a proviso that justice between co-wives in terms of maintenance and conjugal rotation must strictly be observed. Otherwise, they are advised to practise monogamy. The majority of Muslim countries including Bangladesh adopts restrictive measures and provides for prescribed procedures through the judicial inquiry process. Matters that are subject to inquiries include financial implications, views of the existing wife or wives, possible harm the subsequent marriage causes to the existing wife, equal treatment between co-wives and the justice and necessity of the proposed marriage. All those requirements must be satisfied. Reasons such as infertility or sexual dysfunction of the existing wife can be good grounds to support the application for polygamy. The procedure is troublesome for those who are not legally qualified and opted for marriages to be solemnized in neighbouring countries either through syndicate or self-arrangement. These marriages are usually unregistered and the women become the victim if they are not successful in getting the marriage registered upon failure to provide satisfactory evidence. It does not only affect the

interest of the subsequent wife, but the interest of the existing wife will also be jeopardized for failure to prove that the polygamous marriage has taken place. This will affect her right to make other claims associated with the polygamous relationship.¹⁷

To protect the interest of the existing wife, the current reform requires the husband to allocate maintenance for existing wife and children and propose for the division of jointly acquired property during marriage prior to the solemnization of subsequent marriage.¹⁸

4.2 Equal Responsibilities between husband and wife

Shariah law provides more responsibilities on the husband as a financial provider in which the husband is responsible to provide maintenance and other financial needs for the wife and children. There is no change with regard to marital duties.

The husband is obliged to pay maintenance (*nafkah*) that comprises basic needs such as shelter, food and clothing inclusive. The applicable law in Bangladesh may widen the scope of maintenance depending on the needs of the party and the capability of the husband to pay. Non-payment of maintenance is considered as an offence and recoverable as debts in the court. In respect of a wife, her responsibility is to respect and obey (*ta'at*) the husband on matters that do not go against Shariah principles. Willful disobedience (*nusyuz*) of the wife is an offence. A wife is said to be disobedient if she willfully refuses to associate with her husband, leaves the matrimonial home unreasonably or refuses to cohabit with her husband without any valid reason according to Shariah law.¹⁹

The common problem that is faced by women nowadays is the failure or neglect on the part of the husband or the father to provide maintenance. The issue of gender is not relevant in this context as to impose liability on the mother would mean an extra burden for women except for the rich. Therefore, the reform that is underway is to strengthen the law that imposes the liability on other family members from paternal relatives to pay.

4.3 Pronouncement of *Talaq* outside the Court

The law pertaining to divorce by *talaq* is well regulated in Islamic family law in a modified form where both parties to the marriage may apply for such divorce even though traditionally, it is an exclusive right of the husband to make the pronouncement. The deviation from the traditional practice, in the eye of the legislature, gives the opportunity

for the court to examine the reasons for the divorce and determine other things that relate to the dispute. This legal device is seen as a control measure to prevent unwanted divorces as it makes an imposition on either party to the marriage to formally apply to the court so that the *talaq* can only be pronounced with the permission of the judge after considering the arguments of both parties. This practice is in accordance with the spirit of Shariah law as the intention is to promote an amicable and harmonious relationship between the parties after the divorce and to reduce the hardship caused to any children.²⁰

Due to the difficulty faced by Muslim wives, *talaq* divorce outside the court has not been recognized in some Muslim countries and should be discouraged. Moreover, *talaq* divorce will take effect even without the wife's fault, which is contrary to the purpose of *talaq* itself.

It is suggested that woman is given equal opportunity to walk out from the marriage through khulu' if life becomes torture and to provide a balance of rights in divorce. This is because it is imaginable that the woman will relinquish any part of her property but with a view to her own safety and ease, which cannot be obtained but by a total separation.²¹

It is reasonable to conclude that the generality of primary sources and the intention to preserve the family unit have placed the legislature and the judiciary in a difficult position in balancing the right of the wife with the hardship of the divorce on family members. Although a precautionary measure in the form of arbitration proceeding may be adapted to look for a possible reconciliation, it has to be professionally exercised by taking into account that the wife is also accorded such a right to divorce. The general rule that hardship must be removed remains an acceptable test to accord to a judicial decree.

5. CONFLICT OF LAWS

As a dualist state, conflict of laws is bound to happen. The determination as to the religious status of a child as well as the custodial right is very much in dispute between these parents as their marriages have to end in a legal system where religion decides on the legality of the marriage such as Bangladesh. In most occasions, the general rule on custody arrangement after the divorce has not been emphasized to resolve the conflict as the main focus of the dispute is on marital status and religion seems to be the only consideration especially in the case when one parent converts to Islam. The issue on gender is not a

directly relevant but religious conviction of the parties is pertinent in a legal proceeding. This approach has resulted in dissatisfaction if the whole dispute is to be assessed from human right's perspective as an international convention on human rights does not support religion as the only criteria for consideration in family court proceedings involving custody of children.

The above contention is becoming more complicated in determining a child's religion in case of unilateral conversion to Islam, as the parent who is awarded custody order will have a better chance to decide on the religious upbringing of the child. As shown in several cases decided in the civil courts, the issue of religion is equally important in determining the welfare of the child apart from the capability of the custodian to raise the child in a more suitable and conducive environment. The court will give preference to the religious status of the custodian, as one of the important criteria as expressly provided for under the Islamic Family law, though the issue of religion for the custodian in Islamic jurisprudence, is subjective. This is quite understandable as the issue of faith is fundamental for Muslims.

However, the present law creates a tug of war situation between the Muslim and non-Muslim parents. This situation could be even worse if the escalation concerns minor children and the mother who is preferred by the law as the best to care for minor children is the non-convert spouse.

6. CONCLUSION

The above discussion proves that the ratification of the international instrument is significant to accelerate legal reforms despite inconsistencies with fundamental principles. However, new situations and challenges suggest for the need to develop possible and permissible methods that necessitate fresh interpretations of fundamental principles which require application in an ever-changing world and modern realities. This is particularly relevant when dealing with human relationships such as family where the legal rulings must be consistent with changes in time and circumstances.

¹ As in the preamble of the United Nation Charter

² Islamic Family Law Act and Enactments of respective 14 states throughout Bangladesh

³ Section 7 of the Muslim Family Laws Ordinance 1961

⁴ For example, Netherland is among the earliest country that recognizes same-sex marriages, followed by the United States and European countries.

⁵ See for example the Law Reform Act 1976, section 69(d) that provides for grounds on which the marriage is void if the parties are not respectively male and female; Section 7 of the Muslim Family Laws Ordinance.

⁶ The preamble of United Nations Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962).

⁷ See Islamic Family Law Act 1984, section 13.

⁸ Md. Nannu Mian & Shaikh Rajib Hossain, Modernizing Marriage Registration Law In Bangladesh, *International Journal Of Physical And Social Sciences*, Vol. 3, Issue 7, 2013, P.131.

⁹ Article 29 of the Constitution of the People's Republic of Bangladesh.

¹⁰ Md Nannu Mian & Shalina Akter. A Comparative Study of a Restitutionary Remedy for an Undue Influence between the English Law and the Islamic Legal Principles. *IOSR Journal of Humanities and Social Science*, India, Vol.12, No.5, 2013: 37-42.

¹¹ As reflected in the objectives of the National Policy on Women.

¹² As reflected in the Report Round Table Discussion: Rights and Obligations under CEDAW as organised by SUHAKAM 2004.

¹³ Bangladesh legal system recognises adat law such as Adat Pepatih which gives preference to women in the division of inheritance property.

¹⁴ See Administration of Islamic law 1993, ss.32,37. The word 'himself' indicates a specific preference to the male appointment. However, the Fatwa Committee consists of both male and female.

¹⁵ Section 9 of the Muslim Family Laws Ordinance 1961.

¹⁶ See Al Qur'an, Al Nisa': 2 And 3

¹⁷ Section 6 of the Muslim Family Laws Ordinance 1961.

¹⁸ Ibid.

¹⁹ Section 9 of the Muslim Family Laws Ordinance 1961.

²⁰ Section 7 of the Muslim Family Laws Ordinance 1961.

²¹ Ibid.