

Uniform Family Code: An Appraisal of Viability in Pluralistic Bangladeshi Society

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Abstract

The personal laws govern significant aspects of family life in Bangladesh. Matters such as divorce, marriage, maintenance, guardianship, adoption and so forth are determined by each religious community's 'religious-personal law' system. Hence, the people of different religions are not treated equally on similar issues. Many of the personal laws are not gender-sensitive, codified and do not accord to the demand of the time. The difference of legal treatments under pluralist religious legal system have been perceived as the intrinsic cause of gender inequalities prevalent in the personal laws of different religions in Bangladesh.. In this matrix of problems, the demand for a secular Uniform Family Code for all citizens irrespective of sex, religion or ethnicity containing the ideals of equality provisions of the Constitution and international guarantees in all matters relating to the personal spheres has got pace. On the other hand, the demand for such a Uniform Family Code has encountered strong opposition and resistance by the traditionalists who believe that the religious laws are divine revelations and no one has the authority to alter it. The paper seeks to appraise the viability of enacting a uniform family code in the pluralist society of Bangladesh.

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Introduction

The ‘Uniform Family Law’ is a long debated issue since even prior to the partition in 1947. In the passage of time, the controversies over this subject have been more widened and condensed. The difference of legal treatments under pluralist religious legal system have been perceived as the intrinsic cause of gender inequalities and inconsistencies prevalent in the personal laws of different religions in Bangladesh. At present the demand for a uniform Family Code for all people of the state, irrespective of religious faith or ethnicity has been voiced than ever before while many others have been making protest of it negating the demand for Uniform Family Code. This paper seeks to appraise the prospects and problems of enacting a Uniform Family Code in the pluralist society of Bangladesh.

Family Law Defined

In Bangladesh the legal system may be said to be pluralistic in the sense that there exists a uniform and non-religious system of law applicable to all Bangladeshis e.g. criminal laws, land laws etc. while on the other hand personal and private family matters such as marriage, its dissolution, custody of children and so forth fall within the ambit of the personal law of each religious community.¹ The Family Laws, a term used interchangeably in most discourses with ‘Personal Laws’ is subsumed under the General Law category. For the most part, family laws are governed by the civil law. However areas covering marriage, divorce, dower, maintenance, guardianship, custody, inheritance and restitution of conjugal rights are governed separately by each religious

¹ Huda, Shahnaz, (2004), *Personal Laws in Bangladesh: The Need for Substantive Reforms* in the Dhaka University Studies Part-F, Vol. XV (1): pp.103-126 at p.103

community's 'religious-personal law' system.² Family laws or Personal Laws are those laws that govern a particular religious community and are consonant with the belief of and apply to the regulation of that community and its adherents. These laws encompass important areas of a person's life, such as birth, marriage, death, and property rights.³

Uniform Family Law: Meaning And Application

'Uniform Family Law'-is a term referring to the concept of an overarching uniform set of secular laws to govern all people of the state, irrespective of their religious belief, gender, caste, birth, or ethnic origin on an equal footing in all matters relating to the personal sphere. This supersedes the right of citizens to be governed under different personal laws based on their religion, sex, caste or tribe.⁴ The term 'Uniform Family Law' is often interchanged by 'Uniform Family Code' or 'Uniform Civil Code'. The common areas covered by a Uniform Family Code include laws related to marriage, dissolution of marriage, dower, maintenance, guardianship, custody, inheritance, restitution of conjugal rights etc. This set of laws will be uniformly applicable to all the citizens of the country and the only criterion for benefiting under its provisions would be citizenship, irrespective of any other qualification.

Historical Background Of Uniform Family Laws

The debate on Uniform Family Law dates back to the British colonial period. The Lex Loci Report of October 1840 emphasized

² Pereira, Faustina (2002), *The Fractured Scales*, STREE, Calcutta, at p. 1

³ *Ibid.*

⁴ http://en.wikipedia.org/wiki/Uniform_civil_code_of_India (Last accessed on September 02, 2010)

the importance and necessity of uniformity in codification of Indian law⁵ relating to crimes, evidences, contract etc., but it recommended that personal laws of Hindus and Muslims should be kept outside such codification.⁶ Attempts to reform Hindu law by legislative processes commenced during British period. Reforms such as The Caste Disabilities Removal Act, 1850, the Hindu Widow Remarriage Act, 1856, the Hindu Inheritance (Removal of Disabilities) Act, 1928, the Hindu law of Inheritance (Amendment) Act, 1929, the Hindu Women's Right to Property Act, 1937, the Hindu Married Women's Right to separate Residence and Maintenance Act, 1946 were all enacted to give relief to those who were not content to abide by ancient shastras. The Hindu Law Committee was appointed in 1941 to look into a comprehensive legislation covering all Hindu laws.⁷ This committee ceased to function after sometime due to war. It was revived in 1944 under the chairmanship of Sir B.N. Rau and recommendations of Rau committee were given effect by a series of acts passed in 1955 and 1956, to regulate marriage succession, guardianship and adoption. These were the Hindu Marriage Act, 1955, the Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act, 1956, and finally the Hindu Adoptions and Maintenance Act, 1956⁸. But since these major reforms in Hindu law were made after the Partition in 1947, these had not brought any effects on the Hindu Laws prevalent in Pakistan and Bangladesh and hence at present these four enactments are not applicable in Bangladesh. After

⁵The enactments made in undivided India before the partition of 1947 are applicable to India, Pakistan and Bangladesh unless expressly mentioned.

⁶Anderson, Michael A. (1996) *Islamic Law and the Colonial Encounter in India*. <http://www.wluml.org/english/pubs/pdf/occpaper/OCP-07.pdf>. (Last accessed on September 10, 2010).

⁷Bilimoria, Puroshottam. *Muslim Personal Law in India: Colonial Legacy and Current Debates*. <http://www.law.emory.edu/IFL/cases/India.htm> (Last accessed on September 10, 2011)

⁸Chandra, Bipan. (2000) *India after Independence 1947–2000*. New Delhi.

partition in 1947 while there were major legislative changes in India as regards Hindu Law there were close to none in the then Pakistan. After the independence of Bangladesh in 1971, this trend continues and significant legislative reforms to Hindu Laws are negligible. The Hindu Law of Bangladesh thus, generally remains at the position the British left it in 1947⁹

As regards Muslim Law, added to the classical religious sources, we have statutory laws enacted by the legislative organ of the state which have supplemented, changed or reformed the application of personal laws which have made significant contribution to the interpretation, clarification and reformation of religious law.¹⁰ The most important legislative reforms which affect Muslims in Bangladesh are the Dissolution of Muslim Marriages Act, 1939, The Muslim Family Laws Ordinance, 1961, The Muslim Marriages and Divorces (Registration) Act, 1974 and the Family Courts Ordinance, 1985. In the field of Muslim personal law there have been many reforms in Bangladesh. For the minorities, the orthodox religious laws and the British colonial enactments are retained in the case of personal laws of the Hindus, Christians, Buddhists and the indigenous communities. Despite the reforms of Muslim law, the existing personal laws of Muslim, Hindus and other religions are discriminatory, inconsistent and outdated to a great extent.

The whole matrix of these problems lies in the pluralistic and complex legal system of Bangladesh. In cases of family or

⁹ Menski, Werner F. and Rahman, Tahmina (1988) *Hindus and the Law in Bangladesh in South Asia Research Vol.8, No.2, November 1988 pp. 111-131 at p.1*

¹⁰ Huda, Shahnaz, (2002) *Legal Rights of Women in Marriage and its Practice in Bangladesh*. Paper presented at the dialogue on “Islam & Women: Shariah Law” organized by FOWSIA; 6 July 2002

personal matters, women in Bangladesh are burdened by a twofold standard, first on the basis of religion, and then on the basis of sex. The idea of a uniform system of laws for all citizens of the state irrespective of religious belief or gender in consonance with the high ideals of the Constitution and the International instruments of human rights comes forth from this disparity of treatment on the basis of gender and religion.¹¹ Leading non-Government Organizations on human rights and legal aid, the Bangladesh Mahila Parishad (BMP); and Ain -O- Salish Kendro (ASK) have been working for a long time to formulate a Uniform Family Code. To envisage their demand these two organizations formulated a draft Uniform Family Code.¹²

In a reference by the government towards the possibility of framing of a Uniform Family Code for all communities of Bangladesh relating to marriage, divorce, guardianship, inheritance etc. the Law Commission of Bangladesh submitted a report on July 18, 2005. In this report The Law Commission rejected the idea of Uniform Family Code contemplating it to be contrary to the religious sentiment, faith and beliefs of the people of the country.¹³

An Overview of The Personal Laws of Bangladesh

Bangladeshi legal system is a mixed arrangement of laws that consists of combined influence of indigenous Indian, Moghul and English legal imprints. Upon independence in 1971, Bangladesh inherited this vast mixed body of jurisprudence. By the Bangladesh (Adaptation of Existing Bangladeshi Laws) Order 1972, this large compendium of laws was adopted and made applicable for the

¹¹ *Supra* note 3 at p.4

¹² This proposed Uniform Family Code is published by Bangladesh Mahila Parishad, 10/B, Shegunbagicha, dhaka-1000 in April 1, 1993

¹³ <http://www.lawcommissionbangladesh.org/reports/69.pdf> (Last accessed on December 20, 2010)

governance of Bangladesh. Broadly speaking, the legal system of Bangladesh is categorized in two distinct branches. One is Constitutional Law and other is General Law. The General Law consists of, but is not limited to, civil and criminal laws. The personal laws or family laws are subsumed under this General Law category. For the most part, family laws are governed in the form of civil laws. But areas covering marriage, divorce, dower, maintenance, guardianship, custody, inheritance and restitution of conjugal rights are governed separately by each religious community's 'religious-personal law' system. Citizens of Bangladesh are identical in all respects as far as their rights, duties and legal status are concerned. It is only in the matter of personal relationships or family matters that a gulf of differences arises.¹⁴ Personal laws govern important aspects of family life in Bangladesh. Matters such as divorce, marriage, maintenance, custody, adoption and so forth are determined for Muslims by Muslim law, for Hindus by Hindu law and for Christians by Christian law. The same rule applies in the case of other religions.¹⁵

Precisely, the following laws generally embrace the personal laws pertaining to the three religious communities:

Muslims:

- a) The Muslim Personal Laws (Shariat) Application Act, 1937
- b) The Dissolution of Muslim Marriages Act, 1939
- c) The Muslim Family Laws Ordinance, 1961
- d) The Muslim Family Laws Rules, 1961

¹⁴ *Supra* note 3 at p.2

¹⁵ Huda, Shahnaz (1998), "Double Trouble": *Hindu Women in Bangladesh- A Comparative Study*, in the Dhaka University Studies Part-F, Vol. IX (1) pp. 111-133 at p.112

- e) The Muslim Marriages and Divorces (Registration) Act, 1974
- f) The Muslim Marriages and Divorces (Registration) Rules, 1975

Hindus:

- a) Hindu Widow's Remarriage Act, 1856
- b) Hindu Disposition of Property Act, 1916
- c) Hindu Inheritance (Removal of Disabilities) Act, 1928
- d) Hindu Law of Inheritance (Amendment) Act, 1929
- e) Hindu Women's Right to Property Act, 1937
- f) Hindu Marriage Disabilities Removal Act, 1946
- g) Hindu Married Women's Right 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

Legislative activism in recent years has brought about a number of important legislative instruments which allow certain laws to be uniformly applied in the personal matters of all citizens, irrespective of their religious traditions. These enactments include inter alia:

- a) The Special Marriage Act, 1872
- b) The Guardians and Wards Act, 1890
- c) The Child Marriage Restraint Act, 1929
- d) The Family Courts Ordinance, 1985
- e) The Family Court Rules, 1985
- f) The Dowry Prohibition Act, 1980

Personal Legal System: Persistent Disparities

Bangladesh is a country that derives an important measure of its national identity from its religious character.¹⁶ Islam is the largest religion of Bangladesh; Muslims constitute 89.5 % of the population followed by Hindus who constitute 9.6 %. The remainder of Bangladeshis practices other religions such as Buddhism and Christianity.¹⁷ Personal laws govern important aspects of family life in Bangladesh. Matters such as divorce, marriage, maintenance, custody, adoption and so forth are determined by each religious community's 'religious-personal law' system. Therefore, people of different religions are not treated equally on the same kinds of issues. Many of the personal laws are not gender-sensitive, codified and do not accord to the demand of the time. Political use of religion, patriarchal interpretation of existing progressive laws and the persistent disparity and anomalies in the different personal laws leave the Bangladeshi women's lives in a subjugated state. In the case of Bangladesh where we have a system of pluralist society with diversity of

¹⁶ Roy, Asim (1983). *The Islamic Synergetic Tradition in Bengal*, Princeton University Press, pp.15-16

¹⁷ See, http://en.wikipedia.org/wiki/Religion_in_Bangladesh (Last accessed on November 26, 2011)

ethnicity and religious origin, gender discrimination and anomalies are evident.

As regards marriage, polygamy/bigamy is allowed for Muslim and Hindu/Buddhist husbands. Under the Hindu law unlimited polygamy is permitted for males while polyandry for females is prohibited. In India however, by virtue of Hindu Marriage Act, 1955, monogamy has been established and bigamy is made punishable both for the male and female. Section 11 of the Act makes a bigamous marriage null and void and Section 17 makes it a penal offence. Other changes made to the laws on Hindu marriage in India include the legalization of inter-caste marriages which continues to be forbidden in Bangladesh. As far as capacity is concerned, only a person who has attained majority can enter into a marriage contract. Muslim law however recognizes the right of guardian to contract marriage on behalf of a minor. A woman is deemed to have reached majority upon the attainment of puberty and as a major, she alone has the right to consent to her marriage. In 1929, the effort was first made to enact a minimum age of marriage which would be uniform, and would apply to all communities of the then undivided India. Due to the fear of backlash from these communities, the Child Marriage Restraint Act, 1929 dealt with punitive measures and could not declare marriages, where the parties were below a certain age, void. In 1929 the minimum age was set at 14 for girls. In 1961 by virtue of the MFLO the age was raised from 14 to 16 and by the Child Marriage Restraint (Amendment) Ordinance to 18 in 1984.¹⁸ Hindu law permits child marriages and though the Child Marriage Restraint Act, 1929 limits the marriage of children by making it a punishable offence, it does not affect the validity of such marriage.

¹⁸ Huda, Shahnaz (1994) “*Untying the knot*”-*Muslim Women’s Right of Divorce and Other Incidental Rights in Bangladesh* in the Dhaka University Studies Part-F, Vol. V (1): pp.133-157 at p.137

Unlike the Muslim girl, a Hindu girl has no option on reaching puberty to repudiate the marriage. Child marriages and the marriage of minors with the consent of a parent or guardian are recognized under the Christian Marriage Act, 1872, as well as the Code of Canon Law. 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. Thus Section 19 of the Christian Marriage Act, 1872 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.¹⁹ As under age marriages are allowed under the religious laws and statutory laws did not declare such marriages as void, the practice of child marriage is rampantly continuing leaving the lives of the teenage girls at stake. As far as registration is concerned, although Bangladeshi law provides for registration of Muslim marriages²⁰ through legal mechanisms, albeit faulty, there are no provisions at all for the registration of Hindu marriages.²¹ The lack of proof of marriage is causing considerable difficulty to Hindu women in Bangladesh who seek to validate their rights.

Muslim marriages may be dissolved by the death of the spouse, by the act of parties or by judicial process. Since Islam considers divorce to be distasteful but nevertheless a necessary evil, there exists the scope of reconciliation between the parties in most cases. The various forms of divorce are covered by Section 7 of the Muslim Family Laws Ordinance, 1961, Section 5(a) of the Family Courts Ordinance, 1985 and the Dissolution of Muslim Marriages Act, 1939. The primary and unfettered rights of dissolving the marriage lie with the husband who can according to religious law

¹⁹ *Supra* note 3 at p.47

²⁰ The Muslim Marriages and Divorces Registration Act, 1974

²¹ Huda, Shahnaz (1999). *Registration of Marriage and Divorce in Bangladesh, A study on Law and Practice*; Bangladesh Legal Aid and Services Trust (BLAST), Dhaka.

pronounce talaq. In the case of talaq the wife's consent is not required, and the declaration of talaq is extra-judicial, in no way subject to any external check.²² The Dissolution of Muslim Marriages Act, 1939, provides a woman with a number of specific grounds for seeking a divorce.²³ She may obtain a decree for the dissolution of her marriage without necessarily losing her right to dower²⁴ if she can invoke one or more of the grounds enshrined in the Act. The Muslim Family Laws Ordinance, 1961 has attempted to make the effects of the *talaq-al-bida'* a less precipitate.²⁵ Section 7 enumerates various restrictions to unilateral, arbitrary and unencumbered divorce by husbands. By virtue of this enactment no divorce will become effective from the moment of pronouncement. Notice must be given to the Chairman of the Arbitration Council, who will call a meeting of both parties about reconciliation.²⁶ A copy of the notice must be supplied to the wife.²⁷ Divorce is legally effective even in the absence of proof of constitution of Arbitration Council.²⁸ The divorce will be effective after 90 days even if no such committee was formed and no attempts made at reconciliation. The date of the receipt of notice by the Chairman is the date from which the 90 days will run irrespective of the fact that the other party may have been notified later.²⁹ This is a gross procedural defect because there may be cases where the party initiating the divorce deliberately delays the serving of notice to the other party so as to deprive him/her from

²² Pearl, David (1987) *A Text Book on Muslim personal Law*, 2nd Edition; Croo, Helm, London at p.100

²³ Section 2 of the Dissolution of Muslim Marriages Act, 1939 (as amended up to 1986)

²⁴ *Ibid.* Section 5

²⁵ *Abdul Kadir v. Salima* (1886) 8 ALL. 149

²⁶ Section 7(3) of the MFLO, 1961

²⁷ Section 7 (1) of the MFLO, 1961

²⁸ *Abdul Aziz vs Rezia Khatoon*, 21 DLR 733

²⁹ *Op.cit.* Huda 2002.

accessing to the Arbitration Council. The wife is entitled to her dower and maintenance until the divorce becomes effective. She is required, however, to observe *iddat*. The MFLO, 1961 legally abolished the need for an intervening marriage; commonly known as '*Hilla*' marriage with a third person required by the religious law for a woman before she can remarry a husband from whom she has been divorced unless such termination is for the third time so effective.³⁰ The rights of women in Islam regarding the right to divorce are not equal. The man still has unfettered right to divorce his wife whereas the woman has: in the case of *talaq-e-tafweez*, to depend on her husband's delegation of the right; in the case of *khul*, where the husband does not consent, to convince the Court that the marriage has transgressed the bounds prescribed by Allah; and in the case of *faskh* or judicial rescission to involve oneself in costly and complicated legal procedures.³¹ Even in the case of judicial dissolution of marriage, a distinct disparity exists between Muslim men and women in relation to the right to divorce. A man can obtain a divorce under any circumstance by pronouncing *talaq*, giving notice to the Arbitration Council and waiting for 90 days to take it effect. A woman, on the other hand, who has not been delegated the right of divorce, must have recourse to a court of law and prove one or more of the grounds stipulated. This process is not only inconvenient but also time-consuming, expensive and in most cases socially humiliating for the woman and her family.³² The social stigma attached to divorce is so pernicious for women as opposed to men, that a woman in many cases is compelled to remain with her husband under torture and suppression leading a life of jeopardy.

³⁰ Section 7 (6) of the MFLO, 1961

³¹ Vesey, Fitzgerald, Seymour (1931) *Muhammadan Law: An Abridgement*, Oxford University Press, London. at p.154

³² *Supra* note 3 at p.25

The dismal condition of the legal status of a Hindu woman is more evident in the case of divorce as divorce for Hindus is not possible in Bangladesh. Under no circumstances a Hindu woman has the recourse to bring a suit for dissolution of marriage. In reality, this means that many Hindu women in Bangladesh lead lives of abject misery in cases of abandonment by the husband who can marry as many wives as he wishes. The deep embedded gender biasness in Hindu law on the question of dissolution of marriage relegates women to a role of service providers, without any statutory rights. The most she may get is limited relief under the Hindu Married Woman's Right to Separate Residence and Maintenance Act, 1946 under Section 2 of which she is entitled to separate residence and maintenance from her husband on one or more of the grounds stipulated in the Act. A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceased to be a Hindu by conversion to another religion or is living apart without justifying causes. Many of the disabilities of Hindu women have been removed in India. By the enactment of Hindu Marriage Act, 1955 bigamy is made punishable offence. This Act provided for the registration of marriage and made scopes for bringing a suit for divorce on certain grounds. The existing Hindu law in Bangladesh is a violation of the Universal Declaration of Human Rights, 1948 which declares under Article 16(a) that the right to marry and divorce is a Human Right for all.

The Divorce Act, 1869 deals with the dissolution of Christian marriages. Section 10 of the Act lays down the grounds upon which suit for dissolution of marriage between Christian parties may be sought. Although the husband may file petition simply on the grounds of adultery, a Christian wife has to prove not only simple adultery but also other issues when she wishes to dissolve her marriage due to adultery. The discrimination between men and women is apparent because women cannot petition for divorce on grounds of adultery alone. This was challenged in the Madras High

Court in Dwarakabai's case. The Court adopted an extremely discriminatory posture and ruled:

Adultery by a man is different than adultery by wife. A husband cannot bear a child and make it legitimate to be maintained by the wife. But if the wife bears a child the husband is bound to maintain³³

According to the Divorce Act 1869, adultery simpliciter by the husband would not entitle a wife to dissolution of marriage, though adultery by the wife is an important weapon in the hands of the husband to get the marriage dissolved. Moreover, under Section 34, for this Act, a husband may sue the co-respondent for damages; not by way of punishment but for compensation for the loss of his wife. A wife, however, has no such redress on the same ground. The Law Commission of Bangladesh, however, submitted a draft of proposed amendment to the Divorce Act, 1989 to the Ministry of Law on 19th February, 2006 with the view to bring substantial change, relief and speedy justice to Christian women who are currently going through a complicated, restricted and time-consuming process of dissolution of marriage.³⁴

A Muslim mother is never a legal guardian of her child; she can only claim custodianship in limited circumstances. In Hindu and Christian law also, the mother's right to guardianship is secondary to the father's right. Under Hindu law, only men have the right to adopt, that too only a male child who will maintain the family line of succession.

As far as Muslim women are concerned, except for a few exceptional cases, most women inherit half of their male counterparts e.g. the daughter inherits half of what the son

³³ *Dwarakabai Vs. Prof. Mainam Matthews*, AIR 1953 MAD 792.

³⁴ See the detail draft of the proposed Amendment to the Divorce Act, 1869 at <http://www.lawcommissionbangladesh.org/reports/72.pdf>

inherits.³⁵ A Bangladeshi Hindu woman's right to inheritance is non-existent. Under the Dayabagha law, the right to inherit arises on the heir's capacity to confer or offer spiritual benefit to the propositus. A widowed, sonless, or childless daughter can not inherit, as she can not afford spiritual benefit through a son.³⁶ A widow's life-estate generally means that she is not entitled to alienate the immovable property inherited by her but only that she has the power of disposal of the income of the property. She acquires merely a very limited estate, over which she has a restricted power of alienation, and on her death or surrender, it reverts to the line of the last male owner.³⁷ In India, the Hindu Succession Act, 1956 brought revolutionary changes in the inheritance law of Hindus. In a land-hungry country like Bangladesh, inequalities arising from inheritance rights perpetuate women's disadvantaged position perhaps more crucially than any other areas of family law. Already a number of reforms have been undertaken, mainly through the MFLO, 1961, to ameliorate some areas of discrimination for Muslims. For instance, Section 4 of this Ordinance changed the rule where the grandchild could not inherit their deceased parents' property if the grandparents are alive. By incorporating 'the Doctrine of Representation', now the grandchildren can inherit the same share as their deceased parents would have inherited. Nevertheless, the position of women has not benefited in any significant way from such piecemeal reforms.³⁸ The Hindus in Bangladesh belong to the Dayabagha School. Since the laws governing Hindus in Bangladesh date back to the pre-

³⁵ For more see Huda, Shahnaz (1998), "Women's Property Rights in Bangladesh: Effect of Religion and Custom" in *Development Issues Across Regions: Women, Land and Forestry*; Wickramasinghe. Anoja (editor); CORRENSA, Peraduniya, Sri Lanka. pp.294-308

³⁶ Rakshit, Mridul Kanti (1985). *The Principles of Hindu Law—personal law of Hindus in Bangladesh and Pakistan*; Chittagong at p..391

³⁷ *Op. cit.* Pereira (2002) p.45

³⁸ *Op. cit.* Pereira (2002) at p.38

1947 period, when it was part of the undivided subcontinent, Hindu women in Bangladesh continue to face disabilities due to application of ancient discriminatory laws.

There are at least twenty-seven different documented tribes in Bangladesh and they belong to about six linguistic categories.³⁹ In some sections of the tribal populations matriarchy is the norm, thus problems evolving in the personal sphere are somewhat different from those under scrutiny herein, requiring a different matrix of assessment. A large part of the ethnic community belongs to the Christian and Hindu faiths. The Buddhists in Bangladesh have no distinct personal or civil law of their own and that from time immemorial they have followed the Hindu religious law and customs in spite of the fact that they renounced the Hindu religion.⁴⁰

The Family Courts, which are constituted under Family Courts Ordinance, 1985 to dispose of disputes arising out of family matters under the respective personal laws, lack extensive jurisdictions.

GENDER DISPARITIES IN PERSONAL LAWS: A QUEST FOR REDRESSING MECHANISMS

The personal laws of different religious faiths applied in Bangladesh are inconsistent to each other and contain ingrained inequalities. Women are evidently subjected to more vulnerability in this discriminatory personal law system. Because of the persistent disparity in treatment and patriarchal character of personal legal system, the women are prone to exploitation and

³⁹ See R.W. Timm (1999). *Ethnic and Religious Minorities in Bangladesh, in state of Human Rights: Bangladesh*. CCHR.B.

⁴⁰ Huda, Shahnaz (1998), *Custody and Guardianship of Minors in Bangladesh in Gender in Law*; Ahmad, Tahmina and Khan, Md. Maimul Ahsan(editors); ADTAM Publishers, Dhaka at p.34

discrimination as regards marriage, divorce, guardianship or inheritance. Bangladesh is not absolved under its Constitution or its commitments under International Human Rights Law from upholding gender equality between all its citizens in all spheres of their lives.

Gender equality and non-discrimination have been guaranteed by the Constitution of Bangladesh. Articles 27, 28, 29 of Part III (Fundamental Rights) of the Constitution of Bangladesh embody various provisions relating to equal treatment of women with men:

- a) Article 27 : All citizens are equal before law and are entitled to equal protection of law.
- b) Article 28(1): The State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex or place of birth.
- c) Article 28(2): Women shall have equal rights with men in all spheres of the State and of public life.
- d) Article 28(3): No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution.
- e) Article 28(4): Nothing in this article shall prevent the State from making special provisions in favour of women or children or for the advancement of any backward section of citizens.
- f) Article 29(1): There shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic.

Article 7 of the Constitution states that it is the supreme law of the land and any law which is inconsistent with it shall be void.

Further more, Article 26 provides that all laws inconsistent with the fundamental rights shall be void.

Along with a number of other states, Bangladesh too is culpable for using the dichotomy of “public” and “private/personal” spheres. In Bangladesh, however, there is a clear demarcation between the “public” and the “private” or “personal”, with family affairs falling under the personal laws governed by religion, where the State is reluctant to be involved. Ironically, the constitutional protection of equality of sexes does not extend to family laws. The Fundamental Principles of State Policy, although not judicially enforceable, do give preference to the religion of the majority of the population. By the Proclamation Order No.1 of 1977 under President Ziaur Rahman, Bangladesh has emphasized the element of Islam. Under Article 8 of the Constitution it is contemplated that absolute trust and faith in the Almighty Allah shall be the basis of all actions. This shows that the Constitution itself is biased towards a particular religion. However by a recent judgment, the Appellate Division of the Supreme Court of Bangladesh declared the 5th Amendment to the Constitution illegal. The Court ruled that the original constitution of 1972 has been automatically restored and the four state principles including secularism have been automatically restored following the SC Judgment on the 5th Amendment.⁴¹

Bangladesh is under an obligation to comply with the norms and standards set by International human rights treaties and conventions. Bangladesh has undertaken this obligation by acceding and ratifying diverse International Human rights treaties. The Universal Declaration of Human Rights adopted in 1948, continues to serve as an important touchstone for state and individual actions worldwide on matters of life, liberty and the

⁴¹ vide Civil petition for leave to Appeal Nos. 1044 & 1045 of 2009

pursuit of happiness. The cardinal among the principles enshrined in this Declaration is the duty not to discriminate on the basis of gender.⁴² The United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) of 1979 purports to guarantee equal rights to women.⁴³ The ratification of the CEDAW by Bangladesh in 1989 is a concrete endorsement of the government's seriousness to carry forward the process of bringing to a common level of legal status as citizens, removing the differences and discrepancies that beset in the outdated systems.⁴⁴ As of May 2009, 186 states have ratified or acceded to the treaty.⁴⁵ However, originally, Bangladesh had entered reservations on four important provisions of CEDAW: Articles 2, 13(a), 16(1) (c) and 16(1) (f), denominating these provisions contrary to the personal laws of the State and contradictory to the socio-cultural ideology of Bangladeshi society. But in July 1997, it had withdrawn its reservations on Articles 16(1) (c) and 16(1) (f). It has been argued recently that the reservation is incompatible with the object and purpose of the Convention and also conflicts with the existing international obligations under the UN Charter and other international instruments.⁴⁶ The reservations submitted by Bangladesh, therefore, impinge upon the very core aim and objectives of the Convention itself.

⁴² *Niaz Bi vs. Fazal Ilahi*. PLD 1953 Lah. at p.104

⁴³ On this Convention see for example Tinker, C.(1991) "*Human Rights for Women: The UN Convention on the Elimination of All Forms of Discrimination Against Women*", Human Rights Quarterly, pp.32-43

⁴⁴ The Study Team, *Marriage, Inheritance and Family Laws in Bangladesh: Towards a Common Family Code*, Women For Women: A Research and Study Group, Dhaka at p.13

⁴⁵ http://en.wikipedia.org/wiki/List_of_parties_to_the_Convention_on_the_Elimination_of_All_Forms_of_Discrimination_Against_Women (Last accessed on November 24, 2010)

⁴⁶ Hossain, S. (1994). "*Equality in the Home: Women's Rights and Personal Laws in South Asia*", in Cook J.R. (ed) pp.465-494

Bangladesh acceded to the ICCPR and ICESCR in 1998 and Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage in 1998 with reservations stating that these treaties would be applied in accordance with the Personal Laws of different religious communities of the country. In spite of the government's international commitments, policy decisions are yet to be taken in favour of a Uniform Family Code in Bangladesh.

REFORMS OF PERSONAL LAWS IN GLOBAL SPHERE

Many predominant Muslim countries brought revolutionary reforms in the matters of Shari'a and general Islamic personal laws which buttress the argument that the codification and reformulation of religious personal laws are possible in order to bring cohesion in national legal systems and to be in conformity with the universal precepts of justice, equality and fairness. Algeria, Egypt, Indonesia, Iran, Iraq, Jordan, Malaysia, Morocco, the Sudan, Turkey, Somalia and Tunisia are glaring examples of Muslim majority countries grappling with modernistic approaches in bringing reforms to their religious personal laws. Malaysian Islamic Family Law has gone a long way in institutionalizing a system of recompense to Muslim women arbitrarily divorced by husband. In the 1920s, Turkey abandoned the Shari'a law altogether in favour of the Civil Code. Egypt's Civil Code too is an adaptation of the Swiss Civil Code.⁴⁷ In a more radical move, Tunisia also abolished the husband's unilateral right to divorce. With the exception of Saudi Arabia, most predominantly Muslim countries have been able, despite increasing resistance from religious extremists, to amend personal status laws, albeit often in piecemeal fashion.⁴⁸

⁴⁷ Pereira, Faustina (2002), *The Fractured Scales*, STREE, Calcutta, at p. 115

⁴⁸ *Ibid* at p.116

UFC: PROSPECTS AND PROBLEMS IN THE LIGHT OF VIABILITY

The adoption of a uniform Family Code is one of the most contentious issues in present Bangladesh. There seems to be two very contradictory streams of thoughts circulating in Bangladesh. One segment, stubbornly refusing to admit the scope or possibility of reforms or changes to the religious personal laws while the other part advocating for a secular or uniform system of law to be applied to all citizens irrespective of religious identities. The concept of Uniform Family Code has been a concern of civil society over the last two decades and proactively advocated by different organizations for its application to all citizens of Bangladesh. Since the mid-1980s, particularly after the Third International Conference on Women, held in 1985 in Nairobi, the Bangladesh Mahila Parishad, a pioneering body for the women's movement in Bangladesh, began to appraise the concept of a Uniform Family Code for Bangladesh.⁴⁹ Soon after this concept was officially incorporated into its agenda, several other women's rights organizations, particularly Ain O Salish Kendra, Bangladesh Legal Aid and Services Trust (BLAST), BRAC etc. launched drives for building grass-root awareness of women's right. In 1993, the Bangladesh Mahila Parishad brought out for the first time a draft model of a Uniform Family Code. In 1996, the Bangladesh Mahila Parishad and Ain o Salish Kendra jointly brought out a draft of an improved version of UFC. Since the proposition of Uniform Family Code, the controversies and heated debates go on continuing regarding its viability and application. The proposed Uniform Family Code has been subjected to severe criticism and resistance by the conservative sections of the community in Bangladesh.

⁴⁹ *Ibid* at p.188

The demand for a Uniform Family Code has its roots in the ingrained inequalities and discrimination which pervades in the religious personal laws. Being a fusion of several systems, the legal system of Bangladesh contains a variety of contradictions. It has been evident from the earlier appraisal of different personal laws of Bangladesh that many of these religious-personal laws are inconsistent with the equality provisions of the Constitution where women are subjected to discrimination and subjugation. In a personal interview, Sultana Kamal⁵⁰, the Executive Director of Ain o Salish Kendra opines:

The underlying assumption of all the personal laws is that, throughout their lives, women will be economically dependent on men. There is a patriarchal influence on the law, which assumes a social/gender division of labour with women attending to the children and household, and men providing for and 'maintaining' their women.

In an urge to adopt a Uniform Family Code, Sultana Kamal added:

Many Muslim countries have ratified CEDAW, what are needed is political will and the courage to break tradition. Our lawmakers must make a clear decision about their compliance line, whether it is religion or liberation of people.

It is well conceived that a properly formulated code of uniform laws, based on the universal norms of human rights and in compliance with the principles of equality and non-discrimination enshrined in the Constitution would serve as a vital instrument in achieving gender equity, justice and national development. It is

⁵⁰ *Sultana Kamal* is an Advocate and human rights worker. She was an adviser to the interim Caretaker government of Bangladesh. She can be contacted at ask@citechco.net

argued that though the Muslim personal laws have gone through significant reforms in Bangladesh, the Hindu personal laws are left untouched. Several liberals and women's groups have argued that the Uniform Family Code gives women more rights and ensures gender equality. Bangladesh is under an obligation under its Constitution and different international instruments to ensure gender justice and not to discriminate against the citizens on the basis of sex or religion. It has now been widely argued that secularism has been restored in our Constitution as the basic principle of state policy following the 5th Amendment judgment and now there is no constitutional bar in adopting a Uniform Family Code. The government of Bangladesh has ratified Article 15 of CEDAW without reservations, meaning that Bangladesh will comply with the gender equality in all spheres of public as well as personal life. One strong argument about the codification and uniformity of personal and customary laws is that these laws lack specific guidelines and are often misinterpreted by the community elite such as the Imam, Purohit, Matbor or other influential persons. It is equally applicable to the tribal communities where the judgments of the headman vary from person to person. Different human rights groups have also been lobbying for the implementation of the Uniform Family Code. Moreover, many Islamic countries have codified and reformed Muslim personal Law to check its misuse. It is noteworthy that a significant number of tribal people are affirmative regarding the reform of personal laws of the indigenous people and therefore have called for changes to the system.⁵¹

⁵¹ Raja Devashish Roy (2004)-Defending Diversity-Case Studies-an extract from "*Challenges for Judicial Pluralism and Customary Laws of Indigenous People: The Case of the CHT, Bangladesh*". Arizona Journal of International and Comparative Law, vol.21.no.1, 2004

CONTROVERSIES CONTINUE

The proposition of Uniform Family Laws has been subjected to severe criticisms and resistance by the conservative society of Bangladesh. The opponents of Uniform Family Laws argue that this law purports to poke the religious sentiments. They feel that this code will affect the religious freedoms and sentiments of minorities. The reluctant group sees the adoption of such a proposed code as a challenge within mainstream Bangladeshi society due to the prevalence of religious conservatism.⁵² Fears have been voiced that such uniformity of personal laws may mean Hindulisation or Muslimisation of laws depending on which religion forms the majority.⁵³ There is no provision in the Constitution of Bangladesh like Article 44 of the Indian Constitution to secure for the citizens a Uniform Civil Code.⁵⁴ However, in spite of being a secular State and even after more than 60 years of independence, India was not able to adopt a Uniform Civil Code as per constitutional obligations due to political pressure and resistance from religious fundamentalists. Though after the 5th Amendment judgment it has now been argued that secularism has been restored in our Constitution as the basic principle of state policy, Islam still continues to be the State religion in Bangladesh. Bangladesh is a densely Muslim populated country and they are habituated to live their personal lives under the religious practices. The Muslim religious law originates from Quranic verses and from Sunnah, Ijma and Qiyas. The largest of the Muslim population of our country believes that the Quran is the revelation of Allah. Hence it is immutable and beyond the

⁵² The Study Team, *Marriage, Inheritance and Family Laws in Bangladesh: Towards a Common Family Code*, Women For Women: A Research and Study Group, Dhaka at p.95

⁵³ Huda, Shahnaz (1998), *Double trouble: Hindu Women in Bangladesh*, The Dhaka University Studies, Part-F Vol. IX(1), p.128

⁵⁴ Article 2A of the Constitution of the Peoples Republic of Bangladesh.

jurisdiction of any human being to amend or alter. Therefore it is apprehended that the Muslims of Bangladesh would rise in revolt as one man if they are asked to give up basic tenets of their faith. The arguments that come from the Hindu community are that it would undermine the Hindu social cohesion. They apprehend that it would encourage more Hindu women to convert to other religions and thus properties belong to the Hindu community will be taken away. It also relates to the economic based ownership/possession of land and immovable property. So it is more than a legal issue to them. Due to its historic evolution Hindu, Buddhist along with Tribal laws are dependent on custom and usages.

In an interview regarding the viability of Uniform Family Code in Bangladesh, Sanjeeb Drong⁵⁵ observed that this may not be applicable for the *Adivasi* community. He stresses:

The unique traditions of the *Adivasis* must be taken into consideration when forming a Uniform Family Code. Though traditional laws should not contradict national laws, a way must be found for them to fit in, and so, before a Uniform Family Code is put in place, the State should have meaningful dialogue with the *Adivasis*.⁵⁶

Bangladesh has a long heritage of personal or customary laws and it cannot be given up easily. Unless a broad consensus is drawn among different communities, the Uniform Family Code will remain a far-fetched and utopian idea.

⁵⁵ *Sanjeeb Drong* is a prolific writer, human rights activist and General Secretary, Bangladesh Adivasi Forum

⁵⁶ For details of the interview with *Sultana Kamal* and *Sanjeeb Drong*, see <http://www.thedailystar.net/magazine/2008/03/01/hr.htm>

In a reference by the government towards the possibility of framing of a Uniform family Code for all communities of Bangladesh relating to marriage, divorce, guardianship, inheritance etc. the Law Commission of Bangladesh submitted a report on July 18, 2005. In this report The Law Commission rejected the idea of Uniform Family Code contemplating it to be contrary to the religious sentiment, faith and beliefs of the people of the country. In this report Justice Mustafa Kamal, Justice Md. Sirajul Islam and Dr. M. Enamul Hoque negated the idea of a Uniform Family Code. They observed:

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 manners of application. All these religious or personal laws are based on religious injunctions, faith and beliefs. More so, the personal laws of all communities are sensitive, complex and 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 Common Family Code. Any such attempt is likely to cause injury to the religious sentiment, faith and beliefs of the people of the country. In view of the discussions above, our opinion is that there cannot be any Common Family Code for all the communities in our country as proposed by a few persons only which does not reflect the wish or opinion of all the people of the Country.⁵⁷

⁵⁷ see the detail of the report <http://www.lawcommissionbangladesh.org/reports/69.pdf> (Last accessed on October 20, 2011)

CONCLUSION:

In this matrix of problems, a secular Uniform Family Code has been demanded by the progressive quarters of the society. Their conviction is that Bangladesh is under an obligation to maintain the principle of equality under the Constitution and also in accord to international human rights mechanisms. On the other hand, this demand has encountered strong opposition and resistance by the traditionalists who believe that the religious law is God's law or eternal and no one has the authority to alter it. The Law Commission Report 2005 rejected the demand of framing the Uniform Family Code taking the shelter of S.2 of the Muslim Personal Law (Shariat) Application Act of 1937 and Articles 8(1) and 8(1A) of the Constitution. The heated debate over the adoption of a Uniform Family Code seems to be unending. There are those who feel that the personal laws should be codified instead of its present unwritten form so as to stop misinterpretation and arbitrary judgments. There are those who suggest the partial reforms to the personal laws in order to remove the inconsistencies and discriminatory provisions keeping the personal laws in its traditional religious shape. This denotes the harmonization of family laws. Some people on the other hand feel that personal laws should not be interfered with at all through legislative enactments and should be left to the people concerned. Raja Roy, the Chakma Chief, held the view that among these different opinions, the proposal for partial reform is the one that is likely to draw the strongest support within indigenous society.⁵⁸

The proposition of a Uniform Family Code is not a capsulated remedy for the complex sufferings of women. The crux of the matter is not that the laws for equality and non-discrimination do not exist but that the application of the laws are ineffective and the

⁵⁸ visit: www.jillani.org/LAW%20OF%20GUARDIANSHIP%20IN%20PAKI.
(Last accessed on October 29, 2011)

existing progressive laws are not being properly implemented due to procedural defects, patriarchal attitudes and political interest. Bold and pragmatic State action is the call of the day. The crying need of the moment is the wide ranging codification and legislative reforms to alleviate the discrepancies of treatment. We feel that a Uniform Family Code containing the high ideals of equality, equity and non-discrimination envisaged in the Constitution may be the best way for removing the persistent discriminations in the personal laws. No doubt, the realization of a common Family Code is a tough job, given the vast ideological diversity. We should understand that the people of Bangladesh are deeply attached to their religious faiths and culture and this inherent adherence can not be taken away overnight. It is only enlightened public opinion that will help fulfill the desire of uniformity of laws. Communal feuds, vote-bank politics, staunch fundamentalism are currently barriers to its realization but with time and tolerance they can be overcome. In the present day, existing non-discriminatory laws should be given effect and progressive reforms of personal laws are urgently be made keeping the existing religious-personal law system in its traditional shape. Besides the harmonious personal law system, there should be an optional secular system as well for the people who prefer it. In this manner the State need not disturb the already existing personal customary norms within each religion while at the same time leaving room for those who do not wish to be bound by religious personal laws. The adoption of a Uniform Family Code may not be possible right now but harmonization and reformation of personal laws will act as a catalyst for paving way envisioned uniformity of laws so as to ensure the principle of equality and development in the near future.