

ISSN 1991-8976

RAJSHAHI UNIVERSITY LAW JOURNAL



FACULTY OF LAW
RAJSHAHI UNIVERSITY
DECEMBER 2005

ARTICLES

Women's rights in the Nikahnama in Bangladesh : A critical study

An Application of Islamic Law in Bangladesh with Special Reference to Women

Real Estate-Its Defense System in Bangladesh: A Study

Internet Exposes a New Dimension in International Space: A Challenge to the Traditional Concept of Sovereignty

The International Criminal Court: A Remarkable Achievement Striving Against Global Political Setbacks

The Impact of Section 7 of the Muslim Family Laws Ordinance on the Validity of Talaq: A Legal Analysis

Muslim wives' right to maintenance in Bangladesh: the role of N.G.O's in Rajshahi District

Prevention of Crime in Islamic Criminal Law: Perspective Bangladesh

যৌতুক : একটি সামাজিক ব্যাধি

সড়ক দুর্ঘটনা ও ট্রাফিক আইন : প্রেক্ষিত বাংলাদেশ

আদালত অবমাননা, সাংবাদিকতা-প্রকাশনা ও তথ্যের অধিকার : পরিপ্রেক্ষিত বাংলাদেশ

বাংলাদেশের রাজনীতিতে পঞ্চম জাতীয় সংসদের কার্যকারিতা : একটি পর্যালোচনা

Abstract on the Project Changing Pattern of Trade Union in Bangladesh

Abstract on the Project Protection of Human Rights in Criminal Justice: Bangladesh Perspective

ISSN 1991-8976

Rajshahi University Law Journal

FACULTY OF LAW
RAJSHAHI UNIVERSITY

December 2005

Published by:

Dean

Faculty of Law
Rajshahi University
Rajshahi- 6205
Bangladesh

© Reserved by the Publisher

Cover Design & Printed by:

B T S Commercial Institute
Benodpur Bazar, Rajshahi

Printed at:

Barendra Printing Press & Packaging

Supora, Biman Bandar Road, Rajshahi. Mob.: 01715-361984

Subscription Rates

For Individuals: **Tk. 100.00 US\$ 20** (without postage)

For Organisation: **Tk. 150.00 US\$ 30** (without postage)

[Published in December 2006]

Rajshahi University Law Journal 2005

Editorial Board

Editor	Professor Dr. Begum Asma Siddiqua Dean, Faculty of Law, RU
Member	Professor Dr. A B Siddique Department of Law & Justice, RU
	Professor A F M Mohsin Department of Law & Justice, RU
	Professor Dr. M Rabiul Hossain Department of Law & Justice, RU
	Dr. Mohammad Abdul Hannan Department of Law & Justice, RU
	Sayeeda Anju Department of Law & Justice, RU

Rajshahi University Law Journal 2005

<u>Authors' Name</u>	<u>Article</u>	<u>Page</u>
Dr. Begum Asma Siddiqua	Women's rights in the Nikahnama in Bangladesh : A critical study	1-10
Dr. Gazi Omar Faruque	An Application of Islamic Law in Bangladesh with Special Reference to Women	11-20
Dr. Md. Abdul Karim Khan	Real Estate-Its Defense System in Bangladesh: A Study	21-30
Md. Morshed Mahmud Khan Mohammad Osiur Rahman Mohammad Mahabubur Rahman	Internet Exposes a New Dimension in International Space: A Challenge to the Traditional Concept of Sovereignty	31-52
Dr. Mohammad Abdul Hannan	The International Criminal Court: A Remarkable Achievement Striving Against Global Political Setbacks	53-68
Muhammad Ekramul Haque	The Impact of Section 7 of the Muslim Family Laws Ordinance on the Validity of Talaq: A Legal Analysis	69-86
Sayeeda Anju	Muslim wives' right to maintenance in Bangladesh: the role of N.G.O's in Rajshahi District	87-96
Dr. Mohammad Abdul Hannan M Sahal Uddin	Prevention of Crime in Islamic Criminal Law: Perspective Bangladesh	97-110
জোবাইদা সুলতানা	যৌতুকঃ একটি সামাজিক ব্যাধি	111-128
মোঃ আব্দুর রহিম মিয়া	সড়ক দুর্ঘটনা ও ট্রাফিক আইনঃ প্রেক্ষিত বাংলাদেশ	129-154
মুস্তাক আহমেদ মো: সাহাল উদ্দীন	আদালত অবমাননা, সাংবাদিকতা-প্রকাশনা ও তথ্যের অধিকার: পরিপ্রেক্ষিত বাংলাদেশ	155-170
ড. রাকিবা ইয়াসমিন	বাংলাদেশের রাজনীতিতে পঞ্চম জাতীয় সংসদের কার্যকারিতা : একটি পর্যালোচনা	171-200
A F M Mohsin	Abstract on the Project Changing Pattern of Trade Union in Bangladesh	201
Muhammad Faiz-ud-Din M Abdul Hannan	Abstract on the Project Protection of Human Rights in Criminal Justice: Bangladesh Perspective	202

Women's rights in the *Nikahnama* in Bangladesh: A critical study

Dr. Begum Asma Siddiqua^{*}

1. Introduction

The most celebrated event of human life is marriage. The right to marry is a mark of adulthood, symbol of social participation, associates with citizenship, relates to sense of belonging in family and community. Marriage promotes mutual care, support and commitment in human relationships. It is an important social institution by which the society affirms and celebrates inter personal love and commitment. Marriage for Muslims is both a religious rite and a civil contract. A Muslim marriage can be solemnised verbally without entering into a written contract. In Bangladesh, registration of Muslim marriages have been made compulsory by the Muslim Marriages and Divorces Registration Act, 1974 by completing a prescribed form called *nikahnama*. Contravention of this law is punishable with simple imprisonment which may extend to three months, or with fine which may extend to five hundred taka or with the both. The law does not declare a marriage invalid for non registration. With this law in application for more than thirty years in Bangladesh, mounting local awareness and media sensitization, most of the people have learnt to register their marriages yet a few fail to follow the law at their own impairment. This article aims to discuss the utility of a compulsory written document for marriage contract, drawbacks of the existing marriage contract, in compliance between the Islamic law and social reality, gender issues involved and finally suggest for amendments in the existing statutes related to Muslim Personal Law including the *nikahnama* thus strengthening the marriage contract against future unpleasant incidents in post marriage situations.

2. *Nikahnama*

Registration of Muhammedan Marriages and Divorces Act 1876 (Bengal Act),¹ made provision for registration of Muslim marriages, but registration

^{*} Professor, Department of Law and Justice, Rajshahi University, Rajshahi- 6205, Bangladesh.

¹ East Pakistan Code, 1963 Vol. 11. p.71; see 4.1 The Birth, Death & Marriages Registration Act, 1886 which was applicable to all the community was also optional.

under this Act was optional. Muslim Family Laws Ordinance 1961 made the registration compulsory and enjoined the *Qazi* (who solemnises marriage) on pain of punishment to report solemnisation of marriage to marriage registrar so that the marriage could be registered. The Muslim Marriages and Divorces Act, 1974 has repealed all the previous enactments and enjoined upon the licensed *Nikah* Registrars to register marriages. Although the provision of solemnising marriage by any other person exists, the practice has developed to call a *Nikah* Registrar to solemnise and register a marriage by filling up the prescribed form of *nikahnama*.

Nikahnama is a marriage document, marriage contract, marriage certificate or proof of registration of marriage for married couples in Bangladesh. It is embodied in the Register of Marriages Book in Form E under rule 24 (1) (i) of The Muslim Marriages and Divorces Registration Rules 1975.² It contains 25 clauses of which clauses 2,3, 9,10, 21 and 22 directly relate to the bridegroom's personal details and clauses 4, 5, 6,7 and 8 likewise relate to the bride's personal details. Clauses 1, 12, 23 and 24 relate to the place, date and *Qazis* name. Clauses 11, 13, 14, 15, 16 and 25 relate to the essentials of a Muslim marriage contract, i.e., offer and acceptance, witnesses and consideration of dower. Clauses 17, 18, 19 and 20 relate to any stipulation which may be inserted into the marriage contract. It seems by reading the *nikahnama* that the treatment to the bride and the bridegroom are differently made as to their marital status with obvious reasons behind it. With the abuse of Quranic injunctions by many people and the rise of feminism the *nikahnama* could be more equitably gender sensitive and more vocal as to the effects of manhandling the institution of marriage. The discussion on the various aspects of *nikahnama* and suggestions to improve the same will follow consecutively.

3. Importance of *Nikahnama*

Married and registered couples are issued with certificates which provide them with quick and easy way to prove their marital relationship status if challenged. Registration of marriage is a useful resource for anyone researching family history or posterity of any person. There are concrete advantages for the compulsory registration of marriages. The certificate is a

² see Marriage Deed.

government document which provides valuable evidence to a spouse accompanying his or her partner for a visit to a foreign country. A spouse can claim money from a bank deposit or life insurance policy if his or her partner failed to nominate the name of a beneficiary before death. This can be particularly important in medical emergencies when snap decisions must be made about treatment, visitation or funeral arrangements. Registration of a marriage would prevent child marriages and thereby sale of girls and trafficking, provided the parents and guardians remain cautious. Registration of marriage is a strong means to combat fraud, force or failure in marriage. The validity of marriage is not affected by non registration but non registration affects women the most. They are the victims of polygamous relationships and property disputes. Today, much of the violence women suffer is within marriage. It is a document for the future couple where numerous stipulations can be put by either party and protect their rights in particular the women.

4. Drawbacks of *Nikahnama*³

The *nikahnama* existing in Bangladesh is the one drawn during the promulgation of the Muslim Family Laws Ordinance, 1961. Without any change to this prescribed form it has made its place in the Muslim Marriages and Divorces Registration Act, 1974. With the passage of time it appears that this precious document needs amendment to ensure the effectiveness of law and protect the parties. There are few areas such as, age and marital status of the parties, financial condition of the bridegroom, stipulations, right to dissolve marriage etc. These areas are discussed briefly.

4.1 Age

The age for marriage in Bangladesh for a bride and bridegroom are 18 and 21 years respectively. Under the Child Marriage Restraint Act, 1929 under-age marriage is a punishable offence for the guardians, persons solemnizing such marriage and parties to the marriage if any one of them has attained majority. It was difficult in Bangladesh to determine the age of the parties as the birth of a child was hardly registered and many children never used to go to school. The Birth, Death & Marriages Registration Act, 1886 never made the registration compulsory and as such people in Bangladesh took the

³ This section is developed from the personal experience of the author.

liberty to give their option for it. At present the Bangladesh government has given emphasis on birth registration through the social welfare officers of the government and has introduced compulsory free primary education. It is mandatory to produce birth registration to get admission in a school. Even then there are many children who have never been to any school but these steps have enabled to determine the age of most of the children. Allocation of voter identification number by the Election Commission is also at vogue in Bangladesh. It is often heard that under-age persons are given voter identification number in Bangladesh. The number of children who do not go to school or under-age persons who produce voter identification number may be substantial in number. It is difficult to quantify a number as we do not have any proper statistics in this regard. It is submitted that voter identification number and birth certificate may to some extent ensure the majority of a person. It is suggested that the voter identification number and age according to birth certificate is included in the *nikahnama*. If a conflict between the two documents arise, the birth certificate may be given preference. In exceptional cases the expert opinion of pathologists may be sought by examining the bone age of the person.

4.2 Mehr and Mata'

It is proposed that the *nikahnama* inserts a clause mentioning the time frame within which the *mehr* or dower money should be paid and that it is proportionate to the husband's income. It should be sufficient for the wife to draw upon in case she is divorced. At present the husband agrees to pay a sum of *mehr* or dower money which is at least half or less than the dowry that he demands from the wife's family. It is difficult to execute the Dowry Prohibition Act, 1980 to dissuade a husband from demanding dowry.

It is suggested that the husband makes the dower payment immediately after marriage is solemnised so that it can be mentioned in the *nikahnama*. Moreover, it is suggested that the words of clause 13 of the *nikahnama* should be rewritten as 'Valuation of dower in terms of gold' instead of 'Amount of dower' as the value of currency is always getting devalued. An amount of dower fixed on the date of marriage loses its current value at a future date.

It is also suggested that payment of *mata'*, which is maintenance for a year or two, should be inserted in the *nikahnama* for failure of marriage provided the wife was innocent. Maliki and Shafi school of thought endorses the

concept of *mata'* in case of divorce.⁴ The divorcee wife will have some time to alleviate from hardship resulting from divorce and consequential loss of financial support.

A new clause should be inserted in the *nikahnama* for providing with the financial statement of the bridegroom. Among others this will help to determine and payment of the dower amount. In case of divorce, it will to some extent assist in determining *mata'* although a second financial statement would be necessary at that point of time.

4.3 Polygamy

The *nikahnama* contains a clause asking the husband about the existence of any wife and whether he has obtained the permission of the Arbitration Council for remarriage under the Muslim Family Laws Ordinance, 1961. There are many men who practise polygamy; they leave their former wives and their children without maintenance. Some of them often lie about their existing marital status and remarry. All that an existing wife can do is ask for full dower, complain against remarriage for which the husband may be convicted, and ask for her own divorce for this reason. None of these are solution to the destitute condition in which a wife is thrown. Her pride, self respect, aspirations of a conjugal life are reduced into dust. Sura Nisa categorically mentions about polygamy and the conditions related to such institution. The conditions are orphan child and occasion of war.⁵ It is suggested that the *Quranic* injunctions are strictly followed to protect the interest of the first wife so that polygamy is allowed only

- i) in those countries where war has broken down, provided the 'to be second wife' is at present a widow or she is an orphan;
The permission will continue for four years from the first date of war as things gain normalcy after a certain period of time,
- ii) or the exigencies of a situation calls for second marriage with the voluntary consent of the first wife.
- iii) the husband must be financially solvent.

Exigencies of the situation could be all such situation mentioned in the Muslim Family Laws Rules 1961, such as, sterility, physical infirmity, physical

⁴ Abdur Rahman I. Doi, *Shariah The Islamic Law*, London, 1984, p. 208

⁵ Abdullah Yusuf Ali, *The meaning of the Glorious Quran*, vol.I, p.179 fn.508, Lebanon, 1938

unfitness for the conjugal relation, wilful avoidance for restitution of conjugal rights or insanity, on the part of the existing wife. Whereas a wife will continue with her husband on any of the above grounds, a husband has a choice to enter into a second marriage. Given the *Quranic* injunctions, sentimental attachments and financial hardship, it is suggested that without the voluntary consent of the first wife no second marriage should take place.

To ensure financial solvency the Tax Identification Number (TIN) of the husband must be included in the *nikahnama*. Those who pay land taxes, copy of receipt of such taxes may be taken for those who does not have TIN. Yet there are a vast majority of people in Bangladesh who live below tax liabilities or are landless. They never pay any kind of tax whatsoever. The Court shall make all endeavour to satisfy itself about the financial solvency of these vast majority of people.

The application and permission to marry a second wife should be made through Family Court instead of Arbitration Council. The court will obtain a certificate in writing from the man as to his marital status. To protect the rights of the existing wife, it would be prudent for the court when considering the application to ensure that the rights of the present wife are not prejudiced by the subsequent marriage. Islamic law automatically recognises the contributions of a wife to the household and the estates. Provisions should be made for Family Court judges to wind up the first estate taking in consideration her contribution to the household, family, years of conjugal life etc., before allowing the husband to enter into a second marriage. It is suggested that the above proposed amendments are brought into The Family Court Ordinance, 1985.

The *Nikah* Registrar before solemnising or registering the second marriage should see and read the permission of the Court. A new clause should be added into the *nikahnama* stating whether the *Nikah* Registrar has seen and read the permission of the Court, to which he may say yes or no. Provision should be made to declare a second marriage void if the above conditions are not met with. In addition, the husband, the person solemnising such marriage, and the *Nikah* Registrar should be punished with imprisonment and fine. The imposition of fine and imprisonment must be deterrent enough so that people will not get allured by any offer.

4.4 *Talaq*

The Muslim Family Laws Ordinance, 1961 abolished triple *talaq* in one sitting and made provision to initiate divorce in *talaq ahsan* mode. It has also allowed a woman to initiate divorce if she has the delegated authority of *talaq-i-tafwid* or by *khula*. The Muslim Marriages and Divorces Registration Act, 1974 made the payment of the *mehr* or dower money mandatory by inserting it into one of the clauses of the *nikahnama*. Unfortunately none of these is practised in its mandatory form. The tradition of triple *talaq* even in wife's absence or without bringing it to her knowledge continues and is stuck with the rural community of Bangladesh. Most of the husbands do not bother to pay the dower during continuance of marriage or after utterance of *talaq* unless they are brought within the purview of law. Legal recourse has not filtered through the community and women continue to suffer arbitrary *talaq*. It is suggested that the clause on *talaq-i-tafwid* in the *nikahnama* be made mandatory. It is further suggested that all forms of divorce whether initiated by husband or wife must be considered in the mode of *talaq raji* keeping in conformity with the Muslim Family Laws Ordinance, 1961 and made final through Family Court only. This will make the procedure harmonious both for husband and wife. This proposed amendment will also dispense with the debate on *khula* mentioned in the Muslim Family Laws Ordinance, 1961 and fault theory of *faksh* mentioned in the Dissolution of Muslim Marriages Act, 1939.

5. Rights Awareness⁶

Few women know the law or the Constitution, many are illiterate and have not read the Quran. Many women are learning their *Quranic* and constitutional rights. Those who are becoming educated are starting to demand their rights to the grudge of a section of the religious community. There is a demand from various women and women based organisations that clerics should not be allowed to misinterpret *Quranic* verses for them. Women can read the Quran, understand it and interpret it. Women who are demanding reform of Islamic law from within Islam believes that the Quran has the most comprehensive knowledge about social and gender justice.

⁶ Some of the ideas have been developed by reading file <http://www.engender.org.za/publications/OralSubmissiononIslamicMarriagesBill.pdf>

More Muslim women must be made aware that the Muslim society under the influence of feudal social ethos never realised the revolutionary potential of *Qur'anic* teachings. Many more Muslim women should acquaint themselves thoroughly with *Qur'anic* teachings and Islamic law and launch a movement for reform and change. The majority of women remain unable to negotiate substantial protections for themselves, before the marriage, during the marriage, or at the dissolution thereof.

Young women should be made aware about their rights and duties embodied in the *nikahnama*. They should know their position before they sign the *nikahnama* to enter into the contract. They must be told that they can stipulate any condition in addition to dower. They can stipulate to regulate their future matrimonial property. In case of dissolution of marriage by divorce women can stipulate in their marriage contract for *mata'* in addition to *idda* maintenance and *mehr*. This Maliki and Shafi school of thought can be patched up into the present Hanafi school of thought within the process of *talfiq*, an important source of Islamic law. The amount of *mata'* may be determined with reference to the means of the husband, the circumstances of the divorce and the duration of the marriage. If necessary or convenient, the *mata'* may be paid in instalments. They should as well be taught that a contract cannot be vitiated or frustrated by a declaration of one party by pronouncing an unfettered right of *talaq*. The obligations of contractual parties can be dissolved by mutual consent or the interference of the court.

Women should be made aware that in case of divorce she can claim for household services rendered to the matrimonial home. She can claim from her husband to bear the delivery costs if she is divorced during pregnancy. The reason is divorce does not become final during pregnancy and maintenance of child is obligatory on the husband.

The *Nikah* Registrar must be trained to inquire effectively about the marital status of the parties willing to enter into a marriage contract. Provision should be inserted to ensure that the *Nikah* Registrar does not solemnise or register a marriage of a man who comes to marry for the second time without lawful authority. In addition to the court permission, The *Nikah* Registrar must undergo training in respect of legal proceedings as well as aspects of Muslim family laws in Bangladesh. The *Nikah* Registrar may be made guilty of an offence and liable on conviction to both imprisonment and

fine for violation of the proposed provisions of law. The *Nikah* Registrar ought to be held to higher standards of accountability and therefore the fine and the period of imprisonment must be made deterrent. The Muslim Marriages and Divorces Registration Act, 1974 must be amended for this purpose.

The Islamic Foundation should be contacted so that it make arrangements for the Imams to inform men, about the rights and duties conferred on men and women in Islam and Islamic law, through *khutba* (religious sermon) of *Jumma* prayer. The Imams must be trained for that purpose by the Imam Training Centre under the Islamic Foundation. Information session should be arranged for women to make them aware of their divine rights and duties.

6. Conclusion

The Muslims of Bangladesh are quite conscious today as a result of the mandatory provision of Muslim Marriages and Divorces Registration Act, 1974 to register their marriages. There are a very few from the present generation who may not have their marriage registered as a result of promiscuous relationship or false pretence of marriage. Today couples realize the importance of a formal document in every day life to claim various kinds of rights. Initiative of Bangladesh government, media publicity and grass root programmes by women organizations have created awareness among many people to send their children to schools, to conduct marriages in due age and register marriages. What could not be achieved as yet is eradication of dowry, triple *talaq* in remote areas, polygamy in respect of some people in some areas. The mass give in to dowry for a better prospect of their daughters. To oppose these social evils the *ulemas*, government and women organizations should come forward to educate both men and women the Islamic norms, *Quranic* teachings and statutory laws.

The Quran should be read and interpreted in its entirety. It cannot and should not be interpreted as and when it suits the patriarchal society. In interpreting the *Quranic* verses of Sura Nisa the conditions are overlooked and the permission is treated as a general one by the clerics. Although the Muslim Family Laws Ordinance 1961 and the Muslim Family Laws Rules, 1961 restrict the institution of polygamy, it is of no avail due to the misinterpretation of the clergies. It has to be asserted that orthodox Muslims' customs and traditions cannot be more important than the *Qur'anic*

injunctions. The decisions of the local clerics are highly influential. The problem with many among men is that they claim their right of small amount of dower, polygamy and triple *talaq* in the name of Islam but compel to grab dowry or leave their wives and children to move as vagabonds. The Acts and Ordinances mentioned in the text of the article should be amended in keeping with the spirit of justice and equity as embodied by the Quran. The Family Courts Ordinance should be radically amended to include *mata'* for women. *Talaq-i-tafwid* mentioned in the *nikahnama* should be made mandatory. Valuation of dower should be made in terms of value of gold. A financial statement of the bridegroom should be given during marriage. The *nikahnama* should be amended to include the provision of dower and financial statement. Before allowing a second marriage to the husband the first estate with first wife should be wind up. Before permitting second marriage the Family Court judge should make all endeavour to ascertain financial solvency of the husband. The judge should not give permission to second marriage without taking consent of the first wife in person. The second wife should be a widow or an orphan. The *Nikah* Registrar should try to ascertain the real age of the parties to marriage. He should be trained in family law matters and legal proceedings. Deterrent punishment must be introduced for all those who are responsible for initiating, solemnising and registering second marriage of the husband or child marriage. Since many people born in a Muslim family abuse Islam and with the conscious demand of women from various walks of life, it is suggested that the statutes and the *nikahnama* are amended in accordance with the proposed suggestions so that the *Quranic* injunctions and the law of the country could be upheld.