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Debates on Family Law Reform in Bangladesh with Special Reference to Muslim Law

Biswajit Chanda*

ABSTRACT *This article is a study of the debates on reform of Muslim family law in Bangladesh. It attempts to analyse different views from different corners regarding the necessity of legal reforms. Furthermore, this paper examines the nature of the reforms that have taken place so far in Bangladeshi Muslim family law and the role of the legislature and judiciary in this regard. A study of the political viewpoint on this issue is quite pertinent and therefore that has been analysed as well. The debate over the possibility of a uniform family code or uniform civil code has also been briefly discussed. This article argues that a more inherently plural, culture-specific and identity-conscious approach of legal reform is necessary particularly for family laws in Bangladesh. Finally, this paper emphasises on how an appropriate balance could be brought about for the realisation of the rights of women in their family.*

KEYWORDS: *Muslim law, family law, personal law, reform, legal pluralism, identity, Bangladesh, legislature, judiciary, uniform family code*

1. Introduction

The debates on family law reform in Bangladesh are nothing new. Although this debate is equally centred on all family laws including Hindu, Christian and other minority family laws, this paper deals specifically with the debates in relation to the reform of Muslim family law in Bangladesh. The debate in question arises from different views on the reform agenda, where the traditionalists are hostile to any reforms (Serajuddin 2001: xi), and therefore prefer to maintain Muslim law as it is as a separate personal law for Muslims. On the other hand the modernists or feminists, who advocate for the absolute realisation of the equality provisions of the Bangladeshi Constitution as well as that of international norms and ideals, are fervently campaigning for a just and equal uniform family code for all citizens, irrespective of sex and religions

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(Pereira 2002; Serajuddin 2001; Sobhan 2005). Their campaign is for gender justice referring to the balance of power between the sexes and looking not only to substantive equality, but also equity, and not a substitution of equity for equality (Sobhan 2005: 339).¹ In the middle of these two views there is another group who argue for gender equity instead of absolute equality through better implementation of the existing Muslim family law in its already reformed form, thus keeping the Muslim personal law as a separate personal law (Monsoor 1994), which would then suggest that the other personal laws also need to be similarly reformed. Monsoor argues that through proper implementation of existing laws, the current unequal treatment especially towards Muslim women through depriving them of their rights prescribed even by *Shari'at* as well as by existing reformed laws, could be prevented. Such debates not only bring up ancient discussions about the sources of traditional Islamic laws and the right to interpret them, they also concern the crucial interaction of religious and local customary traditions, as well as extremely instructive debates about the role of the modern state vis-à-vis Islam, the place of women, and the development of a modern Islamic economic system.

This paper argues that to effectively understand and tackle reforms in the legal system of a plural society like Bangladesh, inadequate traditional positivist framework or Eurocentric monist legal methods² must be rejected as insufficient and too state-centric. It follows that a more inherently plural,³ culture-specific and identity-conscious approach, which is instituted in Menski's (2006b; 2011a; 2011b) 'global legal realism', should be adopted to reflect the fact that the legal identity of Bangladesh contains a majority Muslim element, but also a number of other personal law systems.

¹ Among others Ain o Shalish Kendra (ASK), most of the women's organisations such as Bangladesh Mohila Parishad (Women's Council of Bangladesh), Jatio Mohila Ainjibi Samity (National Women Lawyers' Association), Women for Women, some other NGOs and the moderate elite Muslim class are campaigning for a uniform civil (or family) code (UCC or UFC) for all citizens.

² The three major Western theoretical approaches are natural law, the socio-historical schools and legal positivism. For a comprehensive study of these three major schools, see Cotterrell (2003), Freeman (2001), Menski (2006b), Tamanaha (2001) and Twining (2000).

³ By 'legal pluralism' Griffiths (1986: 1) means, following Moore (1978), the presence in a social field of more than one legal order.

This paper examines the nature of the reforms that have taken place so far in Bangladeshi Muslim family law and the role of the legislature and judiciary in this regard. For a comparative study of the debates on Muslim family law reform, different views from different corners on this issue are analysed. The current political stand on this issue is quite relevant and thus obviously has been scrutinised as well. Lastly this paper also focuses on how an appropriate balance could be brought about for the realisation of the rights of women in their family, which is important for gender development in Bangladesh.

2. Background: Reform in the Colonial and Postcolonial Periods

Bangladesh inherited a pluralistic legal structure from its colonial rulers, where state-made general secular laws applicable to all citizens, irrespective of religion or sex, for criminal, civil or commercial issues, co-exist with different religious and customary laws on personal or family matters, known as personal laws or family laws (Chanda 2008; Hoque 1980; Menski and Rahman 1988; Patwari 2004). Muslim law in Bangladesh is thus applied as the personal law of Muslims. The general law is based on egalitarian principles of sexual equality but the personal law or family law, does not operate on the basis of absolute equality to men and women, but on sexual equity (Monsoor 2004). It should be noted here that although the principle of sexual equity is found to some extent in Muslim family law, even this may not be the fact for some other religious laws in Bangladesh.

It is asserted that the division between personal and other spheres of secularised general law was first introduced in India by British administrators who, early on, decided to leave the personal laws of the natives undisturbed, ostensibly because they formed a part of the religion of the natives (Parashar 1992: 46).⁴ Therefore they retained Hindu law on an equal footing with

⁴ Supposedly, Hastings and his advisers made this distinction for the first time, but it must be a fact that earlier rulers of the subcontinent were intricately aware of different personal laws. Current legal scholarship suffers from amnesia regarding the period prior to colonial intervention. Hastings claimed that the plan was adapted to the manners and understanding of the people and exigencies of the country, adhering as closely as possible to their ancient usages and institutions (these explanations were mentioned in a letter to Lord Mansfield, dated 21st March 1774; see Keith 1922: 60; Parashar 1992: 63). However, it cannot be said that this was to respect the sanctity of religious laws, because then every religious group should have been allowed to be governed by its own religious law, which was not the case. For example,

Islamic law for personal matters respectively for Hindus and Muslims. Under the Judicial Plan of 1772, envisaged by Warren Hastings, *maulavīs* and *pandits* were attached to the courts to explain their laws to the English judges. Section 27 of the well-known Regulation of 1780 laid down:

In all suits regarding inheritance, marriage and caste and other religious usages or institutions the laws of the Koran [Qur'ān] with respect of Mohammedans, and those of the Shaster [Shāstras] with respect to Gentoos, shall be invariably adhered to (Morley 1858: 177-8).

Over a period of time the colonial rulers replaced many aspects of general law, which were equally religious under the Hindu and Islamic systems, by a mixture of common law and civil law with many indigenous Indian elements (Banerjee 1962: 129ff.; Menski 2006a: 242), which was 'secular' and applicable to all citizens irrespective of religion and sex. However, the introduction of this distinction, and subsequent different treatment of personal laws from all other aspects of law, as Parashar (1992: 46) has confidently asserted, form part of the foundation for present day claims that religious personal laws cannot be modified by the state.

The policy of this separate personal law system⁵ and too much reliance on textual sources of religious laws introduced identity problems among the people of different religions in British India. Anderson (1993: 165) rightly observes:

In their [colonial jurists'] preference for textual sources the courts were inclined to endorse highly orthodox forms of Islamic law which were applied more widely and rigorously than in the precolonial period ultimately *contributing to a new politics of Muslim identity* in the twentieth century (emphasis added).

Thus the personal law system contributed to the emergence of different identities for the people of different religions of the same land. Therefore, so the argument, now it has become quite difficult for the state to change this mindset of people overnight and thus reform their religious personal laws

the report of the third Law Commission rejected the claims of the Parsis who wished to have their own personal law recognised in matter of succession (Jain 1966: 672).

⁵ This was familiar in the pre-colonial Muslim period as well when civil and criminal laws were partly Muslim laws and partly customs and royal decrees. Nevertheless, Hindu law was retained as the personal law of Hindus. However, the reliance on the religious texts was not as much as it was in the colonial period.

thoroughly, especially the Muslim personal law.⁶ The case would have been the same for criminal justice if Muslim criminal law would be in operation still now as the criminal justice system. As the colonial rulers replaced the application of religious law in the criminal justice system by introducing a secular system, which the people have by now been accustomed to, any reform attempt in criminal law does not encounter people's resistance nowadays.

It was not so tough for the British to replace the Muslim Criminal law in a Hindu majority country like India, and they were keen to do so, because their chief objective was to have security in social conditions so as to facilitate trade (Fyzee 1964: 53-4). However, they understood that it would be wrong to replace the personal laws of both Muslims and Hindus by a secular law, which was not necessary to facilitate their trade as well. Another justification of the colonial rulers' unwillingness to change the personal law system is that they assumed that 'by disturbing the bases of religious and traditional authority, they would unleash revolt against their rule' (Washbrook 1981: 665). Serajuddin (2001: 3) rightly observes the reason why they were not hesitant to replace the public law, instead were disinclined to adopt the same policy for personal laws:

The open abandonment of civil and penal law and the law of evidence...which are integral part of the *Shari'a* law evoked little unrest or resistance. This is not surprising when it is throughout the history of Islam the public law of Islam has been much less faithfully observed than the law of family relations which has been regarded as the "very heart of the *Shari'a*".

This paper does not claim that the colonial rulers did not touch personal laws at all, instead it observes that they made some key changes to some aspects of different personal laws, thus discriminating between different social groups

⁶ Here Muslim law has been emphasised because this may not be the case for other personal laws in Bangladesh. For example, if Bangladesh follows the Indian model for reforming Hindu, Buddhist, Christian and other minority family laws, it will probably face little resistance, if this country takes account of rational local customs and traditions where necessary. Although India had to abandon the original plan of a Hindu Code precisely because of vigorous Hindu protests (Derrett 1957), it, however, managed to reform classical Hindu law extensively through codification within less than a decade after its independence, when it gave due respect to religious or local customs or norms: the customs and rites in relation to marriage, for example, were incorporated in the new laws, as found in s. 7 of the Hindu Marriage Act of 1955, which incorporates *sastric* and/or customary ceremonies and rites as the requirements of a valid Hindu marriage (Diwan 2005: 88).

and their laws. However, in most cases the reformist initiatives came from the progressive political leaders of the respective religions. Some reforms have taken place after the British period as well, although it is a notable feature of post-colonial South Asian family laws that the respective majority laws in India and Pakistan/Bangladesh have been reformed first, while the minority laws have been left to themselves, which has been elaborated in the following discussion.

2.1 Legislative reforms in Muslim family law before and after 1971

It is claimed that traditionalists are hostile to any change and seek to claim that the state has no authority to change their religious personal laws (Serajuddin 2001). However, this is hardly a new argument. As a matter of methodology, all legal systems are perceived as living entities that have to constantly balance conflicting expectations. Law in the world today is neither just religious, nor just secular, nor is it just state law, or religious law, or a matter of social custom. This is true for Bangladeshi legal system as well.

Family laws in pre-colonial period were uncoded, however, since the colonial period, legislative enactments have, to some extent, reformed, modified or supplemented the family laws of different communities (Huda 2003). Although no reforms have taken place in minority family laws after the colonial period (Menski and Rahman 1988), some efforts have been taken to reform Muslim family law in the Pakistani period as well as after the liberation in 1971. This paper does not provide a detailed account of every single legislation which brought reforms in Muslim family law, but endeavours to give a synopsis of them to have an idea about the extent and type of reforms, which will help to focus on the current debate on further reform.⁷

The important legislative reforms from the colonial period until today in relation to Muslim family law are the Muslim Personal Law (Shariat) Application Act of 1937, the Dissolution of Muslim Marriages Act of 1939 (hereinafter DMMA), the Muslim Family Laws Ordinance of 1961 (henceforth MFLO), The Muslim Marriages and Divorces Registration Act of 1974 and the Family Courts Ordinance of 1985. The Child Marriage Restraint

⁷ See Huda 2004 for a detailed discussion on the development of Muslim family laws in Bangladesh.

Act of 1929 is applicable to the people of all religions and thus affects the Muslim marriages as well. Therefore, to some extent Muslim family law in Bangladesh has got a codified form. Anyway, regarding the nature of existing reforms, Monsoor's (1994) findings show that even the reforms in Muslim family law in Bangladesh are mostly procedural and not properly implemented, hence in some cases not followed by patriarchal society, and therefore leave the scope for debates on further reforms.

The most important and far-reaching enactment passed by the British colonial rulers, dealing with the application of Muslim personal law in British India, was the Muslim Personal Law (Shariat) Application Act, 1937. This Act was passed as a result of the agitation for abrogation of customs led by the Jamiat-ul-Ulama-i-Hind, also supported by some Muslim women's organisations which condemned the customary law as adversely affecting their (women's) rights (Serajuddin 2001: 18).⁸ Thus this Act was passed to restore the law of Islam to all Muslim communities residing in British India and to abrogate the customary practices except in the cases of will, adoption and legacies where a Muslim could adopt the Muslim law in preference to customary law.

The vital and only legislation which introduced a substantive and very much desirable reform directly in relation to Muslim family law in the British period is the Dissolution of Muslim Marriages Act, 1939. According to Fyzee (1974: 169), "Prior to the passing of this Act, the Courts, following the Hanafi⁹ interpretation of the law, had denied to Muslim women the rights of dissolution available to them under the *shari'at*." In Hanafi law, the only ground on which a woman can seek to have her marriage dissolved is the total incapacity of her husband to physically consummate the marriage. Hence the initiative was taken by the Muslim leaders who wanted to stop Hanafi Muslim wives from renouncing Islam to get rid of their unhappy marriages.¹⁰ Fyzee (1974: 169) terms this Act as one of the most progressive enactments. This Act introduced a major reform ensuring to all Muslim wives, whatever school of Islamic law they belong to, the right to seek judicial divorce against their husbands. The principle which made this reform possible is that "in cases in

⁸ For the statement of objects and reasons of the Act, see Mahmood (1983: 25), and for the text Mulla (1990: 323-4).

⁹ The school of Muslim law in general applicable in the Indian Subcontinent.

¹⁰ Qazi Muhammad Ahmad Kazmi introduced the bill in the central legislature on 17th April 1936, which was passed with suitable modifications on 17th March 1939 (Fyzee 1955: 144).

which the application of Hanafi law causes hardship, it is permissible to apply the provisions of the 'Maliki, Shafi'i or Hambali law'", which was laid down by the Hanafi jurists (Fyzee 1974: 170). Hanbali jurists in Saudi Arabia are authorised to draw upon, and borrow from other schools (Hoque 2007). A judicial recognition of this inter-school borrowing principle is found in *Gui Bibi v. Moliammad Saieem*¹¹ in Pakistan. The principles of Maliki school were followed in the DMMA as this school allows Muslim women much wider grounds for divorce. This is an example of the application of inherent pluralism among Muslim legal schools, which can be used to enhance the scope of further reforms of Muslim family law in Bangladesh or elsewhere.

While Indian state has shied away from reforms of Muslim law, focusing instead on reforms in majority Hindu and other religious laws, Pakistan after its independence as a Muslim dominated state introduced some important reforms to Islamic laws, which were, however, perceived as anti-Islamic especially by the *ulema* and fierce debates arose in the 1950s about the role of the modern state law vis-à-vis Islamic laws (Menski 1997). In the Pakistani period the major reforms came through the Muslim Family Laws Ordinance of 1961. A Commission on Marriage and Family Laws which was appointed in August 1955 in Pakistan, to enquire whether the then Muslim family law required modification in order to give women their proper place in society according to the principles of Islam, found that the provisions of the 1939 Act regarding Muslim women's right to judicial divorce were adequate and required no modification (Coulson 1957: 138).¹² However, MFLO enumerated a further ground on which a Muslim woman can seek judicial divorce: 'that the husband has taken an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance 1961,'¹³ i.e. without the legally required permission of the Arbitration Council.¹⁴

MFLO also enumerates some other important procedural reforms in Muslim laws relating to divorce and polygamy. Another procedural change in divorce

¹¹ 12 PLD 1978 (Quetta) 117.

¹² See also the Report of the Commission published in the *Gazette of Pakistan, Extraordinary*, dated 20th June 1956. Karachi: Government of Pakistan Press.

¹³ Muslim Family Laws Ordinance, 1961, section 13(a). The MFLO also raised the age in section 2(vii) of the Dissolution of Muslim Marriages Act which has been discussed in the following discussion. The Ordinance is available in Ferdousi et al 2004.

¹⁴ See section 6 of the Muslim Family Laws Ordinance, 1961. Also Carroll 1985.

law is that the divorce will follow a reconciliation process that entails the involvement of an Arbitration Council.¹⁵ This replaces the traditional irrevocable and immediate divorce effected through a triple pronouncement of *talaq* (divorce) by the husband. Although MFLO does not invalidate a triple *talaq*, the object of this reform is to provide the parties with a cooling off period and to allow greater deliberation and dignity to attend the termination of a marriage (Raja 2003). It should be noted here that a divorce is legally effective even in the absence of proof of constitution of Arbitration Council.

This Ordinance makes it obligatory to get the permission of the Arbitration Council for a polygynous marriage. However, it does not invalidate polygyny, even if the subsequent marriage(s) is/are contracted without such permission, although it has been criminalised.¹⁶ This law Polygyny is still there and polygynous husbands are rarely punished in Bangladesh.

Interim (*hilla*)¹⁷ marriages also have been prohibited by this Ordinance, which is really a good step, although such a marriage is required if the termination of marriage or *talaq* is for the third time.¹⁸ However, there are some instances of *hilla* marriages still now in rural Bangladesh on the basis of so called *fatwa* by village mullahs even in the case of first or second termination of a marriage.

The MFLO was promulgated in liberal times, albeit by a military dictator, Field Marshal Ayub Khan. It also made a substantive reform regarding the orphaned grand children's right to inheritance in their grand parents' property, although recently the validity of this provision of the MFLO was questioned in the Allah Rakha case in Pakistan since the constitutional basis of the legal interpretation in Islamic Republic of Pakistan is *Shari'a*.¹⁹ In this case, the Pakistani Federal Shariat Court held that the inheritance right in the estate of a grandparent made available by the MFLO to orphaned grandchildren was

¹⁵ Section 7 of the MFLO 1961 requires the husband who wishes to divorce his wife to give notice in writing to the Chairman of the local Union Council or Pourashava or Mayor of the City corporation as soon as he pronounces the *talaq*.

¹⁶ Section 6 of the Muslim Family Laws Ordinance, 1961.

¹⁷ Where a Muslim husband has repudiated his wife by three pronouncements, according to classical Islamic law, it is not lawful for him to marry her again until she has married another man, and the latter has divorced her or died after actual consummation of the marriage. This interim marriage is called *hilla* marriage.

¹⁸ Section 7(6) of the Muslim Family Laws Ordinance, 1961.

¹⁹ Allah Rakha vs. the Federation of Pakistan. PLD 2000 Federal Shariat Court 1.

contrary to the dictates of the *Shari'a*. The Shariat Court, however, itself moved to ameliorate the harsh consequences of denying an orphaned grandchild a share in the grandparents' estate by declaring that in all circumstances the grandparents be deemed to have made a will in favour of the otherwise disinherited grandchild. The judgment in Allah Rakha case revealed the Shariat Court intellectually torn between allegiance to traditional conceptions of the *Shari'a* and the needs of contemporary social reality (Raja 2003). However, the MFLO, including the provision of the orphaned grandchildren's inheritance right, is a valid part of Muslim personal law in Bangladesh as it is not constitutionally an Islamic country, although Islam has been declared the state-religion of Bangladesh through the 8th constitutional amendment in 1988 by the puppet parliament of the military dictator General Ershad (Chanda 2008).

The religious personal laws co-exist with the wider general laws such as the Child Marriage Restraint Act, 1929 which applies to all citizens of Bangladesh irrespective of religion. Under this Act of the British period the minimum ages for marriages had originally been laid down as 14 years for women and 18 years for men. Under Pakistani law, the 1929 Act had been amended by the 1961 Ordinance to the effect that the minimum ages in marriage for women should be 16 years, while the minimum age of 18 years was retained for men by section 12 of the Muslim Family Laws Ordinance of 1961. Bangladeshi state then increased the official minimum ages of marriage to 18 years for women and 21 years for men through the Child Marriage Restraint (Amendment) Ordinance of 1984. This Ordinance was partly promulgated as a means of seeking to control the population problem of Bangladesh, since it was then believed that suggesting higher marriage ages would lead to lower population growth. Whoever performs, conducts or directs any child marriages, or the father or male guardian who does any act to promote the marriage or permits it may be punishable,²⁰ however, none of these laws invalidates a marriage where the parties are below the prescribed ages, and still today the number of child marriages in Bangladesh is not quite low; more than half of all girls under 18 are married, and specifically, the percentage of girls (aged 15 to 19) married by age 18 is 51 per cent (UNFPA 2005).²¹ While

²⁰ Sections 4, 5 and 6 of the Child Marriage Restraint Act, 1929.

²¹ UNFPA (2005). *State of World Population 2005: Child Marriage Fact Sheet*. Available at http://www.unfpa.org/swp/2005/presskit/factsheets/facts_child_marriage.htm#fn5, (citing

age at marriage is generally increasing, it is not uncommon to find girls married before age 15; 45 per cent of young women between 25 and 29 were married by age 15.²² There are various socio-cultural reasons for this quite higher rate of child marriage especially for girls. The main reason is that the guardians are concerned about the security of young girls. However, as a tool of social engineering this law has been able to reduce significantly the number of child marriages which was almost 100 per cent when at first the 1929 Act was enacted.

The reforms in Muslim family law after the independence of Bangladesh are not significant in quantity and mostly limited to some amendments of the laws enacted in the British and Pakistani periods and thus no major fundamental changes have been made. Apart from above mentioned 1984 Ordinance with regard to child marriage, there are only two legislations, namely, the Muslim Marriages and Divorces Registration Act of 1974 and the Family Courts Ordinance of 1985. The 1974 Act just consolidated and amended the law relating to registration of Muslim marriages and divorces repealing the Muslim Divorce Registration Act of 1876 and section 5 of the MFLO 1961 regarding registration of Muslim marriages. According to the 1974 Act all Muslim marriages and divorces are required to be registered. However, this Act does not invalidate an unregistered Muslim marriage or divorce, although non-registration of marriages may be a punishable offence for the person who solemnises the marriage but does not report it to the Nikah (Marriage) Registrar. However, non-registration of a divorce has not been criminalised. This is still the fact that some Bangladeshi people, especially in rural area, do not care about registering their marriages. Even if they register their marriages or divorces, they do not or sometimes due to natural disasters cannot preserve the documents and also do not know how to get a copy of a duplicate marriage or divorce certificate.²³

UNAIDS, UNICEF and WHO (2002). *Young people and HIV/AIDS: Opportunity in Crisis*; Population Division. (2000). *World Population Prospects, the 2000 Revision*. New York: United Nations).

²² UNFPA (2005). *State of World Population 2005: Child Marriage Fact Sheet*. Available at http://www.unfpa.org/swp/2005/presskit/factsheets/facts_child_marriage.htm#ftn5, (citing Demographic and Health Surveys (DHS). *Data for Bangladesh, 1999-2000*. Available at: http://www.measuredhs.com/countries/metadata.cfm?ctry_id=1&surv_id=135).

²³ Currently the author is undertaking a fieldwork in Bangladesh and he develops this idea from his fieldwork which is not yet completed. Almost every year there is flood or cyclone in

An important and effective recent procedural change concerns the introduction of pre-trial reconciliation between parties in family courts through section 10 of the Family Courts Ordinance of 1985, which is useful and working quite well. This Ordinance established separate family courts for adjudicating disputes in relation to family matters. Other procedural changes mentioned above remain as important tools of social engineering through law, showing that Bangladesh operates a legal system in which traditional Muslim *shari'at* law co-exists with modern statutory Muslim laws provided by the state.

Although some reforms have taken place in Muslim family law since colonial period, now the question is how far they are followed by Bangladeshi Muslim society. The data given above shows that half of the marriages in Bangladesh are child marriages. There are a lot of examples of polygynous marriages where no permission from the existing wife has been taken. The number of unregistered marriages or divorces is not very low. Lots of women do not get any maintenance from their husbands. Women do not get the Qur'anic share from their parents' property. Then the next question is what the further initiatives are which can be taken to reform Muslim family law in Bangladesh that might be acceptable to society. The current law and politics situation requires to be examined for examining the possibility of any future reforms.

3. Reform Initiatives from the Judiciary

Since like other South Asian countries it has been the reality in Bangladesh that the political power is not willing to or unable to take any initiative for substantive reform in personal laws, there is a hope that personal laws can be reformed effectively through judicial development. The judiciary, especially the High Court Division of the Supreme Court of Bangladesh in some cases has played an active and progressive role, although some of its significant decisions were overturned by the Appellate Division of the Supreme Court. Some examples given below illustrate several relevant notable decisions.

Section 6 of the MFLO 1961, mentioned above, allows a husband to marry polygynously with the written permission of the Arbitration Council. In

Bangladesh, which takes away people's households and therefore to the poor village people it is not very important to take care of their marriage/divorce certificates while they are struggling for food and other basic needs. So the courts should consider other forms of proof of marriage or divorce, such as presumption of marriage or divorce.

Jasmin Sultana v. Muhammad Elias,²⁴ the court, relying on Tunisian law as well as taking a fresh look at the Qur'anic foundations (Pearl and Menski 1998: 22), held that this principle of section 6 is against the principle of Islamic law and should be repealed and replaced by a legal provision prohibiting polygamy.²⁵ Although the state has not taken any such step so far and if it intends to do so, its impact also needs to be considered, such as the number of divorces may be increased. Serajuddin (2001) examines the existing provisions of polygyny through the analysis of the recommendations of different scholars and then he also suggests to amend Section 6 of the MFLO. His first suggestion does not presumably advocates for the total abolition of polygyny where he mentions that no man should be legally allowed to contract another marriage without prior permission of the court, and any such marriage without the permission of the court shall be invalid (Serajuddin 2001: 184). But if polygyny is to be abolished then considering the fate of the existing wife he rightly asserts: "restrictions on the husband's right to polygamy will be only fully effective if restriction is also placed on his right to repudiate his wife unilaterally" (2001: 184-5).

Another remarkable decision was taken by the High Court Division in *Md. Hefzur Rahman v. Shamsun Nahar Begum and another*,²⁶ which granted the right of post divorce maintenance beyond *iddat* until the death or remarriage of the wife. However, this decision was reversed by the Appellate Division and now the position in this regard is that a woman is entitled to maintenance after divorce during the *iddat* period only and not beyond.

In the case of *Md. Hefzur Rahman v. Shamsun Nahar Begum and another*, 51 DLR (AD) 172, in which a question of maintenance of a divorced Muslim woman was decided by the Appellate Division, Mustafa Kamal J. in his judgment quoted section 2 of the Muslim Personal Law (Shariat) Application

²⁴ 17 BLD (1997) (Civil Revision No. 4591 of 1995).

²⁵ In this case the court argues: "...the expression of holy Qur'an by the words "be able to deal justly" is the condition precedent to marry more than one woman which implies equality in love and affection and such equality being impossible in the weaknesses of human nature, the permission to take another wife amounts virtually to a prohibition for which section 6 of the Ordinance is against the principle of Islamic law".

²⁶ 15 BLD (1995).

Act, 1937,²⁷ and took the support of Articles 8 (1)²⁸ and 8 (1A)²⁹ of the Constitution to overturn the progressive decision of the High court Division. He later on as the Chairman of the Law Commission of Bangladesh quoted the same legal and constitutional provisions and completely denied the demand of a uniform family code in Bangladesh saying that "the Muslim personal law is an eternal law prevailing as the only law for all Muslim family affairs and hence there cannot be any change in it nor can it be amalgamated with any other personal law of any other religion" (Law Commission 2005: 3). Moreover, the Law Commission Report did not recommend any sort of reform in existing personal laws, not even for minority personal laws, which have not seen the light of reform at all after the British period.

Although there are some decisions which represent judges' weaknesses towards the traditionalism, this paper does not analyse them as it is not possible to accommodate them here. A number of examples of progressive decisions by the High Court Division are also not discussed here. Anyway, it should be noted here that some of those pro-reform decisions are in force and the rest were, as mentioned above, overturned by the Appellate Division.³⁰ The highest level of the judiciary, the Appellate Division, are nowadays criticised as the follower of the governmental instructions, which is not desirable though.

²⁷ Section 2 (application of personal law to Muslims): "Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubara'at, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

²⁸ Article 8(1): "The principles of absolute trust and faith in the Almighty Allah ...shall constitute the fundamental principles of state policy".

²⁹ Article 8 (1A) says, "Absolute trust and faith in the Almighty Allah shall be the basis of all actions."

³⁰ For a detailed analysis of the role of the judiciary in this regard see Hoque and Khan (2007) and Serajuddin (2001).

4. The Polarised Trend of Islamisation and Possibility of Reforms in Bangladeshi Family Laws

Starting its journey with an explicitly socialist and secular constitution, Bangladesh retained the legal system of the Pakistani period by adopting the entire legal system of Pakistan, including the British-era legislation and post-1947 Pakistani law as it stood on 26th March 1971 through the Bangladesh (Adaptation of Existing Bangladesh Laws) Order of 1972. However, soon after the assassination of its founding father, Bangabandhu Sheikh Mujibur Rahman in 1975, military rulers led an assault on the secular Constitution, trying to establish Islam as the state religion. This remains a bone of contention. The first step of this journey was taken by Major General Ziaur Rahman by Proclamations Order No. I of 1977. 'Secularism', one of the four fundamental principles of state policy, was substituted by 'absolute trust and faith in Almighty Allah', and Article 12 of the original Constitution containing references to 'secularism and freedom of religion' was omitted altogether. From the constitutional point of view all these changes by martial law proclamations were illegal and unconstitutional (Halim 1998: 147). However, after the second parliamentary election in 1979 while Zia's newly formed party managed to secure two-thirds majority, all these changes were legalised by the 5th Amendment of the Constitution on 6th April 1979. Halim (1998: 150-1) rightly argues, "[i]t was a constitutional tricks played by Zia especially to get quick blind support from a large section of [Muslim] people who are religious but politically unconscious".

In 1988, another military ruler, General Ershad, as mentioned above, following the same way attempted to make Islam the state religion by the 8th Amendment of the Constitution (Chanda 2008). This created an impression that Bangladesh had become an Islamic Republic, which is legally constitutionally not the case yet. However, this is true that the Bangladeshi state has gradually moved away from the post-independence ideology of secularism towards more emphasis on Islamisation. Through Islamising the Constitution, specifically Articles 8(1) and 8(1A), a barrier was created for any major initiative to reform the Muslim personal law, which is allegedly under challenge by 'secularization'. Article 8(1) stated: "The principles of absolute trust and faith in the Almighty Allah...shall constitute the fundamental principles of state policy" and Article 8 (1A) provided: "Absolute trust and faith in the Almighty Allah shall be the basis of all actions."

Taking the support of these constitutional provisions, conservatives contended that the state had no authority to make any changes in Muslim personal law as it would be contrary to the constitution.³¹ However, following the judgment of the Supreme Court in *Bangladesh Italian Marble Works Ltd. V. Govt. of Bangladesh and Others*,³² the fifteenth amendment of the Constitution brought the provisions relating to 'secularism' back into Article 8(1).³³ The Fifteenth amendment also put Article 12 of the original Constitution back into place, and it provides a definition of what 'secularism' means or includes in the Bangladeshi context. The Fifteenth Amendment also reinstates some other important provisions of the original (1972) Constitution, which were previously changed by General Zia by the *Proclamations Order I of 1977* and then through the 5th Amendment. Nevertheless, significantly, the Fifteenth Amendment did not go as far as removing the heavily contested Article 2A, which made Islam the state religion. One could see this as a manifestation of emerging or growing legal realism.

Anyway the modernists' argument is based on the equality provisions of the Constitution. The Constitution of Bangladesh guarantees the principles of equality before law and equal protection of law for all citizens (Article 27) as well as non-discrimination irrespective of religion, race, caste, sex and so forth [Article 28(1)], although for women the emphasis is on equality in state and public life [Article 28(2)], they argue that it does not mean that other areas such as the laws relating to family matters would remain discriminatory. They campaign for abolishing polygamy and for equal rights of women in laws relating to divorce, guardianship, inheritance and so on, moreover, many of

³¹ See the judgment by Mostafa Kamal J. in *Md. Hefzur Rahman v. Shamsun Nahar Begum and another*, 51 DLR (AD) 172 and also the argument in this regard in Law Commission (2005). The Law Commission report was also produced under the leadership of Justice Mostafa Kamal who is the Chairman of the Law Commission now.

³² In Writ Petition No. 6016 of 2000, the High Court Division declared the Proclamations (Amendment) Order, 1977 (Proclamations Order No. I of 1977) and this has been approved by the Appellate Division of the Supreme Court in the Civil Petition for Leave to Appeal Nos. 1044/09 and 1045/09.

³³ The original clause (1) of Article 8 has been revived, replacing the clauses (1) and (1A) of Article 8, by the *Constitution (Fifteenth Amendment) Act, 2011* (Act XIV of 2011), section 8. The new clause (original clause of Constitution of 1972) is as follows:

[(1) The principles of nationalism, socialism, democracy and secularism, together with the principles derived from those as set out in this Part, shall constitute the fundamental principles of state policy.]

them also argue for a uniform family or personal code for the people of all religions (Pereira 2002). There is another group of progressive Muslim scholars who argue that equal provisions on these issues can also be possible through progressive illustration of *Shari'at* and by taking the help of above mentioned inherent pluralism of different schools of Islamic laws, the DMMA of 1939 is a great example of it.

5. Society and Family Law in Bangladesh

The real condition of Muslim family law or any law in practice could be observed if one relies not merely on religious texts, legislations, textbooks and reported cases, but ventures out into the community to understand the legal issues that arise at the local and individual level, rather than as big political issues. The bottom line of the dilemma is that significantly many women in Bangladesh today are deprived even of the rights granted by the religious and state-sponsored family laws. The patriarchal nature of society is blamed for this situation. Unfortunately no recent empirical study is available on these issues. However, a study in the capital city Dhaka in 1990s reveals that 88% of Muslim wives did not receive their dower (Akhter 1992: 35).³⁴ Another study on two villages in Bangladesh reveals that 77% of women from families with landed property did not intend to claim their legal share in their parental property to retain better links with their natal family (Westergaard 1983: 71). These are instances of patriarchal arbitrariness of Bangladeshi society which regards women's claims to their legal rights as challenging the existence of the patriarchal system itself, despite the fact that these claims are based on an Islamic obligation or official law (Monsoor 1994: 5-6).

Sobhan (2005: 352) therefore makes the point that "Changing the law is an important means to ensure justice, but is insufficient, of itself. More importantly, attitudes need to change". Such attitudes are also reflected in the earliest speeches from Nehru in India and are for example found in later literature about the reforms of child marriage law (Sagade 1981).

It is a valid question whether it is the people who do not accept the reforms, or the reformed laws themselves are not strong or good enough to tackle the current situation, or the lack of proper implementation of existing laws contributes to this non-acceptance or ignorance. If society does not accept the

³⁴ Cited in Monsoor (1994: 5).

suggested reforms, then it is required to investigate why. Is it simply because people do not want to see that their supposedly divine law is being interfered with by human agency? Or is it because men cannot get rid of their patriarchal mindset and thus do not want to share the control of the family and of material resources with women? The contribution of women also needs to be looked into. Many women may also support this so-called discriminatory personal law system because they are growing up in such a patriarchal environment where they have learnt only to accept these ideas without questioning them. Monsoor (1994) finds that women are even hesitant to enjoy their existing rights in the family which their religious laws offer. This may also be a consequence of local customs or this may be because of learning from the patriarchy that claiming one's rights is a sin for women.³⁵ However, this paper cannot provide the answer of these questions as it requires a detailed empirical research.

6. Family Law and Women

'Women and family law' has always been a much-debated issue. The concept of sexual equality influences the discourse about the position of women in family law in Bangladesh, as elsewhere. Women in Bangladesh are undoubtedly subordinated within an intensely hierarchical system of gender relations which denies women access both to social power and to autonomy over their own lives (Kabeer 1988). They are deprived of their equal or even equitable rights by their own family, as in any patriarchal society. However, in other societies, for example in Britain, it seems that absolute equality of rights is also not witnessed in practice (Brophy and Smart 1989). Considering the unequal treatment of women within the family, many South Asian feminists see the crux of the problem as women's lack of control over their own lives and financial condition. Kapur and Cossman (1996: 133) find that Indian women are commonly seen as never fit for independence, supposedly reflecting the remark by Manu in the *Manusmriti*³⁶ that '[h]er father protects her in childhood, her husband in her youth, her son in her old age'. However, whether this should be understood as a prescription for male control over

³⁵ See Monsoor 2005.

³⁶ Although some refer to this as the '*Corpus Juris*' of ancient India, this misrepresents a reality in which there was no such formal legal codification in such times. Rather, the *Manusmriti* would be better understood as one particular ancient Hindu cultural text (Menski 2003: 26, n. 50).

women or men's duty to maintain and protect them is a debatable point. Proponents of the former view tend to argue that South Asia's maintenance and property laws apply this moral theme to economics, illustrating, according to Kapur and Cossman (1996: 133), that the 'important role of family laws is reinforcing women's economic independency'. Furthermore, the perceived ideology of a woman's inferiority is said to be internalised and socially reinforced by the media, police, social workers, activists and women's own families alike.

However, in recent times increasing numbers of women have begun demonstrating a desire to control their own lives and the upbringing of their children from an earlier age. Accompanying such trends has been an increasing level of rights consciousness amongst women, which means that they are now conscious about their unequal treatment by family laws as well. However, the existing reforms in Muslim family law in Bangladesh appear to be unable to protect women effectively from violence and economic deprivation (Monsoor 1994: i), while there have not even been any reform efforts in the minority personal laws. For Muslim law as well as minority personal laws in Bangladesh, therefore, in addition to theoretical research, in-depth empirical research is required to highlight the existing problems in all family laws and to explore strategies for promoting equal or at least equitable rights of women of different religions.

7. Debate on a Uniform Civil/Family Code

Some NGOs such as - Ain o Shalish Kendra (ASK), and some women's organisations (Serajuddin 2002: xi), for example, Bangladesh Mohila Parishad have been fervently campaigning for a uniform civil code for all citizens, irrespective of sex and religion, on the basis of equality provisions of the Constitution and international human rights. From the view of absolute gender equality, this looks like a good proposal. However, considering the social conditions and the mentality of the people of this region, this demand is not unquestionable, on the contrary, it may be deeply problematic for a culturally and religiously plural nation like Bangladesh to argue for a uniform civil code, because that law would then be dominated by Muslim law principles for all citizens and would not leave sufficient space for the minorities. It is for that very reason that in India, once the Hindu nationalist BJP party came to power during the 1990s, the nature of the uniform civil code debate suddenly changed, and many people began to realise that the BJP's call for a uniform

law meant a hidden agenda of Hinduisation for all. There is no guarantee that the same risk should not be at play in Bangladesh, this time in terms of Islamisation of the entire legal system. Menski (2006a) has recently shown how this original demand for a uniform civil code was like “asking for the moon, totally unrealistic and simply not feasible” for India. It appears that this is true for the legal system of Bangladesh as well, as these two nations, which were previously a single nation until 1947, have almost the same nature or characteristics vis-à-vis their legal history. Anyway, since 2001, it has become apparent that Indian law has now reached a mature stage of hybrid legal uniformity, which is significantly different from its originally envisaged uniform model. The plan of a uniform civil code for India, if understood to mean creation of one new Indian family law for all Indians abolishing the personal law system, has turned out to be totally unrealistic (Menski 2006a and 2006c).

Bangladesh could perhaps follow the new harmonised policy of India, since total elimination of the personal law system would not be acceptable by and viable for Bangladeshi society. The policy India has adopted is that it has achieved a different kind of uniform civil code, where the postmodern Indian uniformised law clearly retains the personal law system and at the same time seeks to ensure that all these various laws contain more or less the same rules (Menski 2006a). Bearing in mind the fact that traditionalists in Bangladesh are hostile to any change (Serajuddin 2002: xi),³⁷ this paper aspires particularly to explore the viability of such a proposition, a harmonised personal law system, for Bangladesh.

9. Conclusion

Since religion plays a significant role in determining most of the rights in relation to personal or family matters, this paper assumes that it also plays a crucial role in the definition of its followers' identity, in the contemporary late-modern context, with sets of secular institutions and predominantly secular natural law philosophies. In South Asia, religion plays the role of a principal identity constituent (Baird 2005; Kozlowski 2005; Larson 2001). Evans (2001: 32) describes religion as an 'essential component of self-identity'. Bangladesh, like other South Asian nations, is a country where

³⁷ Sobhan (2005: 351) states that “[e]ven if most of the provisions of the Shariah are maintained, opine many Muslims, the idea of a secular code is unacceptable”.

people live together with all their different cultural identities as citizens of one country. Although they bear a common Bengali cultural heritage, their identity varies from religion to religion as well as from that of other countries. They are very conscious that if their religious personal laws are changed then they may lose their identity. Now if it is suggested that Bangladeshi family laws should be reformed completely in line with the international human rights norms, then that would be detrimental, as it will stop the chance of making reforms *slowly* in line with popular demand. Thus it has become clear that blind reception of the provisions of international human rights laws is not a solution for Bangladeshi legal system. However, the provisions which are not contrary to Bangladeshi culture and also to social and religious values of Bangladeshi people can be incorporated in the Bangladeshi legal system. Nonetheless, imposing one religious law on people of another religion in Bangladesh would also not be accepted and here lies the main risk of implementing the idea of uniform civil/family code.

Since a uniform civil/family code is not a viable option for the people of Bangladesh right now, the way forward in reforming Muslim family law could be to find out an approach from within Islamic principles by using the inherent pluralism of different schools of Islamic law which was done in the DMMA 1939 mentioned above. The existing principles or practices in Muslim family of Bangladesh which are not directly prescribed in the *Qur'an* or *Sunna* can be reformed without much protest from Muslims. Mahmood (1981: 28-9) points out some reasonable grounds in favour of secularising reforms of Muslim personal law:

[A]s far as personal law is concerned, it is an incorrect presumption that its minutest details are prescribed by the *nuṣūṣ* (the immutable *Qur'an* and the mandatory *Sunna*). Fundamentals of family life, ... are laid down in these texts in the form of substantive legal principles. But the subsidiary details of these principles are mostly man-made and were worked out by the Arab jurists of the past. ... Undoubtedly, the details formulated by them were marvellous and superb for the then human society. However, after a lapse of time of more than a thousand years, man has now ceased to be what he was... Fear of God has diminished, reverence for religion and its mandates has disappeared. ... It is to check this degenerate trend that a change may be required in some of those man-made subsidiary legal rules.

Mahmood (1981: 29) concludes that reform of personal law is not, in any case, *tahrif-i-Qur'an* or tempering with *Sunna*. In the case of Hindu or other

minority family laws, the honest intension of the state is the first requirement. The Indian experience suggests that any reasonable reform-attempt will not be resisted strictly by the concerned minority communities in Bangladesh if their religious values and culture are not ignored. Thus to meet the societal needs, reforms in all family laws could and should be initiated. What needs to be debated is the extent of such reforms, and maybe the speed with which changes are to be expected.

As mentioned above since the political power is not too keen to take necessary steps to reform Muslim family law, judicial activism, which can be treated as an enlightened application of *ijtihad* (Hoque and Khan 2007), can play a positive role. Hoque and Khan (2007), like many other Muslim scholars, rightly argue that judges have adequate authority and legitimacy to develop Islamic family law to ensure better justice.

It can also be argued that besides the reform process another key problem lies with the proper management of official/unofficial laws (Chiba 1986) or formal/informal regulation, legal postulates (Chiba 1986) and/or informal socio-religious norms. Such management problems are not restricted to religious doctrines and 'traditional' ideologies; they have also infected modern 'liberal' participants, creating new rigid 'fundamentalisms'. When too much reliance on traditional religious principles is known as one kind of fundamentalism, one may also claim that too much advocacy in favour of implementing (or globalising) international human rights principles in each and every country irrespective of their cultural or societal values or demands is also another kind of fundamentalism. The solution could be in the middle of these two fundamentalist ideologies and a negotiation is necessary among them for bringing reform into or for the proper management of different personal laws.

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