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Laws relating to Prosecution Service in Bangladesh: A Critical Analysis

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Manuscripts submitted for publication must be in three copies, double-spaced typescript or electronic print-out on A4 size (8.5"×11") white sheets with margins of 1" on all sides and pages consecutively numbered. The manuscript should have a title-page with the title of the article and the author's name, designation and contact address. The author's name or anything that may identify the author should not appear anywhere in the text paper. An abstract in English must be provided within 200-300 words at the beginning of the article. Submissions should be addressed to the Editor in Chief, Rajshahi University Law Journal, Faculty of Law, University of Rajshahi, Rajshahi 6205, Bangladesh.

The Laws relating to Muslim Women-Initiated Divorce in Bangladesh: An Overview from Right-Based-Approach

Most. Zobaida Sultana*
Md. Abdur Rahim Mia**

Abstract: *Breaking off matrimonial relationship as a permissible right absolutely belongs to the husbands under Islamic Shariah principles; while limited options are given to the wife within its framework, such as divorce by the delegated power, Khula and Mubarat. Alongside, the statutory development has taken place in different countries recognizing the judicial involvement for the dissolution of Muslim marriage. Bangladesh is not far cry from all these practices. According to the statutory laws of Bangladesh, a Muslim husband has the unilateral right to divorce his wife whenever he chooses, for any reason. A Muslim wife can only use the unilateral right to divorce if her husband explicitly grants it to her in the marriage contract. Furthermore, she may also file to the Family Court for a divorce. The right to divorce between a Muslim husband and a Muslim wife are not similar, and hence contradictory with the constitutional spirit on equality. The existing laws of Bangladesh relating to women initiated divorce suffers from various loopholes or shortcomings which hamper wife to exercise her legal right to divorce. Women initiated dissolution of marriage under the terms of 'khula', 'delegated power' and 'judicial divorce' raises many questions regarding inequality. The rate of women initiated divorce is increasing day by day in Bangladesh. Therefore, investigation into the existing laws recognizing the women's rights to dissolution of marriage in Bangladesh as to whether these laws and Shariah options consider the equality is academically invaluable and significant. This article is an attempt to focus on the weaknesses of the existing laws related with the wife initiated divorce in Bangladesh and recommends the changes or modifications into the existing legal framework of Bangladesh.*

Keywords: Marriage, Delegated Power, Right to Divorce, Family Court, Arbitration Council.

1. Introduction

The dissolution of Muslim marriage through the application of different modes considerably takes place in Bangladesh. Beyond

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traditional modes of the pronouncement of '*talaq*', the use of other means initiated by the Muslim women within the permissible legal framework is not at negligible rate, rather increasing day by day. The divorce is such a practice that has both legal and social implications for the lives of Muslim individuals in a society. The Muslim Family Laws Ordinance, 1961 (MFLO), the Dissolution of Muslim Marriages Act, 1939 (DMMA), the Family Court Ordinance, 1985 (FCO) and the Muslim Marriages and Divorces (Registration) Act, 1974 (MMDA) are all used together to control and monitor divorce among Muslims in Bangladesh. The MFLO stipulates that a husband has unrestricted authority to dissolve marriage without a judge's assistance. Unlike a husband, a Muslim wife is not allowed to divorce her partner. A Muslim wife can end her marriage unilaterally if her husband grants her the right to divorce in the marriage contract.¹ The DMMA still does not provide Muslim wife absolute power to divorce her husband. The DMMA only addresses several specific circumstances under which a Muslim wife may get a court order for the dissolution of her marriage. In spite of the fact that Family Court, established under FCO, appears to be a woman-friendly approach from the government, a detailed examination of some cases² filed by Muslim women seeking to dissolve their marriages discovers nothing but a lengthy obstruction of legal, social, and financial challenges.

The unalienable right of Muslim woman to dissolve marriages on the same terms as man is rejected by both statutory laws and case laws. Divorce initiated by the husband is generally straightforward, arbitrary, faultless, and extrajudicial.³ The subordination of woman in society as a result of this gender disparity gives rise to several socio-legal issues.⁴ A Muslim wife in Bangladesh must undergo time-

¹ Section 8, *The Muslim Family Laws Ordinance*, 1961

² *Hasina Ahmed vs Abul Fazal*, 32 DLR (1980) 294; *Mst. Resham Bibi vs Muhammad Shafi*, 19 DLR (1967) 104; *Mst. Saeeda Khanam vs Muhammad Samir*, 4 DLR (1952) 134; *Md. Kutubuddin Jaigirdar vs Noorjahan Begum*, 25 DLR 1973 (HCD) 21; *Abdus Sobhan Sarker vs Md. Abdul Ghani*, 25 DLR 1973 (HCD) 227; *Hosne Ara Begum vs Alhaj Md. Rezual Karim*, 43 DLR 1991 (HCD) 543; *Sirajul Islam vs Helana Begum*, 48 DLR 1996 (HCD) 48; *Captain Shamsul Alam vs Sheerin Alam*, 48 DLR 1996 (HCD), 79; *Sherin Akhter vs Md. Ismail*, 51 DLR 1999 (HCD) 512

³ Rabia Bhuiyan, *Gender and Tradition in Marriage and Divorce: An Analysis of Personal Laws of Muslim and Hindu Women in Bangladesh*, United Nations Educational, Scientific and Cultural Organization (UNESCO), 2010, p.127

⁴ *Ibid*, p.177

consuming and expensive legal procedures to dissolve her marriage under the narrow scope of her divorce rights, and only few women have the financial or other resources to do so. Because of weak laws and flawed judicial systems, many of them do not succeed. Muslim women often face severe injustice as a result of current laws and procedures relating to women initiated divorce, which also adds instability and insecurity in their life. This discrepancy not only undermines the equality between man and woman but it also serves as a major contributing factor of domestic violence, rising numbers in lawsuits, increasing extramarital affairs of the spouses. Except for divorce obtained through court intervention or arbitration council, Bangladesh's laws do not provide any further provisions regarding divorce. These laws contain some flaws and weaknesses that prevent married woman from easily exercising her right to divorce. In order to enhance Bangladesh's divorce system, it is therefore important to revise the current legislation. The core focus of the article is to identify the deficiencies of statutory laws of Bangladesh governing Muslim wife's right to divorce and suggest measures for overcoming the problems. This article is analytical in nature. Relevant policies, data, books, reports, articles, newspapers and internet materials have been reviewed for content analysis. Relevant statutes and reported and unreported cases have also been analyzed whenever necessary.

2. Woman-Initiated Divorce in Bangladesh: Causes and Growth

To free couples, especially woman, from violent, abusive, and oppressive marriage relationships, divorce is important. In Bangladesh, abuse, infidelity, polygamy, impotence, infertility, extramarital affairs, addiction to drugs and social media, substance abuse, pressure for dowry, non-payment of maintenance, women's income, and husbands' lack of financial means are the most frequent causes of women's decisions to initiate divorce.⁵ Data from Dhaka City Corporations show that divorce applications surged by 34% over the previous seven years, while domestic violence and divorce rates soared by 29.78% during the coronavirus epidemic in 2020.⁶ According to this data, 70,000 divorce

⁵ Majhar Mannan, 'Increase in divorce cases is ominous', *The Daily Independent*, 25 December 2020; Abdur Rahman Zibol, 'Divorce in Muslim Families: A Common Phenomenon, Bangladesh Perspective', *Journal of Governance and Innovation*, Vol. III, No. 1, Dhaka, 2017, p.43

⁶ Mansura Hossain and Sujon Ghose, 'One divorce per hour in Dhaka', *The Daily Prothom Alo*, 28 August 2022

petitions were filed in Dhaka city from 2010 to 2019; 70% of these petitions were submitted by wives. A report of Bangladesh Bureau of Statistics states that the divorce rate increased from 0.7 per thousand persons in 2021 to 1.4 per thousand in 2022.⁷ This report also shows that educated and working women were no longer prepared to put up with domestic violence based on gender, which is one of the main factors driving up divorce rates. It is significant to point out that more women than men are initiating divorces in Bangladesh. Seven out of ten applications were submitted by wives in 2022.⁸ Despite this, there are a number of reasons for which Muslim wives would prefer to avoid going through the legal process, such as the lengthy, expensive, and complex court system, the male-dominated nature of the judiciary, financial dependence, lack of family support, lack of a separate family court system, institutional and procedural obstacles. Furthermore, in a *purdah* maintaining community like Bangladesh, few women have the bravery to go to court to prove their claims against their husbands so that the judge will grant them a dissolution.

3. Modes of Women-Initiated Divorce in Bangladesh

A Muslim wife may dissolve her marital tie by *khula* or *mubarat* in accordance with Muslim *Shariah* law. Under the statutory laws of Bangladesh, every Muslim wife has the right to unilaterally divorce her spouse (*talaq-i-tafweez*) if her husband grants such right. If the wife is unable to get a divorce by *talaq-i-tafweez*, she can only get her marriage dissolved by the court.

3.1 Khula and Mubarat

Khula talaq is a method of ending a Muslim marriage that is carried out by the consent of both parties. In *Khula*, a wife seeks a divorce from her spouse by renouncing any entitlements or rights, including dower or assets. In *Mubarat*, either the woman or the husband can present the divorce request. Once the offer is accepted, it becomes a single irrevocable pronouncement of *talaq*. *Khula* and *mubarat* both require mutual consent. The husband might take advantage of the wife's

⁷ SM Najmus Sakib, 'Rising violence against women, social instability major causes of separation', available at www.aa.com.tr/en/asia-pacific, last accessed on 01 July 2023

⁸ Salman Akhtar, 'Rising Divorce Rates in Bangladesh: A Closer Look at the Figures and Underlying Causes', available at <https://bnn.network/breaking-news>, last accessed on 20 August 2023

ability to file for divorce in either a *khula* or a *mubarat*. It must be kept in mind that in the *khula* form of divorce, a woman may be asked to give up her entitlement to dower or other property in exchange for her husband's approval. Only a woman having a strong financial capacity can overcome this financial challenge. In consequences of *talaq*, every husband must pay the dower if the dower hasn't already been given to his wife. In *khula*, the wife is supposed to forego property to her husband. If a husband rejects the wife's offer of *khula* offer, she may ask the court for a divorce on this issue, because a husband always enjoys unilateral right to *talaq*. Thus, it appears that the exact meaning of the wife's right to *khula* is unclear.

3.2 Delegation of the Power of Divorce by Husband or *Talaq-i-tafweez*

If a husband grants his wife the 'authority of divorce', the wife is then free to end her marriage. According to the MFLO, if the woman is granted the power to divorce through delegation, she may exercise it in the same manner as the husband, mentioned in section 7 as long as it is permissible.⁹ This kind of divorce declared by the woman will not effect until 90 days have elapsed since the notice was sent, and she has notified the head of the local administrative unit. During this time, the wife has the option to revoke the divorce. Additionally, the wife is required to give the husband a copy of the aforementioned notice. Within 30 days after receiving the notice and in an effort to reconcile the parties, the Chairman convenes an arbitration council with representatives from the husband and wife. If the couple is unable to reconcile together within 90 days and the woman does not withdraw the divorce notice, the divorce is declared final and both parties are given divorce certificates by the chairman. If the arbitration's reconciliation is successful, the divorce is annulled.¹⁰

3.3 Judicial Divorce

A wife may end her marriage under section 2 of the DMMA by filing a complaint in the Family Court on any of nine grounds.¹¹ She does not

⁹ Section 8, *The Muslim Family Laws Ordinance, 1961*

¹⁰ Section 7, *Ibid*

¹¹ Grounds under section 2: (a) If the husband has been gone for four years without being found; (b) If he does not provide maintenance to his wife for two years; c) If he has served a 7 years or longer prison sentence; d) If the husband has neglected a marital duty for three years or longer; e) If the husband was or is still impotent; f) If the husband has neglected his marital duties for three years or longer; g) If

require the consent/authority of her husband for this. The court issues the verdict of dissolution of marriage after the woman successfully proves her case during the trial. The Chairman of the Arbitration Council must get a copy of the decree so that the arbitration council can take action to mediate disputes between the parties. The *Nikah Registrar* is notified in writing to take the appropriate actions to record the divorce in the Registrar book if the arbitration council's attempt at conciliation is unsuccessful. The court will not grant a woman a decree, if she is unable to support her claims. However, the majority of women lack the resources to take legal action to separate from their partners.¹² The court must send a certified copy of the divorce decree to the relevant Chairman or Mayor within seven days of the decree's issuing. The divorce shall be regarded as final and binding if it has been finalized 90 days after the Chairman or Mayor receives the notice. Additionally, Muslim marriage and divorce registration are covered by the Muslim Marriages and Divorces (Registration) Act, 1974 (MMDA). A registrar may, upon request, record a divorce as per Muslim law in line with section 6 of the Act.

4. Equality under the Constitution in Exercising the Divorce Power

Despite the fact that Bangladesh has ratified a number of international treaties¹³ supporting gender equality, it disagrees with the provisions of article 2 of the CEDAW because it is contradictory with the

the husband has a history of mental illness and has endured other potentially fatal conditions for a period of two years; h) If the woman was married before the age of 18 and she wishes to dissolve the union before the age of 19; and i) If the husband mistreats the wife.

¹² Human Rights Watch (2012), "Will I Get My Dues ... Before I Die?" Harm to Women from Bangladesh's Discriminatory Laws on Marriage, Separation, and Divorce", at p. 60, available at www.hrw.org, last accessed on 23 March 2017

¹³ Bangladesh has ratified a number of international laws promoting gender equality, such as *Convention on the Elimination of All Forms of Discrimination against Women*, 1979; *Universal Declaration of Human Rights*, 1948; *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, 1964; *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, 1999; *Convention on the Political Rights of Women*, 1953; *International Covenant on Civil and Political Rights*, 1966; *International Covenant on Economic, Social and Cultural Rights*, 1966, *Convention on the Elimination of All Forms of Discrimination against Women*, 1979 (CEDAW) etc.

provisions of Holy Qur'an and Sunnah.¹⁴ The Constitution of Bangladesh guarantees both the right to equality before the law and the right to equal protection under the law.¹⁵ The same Constitution guarantees that no citizen of Bangladesh will be subject to discrimination on the basis of religion, race, caste, sex, or place of birth alone, and woman will enjoy equal rights with man in all spheres of the state and public life.¹⁶ The Constitution is the highest law of the land, any law that contradicts with it will be invalid.¹⁷ The Constitution's supremacy is slightly weakened by the traditional application of *shariah* law in cases involving gender inequity, especially when women's rights in private life are taken into account. Both statutory legislation and *shariah* law in Bangladesh cover the whole process for dissolving a marriage. As Muslim marriage is treated as like a civil contract, it is supposed to be governed by the same laws which give both partners equal power to end the contract, if it is necessary. But in case of a divorce, whether it be judicial or extrajudicial, neither *shariah* law nor statutory laws provide this equality to women. The FCO affirms that man and woman are handled differently; whilst a husband is not required to file any case to gain a divorce, but a wife needs to file a case for divorce from her husband. Even if the court decides in the litigant's favor, the ruling still needs to be approved by the Arbitration Council.¹⁸ Since women previously had to file for divorce in court under the MFLO, this approach cannot be treated as an improvement.¹⁹ An examination of the divorce provisions of *shariah* law in its various manifestations, such as *khula*, *mubarat*, and *talak-i-tafweez*²⁰, as well as Bangladesh's statutory laws, such as the FCO

¹⁴ According to Article 2 of CEDAW, States Parties concur to pursue and take all necessary measures to abolish discrimination against women. However, Bangladesh does not see these clauses as requiring it to do anything. All types of discrimination against women are condemned by the States Parties.

¹⁵ Article 27, *The Constitution of Bangladesh*

¹⁶ Article 28, *Ibid*

¹⁷ Article 7, *Ibid*

¹⁸ Section 23 (2), *The Family Courts Ordinance, 1985*

¹⁹ World Bank, *Bangladesh: Strategies for Enhancing the Role of Women in Economic Development*, Washington DC, World Bank, 1990, p.37

²⁰ The terms of the marriage contract must be met for the wife to unilaterally divorce her husband. If the husband gives the wife permission to divorce throughout the course of the marital contract, this is referred to as a '*talaq-i-tafweez*' or 'delegated divorce'.

and the MFLO on the matter, shows that Muslim husbands have been given unrestricted power over their wives in the area of divorce.

5. Women's Right to Divorce under the Muslim Family Laws Ordinance, 1961

Section 7 of the MFLO was designed to stop the husband from utilizing his right of divorce in an impulsive and imprudent manner to end the marriage. The MFLO raises many questions rather than solutions in regard to 'delegation of divorce power by the husband', 'insincerity of the arbitration council' and 'non-serving of divorce notice'.

5.1 Delegating Divorce Power by the Husband

It is another method of ending a marriage in which a woman is given the option of breaking her union.²¹ The husband may grant his wife the right to divorce with the terms agreed upon by the parties in Column 18 of the current *nikahnama*. Although it is a vital protection for women, the right to a delegated divorce is totally dependent on the husband's choices. As a result, the *talaq* right of a husband and wife cannot be equal. In Bangladesh, Muslim marriage agreements give the option to the husband to delegate the right to divorce to the wife. This clause may be disregarded or physically crossed out by the marriage registrars without consulting the parties to the contract. In this regard, the MFLO has no punitive recommendations. The wife may be legally entitled to exercise her right to a delegated divorce under certain circumstances, such as the husband's second marriage, non-payment of dower, cruelty, mistreatment etc.²² The issue arises when the wife asserts her right on the justification that the predetermined circumstance has occurred, but the husband contests her assertion. This right is in no way comparable to the husband's ability to declare divorce because it exclusively depends on his choices. The husband may contest the wife's declaration of *talaq* made in the course of exercising her delegated authority on the grounds that the necessary circumstances have not been met.²³ As a result, in order to exercise the right to delegated divorce, the prerequisites for the delegation must be satisfied or the delegation should be unconditional. In this case, the law

²¹ Section 8, *The Muslim Family Laws Ordinance*, 1961

²² Section 2, *The Dissolution of Muslim Marriages Act*, 1939

²³ Shahnaz Huda, 'UNTYING THE KNOT'-MUSLIM WOMEN'S RIGHT OF DIVORCE AND OTHER INCIDENTAL RIGHTS IN BANGLADESH', *The Dhaka University Studies*, Part-F, Vol. V (1), Dhaka University, Dhaka, p.143

needs to be modified. The High Court of Bangladesh ruled that divorce rights may be unconditionally delegated in accordance with Muslim law.²⁴ The husband and wife's rights do not become equal until the delegated right to divorce is unconditionally given. In contrast, if the wife exercises her right, it may result in expensive and complicated judicial disputes. Although the husband is not permitted to challenge the divorce, it frequently happens that he files a lawsuit seeking the restoration of his conjugal rights.²⁵

5.2 Arbitration Council

Because of statutory restrictions and practical gaps therein, the intention of both parties to reconcile under section 7(4) of the MFLO has frequently been hindered. The entire arbitration council arrangement has been changed from being mandatory to being optional.²⁶ The Chairman of the arbitration council plays a crucial role in helping the parties come to an amicable agreement that could ultimately preserve a family. The parties cannot be compelled to attend an arbitration hearing by the arbitration council. If the Chairman intentionally or unintentionally fails to form an arbitration council, fails to take any meaningful action to mediate a settlement between the parties, or if the husband refuses to assist the arbitration council, the MFLO does not provide any solution in this regard. Due to our social and practical reality, husbands frequently avoid the arbitration council and legislative restrictions are not always strictly followed by them.²⁷ When the Chairman receives notice of a *talaq* pursuant to subsection (1) of section 7, the *talaq*, if it is otherwise legitimate, will take effect 90 days after the delivery of the notice. As a result, the Arbitration Council has no role in the effectiveness of the *talaq*, which, according to section 7(1), takes effect after the specified period. Regrettably, these procedural flaws and statutory restrictions might prevent the parties from coming to an agreement. If the husband divorces his wife but disregards the MFLO's processes, he can still register the divorce under the MMDA. Even so, the *Nikah* Registrar registers the *talaq* in

²⁴ *Aklimakhatun vs Mahbubur Rahman*, 1962 14 DLR 476

²⁵ Shahnaz Huda, *Op.cit*, p147

²⁶ Mohammad Hasan, 'No Notice, No Talaq: A Conundrum', *The Daily Observer*, 10 October 2019

²⁷ Kamrul Hossain, 'In Search of Equality: Marriage Related Laws for Muslim Women in Bangladesh', *Journal of International Women's Studies*, Volume 5, Issue 1, 2003, p.30

Bangladesh if it does not adhere to the MFLO. Since the husband's approval is required in this situation, it is impossible when the wife wants to divorce her husband. Undoubtedly, such a practice may seriously impede efforts to reconcile, on the other hand, it cannot stop the husband from arbitrarily using his right to divorce.

Although the goal of section 7 is to avoid quick divorces without an attempt at reconciliation on the part of the parties or the UP Chairman, the rate of such reconciliation in Bangladesh is quite low, especially in rural regions.²⁸ According to a study, many UPs do not take the effort to reconcile, which is the cause of the low rate of reconciliation.²⁹ The UP members and Chairman don't seem to be very interested in serving on the arbitration panel.³⁰ There is no provision in the current Village Court Act, 2006 (VC), which addresses the situation if the UP Chairman fails to arrange an arbitration council meeting on time. According to a study, each UP had a well-equipped Village Court chamber, but the UP lacked a conciliation/mediation room.³¹ It is exceedingly challenging to establish a calm environment for conciliation under the arbitration council without a conciliation room. Only a notification of a *talaq* is required to be given to the Chairman, under the Ordinance. In contrast to sections 6 and 9 of the MFLO, which require the arbitration council to decide on a husband's request for permission to marry again, and to make a determination in

²⁸ Naima Huq, *The Muslim Family Law Ordinance, 1961 and a Wife's Safeguard*, CLEP Bulletin August 1996.

²⁹ Rana P Sattar, *Study on the Overall Impact of Madaripur Legal Aid Association's Mediation Activities and the Monitoring and Evaluation Capacity of the Organization*, conducted by Social Development Consultants, Dhaka, September, 2000; Cited by Dr. Nusrat Ameen, 'DISPENSING JUSTICE TO THE POOR: THE VILLAGE COURT, ARBITRATION COUNCIL -VS- NGO MEDIATION', *The Dhaka University Studies*, Part-F Vol. XVI (2), Dhaka, 2005, p.114

³⁰ Abul Barkat, *Review of Social Barrier and Limitation of Village Courts*, Local Government Division (LGD), Ministry of Local Government, Rural Development and Cooperatives, Government of Bangladesh under Activating Village Courts in Bangladesh Project, LGD, Dhaka, 2012

³¹ Md Abdur Rahim Mia, *An Evaluation of the Village Courts in Bangladesh*, A Final Report Submitted on RU Research Project 2019, Faculty of Law, Rajshahi University, 2020; Bashir Ahmed and Mohammad Tariqul Islam, *The Role of Union Parishad in Rural Dispute Resolution in Bangladesh: An Evaluation in the Light of People's Perception*, Dhaka, 2013, p.195; Maria Matin, 'Sometimes Village Courts can do the Job', *The Daily Star*, 25 July 2019

response to a wife's request for maintenance, sections 7 and 8 of the MFLO require the arbitration council to make no decision or determination in response to such notice. Despite the fact that parties may petition the court for a review of the arbitration council's divorce decision, the Ordinance makes no reference of the provision allowing them to do so. As a result, the aggrieved party may consider the arbitration council's decision to be final due to the lack of the legal provisions. The aggrieved woman's human rights may have been violated in this situation. In this situation, the woman who feels aggrieved can ask the court to reconsider the arbitration council's judgment, but it is also required to define the legal position on the matter. Additionally, there is still a chance that the arbitration council will make biased rulings in many divorce cases because the Ordinance does not contain accountability requirements for the arbitration council.³²

5.3 Failure to Issue Notice

In the event of a delegated divorce, section 8 of the MFLO mandates that the wife deliver copies of the notice to the Chairman and husband as soon as the *talaq* is issued. The lack of precise statutory guidelines on the status of *talaq* in cases where neither the husband nor the wife has given notice, no arbitration council has been established, and no attempt has been made at reconciliation has raised more questions than it has provided answers.³³ If a wife purposefully fails to notify her husband of the divorce, she cannot legally register this divorce without his consent. The wife is not permitted to remarry, and if she does, both the new husband and she will be accused of adultery because the husband has not given his consent. Under the DMMA, the wife must appear in court once more to obtain a divorce.

Regarding the issue whether a husband initiated *talaq* is invalidated by the lack of notice being served, there are various judgments. In some cases³⁴, the High Court of Bangladesh has stated that no divorce is

³² Begum Asma Siddiqua, *The Family Courts of Bangladesh: An Appraisal of Rajshahi Sadar Family Court and the Gender Issues*, Forum on Women in Security and International Affairs and Bangladesh Freedom Foundation, Dhaka, 2005, p.17

³³ Kamrul Hossain, 'In Search of Equality: Marriage Related Laws for Muslim Women in Bangladesh', *Journal of International Women's Studies*, Volume 5, Issue 1, 2003, p.30

³⁴ *Nur Nabi (Md) vs Salima Akter Doly*, 13 (BLC) HCD p. 327; *Abdus Sobhan Sarker vs Md. Abdul Ghani*, 25 DLR, HCD, p. 227; *Abdul Aziz vs Rezia Khatoon*, 21 DLR 733;

permissible under section 7 of the MFLO unless the statutory requirement of providing notice is strictly followed. The decision in the *Sirajul Islam vs Helena Begum*³⁵ case holds that the divorce is nonetheless legitimate even though the mandatory notice to the Chairman of the *Union Parishad* was not given. According to the ruling in the case of *Sirajul Islam vs Helena Begum*, the failure to give the required notice to the Chairman of the *Union Parishad* does not invalidate the divorce. The High Court Division of Bangladesh also ruled that the failure to serve notice does not render a divorce ineffectual or unenforceable.³⁶ Thus, it is an established principle now that without notice a divorce can be effective.³⁷ In the event of a delegated divorce, the MFLO is mute as to whether or not the *talaq* will be enforceable if the woman has not given the required notice. Certain procedural formalities must be followed in accordance with the MFLO. One of the procedures is giving notice. The 90 days for reconciliation start to run from the day the Chairman receives the notice, regardless of when the opposing party got it. This is a major procedural error since there may be circumstances in which the party filing for divorce purposely waits longer than necessary to notify the other party in order to prevent that party from attending the arbitration council.

In accordance with Islamic law, a third divorce takes effect immediately after being issued; however, under section 7, it won't take effect until ninety days have gone by since the Chairman received the notice. Islamic law states that "*iddat*" begins to accrue at the moment of pronouncement, but according to section 7, it begins to accrue when the Chairman receives the notice. When the Chairman is not notified, then problems arise. In accordance with Islamic law, a couple's divorce if they haven't yet consummated their marriage takes effect right away, and the lady doesn't need to perform a '*iddat*'. Under the MFLO, every divorce, whether the marriage is consummated or not, will be effective 90 days after the Chairman receives the notice.

Sirajul Islam and others vs State, 46 DLR 700; *Dilruba Aktar vs AHM Mohsin*, 55 DLR (2003) 568; 55 DLR (HCD) 568; 25 DLR (HCD) 227; 15 DLR (SC) 09

³⁵ 48 DLR (HCD) 1996 P.48

³⁶ 13 BLC (HCD) 327

³⁷ Mohammad Hasan, 'No Notice, No Talaq: A Conundrum', *The Daily Observer*, 10 October 2019

6. Women's Right to Divorce under the Dissolution of Muslim Marriages Act, 1939

Any of the nine grounds stated in Section 2 of the DMMA may be used by a Muslim wife to request from the court a judgment for the dissolution of her marriage. The DMMA does not restrict men's ability to unilaterally divorce. This Act does not provide any guidelines about judicial separation when the parties of the marriage want to live separately without expecting any divorce. *Mubarat*, or mutual consent, is not included in this Act, but it is included in section 8 of the MFCO which does not mention the word 'mutual consent' clearly. "Adultery" is also not a basis for divorce under this Act. It is not specifically mentioned in Section 2 of the DMMA that a wife may file for divorce on the basis of *khula*.

In accordance with Section 2, a wife may apply for a decree of dissolution of marriage if her husband was sentenced to a prison term of at least seven years. This is subject to the restriction that no divorce decree may be granted on this basis before the judgment has been rendered final. However, it must be remembered that crimes of a grave nature carry a mandatory sentence of captivity for seven years or longer. Because of this, wives of guilty husbands face tremendous social pressure. Furthermore, under our criminal justice system, a sentence is only affirmed following an appeal and modification in the "appellate court," which is often a protracted process.³⁸

In accordance with Section 2, a wife may initiate divorce proceedings if her husband has neglected or refused to pay support for two years. Wives in Bangladesh mostly depend on their husbands for financial support. The requirement that a woman who depends on her spouse must wait two years before being allowed to divorce appears absurd. The struggles a financially dependent woman faced at the time is not addressed by this section. If a woman's husband neglects or does not properly care for her, she must be given the decree to end the marriage sooner. In addition, the word "maintenance" itself is unclear and nebulous. The effects of a husband's insufficient support for his wife are not mentioned in this section.

³⁸ Shahnewaj Patwari and Abu N M A Ali, 'Muslim Women's Right to Divorce and Gender Equality Issues in Bangladesh: A Proposal for Review of Current Laws', *Journal of International Women's Studies*, Vol. 21, Issue 6, Bridgewater, 2020, p. 72

In accordance with section 2(viii), a woman who is given in marriage before the age of 18 by a parent or other guardian can dissolve the union before the age of 19, so long as the union has not yet reached consummation. The DMMA says nothing on what to do when the consummation occurs against the girl's choice. The DMMA does not provide any solution when such type of marriage is consummated 'before attaining puberty' or 'without free consent of wife' or 'by force'. These grounds prevent the wife from using her right to "option of puberty,"³⁹ as well as makes it difficult for the wife to gather evidence of incidents. Furthermore it would not be considered adultery if the woman permits consummation even after exercising her right to puberty.⁴⁰ Since the marriage would still be valid, cohabitation would be completely lawful. To obtain a successful divorce, the young wife must prove to the Family Court that she was given in matrimony before reaching the legal age of consent and that the union has not been consummated. It is necessary to further demonstrate that the accomplishment occurred against her will⁴¹ or before she reached puberty⁴² if the marriage is consummated. These court proceedings are not only expensive and time-consuming, but they are also difficult for a young woman who is under the age of 19. The Child Marriage Restraint Act, 2017 is effectively made a mockery of in this situation.⁴³ Who will represent or assist this child in approaching the Court is still an open topic. The requirement to get a divorce decree from an appropriate court is the most crucial issue with relation to the option of puberty. In other words, the marriage is not dissolved by the wife just

³⁹ Once puberty is achieved, the minor gains the legal right to reject the marriage if it is entered into on their behalf by a guardian other than their father or paternal grandfather; *Naveen Kohli vs Neelu Kohli* on 21 March 2006, Appeal (Civil) 812 of 2004, available at <http://indiankanoon.org/doc/1643829>, last accessed on July 26, 2015

⁴⁰ Shahnewaj Patwari and Abu N M A Ali, 'Muslim Women's Right to Divorce and Gender Equality Issues in Bangladesh: A Proposal for Review of Current Laws', *Journal of International Women's Studies*, Vol. 21, Issue 6, Bridgewater, 2020, p. 72

⁴¹ *Mst. Ghulam Sakina vs Falak Sher*, PLD 1949 Lah.79

⁴² *Allah Diwaya vs Mst. Kammon Mai*, 9 DLR (1957) 49

⁴³ The minimum age for marriage has remained at 18 for girls and 21 for males under the *Child Marriage Restraint Act* of 2017, which repealed the *Child Marriage Restraint Act* of 1929. For a minor girl's "greatest benefit," exceptions may be made for her marriage "by order of the Court and with the consent of the parents." A person under the age of 18 is considered a kid by Section 3 of the *Majority Act*, 1875, however this definition is not applicable in cases of marriage, dower, divorce, etc.

exercising her right to become a teenager. It continues until a court issues a judgment dissolving the marriage. When the wife reaches puberty, the husband may utilize this right to divorce her; but the wife has to apply to the court to use such right. The marriage will be deemed legal if the minor doesn't object. Therefore, reaching puberty does not instantly renounce a marriage; rather, it serves as a basis for requesting a divorce through the support of the court. This is due to the belief that a girl under the age of 18 is unable to develop the degree of cognition necessary to make a marriage decision.⁴⁴ If a girl marries before becoming 18, her legal guardian will decide whether or not she must wed. When a Muslim wife wants to end her marriage after turning major, she must face the challenges of specific legal procedures on her own in order to exercise her right to choose puberty.⁴⁵

7. The Family Courts Ordinance, 1985 relating to Women Right to Divorce

To settle disagreements regarding divorce, support of the wife, dower, restitution of conjugal rights, child custody, and guardianship, Family Courts (FC) were formed in Bangladesh in accordance with the FCO. A separate family court was intended to be formed and established under the FCO to handle only family-related disputes. Since the Ordinance was published in 1985, no independent court has been established. Every assistant judge of the civil court serves both as a judge and a mediator in this situation. He already has too many civil lawsuits on his plate and is the judge with the least amount of experience.⁴⁶ Due to the lack of a distinct family court in Bangladesh, there is a delay in the issuance of summons, the issuance of warrants for the monetary recovery of judgments, the taking of simultaneous copies of cases, and most importantly, the adjudication of cases. The pressure of civil appeal cases in the district judge's court and the pressure of civil cases in the lower courts is growing as a result of the absence of distinct family courts. If the judge solely handles family law issues, it would have been simpler for him to either try the case or mediate the disagreements. As a result, family law matters frequently drag on and female divorce plaintiffs frequently lose interest in the case.

⁴⁴ Editorial Report, 'Child marriage and its fatal consequences', *The Daily Prothom Alo*, 12 October 2014

⁴⁵ Section 101, *The Evidence Act, 1872*; *Allah Diwaya vs Mst. Kammon Mai*, 9 DLR (1957) 49

⁴⁶ Section 4, *The Family Courts Ordinance, 1985*

After the FC system was established, no logistical or infrastructure development has yet been used to carry out the FC's objective. The current FCO does not contain any provisions relating to counseling support services despite the fact that these services are absolutely vital for aiding the parties in resolving family conflicts. The court system is also out of the ordinary citizen's reach due to being expensive. According to the Ordinance, the judge must take the initiative to mediate any family disputes; but, if the judge's initiative is unsuccessful, the legislation is silent regarding the appropriate course of action to be taken against the party(ies) at fault.

Muslim husbands are commanded by the Qur'an to either release or keep their wives in a kind manner. If a woman wants to divorce her husband, the only acceptable course of action for a third person, such as a *Quazi* or a judge, is to first attempt to reach a settlement and, if that fails, to legally separate the couple. Upon the woman's success in establishing her case during the trial, the court issues the judgment of dissolution of marriage. In order to take "initiatives to conciliate" between parties, a copy of the decree is sent to the "Chairman" of the arbitration council. If the arbitration council's attempt at mediation is unsuccessful, it notifies the *Nikah* Registrar in writing to take the appropriate actions and record the divorce in the Registrar Book. The court will not grant a woman the divorce decree, nevertheless, if she is unable to support her claims. There is no justification for the court's decision to transfer the case to the arbitration council for further reconciliation if a woman refuses to drop her claim for separation in spite of all reasonable attempts made by the court to try to reach a peaceful settlement.⁴⁷ It is unjust, protracted, and against the law. The judgment of the Court judgment ought to be considered as binding and final.

8. Muslim Marriages and Divorces (Registration) Act, 1974 Relating to Registration of Muslim Women Initiated Divorce

According to section 6(3) of the MMDA, if there is no document registered under the Registration Act of 1908 by which the husband transfers the right to divorce to his wife, the *Nikah* (Marriage) Registrar is not allowed to register a wife initiated divorce which is delegated by husband to his wife.⁴⁸ The authors discovered through random review

⁴⁷ Sections 23 (2) and 23(3), *The Family Court Ordinance, 1985*

⁴⁸ Clause 17, *The Muslim Marriages and Divorces (Registration) Act, 1974*

of selected *kabinnamas*, found that, the *Nikah* Registrar hurriedly filled out column 18 of Form D of the Muslim Marriages and Divorces (Registration) Rules, 2009 without obtaining the spouses' consent in advance.⁴⁹ The delegation of *tafweez* in this manner presents legal issues regarding the legitimacy and correctness of the authority held by Muslim wives in the strict sense of the word. According to the MFLO, the wife's right to *tafweez* can only be exercised with the husband's consent.⁵⁰ A husband is also allowed to specify additional terms and the reasons on which his wife may exercise the right. The husband has the choice to contest the divorce demanded by Muslim wives through *tafweez* if they so want, using the justifications that the right of *tafweez* was not devolved and that the necessary circumstances for their wives to use *tafweez* were not acquired. In the case of *Nelly Zaman vs Giasuddin*,⁵¹ the divorce was contested by the defendant Nelly Zaman's wife on the grounds that the *tafweez* issued separation from her husband was not properly carried out by her. The divorce was found to be illegal by both the trial court and the lower appeal court, who also decided that the conjugal rights had been reinstated. In the end, the High Court Division (HCD) heard this case, and the HCD dismissed the simultaneous judgments of lower courts. This suggests that court rulings are also applied to the *talaq-i-tafweez*. This matter was ultimately brought before the High Court Division (HCD), and the HCD overturned the simultaneous judgments of lower courts, proving that the *talaq-i-tafweez* is equally susceptible to legal judgments and depends on the clear intension of the husband.

The stipulations put in the marriage contract appear imprecise and confusing due to the *Nikah* register's dishonest role, especially given that they were the same in every contract carrying restrictions. Usually, the parties do not express their unique viewpoints; instead, the Registrar just lays the circumstances down as a formula. *Nikahnama's* column 18 asks, "Has the husband granted his wife the right to divorce?" And if so, under what circumstances. This column's empty area is often filled with the words "Yes" and "According to applicable law. In other words, a wife can only divorce her husband if the

⁴⁹ The government has established Form D as a standard marriage contract form that covers the terms and conditions as well as other pertinent information about the newlywed spouse. The question of whether the husband wishes to give his wife the *tawfiz* power is addressed in detail in Column 18 of the Form D.

⁵⁰ Section 8, *The Muslim Family Laws Ordinance, 1961*

⁵¹ 34 DLR (1982) 221

husband grants her that authority. However, in a village area, this column may occasionally remain empty due to the groom's plan or due to a lack of interest on the side of both parties. It would be challenging to establish in a legal dispute the circumstances under which the right to divorce is granted. No restriction on the husband's right to divorce is stated in the *Nikahnama*, but there are limitations on women's rights to divorce. It should be upheld on the MMDA that the husband cannot declare divorce without the wife's consent in order to ensure equality. If the husband has a physical or other problems, why should the wife wait for the husband's permission to divorce him? In addition, if the husband has the right to divorce his wife whenever he pleases, why shouldn't the wife have the same right and oppose to this divorce column? Why should the wife obtain the husband's consent to divorce if the husband is oppressive, promiscuous, adulterous, or otherwise deviant? It is in conflict with the matter of fundamental rights and gender equality. That column needs to be updated and improved in this regard.

9. Suggestions and Conclusion

The above discussions suggest that only the husband has the absolute authority to divorce, and current Bangladeshi laws do not give Muslim women the same freedom to dissolve their union at any time as their male counterparts have. This article also indicates that existing laws of Bangladesh relating to Muslim women initiating divorce have many weaknesses and shortcomings which restrict women to enjoy their divorce rights. The right to divorce is restricted for women because the husband must grant her this right at the beginning of the marriage. This narrow scope may be even more constricted if the husband, at the time of delegation, outlined the conditions in which the wife could use her right to divorce. In Bangladesh, the right of divorce between husband and wife is not equal and hence contradictory with the constitutional provisions. The MFLO raises many questions rather than solutions in regard to delegation of divorce power by the husband and insincerity of the arbitration council. There are many shortcomings of the MFLO which limit women's chances to initiate divorce. The DMMA's provisions for divorcing a husband by the wife are quite limited, and the Act's stated goal of elevating Muslim women to the status that Islam bestowed upon them has not been accomplished. Since the FCO's adoption, no independent family court has been established. When the mediation endeavor fails due to the parties' actions, this FCO makes no recommendations. The Ordinance does not

enhance equality between husband and wife in cases of puberty choice. Furthermore, the FCO has not discovered any justification for sending the family court's ruling to the arbitrarily appointed council for further conciliation. The MMDA does not impose any sanctions for the *Nikah* registrar's dishonest attitude. Under this Act, the delegation of divorce authority is not required to be unconditional. The Bangladeshi procedure for women-initiated-divorce has the aforementioned lackings. The current divorce rules and procedures in Bangladesh regularly cause serious injustices, instability and insecurity in Muslim women's lives. Some suggestions are recommended below to reduce the sufferings of women who want to divorce her husband.

The government may create a directive or regulation outlining the responsibilities of the arbitration council so that the dowry, maintenance, and child custody disputes, along with the divorce petition, can be resolved through the arbitration council, relieving the family court of some of the cases. A wife who has the option of *talaq-i-tafweez* avoids expensive court cases. As a result, changing section 7 of the MFLO may require that the wife always be granted the right to a delegated divorce. If that's not possible, then whatever permission is given must always be given freely. In this regard, *Kabinnama* should be modified. A clause should be added to the MFLO stating that, in the event of a choice of puberty, both the husband and the wife will have the right to unilaterally divorce after reaching the age of majority, subject to the requirements of section 7 of the MFLO, and that the terms "consummated before attaining puberty" or "consummated without the wife's free consent" or "consummated by force" will be taken into consideration along with other factors. *Mubarat* should be mentioned clearly under the purview of section 8 of the MFLO. It should be upheld on the MMDA that the husband cannot declare divorce without the wife's consent in order to maintain equality. The MMDA should include a section describing the function of *nikah* registrars and the sanctions for their dishonesty. Every *Upazila* needs a separate Family Court, hence the FCO needs to be modified. When the mediation endeavor fails due to the actions of the parties, the FCO should have guidelines. By altering the FCO, the Family Court's ruling must be made final. The DMMA should be amended to include "adultery" as a basis for divorce. *Khula* needs to be clearly specified in section 2 of the DMMA as a reason for divorce. Either section 5 of this Act should be modified, or a new section should be added to the DMMA to address the divorcee's financial stability. A sentence in Bangladesh's criminal justice system is only formalized after an appeal

and revision in the "appellate court," which is typically a drawn-out procedure that can take more than 7 years. It should just take four years instead of seven.

To provide streamlined and impartial legal processes to Muslim wives who desire to divorce their husbands, laws and practices of the country governing women initiated divorce should be examined. The law cannot establish justice if it is flawed and discriminatory. It is impossible to adequately apply the original law if it has a flaw. Any legislation's intent is defeated if it is implemented with varied difficulties due to flaws and gaps in the law. It is true that women make up the majority of the plaintiffs in cases brought under the aforementioned legislation. If women—the state's overwhelming population—remain disenfranchised and in turmoil, national progress would never be achievable. All family laws must be liberalized and flaws eliminated in order to promptly and easily resolve family disputes. Regardless of gender, ethnicity or religion, the government is required to uphold each citizen's right. The government is expected to act quickly to change and reform the law in order to guarantee Muslim women's legal protection and benefit of the society.