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Revisiting Muslim Personal Law in Bangladesh: Challenges and Opportunities for Codification

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Abstract: This study examines the necessity of codifying Muslim personal law in Bangladesh. Bangladeshi Muslim personal laws are driven by different schools of thought, but remain anomalous. The harmonious balance between legal provision and Sharia principles are absent in many cases. Patriarchal bias, ambiguity, and conflict with constitutional principles is also vigilant in Bangladeshi laws, e.g., the Muslim Family Law Ordinance 1961, and the Dissolution of Muslim Marriages Act 1939. Many countries like Kuwait, UAE, Morocco, and Malaysia are adopting progressive interpretations to make their laws time-befitting. This qualitative study has identified gaps between legal codification and Sharia principles that discards social justice and gender equality in issues like the age of marriage, option of puberty, consent in marriage, and divorce during pregnancy. The author urges a comprehensive codification that will harmonize Sharia principles, constitutional law, and international norms with national legislation, ensuring clarity, gender equality, and social justice.

Keywords: Muslim laws; personal laws; Bangladeshi laws; challenges; opportunity; codification

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1. Introduction

The Muslim personal law is diversified because of different schools of thought, i.e., Hanafi, Maliki, Shafi, and Hanbali. These four schools of thought are under the umbrella of Sharia law (Yusuf and Ismail 2025). The Quran and Sunnah are the primary sources of law in Islam and a Muslim country like Bangladesh. Quranic verses emphasizing rules are either Muhkamat or Mutashabihat. Generally, there is no difference of opinion among the jurists regarding 'Muhkamat' verses as these are clear in nature. Contrarily, jurists have diverse opinions in the 'Mutashabihat' verses due to ambiguity or vagueness (Darojat et al. 2016). Differences of opinion among the schools of thought extends the Muslim Sharia Law. In Bangladesh, majority of the Muslims belongs to Hanafi school. Though there are codified Muslim laws in Bangladesh, these are full of anomalies. Hence, codification of Muslim personal law is necessary. There are practical ramifications, as well as benefits of codification. Codification creates social morality and, in its absence, a society may create its own ideology of an inherent inclination towards power (Wylie et al. 2024). Patriarchal society disregards women's rights reflecting dominance. Muslim family law in a patriarchal society is always defined through the lens of domination by the husband (Mir-Hosseini 2006). Hence, codification is necessary to build up social morality. Codification crystallizes the rights as unwritten laws are always fluid and cannot be brought before the proper adjudicative procedure in case of violation. Codification creates awareness among people about their rights and notifies stakeholders, and legislators to make future laws keeping in mind these laws (Erez 1998). The Muslim Personal Law (Shariat) Application Act, 1937 states that for Muslim contesting parties, matters like gift, maintenance, dower, divorce, guardianship, gifts, trusts, and waqfs shall be regulated by the Muslim Personal Law (Shariat).[1] But the ambit of Sharia is large, and without codification, it may lead to confusion among the civil society and the jurists while applying the Sharia. For all these practical ramifications, a codification of Muslim family law in Bangladesh is an urgent necessity. This study weighs the overall necessity of codification of Muslim personal law in Bangladesh.

2. Methods

[1] Muslim Personal Law (Shariat) Application Act, § 2 (1937).

Qualitative method was used to conduct this research based on primary and secondary sources. Primary sources like Acts of Parliament, legislation, policies, and case laws were used. Secondary sources like books, journal articles, conference papers, newspapers, and online sources were used to conduct this research. While conducting this research, online and offline sources were used simultaneously. As this research weighs the credibility of current available legislations and policies available for Muslim personal law, a qualitative study is more befitting for finding lacunas and proposing necessary reforms.

3. Challenges and Modes of Codification

The inherent problem of law is its rigidity. Once a law is enacted, it takes a lot of time and effort to revise it. However, lawlessness does not create codified morality, and rather creates a vacuum in society. Codification in vague terms may lead to poor understanding of Sharia law, which is not desirable. Incomplete codification also creates barriers in the legal development. The legal maxim, *ignorantia juris non excusat,* means ignorance of the law is no excuse. However, improper notification of rights enumerated in the legislation may not serve its purpose (Hovden 2023).

There can be two types of codification for Bangladeshi Muslim Family laws:

(1) Remove the anomalies of the current law.

(2) Create a fresh, exhaustive legislation.

4. Principles to be used to Interpret Sharia

4.1 Ishtihad

This is the systematic analysis of the Quran and Sunnah. The creative efforts of the jurist made Ishtihad a tool for interpreting Quranic and Sunnah policies (Bhartiya 2012). Modernists think that the door to Ishtihad is still open for interpretation. As society is changing so interpretation will obviously change to keep everything within the purview of Sharia. This principle is more relevant for Bangladesh while interpreting laws.

4.2 Takkhayyur

This doctrine permits choosing the best possible solution available avoiding the strict adherence to a single madhab (Wiederhold 1996). As Sharia law covers all schools, including the teaching of the Quran and Sunna, taking one of the liberal interpretations will not make religion burdensome rather progressive. Bangladeshi courts, in many instances, use this principle while giving remedies to the aggrieved persons.

4.3 Liberal Interpretation

There are different types of stances of the jurist in the case of 'Mutashabihat' verses. However, if choosing a liberal interpretation leads to more gender-equal legislation and social justice, then that needs to be followed. As Quran also speaks about gender equality and justice.

5. Anomalies in Bangladeshi Laws and Recommendations

There exist certain anomalies in the Bangladeshi legislation that deviate from Sharia. If a small portion of the legislation is anomalous then this research proposes only reforming those anomalous provisions. If the whole legislation is problematic, this study recommends a fresh legislation.

5.1 Definition of Marriage

Sharia defined Muslim marriage as *hisn* meaning fort and *Nikah* meaning joining together. Marriage protects from unchastity and joins two persons of different genders (Haque 2015). Since law is silent about the definition of Marriage; Bangladeshi society adopted a worse definition of superiority of husband over wife. If law had definition of love and affection as provided in Shariah, social morality would have been created. Thus, the Muslim Family Law Ordinance 1961 could not create social morality. It rather reflects patriarchy. As the law did not define marriage property, there remained different judicial opinions. Some took marriage as a contract. *Khurshid Bibi case* of Pakistan defined it as in the nature of a contract in a legal and religious sense.[2] The Bangladesh Supreme Court defined 'a marriage between male and female is not a sacrament but a civil contract'.[3] A well-furnished definition could have resolved all these dilemmas. Kanz al Daqaiq showed the husband as superior in nature. But the Holy Quran places men and women on equal footing, stating, 'your wives are garments for you, and you are garments for them' (The Qur'an 2:187). For creating a good social norm, definition of marriage is inevitable.

5.2 Marriage Registration Form (Kabinnnama)

The Muslim marriage registration form is commonly known as Kabinnama.[4] Bangladeshi Kabinnnama is more conservative than Sharia. The registration form only contains two spaces to insert witness names and signatures. Women cannot be witnesses under this form, because two witnesses are necessary for a Muslim marriage, and if women want to be witnesses, then two women are equivalent to one man in the case of a single witness (Karmakar 2023). Slots for a marriage witness need to be increased to ensure gender equality. This document can increase women's power.

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2 *Khurshid Bibi v. Muhammad Amin, PLD 97 (SC 1967).*

3 Anwar Hossain vs. Momtaz Begum, 51 DLR 444 (HCD 1999).

4 Muslim Marriages and Divorces [Registration] Rules (2009).

5.3 Registration of Marriage

Muslim marriages in Bangladesh are registered under the Muslim Marriages and Divorce Act, 1974. The validity of Muslim marriage does not depend on this registration. Bangladeshi legislation requires that the marriage shall be registered after the solemnization.[5] This provision complements Sharia law, as one of the primary requirements of marriage is to have witnesses for proof of marriage, and registration also reinforces the purpose of the witness.

Section 5 of the Registration Act requires the husband to report to the Kazi, within 30 days, for registration of marriage.[6] This is nothing but patriarchy. A woman should have the capacity to go before the Kazi and register her marriage. This is a clear violation of Articles 27 and 28 of the Constitution of the People's Republic of Bangladesh, which ensure equality before the law and non-discrimination based on gender.[7] Hence, this law should be amended to establish gender equality.

The Registration Act did not mention what would be the result of non-registration, thus a conflicting judgment can be seen by higher court. In *Abdur Rakib (Md Shahin) vs Sheetaj Khatun and another,* non-registration of marriage did not invalidate the marriage.[8] However, in *Sabbir Sheikh vs. State and another (2021),* allegations of rape was proved due to mere non-registration of the marriage. Deputy attorney general said that the marriage was not registered, so the marriage was invalid.

A clear codified law is necessary to avoid this type of unwanted crisis. The law should be amended by adding "non-registration of a Muslim marriage does not invalidate the marriage". Additionally, legislation must be gender equal.

equivalent to one man in the case of a single witness (Karmakar 2023). Slots for a marriage witness need to be increased to ensure gender equality. This document can increase women's power.

5.4 Marriage of a Minor

A child marriage needs consent of wali (guardian) in Sharia. However according to the Dissolution of Muslim Marriages Act 1939, only a girl marriage needs consent her guardian[9]. Thus, the law is more discriminatory than the Sharia. Additionally, there are anomalies regarding age. Section 2(vii) states that the law presumes a girl under 18 years is not an adult. Before the attainment of 18 years, if her father consents for her marriage, she can repudiate it before 19 years. So, a 17 years girl can be given in marriage by her guardian. But according to Sharia law, attainment of puberty is the benchmark to determine adulthood or the age of marriage (Novitasari et al. 2024). This provision also gives the impression that a 17 years boy cannot be given in marriage by his guardian. So, this is a clear violation of Sharia law.

There are two types of children, i.e., real child, and legal fiction. Laws of Bangladesh, in case of the determination of a child's age, have a different standing. Thus, a man at the age of 20 can make a contract, can give a vote, but interestingly, cannot marry. Thus, laws are in conflict with each other. According to Article 28 of the Constitution of the People's Republic of Bangladesh, the state shall not discriminate on the basis of sex. A woman of age 19 can marry, but a man of age 19 cannot marry. As mentioned in section 2 of the Muslim Sharia Application Act that in the absence of clear guidelines, Sharia law will be applicable. So either we need to make uniform legislation or follow Sharia law equivalent to one man in the case of a single witness (Karmakar 2023). Slots for a marriage witness need to be increased to ensure gender equality. This document can increase women's power.

5.5 Forced Marriage

In Sharia law, there is no place for forced marriage. As the child has no consent-giving capacity, guardians give consent on their behalf, and they have the option of puberty. However, the anomalous law opened the doorway to forced marriage, as the father can give her in marriage when she attains consent-giving capacity after the attainment of puberty[10]. So, in no way, a guardian can marry a girl of 17 years old in the eyes of Sharia. According to the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, a person will give his/her consent by himself/herself. No one will force him/her.[11] As this law approves forced marriage, this is a clear violation of Sharia law, constitutional law, and international law.

5.6 Option of Puberty

Generally, '*Khiyar ul bulugh'* or the option of puberty means a minor, if given marriage by his/her guardian, then after attaining puberty, they will have an option to repudiate that marriage (Singh 2024). In Bangladesh, the option of puberty has been reformed by the Dissolution of Muslim Marriages Act 1939, Section. 2(vii). Here, if the girl attains puberty before 18 and consummates after the marriage, still she will have the option of puberty provided she does not consummate after the attainment of age 18 (Haque 2015). This outcome is a direct deviation from the Sharia. A woman may gain her puberty before her 18th birthday. Additionally, the law only talks about girls' option of puberty, but Sharia grants it to both boys and girls.

5.7 Women's Capacity to Marry

All jurists unanimously opined that a non-virgin girl (who lost her virginity due to marriage or illicit relationship) can contract her own marriage without the consent of her wali (guardian). For a virgin girl, however the consent of her wali is a mandatory requirement. However, Imam Abu Hanifa disregarded this idea and opined to give her full capacity to marry without the consent of her wali (Büchler and Christina 2013).

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5 Muslim Marriage and Divorce [Registration] Act, § 3 (1974).

6 Muslim Marriage and Divorce [Registration] Act, § 5 (1974).

7 Constitution of the people's Republic of Bangladesh, art. 27,28 (1972)

8 Civil Petition for Leave to Appeal No. 1280 of 2007.

9 Dissolution of Muslim Marriages Act, § 2 (vii) (1939).

10 Ibid.

11 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, art 1 (1962).

Many modern laws in Kuwait, UAE, Morocco, and Malaysia have increased women's capacity to marry, and their consent is a material issue to disregard a marriage tie (Büchler and Christina 2013). So, Bangladesh needs a comprehensive law to cover this area.

5.8 Bride's Consent

All jurists believe that consent of a non-virgin bride is mandatory and without it, marriage will be void. But according to the other three jurists, father can marry off her daughter without her consent (Büchler and Christina 2013). Bangladeshi people are mostly Hanafi followers; however, this practice is not being followed.

According to the Dissolution of Muslim Marriage Act 1939, section 2(vii), a girl of 17 years old can be married off by her father against her will as the law presumes a girl of 17 years old as a child. This legal fiction contradicts two hadiths of the Holy Prophet Muhammad (PBUH). The Holy Prophet Muhammad (PBUH) said that 'as for the virgin, her father must ask her permission'. Another Hadith of Abdullah Ibn Buraydah also includes the same. Bangladeshi law needs to be amended or new legislation should be enacted to remove malpractice from society. Adult women must have the option to give their consent in this type of life-changing decision.

5.9 Legal Inconsistency on Age of Consent

Muslim marriages i In Bangladesh, a physical relationship with a wife under 13 years of age, with or without consent, is a marital rape.[12] Muslim family law recognizes a marriage with a girl under 13 years of age (if the girl has attained puberty) as valid (although it is a punishable act under the law) and allows the sexual relationship to take place. However, such a relationship is treated as a 'rape' under the Bangladeshi Penal Code. Thus, an intercourse with a wife who is 13 years old or more is not punishable under any law. Again, according to section 9 of the Nari-O-Shishu Nirjatan Daman Ain, 2000, sexual intercourse with a wife above 16 years of age is not rape, even if the intercourse takes place without her consent.[13] Both laws exist in Bangladesh, and these provisions create confusion among the Muslims. Laws must be made harmonious to serve the clarity, though they contradict Sharia.

5.10 In case of Divorce (Talaq)

There are three Quranic policies in case of Divorce. Firstly, when someone wishes to divorce must try for reconciliation. 'And if you have reason to fear that a breach might occur between a married couple, appoint an arbiter from among his people and one from hers; if they both want to set things aright, Allah may bring about their reconciliation'(Quran 4:35). Secondly Holy Quran mentions 'At Talaqu Marratani', meaning divorce may be retracted twice (Quran 2:229). Thirdly, this is based on a hadith. Marriage and divorce need to be done in an approved form.

The prerequisites of Sunnah divorce is that it must be pronounced during unconsummated purity, it must be revocable and a single pronouncement must be made at a time (Goyal 2021). But general practices show otherwise. Among the approved forms of talaq, either Hasan or Ahsan, Bangladeshi legislation took a mixed form. However Muslim Family Law Ordinance 1961 could not cover three intervals of the talaq period, as this will take 270 days to cover three reconciliation procedures and notice[14] which is impossible at all. Ahsan talaq easily fits in within this timeline.

5.11 Notice of Talaq

Under section 7(1) of the Muslim Family Law Ordinance 1961, talaq notice shall be given as soon as possible. Divorce shall be effective after the fulfillment of 90 days from the date on which notice was served under section 7(1). If the husband gives talaq on 1 January but he notified the chairman on 10 January, their marriage tie will be severed after 90 days, which means 10 April, but according to Sharia, the real time of talaq will be effective on 1 April or earlier or later. The Arabic lunar month does not always have 30 days. Additionally, if they reconcile their marriage after 1 April and put their mindset to stay together, then this staying is valid according to the law but void under Sharia. The continuance of their marriage tie will be tantamount to zina. This counting procedure must be started from the date of pronouncement; otherwise, this may create a real anomalous situation.

5.12 Intention of Talaq

Hanafi law and Bangladeshi law approves any form of talaq given in any form whatsoever. However, the intention of talaq is very important. Egypt made talaq in intoxication, or compulsion, as void. Syria, Morocco, Iraq, and Jordan took a more progressive stance. They will consider that the intention to the extent, the husband's discretion is lost (Haque 2015). Bangladesh van also consider the intention of talaq.

5.13 Talaq During Pregnancy

Article 7(5) of MFLO 1961 is an inhuman provision that is a form of talaq. Pronouncing talaq during pregnancy is nothing but the worst form of activity. During pregnancy and after pregnancy, a mother needs full mental support. However, this law creates a scope to instigate this sinful Act. This is actually against the Quranic policy. Surprisingly, there is no punishment prescribed for this act in the Bangladeshi law. To remove the patriarchal mindset and create a new social culture, punishment should be provided for this type of divorce. Bangladesh can follow Morocco to force the husband to revoke the repudiation.

5.14 Registration of Divorce

In Bangladesh, bare talaq, i.e., pronounced without procedural or judicial formality, can be registered under the Registration Act 1974, as the law does not require registering talaq after going through the procedural requirements of Section 7 of MFLO 1961. This is an anomaly in the law because bare talaq provides no time for reconciliation, which is approved by the Sharia and the Muslim Family Law Ordinance 1961.

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12 The Penal Code, § 375 (1860).

13 Nari-O-Shishu Nirjatan Daman Ain, § 9 (2000).

14 The Muslim Family Laws Ordinance, § 7 (3) (1961).

5.15 Judicial Talaq

Bangladeshi law does not expressly recognize the judicial talaq. But many countries like Morocco, Syria, Egypt, Lebanon, Tunisia, and Iran made talaq judicial (Sona 2022). Their legislation tried to curtail the arbitrary talaq, giving the power to a husband, and brought reform not exceeding the sharia law. They applied the doctrine of takhayyur.

5.16 Judicial Khula

Bangladesh does not have any judicial khula aprovision like Pakistan, Egypt, Syria, or Morocco. But Bangladesh can apply judicial khula under section 2(ix) of the Dissolution of Muslim Marriage Act 1939, endorsing 'crossing the limits of Allah' as a ground for judicial khula.

6. Conclusions

Bangladesh, a Muslim majority country, must codify its laws as even after 50 years of independence, an ordinance passed in Ayub Khan tenure still prevails in Bangladesh. Legislators must take a vigilant approach to codify these Muslim personal laws or make a new law to cover all areas of Muslim family law. To create a social morality and bring justice for the women, there is no other way except codifying Muslim family laws.

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