

UNIVERSITY OF TARTU
SCHOOL OF LAW
Department of Public Law

A U M IBRAHIM

**GENDER EQUALITY UNDER SHARIA LAW IN BANGLADESHI COURT PRACTICE
IN THE LIGHT OF CEDAW**

Master's Thesis

Supervisor
Dr. Merilin Kiviorg

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Introduction

In Bangladesh, the issue of equal rights for women and men is more complex in the legal context than the social. It allows Sharia law for personal relation issues, but on the other hand, the country is also committed to ensure the equal rights of women in all aspects. But the principles about the woman's rights in Sharia law are completely different from the modern legal system of the country and also contradictory to the equality principle of the CEDAW. However, as Bangladesh allows Sharia law to some extent in its legal framework, for this reason, unfortunately, Bangladesh can't follow some provisions regarding the equality principle of the CEDAW, which is creating debates in the international arena.

There is a specific reason for this complex legal system of the country. Today's Bangladesh has been ruled by various rulers from time to time since its inception. In ancient times (700-200 BC), this region¹ was ruled by the Hindus rulers and after them, the Muslim rulers came. In the seventh century, Arabian Muslim entrepreneurs and Sufi missionaries came into this territory and started spreading Islam as religion and in twelfth-century Muslims conquered Bengal² and established Sharia as a legal system for this province. European merchants arrived in this region from the end of the fifteenth century onwards, and their influence gradually increased in the country's political environment. In 1757 AD, the British East India Company conquered the rule of Bengal by conquering the battle of Palashi, and the territory continued to be governed by the new law of British India.³ Then in 1947 AD, British India was divided into two independent states namely India and Pakistan, and because Bangladesh was a Muslim majority population area, it was annexed with Pakistan named East Pakistan. As a result, at that time Bangladesh came under the Pakistani legal system and that ruled for 24 years.⁴ Finally in 1971, after the war with Pakistan, Bangladesh has become an independent state and started its own legal system. But after independence, Bangladesh was also governed under martial law for a long time. So, it is a long history of the development of the countries legal system.

¹ U. Singh, *A History of Ancient and Early Medieval India: From the Stone Age to the 12th Century*. Delhi: Pearson Education 2008, p. 260.

² M. Hasan, *History of Bengal*. Dhaka: Ononna Prokashoni 2003, p. 228.

³ C. Baxter, *Bangladesh: From A Nation To A State (Nations of the Modern World: Asia)*. USA: Westview Press 1997, pp. 30–32.

⁴ *ibid.*, p. 61.

Looking at the current legal system of democratic Bangladesh, it seems that the legal system of the country is a combination of the laws of the previous regimes. Laws that have been created under independent Bangladesh are widely influenced by the previous legal systems. And the society that has developed under these legal systems actually has been structured according to the previous legal regimes which have been in place for more than a thousand-year. Therefore, it is not so easy to change the legal provisions in the existing legal framework. According to Article 12 of the Constitution, Bangladesh is a secular democratic independent state and secularism is one of the basic principles of Bangladesh. Therefore, almost all national laws of Bangladesh are based on secularism. However, since Bangladesh is a secular country, it respects all religions in an equal manner and for this reason, it allows personal laws like Hindu laws, Sharia laws for some personal status issues of the individual, such as marriage, divorce, inheritance, maintenance, guardianship, etc. This is why some religious laws have been added to the framework of the state's legal system. Since Bangladesh is a Muslim major country, the author will work only with Sharia law as a personal status law in this study.

According to articles 27, 28, 29 and 65(3) of the Bangladesh Constitution, Bangladesh is committed to the development of women in every aspects. Article 28(4) of the Constitution promotes to makes specific laws for the freedom of women. Furthermore, in 2011 Bangladesh makes the National Women Development Policy, which changed the status of women's inheritance. The main Objectives of the National Women Development Policy was to establish equal rights of men and women in areas of public life and inheritance in the light of the constitution of Bangladesh. On the other hand, Bangladesh has signed and recognized many international human rights instruments. Among those International Covenant on Civil and Political Rights (ICCPR), The International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Political Rights of Women (CPRW), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) are the principal instruments. Some articles of these instruments are in contradiction with the current legal system of Bangladesh and for this reason, the State has made reservations to those articles. For example, Bangladesh signed and ratified CEDAW in 1984 and some of its articles such as Article 2, 13 (a) and 16 (1) (c) and (f) are on the reservation because of the contrary position to the prevailing Sharia law in Bangladesh. It is important to mention that, Article 2 of the CEDAW serves the main purposes of the CEDAW, but Bangladesh reserved this Article. Bangladesh also reserved the Article 16.1.c where this

Article also serves another strong purpose of the convention. The international society and the treaty monitoring body strongly criticized on these reservations of Bangladesh.⁵

However, the most widely debated issue of Bangladeshi legal system at the international level is; equal rights for women and men. From the international perspective, it is not possible to guarantee equal rights for women and men if the personal affairs of the people are governed by Sharia law. Because Sharia law does not give equal rights to women and men in all aspects. For example, Sharia law allows a man to have 4 wives at a time in a certain situation⁶ but does not allow a woman to have more than one husband at a time in any situation, and in case of inheritance, a son will get double property than a daughter. In case of marriage, the bridegroom will be obliged to pay the dower to the bride⁷, and after the marriage, the responsibility of maintenance of the wife and child is solely on the man⁸, but a bride has no such obligation under Sharia law, moreover, it is completely prohibited for the bride and her family to give any kind of dowry to the bridegroom or his family in the Islamic culture.

The research problem that needs investigating is the compliance of Muslim personal law as applied in Bangladesh with equality principle as enshrined in the CEDAW specifically in the areas of inheritance, marriage, divorce, and custody. The goal of the research is to offer an alternative view on how the application of Muslim personal laws could be viewed that would mitigate some of the contradictions with international human rights law. The hypothesis of this paper is that ensuring women's rights under Muslim personal law is more important than ensuring gender equality (as understood in CEDAW) to eliminate gender discrimination in Bangladesh. The following research questions are probed in this thesis to help to achieve the research goals and verify the hypothesis:

1. Is usage of Muslim personal law in Bangladeshi legal system in compliance with CEDAW, and specifically with the equality principle enshrined in the convention?
2. Can usage of Muslim personal laws be justified in human rights terms?

⁵ N. Tamanna, S.Hossain, M.A. Haq. Muslim Women's Rights under Bangladesh Law: Provisions, Practices and Policies related to Custody and Guardianship, Dhaka: South Asian Institute of Advanced Legal and Human Rights Studies 2011, p. 5.

⁶ Al-Muntada Al-Islami, The Quran English Meanings, Jeddah: Translated by Saheeh International, 2004, Chapter 4, Verse 3, p. 69.

⁷ Ibid., Chapter 4, Verse 24, p. 73.

⁸ Ibid., Chapter 4, Verse 34, p. 75.

3. Does application of Muslim personal laws jeopardise universality of human rights?
3. Is CEDAW helpful to eliminate gender discrimination in Bangladesh?
4. How to reconcile discrepancies between Muslim personal law and CEDAW?

The study consists of three parts. This paper begins with the chapter explaining gender equality issues in the international human rights laws and the legal provisions. Then it will examine the legal framework regarding the gender equality principle in Bangladesh, its application and standards based on the international instruments that Bangladesh is the state party of. This chapter will also examine the standard of the Bangladeshi courts and their jurisdiction over gender equality cases. The second chapter of this paper will be more concentrated on the interpretation of the Sharia law. The core formula provided in the Holy Quran has been applied to understand the interpretations of the Sharia law. This chapter will also comparatively examine the gender equality principle of the international human rights law. The last part of the chapter will examine the challenges of the application of the Sharia law in the regular Courts and their outcomes. The third chapter of this paper will provide a deeper analysis of recent cases regarding the gender equality in Bangladesh specifically marriage, divorce, custody, and inheritance. In this chapter, it will be examined that to ensure women rights, which one is more important, equality or equity. This chapter will also try to find out the solutions to maintain the balance between Sharia law and CEDAW in case of personal status issues to bring out the true justice for women.

The nature of this research demands two methods to address the issues and the recommendations. Primarily this paper requires some historical information where the author uses the historical method. The reason to use this method is to find out the reason why sharia law is still existing in the countries legal system. And to bring out the arguments, a comparative method is going to be followed which will include the comparative status of the Sharia law and CEDAW regarding women's rights. This method is more important because, it will help to find out which principle, equality or equity, is more reasonable for women. The research scrutinizes both primary and secondary sources including Sharia laws that are applicable for the personal status issues in Bangladesh including some judgments of the higher courts. To understand and find out the legal issues of the court practice regarding equal rights for women, most part of the research is going to address the legal framework of personal status laws in Bangladesh and their applicability in reality

based on the related reports and concluding observation provided by CEDAW Committee, Amnesty International, Bangladesh Government, and the prominent journals and newspapers. The main sources of this study are Sharia law specifically Al-Quran, International Human Rights instruments and reports of treaty monitoring bodies regarding gender equality, especially CEDAW and the national laws of Bangladesh. And as secondary sources, the author is giving more priority to the published journals, books, articles and news reports.

In relation to Bangladesh, there have been some small studies such as “Discrimination against women in Bangladesh by Meah Mostafiz”, “Law for Muslim Women in Bangladesh by Sultana Kamal”, “Muslim Women’s Rights under Bangladesh Law by Nowrin Tamanna, Muhammad Amirul Haq and Sara Hossain” etc. and reports on different aspects of equal rights of women and men, such as marriage, guardianship, employment. To uphold women rights and elimination of gender discrimination focusing the basic principles of Sharia law and CEDAW, how the court continues its judicial proceedings and the judgments given are in fact a reflection of the various international treaties, especially the basic principles of the CEDAW, so far no research has been done in the context of the recent Bangladeshi court cases. Therefore, this research can play an effective role in exercising women rights in Bangladesh. Besides, it can be helpful to understand the comparative position of international law and Sharia law on the issue of gender discrimination, which can be also an important resource for future study.

Keywords: women rights; equality; Sharia law; CEDAW; Bangladesh;

1. National Legal Framework and Legal Provisions on the Gender Equality

The rule of law is one of the fundamental principles of the legal system of Bangladesh.⁹ In Bangladesh, everyone is equal and entitled to have the equal protection of the law, and there should be no discrimination in the equality before the law because of religion, caste, gender of the person¹⁰. It is illegal and completely prohibited to harm anyone's life, freedom, body, reputation or property without a legal proceeding.¹¹ After the emergence of 1971 in the first phase, there was no change in the law and justice system in the legal system of Bangladesh. After the implementation of the constitution of Bangladesh on December 8, the Supreme Court was established with the High Court Division and the Appellate Division. As a Supreme Court, the High Court Division has the power to hear appeals from the subordinate courts and to reconsider cases. In addition, the department is also empowered to issue orders and instructions for the enforcement of fundamental rights and to grant other exemptions under the writ. The Appellate Division has the power to hear appeals on the decisions of the High Court Division and other constitutional entities under the constitutional provisions. The High Court Division has powers to supervise and control subordinate courts and tribunals. The Supreme Court is a court-of-record and can punish anyone for contempt of the Supreme Court or contempt of this court's subordinate court.

The decision declared by the Appellate Division is the law to the High Court Division and any declared decision of both divisions becomes the law for the subordinate Courts of the country. The High Court Division can declare any law invalid which is contradictory to the fundamental rights declared in the Bangladesh constitution.¹² There is a special court for the trial of crimes of women and child abuse committed against children and women. Also, there is a family court system that has been set up with assistant judges to settle the family dispute like marriage, divorce, maintenance, inheritance, custody, etc. Therefore, the laws to govern this vast legal system, on the one hand, confirm and protect the rights of the individual, as well as on the other hand taking care of the sovereignty, peace, and security of the country. But since the individual and the state are two separate entities, sometimes some issues of law are incompatible with

⁹ Preamble, Constitution of the Peoples Republic of Bangladesh. Adopted 04.11.1972, e.i.f. 16.12.1972.

¹⁰ Article 27, 28, 29, Bangladesh Constitution.

¹¹ Article 31, Bangladesh Constitution.

¹² Article 26, Bangladesh Constitution.

each other. And it is very common to the world also. For example, despite the constitution, the rights of women are equal in all other statutory laws of Bangladesh, but in Sharia law, women still have less share than men in the inheritance.

There are some inconsistencies with Sharia law with the other existing laws of Bangladesh, but the state is not interfering in this matter because of maintaining social peace and respect for religious discipline. Nevertheless, since Bangladesh is a democratic state, and since Bangladesh has signed and ratified several international instruments for peace and order in the international arena such as ICCPR, CEDAW, etc. it is also the responsibility of Bangladesh to keep its promises on all the issues that Bangladesh is committed for.

The legal system of Bangladesh mentioned above shows that in the eye of the law, equality for men and women has been taken by the country very seriously. It is taking all the necessary steps for the women rights and women development. But interestingly the thought of women rights in Bangladesh is not actually the same thought of equal rights of women and men. The women rights is slightly different from the idea of equality principle mentioned in the CEDAW. Among the international instruments that Bangladesh has signed and ratified, the most important document for women's rights is CEDAW. Bangladesh signed and ratified CEDAW in 1984. In this chapter, the author tried to highlight the gender equality principle's position in the constitution of Bangladesh, as well as the international commitments of Bangladesh and the complex legal environment on gender equality for women in active personal laws of Bangladesh precisely in the Sharia law.

1.1 International commitments of Bangladesh

As of 2017, Bangladesh has been included as a State Party in several international human rights-related instruments since its independence including the ICCPR, ICESCR, Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Racial Discrimination of All Forms of Punishment, Convention on the Rights of the Child, Convention on Consent to Marriage, Minimum Age For Marriage and Registration of Marriages, Convention on the Rights of Persons with Disabilities, Convention on the Political Rights of Women, CEDAW

and Beijing Platform for Action (BPFA). CEDAW is the instrument that works strongly with the equal rights of women in the above-mentioned instruments.

1.1.1 CEDAW

CEDAW is an international agreement to establish women's rights as a right of human being recognizing the important role and contribution that women have made in the development of society and civilization for ages, eliminating all forms of discrimination against women and ensuring the equal rights of men and women in all social, economic, political and cultural fields. CEDAW began to take effect on September 3, 1981. So far, more than 189 countries currently member of the CEDAW and 99 signatories countries. Most of the countries have taken initiatives to include the provisions of the CEDAW Charter into their national laws.¹³

If we look at the history of the creation of the CEDAW, we can see that it was created based on some international basic norms and principles provided by the UDHR with a specific purpose. And it has no history like the history of a country's legal system. That means, CEDAW did not evolve as the legal system like a legal system of a country gradually developed based on different situations. Therefore, it is not easy to attach it to the legal system of a country. But it has a strong position in the international law and that is why CEDAW is the most widespread and legally binding human rights instrument of women. The Convention is called the International Bill of Rights for Women¹⁴, established itself as an agenda for taking action at the national level to eliminate all discrimination against women. Ensuring the basic human rights and fundamental freedoms of women to the parties under the terms of the Convention; States are an under obligation to ensure the prevention of exploitation of women in trafficking and prostitution; eliminate discrimination against women in political and public life; ensure equal rights to attain, change or maintain nationality like a man; eliminate discrimination in education, employment, health and other areas of economic and social life. It focuses on other issues including issues related to rural women, equality in the view of the law and ending discrimination against women in marriage

¹³ Committee on the Elimination of Discrimination against Women, General recommendation on women's access to justice, CEDAW/C/GC/33, para.6, 23 July 2015.

¹⁴ UN Women, Committee on the Elimination of Discrimination against Women, Overview of the Convention, Accessible at: <https://www.un.org/womenwatch/daw/cedaw/>

and family life¹⁵. The convention also guarantees the right of women to participate in political and social life in their respective countries and to do all work at all levels of government.¹⁶

At the core of the CEDAW charter, we see that it gives the recognition of the constructive role that women have played in the development of the human society and civilization. It establishes equality between men and women in all areas necessary for the peace and development of the society, the state, and the world. It promotes to create legislation to create the environment necessary for the development of women as human. It suggests the reform of existing laws and creation of a conducive environment for establishing equal rights for woman in the law enforcement and administrative grounds. It recognizes women's rights as human rights. The CEDAW is based on three basic principles that hold these key points; the principle of equality, the principle of nondiscrimination and the responsibility of the member states. The CEDAW Charter has 30 sections. These sections are divided into three parts. In sections 1 to 5: Issues related to the equality of men and women are discussed. Sections 8 to 22: CEDAW's procedures and responsibility for state assets and section 25 to 5 discuss about the CEDAW administration. Therefore, it is the responsibility of all the states parties to implement it in their legal system. The people of the country, civil society, and various non-governmental organizations will also play a role to promote and implement it. The Charter specifies the state's principal responsibilities. Among the responsibilities of the state, it is specially requested to declare a policy of non-discrimination in favor of women in the state constitution.¹⁷

1.1.2 Relation between CEDAW and Bangladesh

Keeping reservation on four clauses, Bangladesh became a member of the CEDAW in 1984. Due to the demand for continuous women's movement and the human rights movement, the government of the People's Republic of Bangladesh withdrew its reservation from sections 13.a and 16.1.f of the CEDAW Charter in 1996. But the reservation on sections 2 and 16.1.c

¹⁵ Convention on the Elimination of All Forms of Discrimination against Women. New York 18.12.1979, e.i.f. 3.09.1981, Art 16 (1).

¹⁶ Ibid., Art 3.

¹⁷ Ibid., Art 2 (a).

of the CEDAW Charter has not been revoked yet. The 10th anniversary of the implementation of the CEDAW was celebrated on September 3 in 1992 in the joint venture of Bangladesh Mahila Parishad and the United Nations Information Center. The resolution adopted at the meeting demanded the convention's immediate recognition and full approval.¹⁸ It also demanded the creation of a commission to assess the status of the women society in Bangladesh which is still demanded today and has not been implemented yet. Also, the implementation of most of the clauses that the government approved in the CEDAW is weak. While praising the positive policies and activities adopted by the Government of Bangladesh to end discrimination against women and to stop the oppression of women, The CEDAW Committee also expressed concern in its concluding observation on the State's 8th periodic report over the obstacles to proper implementation of CEDAW. In this case, reservation on both Articles 2 and 16.1.C of the CEDAW, Bangladesh is facing a major obstacle¹⁹. Article 2 is called the life of the Charter that prohibits all kind of discriminatory practices including personal, economic, social and cultural life and emphasizes the principle of equality between men and women. On the other hand, article 16.1.C declares the equal rights of men and women on marital relations and divorce. The Bangladeshi government is not reaching a definitive decision to withdraw these two reservations saying that these two principles are contradictory to the holy Qur'an and Sunnah that is Sharia law.

Bangladesh is not a state that fully governed by the Sharia laws. Many Muslim countries, including Jordan, Kuwait, Lebanon, the Maldives, Oman, Syria, Tunisia, and Turkey have approved the CEDAW without any Reservation on Article 2. Bangladesh has acknowledged that personal laws for Muslims, Hindus, and Christians contain discriminatory provisions concerning marriage, divorce, inheritance, and guardianship,²⁰ but except these areas, the country ensured equality to women in all other areas. Especially for women, Bangladesh has enacted numerous laws and regulations to protect woman's rights, such as Suppression of Violence against Women and Children Act 2000, Dowry Prohibition Act 1980, Domestic

¹⁸ Anonymous. Equal property rights. The Daily Star, 09.03.2019.

¹⁹ Committee on the Elimination of Discrimination against Women, Concluding observations on the eighth periodic report of Bangladesh, CEDAW/C/BGD/CO/8, para.7, 8, 25 November 2016.

²⁰ Ibid., para.2

Violence (Prevention and Protection) Act 2010. Moreover, the Government formulated the National Women Development Policy 2011 to achieve the Constitutional goal to promote and protect the woman rights. Almost all the civil laws of the country, therefore, uphold the principle of equal rights for women and men. If the country can do all these things for the sake of woman rights, then why it can't withdraw the reservation on article 2 and 16.1.C of the CEDAW? Bangladesh has said that the government is collecting information from other Muslim majority countries, which have no problem with the CEDAW provisions and do not make any reservation on any article but it needs intensive examination and also it has to be based on the appropriate interpretation of the Sharia law. However, most of the civil laws, consequently uphold rights for women and men. Women have the proper rights to take part in politics, to have personal property, and to choose or be elected in the employment. The Government guarantees the following of one's religious faith and provisions in personal life. With the establishment of women's equality, withdrawal of the reservation on these two articles and approval of the CEDAW are essential in establishing a democratic society and state.

1.2 Constitutional principles

The Constitution of Bangladesh has given such rights and privileges to the women that are not given in the constitution of many other states. While describing the equal rights of nationals under Articles 10, 19, 27, 28 and 29 of the Constitution of Bangladesh, it also declared the equality of women and men in all areas of life as the fundamental right for a woman. There is no denying of the fact that the role of women is parallel in the history of the advancement of civilization. The Constitution of Bangladesh also recognizes their role under the equality principle as dignity to the women and one of the fundamental principles of the Constitution is the equality. Article 28 (2) of the constitution states that men and women shall have equal rights at all levels of the state and in the public life. In this article, state means government, parliament and any statutory organization of the country²¹. This article clarifies the question of equality between women and men. This declaration has further made it clear that there is equal demand for men and women for the betterment of human life. Bangladesh constitution promotes equality for women in every way and also ensure the participation of

²¹ Article 152, Bangladesh Constitution.

woman in national life. For this, women can file a litigation against the convict. On the other hand, if women are accused, according to the section 497 of the Criminal Procedure Code, women get some privileges than men in case of bail. Article 29 of the Constitution gives equal access to government appointments for the woman. According to the article 65 of the constitution of Bangladesh, women can be a direct candidate in the national election for all the 300 seats. In addition, under article 65 (c), there should be 50 reserved seats only for women in the parliament as a member of the parliament. In order to ensure overall participation in the root level activities of the country, reserved women seats have been arranged for the representation of women in city corporations, municipalities and union council offices.

However, the analysis of the relevant Articles of the Constitution shows that the equality between women and men has been extended almost every aspect of social and economic life such as politics, education, health care, job sector, etc. but not for all the personal life issues such as inheritance and family relations. The CEDAW charter has been ratified by the Government with a reservation on the provision of equality within the family relations. It can be argued that this is a clear deviation from the sincerity shown by the government for the establishment of gender equality guided by the CEDAW. But for that, a clear examination is important. In our society, the backward attitude of the society towards women's equal rights is a major obstacle. Yet the participation of women in the economic activities in the country is increasing. Women in the field of education are equal to men, even more. Unfortunately, there is not a single article or explanation of any article which says that in case of a personal status issue such as marriage, divorce, custody and inheritance equality principle shall be followed. Moreover, the Bangladesh Constitution promotes secularism that means people can follow their religion without any interference from anyone including the government as well as people may follow their religious laws in case of personal status issues. On the other hand, Bangladesh has not yet introduced a common uniform law for its all citizens regarding personal status issues. So, for the peoples of the republic, there is no choice except to follow their religious laws in such issues i.e. for the Muslims, sharia law should be followed in case of inheritance, marriage, divorce and custody.

1.3 Personal law and their application

Many countries want to ensure women's rights based on the constitution. In this regard, if necessary they amended their constitution. But still, women's rights are not protected. Deprivation from the rights is the reality for the women. This reality is more real for the women in developing countries. According to the Article 2 of the CEDAW, every member state is committed to enacting women's friendly development policies and laws in its legal structure. Legally, in all activities of the state, the empowerment of women is the responsibility of the state. In Bangladesh, a large number of women-friendly laws have been enacted after independence. Women's participation in various activities has increased. But in case of personal status issues, it remains the same. For the first time in the country, national women's policies were enacted in 1997 based on the country's constitution and CEDAW, then it amended in 2004 and 2008. Finally, in 2011, the national women's policy was again amended to ensure women's rights according to the CEDAW. In the light of national women's policy, if necessary, any law on women's affairs can be enacted. Apart from this, it is important to have separate laws to prevent oppression on women and discrimination against women.

In response to the demands of various women's organizations and for international commitments of Bangladesh to improve the legal status of women, the government is sometimes amending existing laws and drafting new laws. These include Muslim person-law (Shariat) enforcement Act 1937; Muslim Divorce Act 1939; Muslim Family Law Ordinance 1961 (Amended 1986); Code of Muslim Family Law 1961; Muslim Marriage and Divorce Registration Act 1974; Muslim Marriage and Divorce Act 1975; Muslim Divorce Act 1939; Family Court Ordinance 1985; Family Court Act 1985; Suppression of immoral activities Act 1933; Dowry Prohibition Act 1980; Women-Abuse (Preventive Punishment) Act 1983; Women and Child Abuse (Special Provisions) Act 1995; Maternity Benefits Act 1939; the Prevention of Women and Child Abuse Act 2000, the Acid Terrorism prohibition Act 2002, the dowry prohibition act 1980, the Family Violence (Prevention and Protection) Act, 2010, etc. There are several other policies and laws, including women's policies, which indirectly promise to protect women's rights and interests. To prevent torture against women and girls, the Ministry of Women and Children Affairs, the Department of Women's Affairs and the

National Women's Organization have set up a Women and Child Abuse Prevention Cell. At the district, upazila, union level, a committee has been arranged to prevent violence against women. The Judges of the courts has created funds for abused women to help pay for lawyer fees and other costs. But when the question comes on the inheritance or marriage or custody or any other family relationship issues, then there is no specific law enacted by the country for its citizens.

Currently, all the personal status issues are regulated by the existing religious laws of the country. Sharia law for the Muslim, Hindu laws for the Hindu and Buddhist, Canon laws for the Christian. There is a Special Marriage Act for the atheist citizens of the country for the marriage purpose only.²² Although the constitution of Bangladesh speaks of equality of men and women in every aspect of life, but it does not happen in reality. Women are discriminated in case of personal matters because of the existing religious laws. In Bangladesh's Muslim inheritance law, a son always gets double property then the daughter. Similarly, maternal guardianship over the child is regulated by the principles of the Sharia law. If a mother marries another man, she will lose the guardianship of her child if the child is female. But if a father marries another woman, he will not lose guardianship over that child. On the other hand, in Hindu law, a wife cannot transfer property. According to the existing Hindu law of inheritance, a girl does not get any part of her husband's property. When the husband dies, the property will be owned by his sons (not daughters). If he does not have a son, the ownership will go to his brother's sons. Yet neither his daughters nor his wife will inherit the property. Only five-women (widow, daughter, mother, paternal grandmother, and paternal grand grandmother) can enjoy the properties, but they can't transfer the property. Hindu women living in Bangladesh do not have the right to divorce according to the existing Hindu law. But as a signatory to the CEDAW, Bangladesh is also responsible for ensuring proper rights for women.

As Bangladesh is the Muslim majority country, Sharia law has a strong influence on the countries legal system. All the personal status issues are governed by the Sharia law for the Muslims and in some point sharia law is contradictory with the idea of equality principle

²² Preamble, The Special Marriage Act. Adopted 18.07.1872, e.i.f. 18.07.1872.

promoted by the international law regarding men and women. Bangladesh has ensured all other legal matters according to the CEDAW's provision except the personal status laws. From the author's viewpoint of the principle of freedom of religion or belief, article 2 and article 16.1.C of the CEDAW are also in contradiction with the freedom of religion. Just forget about the interpretation of the Sharia law for a while. According to the UDHR Article 18, ICCPR Article 18, 1981 Declaration of the General Assembly, Art. 1 (1), every individual has the freedom to choose a religion or carry a religion and belief. So, if a 90% Muslim majority country enacts any law or gives its concern to any international law which is contradictory to their religious belief, then this also somehow violates the principle of freedom of religion. There freedom of religion or belief does not only protect right to freedom of religion but also freedom not to participate in any religious legal order.²³ But as a normal understanding, it means it allows someone to follow or not to follow all the rules and obligations by the religion. So, if Sharia law is mandatory for the Muslim to follow their everyday life, and if they are agree to follow then prohibiting them to follow sharia law is also a violation of the freedom of religion.

However, there is a wide gap between women's rights that CEDAW guarantees, and what has been reflected in the personal laws of Bangladesh. The constitution of the country also did not say anything about the equality between a man and woman in case of inheritance, marriage, divorce and custody. In the context of Bangladesh, the personal laws of the community were created based on the family laws that are regulated by the religion into which a person was born. And for this reason, the civil law and personal laws have a continuing gap between men and women's rights regarding the civil relation issues. The complicity between the CEDAW, Constitution of Bangladesh and the Sharia law about the equality principle between men and women will be clear only after the examination of the same principle under the Sharia law. In this regard, next chapter is devoted on this issue.

²³ General Comment 22 on Article 18 of the ICCPR, 13/07/1993.

2. Sharia Law in the Legal System of Bangladesh

Bangladesh is a secular country yet it is a Muslim majority country. Usually, the legal system of the Muslim majority countries widely influenced by the Sharia law. In some countries, Sharia law is the major legal system that governs the country. Some Muslim countries have formed a kind of national legal system in the mixture of Sharia law without fully adopting it in their legal system. But Bangladesh is the complete opposite of this trend. Bangladesh is a civil law country. All civil and criminal matters are covered through the civil/secular legal system. Despite being the Muslim majority country, in Bangladesh Sharia law has been adopted only as the law to govern some family affairs of the Muslim community such as marriage, divorce, inheritance, guardianship, and maintenance. At the beginning of this paper, a rough idea has been given about the legal system of Bangladesh. But still, it is important to know a little bit more about the history of the development of the legal system to understand the influence of the sharia law in the country's legal system.

The use of some Sharia law provisions began in Bangladesh since the era of the Muslim rulers. Over the time, the wideness of the legal structures in the region has increased. The Hindu law in the era of the Hindu empire, Muslim law during the Muslim saltant era, British law during the British period and social customs mainly influenced the development of the legal system of Bangladesh. About fifteen hundred years ago and after the Christian era began, the Hindu period expanded. At that time, ancient India was divided into several independent states and the king was the supreme ruler of each state. In the context of the judicial system, the king was regarded as the source of justice and was the supreme authority of the administration of justice in his kingdom. After that, this area came under Aryan rulers, the Aryan law was amended on the basis of the local social customs and practices. During the Pal era, the legal system was also called a Hindu legal system. The laws were compiled by Gautam Buddha, Astastamba, Harit, Vasishtha, Vishnu, Manu, Jajnavalkya, Narada, Brihaspati and Katyana and these were the source of the new Hindu laws. At that time this law was followed in the case of inheritance and joint property distribution of the people of the sub-continent.

Then after the conquest of Bengal by Bakhtiyar Khalji in 1204, the application of the Hindu laws was restricted into the individual of the Hindus and the principles of the Sharia law were

applied to the administration of justice. Originally, from that time, the use of sharia law has begun in this region. The country has been ruled by independent sultans since the conquest of Bakhtiyar Khalji to the beginning of the Mughal Empire. Each province was under a ruler who was the main person of the local administration and also responsible for maintained law and order in the area. The sultan used to appoint a judicial officer or qazi to ensure the justice according to Sharia law in each department. The sultan also employed a qazi for each city of the province. On the one hand, Kazi tried the bilateral issues between the civilians, while the Sultan used to judge the charges of sedition and blasphemy related crimes. As the head of the judiciary, Sultan could have reconsidered the decision of the Qazi and had the power to correct it. It's like an Appeal system to the higher court. The Sultan was the source of all power and had the power to enforce laws through the officers appointed by him. The only limitation in his power was the Sharia law, which he obeyed. Islamic law scholars known as the Ulama has considerable influence on the sultan on the making of laws. The sultan usually issued laws concerning the administration of civil matters. And the panchayat, consisting of nominees from the villagers, resolved minor disputes of the villagers. At that time non-Muslims were governed by their religious laws in case of any conflict between them. It evident that Sharia law did not fully ignore the Hindu law.

The Turkish-Afghan legal system did not change during the Mughal period but was strengthened. A judge was employed in each pargana consisting of several villages for the trial of civil and criminal cases. Sikder maintained law and order, Amin settled land and revenue related disputes, and Amil collected revenue. Similarly, in each district, there was a Qazi appointed who would hear the hearing of the civil and criminal cases in the district and also hear the appeal against the decisions of the parganas and Qazis. Faujdar maintained the law and order of the district and was the head of the revenue administration of the district. Malguzar was the head of the district's revenue system and he also settled land and revenue disputes at the district levels. He also had the power to reconsider the decision of Amin. Kazi-ul-Kujat as Chief Justice settled the civil and criminal cases in the provincial capital. He also heard appeals on the decision of the district-qazi. The Qazi conducted the judicial proceedings according to the principles of Sharia law. In the case of non-Muslims, Qazi resolved the disputes between them according to their personal laws. To settle the issues according to Sharia law, the Qazi used to take the help of a mufti, and a person specializing in non-Muslim law helped the Qazi

to resolve the non-Muslims dispute. The Sikdar and the Faujdar of the parganas could only punish the perpetrators of peace. The Nazim (provincial governor) has the power to reconsider the death sentence delivered by the Qazi. The provincial diwan had the power to modify the decision of the district Malguzar. During the Mughal rule, the power of the village panchayat was kept intact. The zamindars, who collected revenue as a government representative, did not have any jurisdiction about legal matters at that time, but during the fall of the Mughal rule, the zamindars gain the jurisdictional power. The Mughal emperors enacted laws regarding secular matters, which were obligatory for all to obey. But they did not make any law contrary to the Islamic principles; instead, the Mughal emperor Aurangzeb appointed a commission to compile the rules of Islamic law pursued by Sunni dissidents. This compilation is known as 'Fatwa-i-Alamgiri', which Sunni Muslims have always followed in family status issues.

After 1757, the Muslim empire in this region has started falling. After 1765, the East India Company took over the Indian subcontinent and the power of the provincial governor or nazim was reduced by the Company administration. However, the Governor of the Company, Warren Hastings at that time, appointed an English collector for revenue collection and civil administration in each district. The collectors by their authority with the help of the Muslim Ulama and Hindu scholars tried the disputes between the parties, but in the criminal trials in the district level, the company governor did not interfere with the power of the Qazi. Then, after the Sipahi Revolt of 1857, Queen Victoria took over the administrative power from the company with a proclamation. With a combination of the Sadar Civil Court, the Sadar Nizam's Court and the Supreme Court, the High Court was established in Calcutta in 1862. At the same time, the British government introduced the common law system with some amendments for this sub-continent in 1862 instead of Sharia law. However, in this case, Hindu and Muslim communities had the opportunity to follow personal laws according to their respective religions, and in 1864, Qazi, Mufti, Maulvi, and Pandit were abolished from the legal system of this area. British governed this area for more than 200 years and interestingly in this 200 years long-ruling period of the British Empire, they never try to abolish Sharia law from the legal system.

After the emergence of Bangladesh in 1971, in the first phase, there was no change in the legal system of the country. The civil legal system introduced by the British Empire has been followed in the national legal system keeping Shariah law as family law for the Muslims, which still exists. But after the implementation of the constitution of Bangladesh in 1972, the change has been brought in the court system only. Supreme Court was established with the High Court Division and the Appellate Division. As a Supreme Court, the High Court Division has the power to hear appeals from the subordinate courts and to reconsider cases. In addition to the writ, this division is also empowered to issue orders and instructions for the enforcement of fundamental rights and to grant other exemptions under the writ. The Appellate Division has the power to hear appeals on the decisions of the High Court Division and other statutory entities about any constitutional matter.

Thus, it is seen that in the long run of the changes in the legal system of Bangladesh have the greatest impact of the Sharia law in the formation of the legal system of the country. And the combination of British law of the British Empire has taken this country's legal system into a stronger position. But in the current legal system, the legal structure of the country may not be changed a lot, but the laws of the country have changed. Except for family matters, secular and non-discriminatory uniform laws have been enacted and the country is governing by these laws. Moreover, it is noticeable that since the beginning of the Muslim Empire, family matters of the Muslims have been given the highest priority for the implementation of Sharia law which still exists. Even during the British Empire, Sharia law was chosen to solve Muslim family issues.

So, the scenario of the development of the legal system of Bangladesh at a glance, the formation of the modern system has been started from the beginning of the Muslim period 800 years ago from today and it continued for the next 600 years. In this long term formation, the court system and legal matters have been formulated based on Sharia law. At the end of this period, some Muslim rulers developed some secular laws with no contradiction of the Principle of the Sharia law. After that 200 years ago the British Empire has started ruling this sub-continent under British law. But British rulers considered Sharia law for the Muslims for their personal affairs. They have made some changes in the court structure but keep the basic

structure that created by the Muslim rulers. The major changes they bring is in the legal structure is the administrative and judicial structure of the sub-continent. They did not take the whole British legal system, instead, they modify their existed legal system for this sub-continent with the combination of Sharia law and other existed personal laws. So, officially the structure of the legal system is 800 years old where Sharia law has a direct influence. And this is a strong reason, why it is not possible to enact any law against the Basic principles of the Sharia law. As it is not possible to change the laws then we have only one option open to solve the issues between the principle of the CEDAW and Sharia law which is to understand the principle of the sharia law and its application. In this chapter, the author is going to find out the basic principles of understanding the Sharia law about the Gender equality principle regarding marriage, divorce, inheritance, custody and other family law matters.

2.1 Understanding and interpretation of the Sharia as a legal system

Sharia is a law that comes from the guidance of Almighty Allah. This is not a man-made law. That is why the Sharia is called Divine Law. Islamic law is not a law issued by the sovereign state or adopted by a special parliament. As stated in the Holy Qur'an, this is basically the commandments of Allah and the path of Prophet Mohammad (PBUH). However, at various times this law has been expanded through Muslim scholars. But for this expedition, it takes the cooperation of Hadith, Ijma and Qiyas. According to Sharia, Islamic law is the law derived from the provisions of the Qur'an and interpreted with Hadith, Ijma, and Qiyas, whereby a Muslim can governs his or her overall affairs.

Islamic law or Sharia law is religious law, which is a component of the Islamic tradition. It is derived from the rules of Islam, mainly from the Quran and Hadith. In Arabic, the word shariah is used to explain the laws of the Creator. There is a big confusion among the people about Sharia Law and Fiqh. Present-day, we are calling Fiqh as Sharia law. The Shariah Scriptures and Fiqh Scriptures are contrary. Where Fiqh Scriptures is used to analyze the interpretation of different topics of religion in limited human knowledge (which may differ slightly from the viewpoint of different Fiqh scholars), where the Shariah law is unchanging and must be followed. The various schools (jurisprudence doctrines) of which Hanafi, Maliki, Shafi' and Humbli, to find out the correct provision form Sharia use a theory by using the sources of the

Sharia law known as Ijtihad. In Islamic Traditional jurisprudence or Fiqh jurisprudence, Shariah is divided into two main categories. These two categories are sharia related to worship (prayer) and sharia related to mu'amalat (social relations and interaction). In the Shariah law, any action is taken into judicial analysis in addition to legal status as well as moral standards and hence the decisions of the Shariah are compulsory, incentive, neutral, hateful and forbidden. For this reason, some areas of Sharia decisions are similar to those of Western jurisprudence, and other decisions, especially those related to daily living, are adopted by the Creator's guidance which is at some point are not similar to the Western jurisprudence. Jurist N.J Coulson, in defining Sharia law, quoted a part of a verse from the Qur'an, which says "obey God and his prophet" and in his analysis of this verse, he states that the Islamic legal system has been authorized by the Al Qur'an to expanded as necessary with limitation of the basic principle of the Qur'an, which indicates the use of Ijma and Qiyas²⁴. These laws work as the guideline for the Islamic Stats. Many countries around the world have adopted Sharia law as their own legal system, and many countries took some parts of the system. Since there is no compilation of Sharia law, its legal provisions are interpreted in different ways in different countries. In addition to that, the Imams / Schools also differ among Muslims. There are two major divisions in the Muslim community known as Shia and Sunni Muslim. There are some laws of sharia that are obligatory in one school, and it may not be compulsory for another school. But even after such divisions, the Quran, Hadith, Ijma, and Qiyas are the main foundations of all the Sharia laws of these schools. According to Al Quran, "O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result"²⁵. This verse in the Qur'an refers to the basic principles of Sharia law, as well as it is also instructed everyone to obey these laws. However, if any law or any principle of Hadith, Ijma, and Qiyas is inconsistent with or contrary to any principle of the Qur'an, then the law that was given by Hadith, Ijma and Qiyas will be void. That is, the Quran is the main source of Sharia law. However, in this case, no such pure hadith has been found which is inconsistent with the Qur'an. Thus, the Qur'an and the Hadith should be the main foundations of Islamic law. That is, the law by which a Muslim majority

²⁴ N. J. Coulson, A History of Islamic Law. Edinburgh: Edinburgh University Press, 1964. p. 9.

²⁵ Al-Muntada Al-Islami, The Quran English Meanings, Chapter 4, Verse 59, p. 78.

state will govern their Legislative, Administrative and Judiciary is not the Sharia law, but when a state operates its Legislative, Administrative and Judiciary through the laws instructed in Sharia, all the laws of the state adopted from Sharia, if the practice of the social life of the people is under Islamic rules, then it will be considered as a state governed by Saria law. Thus, Islamic law is not the law of any Islamic state, but it is a law introduced for all Muslims all over the world and for those who believe in Islam. So, Islamic law is actually a universal legal system. Now the question is, why in different countries about the same subject Sharia laws are different? The punishment for theft is the dismemberment of the wrist from the hand in some countries, imprisonment or fine in some other countries. In some countries, it is mandatory for women to cover their face completely in some countries, while it is permitted to keep the mouth open in some other country. Why such discrimination within the same law? The answer is interpretation. That is, different schools of Islam have interpreted different traditions of Islam in different ways. An example will be easy to understand.

If we look at the veiling tradition of different Muslim countries, we can see that in most countries, veiling only refers to the women's covering. But Allah Almighty has commanded both men and women to observe the veiling in the Holy Quran. Regarding men, Allah says, "Tell the believing men to reduce [some] of their vision (Looking only at what is lawful and averting their eyes from what is unlawful) and guard their private parts (From being seen and from unlawful acts.). That is purer for them. Indeed, Allah is Acquainted with what they do"²⁶. Different Muslim countries are avoiding this guidance of Islam. Again, if you only look at the provision of women's veiling system, then there will be more differences. In different countries, the application of Sharia laws about women's veiling is different. For example, according to Egyptian Sharia law, women can wear any hijab or niqab. However, according to national law, the government of Egypt moved to ban the burqa in 2016 and 2017, arguing that the full-face veil is neither an Islamic tradition for them nor ordered in the Quran²⁷. If we look at Iran, we can see that there is a separate law on women's veiling in Iran known as Iran's compulsory veiling code. In Iran, since the Islamic Revolution of 1979, loose-fitting clothing

²⁶ Ibid., Chapter 24, Verse 30, p. 339.

²⁷ O. Smith. BURKA BOMBSHELL: Muslim country to ban the veil 'because it is NOT Islamic'. Express, 11.03.2016.

and a headscarf have been made compulsory in public. On the other hand, if we look at Bangladesh, Muslim women in Bangladesh have been given complete freedom to wear clothing. Someone here wears a hijab, or a niqab. Some women do not prefer to wear any of them. If we look at Saudi Arabia, we will see that there is a legal obligation for the women to wear abaya (a garment that covers the body and arms in public). According to most Salafi scholars in Saudi Arabia, in front of unrelated men, a woman must have to cover her entire body, including her face and hands with abaya.²⁸

Now the question is why there are different rules of Sharia law in different countries. In a word, the main reason is interpretation. Scholars from different countries interpret Islamic rules in different ways. In this case, they look at the provisions of the Hadith and give priority to the governance, culture, and traditions of their country. In the Holy Qur'an, Almighty God says about women veiling is: "O Prophet, tell your wives and your daughters and the women of the believers to bring down over themselves [part] of their outer garments. That is more suitable that they will be known and not be abused. And ever is Allah Forgiving and Merciful"²⁹. Now when a country issues a rule as an Islamic law on veiling, they consider the above issues and then interpret the law of the Quran. So when there is a dispute over any provision of Islamic law, it is unreasonable to condemn whole Sharia law by calling it an Islamic provision. Rather, it would be more reasonable to see the interpretation of the law of that country as Islamic law and understand the thoughts of the scholars that have taken into account at the time of interpretation. There is a guideline to understand sharia law described by the Françoise Bouchet-Saulnier in her book named The Practical Guide to Humanitarian Law, where she says-

"However, some religions on occasion dictate specific rules that go or seem to go against general principles. These specific rules should be interpreted in context if they are to be properly understood. For example, the fundamentals of Islamic law are expressed in Sharia, which is based on both the Koran and the Sunna. These fundamentals must first be identified, understood, and interpreted so that they constitute fiqh . This interpretation is indeed complex because there exist numerous instructions and several schools of

²⁸ Anonymous. Saudi women should not have to wear abaya robes, top cleric says. BBC News. 10.02.2018.

²⁹ Al-Muntada Al-Islami, The Quran English Meanings, Chapter 33, Verse 59, p. 415.

interpretation (fiqh). It is further difficult to identify analogies (qiyas) between what was ordered for a society that existed in the seventh century and that which exists today.

*The principle of compatibility—according to which a specific rule should be interpreted in a way that complies with and does not contradict essential principles—may be used when facing such difficulties”.*³⁰

2.2 Gender Equality in Sharia law

Not equal rights, women's rights are central to Islam. Islamic Scholars also acknowledge that the rights of women given by the Qur'an has been violated more or less. They say that Shariah laws are right, but the implementation is not going in accordance and that is why it is creating the problem. The interesting thing is that for some unknown reason nobody is showing interest to implement the true Sharia law for the women rights. There are some main issues of women's rights in Islam currently in concern which includes unconditional polygamy, the right of immediate divorce of husband, leadership of women, testimony of marriage, divorce, inheritance, maintenance after divorce, custody of children after divorce, compulsory of women's Hijab, etc. There is no end to the debate on these issues, either Muslim, non-Muslim and Muslim-Muslim. They have applied different views of different scholars on the same subject as different laws in the country over the ages. Naturally, all of the Muslims and non-Muslims of the world have fallen into oblivion with regard to what is the real Sharia Law. In the current context, women do not say anything about many countries' so-called Shariah laws, even though they feel oppressed, humiliated and helpless because they think it is against Islam. They don't even try to find out what is actually Sharia said. Therefore, they try to comply with these laws by compromising themselves in various excuses or arguments. It is a kind of behavior by which we try to adapt ourselves to various things that are against our will. It has no relation to Islamic law.

³⁰ F. Bouchet-Saulnier, *The Practical Guide to Humanitarian Law*. USA, Rowman & Littlefield, 2002, p. 283

Islamic law is a clear religious directive for Muslims. Explicit instruction also has some limitations of time and place, so even if the instruction is clear, it may not be forever. Many verses in the Quran are different for different people. Denying a certain background in social structure and applying it forever in the society can cause some difficulties especially when the chain of Sharia Law is not fully followed in a legal system. The various customs and traditions of the Muslims, which was changed by the guidance of the Qur'an, because it was necessary for that time. In particular, some basic principals have been given on personal matters and based on these principles Islamic law has been implemented. For example, one year interjection period of a widow, which was running for a long time, reduced into four months and ten days³¹. Marrying two sisters simultaneously has been prohibited by the Qur'an³². Polygamy has been restricted and allowed to have maximum four wives³³. The inheritance of parents and relatives has changed after many years³⁴. Sometimes these changes done by the Quran and Hadith and sometimes changes done based on the guidelines of the Qur'an and Hadith. So, the Islamic principles derived from the Qur'an and Hadith are primarily known as Islamic law. And the special laws created in light of these principles by the Islamic scholars or Islamic Countries are Fiqh.

Now, let's come to the provisions of Islamic law in different Muslim countries regarding the equality principle. Some Muslim-majority countries have a system of equal inheritance, such as Morocco, Senegal, and Tunisia (99% of Muslims in Tunisia). The Muslim majority Kyrgyzstan imposes two years' imprisonment for second marriage - no matter what the situation was. For more than one marriage in Bangladesh, permission from the previous wife/wives is must needed requirements and after that the person who wants to marry must have to consult with the head of the local judicial system about the necessity of the marriage. Otherwise, that person will be liable for the imprisonment and fine.

A combination of a man and a woman creates a family. Then it leads to a society, from society to state and from state to this huge world. Both women and man contributes to their respective

³¹ Al-Muntada Al-Islami, The Quran English Meanings, Chapter 1, Verse 234, p. 34.

³² Ibid., Chapter 4, Verse 23, p. 73.

³³ Ibid., Chapter 4, Verse 4, p. 69.

³⁴ Ibid., Chapter 4, Verse 11, p. 70.

fields in cultivating a family. And so both should have certain rights and dignity. But over the years, there have been extreme imbalances in the rights and dignity of men and women in different religions and societies. In the Dark Age, women even did not get the equal value of animals. Some women have been called "the gates of hell," the "essential devil". Women were treated as consumer goods. In the death of the father, the children also shared their mothers as an inherent property. Only a few centuries ago, we saw that after the death of a husband his wife was subject to burnt. In the present era, there is still no share for women in inheritance in any religious law other than Islam. There is not a single portion of the property in the Hindu religion for women. Sharia law is establishing the balance of rights and dignity of men and women by rescuing women from such unjust and inhumane conditions. And that is why Sharia law is more important for the Muslim woman.

People are sometimes children, sometimes young, spouses; old parents. The rights and dignities varies on the needs of the different conditions. Based on this difference, Islamic law has provided a clear provision for the rights of men and women. In ancient Arab, the female babies were buried alive and it was kinda tradition. In such a situation, it was made clear in the Holy Qur'an as a rule for the people, "Do not kill your children for fear of poverty"³⁵. On the other hand in the case of the husband-wife relationship, the Qur'an directs their rights in relation to their spouses – "they are clothing for you and you are clothing for them". This means, one is complementary to another and two are equal in favor of each other.

Considering the Qur'anic directives regarding the rights of men, it can be seen that in some cases the rights of women are higher than men, while in some cases the rights of men are higher than women, in some cases both are equal, but not equal overall. For example, in the case of property distribution, men get more shares than women, and on the other hand, in marriage, the wife gets dower from her husband which is obligatory for the groom to pay the bride. So, it actually seems that Sharia law has adopted the principle of equity rather than applying the principle of equality for the rights of women and men. The rights and obligations have been given whatever right they need. And here the main conflict between Sharia law and CEDAW. CEDAW is promoting equality, and Sharia law is promoting equity. Sharia says that women's

³⁵ Al-Muntada Al-Islami, The Quran English Meanings, Chapter 17, Verse 31, p. 266.

rights are the rights for women only, and CEDAW says about equality where men and women are equal in rights. Both laws are trying to protect women's rights, but their perspectives are different. “The Muslim family law given by Allah is a kind of chain of mathematics. If there is a deviation, the reaction will be on the whole mechanism.”³⁶As they have studied this mechanism, in fact, the numbers are really good to match. But the figure matches the perspective of the social structure of society which was in fourteen hundred years ago. In the 1400 years of evolution, it is impossible to apply this mechanism, because some parts of the chain have collapsed and new parts have appeared in the chain. So, if we want to apply the whole mechanism it would lead the world into 1400 years old social situation that is unrealistic and impossible. In that society, the tribe protects every member and woman of their tribe with all their power. It maintained the honor and power of the tribe. But that protection system of women is not there today. Now this is the age of small single-family. Neither parents, siblings nor the state can protect everyone from every aspect at all. We must realize that with all these social provisions the Quran suddenly did not create a new society from zero. The Quran has given some balance to the anti-women environment of that ancient society, and has given way to women rights in the future. If we do not understand the difference between the two, we will never understand the meaning of human welfare under Sharia Law. In that society, reason to give women less rights than men is the inability of women to take responsibility. But Sharia and women both are not responsible for that, the society is responsible.

Some Islamist always says that seek directions from the background of the verse. That's right, because what the instructions in the Quran are for the time being can found in the background. But some Islamist also violate that background for the oppression of women. The same is true for the inheritance issue. In Chapter 4 verses 11 and 176 of the Quran, there is a direct indication that women will inherit half of a man. The background of verse 176 was not found. But verse 11 was revealed in a special background. When a wealthy Ansar named Aus bin Sabet died, according to socio-economic traditions, Aus' cousin came and deprived his wife, two adult daughters and one minor boy from all property. Then the Qur'an has ordered that the property will be double for the child brother than the adult sister for the financial security of

³⁶ M.A Odud, ‘ইনসার প্রতিষ্ঠার প্রয়োজনীয়তা’ (in English- Necessity to establish justice). Daily Inqilab, 25.05.2008.

this under-aged son. That is, these verses are not eternal but a solution to the immediate special situation.³⁷ Today, if the verse is to be followed according to the Quran, it can only be applied in the case of the minor children and the adult sisters. However, most scholars have accepted this direct instruction of the Qur'an as a law because there is no clear explanation for this matter. And according to the socioeconomic system and family structure of Bangladesh, this Shariah law is logical regarding property distribution. The author has talked to Muslim women of Bangladesh in this regard, it is very surprising that they don't have any problem in this matter of Sharia law. There are many women, who did not bring any portion of their property after the marriage that she inherited from her paternal family side, but according to them if the Sharia laws of the family were followed properly, they would feel much more self-reliant and secure.

The real thing is the perception of intention and reality. If our Islamic leaders want to establish women's rights with real change by maintaining values according to the method given by the Quran, then its support will come from the Quran and Hadith. The author already has shown lots of provisions from the Quran and Hadith regarding this. We have to understand that the Quran could remove the curse like drinking in one day but why did it take three steps slowly? The curse of the slavery-like the Quran could have done away with a decree, but why it was abolished after taking many years. The deliberate polygamy and divorce of men, unlimited marriages, and every woman is property less, her visual testimony is inadmissible in court, etc. is just like myth not only in Arabia but in the entire world. The Quran could have removed them in one order. But the Quran knows that if people do not realize any good provision and if they force it, then the society is bound to collapse at the end. So we see that the Quran has very carefully established as little as possible what people could take, as much as was possible in that society. That is why the Quran initially imposed a little barrier on each of the women-oppressors under different conditions, even though it allowed at least half a portion in women-inheritance. But that was not the ultimate destination. The root of the problem was so deep that it was not possible to fulfill it like in the time of the Prophet. So the Qur'an has given the direction of the destination - abolish slavery and establish women's rights. So it is clear that, in some context, Sharia law promotes equal rights for both men and women. But overall it is actually promoting equity for everyone which means it is promoting women rights.

³⁷ M. Hamidullah. Introduction to Islam. Idara-e-Islam 2004, Paragraph 398.

2.3 Legal instruments for the Muslims in Bangladesh

The legal systems for the Muslims in Bangladesh actually depend on the principles of Sharia through Muslim Personal Law that covers the field of marriage, divorce, maintenance, guardianship of children and inheritance along with the general law which is non-religious and secular in its character which covers the rights under the Constitution following civil and criminal matters. As earlier mentioned in the first part of this, Sharia law in the legal system of Bangladesh has a long history and a strong foundation. So, it is not possible to completely remove the provisions of the sharia from the national legal system. Despite constitutional and legal support for women's rights, women's rights have not yet been established in our society because of the presence of masculine control over the society. Countless women are facing human rights violations, constitutional guarantees of the state are being violated and women's rights and helplessness are increasing day by day. In our country, due to the lack of awareness of the rights of women and the limitations of the enforcement of existing laws, women are deprived of the benefit of their rights and legal aid.

If we take a close look at the countries legal structure, we will see that the country ensured all the legal rights for everyone. It is very tough to find any discriminatory legal provisions in the system. But there is some weakness in several legal provisions which are somehow demotivating people to follow these provisions, especially it becomes very challenging in case of legal proceedings. In the case of women's rights-related issues, the author found some issues in the system. For example, in the 'National Women Development Policy -97' adopted in 1997, the words 'equal rights' as described in Section 7.1 has been replaced by the words 'Constitutional Rights'. In section 7.2 the lines and words such as 'property, accommodation, partnership, inheritance, property' etc., have been omitted. Section 7.3 has been changed to 'proper employment of women' instead of 'every sector of employment'. Section 8 completely eliminates the active participation of women in politics and some aspects related to women's empowerment in the Cabinet, Parliament and Bangladesh Mission abroad which was lifted later in 2011. Interestingly, in the constitution, there are both provisions where one article says about equal rights for everyone in every aspect³⁸, in another article, it is saying everyone has

³⁸ Article 19, 27, Constitution of the Peoples Republic of Bangladesh.

the rights to follow their own religion and can practice their religious order³⁹. For example, in the Constitution, The state religion of the Republic is Islam⁴⁰. It is a clear indication that, for the Muslims, the country has the legal provisions which are not contrary to the Islam or Islamic values. For example, drinking alcohol is prohibited in Sharia and also it is prohibited by the national laws. Sexual relations without marriage prohibited in Sharia and liable to serious punishment which is also prohibited in the Countries penal code⁴¹. So, how it is possible to follow both principles when both are contradictory. There is another provision in the Constitution where it says Laws inconsistent with fundamental rights to be void⁴². If it is like that, then how ‘Muslim Family Law Ordinance (MFLO), 1961’ is still using as the laws for the Muslims in Bangladesh. Provisions related to marriage, divorce, custody, inheritance is not ensuring equal rights to the women in this law. This law is violating Article 26 of the constitution. But MFLO is also we can say the result of Article 26 of the Constitution. Because if the country allows to practice religious legal order in its constitution, then a codified law for a particular religion is a must needed instrument. So, at a time MFLO is both consistent and inconsistent with the Bangladesh constitution. So, either government have to change the law to comply with the provisions of the Country’s constitution and CEDAW to ensure the equal rights for women or, the legal system have to introduce a separate law to promote and protect women’s rights not only for Muslims but also for all other religions women.

The laws currently governing Muslim personal affairs in Bangladesh are- The Muslim Personal Law (Shariat) Application Act, 1937, The Dissolution of Muslim Marriages Act, 1939, Muslim Family Law Ordinance (MFLO), 1961, The Muslim Marriages and Divorces (Registration) Act, 1974, The Dowry Prohibition Act, 1980, The Family Courts Ordinance, 1985, Guardian and Wards Act, 1890. Other national laws also governing all the civil and criminal legal matters of the Muslims, but these laws are not for the Muslim personal affairs. In chapter three author elaborately explains the provisions of these personal laws for the Muslims with case laws comparing with the CEDAW’s provisions.

³⁹ Ibid., Article 41.

⁴⁰ Ibid., Article 2A.

⁴¹ Section 497, The Penal Code. Adopted 06.10.1860, e.i.f. 06.10.1860.

⁴² Article 26, Bangladesh Constitution.

2.4 Application of the Sharia law in courts

The Hanafi school of Fiqh is the predominant madhhab/school in Bangladesh. That is why almost all the legal provisions from the Sharia is based on the Hanafi school of Fiqh. All the enacted Muslim laws in Bangladesh entered into force under the authority of the Muslim Personal Law (Shariat) Application Act, 1937. This act gives the power to the government to enact laws⁴³ for the Muslim personal affairs. This law legalizes the application of the personal law to Muslims and specifies the sectors of the applications. According to this Act, Notwithstanding any custom or usage to the contrary, in all questions 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 all forms of divorce, maintenance, dower, guardianship, gifts, trusts, and trust properties the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law that is Sharia law⁴⁴.

Based on Muslim Personal Law (Shariat) Application Act 1937, Muslim Family Law Ordinance (MFLO), has been enacted in 1961 which is covers almost all the personal affairs for the Muslims including succession, registration of marriages, polygamy, Talaq, dissolution of marriage otherwise than by talaq, maintenance and dower. This Ordinance also declares the power to make rules. It also sets forth provisions for discussion of the place of trial. Based on this provision, Bangladesh Government enacted The Family Courts Ordinance in 1985 to try the issues regarding personal affairs for the Muslims. This court have the jurisdiction over the dissolution of marriage; restitution of conjugal rights; dower; maintenance; guardianship and custody of children which are mentioned in the MFLO⁴⁵. All the Assistant Judges shall be the Judges of this Court.⁴⁶ In this court all the proceedings that is plaint, written statement, summons, pre-trial proceedings, etc. are the same as other normal courts. But in this court, the trial shall be based on the enacted laws under the Muslim Personal Law (Shariat) Application Act, 1937 and other relevant laws of Bangladesh. For example, to distribute the inheritance property, the court shall follow the MFLO 1961 as substantive law and to complete the full

⁴³ Section 4, Muslim Personal Law (Shariat) Application Act. Adopted 7.10.1937, e.i.f. 7.10.1937.

⁴⁴ Ibid., Section 2.

⁴⁵ Section 5, The Family Courts Ordinance. Adopted 24.03.1982, e.i.f. 30.03.1985.

⁴⁶ Ibid., Section 4 (3).

procedure, the court will follow the Code of Civil Procedure 1908⁴⁷. So, the trial system is actually a combination of both Sharia and national laws. The fundamentals of how to take any decision based on the sharia law is given in the following chart which is showing the hierarchy of the sources of the Sharia law:

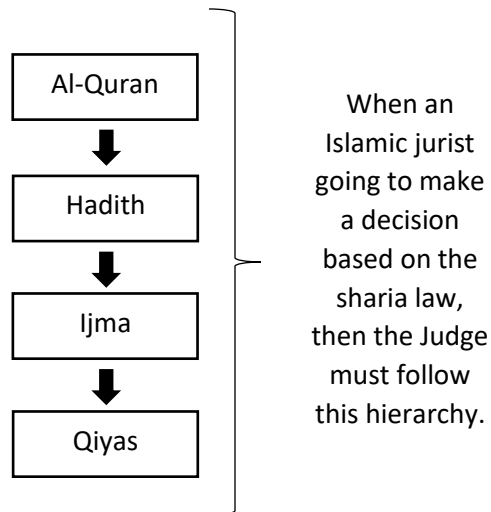


Chart: 1.1 Sharia law hierarchy

The making of the decision by a Judge begins with analyzing the principal source of Islamic law which is the Al Quran. If it provides a solution, the Judge will make the decision based on that solution. If the Judge does not find the direct solution in the Quran, then he will search in the Hadith, if it is not mentioned in the Hadith then he will search in the Ijma. And if it is also not available in the Ijma, then he will approach to Qiyas. This is a very conservative way to make a decision which is not followed very often. As it is time-consuming, many countries introduce their own Sharia law code based on the principles of the Quran and Hadith. In that case, the following diagram will explain how Islamic Jurists codifying Sharia laws for their own system.

⁴⁷ Ibid., Section 2 (a), 5.

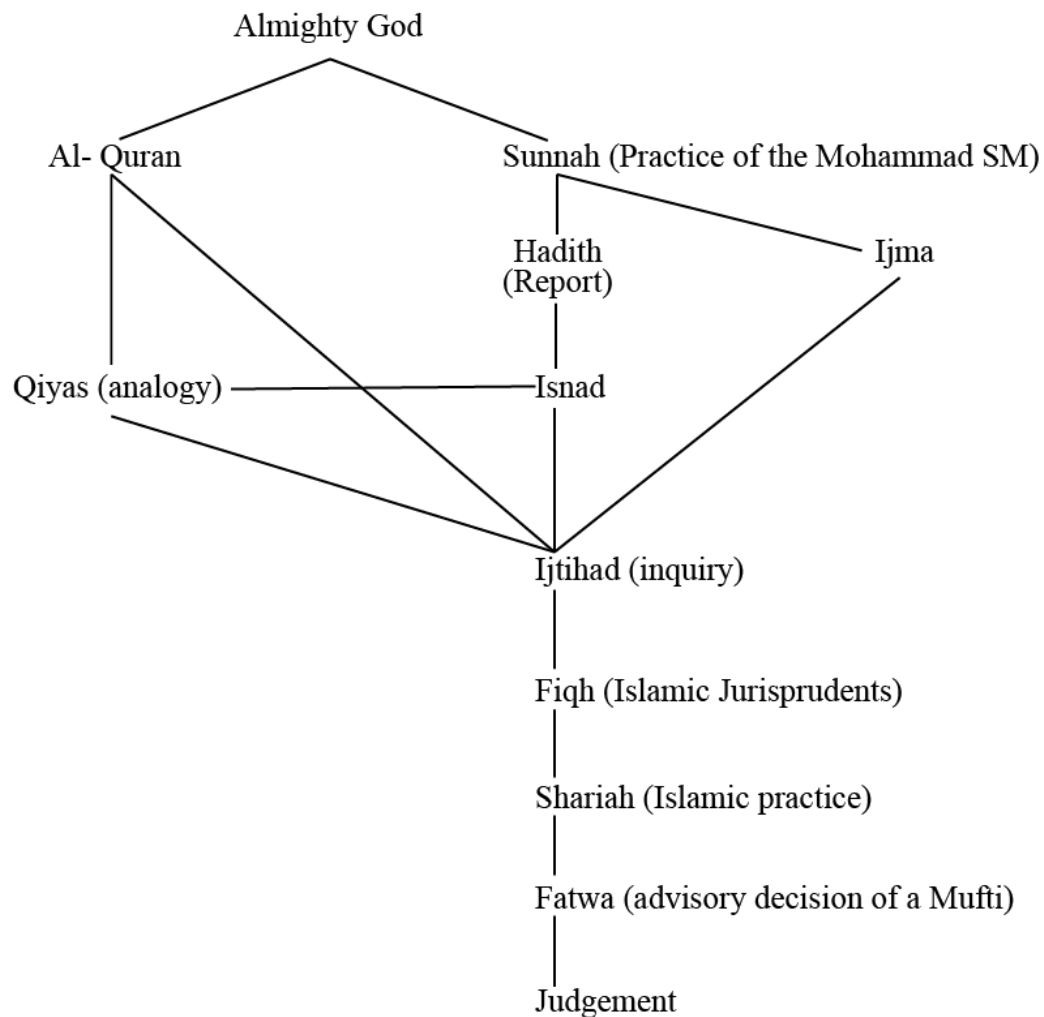


Chart: 1.2 Derivation of Islamic legal System

Almighty God sent Prophet Mohammad (SM) as leader of Muslims and gave him a complete code of life named Al-Quran for the all human being of the world. Quran is treated as the Constitution for the Muslims. Whatever Prophet Said to obey is Hadith. And codifying Sharia laws start from analyzing the Quran and Hadith. If we draw an example it will be clearer that how this codification actually happens. For instance, God said to follow Prophet Mohammad (SM)⁴⁸ and Prophet prohibits temporary marriage which is known as Hadith. This Hadith reported by a chain of narrator known as isnad. The scholars who studied this narrated reports

⁴⁸ Al-Muntada Al-Islami, The Quran English Meanings, Chapter 59, Verse 7, p. 559.

called mujtahid and their study known as ijma and quias together are known as ijtehad. From this study, they decided that the use of this recommendation is not only for Prophet but also for everyone which is known as Fiqh. And then it enlisted as a part of Sharia. Some countries like Bangladesh accept this as Sharia and some countries like Saudi Arabia accept as Sharia law. When any provisions from Sharia became law then it is binding for that particular State or community. But when the don't take it as law, then in a certain situation, they ask advisory opinion from some scholars based on this provision who know as mufti and his opinion known as Fatwa. It is a recommendation, so until the Judge applies this opinion in the court, it won't become law. If Judge makes decision-based on this opinion then it turns into a law.

But in the case of Bangladesh, the Judge does not need to follow all these steps. There are some relaxations for the Judges under the Bangladeshi legal system. The Judge does not need to find any solution from the Quran or Hadith or form any other sources. The judge will only follow the relevant laws which are already in the legal system of Bangladesh like MFLO 1961 or The Dissolution of Muslim Marriages Act, 1939 or The Muslim Marriages and Divorces (Registration) Act, 1974, etc.

So, from the above-mentioned discussion on understanding the Sharia law and its interpretation creates some room for the reader to think about the status of the Equality principles and woman rights under sharia law. As it is discussed, Sharia law principles completely depend on the social structure of the Muslim community that is why it is not familiar to the western world. However, Sharia law is a legal system for such a big portion of the population of the world, and peoples are following this legal system willingly. So, it is really tough to determine that it is completely incompatible regarding human rights or any other rights. From the discussion, the information revealed that Sharia law is also promoting women's rights but in a different way. It is promoting equity rather than equality for the betterment of women. But the issue is, how much capability we have that we can get the appropriate provisions from the Sharia on that issue. Some provisions regarding equality principle in the CEDAW for women and provisions in the Sharia law which is applied in Bangladesh are in some points contradictory. Also provisions from different national laws including Bangladesh Constitution are in some points contradictory with the provision of MFLO 1961 which provides challenges for the

judges in case of judicial trials. In the next chapter author is going to analyze the cases from the Bangladeshi courts regarding family law matters comparing with CEDAW and Sharia law principles on Equality for the women on gender discrimination grounds.

3. Implementation of the Equality Principle in the Bangladeshi Court Practice

According to the UNDP Gender Inequality Index 2014, Bangladesh ranked 111 out of 188 countries on Gender Inequality. It is a clear indication of the improvement on gender equality of Bangladesh. Everyone is equal in the eyes of the law. All citizens of the state are entitled to equal protection under the law. Not only statutory laws, but our constitution also recognizes that citizen's right. There are two basic rights declared in the Article 27 of the Bangladesh constitution. The first declaration states that all citizens are equal in the eyes of the law. The second declaration states that all citizens are entitled to equal protection of the law. The first part of the paragraph in this section means that the law for which people is made shall equally apply to all of that people. There will be no discrimination between people at the time of formation of the legislation. That is, for a particular underdeveloped area is a kind of law, and different law for another place; this disparity of the law is not acceptable. No individual or group is entitled to special privileges in the eyes of the law, everyone is equal before law. Based on the constitutional provisions regarding the equality, every person is protected equally under all the statutory law.

The legal structure of the country is divided into two separate branches. One is for personal matters including marriage, inheritance etc., and another is for collective matters like criminal matters, property related matters etc. Equality in the non-personal laws is clearly visible. Like, everyone is treated equally under those laws. Legal provisions of those laws are equal for men and women, there is no relation with the religious function with these laws. But when it turns into the personal matters, then there are some inequality under the personal laws are visible. Here men and women are first treated as men and women, then they are treated as humans. And for this reason, these personal laws provides different types of protection for men and women, but not equal in every aspects. It can be called equitable protection. Bangladesh is a secular democratic independent state and secularism is one of the basic principles of Bangladesh.⁴⁹ As a secular country peoples understand a state officially neutral in matters of religion. Bangladesh is far ahead of this idea. It is allowing its citizen to follow their own religious law as family law. And for this reason, it took Sharia law for the Muslims, Hindu laws for the Hindus and Buddhist and other personal laws for the other religion in its legal

⁴⁹ Article 12, Bangladesh Constitution.

system. Till this point, it seems very positive because it is ensuring one fundamental right to its citizen. On the other hand, according to Articles 27, 28, 29 and 65(3) of the Bangladesh Constitution, Bangladesh is committed to in-depth development of women and ensure the equal rights for all citizen. But interestingly there is not a single Article in the Constitution which is specifically saying that women have equal rights of men in every sectors of life. For women, it says women rights, not the equal rights. And to be specific, Article 19.2 says about equitable distribution of the property,⁵⁰ not equal. Article 19.3 says State shall endeavor to ensure equal opportunity and participation of women in all spheres of national life⁵¹. This Article specifies the areas, where women will be equal, which is national life, not in personal life. Article 27 of the constitution stipulates that all citizens are equal before the law and are entitled to equal protection by the law. This Article clearly says about the equal protection of the law. So, in that case, if Muslims follow Sharia law as their personal law, then in case of protection, both men and women entitle equal protection of Muslim Family Law Ordinance which is known as Bangladeshi Sharia law for the Muslims. So, if they follow Sharia law in case of inheritance where sister inherited half of one brother to the deceased property, then it is equal protection of the law and also the equitable distribution of the property which is mentioned in the article 19.2. So, technically there is no violation between the Constitution and Sharia law. The framework of the Constitution clearly indicating that Bangladesh constitution is promoting equity and equitable rights for the women which is known as women rights.

The structure of the sharia law currently active in Bangladesh also based on the same principles regarding women. It is separating men and women rights regarding their duties and responsibilities. Somewhere women gets privileges and extra rights and some where men. In this chapter, the author tried to find out the impact of this imbalance in the legal system to the citizens of the country, especially the impact on the women based on some court cases.

3.1. Compliance of the legal provisions in case of Marriage

The definition of marriage is almost same all over the world except same sex marriage. But the function and procedure of the marriage is different. Even, there are different type of procedure

⁵⁰ Ibid., Article 19.2

⁵¹ Ibid., Article 19.3

of marriage is visible in one country. In Bangladesh, except for Muslim marriage, all other marriage that is Hindu marriage, Christian marriage, Tribal marriage etc. is a kind of ceremony. But Muslim marriage is more a civil contract than a ceremony. The conditions for fulfilling the civil contract have to be fulfilled in a Muslim marriage. Therefore, the marriage is called a formal agreement and the civil contract between a bride and a bridegroom. According to this agreement women and men are not only entitled rights to each other but also inherit each other's property. In this paper, the author is going to find out the compliance of the judgments regarding Muslim marriage related issues. Here, the legal issues arise on any violation of the conditions of the marriage. Muslim marriage in Bangladesh, there are following conditions have to be fulfilled. Offer and acceptance, age, dower, witness and registration. The bride and the groom must have independent consent on their marriage. Nobody can force them to marry.

There should be a clear offer of marriage from the groom to the bride and the bride's consent must be stated in a clear pronouncement. The Qazi (a person who do the formalities of the marriage) and the witnesses have to hear the consent in their ears. In many cases, most of the time in arrange marriage the consent of the bride is considered to have be given without the consent of the bride. In such a case, the woman later can refuse to marry. The Assistant Judge can file a declaratory case in the court to cancel the marriage. In the eyes of the law forced marriage without consent is a punishable offense.⁵² If a woman gets married without her consent, she can file a case in accordance with Article 2 of the Muslim law 1939. This law protects the rights of the girl. According to the second source of Sharia law, any widow or unmarried women can't be married without their consent⁵³. There was a landmark case in the high court division of Bangladesh regarding the forceful marriage in 2000. The High Court Division of Bangladesh declared a fatwa given by a Bangladeshi Imam illegal in a case concerning a forced marriage and prohibits any kind of fatwa regarding legal matters⁵⁴. So the requirement of consent of both male and female in Muslim marriage in Bangladesh is complying with the equality principle.

⁵² Section 366, The Penal Code. Adopted 06.10.1860, e.i.f. 06.10.1860.

⁵³ Hadith NO. 5136, Sahih al-Bukhari, Wedlock, Marriage (Nikaah). Accessible at <https://sunnah.com/bukhari/67/72>

⁵⁴ Mohammad Tayeeb VS. Bangladesh, Summary of Judgment, Civil appeal NO. 593-594 OF 2001, p. 2.

In case of the age of marriage, there are some controversies regarding Bangladeshi Sharia law. The minimum age of marriage is not equal for men and women. There are also some inconsistencies in the existing laws where a general law defines one age for marriage, there Muslim law is defining another age. In the Muslim Family Laws Ordinance, 1961, the minimum age for marriage for females is 16 and for males it is 21. But in the Child Marriage Restraint Act 2017, the minimum age for marriage is 18 for females and 21 for males⁵⁵. From 2017 the section in the MFLO regarding age has been repealed by the section 2 (3) of the Child Marriage Restraint Act 2017. Now if we see this provision, we will find a discrimination. But in this case, we are not sure, this discrimination is actually harming whom. Is it a discrimination for women or it is for men? Hypothetically this provision is equitable for men and women and it is not discriminatory. But theoretically, it is violating the equality principle. So, in this case, which one we should accept? According to Article 16.1.C of the CEDAW, women, and men shall have the same rights and responsibilities during marriage and at its dissolution and State, parties are responsible to eliminate discrimination against women in all matters relating to marriage on a basis of equality of men and women. So, in this case, as it is saying that the age limit for women should be equal to men which means 21 years of age limit also for women to eliminate discrimination against women. Bangladesh government don't find this Article reasonable and that is why it puts reservation on it.

Dower is another requirement for a valid Muslim marriage. Dower is a money or some other property which the wife is entitled to receive from her husband as a reward for the marriage.⁵⁶ In Muslim law, it is an obligatory duty for the husband to pay dower to the wife and must needed ingredient of the marriage. Dower is a debt, which the husband is obliged to pay. Before intercourse, the wife may demand her dower from the husband, and if the husband does not pay the dower, the wife can refuse to go to the intercourse with her husband.⁵⁷ It is her rights and if the husband forces her, then it is a crime. A husband cannot get a decree for the restitution of conjugal rights until he pay the dower. Unless there is a detailed description of the marriage registration form (Kabin) about the method of dower, the husband has to pay any amount asked

⁵⁵ Section 2(3), Child Marriage Restraint Act 2017. Adopted 11.03.2017, e.i.f. 11.03.2017.

⁵⁶ D.F. Mollah, Principles of Mahomedan Law, ed. 13. Eastern law house 1905, p. 251.

⁵⁷ Mahmuda Khatun VS. Abu Sayeed, Dhaka Law Reports (DLR), Vol. 21, 1969.

by the wife. Regarding the divorce, the husband must pay all the promised amount to the wife, and the argument is not a valid answer against the claim that it is too much or beyond the husband's repayment capacity.⁵⁸ If the wife, does not receive the dower money, she and her heirs may file a case for the immediate payment of the debt of dower, the time limit for filing the debt is three years from the date of the claim and the refusal to pay it or the date of divorce or death⁵⁹. Dower is never forgiven. If the husband dies, then the widow can collect the debt from the husband's wealth. That is, after the death of the husband, if the dower remains whole or the deferred debt remains unpaid, the wife, however, would take possession of the property of her late husband to recover the dower. Because in Islamic law dower is considered as debt⁶⁰. As we see here, Sharia law gives a special rights to the women in marriage and the Bangladeshi legal system adopts this provision for the Bangladeshi Muslims. This provision of the marriage is to comply with the main idea of the CEDAW which is the advancement of women rights. But again this provision is the complete opposite of the Article 16.1.C of the CEDAW. If here equal rights ensured, then either this provision has to lift from the marriage law or have to introduce the same provision for the men also. This is another reason, why Bangladesh is not lifting its reservation on this Article.

In Muslim Marriage there must have been two sound mind adult witnesses. There is a misconception in our society that one male witness is equal to two female witnesses. According to the provisions of the Evidence Act, the testimony of sound witnesses is sufficient⁶¹. According to this law women and men have equal dignity. There was no mention of women and men individually. Even in the Kabin nama form (Form of conditions of the marriage) there is no mention of two female witnesses as opposed to a male witness. In addition, there is no provision in 'Muslim Family Law Ordinance, 1961' or 'Muslim Marriage and Divorce Registration Act, 1974 or any other law that includes 'two women witnesses are equal to one man'. But this concept came from the concept of inheritance where the sister gets half of her brother. But in case of a witness, men and women both are equally valued under national laws.

⁵⁸ Section 10, Muslim Family Law Ordinance 1961. Adopted 02.03.1961, e.i.f. 02.03.1961.

⁵⁹ Schedule 1, Section 103, The Limitation Act 1908. Adopted 07.08.1908, e.i.f. 07.08.1908.

⁶⁰ Case No. 677, Dhaka Law Reports (DLR), Vol. 22, 1970.

⁶¹ Section 118, The Evidence Act, 1872. Adopted 15.03.1872, e.i.f. 15.03.1872.

So as marriage witness or any other witness, there is no discrimination in the legal system of Bangladesh, and also no contradiction with CEDAW.

The most important part of the Muslim marriage in Bangladesh is marriage registration. The marriage was held according to the law, and the written document of this process is known as registration. According to the Muslim law, in whose office the registration work is carried out known as Nikah Registrar, whom we called Kazi. Registration is recognized as the Marriage Certificate for the men and women. Every marriage and divorce must be registered under the provisions of the Muslim Marriage and Divorce (Registration) Act, 1974. If a marriage is held by a Maulana or Imam, then the marriage must be registered within the next 30 days from the date of marriage. Every marriage registry fee is determined based on dower money. The Nikah Register will receive a fee of Tk 12.5 per thousand of dower for marriage registration. If the amount of dower is more than four lakh taka then the registration fee will be calculated as of one hundred taka for every one lakh taka. However, the amount of the denomination will not be less than the minimum fee of 200 Taka. According to Muslim law, the registration of marriage is compulsory and it is the responsibility of men to pay the registration fee. Otherwise, the men may be sentenced up to two years without labor imprisonment, or fine up to Tk 3000, or both. So, here also women get privileges. She is completely free of this kind of burden. In Bangladesh, this is equitable rights for women. But if here we apply CEDAW provisions regarding equal rights, then the women's rights will be violated.

There is the most debated issue regarding Muslim marriage is polygamy. The right of polygamy actually seems as an extra facility for the men and disrespects for women. A Muslim man can have four wives at the same time, but not more than that. According to the Muslim Family Law Ordinance, no person can perform a second marriage without the prior written consent of the Arbitration Council in the presence of his current wife/wives⁶². However, the Muslim Family Law Ordinance does not declare another marriage invalid while the man has a wife. In this regard, Muslim men have only some restrictions on polygamy. In the case of a Muslim woman, multiple marriages at the same time is illegal and completely prohibited. Not only that, if a woman marries another while she has a husband, she will be punished under the

⁶² Section 6 (1), Muslim Family Law Ordinance 1961.

Penal Code⁶³. In Sharia law, polygamy states that one husband can marry up to four only if he can treat each wife equally, both materially and in affection.⁶⁴ However, in reality, this is never possible. Because a husband who loves his wife does not want to have a second marriage. That is why the Holy Qur'an demotivated polygamy. Polygamy has been allowed in Islam in a different socioeconomic and unstable political reality at the beginning of Islam. Islam keeps this provision because of such a remedy has been put in place to protect the widows and orphan women. An analysis of the situation at that time shows that many Muslim men were martyred during the war in Uhudh, so naturally the parents fewer women and widows felt insecure. To ensure the safety of these women, polygamy was introduced.⁶⁵ But in the case of a second marriage in Bangladesh, the marriage registration will not be done unless permission is given by the arbitral council. Husband has to apply to the chairman of the village council on a white paper with a state fee for permission of the second marriage, and one of the factors that will be considered in allowing the marriage in terms of application is –

- a) Current wife's maternity status,
- b) Physical malpractice,
- c) Physical disqualification on marital life. And
- d) Any conditions for the restoration of the marriage rights.

If a man carries a second marriage without the permission of the arbitral council, he shall be deemed to commit a punishable offense under the Muslim Family Law Ordinance. He will pay his current wife or wives immediate or deferred dower immediately, and if the money is not paid, the amount will be collected as land revenue. Also, if he convicted of the charges, he could be sentenced up to one year of jail and a fine of up to Tk 10,000 or both.⁶⁶ Besides, according to the provisions of the Penal Code section 494, a husband who remarries during the life of his wife shall be punishable with imprisonment for any term which may extend up to seven years and also can be liable for the fine. Though it is allowing polygamy in the law for a certain situation only, but still it imposes strong legal bindings for the men. Some scholars argue that it is a discriminatory provision. But as we see, it is a provision only in special

⁶³ Section 494, The Penal Code.

⁶⁴ D. Bahar, *Women and the Qur'an : A Study in Islamic Hermeneutics*. The Edwin Mellen Press 2009, p. 60.

⁶⁵ J. L. Esposito, *Women in Muslim Family Law*. Syracuse University Press, 2001, p. 19.

⁶⁶ Section 6 (5), Muslim Family Law Ordinance 1961.

circumstances. If anybody tries to manipulate these provisions for his own benefit, then it is a criminal offense and liable for punishment.

From the above-mentioned explanation of the legal provisions of the Muslim marriage in Bangladeshi Sharia law, the author pointed out some curtail points regarding the gender equality where national laws have some issues and on the other hand, CEDAW also have some shortcomings. In some cases, it seems like that there are some discriminations for women in the national legal system. For example provisions regarding the polygamy for men. Though these provisions seem like injustice towards women, but the restriction and conditions reserve the rights of women in this regard. So, polygamy is completely depending on the women's consent. On the other hand, in the context of the social structure of the Muslim community in Bangladesh, some provisions regarding Muslim marriage are contradictory towards women's rights. For example, applying Article 16.1.C can harm women rights. If this Article applied to the countries legal system, women will lose their most important marital rights. For instance, they can lose the dower. Where in the Bangladeshi Muslim society treated dower as an honor to the women. The provisions regarding the maintenance of the wife after marriage will be also in threat because of the application of this section.

3.2. Compliance of the legal provisions in case of Divorce and maintenance

In Muslim law, marriage is an agreement and this agreement can be broken by one or both parties. That is, based on the opinion of husband or wife or based on the opinion of a marriage can be dissolved. It is surprising that divorce is considered the worst lawful act in Islam. Many people think that women can't divorce her husband in Sharia law which is not correct. Women also have the rights to divorce with certain conditions. In Islamic Sharia, husbands have the exclusive right to divorce, that is, the husband can divorce his wife /wives for any reason whenever they want, but the same were not given to the women. However, fulfilling certain conditions according to the Shariah, the wife also can get the right to divorce her husband within the Islamic Shariah, and except this provision of sharia law, now with the help of the statutory law, a Muslim wife also can divorce her husband. This provision of Sharia clearly seems unequal here. Husband and wife both have the right of divorce, but the powers are not

the same. Marriage and divorce are regulated by the Muslim Family Law or Sharia Law, bypassing the law in the parliament in Bangladesh. In western countries it is important to have a lawyer for a divorce, they do not take any initiative of divorce without a lawyer but till now it is not always necessary to have a lawyer for a divorce in Bangladesh or it is not always necessary to call a lawyer. Considering the socio-economic status of Bangladesh, it is seen that there are more divorces on the basis of consensus. The law also has provisions for divorce on the basis of consensus. Most of the divorce cases in our country involve maintenance, dower and some criminal issues. When we discuss about divorce, the Suppression of Violence against Women and Children Act 2000 and Dowry Prohibition act come before us. In our country, 90% of the divorce cases have been reported that when a man sends a divorce notice to a woman, instead, the women lodge a criminal case against the man. In most cases, the case is usually done in a magistrate court. The magistrate then sends the case to the concerned police station to take necessary legal action or to file the case as an FIR. There are some general sections of these cases, such as Section 3/4 of the Dowry Prohibition Act, Section 11 of the Suppression of Violence against Women and Children Act 2000. According to Muslim Family Laws Ordinance 1961, which exists in Bangladesh, the husband must send a written notice to his wife when he divorces his wife. Also, the public representative in the area where the wife lives (eg, chairman of the union council, councilor of the city corporation) should be informed about the notice. This obligation has been imposed on the husband.⁶⁷ The law states that the chairman will take steps to mediate between husband and wife within the next 30 days after giving notice to the public representative. For this issue, an arbitral council shall be made with one of the nominated members of both the parties and one of the members of the City Corporation or Union Council. If the arbitral council fails to reach a compromise between them and the divorce is not dismissed, then the divorce will take effect within 90 days after giving notice. However, if the husband does not give notice to his wife, he may be given one-year imprisonment or fine up to Tk 5,000 or both.⁶⁸

The provisions of divorce for the women, the process is not similar to the men. According to Sharia law, women can give divorce only when men share his divorce power with his wife at

⁶⁷ Section 7 (1), Muslim Family Law Ordinance 1961.

⁶⁸ Ibid.

the time of marriage. In the Nikah nama (the form of marriage conditions) there is a provision numbered 18 where husband can share his divorce power to his wife if any of them want it. This procedure of divorce counted as to a given power divorce, in Sharia law, it is called Talaq-e-Taufiz. In this case, the wife can divorce her husband without the judicial process in the court but it would be work as a judicial decision. It is also important to note that if any condition of the cabin is violated, such as not paying the dower money properly, the wife can divorce her husband for the breach of contract.⁶⁹

Under the current Hanafi law, a Muslim wife can divorce only through an open divorce. If for some reason a wife feels that her rights are being abused or she is being abused or she does not want to carry the marriage for any personal reasons, it is permissible for a wife to divorce her husband in discussion with her husband. And dis kind of Divorce known as Talaq-e-Khula or Open divorce. One of the main features of this divorce is that the proposal should come from the wife and the wife will leave her all interest if needed (such as leaving the property or claim, but her husband must agree to the divorce) and only then the divorce will perform. The interesting thing is that if the husband does not agree in any way / logically, then the court may also order Khula (divorce) by its discretion⁷⁰. If the divorce is not effective in any of the above ways, the wife also can seek divorce through the court under the Muslim Divorce Act of 1939. The law very clearly mentioned the reasons when a wife can apply for divorce in a court which includes the following:

- a. If the husband is unavailable for up to four years.
- b. The husband fails to provide maintenance to his wife for two years.
- c. The husband has been sentenced imprisonment for seven years or more.
- d. The husband fails to perform the marital duty for three years without any valid reason.
- e. If the man is impotent at the time of marriage and it is retained till the case is filed.
- f. If the husband is mad or is suffering from leprosy or serious sexual disorder for two years.

⁶⁹ Sphura Khatun vs. Osman Ghani Mollah, Dhaka Law Reports (DLR), Vol. 9, 1957.

⁷⁰ Bilkis Fatima vs. Nazmul Ekram Quaresi, Dhaka Law Reports (DLR), Vol. 11, 1959.

- g. If the marriage is denied. If a girl's married by the will of her father or family before the age of 18, she can refuse the marriage before the age of 19, but if the bride has not established any marital relationship in the meantime then she can seek divorce decree in court.
- h. If the husband marries multiple women in violation of the provisions of the Muslim family law Ordinance 1961.
- i. Because of the husband's cruelty.

However, it is the wife's responsibility to prove the above allegations in court. On the basis of the evidence of the complaint, the wife may get a decree for divorce. The court will send a verified copy to the concerned chairman within seven days from the date of the decree. The Chairman shall take such notice as the divorce notice and shall take legal action, and ninety days from the day the Chairman receives the notice, the divorce will be finalized. According to the 'Muslim Marriage and Divorce (Registration) Act 1974', divorce is like a marriage that also required to be registered. The marriage registrar will register the divorce on the basis of the application form within his jurisdiction. According to the law, the person who applies for the registry to execute the divorce will and pay a fee. The marriage registrar will check the status of two parties that were in fact divorced. It is usually the responsibility of the husband and wife to collect and keep the certified copies of the divorce registry. If the marriage Registrar refuses to register a divorce, then the person or persons applying for such registration can file an appeal to the Deputy Commissioner within 30 days of such refusal and the order issued by the Deputy Commissioner in such appeal shall be the final decision.

Maintenance is one of the biggest parts of the Muslim married life. According to Muslim Family Law Ordinance 1961, maintenance refers to the provision of living which includes all the necessary parts of daily living. In a clear word, it means taking care of everything of a person for his/ her living. Sometimes helping with some money is not considered to be maintenance. The definition of maintenance is not exhaustive only when it comes to food, clothing, housing, etc. This definition will also cover all costs for education and for body and mental nutrition. No matter how poor the husband is, the rights of his wife's maintenance is obligatory for the husband. There is no way to escape from this. It is the legal responsibility of

a husband to maintain his wife's needs. But when it comes to divorce, it is not up to the husband to continue to give maintenance cost to his wife. All most in all Muslim country this is the prevailing law and practice. The husband is obliged to provide maintenance for his wife for a certain period after divorce. But after that time, it is not the husband's responsibility to provide maintenance costs for his divorced wife. But in an Indian case, it was said that some women would get the right to get the maintenance until they remarry.⁷¹ This applies to Muslim women. We found a similar opinion in a Bangladeshi case where a woman will get maintenance for as long as she doesn't get married⁷². Later in 1998, the Appellate Division dismissed the order of the High Court. The Appellate Division did not accept the explanation of the verse 241 of Chapter 2 given from the Holy Qur'an. However, in some other countries, there are provisions for providing maintenance for an indefinite or fixed time in the case of wrongful divorce.

The legal provisions that we found here regarding divorce and maintenance after divorce under Bangladeshi Sharia law are little bit vague. Somewhere it seems like it is giving the equal rights to the women and men for their divorce, on the other hand somewhere it seems like it is discriminating women. For example, according to the Hanafi School of Islamic jurisprudence, women can give divorce without given power by the husband at the time of marriage. On the other hand, according to the MFLO, women can divorce her husband only when they got the divorce power from their husbands at the time of marriage. Moreover, according to the statutory law, a woman can divorce her husband through the judicial process any time whenever she wants.

So, ultimately it seems that in case of divorce, Bangladesh again giving priority to women's rights, not the equal rights. The reason is, after the dissolution of the marriage, the women need a financial safety because of the social structure of the country and this process of divorce giving her this security. However, the ultimate aim of these provisions of the Divorce in Bangladesh is to the advancement of women's safety and security which is complying with the main objectives of the CEDAW. But these provisions are contrary to the equality principle mentioned in the CEDAW.

⁷¹ M. Ahmed Khan v. Shah Bano Begum, All India Reporter 1985, SC 945.

⁷² Md. Hafizur Rahman vs Shamsun Nahar Begum, Bangladesh Legal Decisions (BLD), Vol. 15, 1995.

3.3 Compliance of the legal provisions in case of Custody and maintenance

The question of the custody arises in two situations. 1. When parents got divorced and 2. When Father or mother died. In this paper, the author is more focused on the 1st case. Because, when parents of a minor get divorced, then in Bangladesh the guardianship became the most important part for the divorced parents. Maximum time father and mother both want to take the custody of the child for himself or for herself or both refuse to have the custody of the minor. To settle this issue, Bangladesh has two major laws namely, The Guardians and Wards Act, 1890 (GWA) which is the main law to decide the guardianship and The Family Court Ordinance, 1985 (FCO), which deals with the procedural matters of such case. In the guardianship case, both laws work together to settle the case. Under normal circumstances, the father is the legal guardian of the body and property of the minor child. In the absence of the father, this responsibility falls on the mother. In the absence of the mother or her denying the nearest relative of the minor's parents may be the guardian. Even the government may appoint the guardian of the minor's body and property if necessary. However, in the absence of the father, the guardianship of the minor's body and property goes directly to the government. The District Judge became a guardian of the body and property of the minor before the Family Court Ordinance had passed in 1985. But now, the responsibility has been entrusted to the Assistant Judge of the Family Court. Appointment as guardian of a minor's body or property, or both, is required to apply to the court in accordance with the Guardian and Wards Act of 1890. However, under Islamic law, if a person entitled to be the guardian of a minor can act as a guardian before receiving a court order. After divorce, under Muslim law, the father is the natural guardian of the child.

In Sharia law, the father is the natural legal guardian of the child. A mother cannot be the guardian of a child under Sharia law. But sharia law gives the authority to the mother that she can keep the son up to the age of 7 and the daughter until her puberty.⁷³ This right is called 'hijana' or responsibility to take care. But the mother can never be the natural guardian of the child. One thing to note here is that even though the children grow up in the care of other female relatives, the child remains under the responsibility of the father. A mother is not deprived of her child's rights because of her divorce. But if the mother got married the second

⁷³ Muhammad Abu Bakar Siddique vs M.A. Bakar & others, Dhaka Law Reports (DLR), Vol. 38, 1986.

time, she will lose the responsibility of the child. However, the court may appoint a mother as the guardian of the child if the guardianship of the mother is considered appropriate and necessary in a particular case based on the situation. That is, the mother does not lose the responsibility of the child after the second marriage.⁷⁴ According to Sharia law, although the mother is not a natural guardian, she can apply for a guardianship. For example, if the mother sees that the father of the child is not properly taking care of the child or fails to perform his duties, then the father loses the guardianship and the mother should have the right of the guardianship considering the real welfare of the child⁷⁵.

The author found the best practice of the minor's welfare in the High Court cases. There are some High Court benches in the Supreme Court of the country which has constitutional jurisdiction (known as writ) and can decide matters regarding custody of the minor. Any aggrieved person can lodge an application known as habeas corpus writ petition under Article 102 (2) of the Bangladesh Constitution to these benches regarding custody. In habeas corpus applications, until deciding the case for minor's welfare, High Court usually issues interim custody orders in favor of the petitioner who is more involved with the minor. The use of "welfare of child" doctrine has been started from the case of *Rahimannessa v Ashraf Mia*⁷⁶. After this case, some judgments have been given by the High Court regarding custody where the court gives the priority to the welfare of the child. To use this doctrine, the Court always interpreted the provisions of the Islamic jurisprudence regarding the situations. But there is a question that, what will get privileges where the Sharia law and the welfare doctrine conflicts because we know that in some cases Sharia law does not provide equal rights to the women. In such a situation, there is Court verdict from a case *Ayesha Khanam v Major Sabbir Ahmed* where the High Court says that "the personal law and the welfare doctrine is not in conflict here and even if there was, the welfare doctrine would have precedence"⁷⁷.

There is a little confusion regarding the provisions under Bangladeshi Sharia law of Custody. The author cannot find any concrete provisions directly from the Quran regarding this issue.

⁷⁴ *Rahela Khatun v. Ramela Khatun*, Dhaka Law Reports (DLR), Vol. 22, 1970.

⁷⁵ Section 19, The Guardians and Wards Act, 1890. Adopted 21.03.1890, e.i.f. 01.07.1890.

⁷⁶ *Rahimannessa v Ashraf Mia*, Dhaka Law Reports (DLR), Vol. 25, 1973.

⁷⁷ *Ayesha Khanam v Major Sabbir Ahmed*, Bangladesh Legal Decisions (BLD), Vol. 13, 1993.

There is no Quranic provision that stated which parent will automatically be entitled to have the custody of the minor child following a divorce. Whenever the Quran does not provide any specific provision regarding any issue, it means the authority to make decision lifted to the concerned people. The Quran leaves it in the best interest of the minor child. But there is an instruction of mutual consultation in the Quran regarding all the matters which arise from a divorce, such as custody. In such cases, the Quran advised to discuss things between the parents acceptably.⁷⁸ But Islamic jurisprudence found father as a first priority for the custody. The argument behind this is, in Sharia, the father is the responsible person for all the maintenance of a child. Mother is free from this responsibility. Even if a mother feeds the Brest milk to the child, she can ask remuneration for this to the father of the child⁷⁹.

According to Sharia, a father is obliged to provide all the living expenses for his minor sons and daughters. Only when the son reaches adulthood, he is no longer obliged to provide these expenses. In the case of a daughter child, the time limit will end when she got puberty. The father is also responsible to bear all the living expenses of his widow daughter or divorced daughter. Not only that, after the divorce, if the wife entitled the custody of the children then the husband is also liable to pay the maintenance cost for both the divorced wife and child for the period of custody⁸⁰. As the father is responsible to give all the expenses of a child, Islamic jurists assumed that the father's custody will be the best interest for the child.

But in reality, the best interest of the child is always depending on various factors such as the age of the child, the financial status of the parents, the family environment of the parents, the special needs of the child, religion, etc. So, if divorced parents failed to find out the best interest of the child, then the decision by the court will be counted as the final decision and acceptable by the Sharia. As a result, the verdict by the High court of Bangladesh is purely acceptable under Sharia law and also acceptable under the equality principle of CEDAW. As the decision of the High court of Bangladesh has no contradiction with Sharia law and CEDAW, now it is time to enact or amend the active laws regarding custody of the child.

⁷⁸ Al-Muntada Al-Islami, The Quran English Meanings, Chapter 65, Verse 6, p. 575.

⁷⁹ Ibid.

⁸⁰ Ibid., Chapter 2, Verse 233, p. 34.

3.4 Compliance of the legal provisions in case of Inheritance

The most debatable issue regarding the discrimination towards women in Bangladeshi sharia law is the distribution system of inheritance. There is no difference between collective property and personal property or ancestral property and acquired property under Muslim inheritance law. When the son and daughter inherit a property, at that time, the daughter gets half of the amount the son receives. So, it seems like a clear discrimination against women. When the whole world taking steps to ensure the equal rights to eliminate all form of discrimination, there some Muslim majority countries specially Bangladesh still using Sharia law as their personal law. In this chapter, the author is going to check that the property distribution system in Bangladeshi Sharia law is actually discriminating women? If it is discriminating women, then how this discrimination affecting women's legal rights?

Before that, let's have a look at the basic property distribution under Sharia law. The Holy Qur'an clearly describes the rights of women in inheritance. If a woman does not have a brother, she (if alone) will receive half of her father's total assets. And if they have two sisters or more and have no brothers, they will get two-thirds of their parents' property. If there is one sister and one brother, then one sister gets half of her brother's share. That is if a person dies while he has one son and one daughter (no other heir). Then the son will get a share of the property in three parts. If the deceased has one son and two daughters, the son will get the property in four parts. And the remaining two will get two daughters (each daughter shares one). The Holy Qur'an says, "Allah commands you about your children: the share of a son is equal to two daughter. And if the heir is only women and they are more than two, then they will inherit two-thirds of the deceased person's property. And if there is only one (daughter) then half for that".⁸¹ This is the provision for the women when she inherits as the daughter of a deceased person. But a woman also can inherit as a mother under Sharia law. The mother also has the right to inherit the property of the deceased child. If the child dies while the mother is alive, the mother will receive one-third of the child's wealth. And if the deceased has any children, the mother will receive one-sixth of the deceased child's property.⁸² The woman also inherits the husband's abandoned property under Sharia law. The rights of a wife have been firmly

⁸¹ Ibid., Chapter 4, Verse 11, p. 70.

⁸² Ibid.

established in Islam. If a husband dies and he has no children, then she will receive one-fourth of all his property. And if the husband has children, then the wife will get one-eighth part of the property.⁸³ Before the advent of Islam, women did not have property rights. In England, until 1882 holding property by women was illegal.⁸⁴ After enacting the Married Women's Property Act: 1882, women get some property rights. Even before marriage, if a woman made money by doing a job or other work, the husband would become the owner of all the property immediately after her marriage. In the case of Germany, German women had no rights on inheritance property before 1900⁸⁵ and Swiss women got the right in 1907.

Modern scholars argued that the women's rights regarding inheritance and property were declared in the Sharia law 1450 years ago⁸⁶. An adult Muslim woman, whether married or not, can own property, transfer ownership without consulting anyone. She has the right to her deceased husband or son or brothers abandoned property. So, the legal provisions of the women succession rights in the western and European world are new but in the Islamic world, it is quite old. But the difference between these worlds regarding the women rights in this area is strong. Sharia law demand that it established the foundation and introduced the women's rights and the western world demand that they develop the idea of women's rights⁸⁷ on the basis of the modern world where equality is more important to abolish the discrimination. Law of Inheritance in Islam is not gender-based, and in the same way, determining the share of wealth in the source of inheritance is not counted based on gender. It is more relation and need based system. This system examine the situation of the heir and the relation of the heir with the deceased person and then declare the portion of the property. Muslim inheritance law gives all the heirs of a deceased person the right to his property. In Muslim law, a child's inheritance is evident at birth, which cannot be underestimated in any way. Normally, according to Muslim law, it is natural for a child to have precedence over his or her parents. In Muslim law, inheritance is related through blood and marriage.

⁸³ Ibid., Chapter 4, Verse 12, p. 71.

⁸⁴ T. May, *An Economic and Social History of Britain, 1760-1990*. New York: Longman, 1996, p.90.

⁸⁵ J. H. Quataert, *Reluctant Feminists in German Social Democracy, 1885-1917*, New Jersey, Princeton University Press, 1979, p.26.

⁸⁶ J. Esposito, *Islam: The Straight Path*, Oxford University Press, 2005, p.79.

⁸⁷ V. K. Dixon, *Western Feminism in a Global Perspective*.- *Inquiries Journal*, 2011, Vol. 3 No. 02.

The theoretical development of the property distribution system will help to understand the necessity of the provisions mentioned in the Islamic inheritance law regarding inheritance. According to Sharia law, when a son becomes adult and capable of earning, all the responsibilities of the family comes upon him. And when he is a husband, he has to provide maintenance for his wife, and when he is a father, he has to provide maintenance for his daughters and also have to bear all the expenses of the marriage of his daughters. When he is a brother then he has the responsibility of providing maintenance for the younger siblings in absence and disability of the father and arranges a marriage for his unmarried sisters. As a child, it is the responsibility of the son to take care of the parents. In this regard, there is a separate law on parenting in Bangladesh. But in Islam, women have been exempted from all these responsibilities, and these responsibilities have been handed over to men only. And the male is legally obliged to perform those obligations. In the case of women, it is completely optional to carry out the responsibilities mentioned above. Moreover, no one can force her if she does not want to fulfill these obligations. Islamic scholars argued that these are the reason why men get almost double property in the inheritance.

However, there is no court case regarding equal distribution of the inheritance in Bangladesh. But there are lot of court cases where women did not get their property even according to the Bangladeshi Sharia law. In Bangladesh, there are a lot of partition suit regarding inheritance in the civil courts. No statutory law on partition has been enacted yet. To settle such cases, Court seeks help from other property related laws. Judicial decisions of the Constitution Court are the main source of this law. The Partition Act, 1893 does not specify any specific definition of partition. In the general sense, partition is the distribution of abandoned property of a deceased, whether movable or immovable, in accordance with the laws of one's own religion. If one party disagrees with the partition, the other party can file a case in the appropriate court. Many times it seems that there is some inequality in the distribution of property. A child may be given more portion of the property because of more affection of the person towards him or her. This provision known as heba (kind of gift) in Muslim law and regarding heba it is clearly permitted in Sharia law. So, there is a chance of inequality regarding the property distribution. But as father or mother anyone can give his or her properties to anybody they want. It is their freedom. But in that case, sharia law fixed a portion which is one third of the whole property

that can be given by a person as heba. Any person has the freedom to choose whomever he wants among his heirs to make heba. So the question of partition is irrelevant if it is done in this way. The condition, however, is that there must be the presence of the essential elements for heba mentioned in the Sharia law.

If a Muslim dies, according to the inheritance law, in his absence, his close relatives that is wife and children, father and mother, or siblings will be the legal heirs. There are many families in Bangladeshi society where if the daughter is married as the heir of the property, the son heirs are reluctant to share the property. There are three classes of heir in the Muslim inheritance. Namely Agnates (sharer/first class), Residuaries (second class) and Cognates or Uterine Relations (third class). Agnates are the sharers whose shares or proportions have been fixed in the Quran and never be a subject of omission. The Muslim Personal (Shariat) Enforcement Act, 1937 states that the daughter is Jabiul Furuji i.e. Agnate i.e. the partner where the place of the sharer among the three classes of heirs cannot be omitted by anyone in the first class. Although she will get half of his brother's share, she will be able to exercise full rights over that part. Therefore, in that kind of a situation where the lawful distribution is not possible, the sister can file a partition suit as the legal heir of the father's property.

The literature reveals that the women are legally free under sharia law from all kinds of responsibilities where men are legally responsible to perform the same responsibilities. The family structure in Bangladesh also seems like the same as describe in the Sharia law. So, if Bangladeshi Sharia law can ensure all the legal freedoms for the women mentioned in the Sharia law, then applying this equitable property distribution is reasonable. In the current stage, the CEDAW provisions regarding equal rights toward inheritance actually do not fit for the Bangladeshi women. There is not a single case in the legal history of Bangladesh, where a woman is asking for the equal distribution of the property in inheritance. Article 2 of the CEDAW makes an obligation to the member state to eliminate all statutory provisions in the Countries constitution and other statutory laws that are discriminatory to the women. If Bangladesh lifts its reservation on this Article, then Bangladesh has to amend its constitution especially Article 19.2 where it says about equitable distribution of the property for men and women. In this case, women will get equal rights.

Women's equal property rights recognized as fundamental human rights in various international human rights instruments including CEDAW. Unfortunately, many policies and practices of these instruments do not match the existing laws of the country. The complexity of the legal system and the lack of awareness and education among the community in social and traditional practice have turned women's rights over inheritance into dreams. Reform of laws and policies generally requires a more holistic and inclusive approach. The property distribution system should also be included in the national land policy. The implementation of such laws and policies will be a huge challenge and a concerted effort to bring the women's rights of inheritance in reality. The property rights currently granted to women in Sharia law is not fully enforced in Bangladesh. Because in most of the villages, even in the cities, women are still being deprived of their ancestral property through various deceptions. So, if Bangladesh wants to continue Sharia law in case of inheritance, then at least they must first be aware of the rights that Muslim women deserve in property and enforce them what they are committed for by the Constitution.

Conclusion

After the evaluation of the Muslim era, Sharia became the principle legal system for the Muslims all over the world. The family structure and social structure of the Muslims are completely different from the non-Muslim. In a Muslim Family, women are protected by the male guardian of the family that is her Father, Grandfather, Brother, Husband or Son or grandson etc. The financial and social responsibility of women in Muslim family is relaxed for the women. If women want, only then she can take some responsibilities by herself. But in that case, nobody can ask or force her to take any responsibility.

So, it seems that women have some separate rights, such as right to be protected financially and socially by a male guardian of her family. And as a guardian of the family, it is the obligatory duty and responsibility for the men to take care of the females of his family. This is the reason why in some cases like marriage, inheritance, custody etc. men and women are not treated equally under sharia law. The principle of equity is more suitable in that kind of situation. That is why Sharia law promotes equity than the equality for men and women rights. But as human, in case of dignity, right to life, education etc. women are equal to the men. Though there are some exceptions and restrictions in some cases for the equal rights in Sharia law. But it is normal and natural. Every legal system has some exceptions. According to the Quran regarding equality, it says for men and women that “they are clothing for you and you are clothing for them”. Which means, one is complementary to another and two are equal in favor of each other. So, as we understand, Sharia law is promoting specific rights for women, not the equal rights.

Sharia law is the main law to govern the personal status issues in Bangladesh for the Muslims which has some basic principle. And one of the most strongly followed principle of the Sharia law is Equity. Based on this principle, Sharia law promotes women rights for the women and do not promote equal rights for the women in every aspects of life. On the other hand, CEDAW Charter is created based on three basic principles that hold these key points; the principle of equality, the principle of nondiscrimination and the principle of responsibility of the member states. According to Article 2 of the CEDAW, all member states shall take all appropriate means a policy of eliminating discrimination against women, undertaking to take concrete

steps to eliminate discriminatory laws, policies and practices in the national legal framework. So, either Bangladesh have to amend their Sharia law or have to eliminate Sharia law and enact new law for the personal status issues or they have to introduce a new law which will work parallel to Sharia law for the person who wants to follow secular law for the personal status issues. Amendment in the Sharia law is only possible when it do not violates the basic principles provided by the Quran and Sunnah. But the problem is Sharia law which is active in the Bangladeshi legal system is based on the Quran and Sunnah. And for the Marriage, inheritance and other family matters, there are specific provisions clearly mentioned in the Quran. So, it is not possible to change, until someone find any other interpretation of those provisions. Article 16.1.c of the CEDAW declares the equal rights and responsibilities during marriage and at its dissolution for men and women; which is again contradictory to the basic principle of Sharia. From the point of view of the CEDAW, as a member state it is the duty of Bangladesh to withdraw the reservation form those two articles i.e. Article 2 (a) and 16 (1)(C) to ensure equal rights for he women. Until they withdraw these reservation, the main purpose of the CEDAW will not serve 100%.

There is a little confusion regarding equality principle under CEDAW. For example it is trying to protect women in every aspects of life from any kind of gender discrimination. Which is really a grate initiative for women. But the problem is, we are mixing up the idea of protection from gender discrimination and Equal rights. Both are not the same thing. Protecting women from gender discrimination is not only possible through equal rights of women to men. It is important to have a good combination of equity and equality to protect women form gender discrimination. As a human being, both men and women have same rights, but as men and women both have different rights and different responsibilities. So, it can be harmful for both men and women to be entitled equal rights in every sectors of life. It will be more reasonable if they have the equal rights as human being, and equitable rights for being the men and women.

From this research, the author have found that, CEDAW is talking about equal rights for women in every aspects of life which may be suitable for the non-Muslim world, but for the Muslim world, it can broke the family structure of the Muslim society and it can create a chaos. For example, if Bangladesh government now withdraw the reservation from Article 2 and

16.1.C of the CEDAW, then the government have to give equal rights to the women in inheritance, have to lift the rights of dower or have to legalize dowry, have to lift the rights of maintenance and have to withdraw the Sharia law from its legal system. And citizens of 90% of the Muslim majority country will not accept it. Or, for an argument, if we accept that, peoples of the Bangladesh accepted the new law, then women will lose their legal rights of financial and social protection from the male guardian. She also have to take equal responsibility like men. Which can cause a social digester for the country. Because Muslim women in Bangladesh is more concern about the equitable rights than the equal rights.

The author suggest Bangladesh to introduce a non-religious nondiscriminatory statutory law for the personal status issues. And it is also very important to make an amendment on CEDAWs basic principle and introduce equitable rights for the women along with equality. Then it will be easier for the all member states to ensure women rights and protect them from gender discrimination.

Abbreviation

BLD	: Bangladesh Legal Decisions.
BPFA	: The Beijing Platform for Action.
CEDAW	: Convention on the Elimination of All Forms of Discrimination Against Women.
CPRW	: Convention on the Political Rights of Women.
DLR	: Dhaka Law Reports.
Eg	: Exempli gratia.
Etc	: Et cetera.
FCO	: The Family Court Ordinance
FIR	: First Information Report.
GWA	: The Guardians and Wards Act
HR	: Human Rights.
ICCPR	: International Covenant on Civil and Political Rights.
ICESCR	: The International Covenant on Economic, Social and Cultural Rights.
MFLO	: Muslim Family Law Ordinance.
Tk	: Taka, the basic monetary unit of Bangladesh.
UDHR	: Universal Declaration of Human Rights.
UN	: United Nations.
UNDP	: United Nations Development Programme.

Legal Terminologies

- Qur'an** : The Quran, also romanized Qur'an or Koran, is the central religious text of Islam, which Muslims believe to be a revelation from God.
- Shariah law** : is a religious law forming part of the Islamic tradition. It is derived from the religious precepts of Islam, particularly the Quran and the hadith.
- Upazila** : formerly called thana, is an administrative region in Bangladesh. They function as sub-units of districts.
- Qazi** : a Muslim judge who interprets and administers the religious law of Islam.
- Ulama** : in Islam, the ulama are the guardians, transmitters and interpreters of religious knowledge in Islam, including Islamic doctrine and law. By longstanding tradition, ulama are educated in religious institutions.
- Mufti** : an Islamic legal authority who gives a formal legal opinion (fatwa) in answer to an inquiry by a private individual or judge.
- Maulvi** : a learned teacher or doctor of Islamic law —used especially in Asia as a form of address for a learned Muslim who ministers to the religious needs of others.
- Pandit** : a Hindu scholar learned in Sanskrit and Hindu philosophy and religion, typically also a practicing priest.
- Pargana** : a group of towns in India constituting an administrative subdivision of the district.
- Sikder** : owner of one siki (one quarter) of land. This title was given by the British Government. Sikder was the head of an administrative unit called Shiqq. The idea of dividing a province into districts was an inheritance from earlier Hindu and Turko-Afgan system.
- Amin** : a revenue assessor, who decided the government's share of the produce of the land.
- Amil** : under the Mughals, a revenue collector, but the term had more general application during the sultanate.

- Faujdar : in the early period, the word was applied to a military officer, but under the Mughals, it meant the head of a district. Later it was used for a police official.
- Malguzar : was the head of the district's revenue system and he also settled land and revenue disputes in the district levels.
- Diwan : A ministry or department; but under the Mughals it meant specifically the financial or revenue ministry (diwani). 2. In the provincial administration, the diwan had judicial power in civil cases as well as having control of revenue collection. 3. The term was also applied to the royal court and the council that advised the ruler.
- Zamindar : Literally, "a landholder," from zamin, land. Under the Mughals, he was a revenue official who had no proprietary rights in the land from which he collected taxes.
- 'Fatwa-i-Alamgiri' : is a sharia based compilation on statecraft, general ethics, military strategy, economic policy, justice and punishment that served as the law and principal regulating body of the Mughal Empire.
- Hadith : A saying or reported action of Muhammad that is not found in the Quran, but that is accepted as a source of fiqh.
- Heba : kind of gift under Sharia law.
- Ijma : is an Arabic term referring to the consensus or agreement of Islamic scholars on a point of Islamic law.
- Qiyas : In Islamic jurisprudence, qiyās is the process of deductive analogy in which the teachings of the hadith are compared and contrasted with those of the Qur'an, in order to apply a known injunction to a new circumstance and create a new injunction
- Fiqh : is Islamic jurisprudence. Fiqh is often described as the human understanding of the sharia, that is human understanding of the divine Islamic law as revealed in the Quran and the Sunnah. Fiqh is the science of interpreting the Shariat. There are four orthodox schools: Hanafi, Hanbali, Maliki, and Shafii. The sources of fiqh are the Quran, hadith, ijma, and qiyas.

- Mu'amalat : is a part of Islamic jurisprudence, or fiqh. Sources agree that mu'amalat includes Islamic "rulings governing commercial transactions" and Majallah al-Ahkam al-Adliyyah).
- Hijab : is a veil worn by some Muslim women in the presence of any male outside of their immediate family, which usually covers the head and chest. The term can refer to any head, face, or body covering worn by Muslim women that conforms to Islamic standards of modesty.
- Niqab : also called a ruband, is a garment of clothing that covers the face, worn by some Muslim women as a part of a particular interpretation of hijab (modest dress).
- Abaya : A loose robe worn by Muslim women, especially in Arabic-speaking regions, covering the body from head to toe or the neck down and often worn with a headscarf and veil.
- Shariat : The Muslim Personal Law, comprising all the rules that govern life.
- Talaq : is commonly translated as "repudiation" or simply "divorce". In classical Islamic law it refers to the husband's right to dissolve the marriage by simply announcing to his wife that he repudiates her.
- Isnad : a Muslim tradition, specifying the chain of human reporters from the time of Muhammad that authenticates the legitimacy of a hadith (a report of sayings and acts of the prophet).
- Kazi : A person who does the formalities of the marriage.
- Nikah : marriage – or more specifically, the marriage contract – is called nikah
- Nikah nama : is a written document that two Muslim partners entering into a civil union must put their signature on in order to legalize their marriage.
- Kabin : is a payment, in the form of money or possessions paid by the groom, to the bride at the time of Islamic marriage (payment also has circumstances on when and how to pay).

Kabin nama : the marriage contract between bride and groom where all details about kabin is written and signed by bride and groom.

Talaq-e-Taufiz: This is a procedure of divorce counted as to a given power divorce in Sharia law. In this case, the wife can divorce her husband without judicial process in the court but it would be work like a judicial decision.

Talaq-e-Khula: is a procedure through which a woman can divorce her husband in Islam, by returning the kabin (mahr) or something else that she received from her husband, as agreed by the spouses or Qadi's (court) decree. Based on traditional fiqh, and referenced in the Qur'an and hadith, khul' allows a woman to initiate a divorce.

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