WOMEN AND DEVELOPMENT OF FAMILY LAW: A STEP TOWARDS RIGHT DIRECTION?*

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This paper provides an overview of the policy debates surrounding the development of family law in Bangladesh, particularly the establishment of the Family Court and it's impact on women. The post-independence reforms in family law are also analysed to assess whether the legal reforms have actually operated to the advantage of women. The relevant laws of the minority communities and their position vis-à-vis uniformity of laws are also taken into account. The paper also assesses the functioning of Family Courts to scrutinise whether the stated aim of vindicating women's rights through these courts are being materialised.

The movement for liberation in Bangladesh accelerated the urge of women towards social and legal emancipation. Women played a significant role in the freedom movement. But the literature primarily portrays women's contribution to the movement as victims of rape by Pakistani soldiers and their collaborators, or as women left alone by a freedom-fighter father, brother or husband.[1] After independence, the Peoples Republic of Bangladesh offered promises to women, acknowledging their contribution in the liberation movement. The stage was, thus, set for an improvement of the legal position of women in the new country.

After independence the liberating forces generated pressure toward sexual equality and a re-evaluation of the stereotyped roles of subjugated women. However, in family law this pressure is creating confusions and contradictions, as women do not enjoy real equality. The concept of sexual

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1 Ahmed, R., "Women's movement in Bangladesh and the left's understanding of the woman question," 30 (1995) Journal of Social Studies., pp.41-56, at p.48.

equality began to influence the discourse about the position of women in family law. But this discourse ignored important dimensions about the realities of women's lives in a patriarchally-dominated society, such as Bangladesh. When the ideal concepts underlying the debates do not match with social facts, the discussion actually confuses idealised positioning and realistic goal achievement.[2] Further, in social reality, women are rarely in a position to realise those rights which are granted under the Islamic and official family laws.

The crux of the problem is that many women are deprived even of the rights granted by the religious and state-sponsored family laws. In real life, for example, women are deprived of their rights of maintenance, dower, dissolution of marriage, custody, guardianship, and other forms of property. It was found in a study of the metropolitan city of Dhaka that 88% of Muslim wives did not receive any dower.[3] A study of two villages revealed that 77% of women from families with land did not intend to claim their legal share in their parental property to retain better links with their natal family.[4] These are instances of the patriarchal arbitrariness of the society which regards women's claims to their rights as a challenge to the existence of the patriarchal system itself, despite the fact that these claims are based on Islamic obligations or official laws.

THE PERSONAL LAW SYSTEM AND WOMEN'S RIGHTS

To situate our assessment of Family Courts within the framework of the existing socio-legal system, we first, in this section, attempt an overview of the relevant laws.

Our legal system consists of the general law and the personal or the family law of various religious communities. The diversity of this system was created by interference from the British colonial rulers and by codification of the general law. Personal laws based on religion are the only laws which are different for different communities. The general law, in most instances, could be said to be based on egalitarian principles of

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2 See for details, Monsoor T., From Patriarchy to Gender Equity: Family Law and its Impact on Women in Bangladesh, unpublished Ph.D. Dissertation, School of Oriental and African Studies, London, 1994.

3 Akhter, S., How far Muslim Laws are Protecting the Rights of the Women in Bangladesh, Dhaka, 1992, at p.35.

4 Westergaard, K., Pauperisation and Rural Women in Bangladesh - a Case Study. Comilla, 1983, at p.71.

sexual equality but the personal or family law, based on religion, does not operate on the basis of post-enlightenment notions of equality of men and women.

The United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) of 1979 purports to guarantee equal rights to women.[5] Bangladesh is a signatory to the Convention. However, it has reserved the articles which according to the government are in conflict with the socio-cultural ideology of Bangladeshi society. It has been argued recently that the reservation is incompatible with the object and purpose of the Convention and also conflicts with the existing international obligations under the United Nations Charter and other international instruments.[6] The purpose and object of the Convention is to eliminate discrimination against women in institutions, laws and administrative actions to achieve equality.[7] However, the author did not suggest how to materialise the implementation of the Convention in the social fabric of our society where even the granted rights are seldom realised.

The preambular paragraph of the Convention declared that despite the promulgation of various international instruments, extensive discrimination against women continues to exist. But even after this Convention the situation has not improved notably and there are considerable discriminations against women even in this new world order. Thus, protection of women's right is much more difficult than either defining them or adopting Conventions. The mechanisms for the enforcement of women's rights are very weak. The primary question, therefore, is how far the Convention is successful in protecting women's right? Unless these Declarations or Conventions are made part of our domestic law there can not be legal enforcement of the body of rights in the Convention. It can be acclaimed as part of the domestic law if it is within the ambit of Constitution.

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5 On this Convention see for example Tinker, C., "Human Rights for Women: The U.N. Convention on the Elimination of All Forms of Discrimination Against Women," 3:2 (1991) Human Rights Quarterly. pp.32-43.

6 Hossain, S., "Equality in the Home: Women's Rights and Personal Laws in South Asia", in Cook J. R. (ed.), Human Rights of Women: National and International Perspectives, Philadelphia, 1994, pp.465-494.

7 Ibid., at p.471.

Women are guaranteed sexual equality by the Constitution and the general law. But patriarchal interpretation of the law continues the subjugation of women.[8] Moreover, there are internal contradictions within the Constitution between granting sexual equality and making special laws for women. While the Constitution ensures equality of the sexes only in a formal sense, the disparity of the sexes can be felt more in the religious family laws applied by the Family Court. Why does the constitutional protection of equality of sexes not extend to family law? This is a central controversy in South Asian laws. However, it is not the main focus of the present paper.[9] A brief attempt, nevertheless, is made here to understand the problem in the context of Bangladesh. First of all, the Constitution states under article 149 that all existing laws shall continue to have effect but may be amended or repealed by laws made under the Constitution. Thus, the personal laws as existing laws continue to be in force and it is doubtful whether the Constitution can override the personal laws. Secondly, the constitutional clause of sexual equality [under Article 28(2)] only applies to the public sphere and is not applicable to the private sphere. Thirdly, personal laws can not be considered inconsistent with the Constitution when one of the fundamental rights [under Article 28(1)] provided by the Constitution is that the state shall not discriminate against any citizen on the ground of religion. This provision ensures freedom of religion and also safeguards the personal laws based on religion. Fourthly, the directive principles of state policy, fundamental for the governance of the country, although not judicially enforceable or justiceable, do give preference to the religion of the majority of the population. By the Proclamation Order No.1 of 1977 under President Ziaur Rahman, Bangladesh has emphasised the element of Islam. Article 8 states,

> (1) The principles of absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice, together with the principles derived from them as set out in this part, shall constitute the fundamental principles of state policy.

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8 On this see in detail World Bank, Bangladesh: Strategies for Enhancing the Role of Women in Economic Development. Washington DC, 1990; Jahan, R,. "Hidden Wounds, Visible Scars: Violence Against Women in Bangladesh," in Agarwal, B. (ed.), Structures of Patriarchy: State, Community and Household in Modernising Asia, New Delhi, 1988, pp.216-226.

9 For the Indian debate on this issue see Mahmood, T., Personal Laws in Crisis, New Delhi, 1986, pp.3-48, at p.21.

(1A) Absolute trust and faith in the Almighty Allah shall be the basis of all actions.

This shows that the Constitution itself is biased towards a particular religion. Under Article 7 it is stated that it is the supreme law of the land and any law which is inconsistent with it shall be void.[10] The Constitution is the supreme law as it reflects the will of the people and all laws are to be tested on the touchstone of the Constitution.[11] Finally Article 26 of the Constitution provides that all laws inconsistent with the fundamental rights shall be void.

However, there are discriminatory laws in the personal law system which are inconsistent with the fundamental rights. Will the Constitution make those laws void? No attempt has as yet been made to examine whether this differential treatment offends against the provisions of the Constitution.[12] It, nevertheless, seems that it may be against the fundamental principles of state policy and fundamental rights to abrogate the personal laws of the different communities.

Gender equality in the Constitution also has some adverse effects. Thus, it became obvious, while analysing the family law cases, that the judiciary are upholding the Constitution, especially the equality clause, in refusing to enforce restitution of conjugal rights. This has been used to refuse husbands to force wives to continue marital life without their desire. But this 'enlightened' position is also acting against the women's interests, as wives also can not force their husbands to continue marital life.[13] It was held in the famous case of *Nelly Zaman vs Giasuddin Khan*[14] that no one can force anyone to lead marital life. This is useful to women who do want to end their undesired, unwanted empty shell of marriage. But for deserted and abandoned women who have no other option of support and sustenance than their husbands, the need is to restore their conjugal life and this liberal concept of restitution of conjugal rights is working adversely for them.

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10 For a discussion on the supremacy of the Constitution of Bangladesh see, Monsoor, T., "Supremacy of the Constitution," 2 (1991) The Dhaka University Studies-Part-F, pp.123-135.

11 Ibid., at p.135.

12 See in detail Ahmed, S. and Jahanara, C., "Women's Legal Status in Bangladesh" in Women for Women, Research and Study Group (ed), Situation of Women in Bangladesh, Dacca, 1979, pp.185-331.

13 See for details, supra note 2.

14 34 DLR (1982) 225.

The whole matrix of these problems lies in the complex system of laws in Bangladesh. While the minority laws have been marginalised, potential conflicts arise between the majority Muslim personal law and the general state law. The Muslim personal law in the new state also partly constituted a legacy inherited from the British Indian and Pakistani periods, made applicable to Bangladesh by the Bangladesh (Adaptation of Existing Bangladesh Laws) Order, 1972. Moreover, the personal law system of the Muslims with regard to marriage, divorce and succession is generated by Islamic law, whose application is regulated by the Muslim Personal Law (Shariat) Application Act, 1937. There has been no amendment to the Act. The West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 which amended the 1937 Act, did not extend to erstwhile East Pakistan (i.e., present Bangladesh).[15] It was never much publicised that in Bangladesh life estates may be created in favour of Muslim women under the customary law, or testate succession may be opened in favour of women, as such settlements are still lawful in Bangladesh. In matters of wills, legacies and adoption under section 3 of the Muslim Personal Law (Shariat) Application Act, 1937 the Muslims of Bangladesh are subjected to local custom and usage, unless a person declares that he or she should be subjected to Islamic law. This might reduce the disparity of traditional Muslim law with regard to intestate succession. Moreover, there are differences of the local law within Bangladesh; in particular the tribal matrilineal laws are more sympathetic to women than the dominant patrilineal law.

Thus, the personal law system of Bangladesh is not only based on Muslim law but also on customary or local law, which may be utilised to benefit women who have unequal rights in the traditional Muslim law. At the same time, generally, customs can be shown to disadvantage women.

In the field of Muslim personal law there have been many reforms in Bangladesh. But for the minority laws, the British colonial enactments or even pre-British laws are retained in the personal laws of the Hindus, Christians, Buddhists, Parsis and Sikhs. Even for the Hindus who are the

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15 See also Mahmood, T., Family Law Reform in the Muslim World, Bombay, 1972, p.247; Mahmood, T., "Personal laws in Bangladesh - a Comparative Perspective," 14:4 Journal of the Indian Law Institute, pp.583-589, at p.586.

largest of the minority communities (nearly 13% of the whole population), the personal law is outmoded and in need of reform.[16]

Recently various groups, particularly liberal women's organisations, have articulated demand for adoption of a Uniform Family Code for all religious communities of the country. However, there is no provision in the Constitution of Bangladesh like Article 44 of the Indian Constitution to secure for the citizens a Uniform Civil Code. The absence in the Constitution of a directive to introduce a Uniform Civil Code provides the constitutional authority for the continuation of the present system.[17] It has been argued that the scope for uniformity of family laws in Bangladesh is more than in India because of its greater homogeneity and compactness.[18] But the possibility for uniformity of family laws in Bangladesh is also doubtful. The reforms of family law in Bangladesh as analysed in this paper suggests that the country is heading towards a new model of uniformity of procedural law and not uniformity of the substantive law of the different communities.

The reforms made in Muslim family law in Bangladesh did not go outside the Islamic framework. This maintains the equilibrium between society and law. The emphasis, therefore, must now be on the improvement and enforcement of the existing personal laws and, thus, on providing gender equity in family law.

REFORM OF FAMILY LAW

This part of the paper offers a general overview of all the family law reforms which aimed to enhance the legal status of women. In the next section of this article, we analyse in detail the reforms regarding the establishment of Family Courts in Bangladesh, exploring whether the aims or intentions of the law makers to ameliorate the status of women were achieved.

The development of family laws in South Asia shows generally that the aim of reforms was not so much to emancipate women but to occasionally placate the political demands of various groups including the

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16 Menski, W. F. and Rahman, T., "Hindus and the Law in Bangladesh", 8.2 (1988) South Asia Research, pp.111-113.

17 Pearl, D., A Textbook on the Muslim Personal Law, 2nd edition, London, 1987

18 Menski, W. F., "The Reform of Islamic Family Law and a Uniform Civil Code for India", in Mallat, C. and Connors, J. (eds), Islamic Family Law, London, 1990, pp.253-293, at p.289.

avowedly religious ones. The personal law system of Bangladesh has seen hardly any substantial change in contrast to the changes in the general law regarding violence against women, dowry, cruelty and the establishment of Family Courts. Men as law makers have been blamed for not making substantial reforms in the discriminatory features of the religio-personal laws, as this would be detrimental to their own interests.[19] In fact, the major portion of family law reforms was in the general law effecting all the communities rather than any specific religious ones. Legislative enactments have been made on the issues of restraining dowry by the Dowry Prohibition Act, 1980; prohibiting cruelty to women by the Cruelty to Women (Deterrent Punishment) Ordinance, 1983; and establishment of Family Courts by the Family Courts Ordinance, 1985 which are general laws affecting all communities. More recently (1995) a more comprehensive enactment (the Repression Against Women and Children (Special Enactment), Act (Act xviii of 1995) has repealed the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 and enhanced the punishment in most cases upto death penalty for a number of crimes against women and children.

The issue of registration of marriage and divorce has been tackled for the majority of the population by the Muslim Marriages and Divorces (Registration) Act, 1974. However, there is a demand for registration of marriage and divorce in all communities as it is becoming more widely recognised that non-registration works against the interests of women. This might be regarded as a modified version of achieving uniformity of family laws in Bangladesh. We regard it as a better method of uniformity as it does not generate agitation, conflict and tension in the communities concerned because only procedural uniformity is effected, while substantive rights or lack thereof are not tempered with.

The ambivalence of the government to enhance the rights of women under family law can be gathered by analysing the different Acts and Ordinances which were enacted at different times. On the surface, the Acts show that these are ameliorating the status of women. But in fact, in social reality, the legislature could not put themselves out of the patriarchal interpretation of the laws. For example, there are still no laws which state that the same minimum age of marriage for males and females. However,

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[19] Khan, S., The Fifty Percent: Women In Development and Policy In Bangladesh. Dhaka, 1988, at p.17.

laws enacted after independence to enhance the position of women signify that the legislature is now more sympathetic to women. On the other hand, there is a growing reluctance against the effective implementation of such laws. The main obstacle that lies in the way of the practical application of the legal rights of women in Bangladesh is primarily the inherent contradiction of attitudes that persist in a male-dominated society.[20] Thus, whatever legal rights women may have officially, they are not necessarily being recognised by the society.

The Dowry Prohibition Act, 1980 which forbids or prohibits anyone from demanding, giving or taking dowry is the most noteworthy of the reforms in family law. However, inspite of this legislative move, dowry still remains a major cause of domestic violence against women in the country. Perhaps, if the Act had prohibited dowry by making the relevant marriage void, its effectiveness would be enhanced.

The Cruelty to Women (Deterrent Punishment) Ordinance, 1983 seeks to deter serious forms of cruelty to women with severe punishment. This Ordinance punishes a person with imprisonment for life or provides death penalty for kidnapping or abducting women; trafficking in women; attempting to cause death; or for committing rape. Because of lack of data it cannot be analysed whether this deterrent punishment is of any help to reduce crimes against women. Moreover, the Acts did not always introduce completely new ideas. For example, the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 merely repeated the prohibition of certain offences already prohibited in the Penal Code, 1860. However, it enhanced the punishments and tied them to other offences committed against women. The Repression Against Women and Children (Special Enactment), Act (Act xviii of 1995 has repealed the Cruelty to Women (Deterrent Punishment) Ordinance, 1983. The Repression Against Women and Children (Special Enactment), Act (Act xviii of 1995 has provided death penalty for nine crimes against women and children [under sections 4,5(b),5(d),6(1)-(4),7,10(1) and 12]. The crimes affecting women and children include causing death by corrosive substance; causing permanent damage of the body by corrosive substance; for rape; for rape with murder; for rape with attempt to murder; for group rape; for group rape with murder; for dowry death; and for trafficking of children. This projects that the legislature has dealt with these crimes against women and children

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[20] Supra note 12, at p.287.

very strongly and if properly enforced the crime rates against women and children, hopefully, will decline.

The Family Courts Ordinance, 1985 created Family Courts with special procedures and lesser formalities but relied on the existing Assistant Judges Courts and did not create separate Family Courts. The Family Courts could not try all the issues of family law, which created confusions and inconsistencies. There was also internal contradictions within the Family Courts Ordinance, 1985 as section 5 states that guardianship is an issue to be dealt by the Family Courts i.e., the Assistant Judges Courts but section 24 states that a Family Court shall be deemed to be a District Court for the purposes of the Guardians and Wards Act, 1890. Thus, Family Courts may act as District Courts in guardianship cases and not on any other issues as provided under section 5 of the Ordinance. It is, however, not clarified why only in cases of guardianship the Family Courts are upgraded to District Courts level. Moreover, although the Family Courts introduced new procedures, it was not a summary procedure, moving away from the adversary system. However, whether introducing Family Courts is a step towards right direction so that women can achieve their rights is yet to be comprehensively to analysed.

AN OVERVIEW OF THE REFORM OF FAMILY LAWS

The reforms with regard to marriage, divorce and intestate succession and related issues in British India and the Pakistan periods are applicable in Bangladesh but have been amended after independence of Bangladesh. As such, there are areas of the law in which Pakistani law and Bangladeshi law now differ. The present section gives a brief overview of the reforms made to pre-independence family laws in Bangladesh.

The legal reforms of family law in Bangladesh have also included many amendments to existing legislation. Prominent among them are the Child Marriage Restraint (Amendment) Ordinance, 1984; the Dissolution of Muslim Marriages (Amendment) Ordinance, 1986; the Dowry Prohibition (Amendment) Ordinances of 1982, 1984 and 1986; the Cruelty to Women (Deterrent Punishment) (Amendment) Act, 1988; the Muslim Family Laws (Amendment) Ordinances of 1982, 1985 and 1986; the Muslim Marriages and Divorces (Registration) (Amendment) Ordinance, 1982; and the Family Courts (Amendment) Act, 1989. If the purpose of some of these amendments was to afford more protection to women, this

was not achieved completely, but attempts have been made to make the Acts and Ordinances more effective.

In the field of child marriage, the Child Marriage Restraint (Amendment) Ordinance, 1984 has increased the legal minimum ages of marriage. The Child Marriage Restraint Act, 1929 had sought to restrain the solemnisation of marriages of children below the age of 18 for the boy and 14 years for the girl. The MFLO 1961, by section 12 had raised the minimum age of marriage for girl's to 16 years. The Amendment of 1984 raised the legal marriage ages for both sexes: for the male to 21 years and for the female to 18 years and prescribed punishments to anyone marrying below that age.[21] Under section 4, substituted by the Child Marriage Restraint (Amendment) Ordinance, 1984, the following is provided:

> Punishment for male adult above twenty-one years of age or female adult above eighteen years of age marrying a child- Whoever, being a male above twenty-one years of age, or being a female above eighteen years of age, contracts a child marriage shall be punishable with simple imprisonment which may extend to one month or with fine which may extend to one thousand taka, or with both.

Under the Child Marriage Restraint Act, 1929 there was a difference between a "child" (female below the age of 14; male below the age of 18) and a "minor" (person of either sex below the age of 18). Under the Act as now amended in Bangladesh, the definitions of "child" and "minor" are identical. A girl below 18 is both a child and a minor, as under section 3 of the Majority Act, 1875 every person domiciled in Bangladesh shall be deemed to have attained majority when he shall have completed the age of eighteen years. But a boy below 21 is a child under the Child Marriage Restraint (Amendment) Ordinance, 1984 and a major from 18 years under the Majority Act, 1875. But the punishment given in the 1929 Act is identical to that in the amended version of the Act of 1984.

The difference is that until the 1984 Bangladeshi amendments, the female spouse was not liable to punishment. Now a female spouse over 18 is made liable for punishment if she is married to a man under 21. Thus a girl who has just turned 18 and who is married to a boy a few months short of being 21, commits an offence for which the girl may be jailed and fined, while her husband is not amenable to any punishment, although her parents or guardians would be. This is an instance of legislated

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[21] It is to be noted that this is the same in India since the Child Marriage Restraint (Amendment) Act of 1978.

discrimination against the female section of the population as they are subject to punishment from an earlier age than the men. Moreover, under section 6(1) of the 1929 Act, which prescribed punishment to the parents or guardians of a minor who contracted a child marriage, it was also specifically provided that no parent who is a woman shall be punishable with imprisonment. This provision is not deleted by the amendment. Thus, now the bride over the legal age of 18 years is liable to punishment for marrying a bridegroom under 21 but her mother or mother-in-law are not to be punished by imprisonment.[22] Actually there was no punishment either by imprisonment or fine for the females in the original statute.[23] But now the bride can be imprisoned and fined for marrying a man below the legal age. This penalty on the bride was introduced perhaps as an oversight, or to avoid *zina* or problems with runaway couples. It looks like a bungled attempt at introducing sexual equality.

That a bride may suffer such punishment at all in the social context of Bangladesh is surely a very disturbing proposition. In rural Bangladesh girls are disadvantaged, secluded and are not allowed to have their own independent opinion about whom they will marry, as marriages are often arranged by their parents.[24]

In a village study in Bangladesh it was reported that in the case of a son's marriage his consent is regarded as necessary but in the case of a daughter's marriage, she is invariably expected to obey her father's decision.[25] However, it is doubtful whether field studies by male researchers talking to men could actually avoid male bias.[26] Moreover, they may have simply failed to reveal the extent to which women have always been able to exercise a certain amount of control, both within and

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22 See Caroll, L., "Recent Bangladesh Legislation Effecting Women," 3-4 (1985) Islamic and Comparative Law Quarterly, pp.255-264 at p.257.

23 *Zafar Khan vs Mohd. Ashraf* PLD 1975 Lah 234, at p.235.

24 Editor's note – the article by Dr. Shahnaz Huda in this issue of the Journal points to similar analysis; Huda, S., "Child Marriage: Social Marginalisation of Statutory Laws", at p.137 above.

25 Taniguchi, S., "Society And Economy of a Rice Producing Village In Northern Bangladesh," 3 (1985) Studies In Socio-Cultural Change In Rural Bangladesh, pp.1-78, at p.23.

26 On this see Donnan, H., "Marriage, Migration And Minorities: South Asian Ethnography -The Case of Pakistan," 3 (1989) South Asia Newsletter, pp.5-7.

beyond the domestic unit.[27] It appears correct to re-state generally that women of all classes in Bangladesh are subjected to patriarchy; for the rural women the effects will be more oppressive.[28] Thus, it is not reasonable that rural women should bear criminal liability in such cases.

Practically, the Child Marriage Restraint Act, 1929 has never been properly effective, particularly in the rural areas where girl-child are often given away in marriage to retain the *parda* and the honour (*izzat*) of the patriarchal family. This shows the dichotomy between law and life.[29] Does this not also reveal that the state by its law is unable to change the folkway?[30] However, the raising of ages of marriage in the statutory legislation appears to have had some impact in the upper and middle strata of society, where the indirect effect of ensuring more education to the girl child has led to higher marriage ages.

A serious obstacle for the effective implementation of the legislation is that a marriage actually solemnised between children is treated as valid by the Child Marriage Restraint Act, 1929, as well as under Islamic law.[31] All that is to be feared then is getting caught violating the Act. There is no proper enforcement agency to catch violators, nor are people's ages easy to prove where births are normally not registered.[32]

It was held in *Mst. Bakshi vs Bashir Ahmed*,[33] that if a girl below the age of 16 years is married in violation of the Child Marriage Restraint Act, 1929, such marriage does not become void although the adult husband contracting the marriage or the persons who have solemnised the marriage may be held criminally liable. Another lacuna of the legislation is the non-cognisable character of the offence, which has been amended in India.[34]

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27 See Donnan, H., Marriage among Muslims: Preference and Choice in Northern Pakistan, Delhi, 1988, at pp.81-83.

28 Cain, M. et al, "Class, Patriarchy And Women's Work In Bangladesh," 5:3 (1979) Population and Development Review, pp.405-438, at p.432.

29 Singh, I. P., Women, Law And Social Change in India, New Delhi and London, 1989, p.65.

30 See also Schur, E. M., Law And Society - A Sociological View, New York, 1968, at p.127.

31 See Anderson, N., Law Reform In The Muslim World, London, 1976, pp.103-104; Mahmood, T., Muslim Personal Law. New Delhi, 1977, pp.51-53.

32 Sobhan, S., "'Women's Issues in Bangladesh," 2 (1982-83) Lawasia, pp. 254-258, at p.257.

33 22 DLR (1970) SC 289.

34 By section 3 of the Child Marriage Restraint (Amendment) Act 1978.

Attempts should be made in Bangladesh to amend the law in tune with India to make the Act more rigorously effective. Moreover, it would be highly applauded if special provisions were made for appointing child marriage prevention officers to enforce the legislation, as was done in the Child Marriage (Gujarat Amendment) Act, 1963.

As the legal age for marriage has been raised to 18 years for females, there has been a corresponding change in section 2(vii) of the Dissolution of Muslim Marriages Act, 1939 regarding the 'option of puberty' to the effect that a girl having been given in marriage by her father or other guardian before she attained the age of 18 years, can repudiate the marriage before the age of 19 years. This was done by the Dissolution of Muslim Marriages (Amendment) Ordinance, 1986 whose only purpose was to increase the age for the option of puberty [under section 2 (vii)]. What about the cases, however, where a child marriage was contracted by the guardians between 1984 and 1986? Will such a child have the option of puberty? Even though the amendment does not disclose whether it acts retrospectively, there is a case under the original Act, holding that section 2 of the Act applies with retrospective effect.[35]

Finally, the Muslim Family Laws Ordinance, 1961 has been amended in 1982, 1985 and in 1986. However, these were administrative reforms to bridge procedural gaps. By section 2 of the Muslim Family Laws (Amendment) Ordinance, 1982 the jurisdiction of the Ordinance was extended to Bangladesh. It is curious that this jurisdiction was only clarified after eleven years of independence. Cases in this period already applied the Muslim Family Laws Ordinance, 1961 when it was formally not applicable to Bangladesh.

By section 4 of the Muslim Family Laws (Amendment) Ordinance, 1982, the penalty for polygamy without the permission of the Arbitration Council under section 6(5)(b) was enhanced from 5,000 to 10,000 taka.

Section 3(a) of the amending Ordinance of 1982 provided a new definition of the Chairman of the Arbitration Council as:

> 'Chairman' means Chairman of the Union Parishad or Paurashava or a person appointed by the Government in the Cantonment areas to discharge the functions of Chairman under this Ordinance.

The necessity for this change had arisen because of the Bangladesh Local Councils and Municipal Committees (Dissolution and Administration) Ordinance (P.O. 7 of 1972), by which the existing local Councils and

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[35] *Manak Khana vs Mst. Mulkham Banu* AIR 1941 Lah. 167.

Municipal Committees of the former East Pakistan were dissolved. This created a procedural gap and certain anomalies arose. Persons could not punished for entering a polygamous marriage without taking permission from the Arbitration Council, as there was no legal authority from which such consent might be taken.

In the case of *Tahera Begum vs Farukh Miah*,[36] the Appellate Division of the Supreme Court upheld the decision of the High Court that, as at the time of the second marriage, i.e., in 1975, there was no person or legislative authority to constitute the Arbitration Council from whom the accused was required to take permission for contracting another marriage, he could not be convicted for an offence under section 6(5) of the Ordinance.[37]

Meanwhile, after the judgement of the High Court division in the case of *Farukh Miah vs Tahera Begum*,[38] the Ordinance was amended hurriedly to correct this perceived procedural gap and the Chairman of the Arbitration Council was defined.[39] This Amendment to the Ordinance was actually superfluous, as the Government had in fact, by an Extra-Ordinary Gazette Notification on 18th November 1972, appointed the Administrators of Union Panchayat, Shahar Committees and Paurashavas to perform all the functions as provided under the Muslim Family Laws Ordinance within their respective areas. The Notification of the Government No. S-1/4R-1/72/532-18th November, 1972 states:

> In exercise of the power conferred by article 6 of the Bangladesh Local Councils and Municipal Committee(Dissolution and Administration) Order, 1972, the Government is pleased to appoint the Administrators of Union Panchayat, Sahr Committees and Pourashavas to perform all the functions as provided under the Muslim Family Laws Ordinance 1961 and the Rules made thereunder within their respective areas."

The existence of this Notification was only revealed in the case of *Ayesha Sultana vs Shahjahan Ali*,[40] where the Court found that the Government had in fact appointed persons as Chairmen of the Arbitration Council and the husband ought to have taken their permission before contracting the subsequent marriage.

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36 35 DLR (1983) AD 170.

37 Ibid., at p.173.

38 BLD 1981 165.

39 In Section 3 of the Muslim Family Laws (Amendment) Ordinance of 1982, as cited on the previous page.

40 38 DLR (1986) HCD 140.

To clear the ambiguity of terms, the Muslim Family Laws (Amendment) Ordinance, 1985 substituted the whole section of definition (under section 2) of 'Arbitration Council', 'Chairman' 'Municipal Corporation', 'Paurashava' and 'Union Parishad'. Under section 3 of the Muslim Family Laws (Amendment) Ordinance,1985, which amends section 6(4) of the original Ordinance, application for the revision of the order of an Arbitration Council would be made to the Munsif and not to the Sub-Divisional Officer. His decision shall be final and shall not be questioned in any court. This projects that the power to settle family disputes is being taken over by the judiciary; it may also reflect failure of the original plan of the Ordinance to settle family disputes at the local level of administration.

By the Muslim Family Laws (Amendment) Ordinance, 1986 a new section was inserted (section 11A) to specify the place of trial. Section 11A states:

> Notwithstanding anything contained in any other law for the time being in force, an offence under this Ordinance shall be tried by a court within the local limits of whose jurisdiction —
> (a) the offence was committed, or
> (b) the complainant or the accused resides or last resided.

The amendments show that there is a policy of encouraging disputes to come up to the court. The idea to resolve them through the local administration, regarding the courts as the last resort, is fading. This imputes that the judiciary are increasingly taking over the local, informal sphere. It also indicates that the legal system is giving more preference to the judicial system than the informal methods. Whether the courts are actually better for the women's cause than the local arbitration is undisputed -- recent trends of unfair *shalis* and *fatwa* are clear indication of it. Access to court for women, particularly the marginalised and disempowered, is a different issue altogether. The justice may be fair — compared to *shalish* and *fatwa*, but the state does not seem to be attempting to make the judicial system more accessible to women.

THE FAMILY COURTS ORDINANCE

The establishment of Family Courts by the Family Courts Ordinance, 1985[41] was a significant step in legal reforms with reference to the legal status of women. The concept of family courts was first

[41] Published in the Bangladesh Gazette on 30.3.1985.

introduced in America.[42] The idea of family courts soon spread and can be found in most American states and also in other countries.

The Family Courts Ordinance, 1985 came into effect from 15.6.1985. Under section 4(1) of the Ordinance there were to be as many Family Courts as there were Courts of Munsifs. Thus, under section 4(2) all Courts of Munsifs became Family Courts for the purpose of the Ordinance. This provision has been amended by section 2 of the Family Courts (Amendment) Act, 1989 by which Family Courts are upgraded to 'Assistant Judges Courts'.[43] Thus, all Courts of Assistant Judges shall be Family Courts after the 1989 amendment.

Under section 5 of the Family Courts Ordinance, 1985 the Family Courts will have exclusive jurisdiction to try and dispose of suits relating to dissolution of marriage, restitution of conjugal rights, dower, maintenance, guardianship and custody. Thus, the Family Courts have no jurisdiction to entertain other issues of family law as for instance inheritance, partition, gift or wakf.[44] Further, the jurisdiction of the Family Courts includes only the civil jurisdiction regarding these issues. If any criminal offence arises, it necessarily falls under the Criminal Courts or the Magistrate Courts.

The Family Courts Ordinance under section 5 gave exclusive jurisdiction to the Family Courts to try and determine maintenance cases. But the Magistrates Courts are still entertaining those suits. Thus, at present, there is a controversy whether Magistrate courts still have the jurisdiction to entertain applications claiming maintenance under section 488 of the Criminal Procedure Code, 1898 as the government or the judiciary has not taken any step to resolve it.[45] This needs a detailed analysis of section 5 of the Family Courts Ordinance, 1985. The section states:

> Subject to the provisions of the Muslim Family Laws Ordinance, 1961 a family court shall have exclusive jurisdiction to entertain, try and dispose

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42 For details see Schaffer, I.D.: 'Family Courts - Reconsideration Invited' in Family Law - in the Last Two Decades of the Twentieth Century, Cape Town, 1983, pp.191-212.

43 Choudhury, O. H., Hand Book of Muslim Family Laws, Dhaka, 1993, at p.2.

44 Choudhury, A., The Family Courts Ordinance 1985 and Other Personal Laws, Dhaka, 1987, at p.2.

45 Rahman, Md. M, Muslim O' Paribarik Ain Porichiti, (in Bangla) Netrokona, 1989, at p.65.

> of any suit relating to, or arising out of, all or any of the following matters, namely:
> (a) dissolution of marriage, (b) restitution of conjugal rights, (c) dower, (d) maintenance & guardianship and (e) custody of children.

From the language of the section it seems that the Magistrates Courts have lost their jurisdiction to try cases for maintenance. We could justify our argument by comparing this section with section 5 of the West Pakistan Family Courts Act, 1964. The Bangladesh Ordinance of 1985 is actually an almost identical copy of the Pakistani Act. Section 5 of the Pakistani Act runs as follows:

> Subject to the provisions of the Muslim Family Laws Ordinance, 1961 and the Conciliation Courts Ordinance, 1961 the Family Courts shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in the schedule.
> The Schedule comprises:
> 1. Dissolution of marriage, 2. Dower, 3. Maintenance, 4. Restitution of conjugal rights, 5. Custody of children & 6. Guardianship.

The only literal difference between the sections is that in the Pakistani Act the Family Courts are allowed to entertain, hear and adjudicate any matter which is described in the schedule. Whereas, by the Bangladeshi Ordinance, the Family Courts are allowed to adjudicate any suit which is described in the section. The term 'suit' generally and usually means matters of a civil nature and not criminal cases. But the term 'matter' obviously includes civil and criminal cases. From the above argument, as discussed in the judgement of *Adnan Afzal vs Sher Afzal*,[46] it can be gathered that the Pakistani Act has ousted the jurisdiction of the Magistrates Courts to entertain maintenance cases. The Pakistani Act, by a state amendment, has also clarified that the government may invest any judge of a Family Court with powers of a Magistrates Court to make an order for maintenance under section 488 of the Criminal Procedure Code, 1898.[47] Later on, probably to avoid confusion, section 488 of the Criminal Procedure Code, 1898 has been omitted from the Code itself.[48]

In India also the Family Courts Act, 1984 specifically provided that a Family Court has jurisdiction under section 7(2) of the Act over new

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46 PLD 1969 SC 187.
47 Punjab Act xiv of 1973.
48 By the Federal Laws (Revision and Declaration) Ordinance, xxvii of 1981.

maintenance cases.[49] Section 7(2) of the 1984 Indian Act states that,

> .....a Family Court shall also have and exercise —
> (a) the jurisdiction exercisable by a Magistrate of the first class under chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974) ....[50]

The Bangladeshi Ordinance has been silent with regard to the jurisdiction of the Magistrates Court to entertain maintenance cases under section 488 of the Criminal Procedure Code, 1898. It is not clear why in Bangladesh the jurisdiction of the Family Courts has not been clarified in the statute itself.

The issue has not been resolved completely by the courts of the country either. It could not be argued that *Adnan Afzal vs Sher Afzal*[51] applies in Bangladesh, since Pakistan's West Pakistan Family Courts Act, 1964 only extended to West Pakistan. But in *Abdul Khaleque vs Selina Begum*,[52] the High Court Division of the Supreme Court held that the provisions made in the Family Courts Ordinance, 1985 have ousted the jurisdiction of the Magistrates Court to entertain an application for maintenance as it was a matter to be dealt with by the Family Courts. The underlying reasoning for this, as Justice Abdul Bari Sarkar stated, is:

> The purpose of the Family Courts Ordinance was to provide a speedy forum for disposal of all family matters in the same forum, instead of in different forums both in the civil and the criminal courts as it was before. There will be anomaly and multiplicity of proceedings and practical difficulties will arise, if, in spite of the establishment of the Family Courts by Ordinance No.XVIII of 1985, the Magistrates continued to entertain cases for maintenance u/s 488 CrPC.[53]

However, in *Meher Negar vs Mojibur Rahman*[54] the High Court Division of the Supreme Court held that it seems from the decision of *Abdul Khaleque vs Selina Begum*,[55] that the jurisdiction of the Magistrates to entertain application under section 488 of Cr.P.C. has

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49 For details of new cases on maintenance see now Menski, W.F. "'Maintenance for Divorced Muslim Wives," 1 (1994) Kerala Law Times, Journal, pp.45-52.

50 For details see Sugathan, N., The Family Courts Act, 1984, Cochin, 1992, at p.9.

51 PLD 1969 SC 187.

52 42 DLR (1990) 450.

53 Ibid., at p.452.

54 47 DLR (1995) 18.

55 42 DLR (1990) 450.

been ousted and maintenance is a Family Court matter now. But considering the legal provisions, facts and circumstances the Court further held that the Family Courts Ordinance, 1985 have not taken away the power of the Magistrates to order for maintenance u/s 488 Cr.P.C. Thus, both the Magistrate Courts and the Family Courts have concurrent jurisdiction in passing order for maintenance of wife and children.

It is indisputable that the civil issues falling under section 5 of the Ordinance come under the exclusive jurisdiction of the Family Courts. In *Abdur Rahman vs Shahanara Begum*,[56] it was held that pending cases in any civil court other than the Family Court in matters within the exclusive jurisdiction of the Family Court may continue in that court if filed before the Family Courts Ordinance came into force. It was also decided that there is no bar under that Ordinance to withdraw or discontinue a pending case from any other court and filing a fresh suit for the same relief in the Family Court.[57] The plaintiff-opposite party had found it convenient to file the case in the Family Court. This projects that Family Courts may be more accessible to women, as the Ordinance provided for speedy disposal of cases filed in a Family Court. The object of the establishment of Family Courts for the summary disposal of cases was also made apparent in this case, as the male petitioner was required to pay compensatory cost of 2500 taka to the opposite party for abusing the process of the court by delay and it was also directed that the trial court, i.e., the Family Court, should dispose of the suit within three months and should not grant unnecessary adjournments, as the Ordinance provides for speedy and summary disposal of the cases.[58]

With this objective for speedy disposal of cases, a further Amendment was made to the Ordinance. The Family Courts (Amendment) Act, 1989 made explicit provision for expeditious judgements, emphasising the intention and aim of passing the original Ordinance. Under section 8(i) of the Family Courts (Amendment) Act, 1989 a new provision was added by which the Family Court may, on the prayer of the defendant and for good cause shown, fix another date not beyond 21 days for the presentation of his defence. Under section 9(ii)

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56 43 DLR (1991) 599.

57 Ibid., at p.600.

58 Ibid., at p.601.

of the Family Courts (Amendment) Act, 1989, where the plaintiff appears and the defendant does not appear when the suit is called for hearing, only if it is proved that the summons or notice was served on the defendant without sufficient time to enable him to appear and answer on the day fixed for his appearance, the Family Court shall postpone the hearing of the suit to a future date not exceeding 21 days. Further on, section 13(ii) provides that on conclusion of trial, if compromise or reconciliation is not possible, the Family Court shall pronounce judgement either at once or on some future date not beyond 7 days, of which notice shall be given to the parties or their agents or advocates. Thus, it cannot be denied that the amendment was necessary so that family disputes are tried without delay. Whether the cases are disposed of in accordance with the new law remains to be further analysed.

The Family Courts Ordinance, 1985 is the only law relating to family matters which offers an opportunity for the conciliatory settlement of disputes. The role of the Family Court judges is of vital importance for attempting such reconciliation between the parties. Similar provisions for reconciliation can be found in India, where the Family Courts Act, 1984 provides under sections 9, 10(3) and 21(2)(c) the procedure to be followed by the Family Court judges for the settlement of disputes.[59] In fact, the Family Court system was rooted in a social welfare philosophy to establish a link between the legal and social sciences.[60] But the Family Courts are courts of law applying legal principles and not a social service bureau which utilises the authority of the law.[61] However, it is compatible for a Family Court to function as a court while at the same time carrying out social objectives so long as those objectives recognise the importance of adherence to legal principles.[62] In the Family Courts Ordinance, 1985 there are clear provisions for the reconciliation of the parties.

Emphasis on the settlement of disputes, if there is any reasonable possibility, is found under section 10 of the Family Courts Ordinance, 1985. According to section 10, after the written statement is filed, the

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59 See for details Bakshi, P.M., "Family Courts Judge's Role In Trial And Settlement," 6:16 (1991) The Lawyers, pp.16-19, at p.16.

60 Supra note 42, at p.194.

61 Gordon, W. C., "The Family Court: When Properly Defined, It Is Both Desirable And Attainable," 14:1 (1975) Journal of Family Law, pp.1-30, at p.5.

62 Ibid., at p.7.

Family Court will fix a date not more than 30 days later for a pre-trial hearing of the suit. In that pre-trial hearing, the Family Court will attempt to effect a compromise or reconciliation between the parties after examining the plaint, written statement, summary evidence and documents under section 10(3). On conclusion of the trial, another attempt is made to effect a compromise or reconciliation between the parties before the pronouncement of the judgement (section 13). Thus, the actual intention of the legislature seems to be that the Family Courts should act as conciliators and mediators for the reconciliation between the parties so that the couple may have a happy conjugal life.

It must be noted here, however, that no evidence of such attempts could be found in the large number of unpublished Family Court judgements which was collected and analysed. Perhaps a more detailed study of the Family Courts procedure could clarify whether the judges are actually trying to reconcile the parties. However, one commentator found that this compromise procedure of the Family Courts is only extending the life of the suit and is an extra burden to the Family Courts where a large number of cases are awaiting disposal.[63]

It was thought that the establishment of Family Courts was a significant step for women's emancipation. It seems that this is not completely true. As there are really no separate Family Courts and the Assistant Judges Courts which are to act also as Family Courts are already overburdened with cases, they could not take utmost care to handle family issues. In India the Family Courts Act, 1984 established special Family Courts for every area in the state comprising a city or town where the population exceeds one million [section 3(a)].[64] The Family Courts of Bangladesh could have been much more effective if they were totally separate courts.

There were provisions in the Family Courts Ordinance, 1985 which were especially helpful to women, although they may be applicable to both sexes. Under section 11(1) of the Ordinance, a Family Court may, if it deems fit, hold the whole or any part of the proceedings in camera.

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63 Rahman, Md. M., "Legal Aspects And Social Problems Of Muslim Family Laws Ordinance And Family Courts Ordinance," 41 DLR (1989) Journal, pp.21-22, at p.22.

64 Supra note 50, at p.4. This has led to calls for more such courts. See Narayan, K. L., "The Family Courts Act, 1984 - A Critical Appreciation," 2 (1992) Kerala Law Times, Journal, pp.21-24, at p.24.

The Family Court will also hold the proceedings in camera at the request of both parties under section 11(2). This will assist women to maintain their *parda* or seclusion and will also avoid their fear of social stigma, preventing that their private affairs be open to the public.

Under section 22 of the Ordinance, the court-fees to be paid on any plaint presented to a Family Court were to be a nominal 25 takas for any kind of suit. This certainly has a positive impact on the women, as less financial burden will give them more accessibility to the courts. But the incidental costs of the lawyers' fees, typing etc. are very high and beyond the reach of the general public, let alone most women.

The Family Courts Ordinance, 1985 is a self-contained law, as clear provisions have been made for the institution of suits, issuance of summons, filing of written statement, pre-trial hearing, hearing and execution of decree. The Ordinance does not depend on any other law for its procedure. Under section 20 of the Ordinance, the Evidence Act, 1872 or the Civil Procedure Code, 1908, except for its sections 10 and 11 (stay of suits and *res judicata*) do not apply to proceedings before the Family Court.

In *Md. Maqbul Ahmed vs Sufia Khatun and Others*,[65] it was held that the Family Courts Ordinance, 1985 is a special law which also provides the procedures to be followed by the Family Courts. The provisions of Order 39 Rule 1 of the Civil Procedure Code, 1908 granting a temporary injunction will not be applicable to such cases. The facts of the above case show that the petitioner (the husband) filed a suit for restitution of conjugal rights in the Family Court at Ramgonj against the wife and others under the Family Courts Ordinance, 1985. The petitioner also filed an application for temporary injunction under Order 39 Rule 1 of the Civil Procedure Code of 1908, restraining his wife from marrying any other person during the pendency of the suit. The wife contended that the husband used to torture her and was a man of loose morals, so that she had no alternative but to sever the marital tie on 29.7.85, notice of which had been served to the husband and the local Chairman of Ramgonj. The Family Court, by its order dated 26.12.85, rejected the petitioner's prayer for an injunction. The petitioner then appealed to the court of the District Judge, who also dismissed the

[65] 40 DLR (1988) 305.

appeal. The petitioner's application to the High Court Division of the Supreme Court was also rejected.

Although the Family Courts could not grant temporary injunctions, they surely could give temporary or ad-interim orders. In *Captain Shamsul Alam Chowdhury vs Shirin Alam Choudhury*,[66] it was decided that since the word 'order' has not been defined in the Ordinance, it cannot be read to mean only a final order. This imputes that the Family Court can also make interim orders.

The Ordinance did not provide in detail how a court will entertain the issues before it. This causes anomalies, as for instance in maintenance it could be said that there is no limit to the amount or quantum of maintenance, as provided under section 488 of the Criminal Procedure Code, 1898. This is causing confusion, as the Family Courts can now allow any amount of maintenance. However, this is parallel to Islamic law and advantageous to women as it gives an opportunity to secure an enhanced amount of maintenance, depending on circumstances.

Under section 9(4) of the Ordinance, where on the day fixed for the hearing the defendant appears and the plaintiff does not, the court shall dismiss the suit. However, it needs to be pointed out that if the plaintiff is the wife who alleges something against her husband, she can easily be threatened in many ways to prevent her from appearing in the court and it is then not justified that her case should be dismissed. Nevertheless, under section 9(5) the plaintiff may, within thirty days of the making of the order of dismissal, apply to the court to set aside the order on satisfying the court that there was sufficient cause for her non-appearance and the court shall then appoint another date for proceeding with the suit.

Under section 17 of the Family Courts Ordinance, 1985, an appeal could only be preferred from a judgement, decree or order of a Family Court to the District Judge's Court for specific issues. In *Moinuddin vs Amina Khan Majlish*,[67] it was held that the District Judge's Court being a civil court, the provisions of the Civil Procedure Code, 1908 would apply to the proceedings before it. It was further clarified by the High Court Division of the Supreme Court that there is no scope for thinking

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66 43 DLR (1991) 297.

67 42 DLR (1990) 483.

that the District Judge's Court referred to in the Family Courts Ordinance is a *persona designata* of a Family Court.[68]

The court of appeal under the Ordinance is not competent to remand a suit to the trial court, i.e. Family Court. It was held in *Hosne Ara Begum vs Md. Rezaul Karim*,[69] that the scheme of the Family Court is quick disposal of a case between husband and wife and for such purpose, under section 20 of the Family Courts Ordinance, 1985, provisions of the Evidence Act, 1872 and the Civil Procedure Code, 1908 have been excluded. The court of appeal can only decide the appeal and has no power to send the case on remand to the Family Court.[70]

Appeal as provided under section 17 of the Ordinance is only allowed in cases of dower which exceed 5000 taka and for dissolution of marriage on the ground of cruelty under section 2(viii)(d) of the Dissolution of Muslim Marriages Act, 1939 and not on any other grounds of dissolution of marriage under the Act. This is a limitation which should be altered. It is discouraging women to bring suits for the dissolution of marriage on all other grounds, as the verdicts of the Family Courts are final and cannot be challenged in higher courts, whereas on other issues of family law which are not dealt within Family Courts, women have the opportunity to appeal. This also projects the hidden agenda that issues concerning women are finally decided, with certain exceptions on questions of dower and cruelty, at the lower end of the judiciary. This shows that these vital issues of women and family are not given adequate importance as the higher courts are only concerned about those cases which could be challenged. It should be mentioned that there is no provision of second appeal or revision to the High Court, so that conflicting decisions on the same issue do not have any platform to be resolved. Because of this limited scope for appeal some conflicting decisions are already remaining unresolved. The most affected areas are, significantly, maintenance and dower. Thus, in one sense the decisions of the Family Courts (except where there is scope for appeal) can be regarded as the law. But what happens when different Family Courts have different decisions on the same point, depending on the facts and circumstances of the case? Then what is the law? Thus, there must be

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68 Ibid., at pp.484-485.
69 43 DLR (1991) 543.
70 Ibid., at p.546.

some scope for appellate jurisdiction settling precedents for the Family Courts to be followed.

It is interesting to note that we have embarked upon the path of a kind of uniformity of laws in family law, as the whole spectrum of the family issues of all the communities falls under the same Family Courts under the Family Courts Ordinance, 1985. Although the Ordinance does protect, under sections 5 and 23, the Muslim Family Laws Ordinance, 1961, it is not necessarily an Ordinance for only the majority of the community, i.e. the Muslims. The Ordinance is concerned with the family law issues of all the communities. But by protecting the law of the majority of the community only and overriding all other laws under section 3 of the Ordinance it has caused not only unfairness but many anomalies.[71] Thus, in the Divorce Act, 1869, a divorce decree requires under (section 17) confirmation by the High Court Division. But the Family Courts Ordinance, 1985 gave exclusive jurisdiction to the Family Courts under section 5 to try and entertain these issues without any confirmation from the higher courts. This seems to be an interference with the minority law, but not the majority law.

It has been provided under section 23(2) of the 1985 Ordinance that a divorce decree passed for a Muslim marriage can not escape the formalities and procedures under the Muslim Family Laws Ordinance of 1961. This makes the procedure more elaborate for Muslims, although it seems that they have two options. For example, after one obtains a decree for the dissolution of marriage from the Family Court it is sent to the Chairman of the Arbitration Council under the Muslim Family Laws Ordinance, 1961 to complete the necessary procedure.[72] But controversies arise when there is a conflict between the two official laws. For instance, a marriage which could not be dissolved in the Family Court may be validly done under the Muslim Family Laws Ordinance of 1961 or vice versa. However, there are situations where a man just follows *talaq-al bida*, i.e., pronounces three *talaqs* in one sitting and does not follow the official law.

A real problem arises when the decree of the dissolution of the marriage has been sent to the Chairman of the Arbitration Council

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71 Chaklader, A.H., "Is The Family Courts Ordinance, 1985 Another Name for Statutory Quixotism?" 38 DLR (1986) Journal, pp.19-21, at p.19.

72 Ibid., at p.20; See also Haq, Md. N., Paribarik Adalotain O' Alochona, (in Bangla) Dhaka, 1990, at p.118.

within seven days of the passing of the decree under section 23(2) of the Ordinance to proceed as an intimation of *talaq*, the wife appeals to the District Judges Court and the decree is set aside by the Appellate Court. Will the marriage be dissolved under the Muslim Family Laws Ordinance of 1961? Or will the parties continue to lead a marital life according to the Appellate Court's decision? Such controversies arise as there is no provision in the Ordinance requiring the Chairman of the Arbitration Council to wait for the judgement of the Appellate Court. Moreover, by providing for an appeal under section 17 for the grounds of the Dissolution of Muslim Marriages Act, 1939 the minority communities do not have any relief of appeal under the Family Courts Ordinance, 1985 for dissolution of marriages for cruelty, which is unfair to the members of other religions. For this reason some argue that the Family Courts Ordinance, 1985 is intended for the Muslims only.[73] There are conflicting decisions on this issue. In *Krishnapada Talukdar vs Geetashree Talukdar*[74] a Division Bench of the High Court Division of the Supreme Court held that the Family Courts have jurisdiction to entertain, try and dispose of suits between litigants who are Muslims by faith.[75] But in *Nirmal Kanti Das vs Sreemati Biva Rani*[76] a Single Bench in the High Court Division of the Supreme Court held that a person professing any faith has got every right to bring a suit for the purposes as contained in the Family Courts Ordinance, 1985 and a Hindu wife is not debarred from bringing a law suit for her maintenance against her husband under this Ordinance. This issue was also confirmed by the Division Bench of the High Court Division of the Supreme Court in *Meher Negar vs Mojibur Rahman*[77] that the provisions of the Ordinance does not only apply to the Muslim community but to other communities which constitute the populace of Bangladesh.

From the above discussion we may infer that the Family Courts Ordinance of 1985 is a beneficial enactment, but its effectiveness must be enhanced by enlarging its scope to allow other relief for women. The analysis of the provisions as a whole suggests that the Ordinance brought only procedural changes and did not effect any substantive

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73 Supra note 64, at p.22.
74 47 DLR (1995), 591.
75 Ibid., at p.592
76 47 DLR (1995), 515.
77 47 DLR (1995), 18.

rights. It is, however, opening a new avenue for creating uniformity of the family laws in Bangladesh.

The Family Courts have exclusive jurisdiction on the issues described in the Ordinance and can entertain no other issues. It is suggested that a separate and independent Family Court should be established which should deal with all family and personal matters. The Family Court should have two jurisdictions, one civil and the other criminal, so that all the issues could be handled by it, expanding the matters enumerated in the present section 5 of the Family Courts Ordinance of 1985. At present, dowry or cruelty to women still fall under the jurisdiction of Magistrates Courts.

The consolidation of jurisdiction over all family-related issues into one court would benefit the litigants, legal practitioners and the court system itself.[78] It was recommended in a workshop on the Uniform Family Code that the power given to the Magistrates Courts under section 488 of the Criminal Procedure Code, 1898 to entertain maintenance cases should be transferred to the Family Courts. Giving also criminal jurisdiction to the Family Courts will make the process more expeditious.

Where more than one court has jurisdiction over family issues, it often results in inconsistent approaches, delays and discrimination.[79] While in criminal courts the litigants can not claim more than 400 taka for maintenance, in the Family Court there is no limit of maintenance that they may receive. Moreover, the Magistrates Courts have the power to issue warrants of arrest to a husband who evades summons or fails to pay maintenance instalment or dower money.[80] But the Family Courts does not have this coercive jurisdiction. Thus, Family Courts should have criminal jurisdiction also to make the whole process more expeditious and easy. This enlargement of the jurisdiction of the Family Courts would certainly enhance the effectiveness of the Ordinance and would help women to bring out their grievances and to seek protection against violence and economic deprivation by men.

It is not imputed here that the laws did not attempt to enhance the position of women. Rather, the Acts had less than significant impact on

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78 Supra note 62, at p.10.

79 Ibid., at p.11.

80 Rahman, S. S., "Family Court and Muslim Family Law" 40 DLR (1988) Journal, pp.24-26, at p.26.

women. However, these Acts also drew public attention to the growth of violence against women and put women's issues more firmly on the national agenda. It also reminded the male section of the population of the rights of women, which acts as a deterrent to treat them as chattel. Thus, the reforms are appropriate to the patriarchally dominated legal framework of Bangladesh. The real problem is lack of enforcement of the legal reforms. This shows that the time has come to understand the real needs of women which is not confined to acquiring gender equality in family law only but to claim their granted rights for achieving gender equity.