

GOVERNMENT OF THE PEOPLE'S REPUBLIC OF BANGLADESH
THE LAW COMMISSION

-SUBJECT-

REPORT ON A REFERENCE BY THE GOVERNMENT TOWARDS
THE POSSIBILITY OF FRAMING OUT OF A UNIFORM FAMILY
CODE FOR ALL COMMUNITIES OF BANGLADESH RELATING
TO MARRIAGE, DIVORCE, GUARDIANSHIP, INHERITANCE
ETC.

OFFICE OF THE LAW COMMISSION

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Opinion on the Study Report for Marriage, Inheritance and Family Laws in Bangladesh Towards a Common Family Code

The UNESCO and Women for Women have jointly prepared a Study Report in respect of “Marriage, Inheritance and Family Laws in Bangladesh —Towards a Common Family Code” and submitted the same to the Government in the Ministry of Law, Justice and Parliamentary Affairs for its opinion on the report. The Government have thereafter referred the joint study report to the Law Commission for our opinion in the matters raised in the Report vide Memo No-177 (ল’এ’) dated 23/03/05.

We have gone through the study report. It appears to have focused on discriminations between male and female i.e. gender inequality, in the personal laws of all communities in Bangladesh. To remove their perceived gender discrimination, the Study Team in their report proposed for reforms in all the religious laws for the purpose of making a Common Family Code for the people of all communities in Bangladesh.

Our opinions on the proposal for reforms of the religious laws of all communities “Towards a Common Family Code” are given below:-

1. The Muslim religious law is originated from Quranic Verses and from Sunnah, Ijma and Qiyas. Qur’an, the religious Book of the Muslims, is the first source of Muslim law. It is an article of faith of all Muslims that Qur’an is not the handicraft of an artful human being, but a revealed Book through which Allah Himself has revealed His thoughts and directions upon all mankind. A large part of Qur’an contains laws and codes of conduct and are, therefore, immutable and beyond the jurisdiction of any human being to amend or alter. The Sunnah, Ijma and Qiyas have all contributed to the development of Muslim law where the Qur’an is silent or where the interpretation of its verses needed authoritative pronouncements from unimpeachable sources. Muslim family law affairs covering marriage, divorce, maintenance, dower, guardianship, inheritance etc. are all included in the huge mass of Muslim law developed over a period of fifteen hundred years. To take up a position that these laws should be suitably changed so as to fit in with a Common Family Code of all faiths and denominations is not merely an intellectual decision, but basically a decision as to whether the Muslims of Bangladesh should give up Qur’an as a revealed Book or not. The Law Commission has no hesitation to say that the Muslims of Bangladesh would rise in revolt as one man if they are asked to give up a basic tenet of their faith.

The Muslim Personal Law (Shariat) Application Act, 1937 (XXVI of 1937) is still an existing law in Bangladesh providing for the application of Muslim

Personal Law in all matters relating to Muslim Family Affairs. A reference may be made to the case of Hefzur Rahman Vs Shamsun Nahar Begum, 51 DLR (AD) 172, in which a question of maintenance of a divorced Muslim woman was decided by the Appellate Division. Justice Mustafa Kamal (then a Judge of the Appellate Division) in his Judgment has quoted section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 which is as follows:

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

In this case mention has been made of Article 8 (1) of the Constitution which says that “The principles of absolute trust and faith in the Almighty Allahshall constitute the fundamental principles of state policy” and of Article 8 (1A) of the Constitution which says that “Absolute trust and faith in the Almighty Allah shall be the basis of all actions.” (page 194, paras 92 and 93)

From the above quoted provision of Act XXVI of 1937 supported by the provisions of the Constitution, it can be said that the Muslim personal law is an eternal law prevailing as the only law for all Muslim Family Affairs and hence there cannot be any change in it nor can it be amalgamated with any other personal law of any other religion.

2. The Hindu law is one of the most ancient laws in Bangladesh. The Hindu jurisprudence regards the Smritis, which are often designated as Dharmashastras, as constituting the foundation of an important source of Hindu law. In Hindu religion, the law is considered as a branch of Dharma. The rights and obligations of Hindus are determined by the principles of Hindu law which is the traditional law of this religious community and which is regarded as law of the religion itself. Therefore, Hindu law also cannot be amalgamated with other religious law in favour of a Common Family Code. Although some changes have been made by a number of enactments in India in the Hindu personal laws, but that have been made applicable to the people of Hindu, Buddhist, Jaina and Sikh communities only in the whole of India and are not applicable to the people of Muslim and Christian communities.

3. The Christians in Bangladesh are mostly followers of Canon laws that are based on traditions of their respective Churches. Christian law is also the personal law of the Christians and is called the law of the religion of the community. The Buddhist community of our country has no separate system of law. They are mostly governed by the principles of Hindu law. The different Tribal Communities are guided by their indigenous religious beliefs, customs and culture. Most of the tribal people follow a Matriarchal family system.

Whenever the laws of Bangladesh admit the operation of a personal law, the rights and obligations of Muslims, Hindus, Christians and Buddhists are determined by their personal laws which are their traditional laws called the law of the respective religions. Hindu and Christian personal laws are not static but empiric and progressive, but even then it will be very difficult in our country to make substantial changes or modifications in those laws.

The hypothesis of a Uniform Family Code and the suggested recommendations made in the Study Report can not be given any legal coverage in our country where five different religions and their respective codes of life are practically the determinant factors in their respective family affairs.

The religious laws of different communities of Bangladesh differ from each other in their origin, base, faith and beliefs. It will, therefore, be impossible in our country to make substantial changes in these laws to make room for a Common Family Code as proposed in the Study Report.

4. It is suggested in para 2 under 'Proposed Legislative Reforms' at page 101 of the Report that the laws on Inheritance, Guardianship, Marriage and Divorce of all Communities should be reviewed and examined to find out the possibility of framing a Uniform Family Code in the context of the changes and developments of the present day society.

In this respect, our opinions are as follows:-

5. **Marriage.-** Marriage under Hindu law is essentially a sacrament and not a contract. Hindu marriage is solemnized in accordance with the customary rites and ceremonies of either party thereto and where such rites and ceremonies include the Saptapadi, the marriage becomes complete and binding when the seventh step is taken. A Hindu wife regards the husband as a god. On the other hand, under Muslim law marriage is not a sacrament but a civil contract. A Muslim marriage is solemnized by proposal and acceptance in presence of two male or one male and two female witnesses. Dower is an essential ingredient of the Muslim marriage which is a sum of money the wife is entitled to receive from the husband as consideration of marriage. Christian Marriage is solemnized in accordance with

the provisions of the Christian Marriage Act, 1872 and the rules, rites, ceremonies and customs of the Churches in Bangladesh. Marriage of the Buddhist is mostly arranged through consent of parents and the wedding is solemnized in the bridegroom's house by pronouncing some religious and social mantras. The various tribal communities of our country are guided by their respective customs and traditions in respect of their marriage systems. The marriage systems of Muslims, Hindus, Christians, Buddhists and tribal communities of our country are quite different from each other. The differing marriage systems cannot be amalgamated in a Common Family Code.

6. Divorce.- Divorce is unknown in Hindu law. In Hindu law marriage is regarded as an indissoluble union between husband and wife: So, neither party to a marriage can divorce the other. On the other hand, divorce is allowed in Muslim law. A Muslim husband may, whenever he wishes, divorce his wife without assigning any cause. The wife may divorce her husband only when such power of divorce is delegated to her by her husband. The Muslim Family Laws Ordinance, 1961 has, however, provided for a notice to be given to the Chairman of a local Government after the pronouncement of talak of a Muslim wife and the divorce will be effective after the expiry of ninety days from the date of notice. The divorce is allowed in Christian community according to the provisions of Divorce Act, 1869. So, differing divorce systems cannot be amalgamated under a Common Family Code.

7. Guardianship.- In Muslim law a father, if alive, is the natural and legal Guardian of the person and property of his minor child. In Hindu law father is the natural guardian of his children. The matter of Guardianship is also governed by the provisions of Guardian and Wards Act, 1890, which is applicable to all citizens.

8. Inheritance.- The Muslim law of Inheritance is also a Quranic law prescribing specific share for each individual nearest relations including female heirs in the property left by a deceased person. The distribution of property of a deceased Muslim person is made according to the principle that within the limits of each class of heirs, the nearer in degree excludes the more remote. On the other hand, in Hindu Law there are two systems in the matter of inheritance. These are (1) Mitakshara system and (11) Dayabhaga system. The Dayabhaga school of law governs the system of inheritance for Hindus in Bangladesh. The Hindu women get only life interest in the property. In respect of stridhan (women's property) a Hindu woman can deal with her property in any way she likes. On the other hand, the Succession Act of 1925 governs the matters of inheritance in the case of the Christians. Thus, the inheritance systems of Muslims, Hindus and Christians are different from each other. So, these differing inheritance systems cannot be amalgamated in a Common Family Code.

The personal laws of marriage, divorce, guardianship, maintenance, inheritance etc. of all the communities including the tribal communities of Bangladesh are different from each other in nature and in their manners of application. All these religious or personal laws are based on religious injunctions, faith and beliefs. More so, the personal laws of all communities are sensitive, complex and of diverse origin. It is impossible to bring uniformity in these differing laws by way of modification or reforms for purposes of incorporation in a Common Family Code. Any such attempt is likely to cause injury to the religious sentiment, faith and beliefs of the people of the country.

In view of the discussions above, our opinion is that there cannot be any Common Family Code for all the communities in our country as proposed by a few persons only which does not reflect the wish or opinion of all the people of the country.

(Dr. M. Enamul Hoque)
Member

(Justice Md. Sirajul Islam)
Member

(Justice Mustafa Kamal)
Chairman