Personal Laws of Bangladesh: A Gender Study in Light of the Equality-Approach of the Constitution

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ABSTRACT

The thesis explores the possibilities of extending the Constitutional guarantee of equality into the sphere of personal laws in Bangladesh. It examines the validity of the arguments generally put forward against the applicability of equality guarantee in the sphere of personal laws with a view to exploring grounds for challenging such arguments.

In Bangladesh the Constitution affords the right to equality to every citizen but the actual experience and status of women, as determined by personal laws is that of inequality, subordination and disadvantage. The study maintains that the existing division of the legal system into "public" and "private" in the form of "general" and "personal" serves as a device to exclude women from the protection of the Constitution and leaves the personal sphere to be regulated by the discriminatory religious laws. This has profound implications for women's right as the religious laws as understood and applied in Bangladesh deny women equal rights within the family and contribute to their subordination and disadvantage in the society. The thesis therefore, addresses this dichotomy and its present feminist critique with a view to considering its relevance and application in the legal context of Bangladesh, that is, in the form of the general-personal law, weighing the arguments in the light of feminist critique with a view to extending an "equality-approach" into the personal sphere.

The thesis aims to illustrate conventional legal wisdom regarding the scope of the equality principle and support its application in the sphere of personal laws through progressive interpretation. To this end, the thesis explores and compares the concepts of equality as they have taken specific and varied juridic form in different countries with a view to assessing what form gender equality could effectively take in the context of Bangladesh. In doing so, the research reviews feminist literature covering theories and debates related to issues such as essentialism, formal versus substantive equality, equality and Islam etc.

INTRODUCTION

PERSONAL LAWS OF BANGLADESH: A GENDER STUDY IN LIGHT OF THE EQUALITY-APPROACH OF THE CONSTITUTION

1. Introduction

The object of this research is to explore the dichotomy between "*general*" and "*personal*" laws in the legal system of Bangladesh and to examine the arguments marshalled against the applicability of the equality principles of the Constitution in the sphere of personal laws. The research aims to explore grounds for challenging such arguments.

The legal system of Bangladesh consists of the general law and the family laws (hereinafter referred to as "personal laws") of the religious communities. While the general law including the penal law and some areas of the civil law (laws governing personal obligations such as laws of contracts and torts) is secular and common for all citizens, personal laws are different for different religious communities. Personal laws in Bangladesh as modified by statutes and case law govern various areas of

family law including marriage, divorce, maintenance, inheritance, guardianship, and custody of children. A close scrutiny of personal laws shows that these laws not only discriminate against women but also significantly contribute to their social and economic disadvantage, obstruct their participation in the public life and perpetuate their subordination within the family and the society.

On the other hand, the Constitution of Bangladesh which is the supreme law of the land, guarantees equal status and rights to all citizens, irrespective of their religion, race, caste or sex. In addition, Bangladesh has also undertaken to ensure women's equal rights and to end all forms of gender discrimination by participating in a number of international human rights treaties[1]. Nevertheless, these equality guarantees have traditionally been perceived by the state as inapplicable to the sphere of religious personal laws hence, arguably in violation of the constitutional guarantee of equality and international obligation, discriminatory personal laws continue to regulate the legal relationships in the personal sphere.

2. Arguments for and against the applicability of the equality guarantee in the sphere of personal laws

As has been discussed above, despite the constitutional guarantee of equality, the legal system of Bangladesh has continued to leave scope for the application of discriminatory personal laws. The reason behind this is the general belief that the scope of the Constitutional guarantee of equality does not extend to the sphere of personal laws. In this regard, arguments commonly placed are as follows:

Since subsection 2 of Article 28 of the Constitution which contains the equality guarantee gives women equal rights with men in all spheres of the State and *public life*, hence it is argued that its application is limited to the "public sphere" only and does not apply in the private sphere where discriminatory religious personal laws operate. It is also argued that the Constitutional provision of equality is balanced by the countervailing constitutional provision (Article 41 (1)) on "freedom of religion" which affords every religious community the right to establish, manage and maintain their respective religious institutions. The argument is that to interfere with the personal laws may be interpreted as undermining the right to practice and maintain religion. Equality is supposedly a western value and when equality and freedom of religion seem to be in conflict, there is no consensus that equality should have preference. Moreover, pursuant to amendments[2] to the Constitution, it is now argued that the Directive Principles of the Constitution should be understood to give preference to the religion observed by the majority of population, which is Islam.[3] This shift away from secularism to "Islamisation" has also contributed to a climate in which the discriminatory personal laws are legitimised and practiced in Bangladesh.

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[1] Bangladesh has acceded to UN Convention on Elimination of Discrimination Against Women (CEDAW) and Convention on the Rights of the Child (CRC).

[2] The Constitution has been amended several times having the effect of altering its secular characteristics. An amendment in 1977 removed the principle of secularism (which was one of the "four pillars" of the Constitution) that had been enshrined in Article 8 under Part II of the Constitution, replacing it with "absolute trust and faith in Almighty Allah." In 1988, the Eighth Amendment affirmed that "[t]he state religion of the Republic is Islam, but other religions may be practised in peace and harmony in the republic".

[3] Some women's groups challenged the Eighth Amendment on the ground that it is inconsistent with the spirit of the Constitution and United Nations Conventions. They argued that this amendment will strengthen the authority of the religious fundamentalist groups which will in turn operate against the interest of women by exposing them even more to discriminatory laws and practices. For details see S Alam 'State-Religion in Bangladesh: A Critique of the Eighth Amendment to the Constitution' (1991) 4 *South Asia Journal* 3, pp.313-334.

It is argued that an equality-based and secular personal law regime applicable to all citizens is contrary to the values and ideals of an Islamic state.

The thesis maintains that the existing division of the legal system into "public" and "private" in the form of "general" and "personal" serves as a device to exclude women from the equality guarantee of the Constitution through discriminatory personal laws. It argues that the equality guarantee of the Constitution should clearly apply to all spheres including the sphere of personal laws. To this end, the research examines the validity of the arguments generally put forward against the applicability of equality guarantee in the sphere of personal laws with a view to exploring grounds for challenging such arguments. The research also explores concepts of equality as they have taken specific and varied juridic form in different countries with a view to assessing what form gender equality could effectively take in the context of Bangladesh.

3. Methodology

This thesis endeavours to combine a formal legal approach to the interpretation and application of the equality provisions of the Bangladesh Constitution with a feminist perspective on the scope and limits of the equality principle in order to analyse the extent to which those principles can and do operate within the existing legal framework of Bangladesh. The research employs theories of constitutional interpretation as developed by classical jurists as well as Bangladeshi case law to explore the meaning and scope of the equality provisions as they currently operate. The thesis goes on to invoke a woman-centred approach to comprehensively critique

various provisions of Bangladeshi personal laws, focusing on their impact on women. The object is to highlight both the explicit discrimination and consequent patterns of gender-based disadvantage with a view to developing an argument for their reform. To this end the research draws on materials focusing on the socio-legal impact of personal laws on women and evidencing the disadvantage they cause women in Bangladesh. These materials include published doctoral researches undertaken by socio-legal scholars on women's socio-legal status and the impact of discriminatory personal laws, reports published by various government, non-government and international organisations, official data etc.

Feminist critiques of the "public/private" dichotomy are deployed to topple some of the arguments generally marshalled against the applicability of the equality guarantee to the personal sphere. Particular research objectives here include:

i) identifying the role and ideological effect of the public/personal (parallel to the public/private) dichotomy in positioning women within the legal system;
ii) exploring the shifting strands of this dichotomy and using feminist critiques to question the coherence and sustainability of the public/personal dichotomy; and
iii) analysing and deconstructing the apparent conflict between freedom of religion and gender equality with a view to challenging their alleged incompatibility in the context of Bangladesh.

The thesis also draws on feminist deconstruction methods to explore the range of meanings, scope and possibilities of the concept of equality with a view to finding a more viable strategic position for women in parallel with the values and cultural

norms of the Bangladeshi society. In doing so, the research considers feminist literature and debates surrounding issues such as gender essentialism, critical race feminism, formal versus substantive equality, equality and Islam.

Another dimension to this research is comparative. Specifically, the thesis employs comparative legal methodology to make a cross-national comparison of how the concept of equality is translated into norms in jurisdictions that provide a constitutional guarantee of gender equality. To this end the research looks at four different jurisdictions, comprising two non-Islamic countries namely Canada, South Africa and two Islamic countries-- Tunisia and Morocco. The research looks at Canada and South Africa to trace the development of substantive equality analysis in these two jurisdictions. The research then looks at Tunisia and Morocco, to trace the different reform approaches to personal status laws in these two Muslim countries and examine what kind of equality is emerging. The object is to explore the possibilities these jurisdictions offer in initiating gender equality-based reforms in Bangladesh.

In the course of the present research, the benefits of such a cross-national comparative approach are as follows:

By bringing together different backgrounds and by comparing and evaluating a variety of conceptual approaches, valuable experience and knowledge of different intellectual traditions and contributions can be obtained.[4] In the course of the present research, this approach is particularly useful because it helps the exploration of

[4] L Hantrais and S Mangen (eds) *Cross- National Research Methods in the Social Sciences* (London: Pinter, 1996).

various conceptual developments in equality analysis in countries such as Canada and South Africa in the form of substantive equality which focuses on disadvantage and thus breaks away from the narrow confines of formal equality focusing on similarity and difference. This highlights new possibilities for equality both as a norm and as a strategic goal.

According to Hentrais, comparisons can lead to fresh insights and a deeper understanding of issues that are of central concern in different countries. They can lead to the identification of gaps in knowledge and may point to possible directions that could be followed and they may also help to sharpen the focus of analysis of the subject under study by suggesting new perspectives.[5] In particular, a comparative approach is useful in informing strategies to initiate reforms of religious-based personal laws in Bangladesh where current personal laws arguably undermine the right to gender equality guaranteed by the state's constitution. To initiate reforms of personal laws in a Muslim society such as Bangladesh, it is politically imperative that these reforms are in accord with the socio-cultural values of that society. Seen from this perspective, it becomes important to compare approaches and policies that have proved effective in other similar contexts such as Tunisia and Morocco so that strategies can be developed to initiate necessary reforms to religious personal laws in Bangladesh. In the context of the present research, the comparative approach becomes particularly valuable in understanding the familial ideologies prevalent in various Islamic and non-Islamic societies and in identifying similarities and differences between them. This exercise in turn helps us to reconsider the values and

[5] See generally, Ibid. p.10.

practices embedded in the socio cultural norms of our society and find a solution in accord with these values.

Although the benefits of successful cross-national comparisons may be considerable, so are the limitations. Since the research involves comparison, it therefore invariably encounters all the dilemmas associated with comparison. One such dilemma is the ethnocentrism inherent in a comparative approach.[6] The problem of ethnocentrism is a familiar one in feminist legal scholarship. As Cossman points out, in the context of feminist legal research, the dilemma of ethnocentrism is associated with the problem of unstated norms against which difference is viewed and judged. This is because the unstated norms of feminist theories and practices[7] have long been the subject of criticism from both inside the West - by women whose lives do not accord with these norms (because they are arguably based on a white, middle-class, heterosexual female identity) and from outside - by those who view it as representing Western values and therefore utterly devoid of cultural legitimacy in non-Western contexts.[8] For example, the strategic value of equality in non-white/non-western contexts has been questioned when equality is invoked as sameness and operates normatively to affirm and promote western values and lifestyles. The concern is that equality cannot accommodate the needs and aspirations of women from different social, cultural, and geographical backgrounds.

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[6] B Cossman 'Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project' in A K Wing (ed) *Global Critical Race Feminism: An International Reader* (New York: New York University Press, 2000).

[7] Joanne Conaghan identifies some common and recurring features of feminist academic engagement with law: "Firstly, feminist legal scholars seek to highlight and explore the gendered content of law and to probe charaterisations posing themselves as neutral and, more specifically, ungendered. Secondly, they are part of a cross-disciplinary feminist effort to challenge traditional understandings of the social, legal, cultural and epistemological order by placing women, their individual and shared experiences, at the centre of their scholarship. Thirdly, feminist legal scholars seek to track and expose law's implication in women's disadvantage with a view to bringing about transformative social and political change." For details, see J Conaghan 'Reassessing the Feminist Theoretical Project in Law' (2000) 27 *J Law and Society* 351, pp.357-374.

Cossman observes in this regard that in the specific context of comparative law's encounter with feminism there may be different ways of negotiating the ethnocentric gaze of comparative law without falling into the trap of cultural relativism which may result in discarding the very project of comparison or "looking beyond". One such way is strategic intervention or "turning the gaze back on itself"[9]. As she explains, strategic intervention in the form of "turning the gaze back on itself" can help to displace the Anglo-American centre of feminist legal studies and help to defend the feminist emancipatory project against those who would deny its cultural legitimacy and authenticity.[10] This is because strategic intervention can help multiply the norms, perspectives, and frames of reference in and through which feminist legal studies is constructed. [11] For example, in the context of family laws, the analysis of feminist engagement with law in Bangladesh can become a stated norm against which the familial ideologies and assumptions of Western feminist legal studies can be viewed, judged and potentially, rethought. Through the process of turning the gaze back on itself, feminist legal studies can thus be rendered "more complex, more global, more local, more transnational".[12] It is a process in which the unstated norms and frames of reference of Anglo-American feminist legal studies are "stated and

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[8] B. Cossman, n6 above.

[9] According to Cossman, one of the dilemmas of comparative law is its ethnocentric gaze or looking when the gaze is not returned. If this gaze is considered inescapable or inherent in comparative law, then some might be tempted to abandon the project of looking beyond or comparing. Cossman argues that if the danger lies in a gaze that is not returned, then we should try to find ways of returning it. For details, see ibid.

[10] Ibid.

[11] Ibid.

[12] Ibid.

revealed on the one hand and challenged as contingent, temporal, and partial on the other".[13]

4. Outline of the thesis

Chapter I: Personal laws of Bangladesh-the Legal Framework

This Chapter introduces the problem of the "general/public", "personal/private" division of the legal system and its implications for women in the context of Bangladesh. The Chapter begins by outlining the existing legal framework of Bangladesh and locating the personal laws therein. After briefly discussing the history, promises, spirit, and aspirations of the Bangladesh Constitution towards equality, social justice and secularism, the Chapter considers the scope and applicability of its equality provisions. In doing so the Chapter examines the existing rules/principles of judicial interpretation of the constitutional provisions as developed by case law in Bangladesh. The aim of the discussion is to illustrate conventional legal wisdom regarding the scope of the equality principle and support its application in the sphere of personal laws through progressive interpretation.

Chapter II: Personal laws and Their Impact on Women

The focus of this Chapter is on the discriminatory aspects of the personal laws. As the areas covered by various religious personal laws operated in Bangladesh are too vast to have exhaustive citation and discussion, the discussion in this Chapter makes a comprehensive exposition of provisions of the religious law that governs the lives of the majority of women in Bangladesh (i.e. Islamic law as incorporated in the

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[13] According to Cossman, in breaking the here/there, us/them cultural binaries and revealing the hybridity of culture, we can begin to disrupt the very assumptions on which claims of feminism's cultural inauthenticity are based. And in its place, we can defend not feminism's authenticity but

religious texts and legislation) specially focusing on explicit points of discrimination. Special attention is given to their practical application in the courts. In addition, the Chapter also assesses how far these discriminatory laws contribute to women's disadvantage. While doing so the Chapter reviews collection of statistics and reports published by different national, international and private bodies documenting the socio-legal and economic status of women in Bangladesh. Particular focus is given to issues such as discrimination in family and public life, women in development, and the obligations of the state under international law.

Chapter III: Public/Private Dichotomy and the Personal laws

This Chapter addresses the public-private dichotomy and its present feminist critique with a view to considering its relevance and application in the legal context of Bangladesh, that is, in the form of the general-personal law dichotomy, weighing the arguments in the light of feminist critique with a view to extending an equality approach into the personal sphere. In this Chapter, the conventional line of demarcation between general and personal is challenged by putting forward arguments highlighting their contradictory and shifting strands. In this regard, the Chapter looks at various feminist debates and critiques regarding the public/private dichotomy and examines their relevance in the legal system of Bangladesh. In the light of existing feminist arguments, the study proposes that in order to ensure equal rights of women in the public sphere as envisaged in the Constitution, the state has effectively to ensure equal rights in the private sphere as well.

Chapter IV: The Prospects of Equality and the Religious Personal Laws

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simply its political legitimacy and relevance in the analysis of contemporary gender relations.

This Chapter explores the range of meanings and possibilities of equality. In doing so, the research reviews feminist literature covering theories and debates related to issues such as essentialism, formal versus substantive equality, equality and Islam. The main object of the Chapter is to highlight the contingency of particular arguments asserting the incompatibility of gender equality and Islam, drawing on feminist (re)interpretations of key Islamic texts and precepts. The discussion reveals that different versions of Islamic doctrine abound alongside varied approaches to the articulation and realisation of equality. This lays the ground for further probing of equality jurisprudence in the latter section of the thesis.

Chapter V: Equality: The Canadian Experience

In attempting to think strategically and critically about our engagement with equality, Chapters V, VI and VII of the thesis look at feminist engagement with equality in different jurisdictions providing constitutional guarantees of gender equality. In so doing, the research undertakes case studies of four different jurisdictions, namely, Canada, South Africa, Tunisia and Morocco, to see how equality has been applied as a strategic and normative goal and what form of equality is emerging in these jurisdictions. To this end Chapter V looks at the equality jurisprudence developed in Canada especially focusing on the development of grounds-based analysis and the debates associated with it. The reasons behind choosing Canada in this regard are twofold. *Firstly*, the pluralist and multicultural society in Canada, because of its complexities and socio-cultural undercurrents, provides fertile ground for the development of a more dynamic understanding of equality. *Secondly*, feminist scholarship in relation to equality jurisprudence in

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See ibid.

Canada, although not without its limitations and setbacks, has developed considerably (through some progressive court decisions) during the last few decades due to the strong presence of women's groups, pioneering a substantive equality approach.

Chapter VI: Equality: the South African Experience

Chapter VI traces the equality jurisprudence developed in South Africa. The Chapter looks at the interpretation of the equality principle developed by the Constitutional Court of South Africa especially focusing on the transformative approach of the interpretation and its impact on equality analysis. The Chapter looks particularly at concepts such as human dignity as a strategy and normative goal and its relationship with substantive equality, as well as living customary law and the debates related to them. The object is to highlight ways in which South Africa has approached difficulties in the application of the equality principle which have parallels in a Bangladeshi context.

Chapter VII: Personal Status Laws in Tunisia and Morocco

The object of this Chapter is to challenge the commonly held view in some part of the Islamic world that religious-based personal laws are sacred and therefore not amenable to reforms and changes. The Chapter begins by tracing the reforms in the sphere of personal laws in Tunisia and Morocco with a view to exploring their prospects in contributing towards an equality-based reform approach in Bangladesh. It is argued that the recent landmark reforms to family law in Morocco demonstrate that it is possible to achieve "women-friendly" reforms within an Islamic legal framework. On the other hand, the Tunisian Personal Status Code with its successive

reforms shows that a secular and gender equality-based model of personal law can also be successfully integrated into the way of life of a Muslim society. This highlights among other things the range of responses of Muslim societies to equality-based reform and the particular differences in approach in initiating them. This Chapter attempts to map these different and sometimes competitive approaches and locate them within contemporary feminist debates related to gender equality discourse in the East and the West.

Chapter VIII: Conclusion

Drawing on the findings of Chapters II, III, IV, V, VI and VII this Chapter explores the possibilities of equality based reforms to religious personal laws in Bangladesh. It concludes that there is scope to interpret the Constitutional guarantee of equality (enshrined in Article 28 of the Constitution) through progressive interpretation established and indicated in various cases in Bangladesh to extend it in the sphere of religious personal laws. Drawing from the experiences in other jurisdictions (i.e. South Africa and Canada) and from the debates, arguments and critiques put forward in feminist legal literature on equality (discussed in Chapter IV, V and VI), the thesis further concludes that there is scope to interpret the equality guarantee to embrace a "substantive approach" to equality. In this regard, the thesis draws attention a recent case[14] (discussed in Chapter IV) where "substantive equality" argument was put forward by the petitioners to interpret the equality guarantee of the Constitution. Unfortunately the Court in this case is in the process of writing the judgment at the time of submission of this thesis. As such it is not yet known how far the Court has endorsed the argument of substantive equality. It is needless to mention that the

[14] Shamima Sultana Seema and Ors v Bangladesh and ors WP No. 3304/2003 *(unreported)*.

judgment if endorses this argument, will strengthen the argument put forward in the thesis in relation to the scope of the Constitution of Bangladesh to embrace a substantive approach to equality. Drawing from feminist critiques focusing in the area of public/private dichotomy (discussed in Chapter III) the thesis further concludes that to fulfil its Constitutional obligation to ensure gender equality in the public sphere, it is imperative that the state should ensure gender equality in the private sphere (i.e. the sphere of religious personal laws) as well. While the thesis concludes that the Constitutional guarantee of equality, if progressively interpreted calls for a unified personal law regime in line with the equality guarantee of the Constitution, it however, accepts that the current socio-political situation in Bangladesh may render it difficult to achieve it presently. The thesis in this regard concludes that while the ultimate goal is to achieve a uniform personal law regime informed by the concept of "substantive equality", there are different strategies that can be pursued at present to further the same goal. One such strategy can be to reform the personal laws through progressive interpretations of the religious sources, side by side facilitating feminist reinterpretation of religious texts. In this regard, the thesis concludes that reforms introduced in Tunisia and especially in Morocco (which explicitly took a reform approach consistent with the values and spirit of Islam) in various areas of family laws such as divorce, polygamy and custody of children (discussed in Chapter VII) can serve as examples to be followed to reform the relevant provisions of Islamic law in Bangladesh.

CHAPTER I

PERSONAL LAWS IN BANGLADESH—THE LEGAL FRAMEWORK

1. Introduction

One of the distinctive features of the legal system of Bangladesh is that, there is a clear division between the general law of the land and the family laws (hereinafter referred to as "personal laws") on the basis of affiliation with religion and how they apply. On the one hand, there is general law of the land which is secular and commonly applied to all citizens. This includes the Constitution, penal law and some areas of civil law such as, law of personal obligations (contract law, tort law), labour law etc. On the other hand, there are personal laws based on religions which are different for different religious communities. The religious personal laws determine rights relating to marriage, divorce, maintenance, inheritance, guardianship and custody. The major three religious-based personal laws in the country are Muslim law, Hindu law and the Christian law. In Bangladesh, women's rights under personal laws have given rise to a considerable amount of contention and debate. The crux of the debate, as explained in the introduction, is associated with the argument that

personal laws do not subscribe to the principle of gender equality, which is granted by the Constitution of the country as well as by the international treaties to which the country is a party.

In Bangladesh, the Constitution is the supreme law of the land and operates as a benchmark or yardstick for determining the validity of all other laws in the land[1]. The Constitution of Bangladesh guarantees equal status and rights to all citizens, irrespective of his or her religion, race, caste or sex[2]. But despite this guarantee, the right to gender equality have traditionally been considered inapplicable to the sphere of personal laws and hence, arguably in violation of the constitutional guarantee of equality, discriminatory personal laws continue to regulate the legal relations in the families.

The Chapter begins with an overview of the legal system of Bangladesh. It specially focuses on the relevant constitutional provisions regarding gender equality, their scope and limits and the rules regarding their interpretation. While doing so, the Chapter highlights and discusses some of the commonly held arguments for protecting religious personal laws from the scrutiny of the Constitution. The Chapter then outlines the obligations of the state under international law with regard to gender equality and examines various policies undertaken by the Government to improve the socio-economic and legal status of women. It then proceeds to discuss briefly the statutory regime relevant to the personal laws. While doing so, the Chapter locates the division between the general law and the personal laws in the context of the legal history of the Indian Subcontinent.

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[1] Article 26 of the Constitution of Bangladesh.

2. Personal laws and the Constitution

a) Rights of women under the Constitution

To understand the status of the religious personal laws in the legal system of Bangladesh, it is necessary to discuss some of the salient features of the Constitution embodying the intention and obligation of the state regarding gender equality.

The Constitution of Bangladesh came into existence in 1972 after a series of movements and struggle leading to a nine months' war of independence in 1971. The key slogans of the independence movement were secularism, social justice and freedom from discrimination in all forms. The Constitution of Bangladesh was adopted on 4 November 1972 and it came into force on 16 December 1972, one year after independence from Pakistan. The Constitution came into existence at the cost of lives of millions of men and women. Side by side with the men, the women of Bangladesh also made a significant contribution in the war of independence. Not only did they actively take part in the liberation movement but they also suffered terrible torture and persecution in the hands of the invading Pakistani forces and their local allies.[3] After independence, acknowledging their contribution in the liberation movement, the first Constitution of 1972 affirmed the equal rights of women and incorporated "secularism" and "social justice" as two of its fundamental pillars. Unfortunately, in later years,[4] the Constitution underwent some major surgeries and

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[2] Article 28 of the Constitution of Bangladesh.

[3] According to official documents, there were nearly 30,000 reported cases of rape of Bangladeshi women committed by the Pakistani soldiers in their so-called mission to populate this wing of the nation with pure Muslims. Unofficial sources claim that the number is more than 2.7 million. For details see: N Kabeer 'The Quest for National Identity: Women, Islam and the State in Bangladesh' (Brighton: IDS, 1989) pp.1-33. See also, N Ibrahim *Ami Birangana Bolchee* (*The Voices of War Heroines*) (Dhaka: Jagreeti Prakashani, 1998).

[4] Between 1975 and 1990 when the country was under military dictatorship.

the principles of secularism and social justice (which were two of the "four pillars" of the Constitution and were vital for developing a uniform family law regime based on secularism and equality) were replaced with diametrically opposite principles.[5] An amendment to the Constitution in 1977 removed the principle of secularism that had been enshrined under Article 8 in Part II of the Constitution and replaced it with "absolute trust and faith in Almighty Allah."[6] In addition, the words "fraternal relations among Muslim countries based on Islamic solidarity"[7] were included in the fundamental principles guiding the state's international relations. Finally, in 1988, the Constitution (Eighth Amendment) Act (1988)[8] inserted Article 2A in the Constitution, affirming, "[t]he state religion of the Republic is Islam, but other religions may be practised in peace and harmony in the republic."[9] All these amendments to the Constitution are alleged to have contributed to the legitimisation of discriminatory personal laws. In spite of these amendments, there still remain some constitutional provisions in force that are advantageous for women and guarantee them equal rights. We shall look at each of them in turn.

i) Preamble and Fundamental Principles of State Policy

The preamble of the Constitution of Bangladesh sets out clearly the philosophy, aims and objectives of the Constitution and describes the qualitative aspects of the polity

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[5] For a detailed discussion on these developments, see S Hossain 'Equality in the Home: Women's Rights and Personal Laws in South Asia', in R J Cook (ed.) *Human Rights of Women* (Philadelphia: University of Pennsylvania Press, 1994).
[6] Articles 8(1) and (1A) of the Constitution of Bangladesh.
[7] Article 25(2) of the Constitution of Bangladesh.
[8] Act XXX of 1988, Section 2.
[9] At that time, some women's groups challenged this amendment on the ground that it is inconsistent with the spirit of the Constitution and with various United Nations Conventions. They also argued that this amendment will strengthen the authority of the religious fundamentalist forces of the country who want to obstruct women's participation in the public life and will expose women to more to discriminatory laws.

the Constitution is designed to achieve.[10] Referring to the historic war of independence the preamble declares that the fundamental aim of the State is to establish a society in which the rule of law, fundamental human rights and freedom, equality and justice would be ensured.[11]

Further, Part II of the Constitution narrates the fundamental principles of the State policy that translates into word the society envisioned by the framers in the preamble and sets the economic, social and political goals towards which the government is required to strive for.[12] Article 10 therein clearly states "steps shall be taken to ensure participation of women in all spheres of national life".

According to Article 8 of the Constitution, the Fundamental Principles of State Policy are not only fundamental to the governance of Bangladesh but they are also to be applied by the state in the making of laws. However, it needs to be mentioned that these principles are not judicially enforceable as fundamental rights.[13]

ii) Fundamental Rights

Taking the Preamble and the fundamental policy of state as our starting point we shall now turn to Part III of the Constitution to consider how far it recognises and incorporates the equal rights of women in public and private spheres. Article 27 of the Constitution provides "all citizens are equal before law and are entitled to equal protection of law." Article 28 of the Constitution which is also known as the "equality principle" states:

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[10] M Islam *Constitutional Laws of Bangladesh* (Dhaka: BILIA, 1995) p.45.
[11] Preamble of the Constitution of Bangladesh.
[12] Islam, n.10 above, p.47.
[13] Article 8 (2) of the Constitution of Bangladesh.

(1) The State shall not discriminate against any citizen on grounds only of religion, race caste, sex or place of birth.

(2) Women shall have equal rights with men in all spheres of the State and of public life.

(3) No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution.

(4) Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens.

In addition, Article 29 of the Constitution states:

(1) There shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic.

(2) No citizen shall, on grounds only of religion, race, caste, sex or place of birth, be ineligible for, or discriminated against in respect of, any employment or office in the service of the Republic.

(3) Nothing in this article shall prevent the State from -

(a) Making special provision in favour of any backward section of citizens for the purpose of securing their adequate representation in the service of the Republic;

(b) Giving effect to any law which makes provision for reserving appointments relating to any religious or denominational institution to persons of that religion or denomination;

(c) Reserving for members of one sex any class of employment or office on the ground that it is considered by its nature to be unsuited to members of the opposite sex.

As has been discussed above, in Bangladesh, despite the constitutional guarantee of equality, the state has always left scope for the application of discriminatory personal laws. One of the main reasons behind this is the fact that there remains certain amount of controversy and confusion as to whether the scope of the Constitutional guarantee of equality extends to the sphere of existing personal laws. One of the main sources of the confusion lies in the wording of the equality provision itself. As seen above, the Constitution in its Article 28 subsection 2 states that women shall

have equal rights with men in all spheres of the *State and public life*. As this Subsection specifically mentions of the *State and public* life and remains silent about equality in *private life* where the religious-based personal laws operate, one may argue that the constitutional guarantee of gender equality only applies to the public sphere and protects the personal laws from the scrutiny of the Constitution under section 26 which declares laws inconsistent with fundamental rights to be void.[14] On the other hand, if Subsection 2 is read together with Subsection 1 which unequivocally states that the State shall not discriminate against any citizen on grounds only of religion, race caste, sex or place of birth, it becomes clear that the intention of the legislature was not to exclude the personal sphere altogether from the scrutiny of the Constitution but only to affirm its position explicitly on ensuring gender equality in the state and public life. The study argues that in this regard, the silence does not amount to "exclusion" and there is scope to interpret this provision to extend the scope of equality guarantee to the personal sphere by employing various well-established rules and principles of interpretation such as purposive interpretation of the Constitution, ascertainment of the intention of the makers of the Constitution, ascertainment of express and implied meaning, harmonious construction etc., all of which call for taking into account the overall spirit of the Constitution while interpreting the scope of a particular Constitutional provision. Various modes of interpretation have been discussed later in this Chapter. This argument is further elaborated and strengthened by discussions in Chapter III on

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[14] Article 26 of the Constitution states: "Laws inconsistent with fundamental rights to be void. (1) All existing law inconsistent with the provisions of this Part shall, to the extent of such inconsistency, become void on the commencement of this Constitution. (2) The State shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent of such inconsistency, be void."

Public Private Dichotomy and the Religious Personal Laws and Chapter IV on Prospects of Equality and the Religious Personal Laws.

Freedom of Religion

While discussing the constitutional guarantee of equality, it is also important to take note of another provision of the Constitution which guarantees freedom of religion and is often portrayed as curtailing the scope of the gender equality guarantee. The argument is that the constitutional guarantee of equality is balanced by the countervailing constitutional provision Article 41 (1)) on "freedom of religion" for the protection of minority rights which affords every religious community the right to establish, manage and maintain their respective religious institutions subject to law public order and morality.[15]

The guarantee of freedom of religion is a common feature of any democratic constitution. But in the legal context of Bangladesh where religions and religious-based laws arguably do not allow gender equality, the right to freedom of religion can be seen as in conflict with the guarantee of gender equality. The concern is that to interfere with the personal laws may be interpreted as undermining the right to freely practice and maintain one's religion.[16] As such, it is sometimes argued that

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[15] Article 41 of the Constitution states: "(1) Subject to law, public order and morality- (a) every citizen has the right to profess, practice or propagate any religion; (b) every religious community or denomination has the right to establish, maintain and manage its religious institutions.
(2) No person attending any educational institution shall be required to receive religious instruction, or to take part in or to attend any religious ceremony or worship, if that instruction, ceremony or worship relates to a religion other than his own."

[16] This view was endorsed by the Government in various international fora and also in reports submitted to various treaty governing bodies. Although, Bangladesh has acceded to the Convention on the Elimination of All Forms of Discrimination Against Women-CEDAW (1981), it still holds reservations on Article 2 and 161 (c) as they, in its opinion, conflict with *Shari'a* Law. A similar view was also expressed by the representatives of Bangladesh before the Women's Anti-Discrimination Committee on the Elimination of Discrimination Against Women

equality is supposedly a western value and when equality and freedom of religion seem to be in conflict, equality should not have preference. The matter becomes even more complicated and problematic for our purpose when we look at the wording of the constitutional guarantee of equality which, as discussed above, is silent about extending the guarantee into the private life of its citizens where religious personal laws operate. This then leaves open the question of whether discriminatory personal laws are protected from the scrutiny of the Constitution.

In this regard, it is important to note that while the Constitution guarantees freedom of religion, this right has also been made conditional. As seen above, Article 41 makes the right to practice religion subject to law, public order and morality. Moreover, there are also a number of judgments by the highest court of the land which reaffirms the position that freedom of religion is not an unconditional right. For instance, in Nelly Zaman v. Giasuddin Khan (1982)[17] it was observed that "by lapse of time and social development the very concept of the husband's unilateral plea for forcible restitution of conjugal right against a wife unwilling to live with her husband has become outmoded and does not fit in with the accepted state and public principle and policy of equality of all men and women being citizens equal before law entitled to equal protection of law and to be treated only in accordance with law

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(comprising of 23 expert members to monitor compliance with the CEDAW who were considering the Fifth Periodic Report of the States Parties submitted by Bangladesh (Doc. No. CEDAW/C/BGD/5) covering the period from 1997 to 2002. The representatives of Bangladesh explained that although the Government is currently trying to address the issue of religious freedom and a uniform family law, there are certain constitutional barriers to the adoption of a family code based on gender equality which will be commonly applicable to all citizens. Another member of the delegation said that one such barrier is the constitutional right to practice religion. For a summary of the meeting, see: http://www.un.org/News/Press/docs/2004/wom1454.doc.htm (Last accessed on 02.12.04). For the full text of CEDAW, see Genral Assembly Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46. Online version available at: http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm (Last accessed 10.05.04).

[17] 34 DLR 221.

as guaranteed in Article 27 and 31 of the Constitution of Bangladesh". Also in a writ petition on *fatwa* it was reaffirmed that the right to practice religion is subject to law, public order and morality.[18] However, it is important to note that there is no clear guideline as to how these conditions (i.e., law, public order and morality) are to be defined and applied. It is perhaps for this reason that the High Court Division recommended "an enactment to control the freedom of religion subject to law, public order and morality within the scope of article 41 (1) of the Constitution. The State must define and enforce public morality. It must educate society."[19]

Considering the fact that freedom of religion is not an absolute right and is subject to certain conditions, this study argues that there is scope to interpret these conditions to scrutinise and reform or strike down religious rules and practises that cause significant disadvantage to women. The reasons and the theoretical basis for this argument will be further elaborated in Chapter IV on the Prospects of Equality and Religious Personal Laws.

Enforcement of the Fundamental Rights

It is to be noted that according to Article 26 (1) of the Constitution, all existing law inconsistent with the fundamental rights shall, to the extent of inconsistency, become void on the commencement of the Constitution, while Article 26 (2) provides that the

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[18] See n.19 below.

[19] In January 2001 in a landmark judgment Editor The daily Banglabazar Patrika and two others v District Magistrate and Commissioner, Naogaon (Writ Petition No.5897 of 2000), a Division Bench of the High Court Division of the Supreme Court of Bangladesh ruled all *fatwas*, or expert opinions on Islamic law issued from an unauthorised source illegal and also ruled that giving a *fatwa* by unauthorised persons(s) must be made a punishable offence by Parliament. Following the court's decision, a number of NGOs and women's rights activists expressed support for the ruling, seeing it as a positive step towards bringing an end to the sufferings and abuses of women

State shall not make any law inconsistent with the fundamental rights and any law so made shall, to the extent of inconsistency, be void.

Under Article 102(1) of the Constitution of Bangladesh, the High Court Division of the Supreme Court has the power to pass necessary orders to enforce fundamental rights and under Article 44 (1) the right to move to the High Court Division for enforcing a fundamental right is itself a fundamental right. The power of the High Court Division "in respect of enforcing fundamental rights and granting relief is not a discretionary one; once it finds that a fundamental right has been violated, it is under constitutional obligation to grant the necessary relief."[20]

Judicial Review

In the legal system of Bangladesh, the Supreme Court is considered the guardian[21] of the Constitution and is vested with the power of judicial review. Save in some specified situations, the Supreme Court, in exercise of that power can strike down any law for inconsistency with any provision of the Constitution including the provisions guaranteeing fundamental rights.[22] As it was observed in Anwar Hossain Chowdhury v. Bangladesh (1989)[23]:

> Ours is a controlled constitution with entrenched provisions which has circumscribed the power of Parliament in making laws and has reposed on the Supreme Court the constitutional responsibility to adjudicate upon the validity of laws.

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in the name of *fatwa*. However, some fundamentalist Islamic groups condemned and rejected the ruling seeing it as an express attack on their religious freedom.

[20] Islam, n.10 above, p.377.

[21] Islam, n.10 above.

[22] Ibid.

[23] BLD (Spl) 1.

According to Islam, although Article 102 does not specifically grant any power of judicial review of legislation on the ground of contravention of the provisions of the Constitution other than the provisions enumerated in Part III, it can be said to be implicit in the Constitution.[24] As it has been observed in Kudrat-E-Elahi v. Bangladesh (1992)[25], when Article 102 is read with Article 7 it becomes clear that the Supreme Court has the power to declare void any provision of law on the ground of inconsistency with the Constitution and the Supreme Court has been exercising that power while deciding applications filed under Article 102.

3. Interpretation of the Constitutional Provisions

The Constitution of Bangladesh, under Article 8(2) provides that the fundamental principles of State policy shall be a guide to the interpretation of the Constitution and the laws of Bangladesh. Following this, the court is, therefore, required to take note of the scheme and objectives of the Constitution as envisaged by the principles of State policy and "cannot interpret any provision contrary to such principles unless the language of the provision is so clear as to convince the court that in that particular instance the framers wanted to make a departure".[26]

Apart from this, there are some other general rules of interpretation which have been pointed out by the constitution experts and developed through case law. Islam[27] summarises some of the relevant principles and rules which can be enumerated as follows:

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[24] Islam, n.10 above, p.376.
[25] 44 DLR (AD) 314.
[26] Islam, n.10 above, p.29.
[27] Ibid,, pp.28-9.

a. Purposive Interpretation of the Constitution

As Islam observes, every constitution is founded on some social and political values and the legal rules are incorporated to build a structure of political institutions aimed to realise and effectuate those values. Therefore, the legal rules incorporated in the body of a Constitution cannot be interpreted divorced from those social and political values and the purpose which emerge from the scheme of the constitution.[28] This principle was established in the celebrated case of Anwar Hossain Chowdhury v. Bangladesh (1989)[29] where the Appellate Division of the Supreme Court of Bangladesh interpreted the Constitution on the basis of its spirit instead of confining itself in the written words of the Constitution.

b. Ascertainment of Intention

The function of the court in interpreting any provision of a constitution is to ascertain the intention of the makers of the constitution.[30] As the language primarily expresses the intention, effort should be made at the first instance to gather it from the words used[31] and upon consideration of the whole of the enactment. A clause cannot be interpreted in isolation and must be construed as part of a unified whole.[32]

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[28] Ibid., p.28.
[29] See n.23 above.
[30] Ibid.
[31] Mujibur Rahman v. Bangladesh (1992) 44 DLR (AD) 111.

c. Harmonious Interpretation:

A constitution must be read as a whole. If there is an apparent repugnancy between different provisions of a constitution, it should be removed by interpretation. But if the repugnancy is real, the court should harmonise them if possible.[33]

4. The Obligation of Ensuring Gender Equality under the International Conventions

Bangladesh acceded to the Convention on the Elimination of All Forms of Discrimination Against Women[34] (CEDAW) in 1984 with a reservation on Article 2 which prescribes the elimination of discrimination against women through various measures including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women[35] and Article

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[32] Islam, n.10 above, p.31.

[33] Ibid., p.42.

[34] See n.16 above. The Convention was adopted and opened for signature, ratification and accession by General Assembly resolution of 18 December 1979 and was entered into force on 3 September 1981. As mentioned above, at the time of ratification of the Convention, the Government of Bangladesh has also registered reservations in relation to a number of articles of the Convention. Later, Bangladesh has withdrawn some of the reservations, such as, from article 13(a) (i.e., on the right to family benefits), and article 16.1(f) (i.e., on marriage and family relations), specifically the right to guardianship, trusteeship and adoption of children. It still has reservations on article 2, by which States Parties condemn discrimination against women in all its forms and agree to pursue by all appropriate means a policy of eliminating discrimination against women, and article 16.1 (c) (i.e., on rights and responsibilities during marriage and at its dissolution). For Reservations, see-- http://www.un.org/womenwatch/daw/cedaw/reservations.htm (Last accessed on 05.08.04); see also-- http://sim.law.uu.nl/SIM/Library/RATIF.nsf/0/5f2e13c766de882cc12568b900379af0?OpenDocument (Last Accessed 05.08.04).

[35] Article 2 of the Convention states: "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent

16(1)(c) regarding equality of rights and responsibilities during marriage and upon its dissolution.[36] Bangladesh put a reservation on these provisions by observing that they "conflict with the *Shari'a law* based on (the) Holy *Qur'an* and *Sunnah*."[37] From these reservations it becomes clear that policy of the Government of Bangladesh is of protecting personal laws from state intervention to ensure gender equality in all spheres including the family. It also reflects their view that the rules and principles of *Shari'a* law are irreconcilable with the concept of gender equality and in case of a conflict (between rules of *Shari'a* and gender equality), the religious law should be protected.

Considering the reservations as a major obstacle to improving the status of women in Bangladesh, over the years various women's groups and NGOs[38] have continually voiced their views against the reservations and initiated lobbying efforts and

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national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women."

[36] Article 16 of the Convention states: "(1) States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage; (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent; (c) The same rights and responsibilities during marriage and at its dissolution; (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount; (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights; (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount; (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation; (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration. (2) The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory."

[37] See n.34 above for detail on the reservations of Bangladesh Government.

advocacy programmes to raise public awareness in favour of withdrawing these reservations. Their continuous effort seemed to have yielded some results over the past few years as we can see a slow but gradual shift from a rigid governmental stand which was overprotective of the religious laws to a slightly more flexible and accommodating stand. This shift in the attitude is reflected in the Government's decision to withdraw some of the original reservations to the Convention and its decision to consider the withdrawal of some of the reservations. In this regard, in Government's Fifth Periodic Report[39] to CEDAW covering the period between 1997 and 2002, it was stated that "about withdrawing reservation on Article 2, the present government is taking active interest to come to a decision. In this regard, to avoid future legal complication, the Ministry of Women and Children's Affairs (MWCA) has requested the Ministry of Law, Justice and Parliamentary Affairs (Law Ministry) to examine the ways and means to withdraw the reservation on Article 2." It was further reported that "the Government of Bangladesh is assessing whether its reservation on Article 2 is in direct contradiction to the Religious Personal Law" and "to mitigate the problem of heterogeneity", in 1996, the Government set up a high powered inter-ministerial committee under the Ministry of Women and Children affairs to review the overall situation and recommend changes. Considering recommendations of this committee the government has already withdrawn its reservation from one of the articles and sub-articles of the CEDAW. Currently

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[38] For example, Ain O Salish Kendra (ASK), Bangladesh Mahila Parishad, Bangladesh Women Lawyers' Association (BNWLA) etc.

[39] See-- Government of Bangladesh *Fifth periodic report of States Parties to the Committee on the Elimination of All Forms of Discrimination Against Women* U.N. Doc.No. CEDAW/C/BGD/5. Full text of the report submitted by Bangladesh is available at http://daccess-ods.un.org/TMP/4305302.html (Last accessed on 02.12.04).

withdrawing reservation from or approving the Article 16.1(c) and Article 2 is under active review of the Government."[40]

Bangladesh signed the Convention on the Rights of the Child (1989)[41] (CRC) in 1990 and ratified the same year, with reservations to Articles 14(1) (i.e., on children's freedom of religion) and 21 (i.e., on adoption). The reservation to Article 21 states that the provision will apply subject to the existing laws and practices in Bangladesh.[42]

Bangladesh acceded to the International Convention on Socio Economic and Cultural Rights (1966)[43] (ICESCR) in 1998 with a number of declarations. The interpretative declaration relating to Articles 2 and 3 of the Covenant states that "the Government of the People's Republic of Bangladesh will implement articles 2 and 3 in so far as they relate to equality between man and woman, in accordance with the relevant provisions of its Constitution and in particular, in respect to certain aspects of economic rights viz. law of inheritance."[44]

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[40] Ibid.
[41] General Assembly Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989). The Convention *entered into force* on September 2 1990. Full text of the Convention is available online: http://www1.umn.edu/humanrts/instree/k2crc.htm (Last accessed 10.07.04).
[42] Full text of the declaration available at: http://www.ohchr.org/english/countries/ratification/3.htm. (Last accessed on 02.12.04).
[43] General Assembly Res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* January 3, 1976. Full text available online at: http://www1.umn.edu/humanrts/instree/b2esc.htm (Last accessed 10.07.04).
[44] Full text of the declaration available at http://www.ohchr.org/english/countries/ratification/3.htm. Las accessed on 2 Dec 2004.

5. Government policy, Plans for Action and other initiatives related to gender equality

In addition to the above, from time to time, the Government of Bangladesh has also taken some specific initiatives directed at improving the socio-political, economic and legal status of women. Included in these initiatives is the adoption of a *National Women's Development Policy*[45] and undertaking periodic development plans and specific Plans of Actions.

a) National Policy for Women's Advancement in Bangladesh

To guide, initiate and promote overall development activities for women in March 1997 the Bangladesh Government for the first time declared the National Women's Development Policy[46] Some of the major goals of the policy are to establish equality between men and women in all spheres, to eliminate all forms of discrimination against women and to establish women's human rights.[47]

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[45] Government of Bangladesh *National Women's Development Policy* (Dhaka: Government Publication, 1999).

[46] For details about the background of the National Women's Development Policy, See the Fifth Periodic Report, n.39 above.

[47] The major goals of the National Women's Development Policy_have been summarised as follows: "(1) Establish equality between men and women in all spheres; (2) Eliminate all forms of discrimination against women and girls; (3) Establish women's human rights; (4) Develop women as human resource; (5) Recognize women's contribution in social and economic spheres; (6) Eliminate poverty among women; (7) Establish equality between men and women in administration, politics, education, games, sports and all other socio-economic spheres; (8) Eliminate all forms of oppression against women and girls; (9) Ensure empowerment of women in the fields of politics, administration and the economy; (10) Develop appropriate technology for women; (11) Ensure adequate health and nutrition for women; (12) Provide housing and shelter to women; (13) Create positive images of women in the media; (14) Take special measures for women in especially disadvantaged situations." For details, see – n.45 above. See also, n.39.

With regard to the monitoring of the implementation of the various policies, programmes and laws, the National Council for Women's Development and the Inter-ministerial Coordination and Evaluation Committee provide institutional mechanisms through which individuals and various women's organizations can participate.[48]

b) Five-Year Development Plan

The Bangladesh Government undertook a Five Year Development Plan for improving the status of women. Promoting gender equality, and "realising the constitutional goal of equality between all citizens - women and men", was a major aim of the *Fifth Five-Year Development Plan* (1997-2002)[49]. For example, some of the goals and objectives of the plan were to:

a. initiate necessary steps to implement the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);

b. ensure women's legal rights in property, inheritance and related laws;

c. increase women's participation in decision making at both the national and local level;

d. ensure the visibility and recognition of women's work and to reduce the gender gap in access to information, skill and knowledge about economic opportunities; and,

e. raise the rate of female participation in the active labour force (employed) to bring it at par with men.

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[48] Ibid.

[49] Government of Bangladesh *Fifth Five-Year Development Plan 1997-2002* (Dhaka: Government Publication, 1997).

c) National Plan for Action (as follow-up to 4th World Conference on Women, 1995)

The government of Bangladesh also endorsed the Beijing Platform for Action (Platform) with no reservations. The main tool for implementing the Platform is the National Action Plan (NAP), which sets the following broad goals:

1. to make women's development an integral part of the national development programme;
2. to establish women as equal partners in development with equal roles in policy and decision-making in the family, community and nation at large;
3. to remove legal, economic, political or cultural barriers that prevent the exercise of equal rights by undertaking policy reforms and strong affirmative actions;
4. to raise/create public awareness about women's differential needs, interests and priorities and increase commitment to bring about improvements in women's position and condition.[50]

From the above it becomes clear that although the Government of Bangladesh in its national policy expresses a clear commitment to ensuring gender equality in all spheres and to uphold women's human rights these have not been translated into the legal structure of the land which falls short of incorporating the principle of gender equality. Since its declaration in 1999, it has also failed to take any specific steps to

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[50] In relation to women's employment, the National Action Plan stresses the need to improve women's working conditions. This includes increasing the scope of maternity leave, more creches and day care centres, adequate numbers of separate toilet facilities, better transport facilities especially for night work and accommodation facilities for out of station work placements. The Plan also proposes the development of professionally elaborated gender-sensitive codes of conduct/ethics/self-regulatory mechanisms for the medical and media professionals, with the goal of promoting greater respect for women and their rights, monitoring action and taking internal disciplinary actions against violations of the agreed codes of conduct. For details, see-- Government of Bangladesh *National Action Plan Towards Implementing Beijing Platform for Action*. The English version of the major goals ands objectives of the Plan is available at-- http://www.ilo.org/public/english/employment/gems/eeo/guide/banglade/ng_fydp.htm (Last accessed on 02.12.04).

reform the religious laws to ensure equality in the personal sphere. Similarly, the five year development plan, although in promising to ensure women's legal rights in the area of property, inheritance and related laws, makes no specific commitment or plan of action to reform the provisions of the existing Hindu law and Muslim law which as Chapter II will elaborate, fail to provide equal rights for women in the area of inheritance and other property related rights. In the same way, although the National Action Plan for implementing the Beijing Platform for Action speaks of ensuring "equal roles in decision making in the family, community and nation at large" and also speaks of removing "legal, economic, political or cultural barriers that prevent the exercise of equal rights by undertaking policy reforms and strong affirmative actions", the personal laws which are the main obstacles to achieving equal roles in the family have been left unreformed or with no substantive change. In this regard, from the perspective of gender equality, one of the main points of concern is that various stated and unstated norms of personal law which obstructs women's participation in public life (for example, the duty of obedience and the traditional gender roles of women/dependant, man/provider—underpinning all religious laws) have been left unreformed and unchallenged.

From the above, it is evident that although the Government policy and plans of action indicate a willingness or positive attitude on the part of the Government towards improving the status and condition of women in the economic sphere, education etc, they lack a clear commitment, guidelines and strategies as to how to improve the legal status of women particularly in the personal sphere by bringing any substantive change or reform to the religious personal laws.

6. Historical development of personal laws in brief

The division of the legal system into personal laws and general laws in the Indian Subcontinent was first created during British colonial rule[51]. In the early days of the British rule in India the British rulers adopted a non-interference policy towards the personal laws of the natives.[52] As Agnes points out, the Charter of George I in 1726, which authorised the establishment of Mayor's Courts (Courts of the King of England) in Calcutta, Bombay and Madras, was silent regarding jurisdiction over native inhabitants.[53] The Warren Hastings Plan of 1772 provided for the establishment of civil and criminal courts in each district and granted the Company jurisdiction over the natives.[54] The plan explicitly protected the right of the Hindus and Muslims to apply their own personal laws in civil matters concerning inheritance, marriage, caste etc. The practice of non-interference in the personal laws of the natives continued through all the subsequent regulations in the early days of the British rule. Warren Hastings by Regulation II in 1772 declared that Muslims and Hindus would be allowed to be governed by their own laws in all suits regarding inheritance, succession, marriage, caste and other religious usages or institutions. In the Act of Settlement (1781), the same policy of non-interference of the 1772 Regulation was reaffirmed.[55]

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[51] T Monsoor *From Patriarchy to Gender Equity: Family Law and its Impact on Women in Bangladesh*. (Dhaka: The University Press Ltd, 1999).

[52] Monsoor points out that before the British assumed political power, the Muslim rulers enforced the public laws of Islam as the law of the land and in matters of personal status the other religious communities were governed by their own religion based laws and usages. Ibid.

[53] The Charter of Charles II in 1661 was the first in a series of charters which authorised the East India Company judicial powers in India. For details, see F Agnes *Law and Gender Inequality: the Politics of Women 's Rights in India* (New Delhi: Oxford University Press, 1999).

[54] For details, see Ibid.

[55] See Monsoor, n.51 above.

As Monsoor observes, as a result of Warren Hasting's scheme, for the first time the legal system of the Subcontinent was divided into general laws and personal laws. But this apparent non-interference policy was only with regard to the two major religious communities, i.e., Muslims and the Hindus.[56]

According to Agnes, the consequence of this public-personal division was that the communities in the Subcontinent were categorised on the basis of their religion, and the customs and laws, which the English administrators had decided to save, were in turn deemed to be religious. This according to her created a legal fiction that the laws of Hindus and Muslims are rooted in their respective scriptures and further that Hindus and Muslims are homogeneous communities following uniform laws. As Agnes points out, there was also a presumption that the dividing line between the communities is their religion, over-riding other factors such as caste, sect, occupation, language or regionality. This legal fiction provided no space for validating the role of customary law which has no scriptural basis and is evolved at the local level transgressing boundaries of religious identities. This, as she points out, curtailed women's customary rights which did not have a textual base. Also, as pluralistic communities became characterised as "Hindu", women's right to property ownership became curtailed. For example, the notion of a constrained and limited *stridhana* followed by the Bengal school[57] became the accepted principle of Hindu

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[56] See generally M P Jain *Outline of Indian Legal History* (5th ed., reprinted) (Nagpur: Wadhwa and Co., 2003) and the reference made to him in Monsoor, n.51 above. Monsoor summarises, the personal laws of the Christians and Parsis were codified by the Parsi Marriage and divorce Act (1936) [(III of 1936) 9 PC 351], the Divorce Act (1869) [(IV of 1869) 1 BC 246, 1 PC 303], the Christian Marriage Act (1872) [(XV of 1872) 2 BC 140, 2 PC 142], the Succession Act (1925) [(XXXIX of 1925) 8 PC 195, 10 BC 355] and the Special Marriage Act (1872) [(III of 1872) 2 BC 66, 2 PC 62].

[57] The Bengal school followed the *Dayabhaga* principle of strict construction of *stridhana* or women's property. The two dominant schools of Hindu law are *Mitakshara* of Vijnaneshwar and *Dayabhaga* of Jimmutavahana. The law that governs Hindus in Bangladesh is the Dayabhaga School. The other school i.e., the *Mitakshara* is an important authority for non-Bengali Hindus in all over India.

law for the whole of British India (with a few concessions granted to the Bombay Presidency).[58]

Despite the initial policy of non-interference in "personal" matters, over time a gradual process of interference with the established local customs and personal laws became evident. While these interferences succeeded in improving the position of women to some extent by getting rid of the notorious practice like *sati* or widow immolation and granting Hindu widows right to remarry[59], in some instances these interferences also resulted in curtailing the existing rights granted under the local customs. Some of these instances can be identified as follows:

1. Agnes observes, until the advent of the colonial rule, various local and non-state legal fora applied the norms of customary law and adaptations of the *Smriti* or *Qur'anic* injunctions to suit local conditions. But when the company officers attempted to arbitrate in civil and criminal disputes, due to their limited understanding of local traditions and customs, they relied upon Hindu pundits and Muslim *qazis* to ascertain their respective laws. This set in motion the process of Brahminisation and Islamisation of laws which adversely affected women's rights in the Subcontinent.[60] Gradually the British administrators started to take it upon themselves to translate the ancient texts which later became the basis of Anglo-Hindu and Anglo-Mohammadan law in India. As Agnes observes, it is at this stage that "the process of evolving laws at the local level through commentaries, which

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[58] For details, see Agnes, n.53 above.

[59] As Monsoor points out, during this period the much acclaimed Sati Regulation Act (1829) was followed by other legislations such as the Widow Remarriage Act (1856), the Age of Consent Act (1860) and the Prohibition of Female Infanticide Act (1872), the Muslim Personal Law (Shariat) Application Act (1937) [(XXVI of 1937) 9 PC 404, 11 BC 387], Dissolution of the Muslim Marriages Act (1939) [(VIII of 1939) 9 PC 716] and the Child Marriage Restraint Act (1929) [(XXXVIII of 1984) 36 DLR (Sta) 134]. For details, see Monsoor, n.51 above.

incorporated within them the local customs was arrested". The British interpretations of the ancient texts became binding and made the law certain, rigid and uniform, contributing significantly to the disadvantage of women.[61]

2. Simultaneously with the above, a series of judicial decisions also curtailed the scope of women's rights. For example, Agnes points out that during that period the *Mitakshara* had expanded the scope of *stridhana* [62] or women's property to include property acquired by a woman through every source, including inheritance and partition. But judicial decisions changed this concept and gradually introduced a new legal principle which laid down that inherited property (through a woman's male relatives or female relatives) is not *stridhana* and that it would devolve on the heirs of her husband or father. In this way, women lost the right to will or gift away their *stridhana* and it acquired the character of limited estate. In support of this Agnes cites a number of judgments such as Srinath Gangopadhya v Sarbamangala Debi (1868)[63], Gonda Kooer v Kooer Gody Singh (1874)[64] where the lower courts, following the local customs, upheld the women's rights. The lower courts' decisions were reversed by the higher judiciary and then became binding principles of law.[65]

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[60] n.53 above.
[61] Ibid.
[62] The property which a woman obtains by her own labour is called her *stridhana.* The word *stridhana* derives from *stri,* woman, and *dhana,* property, and means literally woman's property. While declaring the perpetual tutelage of women, and their general incapacity to hold property, Hindu law allows then to hold property of certain descriptions with absolute power of disposal. Only with regard to her *stridhana*, is a woman in the same position as any other person. She may sell it or give it away and at her death she may leave it by will to any one she may choose, and if she dies intestate it will go to her heirs. But with regard to property which is not *stridhana,* her ownership is a restricted one. She can enjoy the full and exclusive enjoyment and the management of the property only as long as she lives. She cannot give it away, nor can she sell it, except under very special circumstances and in case of urgent necessity. She also cannot dispose of it by will and at her death it does not go to her heirs.
[63] 10 WR 488.
[64] 14 BLR 159.
[65] For details of the above argument see Agnes, n.53 above.

After getting independence from colonial rule, some attempts were made in the newly independent, post-1947 Pakistan to improve the position of women through legal reform. But in Pakistan (as it was a country created for the Muslims) the reform approach mainly focused on improving the position of women within the framework of Islam instead of bringing any substantive change by introducing a secular framework for the personal laws. However, in independent Pakistan, various women groups began their campaign against discriminatory personal laws and demanded reforms. In this regard, the campaign and lobbying efforts organised by the All Pakistan Women's Association (APWA) should be mentioned who vociferously demanded reforms of Islamic personal law. As a result, the Government established a Commission on Marriage and Family Laws on 4th August 1955 to review the existing family laws. The Commission, which was constituted of seven members and headed by a former Chief Justice, submitted a report that approached a modernist trend of reform and gave rise to considerable amount of controversy and debate between the traditionalist *ulemas* and the modernist Muslim scholars of that time.[66] The Commission made proposals and recommendation in the areas of marriage, maintenance, divorce and property. On the basis of these recommendations the Muslim Family Laws Ordinance (1961)[67] was promulgated in March 1961.

After nine months of war Bangladesh seceded from Pakistan and became independent on 16 December 1971. Bangladesh too opted to retain the religion based framework of personal laws instead of adopting a secular and uniform personal law regime. Thus the British-era legislation that had continued to be applied in Pakistan, as well as the post-1947 legislation enacted in the Pakistani era, remained the basis

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[66] For details of the debates for and against the Commissions proposal at that time, see A Serajuddin *Shari'a Law and Society: Tradition and Change in the Indian Subcontinent* (Dhaka:

of Bangladeshi personal status laws. As has been mentioned before, no judicial attempt has yet been made to examine whether the existence of the discriminatory personal laws offends against the provisions of the Constitution.

In independent Bangladesh, Family Courts were established by the Family Courts Ordinance (1985)[68], which is considered as a significant step in legal reforms for women. There have also been some amendments of the existing legislations. Prominent among them are, the Child Marriage Restraint (Amendment) Ordinance (1984)[69], the Dissolution of Muslim Marriages (Amendment) Ordinance (1986)[70], the Ordinances (of 1961[71], 1985[72] and 1986[73]) amending the Muslim Family Laws Ordinances (1961)[74], the Muslim Marriages and Divorces (Registration) (Amend) Ordinance (1982)[75] and the Family Courts (Amendment) Act (1989)[76]. This list makes it evident that while in the field of personal law for the Muslim community there have been some reforms in Bangladesh; in the field of personal laws of other minority communities (i.e., the Hindus and the Christians) there has been virtually no reform or change.

Asiatic Society of Bangladesh, 1991) pp.34-66.
[67] (VIII 1961) 14 PC 67.
[68] (XVIII of 1985) 37 DLR (Sta) 159.
[69] (XXXVIII of 1984) 36 DLR (Sta) 134.
[70] (XXV of 1986) 38 DLR (Sta) 105.
[71] Muslim Family Laws (Amendment) Ordinance (1961) [(XXI of 1961) 14 PC *NP*]; Muslim Family Laws (Second Amendment) Ordinance (1961) [(XXX of 1961) 14 PC *NP*].
[72] Muslim Family Laws (Amend) Ordinance (1985) [(XIV of 1985) 37 DLR (Sta) 244].
[73] Muslim Family Laws (Amendment) Ordinance (1986) [(XXIV of 1986) 38 DLR (Sta) 73.
[74] See n.66 above.
[75] (XLIX of 1982) 35 DLR (Sta) 76.
[76] (XXX of 1989) 41 DLR (Sta) 38.

The Family Courts Ordinance 1985

After independence from Pakistan, a significant step towards legal reform was undertaken by the establishment of Family Courts by Family Courts Ordinance (1985)[77]. As will be seen in the discussion below, this step is not only significant for enhancing the legal status of women but also significant from the perspective of the uniformity of the family laws or personal laws.

Under the Ordinance, the Family Courts have special procedures and reduced formalities. Under Section 5 of the Ordinance, Family Courts have exclusive jurisdiction to try and dispose of suits relating to the dissolution of marriage, restitution of conjugal rights, dower, maintenance, and guardianship and custody. One of the unique features of the Family Courts Ordinance (1985)[78] is that it offers an opportunity for the conciliatory settlement of disputes between the parties. The scope for the settlement of disputes is given under Section 10 of the Ordinance. According to Section 10, after the written statement is filed, the Family Court will fix a date not more than 30 days later for a pre-trial hearing of the suit[79]. At the pre-trial hearing, the Family Court will attempt to effect a compromise or reconciliation between the parties[80] after examining the plaint, written statement and documents filed by the parties. After the close of evidence of all parties and before the pronouncement of the judgment, the Court has scope to attempt another compromise or reconciliation between the parties under section 13 (1).

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[77] See n.67 above.
[78] See n.67 above.
[79] Section 10 (1) of the Ordinance.
[80] Section 10 (3) of the Ordinance.

Another important feature of the Ordinance is that 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. This provision is particularly useful and beneficial for women who want to prevent their private affairs become open to the public for the fear of social stigma. Under section 22 of the Ordinance, the court fees to be paid on any plaint presented to a family court is nominal (Taka 25) for any kind of suit. This was designed to curtail the cost of initiating a suit and making access to justice for everyone including women with no or little means easy and affordable. Unfortunately, this initiative has not achieved the expected result as in practise the lawyers' and notaries' fees etc. increase the costs considerably.

Although the Ordinance has a number of features that as explained above are beneficial for women, it also has a number of features related to its procedure that can be deemed as problematic for women. For example, section 5 confines the jurisdiction of the Family Courts to the civil jurisdiction related to the issues such as maintenance, dower, custody etc. Thus, if any criminal offence arises in the context of a civil case, it comes under the jurisdiction of the Criminal Courts or the Magistrate Courts. As has been discussed, the Ordinance under section 5 gives exclusive jurisdiction to the Family Courts to try and determine among others the maintenance cases. But the Magistrates are also given the power to entertain these cases under section 488 of the Code of Criminal Procedure (1898)[81]. This creates confusion as to whether Magistrate courts still have the jurisdiction to decide maintenance cases after the enactment of the Ordinance. The latest position of the case law in this regard has been decided in Pochon Rikssi Das v Khuku Rani Dasi

[81] (V of 1898) 4 BC 90, 4 PC 10.

and Others (1998)[82] where the court affirmed that the criminal courts are no longer entitled to entertain cases related to maintenance.

There also has been confusion as to whether the Ordinance applies to the Muslim community only or whether people from other religious communities such as Hindus and Christians, can take advantage of the Ordinance too. The source of confusion lies in the wording of section 5 which states:

> Subject to the provisions of the Muslim Family Laws Ordinance 1961 (Ordinance VIII of 1961) a family court shall have exclusive jurisdiction to try and entertain any suit relating to and arising out of any suits, namely:
> (i) Dissolution of Marriage
> (ii) Restitution of conjugal rights
> (iii) Dower
> (iv) Custody and guardianship of children.

Due to the words "subject to the provisions of the Muslim Family Laws Ordinance 1961" one may argue that the Ordinance is intended for the Muslims only. In this regard Amir-ul Islam however, observes that by enumerating subjects outside the Muslim Family Laws Ordinance (1961)[83] such as guardianship and children, dower etc. it has been made abundantly clear that the jurisdiction of the family court is not only available to the Muslims, nor it is so restricted to any particular religion or sex.[84] According to Islam the expression "subject to the provisions of the Muslim Family Laws Ordinance 1961" is merely for qualifying the word "exclusive jurisdiction" affirming that in matters relating to the Muslim Family Laws Ordinance

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[82] 50 DLR 4.
[83] See n.66 above.
[84] A Islam 'The Uniform Family Code and Problems of Enforcement of Equal Rights of Women in Bangladesh: Legal, Policy and Social Dimensions', keynote paper at the *Workshop on Uniform Family Code and Problems of Enforcement of Equal Rights of Women in Bangladesh: Legal Policy and Social Dimension* (September 22-23, 1992) organised jointly by Bangladesh Institute of Law and International Affairs (BILIA) and the Mahila Parishad. Proceedings yet to be published.

(1961)[85] the family court shall have concurrent jurisdiction with the Arbitration Council.[86] He concludes that the most likely and plausible interpretation may perhaps be that the expression "subject to the provisions of the Muslim Family Laws Ordinance 1961" refers to the exclusive matter of the jurisdiction of the family court. The intent of the legislature was therefore not to upset the existing jurisdiction of the Arbitration Council.[87]

In this regard it may be pointed out that some of the family courts have already started exercising jurisdictions in cases where the parties are non-Muslim. This issue was considered in Krishnapada Talukdar v Geetashree Talukdar (1995)[88] where the division bench of the High Court Division of the Supreme Court held that the Family Courts have jurisdiction to entertain, try and dispose of suit between litigants who are Muslim faith only. But in Nirmal Kanti Das v Sreemati Biva Rani (1995)[89] a single bench of the High Court Division of the Supreme Court held that a Hindu wife is not excluded from bringing a law suit for her maintenance against her husband under this Ordinance. This was also confirmed by the Division Bench of the High Court Division of the Supreme Court in Meher Nigar v Mojibur Rahman (1995)[90], holding that the scope of the Ordinance extends to the non-Muslim communities as well. These positive decisions of the judiciary regarding the applicability of the Ordinance to the non-Muslim community indicates an encouraging trend from the perspective of uniformity of the personal laws as this now shows that it is possible to lift the legal divide between the religious communities and apply laws uniformly, at

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[85] See n.67 above.
[86] Ibid.
[87] See generally—A Islam, n.83 above.
[88] 47 DLR 591.
[89] 47 DLR 515.
[90] 47 DLR 18.

least on the procedural level, for granting relief to women of all religious communities in matters of divorce, custody, maintenance etc.

Muslim Family Laws Ordinance 1961

Since its independence from colonial rule, the most significant legal reform to Muslim personal law was undertaken by the enactment of the Muslim Family Laws Ordinance[91] in 1961. Fortunately, after independence from Pakistan, the newly independent Bangladesh also continued the application of the Ordinance with some amendments initiated in 1974. The Ordinance covers issues related to Muslim inheritance, marriage registration, polygamy, divorce, dowry and maintenance. The Ordinance prescribes formation of a "Salish council" to resolve disputes arising within the family. The Salish council comprises three members with chairman of local union council[92] and two other members (having one from each of the parties).

Some of the significant features of the Ordinance that it has restricted the practice of polygamy by introducing procedural restrictions (for example, the application process includes requiring the reasons for wanting to contract a polygamous marriage and certification attesting to the existing wife's or wives' consent etc.) It has also established penalties for contracting polygamous marriages in contravention of the Ordinance. Another significant feature of the Ordinance is that it has abolished the practice of "triple divorce" - a particularly oppressive practise towards women and introduced a rational procedure for divorce. These features are further developed in Chapter II on Personal Laws and Their Impact on Women.

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[91] See n.66 above.

[92] A *Pourasabha* (municipal) chairman in the *pourasabha* area and a Mayor or administrator in the municipal corporation area would be the chairman of *Salish* (arbitration) council.

7. Conclusion

The above discussions have explained the legal framework within which the religious personal laws operate. It has been observed that although the Constitution of Bangladesh has a gender equality guarantee it has been argued not to extend to the sphere of personal laws as one of the subsection of the equality provision (Article 28 subsection 2) if seen in isolation keeps silent about ensuring equality in the private life of the citizens where the religious personal laws operate. As seen in the discussion, this view is endorsed by the Government of Bangladesh but rejected by various women groups and NGO's. The position of the judiciary in this regard however, (specially the Supreme Court which is the highest court of the land and the ultimate authority for interpreting the constitution) is still not clear due to the fact that there has not been an attempt yet to challenge the validity of religious laws by invoking the gender equality guarantee of the Constitution. The study in this regard takes the position that there is scope to interpret Article 28 to extend its application to private sphere and bring the religious personal laws in line with the guarantee of gender equality. In support of this Chapter has highlighted various modes of interpretation endorsed by the judiciary of Bangladesh that calls for taking into account the overall spirit of the Constitution while interpreting a particular provision. In this regard it has been pointed out that other provisions of the Constitution such as Article 27 Constitution affirms, "All citizens are equal before law and are entitled to equal protection of law." Also, Article 28 subsection 1 lays down a general equality guarantee without confining the guarantee to a specific sphere by stating, "the state shall not discriminate against any citizen on grounds only of religion, race caste, sex or place of birth". In addition, the preamble to the Constitution states, "the fundamental aim of the State is to establish a society in which the rule of law,

fundamental human rights and freedom, equality and justice would be ensured". This argument is further strengthened by the arguments put forward in Chapter III on Public Private Dichotomy and the Religious Personal Laws which offers a critique of the dichotomy and points out that because of the overlapping nature of the boundary between public and private, it is important to ensure equality in the private sphere in order to ensure it in the public sphere.

It has also been observed in this Chapter that right to freedom of religion has been deployed to restrict the scope of the equality guarantee and to make it inapplicable in the personal sphere. In this regard, the discussions in this Chapter have already pointed out that this is not a viable argument because the freedom of religion is not an unconditional right. It has also been pointed out that the judiciary in Bangladesh have already invoked the notions of law, public order and morality to strike down practises which are particularly oppressive toward women such as *fatwa*. The next Chapter will discuss some of the discriminatory aspects of Islamic law that operate in Bangladesh and highlight the disadvantage they cause to women.

CHAPTER II

PERSONAL LAWS AND THEIR IMPACT ON WOMEN

1. Introduction

In the preceding Chapter, the status of personal laws in the legal system of Bangladesh has been discussed. It has been observed that despite the constitutional guarantee of equality, the state has always afforded recognition to and left scope for the application of religious laws in the personal sphere. In this regard, some of the impediments to reform and arguments in favour of the non-interventionist stand of the state into the personal laws have also been highlighted. On the other hand, it has been pointed out that various women's groups in Bangladesh have been campaigning for reforms of the religion-based personal laws on the grounds that they not only violate the Constitutional right to gender equality but also perpetuate women's subordination in the society and constitute discrimination between women of different religious groups. In the light of the above, this Chapter sets out to examine the impact of personal laws on Bangladeshi women. To this end, this Chapter makes a comprehensive exposition of personal laws

specially focusing on the points of discrimination. The Chapter also highlights the way in which legally entrenched discrimination results in significant disadvantage for women in Bangladesh. As the areas covered by the personal laws are too vast to allow exhaustive citation and discussion, for the purpose of highlighting discriminatory provisions, discussions are limited to various provisions of Islamic law and areas of law covered for this purpose are marriage, divorce, dower, inheritance of property and guardianship as prescribed by Islamic law in Bangladesh. The object of the Chapter is to set the background for developing the central argument of the thesis that reforms to personal laws are desirable and possible in line with the equality provision of the Constitution.

2. Islamic Law

The majority of people in Bangladesh are Muslims[1]. Of them, most are *Hanafi*[2] Muslims and the basis for the law is classical *Hanafi fiqh*. Only a small minority of the population belong to any other sects. The Muslim Personal Law (Shari'at) Application Act (1937)[3] governs the application of Muslim family law in Bangladesh. Although the principles and rules of *Shari'a* law as settled by the classical jurists have been traditionally regarded as "sacrosanct and immutable"[4], there have been some occasional changes to

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[1] Religions in Bangladesh (Census 1991): Islam (88.3%), Hinduism (10.5%), Buddhism (0.6%) and Christianity (0.3%). Source: National Data Bank, Bangladesh Bureau of Statistics http://www.bbsgov.org/ (Last accessed on 20.12.2000. The total population of Bangladesh is approximately 130 million. Sunni Muslims constitute 88 percent of the population. About 10 percent of the population are Hindu. The remainder are mainly Christian (mostly Catholic) and Buddhist. Members of these faiths are found predominantly in the tribal (non-Bengali) populations of the Chittagong Hill Tracts, although many other indigenous groups in various parts of the country are Christian as well. There also are small populations of Shi'a Muslims, Sikhs, Baha'is, animists, and Ahmadias. Estimates of their populations vary widely, from a few hundred up to 100,000 adherents for each faith. US Department of State *International Religious Freedom Report* (October 26, 2001) by the Bureau of Democracy, Human Rights, and Labor. Full report available at International Freedom of Religion Homepage at http://www.state.gov/g/drl/rls/irf/2001/5556.htm (Last accessed on 02.12.02).

[2] Muslims are broadly divided into two main sects- Sunni and Shia. The Sunnis follow one of four different schools of law, the *Hanafi* school being the one to which most Muslims in the subcontinent adhere. As Uhlman/UmHani summarises, "following the death of the Prophet Mohammad, different schools of legal thought developed. While jurists generally agreed on the four sources of law (i.e. the Qur'an, sunnah, ijma and qiyas) their views differed regarding textual interpretation, the definition of consensus, and the value that should be attached to analogy. The two main juristic schools, the Sunni and Shia schools, developed as a result of a political dispute over the succession of the Prophet after his death. While the Shia held that leadership should remain in the Prophet's family, the Sunnis believed that leadership could pass to other worthy individuals. This political division gave rise to philosophical differences between the two sects. Over time, different schools of thought developed within the Shia and Sunni sects. Today, Sunnis comprise the majority of Muslims. Although many Sunni juristic schools existed in the past, only four main schools have survived: the Hanifi, Hanbali, Maliki, and Shafii schools. Shiaism consists of three main schools: the Ithna-Ashari (Imami, or Twelve Shias), Zaidi, and Ismaili schools. While the different schools agree on certain fundamental legal issues, their various interpretations and views of the sources of *Shari'a* have given rise to different rules on many points of law." For details, see K Uhlman/UmHani 'Overview Of Shari'a and Prevalent Customs In Islamic Societies - Divorce and Child Custody' paper presented in the California State Bar 2004 Winter *Workshop on International Custody Abduction: Non-Hague, Islamic Countries*. Online version available at: http://www.lawmoose.com/Documents/UmHaniarticle.pdf (Last accessed 25.11.04).

[3] (XXVI of 1937) 9 PC 404, 11 BC 387.

[4] A Serajuddin *Shari'a Law and Society: Tradition and Change in the Indian Subcontinent* (Dhaka: Asiatic Society of Bangladesh, 1991).

the *Shari'a* law. The most important of these changes have been brought by the Muslim Family Laws Ordinance (1961)[5] which governs areas such as polygamy, divorce etc.

a) *Shari'a* Law

Shari'a is the Arabic term for Islamic law. As Akaddaf points out, it first appears in the *Qur'an* to mean "path" or "way."[6] As a divine law and as the expression of God's will and justice, *Shari'a* governs all aspects of life.[7] Various provisions of *Shari'a* set forth among others rules regarding marriage, maintenance, divorce, child custody, inheritance and other matters regarding the family life of the Muslims. As Joseph Schacht describes, *Shari'a* is "the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernal of Islam itself."[8]

Sources of Shari'a

Shari'a law is derived from four principle sources: the *Qur'an*, the *Sunna*, the *ijma*, and *qiyas*. The main source of *Shari'a* is the *Qur'an* which is a collection of revelations the Prophet Mohammed received from God. However, while the *Qur'an* sets forth certain fundamental legal rules, it does not provide specific legal direction in many areas. For this reason, Islamic jurists looked to other sources to compile a detailed body of

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[5] (VIII of 1961) 14 PC 67.
[6] F Akaddaf 'Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?' (2001) 13 *Pace Int'l L. Rev.* 16.
[7] J Nasir *The Islamic Law of Personal Status* (2nd ed.) (London: Graham and Trotman Ltd, 1990).
[8] J Schacht *Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950).

law.[9] The second most authoritative source of *Shari'a* is the *Sunnah* or the practice, conduct, and tradition of the Prophet. These two sources are further supplemented by other sources such as *ijma* and *qiyas*. In the event that neither the *Qur'an* nor the *Sunna* provides guidance on a given point, jurists generally look to *ijma* or consensus among Islamic jurists. If the jurists arrive at a consensus on the legal point at issue, their opinion becomes authoritative. When none of these above sources provide necessary legal authority, jurists may resort to *qiyas* or reasoning by analogy which allows them to reason from *Qur'an, Sunnah or ijma*.

Shari'a has influenced and shaped the family laws of many Muslim societies. It also plays an integral role in the religious, social and cultural life of Muslims in Bangladesh. As the discussion in Chapter 1 on development of personal status law in the Subcontinent clearly demonstrates, although the principles and rules of the *Shari'a* law as settled by the classical jurists have been for the most part regarded as sacred and immutable, there have been some major changes in the form of statute, case law and customs modifying the traditional understanding of the *Shari'a* law to some extent[10]. Some of the key factors that can be said to have attributed to these changes are the impact of human rights activism, the relentless efforts of women's rights activists and the influence of western thought and ideas during colonial rule.[11] A close study of the historical discourse of the Subcontinent also reveals that "while the modernist Muslims have hailed these changes in the *Shari'a* law as salutary, the traditionalists have

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[9] Uhlman/UmHani, n.2 above.
[10] Serajuddin, n.4 above.
[11] As Serajuddin observes, "it is mainly because of these reasons that the term *Shari'a* Law which is popularly used is synonymous with Islamic law, Muslim law and Muhammadan law. It is also sometimes known as Anglo-Muhammadan law in the Indian Subcontinent because of the influence of English common law, equity and procedures." For details, see- ibid., pp.1-27.

continued to resist them, accusing reformers of subservience to Western ideas and norms and of distorting Islamic teaching and injunctions"[12].

In this Chapter, for the purpose of discussion first the classical *Shari'a* law position on a particular topic is discussed and then each topic is reviewed in the light of the changes that have been brought by the relevant legislative and judicial reforms in Bangladesh. At the end of discussion on each topic, the impact of relevant laws on women in Bangladesh is discussed, highlighting the discrimination and disadvantages they cause women.

(a) Marriage

In Islam, marriage is a civil contract between husband and wife legalising intercourse and the procreation of children[13]. Therefore, unlike some other religions that consider marriage as a spiritual union, Islam perceives marriage as a civil union. As Fyzee explains, marriage in Islam is a contract for the legalization of intercourse and the procreation of the children[14]. *Shari'a* prescribes certain preconditions to a valid marriage contract, and prohibits marriage on various grounds. These can be summarised as follows:

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[12] Ibid.
[13] J Esposito *Women in Muslim Family Law* (New York: Syracuse University Press, 1982) pp.15-16.
[14] A Fyzee *Outlines of Muhammadan Law* (Delhi: Oxford University Press, 1974) p.90.

(a.1.) Preconditions of and Prohibitions on Marriage

In order to contract a valid marriage, a Muslim man or woman must be sane and must have reached puberty[15]. However, most Islamic countries have enacted legislation setting the age limit for men and women for contracting a valid marriage. In Bangladesh, the Child Marriage Restraint Act (1929)[16] as amended by Ordinance in 1984[17], sets the minimum ages of marriage at 21 for men and 18 for women. The legislation provides penal sanctions for those who knowingly participate in the contracting of an under-age marriage, but does not invalidate such marriages. Islam and Ahmed observe that the rise in age at marriage in Bangladesh has been remarkably slow during the last 70 years as compared with other South Asian countries. Their study shows that a significant proportion (18 per cent) of women marry before they reach puberty. They conclude that of the several background variables included in their analysis, illiteracy emerges as the most significant factor in explaining the high incidence of early marriage. As they point out, although the Government of Bangladesh in 1984 established the legal age at marriage as 18 years for females and 21 for males, the law is hardly observed in rural areas. As a result, the age at marriage remains appreciably low in such places. According to the authors, "the traditional marriage system in rural areas places great emphasis on protecting family honour by ensuring that daughters are married off before they could bring disgrace to the family through either becoming pregnant outside marriage or reaching an age where they could be considered

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[15] Uhlman/UmHani, n.2 above.
[16] (Act XIX of 1929) 8 PC 430, 11 BC 77.
[17] Child Marriage Restraint (Amendment) Ordinance (1984) [(XXXVIII of 1984) 36 DLR (Sta) 134.

to be "old maids". People start to worry about old-maid status if a woman reaches the age of 18 or 19 without marrying. Among rural people, a more sanguine attitude concerning this perception is that girls are considered old maids if they remain unmarried at 15"[18].

The Dissolution of Muslim Marriages Act (1939)[19] which remains in force in Bangladesh with the amendments initiated during the Pakistani era by the Muslim Family Laws Ordinance (1961)[20] prescribes for the exercise of the "option of puberty" that entitles a girl contracted into marriage by her father or other guardian before the age of 18 to repudiate the marriage (provided it has not been consummated) before attaining the age of 19.

Aside from these preconditions, a marriage may be prohibited on grounds of religion, kindred affinity and fosterage. These grounds can be summarised as follows:

(i) Prohibition on grounds of religion: In Islam, while a Muslim man is allowed (by all the juristic schools) to marry a Jewish or Christian woman, a Muslim woman is not allowed to marry a non-Muslim man. For example, in Bangladesh, the general rule is that a Muslim man may contract a valid marriage with a non-Muslim *kitabia*[21] woman. He may also marry a Hindu or Buddhist woman in which context the marriage would

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[18] M N Islam and A U Ahmed 'Age at First Marriage and its Determinants in Bangladesh' (June, 1998) 13 *Asia-Pacific Population Journal* 2.
[19] (VIII of 1939) 9 PC 716.
[20] n.5 above.
[21] Either a Christian or a Jew.

not be "void" but "irregular".[22] A Muslim woman on the other hand, cannot contract a valid marriage with anyone other than a Muslim man. For example, a marriage between a Muslim woman and a *kitabia* man would be irregular while a marriage between a Muslim woman and a Hindu man would be invalid and any children born out of the wedlock would be illegitimate.[23]

(ii) Prohibition on grounds of kindred and affinity: Uhlman/UmHani[24] summarises the position of different schools with regard to prohibition on the ground of kindred and affinity as follows: According to the Malikis, Shafiis, Hanbalis, and the Shias, men are forbidden from marrying their ascendants, descendants, the ascendants or descendants of their wives, or the wives of their ascendants or descendants. Under the Shia Ithna-Ashari school, a man is also prohibited from marrying the ascendants or descendants of a woman with whom he committed adultery. The adulteress is prohibited to his ascendants and descendants as well.[25]

(iii) Prohibition on grounds of fosterage: Generally, any prohibited degree on grounds of kindred is also prohibited on grounds of fosterage or suckling. Children breast-fed from the same woman are prohibited from marrying each other when they come of age, and are considered related as "milk-brother" or "milk-sister".[26]

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[22] In case of "irregular" marriage, the children born out of such wedlock would be legitimate but the parties would not inherit from each other.
[23] S Sobhan *Legal Status of Women in Bangladesh* (Dhaka: Bangladesh Institute of law and International Affairs-BILIA, 1978).
[24] Uhlman/UmHani, n.2 above.
[25] Ibid.
[26] Ibid.

(a.2.) Formation of the Marriage Contract

The most important features of an Islamic marriage contract are an offer (*ijab*) and acceptance (*qabul*) occurring at the same meeting. In order for the contract to be valid, it is imperative that the man and woman both hear and understand the offer and acceptance.[27] According to the Sunni schools, the marriage also must be witnessed by two male witnesses, or one male and two female witnesses. There is no requirement under any school that the marriage contract be made in a particular form or ceremony[28]. In Bangladesh, the Muslim Marriages and Divorces (Registration) Act (1974)[29] has been enacted to strengthen the requirement of civil registration. It states that "every marriage solemnised under Muslim law shall be registered in accordance with the provisions of this Act" and establishes the licensing of Marriage (*Nikah)* Registrars. The punishment for not registering a marriage is a prison sentence and/or a fine although failure to register does not invalidate the marriage.

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[27] In this regard, Nasir (see n.7 above, pp.46-50) observes that in all schools except the *Hanafi School*, the general consensus among jurists is that a woman must have a legal guardian to conclude the marriage contract on her behalf even if she possesses full legal capacity.

[28] Uhlman/UmHani examines the works of various scholars and summarise the different positions adopted by various Islamic *schools* regarding the content/provisions of a marriage contract. For example, under the *Hanbali* school, the bride and groom have the right to add provisions to the marriage contract at the time of marriage or afterwards by including additional clauses provided that such clauses further the object of the marriage and not violate the *Shari'a*. For instance, conditions that the husband need not maintain the wife, or that the husband must divorce a previous wife are deemed void. On the other hand, imposing conditions on the husband's right to take a second wife, or adding provisions granting the wife greater freedom of movement or the power to divorce her husband at will, are valid. Many *Hanifi* jurists today recognize that certain conditions may be added. While such *Hanifis* accept conditions that give the wife the right to divorce the husband at will, they consider a condition prohibiting the husband from taking another wife void. For details, see Uhlman/UmHani, n.2 above.

[29] (LII of 1974) 27 DLR (Sta) 4.

(a.3.) Problems associated with the marriage procedures

1. Although the main object behind the enactment of the Child Marriage Restraint Act (1929)[30] was to restrain child marriage which is a common practice in the Sub-continent, child marriage still prevails in many rural parts of Bangladesh. In this regard, one of the main flaws that can be identified in the legislation is that the Child Marriage Restraint Act (1929) does not declare the marriage contracted in violation of the Act to be invalid.

2. Rules governing the prohibition of marriage on the ground of religion are clearly discriminatory. While it allows a man to enter into a perfectly valid interfaith marriage with a Christian or Jewish woman, it does not allow such a marriage for a Muslim woman. Moreover, a marriage between a Muslim woman and a Hindu man is clearly void and the children born out of the wedlock are illegitimate, whereas it is only irregular for a Muslim man to marry a Hindu woman. This sometimes has grave implications for a Muslim woman entering into an interfaith marriage because of the social stigma attached to an interfaith marriage unrecognised by her religion. In such cases, the only option left to a Muslim woman seeking to marry a non-Muslim man of her choice is either to convert him to the Muslim faith (in which case he has to renounce his original faith) or take recourse to the Special Marriage Act (1872).[31] But this Act also fails to provide satisfactory solution because to take advantage of this Act, the

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[30] n.16 above.

[31] (Act III of 1872) 2 BC 66, 2 PC 62. In 1872, the Act introduced in British India a common form of civil marriage for all communities making it possible for an Indian of whatever caste or creed to enter into a valid marriage with a person belonging to any caste or creed, provided the parties registered the contract of marriage declaring *inter alia* that they did not belong to any religion. This Act was amended by Act XXX of 1923, making it possible for Hindus, Buddhists, Sikhs and Jains (but not for Christians, Jews, Mahavardans and Parsees) to declare their religion and yet get their marriage registered.

woman has to denounce her own religion as the Act only allows Hindus, Buddhists, Sikhs and Jains to declare their religion and yet get their marriage registered.

3. For conducting a valid marriage the presence of two witnesses comprising of two men or one man and two women is required. So it is clear that for the purpose of witnessing a marriage, one man is deemed to be equivalent to two women. Although in the context of present day it is difficult to see the logic behind this rule, it is still practiced in Bangladesh.

(b) Dower

Dower (commonly known as *mahr*) can be described as the sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage. The amount of dower is usually settled on the basis of the bride's social status, personal traits, and beauty.[32] According to *Shari'a* law, whether or not it is specified in the marriage contract, it is binding on all Muslim men to pay his bride dower which could be a sum of money or other property that is of monetary value.[33]

The dower is considered a debt of the husband to his wife and he has to pay her the total amount on demand. The dower is considered the property of the wife, not her guardian or relatives[34]. Although a dower becomes binding as an effect of the marriage, it may be

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[32] Uhlman/UmHani, n.2 above.
[33] Nasir, n.7 above, pp.46, 48.
[34] Ibid., p.46.

paid immediately in full or be deferred. A "deferred" dower is payable to the wife upon a date agreed to by the couple, or upon divorce or death, whichever occurs first.[35]

It however, needs to be mentioned that from the perspective of gender equality the concept of dower is a controversial one based on the argument that it serves to reinforce stereotypical ideals of women's subordination and dependence on men. It is also argued that the concept of dower can operate as "bride price" in disguise which can be used to justify problematic practices common in many Muslim societies such as the "duty of obedience" (i.e., *ta'a*) owed by the wife to the husband.[36] Reflections of some of these problematic views and perceptions are highlighted in a study[37]. In this study, when asked about dower, one of the interviewees, an *Imam* said "dower means that a woman is to be taken on payment of a certain "price" and 50 percent of such "price" must be paid before consummation of marriage. Without "payment" such consummation shall be illegal."[38] A religious instructor of a school said that men have to pay dower in order to make women *halal* or permissible for themselves. In his words, "after all, when you buy a "thing" from the market you necessarily have to pay some price. Dower is likewise a price paid for the woman."[39] On the other hand, it needs to be noted that in many Muslim societies including in Bangladesh, where most women are dependent on their

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[35] Ibid., p.49.
[36] For detailed discussion on *ta'a*, see Chapter IV.
[37] A total of 110 interviews (of which 59 were women and 51 were men) were conducted in 15 districts of Bangladesh as part of the project Women and Law in the Muslim World conducted by the International Solidarity Network of Women Living Under Muslim Laws. For details see, S Kamal *Her Unfearing Mind: Women and Muslim Laws in Bangladesh* (Dhaka: Ain O Salish Kendro-ASK, 2001).
[38] A total of 110 interviews (of which 59 were women and 51 were men) were conducted in 15 districts of Bangladesh as part of the project Women and Law in the Muslim World conducted by the International Solidarity Network of Women Living Under Muslim Laws. For details see- Ibid.
[39] A total of 110 interviews (of which 59 were women and 51 were men) were conducted in 15 districts of Bangladesh as part of the project Women and Law in the Muslim World conducted by the International Solidarity Network of Women Living Under Muslim Laws. For details see- Ibid.

husband for their subsistence, dower and maintenance are the only two forms of financial security usually available to women during marriage or after divorce. A large deferred dower specified in the marriage contract can operate as a safeguard for wives against unilateral divorce by the husbands and can also serve as an important bargaining tool for a wife in a situation where the husband wants to conduct a second marriage without her consent.

Although in the context of Bangladesh dower can generally operate beneficially for women, a number of difficulties can be faced by women in ensuring it in practice. For example, the fact that the dower payable by the husband can be divided into categories such as "prompt" and "deferred" according to *Shari'a,* sometimes creates difficulties for women as it can result in the reduction of the total amount of dower payable if the husband can show that the prompt dower has been paid in the form of jewelry or other valuable items given to the bride at the time of the marriage ceremony and there is not much left to be paid in the form of deferred dower. In this regard, Monsoor[40] examines some of the unreported judgment of the Family Courts which clearly show that the right of dower can be curtailed by reducing the amount payable by the husband using the customary concept of *usool* (or "paid")[41]. The concept of *usool* practiced in Bangladesh can be described as a practice by which the bridegroom and his relatives at the time of marriage assert that a portion of dower has been paid by jewelry or other valuable goods. This might be noted down in the *kabinnama* which is the document that evidences the contract of marriage. Monsoor in this regard cites cases which reveal that

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[40] T Monsoor *From Patriarchy to Gender Equity: Family Law and its Impact on Women in Bangladesh* (Dhaka: The University Press Ltd, 1999).

[41] The term *usool* refers to the amount of money being paid or given to the wife or spent in relation to the marriage ceremony.

whether any portion of dower is actually paid or not, if it is mentioned in the registered *kabinnama*, the Courts tend to reduce the amount of dower by the alleged *usool*.[42] She further observes that the tendency to reduce the dower amount in the form of *usool* can also be found in cases where the registered *kabinnama* did not specify that a part of dower has been paid by the husband at the marriage ceremony[43]. In some cases the Family Courts even go so far as to decide that the *usool* in the form of jewelry and other items can substitute for the entire amount of dower so that the wife is entitled to no dower at all.[44] Side by side with this trend, Monsoor's analysis of unreported cases of the Family Courts also reveals that instances where the courts are enterprising in determining whether the husband actually paid the dower. For example, she cites Ambia Khatoon v Md. Yasin Bepari[45] where the defendant husband, in order to evade the payment of dower, relied on out-of–court settlements and agreements. During trial, the husband contended that he paid a large amount of dower as *usool*. The Family Court rejected his claims by observing that his claims are contradictory in themselves and held that the plaintiff was entitled to the payment of the prompt dower as the marriage between the parties still subsisted.[46]

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[42] As evidence of this, Monsoor cites various unreported cases of the Family Courts such as Mst. Razia Akhter v Abul Kalam Azad Family Suit No. 193 of 1989 (unreported), Mst. Hafeza Bibi v Md. Shafiqul Alam Family Suit No. 28 of 1992 (unreported), Mst Roksana Begum v Md. Abul Khair, Family Suit No. 96 of 1991 (unreported). For details, see Monsoor, n.40 above.

[43] In support of this, Monsoor cites a recent case Mst. Mahsina Tabassum Shirin v Abul Karim, Family SuitNo.9 of 1992 (unreported). For details, see- Ibid.

[44] Monawara Begum v Hanna Hawladar Family Suit No. 15 of 1991(unreported) and the reference made to it in Monsoor (n.40 above).

[45] Family Suit No. 98 of 1990 (unreported). For details, see—Ibid.

[46] Monsoor, n.40 above.

The above discussion clearly illustrates some of the problems associated with the rules regarding dower and the difficulties the women encounter in claiming it in practice. They can be summarised as follows:

1. As seen above, while *Shari'a* law prescribes that the dower is payable on demand, a range of customary practices curtail this right by reducing the amount of dower in various ways.

2. Also, it is interesting to note that while the law lays down that dower can be demanded anytime including during the subsistence of marriage, the socio-legal condition and subordinate status of women in the family and society make it difficult for a woman to demand or get the dower during the subsistence of her marriage. In this regard, Monsoor draws attention to recent studies revealing a dismal picture of how this right has been proved to be almost ineffective in reality for women in Bangladesh. According to one study conducted in the metropolitan city of Dhaka, 88 percent of Muslim wives did not receive any dower[47].

3. As has been discussed, in the context of Bangladesh where most of the women depend on their husband or father for survival, dower is one of the few forms of financial security available to women particularly after divorce. But, as discussed later in this Chapter, in the case of a *Khula* divorce (when the desire to separate emanates from the wife), the wife has to forego the right to dower. Therefore, the only possible situation when a wife can demand dower upon divorce is when the divorce is initiated by the husband.

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[47] S Akhter *How Far Muslim Laws are Protecting the Rights of the Women in Bangladesh* (Dhaka: 1992) p.35 and the reference made to her in Monsoor, n.40 above.

(c) Polygamy

Polygamy is an issue that has given rise to a lot of debates over the years in many Muslim societies seeking to reform their personal status laws. One of the main obstacles to abolishing polygamy is the argument that polygamy is explicitly permitted by the *Qur'an*. Central to this argument is verse 4:3 of the *Qur'an* which states:

> If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hand possesses. That will be more suitable, to prevent you from doing injustice.[48]

This verse has been interpreted as giving permission to Muslim men to marry up to four women simultaneously. But many feminist writers and Muslim reformists do not accept this interpretation. According to them, permission to engage in polygamy is subject to the condition that the man can do full justice to all of the wives. "Justice" according to some commentators does not only mean equality in the provision of food, clothes, residence or money but also equality in love, affection and esteem.[49] As it is arguably impossible for any man to give equal love, affection and esteem to all his wives, they argue that the Islamic view of polygamy is not that of encouragement, but rather the opposite.

In support of this argument verse 4:129 of the *Qur'an* can be cited which states:

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[48] *The Holy Qur'an* see English translation by Abdullah Yusuf Ali at http://web.umr.edu/msaumr/Quran .
[49] Serajuddin, n.4 above, p.118.

> Ye are never able to be fair and just as between women, even if it is your ardent desire: but turn not away (from a woman) altogether, so as to leave her (as it were) hanging (in the air).[50]

Unfortunately, in many Islamic societies including Bangladesh, the above requirement of doing justice among co-wives is not established as a condition precedent to a polygamous marriage but acts as a mere guideline or private "recommendation" to individuals. However, some attempts have been made by statute in Bangladesh to provide remedies to a wife whose husband has taken a second wife against her wish or to a wife who is subjected to unequal treatment by the husband. Unlike countries such as Tunisia, Bangladeshi law does not prohibit polygamy altogether but only imposes some procedural restrictions on the practice by the Muslim Family Laws Ordinance (1961)[51]. Section 6 of the Ordinance provides that no man during the subsistence of an existing marriage shall enter into another marriage except with the prior permission of the Arbitration Council. Application for such permission must be made to the Chairman of the Union Council,[52] stating the reasons for the proposed marriage and whether the consent of the existing wife (or wives) to this marriage has been obtained. On receipt of the application the Chairman shall ask the applicant and the existing wife or wives each to nominate a representative and these representatives together with the Chairman shall constitute the Arbitration Council. If the Arbitration Council is satisfied that the proposed marriage is necessary and just, it may grant the permission requested, subject

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[50] n.48 above.
[51] n.5 above.
[52] "Union Council" is a unit of the local government administered by elected representatives. According to Section 2(b) of the Muslim Family Laws Ordinance (1961), the term "Chairman" includes- Chairman of the Union Parishad; the Chairman of the Paurashava; the Mayor or Administrator of the Municipal Corporation and the person appointed by the Government to discharge the functions of a Chairman where the Union Parishad, Paurashava or Municipal Corporation is superseded and in the Cantonment areas.

to such conditions as it may deem fit to impose. The Arbitration Council must record the reasons for its decision and any party aggrieved by the decision may file a revision application to the Sub-Divisional officer.[53] His or her decision shall be final and cannot be challenged in any court. Section 6 further lays down that if a marriage is contracted without prior permission of the Arbitration Council, the husband shall be liable—a) to pay forthwith the entire amount of the dower which is due to the existing wife or wives, which amount, if not immediately paid, shall be recoverable as arrears of land revenue; and b) on conviction upon complaint, to punishment with simple imprisonment which may extend to one year, or with fine or with both. In addition, it is well established by statute that a wife who is subjected to unequal treatment can seek judicial dissolution of her marriage according to section 2(viii) (f) of the Dissolution of Muslim Marriage Act (1939)[54] and section 13 of The Muslim Family Laws Ordinance (1961).[55]

Although the intent behind passing the Muslim Family Laws Ordinance (1961) was to restrict the practice of polygamy, various loopholes in the law prevented it from achieving the expected success. For example, although it is laid down in the Ordinance that a marriage without the permission of the Arbitration Council is punishable with a fine and imprisonment, it does not declare the polygamous marriage itself to be illegal or void. It is, therefore, evident that the Ordinance does not directly affect the rights of the husband in any substantive way but only circumscribes that right to some extent by

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[53] A bureaucrat at the local government level.

[54] n.19 above.

[55] According to section 2(viii) (f) of the Dissolution of Muslim Marriage Act (1939), a woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on the ground, inter alia, that the husband treats her with cruelty. This has been reinforced by section 13 of The Muslim Family Laws Ordinance (1961) which established that a second marriage contracted against the first wife's consent constitutes a ground for divorce.

imposing some procedural impediments[56]. Since a second marriage contrary to section 6 is a perfectly valid marriage, penalties prescribed in it are not a sufficient deterrent as this often enables a man to get away with just paying the monetary fine[57]. Furthermore, instead of making polygamy subject to prior authorisation of the court (as in Morocco where according to the recent amendment in 2004, the judge before authorising a second marriage must make sure that there is no "presumption of inequity" and that the husband has the ability to treat the second wife on an equal footing with the first), the Ordinance leaves it to the decision of a non-judicial Arbitration Council. As these Arbitration Councils are usually composed of men, their decisions often reflect a bias in favour of husbands in giving permission for a second marriage. Serajuddin in this regard draws attention to several studies which reveal that the applications for permission to contract a second marriage are hardly ever refused by the Arbitration Council. According to a survey, out of 32 men who applied for permission during the years 1966-68, all but one had been granted permission to remarry. Another survey also reveals a similar picture. Here 32 unions in eight Thanas covering all geographical divisions and social strata of the Country were surveyed. It was found that 35 per cent of the polygamous marriages that took place in one year came up before the Arbitration Council for settlement. Permission was granted in 70 per cent of these cases and refused in 13 per cent of cases.[58] Monsoor observes in this regard that although the Ordinance provides the

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[56] Serajudin, n.4 above.

[57] Monsoor, n.40 above.

[58] Socially recognised grounds like barrenness or chronic ill health of the first wife or the need for an extra hand in the household work accounted for two-thirds of the polygamous marriages. A husband's wealth and influence, luxury, hobby, sex-urge, discord between spouses and the wife's bad looks were responsible for the remaining third. For details, see S Qadir *Modernization of Agrarian Society: A Sociological Study Of the Operation Of Muslim Family laws Ordinance and the Conciliation Courts Ordinance in East*

opportunity of an appeal against the decision of the Arbitration Council, the socio-economic reality in Bangladesh makes it very difficult for an aggrieved woman to do so as she often has to depend on her husband for her bare subsistence.[59] Although the Ordinance requires the first wife's consent to enter into the second marriage, her consent can be extorted in many ways. For example, if she does not give consent to her husband to a polygamous marriage, he can simply divorce her and go ahead with another marriage which often leads to the problem of successive monogamy instead of simultaneous polygamy.[60] As the husband's power to initiate unilateral divorce without adjudication or showing any reason still remains intact, the wife is sometimes left with no other choice but to give her consent for fear of being divorced. In the same way, the wife, although given the right to seek divorce on the ground of polygamy, is seldom in a position to exercises this right for fear of being left alone in society without financial support and protection. The fact to be noted here is that although in other Muslim Countries, notably in the Middle East, divorce does not carry a stigma, in the Indian Subcontinent it does.[61] Some of these problems have been further highlighted from the observations of the interviewees in a study. In that study, most of the interviewees agreed that the requirement of obtaining permission from the first wife before conducting a second marriage is totally ineffective because first of all, women who are entirely dependent on their husbands have no choice but to give consent. Secondly, refusal to give consent may entail torture and other forms of violence. And thirdly, she may have to confront the threat of divorce or even death. Fourthly, it is the children who

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Pakistan (mimeograph) (Mymensingh: Agricultural University, 1968) p.11 and the reference made to him in Serajuddin, n.4 above.

[59] Monsoor, n.40 above.

[60] Serajuddin, n.4 above, p.169.

[61] Sobhan, n.23 above, p.23.

suffer most if the husband is punished by law for defying the conditions of the Ordinance.[62]

In this regard we should take notice of a decision of the High Court Division of the Bangladesh Supreme Court in which the Court examined the issue as to whether Islam truly approves of polygamy. In Jesmin Sultana v. Mohammad Elias (1997)[63], the High Court held that since section 6 of the Ordinance does not prohibit polygamy altogether, it is against the principle of Islamic Law. The Court by citing a number of *Qur'anic* verses and *hadith* affirmed that "to be able to deal justly" is the condition precedent to marry more than one woman and the impression implies equality in love and affection. Since this essential condition for polygamy is practically impossible to fulfil because of the "weakness of human nature" and also because of the "modern social and economic conditions"[64], the Court accepted the argument put forward by some modern commentators that the permission to take a second wife amounts virtually to a prohibition. The Court while considering various persuasive sources of law on this point, also noted that the Tunisian Code of Personal Status has given legislative effect to this interpretation by abolishing polygamy. As such, the Court concluded that section 6 of the Ordinance is against the principle of Islam and recommended this section to be deleted and substituted with a section prohibiting polygamy altogether. The Court also

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[62] A total of 110 interviews (of which 59 were women and 51 were men) were conducted in 15 districts of Bangladesh as part of the project Women and Law in the Muslim World conducted by the International Solidarity Network of Women Living Under Muslim Laws. For details see, Kamal, n.37 above.

[63] 17 BLD 4.

[64] This view was mainly adopted by Justice Mohammad Gholam Rabbani from the arguments of the Tunisian jurists. See Ibid., para 17 of the judgment.

referred the judgment to the Ministry of Law for amending the law accordingly. No action is known to have been taken on it.

(d) Divorce

There are generally three ways to dissolve a marriage during the lifetime of the spouses under Islamic law: (i) by mutual agreement of the parties, known as *khula* or *mubarat*,[65] (ii) by the act of the husband, called *talaq,* and (iii) by a judicial process known as *faskh.*

The Islamic law of divorce is often criticised for granting unlimited and arbitrary power to men and for perpetrating injustice and disadvantage against women. The most controversial aspect of the Islamic law of divorce is *talaq,* i.e., a husband's freedom to terminate the marriage unilaterally.[66] While discussing the devastating effect of *talq on*

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[65] One of the unique features of Islamic law of divorce is the dissolution of marriage by the common consent of the parties. When there is an agreement between the parties to dissolve the marriage at the initiative of the wife and the wife gives a consideration such as surrendering her dower to the husband for her release from the marriage, it is called *khula.* If the dissolution is effected by mutual agreement and aversion of the parties it is known as *mubarat.* In the cases of *talaq, khula* and *mubarat* no decree of the judge is necessary to dissolve the marriage.

[66] According to classical Islamic law of divorce, a Muslim man may divorce his wife whenever he desires. The *talaq* operates from the time of pronouncement. The divorce may be either oral or in writing. The wife's consent or lack of consent in this regard is immaterial. Even her presence at the time of pronouncement of divorce is not an essential condition for the validity of the divorce. The traditional Islamic law recognises two kinds of *talaqs*: (i) *talaq al-Sunnah,* and (ii) *talaq-i-bid'at.* Serajuddin summarises the classical Islamic position on different forms of *talaq. Talaq al-Sunnah* may be pronounced in two forms: *ahsan* or the most approved *hasan* or the approved form. In the *ahsan* form, the husband pronounces a single *talaq* in a *tuhr* or period of purity when the woman is free from her menstrual course and abstains from sexual intercourse during the *iddat* period. The husband may revoke the *talaq* at any time during the *iddat* and resume conjugal life with his wife. After the expiration of *iddat* the divorce becomes final. The *hasan* form of *talaq* consists of three successive pronouncement of *talaq* during three consecutive *tuhrs* or periods of purity. Unless the husband revokes the *talaq* earlier, the third pronouncement operates in law as a final and irrevocable dissolution of marriage. The husband cannot remarry the divorced woman unless she goes through the ceremony of marriage with another man which is consummated and is itself validly dissolved by the death of the husband or by divorce. Both these forms of *talaq* give opportunity and time for reconciliation between the parties. For details, see Serajuddin, n.4 above, p.203.

Muslim women Anderson observes: "The Muslim wife lives under the perpetual threat of divorce. She never knows when this may happen. Even her husband himself may not know when this may happen; for a husband who swears an oath by 'triple divorce', or who makes divorce conditional on something which someone else may do, does not himself know when his wife may be divorced. Thus the happiness of the married couple, of their children and of the family may depend on some act extraneous to the will of the head of the family or on the will of the mistress of the family."[67]

It is important to note that while to men the Islamic law grants unilateral right to divorce, the wife's right in this regard is made subject to certain conditions. The Dissolution of Muslim Marriages Act (1939) in Bangladesh provides a list of specific grounds which a woman must prove in order to divorce her husband.[68] In addition to the above, courts can grant judicial *khula* which allow a woman to obtain divorce by waiving her financial rights. In Balqis Fatima v Najm-ul-Ikram Qureshi (1959)[69], the Court observed that a woman can be granted *khula* by judicial decision in spite of a husband's refusal to end the marriage if the Court is of the opinion that the marriage has in fact broken down. This decision was reaffirmed in the later cases such as Mst.

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[67] J Anderson *Law Reform In the Muslim World* (London: Athlone Press, 1976), p.125.

[68] According to section 2 of The Dissolution of Muslim Marriages Act (1939) [n.19 above], the grounds on which women may seek divorce include: desertion for four years; failure to maintain for two years or polygamy by the husband in contravention of established legal procedures, i.e., a polygamous marriage by the husband in contravention of the provisions of the Muslim Family Laws Ordinance (1961)--husband's imprisonment for seven years; husband's failure to perform marital obligations for three years; husband's continued impotence from the time of the marriage; husband's insanity for two years or serious illness; wife's exercise of her option of puberty if she was contracted into marriage by any guardian before the age of 18 and repudiates the marriage before the age of 19 (as long as such marriage was not consummated); husband's cruelty (including physical or other mistreatment, unequal treatment of co-wives); any other ground recognised as valid for dissolution of marriage under Muslim law.

[69] PLD (WP) Lahore 566.

Khurshid Bibi v Muhammad Amin (1967)[70] and Hasina Ahmed v. Syed Abul Fazal (1980)[71]. It is important to note that there is also an option to expressly delegate the "right of divorce" (known as *talaq-e-tafweed*) by the husband to the wife in the *kabinnama* or a marriage contract. The wife, if the power is delegated to her in this way can initiate divorce extra-judicially.

In 1961, the Muslim Family Laws Ordinance was passed which set out the procedure to be followed for divorce. According to section 7 of the Ordinance, any man who wishes to divorce his wife needs to give notice in writing to the Chairman of the Union Council and a copy of such notice to the wife after pronouncing *talaq* in any form[72]. A *talaq* will not be effective until the expiration of ninety days from the day on which notice is delivered to the Chairman[73]. Within thirty days of the receipt of notice, the Chairman shall constitute an Arbitration Council to bring about reconciliation between the parties.[74] Subsection 2 of section 7 provides that any person divorcing his or her partner in contravention of the Ordinance shall be punishable with simple imprisonment for a term which may extend to one year or with fine or both. Another important contribution of the Ordinance is that it has abolished the extremely arbitrary and oppressive practice of *talaq-i-bid'at* or triple divorce by the husband[75]. Section 7(6) of the Ordinance also

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[70] PLD SC 97.
[71] 32 DLR 294.
[72] n.5 above, Section 7 (1).
[73] Ibid., Section 7 (3).
[74] Ibid., Section 7 (4).
[75] *Talaq-i-bid'at* or triple divorce is an extremely abusive form of divorce in which three pronouncements of *talaq* are made either in one sentence, e.g., "I divorce you" thrice or in three sentences, e.g., "I divorce you, I divorce you, I divorce you". After such pronouncement the divorce becomes final and irrevocable. In this form of divorce, there is no room for reconciliation and remarriage with the husband is only possible if the wife marries another man and he then divorces her after consummation of the marriage. Before the enactment of the Ordinance the practice of *talaq-*

allows remarriage between the parties after divorce without an intervening marriage with a third person, unless such divorce is for the third time so effective.

Despite the efforts made by legislators to restrict the abuse of divorce by men, some flaws still exist in the Ordinance which works against the interests of women. In the first place, instead of referring the matter of divorce to a court, as in Morocco and Tunisia, the Ordinance refers it to a non-judicial body, i.e., an Arbitration Council. Secondly, as Serajuddin[76] points out, the Ordinance simply freezes for ninety days the *talaq* pronounced by the husband for the purpose of bringing about a reconciliation between the spouses. But unlike the divorce procedure in Tunisia and Morocco, the reconciliation effort under section 7 does not precede the pronouncement of *talaq*, it follows it. In this regard, it is important to note that according to the Ordinance, if the reconciliation process does not succeed (which most of the time depends on the husband's will) the divorce automatically takes effect ninety days after the notice. So, the husband's unilateral right to divorce remains intact under the Ordinance, except that there is a procedure of notice and reconciliation to which he has to adhere[77].

(e) Maintenance

The issue of maintenance is a significant one in the context of Bangladesh where the majority of women have to depend on their husband or father for their subsistence.

According to *Shari'a* law it is the responsibility of the husband to maintain his wife and

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i-bid'at was quite common in the Subcontinent. Unfortunately it is still practiced in some rural parts of Bangladesh in contravention of the Ordinance.

[76] Serajuddin, n.4 above.

[77] Ibid., pp. 169-170.

children and to provide for their daily necessities such as shelter, housing, food clothes, educational and other expenses. The basic *Shari'a* principles and rules governing the maintenance of wife and children are based on the following three verses of the *Qur'an*:

> Let the man of means spend according to his means: and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him. After a difficulty, Allah will soon grant relief.[78] (Verse 2:233 of the Holy *Qur'an*)

> Let the women live (in 'iddat) in the same style as ye live, according to your means: Annoy them not, so as to restrict them. And if they carry (life in their wombs), then spend (your substance) on them until they deliver their burden: and if they suckle your (offspring), give them their recompense: and take mutual counsel together, according to what is just and reasonable. And if ye find yourselves in difficulties, let another woman suckle (the child) on the (father's) behalf.[79] (Verse 65:6 of the Holy Q*ur'an*)

> Let the man of means spend according to his means: and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him. After a difficulty, Allah will soon grant relief.[80] (Verse 65:7 of the Holy *Qur'an*)

Under *Shari'a* law the maintenance of the wife is obligatory upon the husband irrespective of any impediments on his part, such as, financial difficulties. Moreover, any agreement between a husband and wife stipulating that no maintenance shall be payable by the husband or any undertaking given by the wife that she will not claim maintenance is void as being contrary to public policy.[81] As Syed Ameer Ali, J., says: "It makes no difference in the husband's liability to maintain the wife, whether he be in health, or suffering from illness, whether he be a prisoner of war or undergoing punishment, "justly or unjustly" for some crime, whether he be absent from home on

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[78] See English translation of the Holy *Qur'an*, n.48 above.
[79] Ibid.
[80] Ibid.
[81] Serajuddin, n.4 above.

pleasure or business, or gone on a pilgrimage, and whether he be rich or poor.''[82] The husband is thus legally bound to maintain his wife and provide her with all the necessities such as clothing, housing, food and medicine at his own expense.[83] The matrimonial home is a central aspect of maintenance and a wife is expected to follow her husband to the matrimonial home provided it complies with *Shari'a* requirements[84]. According to the *Shari'a*, the home must be suitable based on the husband's financial status, habitable and private. She cannot be required to share it with any other relatives of the husband against her will. If the husband has more than one wife, he has to treat them equitably and provide their maintenance evenly[85].

The statutory law that governs disputes related to maintenance is the Muslim Family Laws Ordinance (1961)[86] section 9 of which provides that if the husband fails to maintain his wife adequately, or where there are more wives than one, fails to maintain them equitably, the wife or wives, may in addition to seeking any other legal remedy available apply to the Chairman of the Union Council who shall constitute an Arbitration Council to determine the matter, and the Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband. The amount if not paid in due time, shall be recoverable as arrears of land revenue. From this it becomes evident that the amount of maintenance to be paid can be

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[82] S A Ali *Mahommedan Law* (Vol. II) (Lahore: Law Publishing Company, 1965-*reprint*)

[83] J Nasir in this regard observes that maintenance "is the right of the wife to be provided at the husband's expense, and on a scale suitable to his means, with food, clothing, housing, toilet necessities, medicine, doctors' and surgeons' fees, baths, and also the necessary servants where the wife is of a social position which does not permit her to dispense with such services, or when she is sick.'' For details, see Nasir, n.7 above, p.59.

[84] Serajuddin, n.4 above.

[85] Ibid.

[86] n.5 above.

determined by the Arbitration Council. But unfortunately the Ordinance does not lay down any rules by which the quantum of the maintenance can be determined.

It is important to point out that the wife can add to the marriage contract provisions protecting her right to maintenance for future. As Serajuddin observes, a stipulation by the husband to pay separate maintenance to his wife in case of disagreement, dissention, ill feeling or separation between the spouses is not against public policy and is enforceable in law. Similarly, a stipulation making a settlement for life for the wife's maintenance or entitling her to live away from her husband and yet receive maintenance if the husband ever takes a second wife is not opposed to public policy. But stipulation that she may leave the matrimonial home for any reason or that she will have an unconditional right to maintenance have been held to be against the public policy and invalid.[87]

In addition, a wife can seek divorce on the ground of a husband's failure to maintain. Section 2(ii) of the Dissolution of Muslim Marriage Act (1939)[88] provides that the wife is entitled to obtain a decree of divorce if the husband has neglected or failed to provide for her maintenance for a period of two years.

It is important to note that while in *Shari'a* law the maintenance of a wife during the subsistence of a marriage is obligatory upon the husband, such a duty is also conditional. The wife's right to maintenance is generally based on two conditions: (1) the wife granting her husband sexual access to herself at all lawful times (*tamkeen*); and (2) the

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[87] Serajuddin, n.4 above, p.268.
[88] n.19 above.

wife obeying her husband's lawful commands. If the wife fails to fulfil any of these conditions, she loses her right to maintenance. For example, according to the majority of Islamic jurists, a wife who works outside the home without her husband's permission is not entitled to maintenance.[89]

According to the provisions of *Shari'a* the husband is thus bound to maintain his wife so long as she remains faithful to him and remains "obedient". But he is not liable for her maintenance when she takes employment outside the house without his consent, goes on a voyage without her husband's permission even if it is for the *haj* pilgrimage, or she is guilty of *nushuz* or disobedience[90]. *Nashiza* is a special juristic term meaning "the wife who leaves the matrimonial home without a lawful reason or denies her husband access to the home which she owns without first requesting him to accommodate her elsewhere."[91] Thus, if the wife leaves the husband's house against his will without any valid reason or denies him access to her house, she would disentitle herself to maintenance. But if she is living with her husband, although refusing to cohabit with him she is not deemed to be *nashiza* or disobedient and does not, therefore, lose her right to maintenance.[92] For example in Ahmad Ali v Sabha Khatun Bibi (1952)[93], the Court observed, "It is no doubt true that the husband is bound to maintain his wife so long as she is faithful to him and obeys his reasonable orders. But he is not bound to maintain her if she refuses herself to him or is otherwise disobedient unless the refusal

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[89] Nasir, n.7 above, p.102.
[90] Serajuddin, n.4 above.
[91] J Nasir, *The Status of Women Under Islamic Law and Under Modern Islamic Legislation* (London: Graham and Trotman, 1995), p.63.
[92] Serajuddin, n.4 above.
[93] 4 DLR 613.

or disobedience is justified." In Begum Hamida v Abdul Hamid (1974)[94] the Court observed that:

> In view of the circumstances which made it impossible for her to live with her husband and compelled her to have a separate residence for her and her children, her claim for maintenance cannot be refused if the claim is otherwise not sustainable.

According to *Shari'a* law, a wife is entitled to receive maintenance not only during the subsistence of the marriage but also reasonably after dissolution of the marriage.[95] Although it is now well established that the husband is bound to maintain the wife for three months (known as *iddat* period) after the dissolution of marriage, it has been argued by various women's groups and academics that the provision for post divorce maintenance should be extended beyond that period. It can be argued that in the context of Bangladesh where husbands have unilateral and arbitrary right to divorce, it is not justified that the right to maintenance (which is often the only means of survival for many women in Bangladesh) should be limited to the *iddat* period only. In India it has been argued in Mohd. Ahmed Khan vs. Shah Bano Begum (1985)[96] that maintenance after divorce is an obligation of the ex-husband. In Bangladesh similar attempt was made to extend the post-divorce maintenance beyond the *iddat* period. In Muhammad

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[94] 26 DLR (SC) 26.

[95] *The Qur'an*, 2:228 and 2:241. See English translation of the *Holy Qur'an*, n.48 above.

[96] AIR (SC) 945. The Supreme Court in this case decided in favour of Shah Bano and granted her maintenance for life under section 125 of Criminal Procedure Code. The Supreme Court held that since Criminal Procedure Code is common for all citizens she can claim maintenance under the Code and that Muslim personal law will not be applicable in this matter. In response to the judgment, thousands of Muslims led mostly by the conservative *Ulamas* (Muslim leaders) organised protests against the Supreme Court decision. Ultimately a new legislation was enacted (The Muslim Women (Protection of Rights on Divorce) Law 1986) to prevent such a court decision in the future exempting the Muslim women from application of section 125 of the Code and keeping the classical position on maintenance in tact.

Hefzur Rahman v. Shamsun Nahar Begum (1995)[97] the Court held that a husband is bound to provide his divorced wife with maintenance until she remarries by progressively interpreting relevant verses of *Qur'an*. Unfortunately this decision was later overturned by the Supreme Court on 3 December 1998 leaving the classical *Hanafi* position (that post divorce maintenance should not extend beyond the *iddat* period) intact.

From the above discussion a number of problems can be identified regarding the rules of maintenance followed in Bangladesh.

First, as has been pointed out earlier although the duty of maintenance has been made obligatory on the husband, it has also been made subject to the duty of obedience by the wife which often serves as a big obstacle to women taking work outside the home or participating in the public domain. A double standard is clearly visible here. On the one hand, *Shari'a* law as operated in Bangladesh prescribes specific gender roles, i.e., male protector/provider female obedient/care giver. But the same law fails to give her sufficient financial protection by closing all the doors to her becoming self sufficient.

Second, there is also a problem associated with the quantum of maintenance. It has been pointed out that there is no clear policy or guideline indicated either in the Muslim Family Laws Ordinance (1961)[98] or in the Family Courts Ordinance (1985)[99] to determine the amount of maintenance.

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[97] 15 BLD 34.
[98] n.5 above.
[99] (XVIII of 1985) 37 DLR (Sta) 159.

Third, if the husband evades paying maintenance, the only option left to the wife is to execute the decree as arrears of land revenue. As has been discussed in Chapter I, the Family Courts who are given the power to decide disputes related to maintenance are not given any criminal jurisdiction in the matter under the Family Courts Ordinance (1985). Monsoor in this regard observes that men in patriarchal society have the power to use social harassment, family slander and, in the extreme, physical threats so as not to implement the law. She therefore suggests that the sanctions of the Family Courts in this regard should be strengthened by providing them with a criminal court's power to attach the property of the husband to pay maintenance to the wife. [100]

(f) Restitution of conjugal rights

Legal provisions governing the Restitution of Conjugal Rights were introduced during the British colonial rule under the Code of Civil Procedure of 1859[101]. Furthermore, in 1877, refusal of restitution of conjugal rights was made punishable by the same Code with attachment of property and imprisonment and it was enforced under the civil law of the country. Subsequently in 1908, the British made the punishment of imprisonment discretionary and in 1923 the punishment of imprisonment was withdrawn.[102] According to this law, both the Muslim husband and wife were entitled to the remedy of restitution

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[100] For details, see Monsoor, n.40 above, p.218.

[101] Act XV of 1859. This earlier Code went through a number of revisions and amendments in the hands of various Law Commissions appointed during the British Period. The reformed version of the Code is now known as the Code of Civil Procedure (1908) [(V of 1908) 6 BC 1, 5 PC 1]. For details on the evolution of the Code, see- Government of Pakistan *Reports of Ad hoc Law Reform Commissions*, available at: http://www.ljcp.gov.pk/menu%20items/item-09/3-summary%20of%20reports%20adhoc%20commissions.htm (Last accessed 11.10.04).

[102] Monsoor, n.40 above, p.73.

of conjugal rights.[103] But as Monsoor observes, such a remedy was not actually useful to Muslim women as the husband could always unilaterally or extra-judicially divorce the wife.[104]

Fortunately, in Bangladesh some legal development has occurred in this field through case law. In Nelly Zaman v. Giasuddin Khan (1982)[105], the Court ruled that, with the passage of time, the husband's right to sue for forcible restitution of conjugal rights against an unwilling wife is both outdated and unsustainable if considered in the light of the principle of equality of men and women enshrined in Articles 27 and 31 of the Constitution. The Court observed--

> in a husband's unilateral plea for forcible restitution of conjugal rights as against a wife unwilling to live with her husband, there is no mutuality and reciprocity between the respective rights of the husband and the wife, since such plea for restitution of conjugal rights is not available to a wife as against her husband apart from claiming maintenance and alimony. A reference to Article 28(2) of the Constitution of Bangladesh guaranteeing equal rights of women and men in all spheres of the state and public life would clearly indicate that any unilateral plea of a husband for forcible restitution of conjugal rights as against a wife unwilling to live with her husband is violative of the accepted state and public principle and policy.[106]

The unpublished judgments of the Family Court with regard to the issue of restitution of conjugal rights indicate that the progressive judgments of the higher judiciary have had effects on the lower tier of the judiciary.[107]

(g) Custody and Guardianship of Children

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[103] T Mahmood *The Muslim Law of India* (Allahabad: Law Book Co., 1980), p.84.
[104] Monsoor, n.40 above, p.73.
[105] 34 DLR 221.
[106] Ibid., at p.222.
[107] For details, see- Monsoor, n.40 above, p.175.

The prevailing law in Bangladesh draws a distinction between custody and guardianship of children. According to classical Islamic law, a father is the natural guardian (*al waley*) of his children's persons and property. For custody the general rule is that the mother is entitled to the care and physical custody over male children until the age of 7 and over female children until puberty. The right of a mother to the custody of her children continues when she is divorced by her husband, but she forfeits the right if she marries a stranger[108] or changes her religion. In Bangladesh, the main legislation in this area is the Guardians and Wards Act (1890)[109]. Section 17 of the Act prescribes that the courts are to be guided by the personal law by which the minor is governed. The courts are also directed to consider the age, gender and religion of the minor and the character and capacity of the proposed guardian, as well as considering the minor's own opinion. In all cases, the interests of the child should be the paramount consideration by the courts. In addition, the Act also provides the court with the power to appoint someone (including the mother) as the guardian of a child upon application if the court is satisfied that it is for the welfare of the child.

In her analysis of judicial trends regarding the cases of custody and guardianship of children, Monsoor observes that in the cases of guardianship, the judiciary of Bangladesh is mainly following a conservative line of interpretation by not recognising a woman as the natural guardian of her children but in the cases of custody the judiciary of Bangladesh seems to be protecting women more by recognising a mother's right to

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[108] A non-relative or a relative who is not in a prohibited degree of relation to the child.
[109] (VIII of 1890) 3 BC 292, 3 PC 300.

the custody of her children as almost an absolute right.[110] This has been confirmed in a number of judgments, such as Md. Abu Baker Siddique v. S.M.A. Bakar & Others (1986)[111]. In this case the ruling of the Appellate Division of the Supreme Court of Bangladesh deviated from the classical dictates of *Hanafi* law according to which the mother's custody over a male child ends at 7. The Court stated that:

> [i]ndeed, the principle of Islamic Law (in the instant case, the rule of *hizanat* or guardianship of a minor child as stated in the *Hanafi* school) has to be regarded, but deviation there from would seem permissible as the paramount consideration should be the child's welfare.

This reveals an interesting contradiction in Islamic personal law. On the one hand, the traditional Islamic stance accords almost absolute familial authority to the father. On the other hand, the assumption that women's natural role is that of caregiver provides a compelling reason for granting custody to women. This contradiction, which is also evident in western social and legal conceptions of the family, offers a rare example where women can sometimes legally benefit from the traditional gender role assumed by the religious laws.

(h) Inheritance

To understand the rules regarding inheritance in Islam we need to understand first, which of the relatives of the deceased are entitled to inherit and secondly, what is the quantum share entitlement of each of the heirs concerned. In this regard some of the

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[110] Mosoor, n.40 above, p.193.
[111] 38 DLR (AD) 106.

verses of the Holy *Qur'an* give specific details on inheritance shares. These verses are as follows:

> Allah (thus) directs you as regards your Children's (Inheritance): to the male, a portion equal to that of two females: if only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is a half. For parents, a sixth share of the inheritance to each, if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased Left brothers (or sisters) the mother has a sixth. (The distribution in all cases ('s) after the payment of legacies and debts. Ye know not whether your parents or your children are nearest to you in benefit. These are settled portions ordained by Allah and Allah is All-knowing, All-wise.[112] (Verse 4:11 of the Holy *Qur'an*).
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> In what your wives leave, your share is a half, if they leave no child; but if they leave a child, ye get a fourth; after payment of legacies and debts. In what ye leave, their share is a fourth, if ye leave no child; but if ye leave a child, they get an eighth; after payment of legacies and debts. If the man or woman whose inheritance is in question, has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies and debts; so that no loss is caused (to any one). Thus is it ordained by Allah. and Allah is All-knowing, Most Forbearing.[113] (Verse 4:12 of the Holy *Qur'an*).

Serajuddin summarises the extremely detailed Sunni law of inheritance as follows: Where the propositus is survived by both sons and daughters, each son gets double the share of the daughter. If there is only one daughter and no son, the daughter takes half the property and if there are two or more daughters, they take two-thirds of the property. In an event where the propositus is survived by the parents and a child or children, male or female, each parent gets one-sixth of the property and in the absence of any children the mother takes one-third and the father the remaining two-thirds. If there are brothers and sisters but no children, the mother inherits one-sixth and the father the balance five-

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[112] See English translation of the Holy *Qur'an*, n.48 above.
[113] Ibid.

sixths (the brothers and sisters in this case are excluded by the father). If a woman dies childless, her husband takes half of her estate, and if there is a child, he gets one fourth of the property only. On the other hand, where the husband dies childless, the wife receives one-fourth of her husband's estate, and one-eighth if there is a child. If there is one uterine sister or brother, she or he will take one-sixth of the inheritance and if there are more, they share in one-third. If the propositus leaves no parents or children but only a sister, whether consanguine or of full blood, she gets one-half of his estate; and two or more share in two-thirds. But if there be both brothers and sisters, each brother takes double the share of the sister.[114]

With the exception of son and brother of the propositus[115], the other shares in the estate, twelve in number—four males, i.e., father, true grandfather, uterine brother and husband, and eight females, i.e., wife, mother, true grandmother, daughter, son's daughter, uterine sister, full sister and consanguine sister— form a group of heirs called *Qur'anic* heirs or sharers (*ashab al-furud*). These heirs when entitled to inherit are given their fixed shares and the remaining estate is inherited by the residuaries (*asaba*) who are divided into four classes, i.e., descendants, ascendants, descendants of the father and descendants of the grandfather. In the absence of sharers and residuaries the property will go to the distant kindred, i.e., those relations by blood who are neither sharers nor residuaries; they include paternal aunts, maternal aunts and uncles, the daughters of a brother and daughters of a paternal uncle[116].

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[114] Serajuddin, n.4 above, pp.73-74.
[115] Ibid.
[116] Ibid. Serajuddin also points out that two fundamental principles govern the application of the rules of inheritance. First, testamentary disposition of property is limited to one-third of the net estate

There are certain heirs referred to as primary heirs who are always entitled to a share of the inheritance and are never totally excluded. These primary heirs consist of the spouse, parents, the son and the daughter. All remaining heirs can be totally excluded by the presence of other heirs. There are several rules of exclusion which determine the exclusion of some heirs by the presence of others. The general principles in this regard can be summarised as follows:

a. A person (e.g. brother) who is related to the deceased through another (i.e. father) person is excluded by the presence of the latter. b. An individual nearer in degree (proximity) to the deceased excludes the one who is remoter within the same class of heirs (son excludes all grandsons). c. Full blood excludes half-blood through father (so a full brother will exclude a consanguine brother but not a uterine brother).[117]

From the perspective of gender equality, the most problematic aspect of the *Shari'a* law of inheritance is the fact that women do not have an equal share in the deceased's property. In this regard it is significant to note that while the *Qur'an* provides that some women (i.e. daughter, mother and wife) would under all circumstances be entitled to some share and cannot be excluded from inheritance, they are not treated as equal to their male counterparts, i.e. son, father and husband for the purpose of allocation of share. In this regard the general rule is that the female is given one-half the share of the male. As seen above, in paternal property as well women get far less share compared to their brothers. The rationale behind a brother receiving double his sister's share is based

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and any bequest to a legal heir is *ultra vires*. Second, the nearer in degree excludes the more remote from inheritance.

[117] For details, see D F Mulla *Principles of Mohamedan Law* (17th ed.) (Bombay, Tripathi Pvt. Ltd, 1972), p.70.

on the Islamic legal presumption that he has an obligation to provide for her financial needs. Hence, brothers are given larger shares than their sisters, together with the legal obligation to spend a portion of this share for their sisters. But in this regard it needs to be pointed out that the prevailing socio-cultural situation of Bangladesh often makes it difficult for a woman to ask for a share in their paternal property. In this regard it is interesting to note that there is a common perception in the society specially in the rural parts of Bangladesh that since the financial needs of a women are usually taken care of by her husband after marriage and since she also inherits a share from her husband's property, she should not claim her share in her paternal property but leave it with her brothers or other male relatives from the father's side.[118] As an example of this Monsoor refers to a study of two villages in Bangladesh can be mentioned which reveals that 77 percent 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.[119]

3. Conclusion:

This Chapter has examined some of the discriminatory aspects of Islamic family law that operates in Bangladesh in areas such marriage, divorce, dower, maintenance, inheritance etc. The Chapter has highlighted provisions of Islamic law which blatantly

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[118] This is author's own observation as a Muslim woman in Bangladesh formed through interactions with women from different strata of the society. This view was also developed on the basis of experience gathered while working as an activist working in a legal aid NGO (Bangladesh Legal Aid and Services Trust) dedicated to providing free legal aid to rural women and engaging in advocacy and awareness raising activities on issues related to women's rights. Although no specific study evidencing this view could be found, similar view have been expressed in the works of several other socio-legal researchers. For example, see Monsoor n.40 above, p.4 and S R Khan *The Socio Legal Status of Bengali Women in Bangladesh* (Dhaka: The University Press Limited, 2001), p.98.

[119] See K Westergaard *Pauperization and Rural Women in Bangladesh-A Case Study* (Comilla: Bangladesh Academy for Rural Development-BARD, 1983), p.71 and the reference made to her in Monsoor, n.40 above.

discriminates women and causes significant disadvantage to them and therefore are in urgent need for reform. It has been pointed out that while there has been some statutory development such as the Muslim Family Laws Ordinance (1961)[120] and the Dissolution of the Muslim Marriages Act (1939)[121] to mitigate some of the oppressive rules, some flaws still exist in the statutes that work against the interest of women. Chapter IV will explore whether some of the discriminatory aspects of Islamic law are truly condoned by Islam or a product of bias interpretation. The next Chapter will explore the public private dichotomy that operates in the legal system of Bangladesh in light of the feminist critics developed in this area with a view to challenge the division and put forward argument for extending the equality guarantee of the Constitution to the sphere of religious personal laws.

[120] n.5 above.
[121] n.19 above.

CHAPTER III

PUBLIC-PRIVATE DICHOTOMY AND THE PERSONAL LAWS

1. General-Personal *versus* Public-Private

The idea that lies at the root of the division of the legal system of Bangladesh into general and personal laws is the idea of separate spheres, with the underlying presumption that personal or domestic sphere governed by the religious laws is not legitimate a sphere for state interventions and therefore, the state does not have legitimate authority to intervene and bring them in line with the equality guarantee of the Constitution.

As it is the conceptual device of the public-private division that influenced the shaping the legal system of Bangladesh, the dichotomies of public/private and general/personal have many ideological meeting points. Most important of them all is the shared ideology of keeping family life free from state intervention.

An analysis of the public/private dichotomy shows that the set of values and perceptions underlying the public/private dichotomy also operate in the general/personal dichotomy. Therefore, it can be argued that the method of deconstruction of the public and private can be effectively used to understand and critique the dichotomy between the general and personal and its gender implications in the context of Bangladesh. In the light of existing feminist critiques developed in this area this chapter seeks to demonstrate that the state's reluctance to intervene in the personal sphere and to infuse personal laws with the constitutional guarantee of equality is not based on any overriding and determinative principle but is purely a product of political expediency and ideology and is therefore amenable to change. To this end, this chapter puts forward arguments in favour of extending the guarantee of gender equality to the personal sphere.

2. The "Public" and "Private"

Any discussion relating to the public/private dichotomy presents one immediate question, that is, what do public and private denote in this context?

The origin of the division between public and private can be traced back to Greek thought where a clear separation existed between the *polis* or the public sphere and the *oikos* (the home) or the private sphere. The *oikos* was the site of production and reproduction where the master exercised dominion over his wife, children, and slaves.[1] Central to the understanding of the separation between public and private spheres was the perceived symbiosis between them. That is, the inequality that existed within the

[1] M Thornton 'The Cartography of Public and Private' in M Thornton (ed.) *Public and Private: Feminist Legal Debates* (Melbourne and New York: Oxford University Press, 1995) pp.1-2.

oikos was necessary in order to allow the master the freedom to participate within the *polis*.[2]

Although the historical authority for the mapping of the public and private has been accorded to Greek thought and especially to Aristotle, it was from classical liberal thought that the conception of privacy as a *sphere* first emerged. This sphere surrounded the individual to protect (him) first from other individuals and then from the State.[3]

Thus in liberal theory the public sphere was often understood as a realm open to government regulation while the private realm was perceived to be outside the scope of state intervention except in limited circumstances[4]. Sexuality and the family were in this context understood to be private.[5] Although the idea of individual autonomy has been central to the liberal tradition[6], interestingly "the individual" perceived by traditional liberal thought was the adult male head of the household. Moreover, his right to be free

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[2] Ibid., pp.1-3.

[3] Ibid.

[4] In this regard Mill's "harm principle" may be mentioned. John Stewart Mill in his work *On Liberty* laid out the ethical foundation of democratic individualism and considered the circumstances under which individual liberty might be justifiably restricted. This later came to be known as the "harm principle". According to Mill, a person's liberty may justifiably be restricted only in order to prevent harm that the person's actions would cause to others. For details, see- J S Mill *On Liberty* (London: Longman, Roberts & Green, 1869); On line edition available at http://www.bartleby.com/br/130.html (Last accessed 05.06.04).

[5] The Report of the Departmental Committee on Homosexual Offences and Prostitution also known as the Wolfenden report 1957 is a classic example of this position. The report stated that homosexual behaviour between consenting adults in private should no longer be a criminal offence. It said society and the law should respect "individual freedom of actions in matters of private morality" and stressed it was neither condoning nor condemning homosexual acts. Private morality or immorality was according to the report, "not the law's business". The report led to the replacement of the Offences Against the Person Act (1861) with the Sexual Offences Act (1967). See- Lord Wolfendon *Report of the Departmental Committee on Homosexual Offences and Prostitution (Wolfendon Report)* (London: Government of UK, 1957).
http://www.litencyc.com/php/stopics.php?rec=true&UID=1382 (Last accessed 02.08.03).

[6] For details see: N Lacey 'Theory into Practice: Pornography and the Public/Private Dichotomy' (1993) 20 *Journal of Law and Society.*

from interference by the state included his rights over those in his control in the private realm, i.e., women, children, and servants.[7]

As far as the identification of public and private spheres is concerned, two basic accounts have been influential.[8] In the first, the division is between the state and the civil society. Particularly in nineteenth-century *laissez-faire* versions of liberalism, a central idea was that the role of the state should be strictly limited, with the market governing relations other than family relations in civil society.[9] In the second account, the division is between the state and/or the market on one hand and the family on the other. The family is constructed as the private sphere in which human relations must be allowed to develop away from the scrutiny, let alone intervention by the state or market institutions.[10]

As O'Donovan summarises, in recent scholarly writing, the concepts of public and private stand for a variety of referents. "Public" denotes state activity, the values of the market place, work, the male domain, or that sphere of activity which is regulated by law. On the other hand, civil society and personal areas like sexuality, biological reproduction, family, home, which are particularly identified socially as women's domain are seen as "private".[11] In the words of Catherine MacKinnon: "The very place

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[7] Ibid
[8] Ibid.
[9] Ibid.
[10] Ibid.
[11] K O'Donovan *Sexual Divisions in Law* (London: Butler & Tanner, 1985) p.3. Cooper in this regard observes that private does not denote a specific place such as home or domestic sphere. Rather, it identifies "a particular set of norms: feelings of belonging, comfortability, knowing, derived from familializing practises, symbols, and physical structures." For details see, D Cooper ' "And You Can't Find Me Nowhere": Relocating Identity and Structure within Equality Jurisprudence' (June 2000) 27 *Journal of Law and Society* 2. p.269.

(home, body), relations (sexual), activities (intercourse and reproduction), and feelings (intimacy, selfhood) that feminism finds central to women's subjection form the core of private doctrine."[12]

3. Gender Implications of the Dichotomy

a) The domestic sphere remains a sphere of inequality

It has been argued that the dichotomy assumed between "public" (non-domestic) and "private" (domestic) has enabled the family to be excluded from the values of "justice" and "equality". This is because the family, as a private sphere institution, is assumed to operate on the basis of values like love and sacrifice as opposed to individualism, competition and those notions of equality and justice operating in the public sphere.

Feminists scholars have pointed out that, since women's lives have in many societies been lived to a greater extent than men's within the so-called private sphere, the implication of the public/private division has meant that fundamental sources of women's oppression are politically invisible and hence ignored.[13] As has been pointed out, "in discussion of the privacy of marital relations or of the boundaries of state intervention, the home, the family and the married couple remains an entity that is taken for granted. The couple is a unit, a black box, into which the law does not purport to peer. What goes inside the box is not perceived as the law's concern. The belief is that it is for family members to sort out their personal relationships. What this overlooks is the

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[12] C MacKinnon 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) 8 *Signs* 635 at 657.
[13] Lacey, n.6 above.

power-inequalities inside the family which are of course affected by structures external to it."[14]

Similarly, in Bangladesh, relationships and the allocation of resources within the family are governed by religious laws that fundamentally deny equality to women in almost all basic facets of their lives. A close analysis shows that almost all the key provisions of Muslim and Hindu law (In support of this discriminatory aspects of the provisions related to marriage, divorce, custody and guardianship of child and inheritance of Islamic law operated in Bangladesh has been discussed in details in Chapter II) are designed to define and support the differential power relation within the family. In maintaining the division between general and personal law and leaving the personal sphere to be regulated by discriminatory religious laws allow the personal sphere to remain as a domain of inequality where women's lives are largely spent.

The division also serves as a pretext for excluding discriminatory personal laws from the scrutiny of the Constitution and allows the State to turn a blind eye to the various forms of discrimination and even violence that continue to operate in the personal sphere. As has been discussed earlier, although the Constitution by Article 28(1) guarantees equality to all citizens irrespective of their sex, religion and caste, this guarantee has been seen to be inapplicable to personal sphere and as has been discussed in Chapter I, there is a considerable amount of debate as to whether the State has the power to intervene and bring substantial changes in the religious laws in order to bring them in line with the equality principle or to strike them down on the ground of unconstitutionality.

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[14] O'Donovan, n.11 above.

In spite of vigorous campaigns by numerous women's right organisations for decades, the State has failed to address even the most glaring provisions of inequality existing in the personal laws, like the issues of polygamy in case of Islamic law or divorce in case of Hindu law[15], whereas some of these issues have already been resolved in other Muslim and Hindu dominated countries such as Tunisia and India. The construction of the personal-private sphere as a realm beyond state intervention is at the heart of the exclusion of constitutional equality guarantee from key areas of women's lives in Bangladesh.

b) Obstructs participation of women in public life

A salient feature of the division between public and private is the representation of the public sphere as superior to the private (domestic) sphere.[16] The public sphere is consistently represented as the sphere of rationality, culture, and intellectual endeavour, whereas the domestic sphere has been represented as the sphere of nature, nurture, and non-rationality.[17] In this context, it is significant to note that the public sphere is the designated sphere of male activity. Domestic activity is relegated to the private sphere and its relationship with public activity is mediated by men who move between both

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[15] As has been explained in Chapter II, Islamic law grants to men unilateral and unrestricted power of divorce. In contrast, women's power in this regard has been made restricted. Hindu law, on the other hand, considers marriage as a religious sacrament and does not give women any power to divorce.
[16] F Olsen 'The Myth of State Intervention in the Family' (1985) 18 *University of Michigan Journal of Law Reform* p.835. See also, F Olsen 'The Family and the Market: A Study of Ideology and Legal Reform' 96 *Harvard Law Review.*
[17] Ibid.

spheres. Women traditionally have a place only in the private sphere.[18] As Boyd points out, the ways in which the public sphere is organised—arguably along the lines of a presumed married man's lifestyle-rely on a particular way of organising the private sphere. The ability of the unencumbered individual (man) to participate in the public sphere of work and politics assumes that someone, usually a woman, is preparing his food, cleaning his house, and raising the next generation of labourers through her reproductive labour.[19]

Much of women's history over the last century in the Western world and elsewhere has been characterised by the struggle for acceptance within the public sphere on the same terms and conditions as men. Conventionally, "a 'public woman' was a prostitute, a figure of derision, in contrast to a 'public man' a figure of approbation who acted in and for the universal good".[20] In the context of Bangladesh, although the state under the Constitution has the obligation to ensure equal participation of women in public life, it can be argued that by leaving the personal sphere to be regulated by discriminatory personal laws, it plays a significant role in obstructing women's participation in the public life.

The main religions (both Hinduism and Islam) ascribe some virtues to women that tend to confine them to a narrow sphere of behaviour which is reinforced by various provisions of the religious laws operating in the personal sphere. Both Hindu and

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[18] O'Donovan, n.11 above, p.3.

[19] S Boyd 'Challenging the Public/Private Divide: An Overview' in S Boyd (ed.) *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (London: University of Toronto Press, 1997).

[20] Thornton, n.1 above, p.13.

Muslim law perceives women's role as a mother and wife as the most sacred and essential one. A good Muslim or Hindu woman is one who remains faithful to her husband and sacrifices her own aspirations and dreams for the sake of her family and her children. This can leave women, whose major energy, labour and time is spent in domestic chores, in a state of acute and permanent dependence.

The provisions of the religious laws are based on the perception that women need protection in return for their subordination. Men on the other hand are entrusted with the responsibility of protecting and taking care of women. As seen in Chapter II, this attitude is manifested in several key areas of Islamic law like dower, maintenance, inheritance, and guardianship.

For example, although it is well established that according to the provisions of Islamic law the maintenance of the wife is obligatory duty of the husband, such duty is also conditional. According to *Shari'a* the husband is bound to maintain his wife so long as she remains faithful to him and obeys his reasonable orders. He is not liable for her maintenance if she goes on a voyage without her husband's permission, or she takes employment outside the house without his consent, or she is guilty of *nushuz* or disobedience.[21]

Again, in the case of inheritance, a Muslim woman is entitled to only half of what her brother inherits, and a Hindu woman is not entitled to inherit her paternal property at all.

The underlying perception here is that since a Muslim woman does not have the

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[21] See Serajuddin and the detailed discussion on maintenance of women under Islamic law in -- A Serajuddin *Shari'a Law and Society: Tradition and Change in the Indian Subcontinent* (Dhaka: Asiatic Society of Bangladesh, 1991), Chapter 11. See also-- J Nasir *The Status of Women Under Islamic Law* (London: Graham and Trotman, 1990) p.63.

mandatory obligation and responsibility to maintain her family, it is only fair that she gets half the share compared to her male legatee/inheritor. In the case of the Hindu law of inheritance, the perception behind the subordinate position of women can be better understood from the statement of the arch lawgiver Manu: "Their father'' says Manu, "protects them in childhood; their husbands protect them in youth; their sons protect them in age: a woman is never fit for independence."[22]

The public sphere is known to be the sphere of activity of the autonomous individuals. On the other hand, the religious laws governing the personal sphere perceive women as all time dependants, a protected species, who for their every need (from food to shelter) depend on their male counter part. It therefore appears impossible to comprehend that a woman can participate in the public sphere as an autonomous individual when she is located within a relationship of dependence and subordination in the personal sphere. Thus it can be argued that by leaving the personal sphere to be operated by religious personal laws that embed women's subordination, the state in turn, limits their participation in the public sphere where the equality principles purport to govern.

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[22] F Agnes *Law and Gender Inequality: the Politics of Women's Rights in India* (New Delhi: Oxford University Press, 1999), p.6.

4. Deployment of Public-Private Critiques by the Feminists

General Critique

For feminist scholars the traditional conception of the unregulated private is the prelude to an explanation of the division between women and the men in law.[23] According to them, the fiction of non-intervention often serves to disguise the multifarious ways in which the state actively fashions the family and gender relations.[24] It is from this point of view that the famous feminist slogan "the personal is political" emerges, arguing that issues of sexuality and family are and should be of political significance. The argument arising from this line of thinking is that law is not only deeply entrenched in concepts of private and public but also plays an important part in the construction of that division.[25] As the dichotomy is constructed and contingent it is negotiable and may even be reshaped to women's advantage (if not dissolved altogether).

As has been discussed in Chapter I, women's right activists, scholars in Bangladesh as elsewhere in the world operate from the point of view that it is possible to force a patriarchal state and its legal system to bow to women's ends by extending the equality guarantee of the Constitution in the sphere of personal laws. Their project has been to put the issue of the reform of personal laws squarely on the public agenda. They claim that what occurs in the so-called personal sphere should be the legitimate concern of the

[23] O'Donovan, n.11 above, p.1.
[24] Thornton, n.1. above, p.14.
[25] Ibid.

state. Their initiatives[26] have directly challenged the barriers surrounding the family as sacrosanct private sphere.

Feminists across the political spectrum are agreed that the public and private are not in any real sense two distinct and separate spheres.[27] They have contested the distinction as conceptually flawed and misleading. They argue that the terms "intervention" and "non-intervention" are largely meaningless since the terms do not accurately describe any set of policies.[28] The state constantly defines and redefines the family and adjusts and readjusts the family roles whether or not it is designated as "private". Non-intervention is therefore a false ideal because it has no coherent meaning. [29] This conclusion becomes even clearer when we take into account the difficulty of attaching any general significance to a distinction between regulation and non-regulation, or between intervention and abstention. [30] This is because, as the following discussions on "indirect intervention" will demonstrate, in some cases it can be unclear whether to characterise the state's position as one of regulation or non-regulation. Thus, any argument which presupposes the personal sphere as legally unregulated is simply unsustainable. More importantly, any position which denies the extension of equality guarantee of the Constitution to the personal sphere on the ground that it should remain unregulated is based on plainly false premises.

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[26] One of their demands is to have a unified personal status law applicable to all citizens irrespective of religion. This is discussed in more details in the concluding Chapter of the thesis.
[27] See generally O'Donovan n.11 above and M Thornton n.1 above.
[28] Olsen, n.16 above, p. 835.
[29] Ibid. See also, F Olsen 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 *Harvard Law Review* 7.
[30] Ibid.

As the following discussion shows, in the light of the feminist arguments developed in this area, the conventional line of demarcation between the general and the personal sphere can be effectively challenged by highlighting their contradictory and shifting strands.

The Myth of the Unregulated Private Sphere

Feminist scholarship points out that the public private division (general-personal in Bangladesh context) is not grounded in reality but is ideological, adopted to defend and justify certain positions taken by the state. There exists an ever-shifting boundary between what is considered to be public and personal matters by the State. As can be seen from the following discussion, in spite of a great deal of rhetoric about the non-intervention in the personal sphere, on numerous occasions the State has practically intervened in the personal sphere by legislation, judicial intervention, and policies.

(a) Direct Intervention through Legislation

In independent Bangladesh, Family Courts were established by the Family Courts Ordinance (1985)[31], which is considered as a significant step towards legislative reforms with reference to the legal status of women in the personal sphere. There had also been some amendments to existing legislation operating in the personal sphere. Prominent among these are, the Dissolution of Muslim Marriages (Amendment) Ordinance (1986)[32], the Muslim Family Laws Amendment Ordinances of 1961[33], 1985[34], and

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[31] (XVIII of 1985) 37 DLR (Sta) 159.
[32] (XXV of 1986) 38 DLR (Sta) 105.

1986[35], the Muslim Marriages and Divorces (Registration) (Amendment) Ordinance (1982)[36] and the Family Courts (Amendment) Act (1989)[37].

Although registration is not essential for the validity of marriage under classical Islamic law[38], the Muslim Marriages and Divorces (Registration) Act (1974)[39] was enacted to strengthen the process of civil registration requiring that every marriage under Islamic law should be registered before the marriage-registrars. The punishment for not registering a marriage is a prison sentence and/or a fine.

Similarly, the minimum ages of marriage[40] were gradually increased by a series of statutes to 21 for men and 18 for women of all communities.[41] The Child Marriage Restraint (Amendment) Ordinance (1984)[42] provides penal sanctions for those who knowingly participate in the contracting of an under-age marriage.

Among all legislative interventions the most important and most controversial is perhaps the Muslim Family Laws Ordinance (1961)[43] which imposed limitations on the arbitrary rights of men in the two most significant areas of Islamic law, divorce and polygamy.

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[33] Muslim Family Laws (Amendment) Ordinance (1961) (XXI of 1961) 14 PC *NP* and Muslim Family Laws (Second Amendment) Ordinance (1961) (XXX of 1961) 14 PC *NP*.
[34] Muslim Family Laws (Amend) Ordinance (1985) (XIV of 1985) 37 DLR (Sta) 244.
[35] Muslim Family Laws (Amendment) Ordinance (1986) (XXIV of 1986) 38 DLR (Sta) 73.
[36] (XLIX of 1982) 35 DLR (Sta) 76.
[37] (XXX of 1989) 41 DLR (Sta) 38.
[38] T Mahmood *The Muslim Law of India* (Allahbad: Law Book Co., 1982), p.56.
[39] (LII of 1974) 27 DLR (Sta) 4.
[40] There is no fixed age for marriage under *Shari'a* law while under the Hindu law minors are not only eligible but are considered to be fittest to be taken into marriage.
[41] For details see: Child Marriage Restraint Act (1929) [(Act XIX of 1929) 8 PC 430, 11 BC 77], the Muslim Family Law Ordinance (1961) [(VIII 1961) 14 PC 67], the Child Marriage Restraint (Amendment) Ordinance (1984) [(XXXVIII of 1984) 36 DLR (Sta) 134].
[42] (XXXVIII of 1984) 36 DLR (Sta) 134.
[43] (VIII 1961) 14 PC 67.

As has been discussed in details in Chapter II, the Muslim Family Laws Ordinance (1961)[44] imposed restrictions on the practice of polygamy sanctioned by the Islamic law. The Ordinance provides that the first wife's consent and previous permission in writing of the Arbitration Council will be required to conduct a second marriage by the husband. If a marriage is contracted without such permission of the Arbitration Council, the husband shall be liable to punishment with simple imprisonment which may extend to one year, or with a fine which may extend to taka 10,000, or with both.[45]The Ordinance also established that a second marriage contracted against the first wife's wishes constitutes a ground for divorce by the wife.

Similarly, we have seen in Chapter II that to the husband, Islamic law grants unilateral and arguably arbitrary power to divorce. On the other hand, the wife's right in this regard is conditional. To prevent easy divorces the Muslim Family Laws Ordinance (1961)[46] attempted to introduce a rational procedure for effecting divorce.[47] Most importantly, as has been discussed in Chapter II, the Ordinance abolished the extremely oppressive practice of *talaq-i-bid'at* or triple divorce of the wife by the husband and allowed remarriage after such a divorce without an intervening marriage with another man.

It is needless to mention that the passing of the Ordinance was met with approval and enthusiasm by the women rights activists of that time but by universal disapproval by the orthodox Islamic groups who accused it of distorting the fundamental principles of

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[44] Ibid.
[45] Ibid., Section 6.
[46] Ibid, n.43 above.
[47] For details see: Serajuddin, n.21 above, p.203.

Islamic jurisprudence and giving it a western slant and bias.[48] They also questioned the right of the state to intervene and reform the sacred provisions of Islamic law. Fortunately, in spite of all the opposition, the Ordinance has not been repealed and continues to remain in force in Bangladesh.

(b) Intervention by the Judiciary

In spite of the non-interventionist stance purportedly taken by the State, occasionally the judiciary has come forward and intervened by providing progressive interpretations of various personal law provisions. Sometimes the Courts have even gone far enough to deviate from some of the established provisions of religious laws in order to bring them in line with the spirit of the Constitution.

For instance, in a case of the restitution of conjugal rights,[49] the Court ruled that, with the passage of time, a husband's right of forcible restitution of conjugal rights against an unwilling wife has become an outmoded and unsustainable concept when considered in the light of the principle of equality between men and women under the Constitution. The Court observed, "in husband's unilateral plea for forcible restitution of conjugal rights as against a wife unwilling to live with her husband, there is no mutuality and reciprocity between the respective rights of the husband and the wife, since such plea for restitution of conjugal rights is not available to a wife as against her husband apart from claiming maintenance and alimony. Thus, reference to Article 28(2) of the Constitution of Bangladesh guaranteeing equal rights of women and men in all spheres of the state

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[48] Ibid.
[49] Nelly Zaman v. Giasuddin Khan (1982) 34 DLR 221.

and public life would clearly indicate that any unilateral plea of a husband for forcible restitution of conjugal rights as against a wife unwilling to live with her husband is in violation of the accepted principles and policies"[50]. The unpublished judgments of the Family Court with regard to the issue of restitution of conjugal rights indicate that the recent progressive judgments of the higher judiciary have had effects on the lower tier of the judiciary.[51]

In Jesmin Sultana v. Mohammad Elias (1997)[52], the Court held that polygamy can be considered as against the principle of Islamic Law. Referring to the works of various modernist Islamic scholars the Court stated that to treat the co-wives justly and equally is an essential condition for polygamy and since this essential condition is practically impossible to fulfil because of weakness of human nature and also because of the modern social and economic conditions, the *Qur'anic* injunction that a second wife may be taken under specific conditions amounts virtually to a prohibition. Noting that Tunisia has given legislative effect to this interpretation, the Court concluded polygamy should be prohibited altogether in Bangladesh. As has been pointed out in Chapter II, the Court also referred the judgment to the Ministry of Law for amending the law accordingly but no action is known to have been taken on it yet.

In Bangladesh, the Guardians and Wards Act (1890)[53] which governs the issue of custody of a child provides that the courts are to be guided by the personal law of the

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[50] Ibid, p.222.
[51] For details, see: T Monsoor *From Patriarchy to Gender Equity: Family Law and its Impact on Women in Bangladesh* (Dhaka: University Press Ltd, 1999) p.175.
[52] 17 BLD 4.
[53] (VIII of 1890) 3 BC 292, 3 PC 300.

minor while deciding the custody issue. The courts are also directed to consider the age, gender and religion of the minor and the character and capacity of the proposed guardian, as well as considering the minor's own opinion if s/he is old enough to form an intelligent preference. As has been pointed out in Chapter II, for Muslims, the classical *Hanafi* position is that the mother is entitled to custody over male children until the age of seven and over female children until puberty. The right of the mother to the custody of her children continues after her divorce but she can forfeit the right in certain circumstances, for example, if she marries a stranger or changes her religion. In cases of custody, the judiciary of Bangladesh seems to protect women more, as they see the mother's right of custody of young children as almost an absolute right.[54] This has been confirmed by a number of judgments, such as Muhammad Abu Baker Siddique v. S.M.A. Bakar & others (1986)[55]. The Court's ruling deviated from the classical dictates of *Hanafi* law according to which the mother's custody over a boy ends at seven. The Court stated that the principle of Islamic Law has to be regarded, but deviation there from would seem permissible as the paramount consideration should be the "child's welfare".[56] As has been pointed out in Chapter II, this reveals an interesting contradiction in the personal laws which on the one hand, accords almost absolute familial authority to the father and on the other hand, by assuming women's natural role as a caregiver, grants custody of children to women. This contradiction, which is also evident in western social and legal conceptions of the family, offers a rare example where women can legally benefit from the personal-general dichotomy.

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[54] See Monsoor, n.51 above, p.193.
[55] 38 DLR (AD).
[56] Ibid.

(c) Indirect Intervention

As feminist critiques of the public/private dichotomy point out, it is wrong to see direct legal regulation as the touchstone for state involvement. In all sorts of indirect ways, state institutions often have a crucial and deliberate impact on the conduct of family life.[57] For example, the exemption of married men from charges of rape of their wives, which persists in many jurisdictions including Bangladesh, is generally perceived as non-regulation. Yet it discloses a certain view of the marriage relationship which is positively inscribed in law.[58] As Boyd points out through the state's failure to criminalise or prevent violence and discrimination against women or children in the home, men have been accorded significant "privatised" power by laws on marriage and family relations.[59] Thus, in fact, the state always plays a role in regulating social and economic relations, even in its apparent absence.[60]

Generally, the "personal sphere" is considered personal because of the State's reluctance to intervene. However, it also needs to be borne in mind that it is the law that constructs the personal sphere by closing off that arena as inappropriate for its own intervention and leaving it in the open to be operated by disadvantageous religious laws. The decision not to intervene and to allow women's disadvantage to continue made by the state or other institutions with the power to do so are as much political decisions as are

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[57] Ibid.
[58] Lacey, n.6 above.
[59] Boyd, n.19 above.
[60] D E Chunn 'A little Sex Can Be a Dangerous Thing: Regulating Sexuality, Venereal Disease, and Reproduction in British Columbia' in Susan B Boyd (ed.) *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (London: University of Toronto Press, London).

decisions to intervene.[61] In other words, the State's policy of non-intervention and/or omission is precisely another form of intervention, which facilitates and legitimates male dominance.

For example, even though the state may not intervene overtly in the sphere of the religious personal laws, it implicitly sanctions the unequal status quo between men and women by its non-intervention. It has been pointed out in Chapter II that some of the discriminatory provisions of Islamic law such as unilateral right to divorce by the husband and the right to conduct polygamous marriage often lead to endless sufferings of women and leave them and their children destitute. Also, the duty of obedience (this will be discussed in more details in the next Chapter) owed by the wife to the husband common in many Islamic societies including Bangladesh is extremely oppressive towards women and can be seen as approving use of force or violence against women. It has also been pointed out that the underlying value of many provisions of the religious laws such as maintenance and dower in Islamic law that men are protector and provider and women are in need of protection and dependent- reinforces dependence and subordination of women and obstructs their participation in the public arena or workplace as fully autonomous individual. Not intervening in the sphere of personal laws therefore, means condoning the violence, oppression and subordination that continues in the personal sphere and thus facilitating and legitimising dominance of men over women. This decision of non-intervention in the sphere of personal laws is therefore just as political as the decision to intervene.

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[61] Lacey, n.6 above.

5. Conclusion

In the light of the foregoing discussion, it is submitted that the boundary between public/general and private/personal sphere is an ideological construction, which shifts in time depending on the varying socio-historical contexts. The division is contingent on factors such as beliefs about morals and gender, legal theories about law enforcement, and social and economic conditions etc.[62] Although political and legal discourses often insist on maintaining the idea of a clear dichotomy between the public and personal, it is not possible to sustain the boundary analytically over time.[63] Hence, labelling an area of conduct, as 'private' or 'personal' does not necessarily mean that it will be able to retain that label forever.

It has been demonstrated in the earlier sections that maintaining the so-called general-personal division in the laws inevitably links the state with male dominance and operates as a rhetorical device against the application of equality guarantee to a number of significant aspects of women's lives in Bangladesh. Therefore, the next obvious question is whether it is open to the state to intervene in the sacrosanct personal sphere to make it embrace the principle of justice and equality.

As has been discussed, although the concept of personal sphere denotes a sphere of behaviour free from state intervention, this idea of a sphere free from intervention simply collapses when subjected to scrutiny. It is therefore irrelevant to question the state's authority to intervene as the state is already implicated by its numerous direct and

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[62] O'Donovan, n.11 above, p.160.
[63] Ibid.

indirect policies and legislative attempts in the sphere of personal laws. The discussion on public private dichotomy in this Chapter clearly shows that maintaining a divide does not mean complete separation of public and private. This Chapter therefore, continues the argument that what happens in one sphere influences the other and consequently it is an illusion to think that complete separation can occur.[64] To ensure equality in one sphere it is absolutely imperative to ensure equality in the private sphere as well.

As has been pointed out earlier in this Chapter and also in Chapter I, the equality guarantee enshrined in Article 28(2) of the Constitution expressly affirms the responsibility of the state to ensure women's equality in the state and public life. In light of the discussions and the arguments put forward in this Chapter highlighting the overlapping and shifting nature of the public and private, it can be argued that in order to fulfil this constitutional responsibility of ensuring equality in the public sphere, the state has to ensure it in the personal sphere as well. In this regard it has been pointed out that religious personal laws governing the private sphere assigns and perpetuates a specific gender role (i.e., men provider and protector-women dependent and in need of protection) that in turn discourages and sometimes obstructs women's participation in the public life. In this regard, the duty of obedience owed by the wife to the husband under Islamic law can be mentioned which sometimes directly obstructs women's participation in the public life or job market when their husbands do not permit them to take work outside home. On the other hand, various provisions of Hindu and Muslim laws that are based on the idea of traditional gender roles and stereotyping such as, maintenance indirectly obstructs women's participation in the public life as fully

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[64] See generally-O'Donovan n.11 above.

autonomous individuals. Hence, the policy that propagates to achieve equality ignoring the overlapping nature of the spheres cannot succeed. As O'Donovan observes, reforms which do not confront this fact will fail, for within each proposed reform are the seeds of conflict.[65] It is therefore, an illusion to think that it is possible to achieve equality in one sphere (i.e. in public) independent of the other sphere (i.e. sphere of personal laws) where inequality flagrantly exists.

It is therefore concluded that the confinement of equality principles to the public sphere is legally and conceptually unsustainable. Finally, it is the proposition of this Chapter that State's constitutional obligation to ensure gender equality can only be achieved, if, side-by-side the public sphere, equality in the personal sphere is also effectively ensured.

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[65] Ibid., p.159.

CHAPTER IV

THE PROSPECTS OF EQUALITY

AND THE RELIGIOUS PERSONAL LAWS

1. Introduction

In Bangladesh, like many other democracies, "equality" is a key political and legal principle. The last few decades have seen a wave of critical analysis and debate particularly in the West, focusing on the concept of equality, resulting in a transition and development in the understanding of equality from a narrow approach of formal equality to a more sophisticated and context-based approach of substantive equality. Some of the major contributors to the equality-based scholarship are feminist scholars and activists from around the world who have long been critical about the strategic value of the liberal concept of formal equality relied upon by democracies.

As has been discussed in the earlier Chapters, the Constitution of Bangladesh guarantees equality to all its citizens irrespective of their religion and sex. This Chapter therefore, reviews of some of the debates associated with equality as identified by feminist scholars and activists. The nature, scope and possibilities of

the equality guarantee in the context of Bangladesh are also examined in light of these debates. In this regard, the Chapter draws attention to a very recent case[1] that involves interpretation of the equality guarantee of the Constitution and its significance in developing the concept of "substantive equality" in the equality jurisprudence in Bangladesh.

2. Feminist Critiques of Equality

Before focusing directly on the scope and nature of the equality as enshrined in the Constitution of Bangladesh, it is necessary to consider the concept of equality, both as a norm and as a strategic goal, in the context of feminist legal scholarship aimed at improving the status of women in societies across the world. In this regard, it must first be noted that although equality has been and continues to be a central concept in feminist legal scholarship, there have also been ongoing debates among feminists revolving around the question of what legal equality truly entails and how it might be attained in different socio-economic and cultural contexts. Feminist scholars and activists, both inside and outside the West, have long been critical of the strategic value of the liberal concept of "formal equality" which invokes notions of sameness and difference to determine the application of equality norms. In the 1980s, what became known as the "sameness/difference debate" gained momentum in feminist legal scholarship, essentially revolving around the question of whether the liberal concept of formal equality required sameness with men or accommodated difference.

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[1] Shamima Sultana Seema and Others v Bangladesh and others (2003) WP No. 3304/2003. The verdict came out on 16 August 2004. The case has not been reported in the journals and the written copy has not been made available to the parties yet. As such the details of the judgment are not known at the time of submission of the thesis.

By invoking Aristotle's famous maxim "likes should be treated alike and un-likes un-alike" the formal approach to equality holds that only similarly situated individuals are entitled to be treated in the same way and any difference in treatment between similarly situated individuals constitutes discrimination. This "sameness approach" has found its way into constitutions like that of the USA, India, and Bangladesh in the form of the equal protection doctrine. In Bangladesh, it has been used to strike down law or provisions that treat men and women differently. For example, in Uttar khand Mahila Parishad v Uttar Pradesh (1992)[2], when women teachers and employees in the education department were given lower salaries and less promotion as compared with their male counterparts doing the same work, it was found to be unconstitutional. Also in a very recent case, Shamima Sultana Seema and Others v Bangladesh and others (2003)[3] the High Court Division of the Supreme Court of Bangladesh held that a governmental circular purporting to provide women ward Commissioners elected from reserved seats[4] with reduced powers and functions

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[2] AIR SC 1695.

[3] n.1 above. The facts of the case are as follows: A Writ Petition was filed by ten women commissioners impugning a Circular issued by the Ministry of Local Government, Rural Development and Cooperatives as being without lawful authority and in violation of their fundamental rights as guaranteed under Arts. 27 and 28, read with Arts. 9, 10 and 11 of the Constitution. On 25.4.2002, the ten petitioners were elected from "reserved seats" to the Khulna City Corporation, namely seats "reserved" for the election of women, pursuant to section 4(3) of the Khulna City Corporation Ordinance 1984. Another 31 Commissioners were directly elected from the "general" seats, namely seats for which both men and women may contest. The petitioners were directly elected on the basis of universal adult franchise, and from a constituency equivalent to three wards, as opposed to a constituency limited to one ward in the case of "general" seats. On 23.9.2002, the Ministry of Local Government Rural Development and Cooperatives (Local Government Division) issued a circular which set out sixteen separate sets of powers and functions and purported to impose certain disabilities on Commissioners elected from "reserved" seats. Some of these power and functions have been pointed out in n.5 below. These facts have been collected from the Written Submission in support of the Petitioners prepared by Ain o Salish Kendra (ASK), a Dhaka-based human rights and legal aid centre, which was an Intervenor in this Petition.

[4] In 1999, the government amended the local government laws and introduced reserved seats for women in the local government bodies in an effort to empower them politically. As such, in every City Corporation in Bangladesh now, in addition to the general seats (to which both men and women may be elected) one third of the commissioners' posts are "reserved" by law for women.

(as compared to the Commissioners elected from General Seats)[5], to be in violation of the Constitution. As will be seen later in his Chapter this case is of great significance for equality jurisprudence in Bangladesh because of its reference to the equality guarantee of the Constitution and because of the fact that "substantive equality" argument was put forward in the Written Submissions in support of the Petitioners[6] for the consideration by the Court while interpreting the Constitutional guarantee of equality.

As mentioned above, the corollary to the Aristotelian principle "likes should be treated alike" is that "un-likes may be treated un-alike". Thus, if an individual or group is "different" in some way, according to this approach, it is legitimate to treat that group or individual differently, even if such treatment results in disadvantage. Interestingly, as feminist critical scholarship developed in this area reveals, the norm underlying this model of equality - that from which the individual or group is deemed to be different – very often conforms to a prototypical person who is, inter alia, male; and it is this prototype that represents the goal and the standard by which the right to equality is measured. Therefore, to qualify for equal treatment according

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[5] As the arguments submitted on behalf of the Petitioners by the Intervenor (i.e., Ain O Salish Kendro) points out, the Circular lays down sixteen separate sets of powers and functions, which accordingly impose certain disabilities on the Commissioners who are elected from the "reserved" seats. Some of them are as follows: 1. According to the Circular the Commissioner elected from the "reserved seats" may serve only as an advisor to a local Law and Order Preservation Committee, while a Commissioner elected from a "general seat" may not only establish such a Committee but also serve as its Chairperson; 2. Commissioners from the "reserved seats" are not permitted to take part in the census proceedings or issue certificates in their constituencies regarding nationality, births/deaths, inheritance and character etc; 3. Commissioners from the "reserved seats" must serve as the Chairperson of the Committee to Resist Dowry Violence, Acid Attacks and undertake Marriage Registration as well as take steps for the welfare of women and children. In addition, according to a leading newspaper report, Commissioners elected from the reserved seats in Khulna City Corporation have also been receiving a lesser amount as honorarium for their attendance in the official meetings etc compared to the "general-seat" commissioners. See, The Daily Star, 22 August 2004 at www.thedailystar.net (Last accessed 02.12.04).

[6] Written Submission in support of the Petitioners were prepared by Ain o Salish Kendra (ASK), a Dhaka-based human rights and legal aid centre, which is an Intervenor in this Petition. See n.1 above.

to the formal equality approach, women are expected to demonstrate that they are same as the prototype (i.e., men). Moreover, even where women assert rights based upon their "difference", they are invariably invoking a male benchmark. Of significance here is the analysis of Catherine MacKinnon. MacKinnon rejects the sameness and difference dichotomy in the context of sex discrimination, arguing that in both cases (sameness or difference) "man" is the standard against which all others are measured. Under the sameness standard, women are measured according to their correspondence with "man". Under the difference standard, women are measured according to their lack of correspondence with him.[7]

Historically, women have been regarded as inherently different from men or the prototype, and this has served as a justification for the proposition that there is no obligation to treat them equally. For a substantial part of the history of women's movement in every society (including Western societies), we can see women struggling to fit within the liberal equality paradigm, to prove that they are equal to the prototype and to obtain the same rights and privileges accorded to men under law.[8] In law reform efforts and litigation, women's fight for equality was, during this period, largely a fight for inclusion[9] which was premised on a version of equality that stressed the similarity of the needs and concerns of men and women and called for equal treatment of law to all, irrespective of sex, class, ethnicity etc. In reality, however, it can be argued that women often have different needs and concerns. Differences in biology, for example, may warrant differential treatment in some

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[7] For details, see C MacKinnon *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987), p.34.

[8] The history of the Canadian women's movement is mentionable in this regard. Majury discusses the history of Canadian women's struggle to fit in with the liberal equality paradigm in the pre-Charter era which insisted on similarity of needs and concerns of men and women. For details, see D Majury 'Women's (In) Equality before and after the Charter', in R Jhappan (ed.) *Women's Legal Strategies in Canada* (Toronto: University of Toronto Press, 2002), pp.103-106.

[9] Ibid.

important areas[10]. Moreover, men and women are often differently socially situated[11]. By assuming identical/similar experience, needs and concerns among men and women, the formal equality approach thus denies significant factors such as unequal power relations in the private or domestic sphere, the implications and consequences of child birth and child care etc. As such, it can be argued that formal equality fails to address the underlying disadvantage and structural inequalities which belie the appearance of equality (understood in terms of sameness of treatment), thus serving to perpetuate prevailing patterns of social, economic and cultural disadvantage. In addition, critical race theorists[12], building upon the experiences of women across the globe, have raised serious questions about the strategic value of equality in non-white/non-western contexts by highlighting the forced essentialism common to invocations of equality, viewed in terms of sameness or difference, and in which equality operates normatively to affirm and promote western values and lifestyles.[13] Indeed, even where equality is invoked to accommodate difference, the tendency is to assume a generically different woman who departs from the male prototype. Thus whether equality operates to require sameness or to allow for difference, the concern is that equality cannot accommodate the needs and aspirations of women from different social, cultural, and geographical

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[10] E H Wolgast *Equality and the Rights of Women* (London: Cornell University Press, 1980), pp.22-23.

[11] Ibid.

[12] See-- A Harris 'Race and Essentialism in Feminist Legal Theory' (1990) 42 *Stanford L Rev* 581, A K Wing *Global Critical Race Feminism: An International Reader* (New York: New York University Press, 2000) and R Hunter 'Deconstructing the Subject: The Essentialist Debate in Feminist Theory and Practice' (1996) 6 *Australian Feminist Law Journal.*

[13] According to such a critique, equality is essentialist in the sense that it relies on the construction of generic female identity that denies significant differences between women derived from race, ethnic background, class, sexuality etc and hence assumes identical experiences and interests among women. In reality, women from different social, cultural, and geographical backgrounds often have completely different experience and needs. For a detailed critique, see R Jhappan 'The Equality Pit or the Rehabilitation of Justice' (1998) 10 *Canadian Journal of Women and the Law* pp.60-107.

backgrounds.[14] In this way, critical analysis by feminist scholars and activists raises serious doubts about the strategic value of equality for societies in the third world, Muslim world, and in the black community.

To combat some of these problems arising from applications of formal equality, Western feminist scholarship has shifted its focus towards developing a more substantive understanding of equality, insisting that equality analysis should not focus on the sameness or difference of a claimant from some preconceived norm but rather on the social relationships and institutions which use differences to justify and enforce disadvantage, and on the ways in which such disadvantageous practices can be changed. According to the substantive approach, the primary purpose of an equality provision should be to eradicate past patterns of disadvantage and to interpret discrimination within the context of past and existing social, political, and economic disparities.[15] Feminist scholars have therefore placed the notions of difference and disadvantage at the heart of their substantive equality analysis.[16] But is not difference *per se* which is regarded as the source of discrimination or inequality, but difference rooted in disadvantage. Thus, unlike liberal legalism, feminist legal scholarship advocating substantive equality sees difference in more positive light by arguing that differences are only problematic when they perpetuate disadvantage among groups such as women or racial minorities. The focus is not

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[14] As Taslima Mansoor observes, the concept of equality dominating current legal scholarship undermines key factors of the social reality of countries like Bangladesh which is dominated by patriarchal norms, traditions, values and religious beliefs. For details, see T Mansoor *From Patriarchy to Gender Equity: Family Law and its Impact on Women in Bangladesh* (Dhaka: Oxford University Press, 1999) p.4.

[15] S Jagwanth and C Murray 'Ten years of transformation: How Has Gender Equality in South Africa Fared?' (2002) 14 *Canadian Journal of Women and the Law* 2, pp.255-299.

[16] A York 'The Inequality of Emerging Charter Jurisprudence: Supreme Court Interpretations of Section 15(1)'(1996, Spring) *University of Toronto Faculty of Law Review*, p.332.

therefore on difference as such but rather on the disadvantage resulting from this differentiation.

In line with the substantive equality approach, both the South African and Canadian courts have repeatedly affirmed and embraced a context-based analysis which requires courts to examine the actual impact of an alleged violation of the right to equality on the individual within and outside different socially relevant groups in relation to prevailing social, economic and political circumstances.[17] The substantive approach developed by the South African and Canadian Jurisdictions is discussed in detail in Chapters V and VI.

3. Equality Provisions in the Constitution of Bangladesh

Article 27 of the Constitution of Bangladesh combines the English concept of equality before law and the American concept of equal protection of the law.[18] It guarantees that "[a]ll citizens are equal before the law and are entitled to the equal protection of law." "Equality before law" is understood to mean that among equals the law shall be equal and shall be similarly administered. "Equal protection of law" means that all persons in like circumstances shall be treated alike and no discrimination shall be made in conferment of privileges and imposition of liabilities.[19]

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[17] For an overview, see generally Majury, n.8 above. See also, Jagwanth and Murray, n.15 above, pp.255-299. For development in a South African context, see National Coalition for Gay and Lesbian Equality v Minister of Justice (1998) 12 BCLR 1517 (CC); President of the Republic of South Africa v Hugo (1997) 6 BCLR 708 (CC); Brink v Kitshoff (1996) 6 BCLR 752 (CC); Harksen v Lane (1997) 11 BCLR 1489 (CC). For development in Canadian courts, see Andrews v Law Society of British Columbia (1989) 1 SCR 143; Law v Canada (Minister of Employment and Immigration (1999) 1 SCR 497. For a detailed account of the development of substantive equality jurisprudence in South Africa and Canada, see Chapter V and Chapter VI.

[18] M Islam *Constitutional Law of Bangladesh* (Dhaka: BILIA, 1995) p.88.

[19] Ibid.

Subsection 1 of Article 28 provides that no differential treatment can be made on the ground of race, caste, religion, sex or place of birth and subsection 2 provides that women shall have equal rights with men in all spheres of the State and public life. Similarly, subsection 3 of Article 28 provides that no citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institute. Subsection 1 of Article 28 can be contrasted with subsection 4 of Article 28 which provides that state is not prevented from making special provisions in favour of women or children or for the advancement of any backward section of the citizens. In addition, Article 29 (3) (c) allows the state to reserve for members of one sex any class of employment or office on the ground that it is considered by its nature to be unsuited to members of the opposite sex. From the above subsections of Article 28, it can therefore, be summarised that classification on the basis of race, caste, religion, sex or place of birth will be found to be invalid unless they can be shown to serve a legitimate governmental objective [20].

It is seen that Article 27 of the Constitution of Bangladesh contains the general equal protection provision while subsection 1 of Article 28 encompasses enumerated grounds upon which discrimination is prohibited. It is interesting to note here that the requirements of Article 27 are placed only upon the state, and private action is thus not covered by the provision. Also from the wording of subsection 27, the

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[20] Islam concludes this by referring to Chittaranjan v Secretary, Judicial Department (1965) 17 DLR 451. For details, see Islam, n.18 above.

provision appears to operate as a restriction on government and unlike the directive principles of the state[21] it does not impose any positive obligations upon the state.

Equality before law which is enshrined in Article 27 is a Diceyan principle which also has some significance for women's equality rights. As seen in the Canadian case laws there is scope to interpret it narrowly by using "difference" to justify discrimination so that a distinguishing feature in a particular group such as pregnancy can justify different and discriminatory treatment of that group[22] To overcome some of these problems the Canadian Charter of Rights and Freedoms (1982)[23] ("Canadian Charter") included the guarantee of "equal benefit of law" which enabled the courts to break away from the narrow application and judge the actual impact of the law in question.[24]

As has been mentioned earlier the equal protection clause of Bangladesh Constitution has been influenced by the United State's equality protection clause.[25] It may therefore be interesting to compare the general equal protection under Article 27 and the equality guarantee enshrined in various subsections of Article 28 of the Constitution of Bangladesh with the Equal Protection Clause of the Fourteenth

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[21] Part II of the Constitution of Bangladesh narrates the fundamental principles of State policy, setting out the economic, social and political goals for which the state is required to strive. According to Article 8 of the Constitution, the Fundamental Principles of State Policy are not only fundamental to the governance of Bangladesh but they are also to be applied by the state in the making of laws. However, these principles are not judicially enforceable as fundamental rights under the law. For details, see discussion on Constitutional framework in Chapter I.

[22] Dicey outlined three components of the rule of the law the third of which stipulated that every person is equally subject to the law. As some early cases under the Canadian Bill of Rights (1960) ("Bill of Rights") in Canadian jurisprudence demonstrate, it can be used to justify and uphold any law that infringes on a particular group's equality rights, so long as it applies to everyone in that group equally. Some of these cases have been discussed in Chapter V. For the Bill of Rights, see - (1960, c.40). Available at: http://laws.justice.gc.ca/en/C-12.3/text.html (Last accessed 10.09.04).

[23] (1882, 79). Enacted as Schedule B to the Canada Act (1982) (U.K., 1982, c.11), which came into force on April 17 1982. Available at: http://laws.justice.gc.ca/en/charter/index.html (Last accessed 10.09.04).

[24] For details, see Chapter V.

[25] Islam, n.18 above.

Amendment of the United States Constitution. The US Equal Protection Clause provides that "[no State shall] deny to any person within its jurisdiction the equal protection of the laws."[26] However, unlike the language of the Fourteenth Amendment, the language of Article 27 of the Constitution of Bangladesh is coupled with an additional requirement of "equality before the law", implying that no one shall receive special treatment under the laws of the state. Both provisions however, adhere to a negative approach in the sense that they impose a prohibition on government's action so that although the state cannot abridge equality rights, it is not required to act affirmatively to protect them.[27]

Although they have some similarities, the equality guarantee under the Constitution of Bangladesh however, is also different in an important respect as it surpasses the scope of the United States Equal Protection Clause by providing explicit equality protection for women. In contrast to the United States, Article 28 (4) of the Constitution of Bangladesh provides "affirmative action" for women, permitting the government to make "special provisions" for women in order to redress their historical disadvantage. The United States Equal Protection Clause gives no express "affirmative action" power. Only through judicial interpretation has the government been able to enact laws that ameliorate the disadvantage of women.[28]The fact that Bangladesh has an explicit affirmative action provision in its constitution enables it

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[26] Fourteenth Amendment of the U.S. Constitution in section 1 states: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Full text of the Amendment available at http://caselaw.lp.findlaw.com/data/constitution/amendment14/ (Last accessed 10.10.04).

[27] K Davis 'Equal Protection for Women in India and Canada: An Examination and Comparison of Sex Equality Provisions in the Indian and Canadian Constitutions' (1996, Spring) 13 *Ariz. J. Int'l & Comp. Law*, p. 31.

[28] Ibid.

to avoid some of the difficulties that the United States has had in establishing affirmative action power for the government. For example, unlike the United States, Bangladesh does not have to struggle with the question of whether "benign" discrimination is permissible in order to further its equality goals.[29]

a) Equality and the Constitution: formal equality v substantive equality

In the light of the above discussion, the next obvious question that comes to mind is to what kind of equality does the Constitution adhere? Does it adhere to the sameness approach of equality or does it offer scope to accommodate gender difference? And if difference is accommodated, is it difference formed in terms of disadvantage, allowing for the development of a substantive concept of equality? Although Article 28(1) prescribe a gender neutral application of equality provisions[30], by conferring a power upon the state to make special provision in favour of women or children or for the advancement of any backward section of the citizens under Art 28(4), the constitution does seem to accommodate difference, to a certain extent. Also from the wording of this subsection which lays down "nothing in this article shall prevent the State from

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[29] As Davis observes, in the United States, "benign" discrimination has been used to describe the process by which preferential economic legislation and treatment has been used to compensate for past economic discrimination against women. In the United States, preferential treatment for women has been upheld where it is compensation for past discrimination against women as a class, but not when it has unreasonably denied benefits to men. For example, Davis refers to Califano v Webster (1977) 430 U.S. 313, where the Court upheld a statutory scheme permitting women to eliminate low-earnings years from the calculation of their retirement benefits. The Court stated that the statute was enacted to redress the long-standing disparate treatment of women in society and was not based upon assumptions about women as the "weaker sex". Davis also points out some judicially imposed limitations that have been placed upon United States legislatures when implementing programmes to remedy past discrimination. For example, it has been noted that "quota" programmes would be difficult to defend as a valid affirmative action measure under the United States Equal Protection Clause because of the Supreme Court decision in Regents of the Univ. v Bakke (1978) 438 U.S. 265. For details, see - Davis, above.

[30] Article 28 (1) of the Constitution states: "The State shall not discriminate against any citizen on grounds only of religion, race caste, sex or place of birth."

making special provision in favour of women or children or for the advancement of any backward section of citizens" it appears that the Constitution recognises past pattern of disadvantage and where such disadvantage exists, provides the scope for preferential treatment. In other words, Article 28(4) provides the scope for taking into account difference and context in addressing the disadvantage and to achieve equality. The focus of this subsection is therefore not on similarity or difference as such but on impact of the differential treatment, disadvantage and on the context in which such disadvantage continues. Seen from this light, this subsection clearly holds the possibility for adopting a substantive understanding of equality.

In this regard the thesis draws attention to the recent case Shamima Sultana Seema and Others v Bangladesh and others (2003)[31] where it was argued that:

> While Articles 28(1) and (2) provide for the application of the doctrine of "formal or strict equality" that is, a principle of equal treatment: individuals

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[31] WP No. 3304/2003 (see- n.1 above). The verdict of the High Court in this case came out on 16 August 2004 after 10 women Ward Commissioners from reserved seats of Khulna City Corporation (Municipal Corporation) filed a writ petition before the High Court challenging the circular. In the Written Submissions in support of the Petitioners, the Intervenor in the case argued that the Circular constituted discrimination against the women commissioners and is in violation of their fundamental rights as guaranteed under Arts. 27 and 28, read with Arts. 9, 10 and 11 of the Constitution and also in violation of the state's legal obligations under international law (particularly International Covenant on Civil and Political Rights (1966) (ICCPR), the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR), and the Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW)), as well as its policy commitments as contained in the *National Policy for Women's Advancement in Bangladesh* and the *National Action Plan Towards Implementing Beijing Platform for Action* (For reference details, see Chapter I). They also argued that the provision for direct elections to reserved seats had been made as a "temporary special measure" to ensure women's effective political participation, in conformity with Art. 28(4) of the Constitution and of the state's obligations under the international law. They further argued that the Circular by discriminating between Commissioners negates the very purpose of providing for such reservations which is to ensure women's effective participation in all spheres of national life, including local government. By observing that several commonwealth jurisdictions, such as Canada, India and South Africa, have entrenched constitutional provisions which enable special measures to be adopted to redress past disadvantage faced by women, they argued that "the circular, by negating the impact of the special measures adopted to ensure women's participation through the provision of reserved seats, runs counter to the growing trend, both internationally and in other democratic countries, of adopting special measures in order to redress past disadvantage faced by women".

who are alike should be treated alike, according to their actual characteristics rather than stereotypical assumptions made about them. ...Article 28(4) of the Constitution, however, helps us move beyond the strict or formal application of equality and takes into account the notion of "substantive" equality - to take into account certain differences in order to avoid gender-related outcomes that are considered unfair. .....In other words, Article 28(4) provides the scope to undertake remedial measures to reverse the effects of this past discrimination.[32]

As has been mentioned earlier, the written copy of the judgment has not been available at the time of submission of this thesis. Therefore, it is not yet known if the High Court has endorsed the "substantive equality" approach put forward by the Petitioners while interpreting the scope of various subsections of Article 28.

b) Equality and the Constitution: protectionist approach v corrective approach

To determine the nature and consequences of this recognition of gender difference by the Constitution of Bangladesh, one needs to know the underlying presumptions behind such acknowledgements of difference. There are two approaches that seem particularly relevant for understanding the conception of gender difference acknowledged by the Constitution. Two of these approaches are termed by Ratna Kapur and Brenda Cossman[33] as the "protectionist" approach and the "corrective" approach. These approaches can be summarised as follows:

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[32] It was further argued in the submission that - "Article 28(4) provides the scope for unrepresented communities or individuals to have an entry point that they hitherto lacked. Once this is achieved, Articles 28(1) and (2) operate to prohibit any further discrimination on the ground of gender. Thus, once women have been able to access this entry point and have been elected as Commissioners, they may not be treated from other Commissioners of the City Corporation."

[33] R Kapur and B Cossman, 'Women, Equality and the Constitution: Through the Looking Glass of Feminism' (1993, Special Issue) 1 *National Law School Journal,* p.18-21.

(i) The protectionist approach

According to the protectionist approach, women are constructed as subordinate to men and therefore, are considered to be in need of protection. According to Kapur and Cossman, this approach essentialises difference by taking the existence of difference as the natural and inevitable point of departure. In this approach, there is virtually no interrogation of the basis of difference, or any substantive consideration of the impact of differential treatment on women. According to this approach, any differential treatment is usually deemed to be preferential treatment whether or not it is in fact so.[34] This protectionist approach by the state is evident in Bangladesh where family laws are left to be regulated by religious laws. As has been highlighted in Chapter II, various underlying values of two of the major religious laws (i.e. Islamic law and Hindu law) assume women as inherently different from men and assigns different role to men and women in the society. These laws as understood and applied in the context of Bangladesh, operate on the basis of stereotypical gender roles, in which men are viewed as the providers and protectors and women are considered subordinate to men and in need of protection.[35] In Bangladesh subordination and dependence of women in the sphere of personal laws is often justified by the argument that women are inherently different from men and since they receive protection and support from men for their survival, it is natural that they

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[34] Ibid.

[35] As has been explained in Chapter II, various provisions of Islamic laws such as maintenance, dower, inheritance and duty of obedience sees women as dependent and in need of protection. Hindu law as operated in Bangladesh also sees women as all time dependent on man and not fit for independence. As has been pointed out in Chapter III, Manu observes: "Their father protects them in childhood; their husbands protect them in youth; their sons protect them in age: a woman is never fit for independence" F Agnes *Law and Gender Inequality: the Politics of Women's Rights in India* (New Delhi: Oxford University Press, 1999), p.6. See also, G Banerjee, Gooroodass *The Hindu Law of Marriage and Stridhana* (Calcutta: S.K. Lahiri & Co, Calcutta,1913), p.116.

are not treated in the same way as men either in the public or in the personal sphere. Monsoor's work is a classic example of this position. According to Monsoor, Islam believes in the complementary roles of different sexes and assigns special rights and duties for both men and women. As such, she suggests that women of Bangladesh should insist that men should fulfil their respective obligations of maintaining and protecting women as prescribed by Islam instead of striving for gender equality.[36] In her opinion, women often benefit from the traditional roles assigned to them by the society, as she observes, "women in Bangladesh cannot simply be dismissed as submissive and subordinate, there are real powers behind their veils which are not so easy to understand"[37]. This is so because they are considered to be the goddesses of the home.[38]

In this regard, this thesis however argues that in the name of protecting women, the protectionist approach often serves to reinforce their subordinate status. More interestingly, such approach identifies women as a "protected species"[39] and operates against their dignified existence. It does not need to be mentioned that in the real world, terms like "obedience", "subordination", "control", "protection" etc. are often used in relation to inferior and naturally subordinate class, and are also used to describe species which are in danger of permanent extinction[40].

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[36] Monsoor, n.14 above, p.57.
[37] Ibid., p.49.
[38] Ibid., p.51.
[39] The analogy of 'protection—endangered species' was drawn by S Sobhan in *Legal Status of Women in Bangladesh*, BILIA (1978).
[40] N Tamanna 'Book review' (2003) 11 *Feminist Legal Studies* 1.

(ii) The corrective approach

The other approach is the corrective approach, in which women are seen to require special treatment as a result of past discrimination. Under this approach it is argued that failure to take difference into account will only serve to reinforce and perpetuate the disadvantage which, historically, difference has induced.[41] Thus, the corrective approach argues that gender difference must be taken into account in order to produce substantive equality for women.[42]

As Kapur and Cossman points out, although, both the protectionist approach and corrective approach are similar in the sense that both of them acknowledge that gender difference is relevant and therefore must be recognised by law, there are important distinctions as well. Most important of them is that the protectionist approach is more likely to accept both gender difference and special protection as natural and essential. On the other hand, the corrective approach is more likely to consider the basis of the difference and the impact of the recognition or non-recognition of such difference on the lives of women.[43] Seen in this light, the corrective approach seems to be more in line with the substantive approach to equality as it inquires into the impact of the differential treatment rather than seeing difference as natural and, therefore, essential.

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[41] Kapur and Cossman, n.33 above.
[42] Ibid.
[43] Ibid.

If we examine various provisions of the Constitution of Bangladesh, we can see that there is scope to interpret them in line with both these competing approaches. The Constitution reinforces the protectionist approach by appearing to guarantee equal rights only in the public sphere by Article 28(2), leaving the private sphere to be regulated by religious personal laws. Further, while providing equal opportunity to women in respect of employment, the Constitution in Article 29(3)(c) gives the right to reserve certain employment and offices to a certain sex alone if it is considered that members of the opposite sex are, by their nature, unsuited for such employment and office. The use of the words "by its nature unsuited" clearly demonstrates the protectionist attitude of the framers as it takes the difference as a natural and inevitable point of departure without any enquiry into the bases or causes behind such "difference". In practice, this provision has been used in the past to reserve certain employment like service in the armed forces exclusively for men. However, in the recent years, the Government has taken steps to include women in the armed forces as well.[44] On the other hand, the Constitution, by categorising women with children and other "backward" section of the citizens and reserving the right of the state to make special provisions or preferential treatment under Article 28(4) also indicates the willingness to embrace a corrective approach (and as has been argued earlier, the "substantive equality" approach). Exercising the power given under this provision, the government has reserved 10% of all new recruitment in the public sector for women.[45] The same approach is also revealed in other

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[44] Consequently, in the year 2000, women were recruited for the first time in various areas of the armed forces. For details, see *Bangladeshi women fit to fight,* BBC news South Asia, 31 December, 2002 available at http://news.bbc.co.uk/2/hi/south_asia/2617737.stm Last accessed on 12 July 2005.

[45] The reserved quota for women was introduced in 1972 (became effective after a government order was issued in 1976) which reserved 10% women quota in all categories of vacancies subject to their fulfilment of basic qualifications. However, this reservation of quota was not to be applied in respect of recruitment to certain technical posts, posts in the defence services, and

provisions of the Constitution. Article 9 under Fundamental Principles of State Policy of the Constitution of Bangladesh stipulates the representation of women in local government institutions. In 1997 through an Act, the Government reserved three seats for women in the union parishad (union councils) where women members are elected from each of the three respective wards.[46] Under Article 65(3), 15 seats in the parliament were initially reserved for women which was subsequently increased to 30 in 1990. Recently, this has been increased again to 45 by the Jatiya Sangsad (National Parliament) Reserved Women Seats Election Bill (2004)[47]. However, it needs to be mentioned that the bill has invoked protests from the women's groups and civil society members who argued that the bill is unconstitutional and undemocratic as it has provided reservation of women's seats without any direct

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such other posts, which may be considered unsuitable for women. In July 1985 another order revised and partly modified the quota system with a view to increasing women's participation in the services. The order was made mandatory to all government, semi-government and autonomous bodies and different sector corporations in case of direct appointments. Now 10% gazetted posts and 15% non-gazetted posts are kept reserved for women in addition to merit, which is applicable in all types of public employment. There is also a provision for reserving 60% posts of primary school teachers for women. For details, see http://banglapedia.search.com.bd/HT/W_0067.htm Last accessed on 12 July 2005.

[46] Apart from the reserved seats women can also contest for any of the general seats. Previously, the process of selection of the women representatives was on the basis of nominations and/or indirect election. Around 12,828 women were elected as embers in the 1997 local level elections. A total of 20 and 110 women were elected as chairpersons and members, respectively, for general seats. For details, see Global Database of Quotas for Women
http://www.quotaproject.org/displayCountry.cfm?CountryCode=BD
and Online Women in Politics
http://www.onlinewomeninpolitics.org/bangla/bangmain.htm
Last accessed on 12 July 2005.

[47] The bill provides for allocation of 45 reserved seats to women by political parties and alliances on the basis of their proportional representation in parliament. The seats will be allocated to parties in proportion to their overall share of the vote. The bill has also increased the number of the members of the parliament from 300 to 345. On May 16, 2004 the 14th amendment to the Constitution was passed to add 45 new seats to the present 300 members of the parliament. Two writ petitions were filed to the High Court challenging the provision of 45 reserved seats by women's rights activists and civil society members. The Court issued show cause notices to the government. The matter is now pending with the court. For more information on the bill, see http://www.bssnews.net/index.php?genID=BSS-09-2004-09-13&id=7 (Last accessed on 02.12. 04).

election. Seen in this light, the bill can also serve as an example of the "protectionist approach" by the state.

4. Equality and the Personal Laws

Chapter I and II have exposed the discriminatory and disadvantageous aspects of various provisions of Islamic law that violate the principle of equality. In the preceding discussion different approaches to equality, as incorporated in the Constitution of Bangladesh and as reflected in the judicial interpretations of such provisions, have been analysed. It is evident from the discussion that although the Constitution seems to accommodate and adhere to a version of equality in the public sphere, it does not seem to extend it to the private sphere where personal laws operate. It has already been argued in this thesis[48] that this existing dichotomy between private and public is incoherent and does not offer a viable account of the legal system of Bangladesh.

Given the assumption that personal laws in general discriminate/disadvantage women and violate principles of equality, the objectives of this part of the discussion are--(a) To reconsider various provisions of *Shari'a* law to see if this assumption is necessarily compelled by Islam. In this regard this section looks at the works of the Islamic feminists revealing the gender stereotyping in the development of the Islamic jurisprudence as a whole; and (b) To examine if there is a way of reconciling Islam to a particular notion of equality.

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[48] For details, see Chapter III.

a) Equality and Islam

Although, as has been discussed in Chapter II that various provisions of *Shari'a* law such as polygamy, divorce, maintenance, guardianship etc. discriminate against women, in the sense both that they make explicit sex-based classifications and, by so doing, contribute to women's substantive disadvantage, there exist strong arguments (put forward especially by Islamic feminists) that these provisions are neither divine nor condoned by the divine but are the result of patriarchal local customs and patriarchal judicial perspectives.[49] It is contended that what is understood as women's position in Islam today is a product of biased interpretation and selective acknowledgement of textual sources from which rights have been derived.[50]

To understand the true position of women in Islam, we first need to understand the basic principles of Islam. As has been discussed in detail in Chapter II, Islamic law is based on Islamic *Shari'a* which is informed by the *Qur'an* and *Sunnah* (words and deeds of the Prophet Muhammad). These two sources are further supplemented by other sources such as *ijma* (consensus of the jurists) and *qiyas* (analogy which allows the jurists to reason from the *Qur'an, Sunnah or ijma*).

b) Equality and the *Qur'an*

Some provisions of *Shar'ia* law which explicitly discriminate against women such as the duty of obedience, polygamy, maintenance and divorce, are claimed to be based

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[49] A al-Hibri 'Deconstructing Patriarchal Jurisprudence in Islamic Law: A Faithful Approach', in A K Wing (ed) *Global Critical Race Feminism: An International Reader* (New York: New York University Press, 2000) pp.221-233.

[50] D Eissa *Constructing the Notion of Male Superiority over Women in Islam: The Influence of Sex and Gender Stereotyping in the Interpretation of the Quran and the Implications for a Modernist Exegesis of Rights* (Occasional Paper No.11) (London: Women Living Under Muslim Law-WLUML, 1999).

on certain *Qur'anic* verses and are therefore considered sacrosanct and immutable. It is therefore, important to discuss the *Qur'anic* verses from which some of these provisions are claimed to have obtained legitimacy.

In the beginning of the discussion, it is important to take note of some of the verses of *Qur'an* that recognise equality between men and women.

For example, verse 4:1 declares that: "O mankind! Be careful of your duty to your Lord Who created you from a single soul and from it created its mate and from them twain hath spread abroad a multitude of men and women. Be careful of your duty toward Allah in Whom ye claim (your rights) of one another, and toward the wombs (that bare you). Lo! Allah hath been a watcher over you".[51]

According to Riffat Hassan, what is interesting to note here is that there is no reference in this verse to the idea that Adam was created first and Eve was created from his rib, a theory that is commonly believed by Muslims, Christians and Jews.[52] Rather, men and women are created simultaneously and from the same source, i.e., a "single soul". According to the *Qur'an* woman is not blamed for the "fall of man". In narrating the story of Adam and Eve, the *Qur'an* frequently refers to both of them, never singling out Eve for the blame.[53] Pregnancy and childbirth are not seen as punishments for "eating from the forbidden tree." On the contrary, the *Qur'an*

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[51] See M Pickthal's translation of the Holy *Qur'an* at http://www.usc.edu/dept/MSA/quran/004.qmt.html#004.034

[52] R Hassan 'Equal before Allah? Women-man equality in the Islamic Tradition' (Jan-May,1987) *WVII Harvard Divinity Belletin* 2.

[53] The Holy *Qur'an* 7:19-27. J Badawi *Gender Equity in Islam,* published by the World Assembly of Muslim Youth--WAMY Studies on Islam, 1999). Full text of the publication is available at http://www.witness-pioneer.org/vil/Books/JB/genderequityinislam.html . See also--http://www.soundvision.com/Info/gender/ (Last accessed 10.11. 04).

considers them to be grounds for love and respect. Similarly, in several other verses the *Qur'an* emphasises the importance of women's equality with men before God.[54]

(i) Verse 4:34

The verse or *ayah* which is most controversial from the perspective of gender equality is verse 4:34 of the *Qur'an*. Although this verse is often cited as proof that Islam allows male dominance over women, there is a considerable amount of controversy among academics regarding the interpretation of the verse and the rights and obligations derived from it. In particular, some Islamic feminist writers such as al-Hibri[55] and Eissa[56] have provided an interesting challenge to the traditional meaning attributed to this verse. Their analysis of 4:34 provides interesting insights about how gender stereotyping influenced the interpretation of this verse by the traditional jurists.

Al-Hibri begins by pointing out how gender stereotyping influenced the interpretation of some of the key words of the verse to suit the patriarchal ends of the interpreters. She then presents an alternative interpretation of the verse which is more in line with the egalitarian principles of the *Qur'an*. Al-Hibri first provides a partial interpretation of the verse in order to highlight the words that play a

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[54] Ibid. Badawi refers to various verses of *Qur'an* as proof of this. For example, in the *Qur'an*—men and women have the same religious and moral *duties* and responsibilities. They both face the consequences of their deeds (*Qur'an* 4:124) (*Qur'an* 33:35) (*Qur'an* 57:12). The *Qur'an* effectively ended the cruel pre-Islamic practice of female infanticide (*wa'd*): "When the female (infant) buried alive is questioned for what crime she was killed" (*Qur'an* 81:8-9). The *Qur'an* went further to rebuke the unwelcoming attitudes among some parents upon hearing the news of the birth of a baby girl, instead of a baby boy: "When news is brought to one of them of (the birth of) a female (child) his face darkens and he is filled with inward grief! With shame does he hide himself from his people because of the bad news he has had! Shall he retain her on (sufferance and) contempt or bury her in the dust? Ah! what an evil (choice) they decide on!" (*Qur'an* 16:58-59). For details, see Badawi referred above.

[55] See- Eissa, n.50 above.

[56] Ibid.

determining role in the interpretation of the verse. From the perspective of gender equality, these words which are crucial to the ultimate outcome of the verse (i.e., whether it propagates women's subordination to men or not), largely depend on the meanings that the interpreter has chosen to attribute to them.

As Al-Hibri observes the partial translation of the first part of the *ayah* is as follows:

> Men are *qawwamun* over women *bima* God *faddala* some of them over others, and *bima* they spend of their own money.[57]

The traditional interpretation of the verse stands as follows:

> Men are in charge of women, because Allah hath made the one of them to excel the other, and because they spend of their property (for the support of women).[58]

Al- Hibri is of opinion that the reason for this patriarchal outcome of this verse is partially rooted in the relational meaning of the word *qawwam*. In this regard, she points out that the word *qawwam* can be interpreted variously to mean "head," "boss," "leader", "protector", or sometimes "manager", "guide" and "advisor". She points out that while one of the old Arabic dictionaries defines the related word *qiyam* in the context of this *ayah* as "having the meaning of preservation or betterment", another dictionary defines the word *qayyim* as "one who manages peoples' affair, leads and straightens them out". As she observes, both these meanings, while not necessarily hierarchical, are open to hierarchical interpretation

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[57] It translates as: "Men are the protectors and maintainers of women, because God has given the one more (strength) than the other, and because they support them from their means." See Pickthal's translation of the Holy *Qur'an* at http://www.usc.edu/dept/MSA/quran/004.qmt.html#004.034 (n.51 above). On the other hand, Yusuf Ali's translation of this part of the verse is as follows: "Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their mean" (see-- http://web.umr.edu/msaumr/Quran).

and, as seen from the above, the traditional interpretative approaches by Islamic jurists are based on their own patriarchal perspective. [59]

Another significant word in the above verse is the word *bima*. Linguistically, it is composed of two parts: *bi* and ma and the meaning of the word *bima* revolves mostly around the *bi* segment.[60] As a result, *bima* could mean (a) "because"; (b) "in circumstances where"; and (c) "in that which".[61]

In the light of the above, the first part of the verse can alternatively be read as follows:

> Men are (advisors/providers of guidance) to women (because/in circumstances where/in that which) God made some of them different from some others and (because/in circumstances where/in that which) they spend their own money.[62]

Al-Hibri concludes that the first statement that men are *qqwwamun* (advisor or providers of guidance) over women is a general statement. It is operative only:

> (i)where God has endowed a male (in certain circumstances or at a certain time) with a feature, ability, or characteristics that a particular woman lacks (and presumably needs in those circumstances or at that time); and (ii) where that male is maintaining that particular woman[63].

According to al-Hibri, only under both of these conditions may the man presume to offer guidance or advice to the woman.[64] In other words, the verse informs us that God gave the man the responsibility (not privilege) of offering the woman guidance and advice in those areas in which he happens to be more qualified or

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[59] Al-Hibri, n.49 above.
[60] Ibid.
[61] Ibid.
[62] Ibid.
[63] Ibid.
[64] Ibid.

experienced. The woman, however, is entitled to reject both.[65] In support of this interpretation she cites another verse of the *Qur'an* which states that Muslims, male and female, are each other's *walis* (protectors or even guardians).[66]

The prevailing interpretation of the second part of verse 4:34 reads as follows:

> So good women are the obedient, guarding in secret that which God hath guarded. As for those of whom ye fear rebellion, admonish them and banish them to beds apart, and scourge them beat them. Then if they obey you, seek not a way against them. Lo! God is ever High, Exalted, Great.[67]

On the basis of the prevailing interpretation of this verse, traditional Islamic jurisprudence provides that a wife owes a duty of obedience or *ta'a* to her husband, failure to comply with which will make her a *nashiz*.[68] The duty includes not leaving the house without the husband's permission. The concept of *ta'a* or that of *nashiz* has particular significance in maintenance cases. As we have seen in the discussion on maintenance in Chapter II, a wife may lose her right to maintenance if it can be proved that she is guilty of *nushuz* or disobedience. The concept of *ta'a* has also been associated with *tamkin*, or availability which prescribes that a woman's consent to sexual intercourse with her husband is given while the marriage contract is concluded and therefore, can be relied upon at any time by the husband.[69] The most problematic aspect of the prevailing interpretation is perhaps contained in the last

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[65] Ibid
[66] Ibid.
[67] Pickthal's translation (n.51 above). Yusuf Ali's translation (n.57 above) of this part of the verse is as follows: "Therefore the righteous women are devoutly obedient, and guard in (the husband's) absence what Allah would have them guard. As to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (Next), refuse to share their beds, (And last) beat them (lightly); but if they return to obedience, seek not against them Means (of annoyance): For Allah is Most High, great (above you all)."
[68] Eissa, n.50 above.
[69] Ibid.

part of the verse. As seen from the traditional interpretation above, this part of the verse is interpreted to give power to the husband to beat or strike his wife if she is not obedient.

(ii) Alternative reading of the Second Part of Verse 4:34

For our discussion, the most important three words that are contained in this part of the original Arabic verse are *qanitat, nushuz* and *drubuhunna.*

As seen above, *qanitat* is traditionally interpreted as "obedient," implying that women should be obedient to their husbands. In this regard Eissa observes that, in other verses of *Qur'an* the term *qanitat* as well as *nushuz* is used to describe both men and women, and in these verses the term clearly refers to a state of obedience to God. [70] Eissa further argues that the term *nushuz* is used in the Arabic version of the verse in feminine form *nushuzahunna* because there is no neuter in the Arabic language. This does not imply, as she points out that the disobedience is disobedience to one's husband. As *nushuz* is gender neutral and refers to disobedience to God, the feminine form in this instance refers to a woman disobeying God.[71]

Eissa further observes that *drubuhunna* is related to the verb *daraba*, which is traditionally interpreted as "to strike". However, *daraba* does not necessarily indicate force or violence. There are other meanings that can be attributed to this term. For example Eissa points out that the term can be used when someone "strikes

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[70] As a proof of this Eissa refers to verses such as (2:238; 3:17; 33:35) (4:34; 33:34; 66:5; 66:12) for *nushuz* (4:128). For details, see generally Eissa, n.50 above.
[71] Ibid.

out" on a journey. Referring to other verses such as verses 4:128, 30:21 and 2:187, she argues that the *Qur'an* endorses harmony, love, mercy and mutual understanding in the marriage relationship. The meaning "to strike" therefore is not appropriate, as it cannot possibly fulfil the objective of Islam of protecting the institution of marriage and securing the physical and emotional integrity of women.[72]

In light of these, Eissa concludes that the second part of this controversial verse can alternatively read as "good women are God fearing, and that when a man fears that his wife's conduct is disobedient to God, he should admonish her for such conduct, take separate sleeping quarters, and possibly "strike out" of the marriage".[73]

(iii) Verse 4:3

Another controversial verse of the *Qur'an* is the verse 4:3 which has been traditionally interpreted to allow polygamy by men. The verse is as follows:

"If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hand possesses. That will be more suitable, to prevent you from doing injustice."[74]

Following the traditional interpretation, in many Muslim societies, permission is given to a man to marry up to four women. But as has been discussed in Chapter II, this interpretation has also been challenged on the ground that permission of polygamy is subject to the condition that the man can do full justice to all the existing co-wives and since justice does not only require equality in food, clothes,

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[72] Ibid.
[73] Ibid.
[74] See—A Yusuf Ali's translation, n.57 above.

residence or money alone but also requires equality in love, affection and esteem, it is not possible for any man to fulfil this requirement. It can be therefore, argued that seen from this perspective, this verse *Qur'an* actually encourages monogamy and discourages polygamy. As has been pointed out in Chapter II, this view is endorsed by the highest part of the judiciary in Bangladesh as well.

c) Equality and *Sunnah*

Feminist scholars have also provided interesting challenges to the authenticity of some of the *hadith*[75] forming the second most important source of *Shari'a* law which is *Sunnah*.

There is considerable controversy surrounding the authenticity of many reports of the practices and pronouncements that are attributed to the Prophet. Eissa points out that *Sunnah* came to incorporate not only the words and practices of the Prophet but also the words and practices of the first generation of Muslims which facilitated a departure from the *Sunnah* of the Prophet that God intended the Muslims to follow.[76] The matters became even more complicated because of the absence of written records of the *Sunnah* in the first centuries of Islam. The delay in recording the *Sunnah* in writing resulted in the fabrication of many *hadith* and consequently various traditions developed in different communities.[77] In the process, many pre-Islamic tribal law and cultural constructs that discriminated against women were internalized by early Muslim communities.[78] This also influenced the *Sunnah* of the early Muslims and the exercise of *ijtihad* or juristic interpretation of text. According

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[75] *Hadith* (or *"ahadith"*) are reports attributed to the Prophet. *Hadith* are accounts of the practice, conduct, and tradition of the Prophet that have formed *Sunnah* or tradition of the Prophet.
[76] Eissa, n.50 above.
[77] Ibid.
[78] Sobhan, n.39 above.

to Al-Hibri, *Shari'a* law understood today is based in substantial part on medieval Islamic jurisprudence clouded by deeply rooted cultural assumptions that were rarely challenged and "that gave rise to a then common model of state and family relationships which are best described today as authoritarian/patriarchal."[79] As an example of this she cites some of the practices and pronouncements of the second Caliph,[80] Umar ibn al-Khattab, who was known to be restrictive about the freedom of women. He was reported to have said as follows:

> Women are of three types: a modest, honest Muslim woman who helps her people live and will not ally herself with life against her people; another woman is a mere container for conceiving babies; and the third is a plague like lice with which Allah tests whoever He wills of His bondsmen.[81]

Fatima Mernissi offers an interesting challenge to the authenticity of some of the *hadith.* For example, she questions the authenticity of a *hadith* which is quoted in al-Bukhari as an authentic report and has been used to prescribe that women are not fit to be rulers or to hold positions of political leadership. The *hadith* goes as follows: "Those who entrust their affairs to a woman will never know prosperity".[82]

Mernissi observes that after the death of the Prophet, Ali ibn Abu Talib, the fourth Caliph was not in good terms with the Prophet's wife Aisha as she did not accept him as the Caliph. She took a command of an army of insurgents and fought him at Basra in the famous battle of *Kamel.* She was defeated and it is after this battle, more than twenty years after the Prophets death that this *hadith* was reported. Merinissi

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[79] Al-Hibri, n.49 above.
[80] The practices and pronouncements of the first four Caliphs (who were in close touch with the Prophet during his lifetime) in Arabia are considered authoritative as they were known as the "trustees of Islam".
[81] See generally the references made to Anas Ismail Abudawood, Daleel Al-Saileen in F Mernisssi *The Veil and the Male Elite: a Feminist Interpretation of Women's Rights in Islam* (Cambridge, Massachusetts: Perseus Books, 1991).
[82] See references made to al-Bukhari's Sahih Hadiths (collection of Authentic Hadiths) and to the commentary by al-Sindi in Mernisssi, Ibid.

argues that particular political and economic factors were responsible for the fabrication of hundreds of thousands of *hadith* like this.[83] Merinissi also challenges the authority of Abu Hurayra[84] to transmit *hadith.* Giving examples of many disagreements between him and Aisha, Mernissi argues that his dislike of Aisha and women generally caused him to fabricate many reports attributed to the Prophet.

5. Devices for Reform within the Framework of Islam

With regard to initiating equality-seeking reform within Islamic law there are other devices that have been used in the past for introducing reform to the Islamic law in the Subcontinent and may still have the potential to bring Islamic law more in line with gender equality. Serajuddin summarises these as (a) procedural devices, (b) eclecticism or *takhayyur* and (c) *ijtihad.*[85] According to him, "procedural devices" leave the substantial law unchanged but preclude the courts from applying it in specific circumstances. He points out that the doctrine of *siyasah* allows an Islamic state to control the jurisdiction of courts and also to enforce new rules of procedure and evidence. As an example of this he points out that child marriage which was and still is a serious social problem in the Indian Subcontinent has been discouraged by issuing regulations that the courts must not hear any action where the wife is under sixteen and the husband under eighteen years of age at the time of marriage; nor are such marriages to be registered. Thus, under the procedural device the *Shari'a* rule itself is not tampered with but is no longer enforced by the courts. On the other hand, "eclecticism" or *takhayyur* is a device for searching for precedents, not only in the

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[83] Ibid.
[84] Who was a companion of the Prophet and is well known for having complied and transmitted a large number of *hadith.*
[85] A Serajuddin *Shari'a Law and Society: Tradition and Change in the Indian Subcontinent* (Dhaka: Asiatic Society of Bangladesh, 1991).

four orthodox schools but also in the opinion of individual jurists, which would conform most to the needs of modern life. As Serajuddin observes, an effective use of this method was seen in the enactment of the Dissolution of the Muslim Marriages Act (1939)[86] that brought substantive changes in the divorce law applicable to the Muslims of Bangladesh, India and Pakistan, regardless of the school to which they belong (The Act has been discussed in details in Chapter II).[87]

The most important of the above devices is *ijtihad* or juristic interpretation. *Ijtihad*[88] means juristic interpretation of text which is open to all qualified Muslims, whether male or female, having the knowledge of the *Qur'an* and *Sunnah*, important commentaries and other related works.[89] *Ijtihad* provides Islamic jurists the scope to develop or adopt the Islamic jurisprudence most suitable to their societies and to supplement that with local custom, so long as it does not conflict with Islamic law.[90] Unfortunately, with the crystallisation of legal thought and the setting up of schools, the scope of the *ijtihad* has been gradually curtailed.[91]

As the legal history of the Sub Continent reveals, the power of the courts to exercise "judicial" *ijtihad* has long been an established one. The exercise of the power of *ijtihad* by the courts was evidenced in various decisions throughout the Pakistani era which was fortunately carried on by the superior courts of

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[86] (VIII of 1939) 9 PC 716.
[87] Under the Hanafi School (which is followed by the Muslims in Bangladesh) the wife can claim divorce only on the ground of her husband's impotence. On the other hand Maliki jurists recognise other grounds for the dissolution of marriage by the wife. As a solution, the grounds of Maliki law for divorce were incorporated in the Act and made applicable to all Muslims alike. For details, see - Serajuddin, n.85 above.
[88] Today, there are five major schools of *ijtihad*, i.e.,Hanafi, Hanbali,Maliki, Shafi'i, and Ja'fari schools.
[89] Among other qualifications, it is important that the person who is who is engaging into *ijtihad* (*Mujtahid*) should be familiar with the conditions of his or her society. This recognition was derived from the *Quranic* verse encouraging diversity.
[90] Serajuddin, n.85 above.
[91] Ibid.

Bangladesh after independence. [92] As a result of this, two very important rights were asserted which have profound significance for women's rights and the reform of Islamic law. These are as Serajuddin points out: (1) The right of the courts to independent interpretation of *Qur'an* where necessary and (2) their right to differ from the doctrines of traditionally authoritative legal texts which are not based on any specific injunction of the *Qur'an* and *Sunnah.*[93]

In a more recent case as well, the High Court reaffirmed the position that the power to interpret law is vested with the Court and observed that-

> Fatwa means legal opinion which therefore, further means legal opinion of a lawful person or authority. The legal system of Bangladesh empowers only the Courts to decide all questions relating to legal opinion on the Muslim and other Laws as in force. We therefore, hold that any fatwa including the instant one are all unauthorised and illegal.[94]

The above decisions clearly demonstrate the power of the courts of Bangladesh to exercise judicial *ijtihad* to reinterpret the discriminatory provisions of *Shar'ia* law.

6. Equality within the Framework of Islam: the Debates

The next obvious question therefore, is whether there is scope within Islamic law to develop a framework for the reinterpretation of these provisions in line with equality

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[92] Serajuddin concludes this by reffering to various cases such as Md. Abu Baker Siddique v. S. M. A. Bakar (1986) [38 DLR (AD) 106], where the matter before the court was regarding the custody of a eight year old boy and the Appellate Division of the Bangladesh Supreme Court held that it is permissible for courts to differ from the traditional/orthodox rules of *hizanat* or custody of children laid down by the classical jurists. The Court observed that the paramount consideration in these cases should be the child's welfare and decided to grant custody to the mother. The principle of *ijtihad* was also used in Jamila Khatun v. Rustom Ali (1996) [48 DLR (AD) 110] to grant past maintenance to the wife. Similarly in Hasina Ahmed v. Syed Abul Fazal (1980) [32 DLR 294] the court, relying on the decision of the Pakistan Supreme Court in Mst. Khurshid Bibi v. Mhammad Amin (1967) [PLD SC 97] held that a wife could obtain divorce by way of *khula* even if the husband did not agree. For details see- Serajuddin, n.85 above.

[93] Ibid.

[94] Editor, The daily Banglabazar Patrika and two others v District Magistrate and Deputy Commissioner, Naogaon (2000) Writ Petition No. 5897 of 2000.

and in accordance with the needs of modern times. In this regard it should be noted that as in the West, in Muslim societies, ranging from North Africa to South Asia, the concept of gender equality elicits a wide range of interpretations and opinions—from the argument that gender equality is fully compatible with Islam to the claim that gender equality is a product of Western cultural imperialism and represents values that are incompatible with Islam. There are, on the one hand, conservatives who describe those who advocate equality-based reforms as agents of West aiming to destroy Islam in the name of promoting gender equality. On the other hand, there are scholars who reject many traditional interpretations of the Islamic sources and conclude that authentic Islamic doctrine actually supports reforms of *Shari'a* rules designed to ensure gender equality. As has been demonstrated in the preceding discussion, Fatima Mernissi[95], Azizah al-Hibri[96] and Riffat Hassan[97] are among contemporary Muslim scholars who have re-examined original sources and concluded that Islam, properly interpreted, calls for equal rights for men and women. Acknowledging the fact that various provisions of Muslim law such as polygamy, divorce, maintenance, guardianship etc. discriminate against and cause disadvantage to women, they argue that these provisions are neither divine nor condoned by the divine but are the result of patriarchal local customs and patriarchal judicial perspectives.[98] They conclude that what is understood as women's position in Islam today is a product of biased interpretation and selective acknowledgement of textual sources from which rights have been derived.[99]

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[95] Mernisssi, n.81 above.
[96] A al-Hibri 'Islam, Law and Custom: Redefining Muslim Women's Rights' (1997) 12 *Am.U.J. Int'l L. & Pol'y* 1.
[97] Hassan, n.52 above.
[98] Al-Hibri, n.96 above. See also – n.49.
[99] Eissa, n.50 above.

Side by side with these two views, there remains yet a third view that maintains that any reform movement or discourse carried out within an Islamic framework is a limited project not capable of bringing any substantive change in the status of women in the direction of equality. Instead, it is argued that feminists should opt for a secular legal regime where laws will be uniformly applied irrespective of religious beliefs and gender. Supporters of this view maintain that the activities and goals of the scholars operating within an Islamic framework are circumscribed and compromised and as such are not capable of improving the status of women in any substantial way[100]. Moghissi in this regard observes,

> Of course, there are significant differences among various interpretations of the Qur'an and the Islamic laws and instructions. The fact has already been stressed that Islam, like other religions and ideologies, has a contingent character; it has a remarkable capacity to adapt to different indigenous cultures and societies and economic and political conditions. This means that there are many different ways that Islam can be adopted. But no amount of twisting and bending can reconcile the Qur'anic injunctions and instructions about women's rights and obligations with the idea of gender equality. Regardless of the interpretation of the Qur'an and the Shari'a, if the Qur'anic instructions are taken literally, Islamic individuals or societies cannot favour equal rights for women in the family or in certain areas of social life.[101]

The demand for a secular and uniform personal law regime is particularly vociferous in Bangladesh led mainly by NGO-based activists concerned with the promotion of women's rights. To understand the position of those who argue that Islamic law is compatible with gender equality, it is important to note that the concept of equality has a different connotation to these scholars and activists than it has for contemporary feminist western scholars engaged with the equality debates. Compared to the feminist struggles in the West, the engagement of Islamic feminists

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[100] For details, see H Moghissi *Feminism and Islamic Fundamentalism: The Limits of Postmodern Analysis* (Dhaka: The University Press Ltd, 2000), and H Shahidian 'The Iranian Left and "The Women Question" in the Revolution of 1978-79' 26 *International Journal of Middle East Studies* 2, pp.223-47.

[101] Moghissi, ibid.

with equality-based reform is narrower in both theory and practice. While their western feminist counterparts are concerned with the development of more sophisticated understandings of equality such as is evidenced by substantive equality approaches, Muslim feminists and women's rights activists are mostly taken up in a struggle for inclusion, aimed at ensuring equal participation of women in public life and on the same terms as men. As seen in the preceding discussion, in an attempt to eradicate some of the glaring inequalities and improve the status of Muslim women, Muslim feminist scholars are seeking to promote the egalitarian ethics of Islam, highlighting women-friendly verses of the *Qur'an* and *hadith* and using re-interpretation of the sources of Islamic law in their fight to secure rights such as the right to work, equal rights to divorce, custody and guardianship of children, as well as the eradication of polygamy and the duty of obedience (*ta'a*). In this respect it appears that Islamic feminists are demanding equality in law in much the same way that liberal feminists once advocated formal equality. But as Mojab[102] in her critique of Islamic feminism observes "unlike western liberalism, which despite its shortcomings, has succeeded in instituting an extensive regime of rights guaranteeing legal equality, "Islamic feminism" is not even ambitious enough to demand universal formal equality."

As has been noted earlier in this discussion, with regard to the debates related to gender equality and Islam in the context of Bangladesh, there remain arguments that see gender equality as a Western concept and advocates for a solution within the framework of Islam. Monsoor in this regard argues that if the concept of gender equality is incorporated into the sphere of family law, it will disturb the equilibrium

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[102] S Mojab 'Theorizing the Politics of "Islamic Feminism" ' (2001, Winter) *Feminist Review* 69 pp.124-146.

of the social fabric that has been developed over centuries[103]. A more sustainable strategy in her opinion is to pursue "sexual equity" rather than "sexual equality" which according to her, can be meaningfully developed by better enforcement of existing rights guaranteed by Islam.[104]

From the perspective of women's empowerment in Bangladesh, the position Monsoor adheres to is problematic from several perspectives. Firstly, the proposition of introducing the concept of gender "equity" in the legal system appears to be hardly in line with the scope of the Constitution which specifically guarantees gender "equality" of all citizens and does not acknowledge the concept of gender "equity", either directly or indirectly. Secondly, there exists a strong argument in feminist scholarship against the notion of "home" as women's dominion. The position Monsoor's supports, basically accepts the idea of separate gender roles in the private/personal sphere which in turn it reinforces the public private dichotomy that operates in the legal system of Bangladesh. As seen in Chapter III this division tends to conceal the reality of discrimination and violence suffered by women in the home and discourages state intervention in the personal sphere. As has been pointed out already, her proposition also risks adopting (at best) a "protectionist" approach to equality which essentialises/naturalises women and their roles in the family.

7. Conclusion

The discussions in this Chapter clearly highlight the scope and possibilities of the equality provisions of the Constitution of Bangladesh. It also traces the development of equality analysis and some of the debates associated with equality as a norm and

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[103] Monsoor, n.14 above, p.57.
[104] Ibid.

strategic goal within feminist legal scholarship. The following Chapters consider some of these debates in specific contexts. Chapters V and VI look at Canada and South Africa to trace developments in substantive equality analysis in non Muslim secular contexts while Chapter VII looks at two Tunisia and Morocco to examine the possibilities of equality based reforms in Muslim societies.

The analysis put forward by Islamic feminists of the development of Islamic jurisprudence highlights how gender stereotyping and patriarchal cultural assumption may have influenced the interpretation of the *Qur'anic* verses and *Sunnah*. The discussion also demonstrates the possibility of reforming some of the areas of *Shari'a* law by invoking the method of reinterpretation in the light of the egalitarian principles of Islam. Although it is doubtful that this could bring the *Shari'a* law fully in line with substantive equality or even formal equality, this can still serve to secure some important rights for women and help to bring changes in some areas where glaring inequality exists.

The above discussion on *ijtihad* clearly demonstrate the power of the courts of Bangladesh to exercise judicial *ijtihad* to reinterpret the discriminatory provisions of *Shar'ia* law that cause disadvantage to women by invoking the egalitarian principles of Islam. Furthermore, these cases also highlight the judicial trend of acknowledgment that the interpretations of the classical jurists are not necessarily sacrosanct and immutable. In this light, it is also argued that the Courts, by asserting their right to independent interpretation of the *Qur'an* and *Sunnah,* should continue its role in freeing the areas of *Shari'a* law such as polygamy, guardianship, inheritance etc., from the patriarchal interpretation so as to reform them according to the true spirit of Islam.

In addition to judicial *ijtihad*, attempts should also be made to engage in re interpretation of religious texts in order to challenge the orthodox and patriarchal interpretations. Previous discussions have already established that the inferior status and disadvantageous position of women under personal laws is mostly a product of biased interpretation and some of the provisions can be made compatible with the notions of equality if understood in their true spirit. Overall, the conclusion of the Chapter is that while Bangladesh law, as currently understood within the present religious context, is still a far way short of bestowing on women a comprehensive substantive right to equality, there is room for further interpretation, both within *Shar'ia* law and in the context of constitutional jurisprudence, to enhance women's social and legal position in ways which concretely combat disadvantage and foster more egalitarian ideals.

CHAPTER V

EQUALITY: THE CANADIAN EXPERIENCE

1. Introduction

Previous discussions on equality have highlighted the multi-dimensional nature of equality as a concept. It has been pointed out that although equality has been, and continues to be a central concept in the feminist legal movement, there has also been ongoing debate among feminists about what equality truly means and how it may be attained in different socio-cultural-economic contexts.

In attempting to think strategically and critically about our engagement with equality and to explore the possibilities equality may offer for elevating the status of women in Bangladesh, the current Chapter and the following aim to look at the development of equality jurisprudence in two different jurisdictions providing a constitutional guarantee of gender equality namely, Canada and South Africa, to see how the concept has been applied as a strategic and normative goal and what form of legal equality is emerging in these two countries.

The reasons for choosing Canada as a case study are as follows: firstly, as a pluralist and multicultural society, Canada provides a fertile ground for the development of a more dynamic understanding of equality because of its complexities and socio-cultural undercurrents. This study in turn may be helpful to identify and understand the complexities of developing a substantive understanding of equality in a multi religious society such as Bangladesh where the question of gender equality is inextricably linked with various religious group based rights. Secondly, feminist scholarship in relation to equality jurisprudence in Canada has developed considerably during the last few decades due to the strong presence of various women's groups, and other advocacy organisations. Feminist engagements with equality in Canada and the resulting critique developed in this area can be useful to analyse the problems of equality as a strategic goal as well as to identify the possibilities it offers for improving the legal status of women in Bangladesh.

The Chapter begins with a brief background to the history and development of the equality guarantee in Canada. While doing so, it looks at some of the gender-equality decisions made by the Supreme Court of Canada. It then examines feminist engagement with equality in Canada and examines some of the critiques made and some of the possibilities raised by feminists scholars of the equality guarantee under section 15 of the Canadian Charter of Rights and Freedoms (1982)[1] (hereinafter referred to as the "Charter" or the "Canadian Charter").

[1] (1882, 79). Enacted as Schedule B to the Canada Act (1982) (U.K., 1982, c.11), which came into force on April 17 1982. Available at: http://laws.justice.gc.ca/en/charter/index.html (Last accessed 10.09.04).

2. Equality before the advent of the Charter

a) Formal equality

Prior to the interpretative developments of Section 15(1) of the Charter, equality jurisprudence in Canada was dominated by a liberal understanding of equality (also referred to as formal equality) premised on the understanding that equality means treating likes alike and un-likes unalike. The norm underlying this model of equality was that of sameness or difference and a prototypical person that represented the goal and the standard by which the right to equality was measured[2]. This prototypical person was from the dominant groups in all aspects, such as, white, heterosexual, non-disabled, Christian, middle-class, and male. Members of non-dominant groups, such as, racial minorities, working class people, non-heterosexuals including women were expected to demonstrate that they were the same as the prototype to qualify for equal treatment under this model of equality[3].

Historically, women have been regarded in Western societies as inherently different from men, that is, they were not seen as like the prototype, and hence there was perceived to be no obligation to treat them equally. In keeping with the liberal model of equality, in the nineteenth and early twentieth century Canada, women's legal status was very much one of inferiority[4]. For instance, it was not until the 1930 landmark decision of the Judicial Committee of the Privy Council in Edwards v

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[2] D Majury 'Women's (In) Equality before and after the Charter' in Radha Jhappan (ed) *Women's Legal Strategies in Canada* (Toronto: University of Toronto Press, 2002).

[3] See n.2 above and M Liu 'A "Prophet With Honour": An Examination of the Gender Equality Jurisprudence of Madam Justice Claire L'Heureux-Dube of the Supreme Court of Canada' (2000, Spring) 25 *Queen's Law Journal* 417.

[4] C L'Heureux-Dube 'Symposium: Women, Justice and Authority: It Takes a Vision: The Constitutionalization of Equality in Canada' (2002) 14 *Yale Journal of Law and Feminism* 363.

A.G. for Canada (1930)[5] (the "Persons" case), that women were finally recognised as "persons" within the meaning of section 24 of the Constitution Act (1867)[6], and therefore eligible to be appointed to the Senate.[7] The status of racial minorities was also not much different from that of women. For example, federally, Japanese Canadians could not vote until 1948, and status Aboriginals gained the franchise only in 1960[8]. Like women in other Western societies, Canadian women struggled for a long time to fit within the liberal equality paradigm and achieve similar status as the prototype i.e., male. In law reform efforts and litigation, women's fight for equality was, during this period, largely a fight for inclusion focusing primarily on obtaining the same rights and privileges accorded to men under law.[9]

b) Bill of Rights

The original written constitution of Canada contained no express guarantee of human rights or civil liberties.[10] As noted earlier, the struggle for obtaining full legal personhood and broader recognition of rights by women continued and gradually some of the most blatant limitations on women's rights, such as right to work and to own property, were removed. In this process, the first major change came in 1960

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[5] A.C. 124 (P.C.).
[6] (30 & 31 Victoria c.3), also known as The British North America Act (1867). Available at: http://www.solon.org/Constitutions/Canada/English/ca_1867.html (Last accessed 10.10.04).
[7] L'Heureux-Dube, n.4 above.
[8] Ibid.
[9] Majury, n.2 above) observes that these fights for inclusion were largely waged by women who, with the exception of their gender, were from the dominant groups. This, in turn, gave rise to a "feminist prototype" of the white, Christian, non-disabled, middle-class, heterosexual woman which transposed many of the same assumptions and expectations that underlay the male prototype. And just like prototypical males, this feminist prototype operated to exclude the concerns of other women such as, women of colour, non-Christian women, lesbians, disabled and working class women.
[10] Majury, n.2 above.

when the Canadian Bill of Rights (1960)[11] ("Bill") was passed. It applied to all federal laws of Canada.

Section 1 of the Bill provides in part:

> It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,...(b) The right of the individual to equality before the law and the protection of the law.

By the 1980s, the Supreme Court of Canada had decided fewer than ten cases involving the equality section under the Canadian Bill of Rights and two of these dealt with sex equality[12]. Unfortunately, despite the strong affirmation of equality in the Bill, equality jurisprudence failed to escape the prevailing formal equality model because of the narrow interpretation of the equality guarantee under the Bill by the courts. In a series of cases, the courts embraced the concept of formal equality while interpreting the equality guarantee by applying the Aristotelian principle "likes should be treated alike"[13], and Dicey's notion of "equality before the law"[14]. As the cases discussed below demonstrate, the Courts, by adhering to a formalistic reasoning, used "difference" to justify discrimination. As such, in those cases, a

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[11] (1960, c.40). Available at: http://laws.justice.gc.ca/en/C-12.3/text.html (Last accessed 10.09.04).

[12] Majury gathered and discussed the cases which have bearing on this topic, for details see Majury, n.2 above.

[13] The corollary to this is that un-likes should be treated un-alike. Thus, as York observes, according to this analysis, if an individual or group were "different" in some way, it would be legitimate to treat that group or individual differently even if such treatment resulted in disadvantage. A York 'The Inequality of Emerging Charter Jurisprudence: Supreme Court Interpretations of Section 15(1)' (Spring 1996) *University of Toronto Faculty of Law Review.*

[14] Dicey outlined three components of the rule of the law, the third of which stipulated that every person is equally subject to the law. See- AV Dicey, *Introduction to the Study of Law and of the Constitution* (10th edition) (London: MacMillan, 1982). Unfortunately, as the early cases under the Bill of Rights (1960) demonstrate, it can be used to justify and uphold any law that infringes on a particular group's equality rights, so long as it applies to everyone in that group equally.

distinguishing feature in a particular group (such as race, sex, or pregnancy) justified different (and discriminatory) treatment for that group[15].

For example, Attorney General of Canada v Lavell (1973)[16] may be mentioned which involved a challenge to section 12(1) (b) of the Indian Act [17] According to this provision, Indian women who elected to marry non-Indian men lost their Indian status and were struck from the band list while the non-Indian women who married Indian men gained Indian status as result of the marriage. The Supreme Court of Canada held that the distinction between the treatment of Indian women and Indian men in this regard did not constitute inequality under the Bill of Rights (1960) which enshrined the right of the individual to equality before the law.

In his judgment, Justice Ritchie gave a Diceyan interpretation of the "equality before the law" provision under the Bill by defining it as meaning "equality in the administration or application of the law enforcement authorities and the ordinary Courts of the land." Justice Ritchie observed that the Indian Act was a structure created by Parliament for the internal administration of the life of Indians on reserves and their entitlement to the use and benefit of Crown's lands. In his observation, section 12(1)(b) was an essential component of this structure and way of life.[18]

In Bliss v Attorney-General of Canada (1979)[19](*"Bliss"*), the equality guarantee was interpreted similarly narrowly and, as a result, a provision of law that clearly discriminated against pregnant women was upheld. In this case, Stella Bliss

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[15] A York 'The Inequality of Emerging Charter Jurisprudence: Supreme Court Interpretations of Section 15(1)' (Spring 1996) *University of Toronto Faculty of Law Review* p 328.
[16] 38 DLR (3rd) 481.
[17] (R.S., c.I-6). Available at: http://laws.justice.gc.ca/en/I-5/ (Last accessed 12.10.04).
[18] See- n.16 above.
[19] 1 SCR 183.

challenged section 46 of the Unemployment Insurance Act (1971)[20] that disentitled pregnant women and new mothers from regular unemployment insurance benefits for the period during which maternity benefits were available. Stella Bliss had worked over eight weeks to qualify for ordinary employment benefits, but this was not long enough to qualify for maternity benefits.[21] Section 46 of the Unemployment Insurance Act (1971) prevented her from claiming ordinary benefits as it was assumed that during the maternity period women were not capable of working. Stella argued that this disentitlement constituted discrimination which denied her equality before the law. Justice Ritchie, applying the same narrow "rule of law" definition of equality before the law as applied in *Lavell* held that "the enforcement of the limitation...does not involve denial of equality of treatment in the administration and enforcement of the law before the ordinary Courts of the land." Justice Ritchie stated: "any inequality between the sexes in this area is not created by the legislation but by nature"[22].

As these two cases demonstrate, despite the guarantee of equality under the Bill, no immediate change toward substantive equality came as a result. This was, as noted earlier, due to the fact that, the equality guarantee as interpreted by the courts relied on the sameness and difference approach and a narrow interpretation of "equality before law". According to this approach, women along with minorities and the disabled were held to be equal only to the extent that they were no different from what society considered the "norm" (i.e., from the white, Christian, able-bodied, heterosexual male).

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[20] (S.C. 70-71-72, c.48).
[21] To qualify for maternity benefits, she needed to have at least ten weeks of insured earnings.
[22] *Bliss* at 190.

It is also important to note here that one of the important limitations of the Bill of Rights (1960) was that although it could invalidate another federal law, it was an ordinary law and not a constitutional document. According to Justice L'Heureux-Dube[23], this is probably be the reason why the equality guarantee under the Bill of Rights was interpreted so narrowly, i.e., as a formal and procedural right rather than as a substantive one.

3. The Charter and substantive equality

On 16 April 1982 Canada formally amended its written Constitution by adding the Canadian Charter of Rights and Freedoms. The obviously unfair results of equality claims determined under the Canadian Bill of Rights inspired a concerted effort by Canadian women under the leadership of lobby groups to obtain greater recognition and greater protection of their rights. Justice L'Heureux-Dube,[24] writing extra judicially observes that when a move from the Bill towards the Charter was made three very important changes took place. First, equality rights were elevated to a constitutional level. Second, the measure of equality rights was broadened. Third, the reach of equality rights was broadened. All three of these changes constituted essential elements of a trend intended to promote and achieve substantive equality. She also observes that, the initial drafts of the Charter presented before the public show that the then government was using the framework of international human rights conventions as a model, rather than the civil liberties model found in the American Bill of Rights. L'Heureux-Dube points out that the human rights approach insists that human beings should be treated with dignity and should have the means

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[23] L'Heureux-Dube, n.4 above.
[24] C L'Heureux-Dube 'Lecture: Conversations on Equality' (1999) 26 *Manitoba Law Journal,* p.276.

necessary for full and equal participation in society. Since human dignity and equal participation encompass both individual and collective aspects of the human experience, the human rights approach requires balancing the rights of individuals, the recognition that historically disadvantaged or minority groups may need special protection, and the collective social interest.[25] Thus, in essence, the human rights approach requires that society be free from inequality. According to L'Heureux-Dube, this reliance on the human rights approach while drafting the Charter set the stage for a relatively inclusive and purposive approach that is unique to Canadian equality jurisprudence.[26]

Keeping in mind the dismal history of Bill of Rights equality decisions, feminist scholars and activists in Canada put great effort into the wording of the equality provisions under the Charter to get better protection of rights and to foreclose the possibility of restrictive interpretation. So when an initiative was taken in the late 1970s to adopt the Canadian Charter of Rights and Freedoms, the following demands were put forward by them[27]: first, the language of the equality guarantee had to be broader than that of the Bill of Rights; second, distinctions based on sex had to be subject to a stringent review by the Courts; and third, the Charter had to include a general statement of equality between men and women.[28] The result of their effort is clearly reflected in the wording of the equality guarantee of the Charter.

Section 15(1) of the Charter provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination based on

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[25] L'Heureux-Dube, n.4 above, p.366.
[26] Ibid.
[27] Ibid.
[28] Ibid.

> race, nationality or ethnic origin, colour, religion, sex, age or mental or physical disability.

Significantly, section 15(1) provides for every individual not only a guarantee of equality before and under the law, but also the equal protection and equal *benefit* of the law without discrimination. Section 15, thus sets out four different equal protection guarantees: 1. equality before the law, 2. equality under the law, 3. equal protection of the law, and 4. equal benefit of the law. It has been suggested that these provisions should be seen as related to each other rather than as freestanding guarantees. "The four equality clauses make it abundantly evident that the drafters intended to cover every conceivable operation of the law and that, in its operation, 'every individual' be treated 'without discrimination', particularly with respect to a number of specifically recognised categories."[29] As the cases discussed below will demonstrate, the equality provision under the Charter has been interpreted in subsequent cases as embracing the concept of substantive equality.

This substantive guarantee of equality was further reinforced by a clear endorsement/affirmation of ameliorative measures in section 15(2) which provides—

> sub-section (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex or mental or physical disability.

An additional provision section 28 which is directed exclusively at sex equality was also included in the Charter. Section 28 states that "[n]otwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons".

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[29] W Tarnopolsky 'The Equality Rights in the Canadian Charter of Rights and Freedoms: Commentary' in W Tarnopolsky and Gerald Beaudoin (eds.) *The Canadian Charter of Rights and Freedoms: A Commentary* (Toronto: Carswell, 1982), quoted in K Davis 'Equal Protection for Women in India and Canada : An Examination and Comparison of Sex Equality Provisions in the Indian and Canadian Constitution' (1996) 13 *Ariz. J. Int'l & Comp. Law*, p. 31 quoting.

In addition to above, Section 1 provides, "the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Before proceeding to discuss how the equality provisions of the Charter have been interpreted in subsequent case law it may be interesting at this point to compare the equality guarantee in Canadian Charter with the equality guarantee under the Constitution of Bangladesh.

Firstly, as noted earlier, Section 15 of the Canadian Charter provides four different equal protection guarantees, namely, "equality under the law", "equality before the law", "equal benefit of law" and "equal protection of law", whereas the Constitution of Bangladesh, in its Article 27, provides only "equality before law" and "equal protection of law".[30] The text of Section 15 indicates specifically enumerated grounds, including sex, in relation to which discrimination is prohibited. Thus unlike Article 27 of the Constitution of Bangladesh, the Canadian Charter does not have a separate "general" equal protection guarantee. The general language of equal protection does not stand alone but is part of a larger provision which enumerates

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[30] See Chapter I. The equality provisions under the Constitution of Bangladesh consist of Article 27 and Article 28. Article 27 of the Constitution provides "All citizens are equal before law and are entitled to equal protection of law." Article 28 of the Constitution states:
"(1) The State shall not discriminate against any citizen on grounds only of religion, race caste, sex or place of birth.
(2) Women shall have equal rights with men in all spheres of the State and of public life.
(3) No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution.
(4) Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens."

specific grounds entitled to equal protection.[31] Further the equality guarantee in the Charter is limited by Section 1 of the Charter. The Constitution of Bangladesh does not contain such a limitation. And lastly, although both Section 15 of the Charter and Article 28 of the Constitution of Bangladesh prohibit discrimination on similar grounds including race, sex and religion, Section 15 has subsequently been interpreted (in Law Society of British Columbia v. Andrews (1989)[32], which is discussed below) to extend to analogous grounds or grounds similar to the enumerated grounds. Thus, although the concept of equality in the Charter is broader than the Bangladeshi equality guarantee (in the sense that the former contains four equality protections, not two), it is formally tied to the specification of enumerated grounds in a way the Bangladesh Constitution is not. On the other hand, subsequent interpretation of the Canadian Constitution has extended the scope of the Canadian Constitution to embrace "analogous grounds", stretching the reach of the Canadian Constitution particularly in an intersectionality context.

a) Law Society of British Columbia v. Andrews

The most significant case for the development of equality jurisprudence in Canada is perhaps the Law Society of British Columbia v. Andrews (1989)[33]. This is because the case marked a clear turn away from the formal model of equality and a significant move towards the concept of substantive equality. As Hughes points out the "taking account of difference" which lies at the heart of substantive equality had been well established as a principle (in case law under Canadian human rights

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[31] K Davis 'Equal Protection for Women in India and Canada : An Examination and Comparison of Sex Equality Provisions in the Indian and Canadian Constitution' (1996, Spring) 13 *Ariz. J. Int'l & Comp. Law*, p.42.
[32] 1 S.C.R. 143.
[33] Ibid.

legislation) even before the time section 15 of the Charter came into effect in 1985. This and other similar developments were incorporated into the interpretation of section 15 in *Andrews*.[34]

In *Andrews*, Mark Andrews and Elizabeth Kinersly challenged the requirement of the British Columbia Bar that those applying for admission to the Bar should be Canadian citizens. Andrews, a British subject permanently resident in Canada, and Kinersly, an American citizen who was at the time a permanent resident of Canada articling in the Province of British Columbia, both met all the requirements for admission to the practice of law except that of Canadian citizenship. The constitutional questions before the Court were: (1) whether the Canadian citizenship requirement for admission to the British Columbia Bar infringed or denied the equality rights guaranteed by s. 15(1) of the Charter and; (2) if so, whether that infringement was justified by Section 1 of the Charter. It was held that the requirement of Canadian citizenship for admission to the Bar of British Columbia contravened the equality guarantee of section 15 of the Charter.

The Supreme Court's decision in *Andrews* is significant for the equality jurisprudence in Canada from many perspectives. Firstly, *Andrews* confirmed that the grounds of discrimination enumerated in Section 15(1) are not exhaustive. Grounds analogous to those enumerated are also included within the scope of the guarantee. In *Andrews* Section 15 was interpreted to allow a ground of discrimination not expressly listed in Section 15 to be included because it is similar to the grounds listed. Accordingly, although citizenship is not expressly included in Section 15 as a prohibited ground of discrimination, the Court in *Andrews* held that it

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[34] P Hughes 'Recognizing Substantive Equality as a Foundational Constitutional Principle' (1999) 7 *Dalhousie Law*, p.5.

is included as a ground analogous to the express grounds. Non-citizens permanently resident in Canada such as Andrews and Kinersly were found to fall within the group of "discrete and insular minority" that Section 15 was designed to protect. In this regard Justice Wilson observed--

> It is important to note that the range of discrete and insular minorities has changed and will continue to change with changing political and social circumstances...It can be anticipated that the discrete and insular minorities of tomorrow will include groups not recognised as such today. It is consistent with the constitutional status of s.15 that it be interpreted with sufficient flexibility to ensure 'unremitting protection' of equality rights in the years to come.[35]

The recognition of the concept of "analogous grounds" in the judgment is critically important for equality jurisprudence in Canada as it opened the door for inclusion of other important grounds within the scope of the equality guarantee in the Charter.

Secondly, in *Andrews,* Justice McIntyre rejected the concept of formal equality and the subsisting "similarly situated test" to equality. As Justice McIntyre observed, that test was seriously deficient in that it excludes any consideration of the nature of the law. According to McIntyre if the test were to be applied literally, it could be used to justify the Nuremberg laws of Adolf Hitler in the sense that similar treatment was contemplated for all Jews. He observed:

> [The] mere equality of application to similarly situated groups or individuals does not afford a realistic test for violation of equality rights. For, as has been said, a bad law will not be saved merely because it operates equally upon those to whom it has application. Nor will a law necessarily be bad because it makes distinctions.[36]

He observed therefore, that "similarly situated test" to equality cannot be accepted as a fixed rule or formula for the resolution of equality questions arising under the

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[35] See- n.32 above, at p.152.
[36] n.32 at p.171.

Charter. He also added that "consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application."

This indicates the potential for Section 15 to move beyond the model of formal equality. Also, in line with the substantive approach to equality, *Andrews* recognised that the focus of equality analysis should be on the effect of the distinction or classification on the complainant. It confirms that not all forms of distinction constitute discrimination. Section 15 forbids only those distinctions or classifications that involve prejudice or disadvantage.

> The words "without discrimination" require more than a mere finding of distinction between the treatment of groups or individuals. These words are a form of qualifier built into s. 15 itself and limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage. The effect of the impugned distinction or classification on the complainant must be considered. Given that not all distinctions and differentiations created by law are discriminatory, a complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit of the law but must show in addition that the law is discriminatory.[37]

In other words, *Andrews* established that a determination of inequality under Section 15 requires a contextual analysis which seeks to link differential treatment with concrete disadvantage.

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[37] See- *Andrews*, n.32 above, at p.143, Per Dickson C.J. and McIntyre Lamer, Wilson and L'Heureux-Dube JJ. As to what constitutes discrimination Justice McIntire observes: "I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."

As observed above, *Andrews* provided an encouraging start to the equality jurisprudence under Section 15 in Canada. After *Andrews*, the next case, R v Turpin (1989)[38], strengthened the equality analysis of *Andrews*. Together, these decisions form the structure of the Section 15(1) analysis that dominates Canadian equality jurisprudence to this day.[39]

In R v. Turpin, two accused, charged with murder in Ontario, argued that Sections. 427 and 429 of the Criminal Code (1985)[40] violated their equality rights because an accused charged with murder in Alberta could elect to be tried by a judge alone. They claimed that the law by giving accused persons in Albarta, but not in any other province, an election to be tried before judge alone violates their equality rights under Section 15 of the Charter and cannot be justified under Section 1.[41]Justice Wilson held that the Criminal Code provisions did not infringe Section 15(1) of the Charter.[42]

From *Andrews* and *Turpin* there emerged a two-step analysis used to find violations of the equality rights under Section 15(1).[43] As York summarises, the first step is to determine whether the impugned law draws a distinction, intentional or not, based on the personal characteristics of the individual or group and resulting in the denial of one of the four basic equality rights. However, not every distinction would deny an

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[38] 1 SCR 1296.
[39] York, n.13 above, p.334.
[40] (R.S., c. C-34) Available at: http://www.canlii.org/ca/sta/c-46/ (Last accessed 10.10.04).
[41] Except in Alberta, an accused charged with murder must, under Sections 427, 429 and 430 of the Criminal Code (1985), be tried by a judge and jury.
[42] In Wilson J.'s view, the provisions did not discriminate against the complainant, in part because the appellants could not be characterized as a "discrete and insular minority" and therefore, residents outside Alberta and charged with a s.427 criminal offences outside Albarta do not constitute a disadvantaged group in Canadian society within the contemplation of Section 15.
[43] York (n.13 above) extrapolated the test from McIntyres J's judgment in *Andrews* and Wilson J's judgment in *Turpin*.

individual's equality rights. The second step therefore, is to demonstrate that this distinction results in discrimination. To prove discrimination, the claimant must show that the distinction was based on a ground enumerated in Section 15(1) or analogous to one. Such a distinction must also be shown to have the effect of imposing burdens, obligations, or disadvantages on, or withholding benefits and opportunities from, an individual or group not imposed on or withheld from others[44].

But unfortunately, after *Turpin*, in the notorious trilogy of Miron v Trudel (1995)[45], Egan v Canada (1995)[46] and Thibaudeau v Canada (1995)[47] the meaning and direction of the equality guarantee under the *Charter* became increasingly uncertain and fragmented.[48]

In Miron v Trudel (1995)[49] an insurance plan that awarded accident benefits to married spouses but denied it to common law spouses was challenged.[50] A majority of the Supreme Court judges decided that denying spousal benefits to non-married cohabitants violated Section 15(1) of the Charter. Egan v Canada (1995)[51] was concerned with section 2 of the Old Age Security Act (1985)[52] which provided early old age pension entitlement to heterosexual cohabitees but denied it to Mr. Nesbit on the ground that his relationship with Mr Egan as a same sex couple did not satisfy

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[44] York, n.13 above, p.334.
[45] 2 SCR 418.
[46] 29 CRR (2d) 79. also at (1995) 2 SCR 513.
[47] 2 SCR 627.
[48] For details see E Grabham 'Law v Canada: New Directions for Equality Under the Canadian Charter?' (2002) 22 *Oxford Journal of Legal Studies* 4 pp.646-647.
[49] n.45 above.
[50] The appellants were not married but lived together with their children and their family functioned as an economic unit. One of the appellants was injured in an accident and after the accident, he made a claim for accident benefits for loss of income and damages against his partner's insurance policy, which extended accident benefits to the "spouse" of the policy holder. The respondent insurer denied his claim on the ground that they were not legally married and hence do not fall within the definition of "spouse". The appellants argued that the policy terms prescribed by the Insurance Act, R.S.O. (1980) (c.218) violated Section 15(1) of the Charter.
[51] n.46 above.
[52] R.S. 1985, c.O-9. Available at: http://laws.justice.gc.ca/en/O-9/ (Last accessed 09.10.04).

the section 2 definition of "spouse" under the Act. The legislation was found to be discriminatory but was nevertheless upheld under section 1 of the Charter. In Thibaudeau v Canada (1995)[53], the procedure of the "inclusion-deduction" [54] system for post-separation child support under the Income Tax Act (1970) was challenged[55]. The challenge was unsuccessful.

As Grabham points out, in these three cases the Supreme Court judges were seen to be splitting in three ways over the correct interpretation of Section 15. Some of them (a conservative quarter of judges led by Justice Gonthier) wanted to modify the framework set out in *Andrews*; others (Sopinka, Cory, Mclachlin and Iacobucci JJ) wanted to retain it; and one Judge (Justice L'Heureux-Dube) wanted to expand it.[56]

As York Summarises[57], the conservative quarter of judges led by Gonthier J introduced a third step to the *Andrews* test. The third step assessed whether the distinction is based on an irrelevant personal characteristic which is either enumerated in Section 15(1) or one analogous thereto.[58] According to Gonthier J., the third step comprises two aspects: determining the personal characteristic shared by a group and then assessing its relevancy, having regard to the functional values underlying the legislation[59]. The group consisting of Sopinka, Cory, McLachlin and Iacobucci JJ, adhered to the two-step framework of *Andrews*. Finally, Justice

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[53] 2 SCR 627.
[54] Section 56(1) (b) of the Act requires the recipient of child support to include such payments as taxable income, whereas the payer or the non-custodial parent can claim a deduction for these payments under section 60 (b) and (c).
[55] The claimant Suzanne Thibaudeau pointed out that majority of recipients of child support are women and argued that the Income Tax Act (1970) (1970 c.I10, S.C. 70-71-72) imposes a burden on women and therefore violates section 15 of the Charter.
[56] Grabham, n.48 above, pp.646-647.
[57] York, n.13 above.
[58] *Miron,* n.45 above, p.702.
[59] Ibid at 703.

L'Heureux-Dube sought to reassess the direction of Section 15(1) jurisprudence[60]. Instead of defining discrimination with reference to the enumerated or analogous grounds, she preferred to take a functional and contextual approach to Section 15(1) that would focus on the impact of the distinctions on particular groups. Justice L'Heureux-Dube's approach concentrated on the "fundamental purpose" of the provision, which is, "to guarantee to all individuals a certain kind of equality, i.e., equality without discrimination"[61]. She observed that the "pivotal question" is how to define "discrimination"[62].The core elements of a definition of "discrimination", in her opinion, would focus the constitutional analysis upon the impact, or discriminatory effect of the legislation, rather than on its constituent elements, or the grounds of the distinction, and would evaluate the discriminatory effect from the perspective of the victim, rather than the perpetrator.[63]

b) Law v Canada

Due to the confusion created by the notorious 1995 trilogy, a concerted effort was made in Law v Canada (Minister of Employment and Immigration) (1999)[64] ("Law v Canada") to mitigate their unsettling affects by providing a set of guidelines for courts while analysing equality claims under the Charter. In Law v Canada, a 30-

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[60] Grabham, n.48 above.
[61] *Egan*, n.46 above, p.542.
[62] Ibid.
[63] As York summarises, the judge preferred a three-step approach to Section 15(1) in which the rights claimant must demonstrate the following: (1) that there is a legislative distinction; (2) that this distinction results in a denial of one of the four equality rights on the basis of the rights claimant's membership in an identifiable group; and (3) that this distinction is "discriminatory" within the meaning of s.15. Under this approach, a distinction is discriminatory where it is capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration. For details, see--*Egan*, n.46 above York, n.13 above.
[64] 1 SCR 497.

year-old widow without dependent children or disability, was denied survivor's benefits under the Canadian Pension Plan (1985)[65]. She claimed that Sections 44(1)(d) and 58 of the Plan infringed Section 15(1) of the Charter on the ground that they discriminated on the basis of age against widows and widowers under the age of 45. The constitutional questions before the court therefore were whether Sections 44(1)(d) and 58 of the Canadian Pension Plan (1985) infringe Section 15(1) of the Charter on the ground that they discriminate on the basis of age against widows and widowers under the age of 45, and if so, whether this infringement was demonstrably justified in a free and democratic society under Section 1. The Court decided that the first constitutional question should be answered in the negative and the second constitutional question need not be answered.

In her judgment, Iacobucci J. affirmed that a purposive and contextual approach is to be followed while interpreting Section 15 (1). As was observed:

> It is inappropriate to attempt to confine analysis under Section 15(1) of the Charter to a fixed and limited formula. A purposive and contextual approach to discrimination analysis is to be preferred, in order to permit the realization of the strong remedial purpose of the equality guarantee, and to avoid the pitfalls of a formalistic or mechanical approach.

She also added a clarifying third step to the *Andrews* framework.

> A court that is called upon to determine a discrimination claim under s.15(1) should make the following three broad inquiries:
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> A. Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position

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[65] The age limits on survivor benefits under The Canadian Pension Plan (1985) precludes surviving able-bodied spouses without dependants who were under the age of 35 at the time of the death of the contributor from receiving the pension until they reach the age of 65. According to the plan, the survivor's pension is gradually reduced for surviving spouses who are between the ages of 35 and 45 by 1/120th of the full rate for each month so that the threshold age to receive benefits is age 35. For details on the Plan, see-- (R.S. 1985 c. C.18), available at http://laws.justice.gc.ca/en/C-8/ (Last accessed 13.09.04).

within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

B. Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds? And,

C. Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?[66]

The first step of the test requires examination of both the purpose and effect of the legislation whereas, the third step seemingly promotes an effects-based analysis with a focus on the denial of benefits and an underlying concern with disadvantage.[67] In addition to that, it also opens the door for contextual assessment of discrimination through the consideration of four further factors: pre-existing disadvantage, relationship between grounds and the claimant's characteristics or circumstances, the ameliorative purposes or effects of the impugned law, and the nature of the interest affected by the impugned law.[68] The test therefore, expressly takes into consideration historical social disadvantage and affirms that ameliorative measures should be viewed primarily as non-discriminatory. [69]

From the above discussion, it is evident that the Courts by their decisions in *Andrews* and in Law v Canada have now moved towards a more substantive understanding of equality that focuses on the actual effects of legislation on a group, rather than on

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[66] Law v Canada, n.64 above, pp.334-341.
[67] Grabham, n.48 above.
[68] See, Law v Canada, n.64 above, pp.534-41. According to Iacobucci J, the mentioned four factors are examples of factors which may be referred to by a Section 15 claimant in order to demonstrate that legislation has the effect of demeaning his or her dignity.
[69] Grabham, n.48 above.

distinctions made by the legislation itself. The approach of focusing on the "disadvantage" instead of sameness or difference taken by the Courts in these cases is similar to the approach taken by scholars such as Catherine MacKinnon who rejects the dichotomy between "sameness and difference" in the context of gender discrimination[70]. She argues that "the difference approach" continues to adopt a point of view of male supremacy because according to this approach "man" remains the standard against which all others are measured. As she points out, under the sameness standard, women are measured according to their correspondence with man. Under the "difference" approach, women are measured according to their lack of correspondence with the men. She concludes, "gender neutrality is thus simply the male standard, and the special protection rule is simply the female standard, but do not be deceived: masculinity, or maleness, is the referent for both."[71]

4. Substantive equality and equality at the intersection

Inequality and disadvantage can be embedded in many societies, on many levels, and in many different forms. Women from different socio-economic-cultural background therefore may experience these inequalities and disadvantage differently. Often these inequalities are rooted in multiple sites of oppression based on sex, religion, race, class, sexual identity, disability, and age etc[72]. For example—in Bangladesh, Hindu women arguably suffer double oppression because of their gender and also because they belong to a religious minority community; in western societies, lesbian, disabled and racial minority women may also suffer multiple oppressions.

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[70] C MacKinnon *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987) pp.32-46.
[71] Ibid., p.34.
[72] Majury, n.2 above.

As noted earlier, the grounds of discrimination can in fact be wide in number and scope. As Hannett[73] summarises from the writings of Shoben[74] and Eaton[75], this kind of multiple discrimination can occur in at least two ways, namely, where the grounds of discrimination are additive in nature; and/or where the discrimination is based on an invisible combination of two or more social characteristics. The former, additive discrimination, describes a situation where an individual belongs to two different groups, both of which are affected by discriminatory practices[76]. The latter, commonly referred to as intersectional discrimination, arises out of the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone.[77] Examples of these two types of discrimination are given by Crenshaw[78] from the experience of black women. Crenshaw points out that black woman often experience double or additive discrimination as a cumulative effect of practices which discriminate on the basis of race as well as on the basis of sex. And sometimes, they experience intersectional discrimination as Black women, i.e., not as the sum of race and sex discrimination, but simply as Black women.[79]

The issue of intersectional discrimination was almost completely absent in early feminist writings on the Canadian Charter.[80] Since those days, intersectional discrimination as a critical component of any equality analysis has been powerfully

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[73] S Hannett 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination' (2003) 23 *Oxford Journal of Legal Studies*, pp.65-86.
[74] E Shoben 'Compound Discrimination: The Interaction of Race and Sex in Employment Discrimination' (1980) 55 *NYU Law Rev*, p.793.
[75] M Eaton 'Patently Confused: Complex Inequality and Canada v Mossop' (1994) 1 *Rev Cons Stud* 203.
[76] See Shoben, n.74 above, p.794.
[77] Eaton, n.75 above, p.229.
[78] K Crenshaw 'Demarginalizing the Intersection of Race and Sex: A black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' in D K Weisberg (ed) *Feminist Legal Theory: Foundations* (Philadelphia: Temple, 1993) p.383.
[79] Ibid.
[80] Hanett, n.73 above.

brought to the foreground through the writings and advocacy of women of colour[81]. The result of their analysis has been an enriched understanding of what substantive equality should entail. Hughes[82] points out –

> as our understanding of equality has evolved, its role in the ordering of liberal societies has become more prevalent. It is no longer sufficient to assess inequality at a surface (overt or obvious) level: rather, more subtle forms of inequality (disproportionate impact or based on an intersection of grounds) are now being addressed . . . A fully realized substantive equality concept requires an appreciation of the flexibility and overlapping nature of identity and of the distinction between an externally imposed and an internally derived identity.

According to Majury[83] anti-discrimination law must be capable of responding effectively to the complex and intersectional discrimination that many people experience; to the extent that it fails to do so, the law itself is discriminatory. As Grabham points out, "the dilemma in Canadian equality jurisprudence is therefore how to accurately portray, and remedy the multi-dimensional, interlocking and highly specific nature of social inequalities".[84] She observes, in contrast to formal and categorized equality that provides an "either-or" choice of grounds, substantive equality "should work like a spotlight on social relations to clarify the complexity and inter-relatedness of discriminatory dynamics".[85]

Since the advent of the Charter, one of the concerns of feminists in Canada has been that whether Section 15 with its enumerated grounds is capable of addressing situations of intersectional discrimination. The concern is premised on the notion that a grounds-based approach to discrimination may not be able to encompass intersectional discrimination. As the discussion below will show, it is the

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[81] Ibid.
[82] Hughes, n.34 above, p.43.
[83] See- Majury, n.2 above.
[84] Grabham, n.48 above.
[85] Ibid., p.644.

"contextual" approach to interpretation in the test set out in Law v Canada that has ultimately facilitated the introduction of concepts such as intersectionality into the equality jurisprudence in Canada. This eventually led to opening up the multidimensional possibilities of section 15 by Justice L'Heureux-Dube in the case Corbiere v Canada (1999).[86]

In Corbiere v Canada (1999), section 77(1) of the Indian Act (1985)[87] was challenged. This section required that in order to vote in the band elections, the band members had to be "ordinary resident" on the reserve.[88] Following Law v Canada's contextual analysis, the majority of the judges found that band members who were not "ordinary residents" were an analogous group and hence deserved protection under Section 15 of the Charter.

Justice L'Heureux-Dube, citing Justice Iacobucci's dicta in Law v Canada and Justice Wilson's dicta in *Andrews*, observed that the analogous grounds inquiry "must be undertaken in purposive and contextual manner"[89] She identified a number of contextual factors that indicate that certain characteristics or combinations of characteristics have discriminatory potential. These factors include the fundamental nature of the characteristic, the importance of the characteristic to the claimant's sense of identity, personhood, or belonging, and the lack of political power,

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[86] 2 SCR 203.
[87] n.17 above.
[88] The respondents, on their own behalf and on behalf of all non-resident members of the Batchewana Indian Band, sought a declaration that s. 77(1) of the Indian Act (1985), which required that in order to vote in band elections, band members have to be "ordinarily resident" on the reserve, violates Section 15(1) of the Charter. As less than one third of the registered members of the band lived on the reserve, the provision therefore, in effect prevented a large number of band members from exercising their voting rights.
[89] Corbiere v Canada (1999) 2 SCR 203 at 251.

disadvantage or vulnerability of those possessing the characteristic.[90] She concluded that:

> The second stage must therefore be flexible enough to adopt to stereotyping, prejudice, or denials of human dignity and worth that might occur in specific ways for specific groups of people, to recognise that personal characteristics may overlap or intersect (such as race, band membership, and place of residence in this case), and to reflect changing social phenomena or new or different forms of stereotyping or prejudice.[91]

It is clear from the above statement that Justice L'Heureux-Dube's approach to equality analysis recognises the need to take into account possibility of specific grounds of intersectional discrimination through the "contextual determination of analogousness"[92] under Section 15. In allowing the intersection of enumerated and analogous grounds to result in new grounds, she thus created the possibility for recognising that women of colour, for example, are disadvantaged in a unique way on the basis of race, gender and economic class. In doing so, she subverted the focus from the rigid application of enumerated and analogous grounds and affirmed the need for conscious consideration of inequality within the context of persons whose identities may involve the intersection of race, gender, class, sexual orientation, physical disadvantage or other characteristics which often serve as the basis for unfair discrimination. The test set out in Law v Canada as applied in *Corbiere* by Justice L'Heureux-Dube thus clearly progresses toward developing "multi-dimensional"[93] understanding of equality. This indicates that the Canadian courts are on their way to a fuller and more sensitive treatment of intersectional discrimination, which is contextually based.

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[90] Ibid at 252.
[91] Ibid at 253.
[92] Grabham, n.48 above, p.653.
[93] Ibid.

5. Conclusion

The Canadian experience shows that while the drafting of an effective and multi-dimensional equality guarantee can be difficult, it can be even more difficult and complex to interpret it so as to embrace a more substantive, nuanced understanding of equality. As the above discussion demonstrates, in recent years, escaping from previous formal understanding of equality, the Charter is proceeding, with its enumerated and analogous grounds, towards a more nuanced and substantive understanding of equality.

Since its advent, the equality provision of the Charter has brought about a major and ongoing transformation in many areas of Canadian law such as, criminal, family, employment and tort law. As Susan Boyd[94] argues, the Canadian Charter of Rights and Freedoms (1982)[95] has affected family law in Canada in three different ways: firstly, through governmental review of legislation so as to ensure that statutory provision comply with the Charter[96]; secondly, through direct constitutional challenges in the Courts to statutory provisions on the basis that they violate Charter guarantees; and thirdly, through indirectly invoking the Charter to argue that, even in the absence of the required element of government or state action, judges must nevertheless in this situation take into account the fundamental values such as equality that are enshrined in the Charter. Also, as Boyd observes the emphasis of successive Supreme Court judges like Wilson and L'Heureux-Dube upon the

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[94] S Boyd 'The Impact of Charter of Rights and Freedoms on Canadian Family Law' (2000) 17 *Canadian Journal of Family Law* p.293.

[95] n.1 above.

[96] The equality section of the Charter was suspended for three years to permit the federal and provincial governments to review their legislation to see whether statutes were in conformity with the Charter.

importance of a contextual mode of interpretation, together with the work of academics, feminist scholars and women's groups has introduced into Canadian equality jurisprudence a more subtle interpretation of substantive equality that illuminates the complexities and contradictions of de facto inequalities[97].

Despite these developments, debates related to the Charter and the scepticism about its ability to facilitate transition from a formal to a meaningful guarantee of substantive equality still continues among the feminist scholars. As Herman observes, while a majority of feminist lawyers clearly view the Charter's advent as a good thing for women, some academics, notably those writing within a Marxist tradition, remain critical in this area. Most others are 'cautiously optimistic'[98]. These critiques and debates raise some very fundamental questions such as whether, because of its comparative nature, equality can ultimately only mean formal equality, albeit in forms more sophisticated than treating men and women identically[99]. Majury argues that the way in which equality analysis has been set out by the Supreme Court of Canada in its decisions (including Law v Canada) requires that the discrimination has to be related back to grounds and distinct comparator groups have to be determined with respect to each ground. This comparative approach arguably, remains a limiting feature of the analysis and impedes the courts' ability to address situations of intersectional discrimination in their complex wholeness[100]. According

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[97] Grabham, n.48 above.
[98] D Herman *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* (London: University of Toronto Press, 1996), p.73.
[99] Majury, n.2 above, p.334.
[100] Majury, Ibid. York observes in this regard that as the comparative analysis remains embedded in Section 15 jurisprudence, litigants must choose a comparator group that accurately reflects the discrimination experienced. This is particularly relevant for claims arguing that a legislative provision is under-inclusive, since a result oriented court may choose to focus on the differences between the group claiming the benefit and those receiving the benefit. See- York, n.13 above, p.27.

to some, the problems inherent in equality as an analytical tool and as a goal render it of extremely limited utility for women and other subordinated groups. As Radha Jhappan observes ". . . the discourse of *legal* equality as an overarching goal and strategy is an idea whose time may have passed."[101] Criticising the inherently comparative nature of equality, she questions whether an equality analysis can ever lead to anything more than variations on the formal equality.

This Chapter has highlighted the comparison between the equality guarantee enshrined in the Constitution of Bangladesh and the equality in the Charter. It has been observed in Chapter IV that there is scope to embrace the concept of substantive equality in equality jurisprudence in Bangladesh by progressive interpretation of Article 28(4). In this regard Chapter IV also discussed a recent case where "substantive equality" analysis was argued by the Petitioners while interpreting the Constitutional guarantee of equality. While it yet remains to be seen if the judiciary will endorse the substantive equality analysis and if it does, how it will be translated on the ground, in the context of Bangladesh the advantage of pursuing a such a substantive analysis of equality is considerable mainly because it can help to avoid some of the difficulties associated with the issue of reforms of religious law- particularly Islamic law that is perceived as sacred and therefore not amenable to changes. As has been mentioned earlier, in Bangladesh gender equality is often perceived as a Western value inconsistent with the underlying values of Islam. It has been pointed out in Chapter IV that while Islam insists on similarities between men and women in relation to their spiritual role and arguably, in relation to their worth as human beings, it also insists on difference between sexes by

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[101] R Jhappan 'The Equality Pit or the Rehabilitation of Justice' (1998) *Canadian Journal of Women and the Law*10, p.63.

prescribing different social roles and duties for men and women. In this regard it has been noted that substantive equality analysis focuses on the "disadvantages" that flow from differential treatment rather than "difference" between the sexes per se. Seen in this light, the substantive approach to equality becomes much less contradictory to Islam which prescribes as its overarching aim to ensure, arguably, overall justice between the sexes and hence eradicate disadvantage. This argument will be further elaborated in the Concluding Chapter. Also it has been pointed out in this Chapter that the intersectional approach to equality if embraced in Bangladesh context can be beneficial for women belonging to the minority religious communities such as Hindu and Christian women who suffer inequality on multiple grounds. The next Chapter will look at how equality has developed in another jurisdiction i.e. South Africa and if the analysis developed therein useful for addressing the issue of reform to the religious laws in Bangladesh.

CHAPTER VI

GENDER EQUALITY: SOUTH AFRICAN EXPERIENCE

1. Introduction

This Chapter looks at the equality jurisprudence developed in South Africa with focus on its effort to shift towards a model of substantive equality as opposed to the previous formal understanding of rights developed under the apartheid regime. The Chapter begins with an examination of the gender equality framework provided by the Constitution. It then moves on to analyse case law with a view to assessing the Constitutional Court's efforts towards achieving substantive equality. The previous Chapter has traced the development of substantive equality in Canada. This Chapter aims to trace the development of the substantive equality in South Africa with a view to exploring the possibilities it offers together with the equality analysis developed in Canada in addressing some of the issues and concerns pertinent to the basic theme of the thesis i.e. the reform of the religious personal laws in Bangladesh.

a) The Constitutional Framework

i) The Interim Constitution of 1994

Before the enactment of the "final"[1] Constitution in 1996 which came into force in 1997, South Africa was governed by an "interim"[2] Constitution. This constitution was the result of negotiations by strategically placed groups that did not have a democratic mandate and hence was interim.[3] However, it is important to note that this interim constitution laid down the basic structures for a future or final constitution. As such, policy, legislation, and case law promoting gender equality started to emerge before the enactment of the Final Constitution in 1996.[4]

In view of the wide-scale violations of human rights under the apartheid regime in South Africa, the framers of the Interim Constitution attempted to ensure that human rights, including the right to equality, are given prominence and protection. Chapter 3 (Sections 7 to 35) of the Interim Constitution entitled "Fundamental Rights" therefore included a range of rights relevant to gender equality such as the right to equality before the law and to equal protection of the law under section 8 (1), the right not to be discriminated against directly or indirectly, and, without derogating from the generality of the equality provision, on grounds of race, gender, sex, ethnic or social

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[1] Constitution of the Republic of South Africa (1996) [Act No.108 of 1996], hereinafter referred to in this Chapter as the "Final Constitution" or as "the Constitution".
[2] Constitution of the Republic of South Africa (1994) (*Interim Constitution*) [Act No. 200 of 1993], hereinafter referred to in this Chapter as the "Interim Constitution".
[3] S Jagwanth and C Murray 'Ten years of transformation: How Has Gender Equality in South Africa Fared?'(2002) 14 *Canadian Journal of Women and the Law* 2.
[4] All of the decisions made by the Constitutional Court of South Africa in its first twenty-nine months of existence were based on the provisions of the 1994 Interim Constitution. Of the forty-eight decisions in question twenty-six required a decision regarding whether an existing law violated the human rights provisions of Chapter 3 therein. For details, see - B Dickson 'Protecting Human Rights Through a Constitutional Court: the Case of South Africa' (1997) 66 *Fordham Law Review*, p.531.

origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language under section 8 (2). Right to respect for and protection of human dignity under section 10 and freedom of conscience, religion, thought, belief and opinion under section 14.

In some important respects, the interim Constitution went further than the standard guarantee of rights protected in most liberal constitutions. As Dickson[5] notes, the drafters of the interim constitution searched the world for models from which to borrow. While keeping in mind the particular needs of the South African situation, they were especially influenced by the German Constitution (1949)[6] and the Canadian Charter of Rights and Freedoms (1982)[7] (hereinafter referred to as the "Canadian Charter" or as "Charter"). Chapter 3 therefore also protected among other things, the right to respect for one's dignity.

However, it is important to note here that the Constitution did not confer the rights in absolute terms but provided in section 33 Chapter 3, that these rights are limited by law. For this, the Constitution in Chapter 3 laid down a general limitation clause stating that the rights could be limited provided such limitation was-- (a) (i) reasonable, (a)(ii) justifiable in an open and democratic society based on freedom and equality, and (b)shall not negate the essential content of the right in question.[8] In addition to the above, there were also other provisions which were aimed at building a

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[5] Dickson, n.4 above.
[6] Promulgated by the Parliamentary Council on 23 May 1949. Also known as the "Basic Law". Last amended on 31 August 1990.
[7] (1882, 79). Enacted as Schedule B to the Canada Act (1982) (U.K., 1982, c.11), which came into force on April 17 1982. Available at: http://laws.justice.gc.ca/en/charter/index.html (Last accessed 10.09.04).
[8] n.2 above.

legal system based on the values of human rights and equality. For instance, the Constitution specifically directed all courts when interpreting Chapter 3 to "promote the values which underlie an open and democratic society based on freedom and equality."[9] The courts were also required to have regard to relevant international law applicable to the protection of the rights entrenched in the Constitution, and may have regard to comparable foreign case law..[10] Dickson observes that South African courts dealing with constitutional cases have already referred on many occasions to similar cases decided in Canada, the United States, Europe, and elsewhere.[11]

ii) The Final Constitution of 1996 and the South African Bill of Rights

As has been mentioned above, it was the interim Constitution that laid the foundation for the final Constitution of South Africa. Hence, it is argued that the final Constitution did not depart in its purpose and spirit in any fundamental way from the interim Constitution but built on the structure provided therein.[12] Equality and human rights are given clear prominence in the Constitution. They feature in the in the first of the Founding Provisions of the Republic of South Africa: "Human dignity, the achievement of equality and the advancement of human rights and freedoms." They are then spelt out in detail in Chapter 2.

Chapter 2 of the final Constitution, entitled "Bill of Rights" (hereinafter referred to as the *Bill of Rights*), includes an extensive equality provision in section 9 which states,

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[9] Ibid, Chapter VII, 35(1)
[10] Ibid.
[11] Dickson, n.4 above.
[12] Ibid.

"Everyone is equal before the law and has the right to equal protection and benefit of the law." (9(1)). It further provides,

> The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. [13]

This section also protects affirmative action programmes, by providing that "to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken." [14] It is interesting to note here that, like the Canadian Charter, the equality provision of the South African Constitution strives for equal benefit of the law which seeks "equality in result" as opposed to the formal/liberal understanding of equality which is confined to the narrow interpretation of equality before law and equal protection of the law. The Final Constitution also includes a few more sections than Chapter 3 of the Interim Constitution.[15] One of these is section 7, which asserts in subsection (1)—

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[13] Constitution, n.1 above, Chapter II, 9(3).

[14] Section 9 of the *Bill of Rights* provides:

1. "Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[15] Constitution, n.1 above, Chapter II, 7-39.

> This Bill of Rights is a cornerstone of democracy in South Africa. [It] enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.[16]

Sub-section (2) further states that state must not only respect, protect and fulfil the rights in the *Bill of Rights*, but also promote them. The Constitution under section 12 provides that everyone have a right to freedom from "all forms of violence from either public or private sources." Furthermore, subsection 2 of section 12, on freedom and security of the person, expressly includes the right to make decisions concerning reproduction.[17] It is also interesting to note here that the Constitution provides protections against the misuse or gender-biased application of some of the rights which have been a matter of concern for feminists all over the world including Bangladesh as they are often used to preserve and perpetuate discriminatory customs and practices. For example, right to freedom of religion under Bangladesh Constitution may be mentioned which, as Chapter I of the thesis points out, has often been used to justify and perpetuate discriminatory practices in the sphere of religious personal laws in Bangladesh. The South African Constitution under section 15 in subsection 1 also provides the usual protection of freedom of "conscience, religion, thought, belief and opinion" and also expressly recognizes in subsection 3(a) the "system of personal and family law under any tradition, or adhered to by persons professing a particular religion". This immediately raises the concern that this provision may serve to legitimise some of the discriminatory practices evident in some customary laws and religious laws governing family relations. Interestingly, section 15 in subsection 3 (b) removes this concern by requiring that the "recognition of any system of marriage or family law must be consistent with this section and the other

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[16] Ibid. Chapter II, 7(1).
[17] Ibid. Chapter II, 12.

provisions of the Constitution" including the *Bill of Rights*. Similarly, section 31 in subsection 1 provides that persons belonging to a cultural, religious or linguistic community may not be denied the right, to enjoy their culture, practise their religion and use their language; and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. However, the same section in its following subsection 31 (2) provides that these rights may not be exercised in a manner inconsistent with any provision of the *Bill of Rights*.

With regard to limitations on the scope of the *Bill of Rights*, section 36 requires that such limitations has to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Moreover, section 8 (3)(a) expressly requires that a Court, when applying the *Bill of Rights*, apply, or if necessary, develop, the common law to the extent that legislation does not give effect to the right. According to section 8 (3) (b) a Court may also, conversely, develop rules of the common law to limit the right, provided the limitation is in accordance with section 36(1). According to section 39 (2), every Court when interpreting any legislation, and when developing the common law or customary law, "must promote the spirit, purport and objects of the Bill of Rights". Jagwanth and Murray[18] argue that the application of the *Bill of Rights* to the common law (which governs private relations) is obviously important for gender equality in South Africa since gender inequalities and violence against women in the private sphere has traditionally been considered outside the scope of constitutional scrutiny in order to preserve the public-private divide.[19]

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[18] n.3 above.
[19] Ibid.

b) Other Legislative measures to ensure gender equality

The Equality Act

Pursuant to the constitutional requirement that national equality legislation be enacted within three years of the adoption of the Constitution, in February 2000 the Promotion of Equality and Prevention of Unfair Discrimination Act[20] (hereinafter referred to as the *Equality Act*) was passed to promote equality and to prevent and prohibit unfair discrimination, harassment, and hate speech.

The *Equality Act* contains a number of provisions for the prevention and prohibition of unfair discrimination. According to the definition in the Act, discrimination "means any act or omission, including a policy, law, rule, practice, condition or situation which (a) imposes burdens, obligations or disadvantages on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds."[21] The prohibited grounds under the Act include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture language and birth. In addition, any

[20] Act No.4 of 2000.
[21] Ibid. Section 1.

other ground that might disadvantage a person or that "undermines human dignity" or adversely affects his rights and freedoms, is also included.[22]

By specifically affirming in the preamble that promotion of equality requires the "advancement, by special legal and other measures, of historically disadvantaged individuals, communities and social groups who were dispossessed of their land and resources, deprived of their human dignity and who continue to endure the consequences", the *Equality Act* recognises that addressing past patterns of disadvantage suffered by some groups is an essential part of the equality guarantee. This approach is particularly important for women and other racial or religious minorities who often suffer from long-established discrimination and systemic forms of disadvantage.

Another important characteristic of the Act is that it specifically defines the content of certain prohibited grounds of discrimination.[23] For example, section 1 of the *Equality Act* defines marital status as "the status or condition of being single, married, divorced, widowed or in a relationship, whether with a person of the same or opposite sex, involving a commitment to reciprocal support in a relationship". The Act thus provides a way for women to seek redress in areas that previously have not been expressly recognised and protected by laws.[24] According to the Act, gender discrimination includes violence against women, practices that unfairly limit women's rights to property, or other resources including access to social benefits. The Act also

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[22] Ibid. Section 1(xxii).
[23] Jagwanth and Murrary, n.3 above, p. 269.
[24] Ibid. p.270.

prohibits traditional, customary or religious practices that undermine the dignity of women or gender equality.[25]

In addition to the *Equality Act*, there have been a number of other legislative developments that are relevant to gender equality in South Africa. As Jagwanth and Murray points out[26], these include, the Employment Equity Act[27] requiring employers to implement affirmative action programmes to redress disadvantage suffered by people who are members of designated groups such as women, black persons and persons with disabilities; the Prevention of Family Violence Act[28] criminalising the rape of a woman by her husband; the Termination of Pregnancy Act[29] allowing women to terminate their pregnancies during the first twelve weeks and on certain prescribed conditions thereafter, and the Maintenance Act[30] which aims to provide for a simple and effective procedures for dependants to claim and recover maintenance from their ex-partners.

2. Emerging Equality Jurisprudence

a) Liberal Constitutionalism v Transformative Constitutionalism

The uniqueness of South African Constitution has generated a body of academic commentary on the appropriate jurisprudential stance for courts to adopt. In this

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[25] n.20 above, Section 8(d).
[26] n.23 above, see for details on the legislative development regarding equality.
[27] Act 55 of 1998.
[28] Act 133 of 1993.
[29] Act 92 of 1996.
[30] Act 99 of 1998.

context, scholars such as Karl Klare and Pierre de Vos[31] argue that the Constitution of South Africa can be understood to embrace the concept of transformative constitutionalism[32] rather than the concept of liberal constitutionalism. Liberal constitutionalism traditionally pays little attention to the fact that the social, economic, cultural and political context in which the Constitution came into force can change in the future.[33] By adhering to the fiction that "the political community is founded at a single magic moment of 'social contract', it thereby runs the risk of ratifying the pre-existing hierarchy and distribution of social and economic power."[34] Transformative constitutionalism on the other hand sees the Constitution as an instrument committed to social transformation and reconstruction. According to this transformative approach, while determining the scope and meaning of the rights and obligations enshrined in the Constitution, one should not only engage with the past socio-political and cultural context that produced it but also the future that it will gradually shape.[35] Also embodied in this approach is the idea that the power of the community must be deployed to create a society that will nurture and encourage the full potentials of human beings. In other words "the Constitution embraces a vision of collective self-determination parallel to its vision of individual self-determination."[36] Under liberal constitutionalism, the chief purpose of a constitutional document such as *Bill of Rights*

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[31] See K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146, p.155 and P de Vos 'Grootboom, The Right of Access to Housing and Substantive Equality as Contextual Fairness' (2001) 17 *SAJHR*, p.258.

[32] Klare (n.31 above) views "Transformative Constitutionalism" as an enterprise that induces large scale social change through non-violent political processes grounded in law. By the word "transformation" he actually denotes "reform" which is short of or different from "revolution" in any traditional sense of the word. In the background of which is the idea of a highly egalitarian, caring, multicultural community, governed through participatory, democratic processes in both the polity and large portions of "private sphere". Unlike classical liberal constitutions, a transformative constitution is social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural, and self-conscious about its historical setting and transformative role and mission.

[33] De Vos, n.31 above, p.260.

[34] Klare, n.31 above, p.155.

[35] De Vos, n.31 above, p.260.

[36] Klare, n.31 above, p.153.

is to secure individual liberty and property from intrusion by the state, whereas the transformative approach does more than place negative restraints on governmental interference with liberty. It imposes positive or affirmative duties on the State to assist people in exercising and enjoying their constitutional rights, and to facilitate and support individual self-realisation[37]. This means the Constitution is not merely a document that preserves and protects rights but also aims to facilitate the extension of the enjoyment of rights to all. Viewed thus, the Constitution becomes a long term project of constitutional enactment, interpretation, and enforcement committed to transforming "political and social institutions and power relationships in a democratic, participatory, and egalitarian direction".[38]

According to Klare and De Vos, the Constitution of South Africa explicitly rejects the traditional approach of liberal constitutionalism by setting as one of its primary aims the transformation of society into a more just and equitable place where people can realise their full potential as human beings and live their lives in dignity. Klare and De Vos offer as evidence of the transformative vision of the South African Constitution the following features of the new South African Constitutionalism[39]:

1. Social rights and substantive conception of equality: The Constitution of South Africa views political freedom and socio-economic justice as inextricably intertwined and draws a close connection between political and socio-economic rights.[40] The preamble of the South African Constitution affirms that the purpose of democratic transformation is to establish a society based on social as well as political justice and

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[37] De Vos, n.31 above, p.261
[38] Klare, n.31 above, p.150.
[39] The six points discussed here have been extrapolated and summarised from the authors Klare and De Vos. See n.31 above.
[40] Klare, n.31 above, p.153.

Section 1 clearly states that the Republic of South Africa is founded on the value of achieving equality. The Constitution envisages equality not just within the legal process but in the broader social context.

2. Affirmative State duties: As has been mentioned earlier, one important characteristic of the transformative approach is that it imposes on the state both positive and negative obligations. For example, the equality guarantee in section 9 of the Constitution of South Africa places a negative obligation on the state that prohibits it from unfairly discriminating against an individual. At the same time, this guarantee also places a positive duty on the state to take steps to create an environment in which individuals will be able to reach their full potential as human beings and live their lives in dignity.

3. Horizontality: The terminology "horizontal" refers to the scope of application of the fundamental rights provisions of the constitution. Unlike the traditional "vertical application" which denotes that fundamental rights only bind governmental actors and only apply within the relationship of government to citizens, "horizontal" application refers to an application of fundamental rights that binds private as well as governmental actors and applies in relationships between private citizens as well as in relationships between government and citizens.[41] The Constitution of South Africa envisages extending democratic norms and values into the private sphere, particularly the market, the workplace and the family. The *Bill of Rights* binds private parties.[42] Private parties are expressly barred from engaging in invidious discrimination[43] and the government is obliged to enact legislation enforcing this.[44]

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[41] See Klare and De Vos, n.31 above.
[42] Constitution, n.1, section 8(2).
[43] Ibid, section 9(4),
[44] Ibid, n.1, section 9(4) read with schedule 6, item 23(1).

4. Participatory governance: The Constitution envisages inclusive, accountable, participatory, decentralised and transparent institutions of governance[45] and contemplates that government will actively promote a culture of democracy.[46]

5. Multiculturalism: The Constitution celebrates multiculturalism and diversity and expressly promotes gender justice, rights for vulnerable and victimised groups and identities by including protection for gay people and the disabled. It protects language diversity and respect for cultural traditions.[47]

6. Historical self-consciousness: An important feature of the Constitution is its historical self consciousness. According to the Preamble of the Interim Constitution the document is "a historic bridge between the past of....injustice, and a [democratic] future."[48] The Constitution also acknowledges that the Constitution is not self-executing but is an evolving text that must be interpreted and applied. The Constitutional Court has also affirmed that while interpreting the provisions of the *Bill of Rights,* the historical, social and economic context must also be taken into account.[49]

The 2001 decision in Government of the Republic of South Africa v Grootboom (2001)[50] (*"Grootboom")* confirms that the Constitutional Court of South Africa has implicitly embraced this transformative vision by its acceptance of a contextual

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[45] Klare concludes this by referring to sections 40(2), 41(1), 32 and 33 of the Constitution. See Klare, n.31 above, p.155.
[46] Klare concludes this by referring to section 234 of the Constitution. Ibid.
[47] Ibid.
[48] Interim Constitution, n.2, Preamble.
[49] Government of the Republic of South Africa v Grootboom (2001) (11) BCLR 1169 (CC).
[50] Ibid.

approach.[51] In *Grootboom*, almost one thousand people were evicted and made homeless from a land in Western Cape where they were residing.[52] They claimed that the state's policies[53] constituted an infringement of their right of access to housing guaranteed in section 26 of the Constitution. The Court unanimously agreed that the existing housing policies did not meet the obligations set out in section 26 of the *Bill of Rights*, but stated that this did not entitle the applicants to demand housing or shelter immediately.[54]

The reasoning deployed by the Court in this case is of the utmost importance as it places the transformative project of the Constitution at the centre of the Court's interpretation of rights such as the right of access to housing. The judgment confirms that the transformative vision of the Constitution is only realised when the rights therein are interpreted with reference to the specific social and economic context prevalent in the country as a whole, and the social and economic context within which the applicant group find itself in particular.[55] According to Yacoob J., the Constitution sets out the goal of achieving social justice and the improvement of quality of life for everyone. The aim of the Constitution is to create a legal framework that facilitate the

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[51] See De Vos, n.31 above.

[52] To control the influx of Africans to the region the Western Cape apartheid regime implemented influx control policies which resulted in an acute shortage of housing and homelessness especially for Africans. See- *Grootboom*, n.49 above, para 6.

[53] The state's extensive housing programme provided for the progressive realisation of access to formal housing, to be assessed via a waiting list after a waiting period of up to seven years or more. Ibid., para 8.

[54] The Court came to the conclusion that neither section 26 nor section 28 of the Constitution entitled Respondents to claim shelter or housing immediately upon demand. However, section 26 did oblige the State to devise and implement a coherent, co-ordinated programme designed to meet its section 26 obligations. The programme that had been adopted and was in force at the time that the application was instituted, fell short of the obligations imposed upon the State by section 26(2) in that it failed to provide for any form of relief to those desperately in need of access to housing. Accordingly, the Court made a declaratory order requiring the State to act to meet the obligation imposed upon it by section 26(2). This included the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need. Ibid.

[55] De Vos, n.31 above.

realisation of one over-arching goal, namely, the achievement of a society that based on the principles of equality, human dignity and freedom[56].

In line with the transformative vision, the Court also stressed that the Constitution placed a duty on the state to act positively to ameliorate the living conditions of its citizens. In the judgement it was stated that--

> The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The state must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.[57]

As explained earlier, one of the important characteristics of the transformative approach is the understanding that the rights in a constitution are interrelated and interdependent. This implies that the right to equality and other social and economic rights set out in the *Bill of Rights* have been included to ensure the achievement of the same goal of creating a society where people can achieve their full potentials without being disadvantaged on the ground of race, sex, disability, sexual orientation or class. In line with this, the Court in *Grootboom* confirmed that to advance such transformative goals, all the rights under the *Bill of Rights* must be viewed as inter-related and mutually supporting:

> there can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied to those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the achievement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential[58].

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[56] See-- n.49 above, para 1.
[57] Ibid., paras 88 and 89.
[58] Ibid., para 23.

As De Vos points out, the Court is apparently suggesting that the failure by the state housing plan in the Western Cape to provide for the eradication of homelessness was unreasonable, and hence an infringement of section 26, could have a strong bearing on whether the inaction of the State would also constitute an infringement of section 9(3)[59] of the Constitution. This according to De Vos, indicates that where the Court finds the state to act in a way that unreasonably fails to fulfil the social or economic needs of the vulnerable section of the society, it will be a strong indication that such action or inaction also constitutes unfair discrimination. Reading the various sections of the Constitution together in this manner reinforces the transformative nature of the Constitution in general and equality analysis in particular as it confirms the inextricable link between the aspirations of the equality guarantee in section 9 and the aspirations articulated by various social and economic rights.[60]

3. Towards a substantive equality

Equality as a foundational value and as a right is central to the transformative project of the Constitution.[61] The challenge of achieving equality within the transformative project involves the eradication of systemic forms of disadvantage as well as development of opportunities which allow people to realise their full potential as human beings.[62]

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[59] Section 9(3) states: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

[60] See De Vos, n.31 above.

[61] C Albertyn and B Goldblat 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR*,, p.249—presents a distinction between the two. Equality as a value gives substance to the vision of the Constitution. As a right, it provides the mechanism for achieving substantive equality.

[62] Ibid.

Critical feminist scholars have challenged some of the fundamental tenets of liberalism that focus on the rights of the individuals devoid of contextual reality. As Albertyn and Goldblat summarise, having engaged with the law to expose its gender bias, critical feminists argue that the law must see human beings as rooted in their social context and should recognise the structural inequality and disadvantage which affect a person's ability to realise her full potential as a human being. One of the fundamental objectives of critical legal feminism is, therefore, to locate its understanding of law and legal concepts in the lived experience of women and men.[63] Feminist scholars have insisted on a substantive understanding of equality that recognises that women and other disadvantaged groups are subject to various inequalities which are deeply structural, embedded in the socio-economic and cultural norms and values of the society. This approach of substantive equality rejects the formal model of equality that merely requires the state to guarantee equal treatment of the individuals and thus disregards the structural inequality in the society and perpetuates prevailing patterns of social and economic disadvantage. Feminist scholars have, therefore engaged extensively with the notions of difference and disadvantage and argued that differences are only problematic when they perpetuate disadvantage. The focus is not, therefore, on difference as such but on the disadvantage resulting from this differentiation.

The judgements delivered by the Constitutional Court of South Africa so far recognise that equality must be understood substantively rather than formally to give effect to the transformative vision of the Constitution. As the cases below will show, in line with the transformative vision of the Constitution, the Constitutional Court has

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[63] Ibid.

interpreted the right to equality broadly to embrace a more positive approach that places a duty on the state to take steps towards achieving a society in which every individual member of the society can reach their full potential and human dignity. Acknowledging the fact that a person cannot fulfil his full potential as a human being where structural inequality prevails, the Court has developed a contextual approach to equality that requires examination of the actual impact of an alleged violation on the individual within and outside different socially relevant groups in relation to prevailing social, economic and political circumstances.

a) Equality and disadvantage

i) Brink v Kitshoff

In Brink v Kitshoff (1996)[64], the issue before the Court was to decide the constitutionality of section 44[65] of the Insolvency Act (1936)[66]. In her judgment in this case O'Regan J placed the idea of systemic discrimination and group-based disadvantage at the heart of the equality analysis. She observed that the equality provision (in the Interim Constitution) was adopted "in the recognition that discrimination against people who are members of disfavoured groups can lead to pattern of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society. The drafters realised that it was necessary both to proscribe such forms of discrimination and to permit

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[64] (6) BCLR 752 (CC).

[65] This section in certain circumstances operated to deprive married women of some or all of the benefits of life insurance policies ceded to them by their husband before they became insolvent. There were no similar provisions limiting the benefits of a life insurance policy ceded by a woman in favor of her husband. The Court struck the provision down as unconstitutional and held that the distinction between married men and women in this regard could not be justified under the Interim Constitution. Ibid.

[66] Act 24 of 1936.

positive steps to redress the effects of such discrimination"[67] She further observes that by treating married women and married men differently the impugned sections of the Act disadvantages married women and not married men. The discrimination in these sections is therefore based on two grounds: sex and marital status. Although section 8(2) of the Interim Constitution does not require that the discrimination be based on one ground only; it specifically states that it may be based on "one or more" grounds. The list provided in this section is thus not exhaustive. She therefore, concludes that "the subsection states expressly that the list provided should not be used to derogate from the generality of the prohibition on discrimination. It is not necessary to consider whether the other ground of discrimination, marital status, would be a ground which would constitute unfair discrimination for the purposes of section 8. It is sufficient that the disadvantageous treatment is substantially based on one of the listed prohibited grounds, namely, sex."[68]

The case was important because of its emphasis on the need to understand the right in light of South-Africa's history of systemic racial and gender discrimination. It also affirms that the list of grounds provided in the equality guarantee is not exhaustive but may overlap and the equality analysis should take that factor into account. This in turn, points towards the possibility of adopting an intersectional approach to equality. It thus set the stage for developing a more nuanced, context based and substantive understanding of equality by the Courts to follow in the subsequent years.

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[67] n.64 above, para 42.
[68] Ibid. para 43.

ii) National Coalition for Gay and Lesbian Equality v Minister for Justice

In National Coalition for Gay and Lesbian Equality v Minister for Justice and Others (1998)[69] it was recognised that the right to equality must be understood in the context of South Africa's history. The court in this case observed: "Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact is severe, affecting the dignity, personhood and identity of gay men at a deep level. It occurs at many levels and in many ways and is often difficult to eradicate."[70] The Court thus came to the conclusion that the discrimination in question was unfair and therefore in breach of section 9 of the 1996 Constitution.

As to the nature of substantive equality under the Constitution, the Court commented that in a country such as South Africa where persons belonging to certain categories have suffered considerable unfair discrimination in the past, and observed:

> It is insufficient for our Constitution to merely ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely.[71]

According to this approach, the primary purpose of an equality provision is to eradicate past patterns of disadvantage and to interpret discrimination within the context of past and existing social, political, and economic disparities.[72] This

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[69] (12) BCLR 1517 (CC). In National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others (1998), the Applicant, a voluntary association challenged the constitutionality of the common law proscription of sodomy and certain statutory provisions which criminalised sexual acts engaged in between male persons such as, section 20A of the Sexual Offences Act 23 of 1957, Schedule 1 to the Criminal Procedure Act 51 of 1977, the Security Officers Act 92 of 1987. The Court unanimously declared them to be inconsistent with the Final Constitution and invalid.

[70] Ibid. para 26.

[71] Ibid.para 60

[72] Jagwanth and Murray, n.3 above.

highlights the fact that the systematic social marginalisation of groups such as gays and lesbians, blacks, women and black women, require a remedial approach to equality which takes into account their membership in groups with a history of discrimination.[73] The Court concluded that the need for such remedial or restitutionary measures has been recognised in sections 8(2) and 9(3) of the interim and 1996 Constitutions respectively.[74]

This approach is in line with the contextual approach prescribed by a substantive notion of equality that insists that equality analysis should not focus on the sameness or difference of the claimant and her group, but on the social relationships and institutions which utilise differences to justify and enforce disadvantage and the ways in which such practices can be changed.

b) Equality and dignity

i) President of the Republic of South Africa v. Hugo

In President of the Republic of South Africa v Hugo (1997)[75] (*"Hugo"*), a single father, Mr Hugo, challenged the constitutionality of the President Act (1994)[76] which granted special remission of sentence to, "all mothers in prison on 10 May 1994, with

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[73] n. 69 above

[74] Ibid. According to the Court, section 9 of the 1996 Constitution, like its predecessor the interim Constitution, clearly contemplates both substantive and remedial equality. Substantive equality is envisaged by section 9(2) which unequivocally asserts that equality includes "the full and equal enjoyment of all rights and freedoms." In addition to this, the State is further obliged "to promote the achievement of such equality" by "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination," which envisages remedial equality.

[75] (6) BCLR 708 (CC).

[76] Act 17 of 1994, initiated by newly elected President Nelson Mandela in 1994.

minor children under the age of twelve years". Hugo claimed that the President Act (1994), by granting remission to prisoners who were mothers and not fathers, discriminated against him unfairly on the grounds of sex. The majority accepted that the President Act (1994) discriminated against fathers in denying them a benefit accorded to mothers, but in light of historical patterns of disadvantage perpetuated against women as primary care-givers, such discrimination was not unfair.

The reasoning deployed by the Court in this case is significant for equality analysis for a number of reasons which are:

Firstly, in developing its equality analysis, in *Hugo*[77], The Constitutional Court shifted its emphasis from disadvantage and placed dignity at the centre of the equality analysis. Referring to J. L'Heureux-Dube's analysis in Egan v Canada (1995)[78] the Court observed:

> At the heart of the prohibition of unfair discrimination lies recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that is a goal of the Constitution that should not be forgotten or overlooked.[79]

This shift away from disadvantage to dignity has received some criticism from feminist scholars engaged in the equality analysis. Authors such as Albertyn and Goldblat[80] argue that the replacement of disadvantage with dignity returns us to a liberal and individualised conception of right. The problem with this is that it centres the right on individual feelings of affront rather than locating the complainant within

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77 n.75 above.
78 29 CRR (2d) 79, pp.104-5. The case has been discussed in details in Chapter V.
79 n.75 above, para 41.
80 Albertyn and Goldblatt, n.61 above.

the context of a disadvantaged group. According to these authors, this shifts the emphasis away from the transformative use of the right.

Secondly, in *Hugo,* the Court found itself faced with the question that whether a limited and short-term benefit of the remission of imprisoned mothers outweighed the detriment of perpetuating a gender stereotype-that women are "care-givers" and bear more responsibility for child-rearing than the fathers. The majority of the Court agreed that the Presidential decree was justified on the basis that it was aimed at benefiting a vulnerable group which has suffered longstanding discrimination and disadvantage in the past. Justice O'Regan, supporting the majority observed, "Even where discrimination in a particular case arises from reliance upon a stereotype or generalisation, the focus of the [unfair discrimination inquiry] must remain whether the impact of the discrimination was unfair."[81] According to her, the approach advocated by Kriegler J. (discussed below) does not take sufficient account of present social realities and could indeed deter rather than facilitate achieving the constitutional goal of equality.[82]

Hugo provides a good example of some of the difficulties that may arise while addressing the complex nature of discrimination in the equality analysis. Although in this case the Court accepted that the President Act (1994) reinforced underlying societal constructions of difference that maintain women's subordination through a stereotypical assumption regarding women's child-bearing and rearing capabilities as primary care-givers, a contextual evaluation of women's disadvantaged position in South African society ultimately led the Court to conclude that the impugned Act is

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[81] n.75 above, para 111.
[82] Ibid, para 113.

justified as it aimed at benefiting a vulnerable group which has suffered longstanding discrimination and disadvantage in the past.[83] The court held:

> we need . . . to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.[84]

This observation by the court arguably accords with the substantive notion of equality. The ultimate goal of substantive equality is to ensure equality of outcomes. In order to achieve this goal a contextual inquiry into individual and group disadvantage has to be made. This sometimes require treating those who are different the same and in other circumstances it means treating them differently. As Martha Minow points out:

> [E]quality requires same or different treatment, depending on the circumstances and the position of the individual in relation to his or her group-based systemic disadvantage.[85]

The decision in *Hugo* was however much criticised on the ground that it made a stereotype that perpetuated women's disadvantage, constitutionally permissible[86]. According to some, the limited benefit conferred upon a small group of women who suffered historical disadvantage was far outweighed by the long-term detrimental effects of perpetuating a gender stereotype against all South African women.[87] As Van Marle observes, "the court's approach of substantive equality, which aims to represent

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[83] C Barclay 'Toward Substantive Equality: A feminist Critique of the Notion of Difference in the Canadian and South African Equality Tests' (2002) 5 *International Journal of Discrimination and the Law* 2/3.
[84] n.75 above, para 42.
[85] M Minow 'Feminist Reason: Getting it and Losing it' (1988) *J. Leg. Edu* 47.
[86] Barclay, n.83 above.
[87] A total of 440 women prisoners were released under the President Act (1994).

a way of regarding difference, by taking a 'universal'/general or stereotyped view of reality as its starting point, harmed the dignity of and respect for women and men."[88]

As Kriegler J. in his dissenting judgment in *Hugo* observed:

> The limited benefit in this case cannot justify the reinforcement of a view that is a root cause of women's inequality in our society. In truth, there is no advantage to women qua women in the President's conduct, merely a favour to perceived child minders. On the other hand, there are decided disadvantages to womankind in general in perpetuating perceptions foundational to paternalistic attitudes that limit the access of women to the work place and other sources of opportunity. . . I cannot agree that because a few hundred women had the advantage of being released from prison early, the Constitution permits continuation of these major social disadvantages.[89]

Albartyn and Goldblatt observes in this regard that the Court by assuming only mothers as being historically disadvantaged with regard to child care responsibilities, failed to recognise the complexities of issues where fathers are primary care-givers. The Court failed to see Hugo as both part of an advantaged group of fathers, and as distinct from that group, because of his location within the sub-group of primary care-giver parents. The Court, thus, while relating the complainant to a particular group, lost the sight of the overlapping nature of the social groups.[90]

ii) Harksen v Lane

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[88] K Van Marle '"The Capabilities Approach", "The Imaginary Domain" and "Asymmetrical Reciprocity": Feminine Perspectives on Equality and Justice' (2003) 1 *Feminist Legal Studies* 3, p.268. According to Van Marle the court's decision affirmed unfair discrimination against Hugo and other single fathers with children under the age of 12 as well as against children under 12 who were in the precarious position of having only father as a single parent. She further observes that the court's decision also negatively affected the dignity and respect of women by affirming the harmful stereotype and generalisation that only women are to be considered the primary caregivers of children.

[89] n.75 above, para 83.

[90] Albartin and Goldblatt n.61 above.

Following *Hugo*, the Constitutional Court finally set out in Harksen v Lane (1997)[91] the full test for equality, and the circumstances under which different treatment may constitute unfair discrimination. Van Marle summarises the test as follows: While judging a claim of unequal treatment or unfair discrimination under the equality section, the first question is whether the provision of the challenged legislation indeed differentiates between people, or categories of people. If the Court finds such differentiation then it will examine whether there is a rational connection between the differentiation and a legitimate governmental purpose. If such a rational connection cannot be found then the legislation will be held to have violated the equality guarantee. The Court will then look at the limitation clause, to see if the violation may nevertheless be justified.[92] Even where a rational connection is found, the Court will turn to the prohibition of unfair discrimination to determine whether, despite the rational connection, the differentiation none the less amounts to unfair discrimination.[93] To determine whether differentiation amounts to unfair discrimination a two stage analysis is followed. First, it must be determined whether the differentiation amounts to "discrimination" and, if it does, whether it amounts to "unfair discrimination".[94] The Constitution provides two categories of discrimination. The first is differentiation based on one of the sixteen specified grounds in section 9(3) of the Constitution. The second is differentiation o a ground not specified but "analogous"[95] to such grounds. The Court decided that discrimination on an unspecified but analogous ground is one that is objectively based on attributes or characteristics that has the "potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious

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[91] (11) BCLR 1489 (CC).
[92] The test has been summarised from Van Marle, n.88 above.
[93] Ibid.
[94] Ibid.
[95] Ibid.

manner".[96] If the discrimination is on a specified ground, unfairness will be presumed, but if it is on an unspecified ground, unfairness will have to be established by the complainant.[97] It was also held that in order to determine whether discriminatory treatment is unfair, various factors must be considered including the position of the complainants in society and whether they have suffered from discrimination in the past; the nature of the discriminating provision or power, and the purpose sought to be achieved by it, as well as any other relevant factors, including the extent to which the discrimination has affected the rights or interests of the complainant and whether it has led to an impairment of their fundamental human dignity.[98] If the discrimination is held to be unfair, the Court will proceed to the final leg of inquiry as to whether the measure can be justified in terms of general limitation clause. [99]

4. Equality at the intersection

According to Romany[100], black women in South Africa cannot neatly compartmentalise their identities. This is because black women in South Africa have suffered multiple oppressions and have been marginalised because of their colour, religion, class and sex. Recognising the fact that some women can suffer compound inequalities, the Constitution of South Africa provides for an equality framework which is informed by an intersectional approach to equality. It has been observed earlier that under the Constitution, a litigant can allege discrimination "on one or more

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[96] n.88 above at para 49.
[97] Van Marle n.88 above.
[98] Ibid. According to Jagwanth and Murray, it is this part of the test that is intended to be contextual and that gives effect to substantive equality, because it is in this way that factors, such as whether past patterns of disadvantage are being exacerbated, are to be considered. See n.3 above.
[99] n.88 above.
[100] C Romany 'Black Women and the Gender Equality in a New South Africa: Human Rights Law and the Intersection of Race and Gender' (1996) 21 *Brooklyn J. Int'l L,* p. 857.

grounds" listed in section 9 of the Constitution. The Constitution thus provides the scope for a woman to allege discrimination suffered at the intersection of race and gender. In Brink v Kitshoff (1996), Justice O'Regan observed that patterns of race and sex discrimination have resulted in "particularly acute" disadvantage in the case of black women, as race and gender discrimination overlap. [101] In National Coalition for Gay and Lesbian Equality v Minister for Justice (1998)[102], Justice Albie Sachs in concurring judgment recognised the intersectional aspect of equality by holding that "one consequence of an approach based on context and impact would be the acknowledgement that grounds of unfair discrimination can intersect, so that the evaluation of discriminatory impact is done not according to one ground of discrimination or another, but on a combination of both, that is, globally and contextually, not separately and abstractly" According to the judge, an example of people suffering from such multiple discriminations would be African widows, "who historically have suffered discrimination as blacks, as Africans, as women, as African women, as widows and usually, as older people, intensified by the fact that they are frequently amongst the lowest paid workers".

Above discussions demonstrate that the equality jurisprudence in South Africa as in Canada is now moving towards embracing an intersectional approach to equality. As has been observed in Chapter V, the concept of intersectional approach to equality does have some significance for the rights of women belonging to various religious minority communities in Bangladesh who suffers discrimination on multiple grounds.

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[101] Justice O' Regan concludes this by observing that although in South African society, "discrimination on grounds of sex has not been as visible, nor as widely condemned, as discrimination on grounds of race, it has nevertheless resulted in deep patterns of disadvantage. These patterns of disadvantage are particularly acute in the case of black women, as race and gender discrimination overlap. That all such discrimination needs to be eradicated from our society is a key message of the Constitution." See, n.64 above.

[102] n.69 above.

It has been discussed in Chapter I and III that in Bangladesh the personal law general law divide has left the different religious communities to be governed by their own religious laws. It has also been pointed out that since its independence, while the state has made attempts to improve the legal status of women of the Muslim communities, it has left the discriminatory religious personal laws of the minority communities virtually untouched. This in turn has created inequality not only between men and women but also between women of different religious communities. In Bangladesh, Hindu women and Christian women therefore, suffer double oppression because of their gender and also because they belong to a religious minority community. It has been observed in the earlier Chapters that equality guarantee as enshrined in the Constitution of Bangladesh does offer the scope to interpret it in a substantive way. In this context, it has also been pointed out that the argument of substantive equality has already started to appear in equality litigation in Bangladesh.[103] If the judiciary endorses this argument, then the next logical step may be to pursue the argument of intersectionality in the equality litigation in Bangladesh. In this regard the thesis observes that although the concept of intersectionality has so far been completely absent in the equality litigation in Bangladesh as well as in the academic writings, this concept if incorporated into the equality analysis will go a long way in strengthening the argument for replacing the obviously discriminatory and disadvantageous personal laws with a unified personal law regime based on substantive equality.

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[103] For example, Shamima Sultana Seema and Others v Bangladesh and others (2003) WP No. 3304/2003. See Chapter IV for detailed discussion on the case.

a) Equality and Customary/Religious Law

Many writers[104] distinguish between "living" customary law, which is the practices and customs actually observed by the people in their day-to-day lives and "official" customary law, which is the result of an embodiment of customary law in a set of rules compiled by early colonial rulers.[105] It can be argued that application of the "official" version of customary law violates the Constitution and the right to gender equality.

In this regard it needs to be noted that the nature of the relationship between the potentially conflicting rights of cultural/religious freedom and the right to gender equality has always been a problematic and complex one. The problem becomes even more complex in societies where right to participate in one's culture and right to practise religion are guaranteed alongside the right to gender equality under the constitution and the nature of the relationship between these two rights are left to be worked out through adjudication. As seen in Bangladesh, most often the customary or religious practices are seen as a private matter and not a legitimate sphere for state's intervention. As Nussbaum notes, in these situations, discriminatory religious practices are often "cheerfully put up with, as part of legitimate differences".[106]

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[104] See- T Nhlapo 'The African Family and Women's Right: Friends or Foes?' (1991) *Acta Juridica* 135; J Bekker and P Maithufi 'The Dichotomy Between "Official Customary Law" and "Non-Official Customary Law"'(1991) *Journal of Judicial Science* 47; and T W Bennett *A Sourcebook of African Customary Law for Southern Africa* (Capetown/Johannesburg: Juta and Co., 1991).

[105] As summarised by Bennett: "The system of African customary law includes the relegation of wives of customary marriages to the status of minors under the legal guardianship of their husbands. Women may not own property or hold office in public forums; they may not negotiate or terminate their own marriages or claim custody of their children; and customary marriages require husbands to pay bride-wealth and allow them to enter into polygamous unions". See- in T W Bennett *Human Rights and African Customary Law Under the South African Constitution* (Capetown: Juta and Co., 1995).

[106] M Nussbaum *Sex and Social Justice* (New York: Oxford University Press, 1999), pp.85-86.

The concept of "living" customary law which is receptive to change can therefore, play a significant role in societies such as in Africa and South Asia[107] where discriminatory religious and customary practices that causes significant disadvantage to women comes into direct conflict with the equality provision and egalitarian vision of the constitution. The advantage of living customary law is that it is receptive to changing conditions and capable of evolution.[108] In other words, it can be seen as a fluid and flexible concept which can incorporate new developments. Viewed thus, the concept of leaving customary law becomes significant for the project of personal law reform in Bangladesh as it opens up the door to develop the customary and religious laws in line with the values of the Constitution without a wholesale abandonment of the cultural practices of the minority communities.

The concept of "living" customary law, however, is not an easy one to define or develop. As Jagwanth and Murray[109] point out, the concept of living customary law give rise to a range of complex questions such as: who would attest to the living law? In a matter of dispute over the meaning, whose words should be taken as conclusive- that of the chiefs or Mullas (who most often seen to be holding the orthodox predominantly patriarchal view) or that of the members of the community? How do courts (which are restrained by formal rules of procedures), determine the appropriate way to develop customary law?

As the case law will demonstrate, the South African courts have started to recognise the concept of "living" customary law. How this will be developed in future is yet to be seen.

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[107] Most notably in Bangladesh and India.
[108] Jagwanth and Murray, n.3 above.
[109] Ibid.

b) Customary law and the Constitution

As has been discussed earlier, the Constitution of South Africa recognises the right to culture and the right to practice religion as well as the right to equality. However, the Constitution also provides that the right to culture may not be exercised in a manner inconsistent with any provision of the *Bill of Rights*.[110] Viewed thus, it appears if there is a conflict between the right to culture and rights such as equality —the latter will prevail. It needs to be noted here that the South African position in this regard is different from Bangladesh. In Bangladesh, as has been discussed in Chapter I and IV, the Constitution guarantees right to freedom of religion alongside the right to equality and there is no express affirmation about the superiority of one over the other. The right to religion is however made subject to "law, public order and morality". As has been mentioned in Chapter I, the judiciary of Bangladesh has already recommended that guidelines should be set up to define "law, public order and morality".[111]

As has been mentioned before, section 39(2) of the South African Constitution requires the courts to promote the spirit, purport, and object of the *Bill of Rights* when interpreting any legislation, the common law or customary law. This section thus provides a scope to preserve the key features and values of traditional customary practices and at the same time develop or discard the others that may be in conflict with the overall spirit of the Constitution. It thus provides the scope for the incremental development of customary law, ensuring that the values of the

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[110] See sections 30 and 31 of the *Bill of Rights*.

[111] See-Editor The daily Banglabazar Patrika and two others v District Magistrate and Commissioner, Naogaon (2000) (Writ Petition No.5897 of 2000). In this case, the Court observed that "the State must define and enforce public morality. It must educate society." For detailed discussion on the case see Chapter I.

Constitution are infused into cultural practices, which may come into conflict with gender equality.[112] Despite these progressive provisions, the issue of gender equality and customary/religious laws has been and still remains a highly controversial and problematic issue in South African equality jurisprudence.

The difficulties associated with the issue of balancing these competing rights were summarised in a South African Law Commission paper as follows:

> The contested positions involve, on the one side, the need to honour the *Bill of Rights* by removing laws that discriminate against women . . ., and, on the other, the recognition of customary law in the same Constitution as part of the law of the land. The difficult task of trying to reconcile these provisions is complicated in any case by the need to be alive to practical realities and to intervene in ways which do not worsen the situation of people in their daily lives.[113]

The following case shows us that South African courts have already taken notice of the concept of "living customary law". Mabena v Letsoalo (1998)[114], involved the issue of validity of a customary marriage. The appellant (who was the father of the deceased groom) contended that the marriage was void for two reasons: Firstly, he, as the father of the deceased groom, had not consented to the marriage. Secondly, the amount bride price (*lobolo*) to be paid was negotiated by the mother of the bride, instead of the father. It was argued that there was no valid customary union because the respondent's mother could not play the role of a guardian and negotiate the terms of a marriage according to the customary law. The High Court rejected this claim and concluded that for mothers to negotiate the terms of *lobolo* and to act as her daughter's guardian and consent to her marriage is not contrary to the customary law of marriage. The Court observed that although under traditional law it is

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[112] Jagwanth and Murray, n.3 above.
[113] Law Commission *Customary Law* (discussion paper no. 93) (Johannesburg: Project 90, August 2000).
[114] (1999) 116 SALJ 742.

impossible for the mother of the bride to be her daughter's guardian, in practice a mother may act as guardian despite being contrary to customary law. As such, it was in accordance with the customary law *as actually practised* and must be recognised by the Court as a development pursuant to the "spirit, purport and objects" of the Constitution.[115] The approach taken by the Court thus recognises the concept of "living customary law" which is "actually practised" by African communities as oppose to the official version as documented by writers.

5. Conclusion

The above discussions traced the development of equality jurisprudence in South Africa and examined some of the decisions of the Constitutional Court interpreting the equality right by taking into account the history of apartheid in South Africa and the needs of its society. It has been seen that the Constitutional Court has affirmed that the goal of the Constitution is substantive equality and has rejected the formalistic reading of the guarantee. It has also been seen that the Court has embarked on recognising equality as a central dimension of the transformative project of the Constitution and is progressing towards providing a framework within which equality can address systematic disadvantage and provide equal opportunity for every member of society to fulfil his or her human potential. The discussions in this Chapter also highlighted some of the key features of the equality jurisprudence in South Africa such as its trends towards embracing the intersectional approach and the concept of "living customary law". The possibilities these developments and features may offer in the context of

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[115] Ibid.

Bangladesh in relation to equality jurisprudence as a whole as well as in relation to reform religious laws has also been discussed in Chapter. Before proceeding towards the conclusion, the next Chapter will look at the reforms to personal status laws in two Muslim countries i.e., Tunisia and Morocco and examine the possibilities they offer for reform of religious personal laws in Bangladesh.

CHAPTER VII

PERSONAL STATUS LAWS IN MOROCCO AND TUNISIA

1. Introduction

On January 25, 2004, the government of Morocco adopted a new landmark family law granting women new rights, among others, in the area of marriage, divorce and custody of children. The new legislation replaced the family law included in the *Moudawana*, Morocco's Personal Civil Status Code (hereinafter referred to as "*Moudawana*" or as "Moroccan Code" or as "The Code" where appropriate), encompassing family law governing women's status. The reform came as a direct result of longstanding demand and advocacy efforts by women's rights activists both inside Morocco and across the Muslim societies in the world.

The recent reforms succeed in bringing the Moroccan law closer to the level of the Tunisian Code of Personal Status[1] (hereinafter referred to as "Tunisian Code" or as "The Code" where appropriate) as far as women's legal status is concerned. In this respect, the recent reform of Moroccan family law is not only significant in the context of women's rights in North Africa but also in relation to the women's movement in general. One important outcome of this reform is that the personal status law of Morocco, along with Tunisia, can serve as models for other Muslim countries which are concerned with equality-seeking legal reforms grounded within the culturally appropriate values of the society. To initiate the reform of personal laws in any Muslim society, it is arguably politically imperative that these reforms are in accord with the socio-cultural values of that society. It is therefore important to compare approaches and policies that have proved effective in other similar contexts. In particular, this comparative approach may be useful in informing strategies to initiate reforms of religious-based personal laws in Bangladesh where current personal laws as demonstrated in Chapters I and II, undermine the right to gender equality guaranteed by the state's constitution.

The object of this Chapter is to challenge the view that religious-based personal laws are not amenable to equality-seeking reforms and changes. It begins by providing a brief background to the personal status laws in Tunisia and Morocco and proceeds to trace the reforms initiated therein with a view to exploring their prospects in contributing towards an equality-based reform approach in Bangladesh. Since the areas covered by personal

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[1] Code du Statut Personnel. Online version available at: http://www.jurisitetunisie.com/tunisie/codes/csp/Menu.html (Last accessed 09.09.2004); see also-- http://www.jurisitetunisie.com/tunisie/codes/csp/Menu.html (Last accessed 14.11.04).

status laws are too vast to permit exhaustive citation and examination in the course of present study, the focus of the discussion is confined to areas such as marriage, the duty of obedience, polygamy, divorce and custody of children under the present personal status laws of these two jurisdictions.

2. Background to the Personal Status Laws in Tunisia and Morocco

Morocco and Tunisia share a common legacy of Islamic jurisprudence of the *Maliki* School[2] and French legal culture. As Mayer observes, after achieving independence from France[3] these countries had to choose between the French model of codified law enacted by the state and the system of decentralised jurists' law that characterised the pre-colonial period. Both states selected the French model, a choice that maximised the possibility of centralised state control over the legal system instead of a system under which control over the formulation of laws would have reverted to religious scholars. [4] Therefore, in both of these *Maghreb*[5] countries in general while other areas of law have undergone a transformation brought about by colonial rule and influence, the family structure was left to be regulated by traditional Islamic law. After independence and since, these countries have been adhering to a common legislative model of family informed by Islamic values. In this context, Tunisia opted for progressive innovations

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[2] See - House of Commons Foreign Affairs Committee *Human Rights Annual Report 2003: Fourth Report of Session 2003-2004* (London: The Stationary Office Ltd of HOC, 6 May 2004).
[3] Tunisia became a French Protectorate in 1881 and attained full independence in March 1956. Morocco gained independence from France in 1956.
[4] A Mayer *Reform of Personal Status Laws in North Africa: A problem of Islamic or Mediterranean laws?* (Occasional Paper No.8) (London: WLUML, July 1996) p.4.
[5] The term "Maghreb" mainly refers countries such as Morocco, Algeria and Tunisia

and reforms in the area of personal status law, while Morocco chose to reinstate many principles taken from the *Maliki* jurists.[6]

The principle of equality is expressly stipulated in the Tunisian Constitution[7]. Article 6 of the Constitution provides that "all citizens have the same rights and duties and are equal before the law" and Article 32 provides that principles of international treaties once ratified supersede provisions in Tunisian law[8]. In line with the equality guarantee in its Constitution, Tunisia crafted Tunisian Code of Personal Status[9] with a series of provisions that put women in a equal position with men in relation to family matters, such as equal duties and responsibilities in running of the family, equal rights to divorce, the abolition of polygamy and the duty of obedience of the wife to the husband etc. The Code thus reflects a more modernist approach by the legislature as it integrates certain fundamental principles which are more accommodating of equal rights of women such as monogamy, judicial divorce, women's emancipation, the welfare of the child

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[6] n.2 above.

[7] Adopted in June 1959 and amended in1988 and 1991. Article 1 declares Islam the state religion, and Article 38 provides that the President of the Republic must be a Muslim. The principle of equality of men and women with respect to citizenship and before the law is expressly affirmed in the Constitution. In this regard Article 6 states: "All citizens have the same rights and the same duties. They are equal before the law"; articles 20 and 21 recognize that women have the right to vote and to stand for public office.

[8] See – C Benninger-Budel and J Bourke-Martignoni *Violence Against Women in Tunisia* (report) (Geneva: OMCT--World Organisation Against Torture, November 2002). The report was prepared for the Committee on the Elimination of Discrimination Against Women. Available at: http://www.omct.org/pdf/vaw/tunisiaeng2002.pdf (Last accessed 13.10.04).

[9] See n.1 above. The Code was promulgated on 13 August 1956.

(adoption).[10] Tunisia's specific commitment to "gender equality" is also reflected in its Post-Beijing Plan of Action (1997-2001)[11] where it was stated that

> To reaffirm within Tunisian law the principles...of *gender equality*, respect of women's rights, and *equally shared responsibility* in the conduct of family and children's affairs, President Ben Ali promulgated... an extensive series of social measures in favour of women and the family. (emphasis added).

It was further observed that-

> to anchor the *principle of gender equality* in the minds of coming generations, school curricula and manuals have been recast to improve the image of women and emphsize the necessity that family relations be based on mutual respect and shared responsibilities, and to stress the importance of the women's presence as a responsible, active partner in public life and society.[12] (emphasis added).

In its combined report (i.e., initial and second report combined) submitted before the Committee on the Elimination of Discrimination Against Women it was affirmed that the Tunisian Personal Status Code laid the foundations for a new organisation of family, based on legal equality of men and women.[13] The above statements clearly indicate that Tunisia's future policy is to ensure "gender equality" in both its public and private sphere. This approach of the Tunisian policy makers has also been reflected in several successive reforms to the personal status code which reinforced women's equal rights within the family. Since 1956, the legislature has been seen to intervene and uphold

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[10] Collectif 95 Maghreb Egalité *One Hundred Steps, One Hundred Provisions: For an egalitarian codification of Family and Personal Status Laws in the Maghreb* (Discussion Paper) (London: Women Living Under Muslim Law, November 2003).

[11] For details, see Ministry of Women and Family Affairs, Tunisia *Post-Beijing Plan of Action (1997-2001)* (report). Available at http://www.un.org/esa/gopher-data/conf/fwcw/natrep/NatActPlans/tunisia.txt (Last accessed on 02.12.04).

[12] Ibid.

[13] See-- Government of Tunisia *Combined Initial and Second Periodic Reports of States Parties to the Committee on the Elimination of All Forms of Discrimination Against Women* U.N. Doc. No. CEDAW/C/TUN/1-2.

women's rights in matters relating to custody and guardianship of children, divorce, and abolition of the wife's duty of obedience to her husband.[14]

Although the Tunisian Code as it stands today, does not contain any explicit references to Islam, Islamic values and principles influenced its drafting.[15] It is sometimes argued that the Tunisian law-makers have sought to develop a new phase of *ijtihad* or "Islamic thinking" distinct from the Islamic law in other Muslim countries which has resulted in a series of reforms to create gender equality in the areas of marriage, divorce and custody of children. To some therefore, these reforms are not a wholesale abandonment of Islamic values, but rather an evolution in tune with the needs of modern time.[16] As Mayer[17] observes, viewed from the standpoint of comparative legal history, Tunisia's is by far the most modern of the *Maghribi* codes and unique in the Arab world.

However, it also needs to be noted that while the Tunisian Code of Personal Status refrains from making any explicit reference to Islam, it nevertheless remains silent on a number of questions such as intercommunity marriage, obstacles to inheritance between Muslims and non-Muslims and is conservative on other questions such as triple divorce,

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[14] In this regard the Report points out that based on the measures announced on National Women's Day, August 13, 1992, broad legal amendments were made in the Code of Personal Status, the Labour Code, the Nationality Code, the Penal Code, and the establishment of Institutional mechanisms to promote women's equal rights in the family and society. For details, see Post-Beijing Plan of Action (1997-2001) (n.11 above) submitted by Tunisia.

[15] Mayer (see n.4 above) in this regard observes that although the Tunisian Code does not specifically state that laws are to be interpreted by reference to Islamic jurisprudence, it is construed in the light of Islamic principles. As an example, she cites article 5 of the Tunisian code and the interpretation of the term "empechement legal" or "legal prevention" to marriage therein. Although the wording in the text makes no mention of religion, it has been interpreted as incorporating the Islamic legal ban on marriages of Muslim women to non-Muslim men.

[16] For details, see Programme on Governance in the Arab Region (POGAR), UNDP 'Tunisia: Women in Public Life' available at http://www.pogar.org/countries/tunisia/gender.html (Last accessed 02.12.04).

[17] For details, see Mayer, n.4 above.

dowry, breast-feeding as an impediment to marriage and upholds traditional interpretations concerning inheritance.[18] Reference to Islam is also expressed in the official discourse which accompanies and justifies the Code.[19] It is argued that the Tunisian law-makers have always taken great care to present reforms in the framework of a re-reading of the *Shar'ia* which sometimes has the effect of allowing the jurisprudence to revert to a patriarchal and conservative view of the family.[20]

Article 5 of the Moroccan Constitution[21] provides that all citizens are equal before the law and affirms in the preamble its commitment to abide by universally recognised human rights. Despite these specific assertions of equality, women in Morocco were subjected to various forms of legal and cultural discrimination until the reform of personal status law in 2004. The new law although appearing substantially to improve the legal position of women - for example, by putting stringent restrictions on polygamy, abolishing the duty of obedience previously owed by the wife to the husband,

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[18] Collectif 95 Maghreb Egalité, n.10 above.
[19] Ibid.
[20] Ibid.
[21] Adopted on September 13, 1996. The Constitution of the Kingdom of Morocco (as revised by Decree (*Dahir*) no. 1-96-157 of October 7, 1996), contains the following articles relevant to the issue of gender equality, women and employment issues: Article 5 states: "All Moroccan citizens shall be equal before the law". Article 8 provides that "Men and women shall enjoy equal political rights. Any citizen of age enjoying his or her civil and political rights shall be eligible to vote". Article 9(c) provides that "the Constitution shall guarantee all citizens ... freedom of association and the freedom to belong to any union or political group of their choice". Article 12 provides that "opportunities for employment in public offices and positions shall be uniformly open to all citizens". Article 13 provides that "All citizens shall have equal rights in seeking education and employment". Operative paragraph 3 of the Constitution Preamble acknowledges Morocco's commitment to international standards and international human rights guaranteed by international conventions it is a party to: "Aware of the need of incorporating its work within the frame of the international organisations of which it has become an active and dynamic member, the Kingdom of Morocco fully adheres to the principles, rights and obligations arising from the Charters of such organisations, as it reaffirms its determination to abide by the universally recognised human rights". The relevant Articles have been translated and summarised at- http://www.ilo.org/public/english/employment/gems/eeo/law/maroc/cons.htm (Last accessed on 02.11.2004).

and giving women better protection against unilateral divorce by the husband by making divorce subject to prior authorisation of the court - does not however grant women full equal standing with men in all areas of the family sphere. This is evident from King Mohamed VI's speech at the Parliament before introducing the reformed law where he states that one of the objectives of the reform is "to ensure that women enjoy a better and more *equitable* status"[22]. The aim here is clearly not an equal status but a "better and equitable" status within the framework of Islam. It is also important to note that unlike their Tunisian counterparts who refrained from making any overt reference to Islamic jurisprudence in the Tunisian Code, the Moroccan law-makers relied heavily on progressive interpretations of Islamic law and its egalitarian principles in their reforms of personal status laws[23]. This approach was highlighted in King Muhammad's speech before the Parliament on the new law where he stated:

> It is necessary to be mindful of the tolerant aims of Islam, which advocates human dignity, equality and harmonious relations, and also to rely on the cohesiveness of the *Malikite* rite and on *ijtihad*, thanks to which Islam is a suitable religion for all times and places. The aim is to draw up a modern Family Law which is consistent with the spirit of our glorious religion.

3. Personal Status Code: Tunisia

Like some Arab countries, such as Egypt and Algeria, and some South Asian countries such as India, Bangladesh and Pakistan, Tunisia also experienced a period of foreign

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[22] See - King Mohammad VI of Morrocco, speech delivered in the fall session of the Moroccan Parliament on 10 October 2003. Full text of the speech is available at-- http://www.mincom.gov.ma/english/generalities/speech/2003/ParliamentFallSession101003.htm (Last accessed 10.11.2004).

[23] For example, various *Qur'anic* verses and *hadith* were cited in the King's speech (n.14 above) as justifying the restrictions on polygamy and for making divorce subject to judicial supervision under the reformed law.

administration. As Kelly[24] observes, although the French occupation was administrative, France's policy clearly indicated its economic as well as cultural imperialism and in the process Tunisians and Tunisian society were demonised to justify French rule. In Tunisia, under French administration and as a semi-autonomous Ottoman province prior to that,[25] personal status was regulated by religious courts, not the state.[26] The personal status Code presently in force regulates the areas which were traditionally regulated by the religious authorities and brings them into the domain of the state where they now apply to all citizens Muslims as well as the non- Muslims.

In Tunisia, the debates related to the issue of women's rights became intense and vociferous in 1920s and, as Kelly observes, these debates were intricately linked to the nationalist struggle at that time. As is common in many nationalist movements, among those concerned with the issue of reform, there were two distinct and opposite approaches identifiable. Kelly summarises these two approaches or trends of thought as follows. On the one hand, some argued that for Tunisia to be a strong independent nation able to resist European domination it would have to gather the strength of all its citizens including women. On the other hand, some argued that as the Tunisian way of life had been nearly obliterated by colonization, what remained - including the traditional gender roles (which included veiling) - had to be preserved. To them, any attempts to adapt social practices or laws were suspect and viewed as concessions to the

[24] P Kelly 'Finding Common Ground: Islamic Values and Gender Equity in Tunisia's Reformed Personal Status Law' in *Special Dossier No.1* (London: WLUML, fall 1996).
[25] Tunisia was an autonomous province of the Ottoman Empire since 1574.
[26] *Shari'a* courts were abolished in 1956. There are now four levels of courts in the judiciary. Cantonal courts have limited criminal jurisdiction. Courts of first instance have civil, commercial, correctional, social and personal status chambers. Three Courts of Appeal (i.e., Tunis, Sousse and Sfax) have civil, correctional, criminal and accusation chambers, the final one being similar to a grand jury. The Court of Cassation in Tunis is the highest court of appeal, with three civil and commercial chambers and a criminal chamber. For details, see - Mayer, n.4 above.

colonizers, or the West.[27] The nationalists in Tunisia who belonged to the first group were strongly influenced by nineteenth century Arab liberal philosophy. Prominent among them is Habib Bourguiba who was hugely influenced by the teachings of liberal thinkers who believed that Islamic law is by nature evolutionary and that the relative economic, political and social backwardness of Muslim societies was due to their failure to continue to evolve naturally and not to any flaw inherent within Islam.[28]

Challenging the imposition of a dogmatic assimilation between Islam and Muslim jurisprudence, consecutive generations of liberal reformers including Bourguiba extended the debate of modernity to all aspects of legislation on family matters in Tunisia.[29] The interesting point to note here is that, they did so "without questioning Islam as a religion, as a cultural heritage, or as a civilization. With the aim of better understanding and overcoming the problems raised by the application of such a law in a

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[27] Kelly, n.24 above.

[28] Following three decades of dictatorship under President Bourgiba, Zina al-Abidine Ben Ali became President of Tunisia in 1987. As Kelly observes, while the Bourguiba regime was widely applauded for its respect of human rights and had wide popular support, it was not an open political system. Kelly observes, Bourguiba was hugely influenced by the teachings of liberals such as Jamal al-Dil al-Afgani, Muhammad Abduh, Qasim Amin, and Khayr al-Din Pasha al-Tunisi.
See, ibid.

[29] The improvement of women's status through the reform of personal laws and social practices was a significant issue for Muslim liberals because of the importance accorded to women and their role in shaping the family and society at that time. As an example, Kelly refers to the work of Afgani who argued that Muslim women should be educated so that they could fulfil their duties as mothers. As Kelly argues, although the views of the liberals on women and gender roles were often patronizing toward women and displayed a limited concept of women's potential, they represented a great improvement over attitudes held at that time. One important outcome of their work was that by presenting the status of women as a valid concern of state and society, they opened the door for constructive debate among and between both sexes on the status of women. Following liberals like Afgani and others, Bourguiba also used culturally accepted symbols and principles to express his ideas. Thus, while Bourguiba's outlook was secular, he often delivered his ideas in language and terms that were Islamic. From the point of view of reform to religious laws and women's rights, one important consequence of this is that it gave his ideas legitimacy of tradition despite their departure from conventional interpretations and customs. See, ibid.

secular state, their arguments were grounded in a sound knowledge of the content and meaning of Muslim jurisprudence."[30]

After independence in 1956 the first major document developed and adopted by the newly independent Tunisia[31] was the Tunisian Code of Personal Status. The Code introduced various progressive provisions granting rights to women in the area of family law and reflecting the policy of the Tunisian Government and legislature to use personal laws as an instrument of modernisation and amelioration of the poor status of women in Tunisia. [32]

4. Personal Status Code: Morocco

As has been discussed earlier, when Morocco achieved independence from France in 1956, the newly independent Morocco adopted French civil law, but retained, in contrast to Tunisia, a code of Islamic religious laws without breaking away from the traditional Islamic law that governs behaviour within families.

Following independence in 1956, a Law Reform Commission was established in order to draft a code of personal status in Morocco. As a result of the Commission's work, the

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[30] Ibid.

[31] The Code, inspired by unofficial draft codes of *Maliki* and *Hanafi* family law, was passed soon after independence in 1956. It was extended to apply to all Tunisian citizens in 1957.

[32] Various statistics and indicators that women's position have improved in Tunisia during the last few decades. For example one study by the Women's International Network shows significant improvement in the age of marriage from 20.8 (in 1986) to 26.7 (in 1994). The Post-Beijing Plan of Action (1997-2001) submitted by the Government of Tunisia shows that the proportion of women in the working population has risen from 5.5% in 1966 to 23% in 1994. The women occupy 7% of seats in parliament, 17% of the seats in municipal councils, 12% of positions in the public office and the magistracy. During 1995-96, the school enrollment rate among girls between the age of 6 and 12 was 89.4%. For details, see- n.11 above.

religious laws were codified into a formal document, the *Moudawana*, or Personal Civil Status Code, which came into force in 1958, two years after Morocco's independence. The philosophy the Moroccan Code embodied was diametrically opposite to that of the Tunisian Code as it reaffirmed many of the rules taken from the treatises of *Maliki* jurists of the past centuries and reinforced the traditional patriarchal order.[33] For example, under the *Moudawana*, men were free to conduct polygamy and exercise the power of unilateral divorces. Women on the other hand, had unequal rights to divorce and limited property and inheritance rights. It also required them to obtain permission from their fathers or their husbands for various purposes such as opening a business and obtaining a passport.[34] Since independence, various women is rights activists and organizations have been demanding reforms to the Code and protested against the disadvantage and discrimination they suffer in the area of family law. In the 1990s, the Union for Feminine Action (UAF), a women's rights group, organised a campaign for reforming the Moroccan Personal Civil Status Code (or *Moudawana*). The campaign received good response as the organisation was able collect nearly about one million signatures on a petition urging reform of the existing Moroccan Code.[35] Acknowledging the success of the campaign, King Hassan II referred the matter to a council of religious leaders which led to limited reforms in 1993. In this regard, it however needs to be

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[33] The *Moudawana* is a codification of the *fiqh* and in the event of legal *lacunae*, the text expressly referred back to the dominant opinion or to the unchanged jurisprudence of the *Maliki* school. For details, see Mayer, n.4 above, p.6. See also-- House of Commons Foreign Affairs Committee *Human Rights Annual Report 2003: Fourth Report of Session 2003-2004* (London: The Stationary Office Ltd of HOC, 6 May 2004), p.42.

[34] While the Constitution of Morocco affirms the principle of equality between citizens, there is little doubt that Moroccan women remained subjected to a legally inferior status in the family. The main reasons for this have been identified as follows: the father's right to decide his daughter's marriage; the authority of the husband to whom she owes submission and obedience; the women having only custody of young children without the authority of guardianship; the unequal distribution of property in relation to succession and inheritance. For details, see n.10 above.

[35] See story synopsis at: http://www.pbs.org/hopes/morocco/story.html (Last accessed 17.11.04).

mentioned that despite these changes in the personal law relating to marriage, custody, polygamy, and divorce which brought a certain degree of improvement to the status of women, they failed to bring the Moroccan law to the level of the Tunisian Code.

In April 2001, a Royal Consultative Commission of religious authorities and legal experts was established to study the possibility of revising the *Moudawana* in accordance with religious principles. The continued advocacy and awareness-raising efforts of women's rights activists and strong backing by the government contributed to the Commission's decision in favour of a reformed Moroccan family law.[36] After thirty months of contentious deliberation, the Commission presented its recommendations to the Palace. In October 2003, almost two and a half years after the establishment of the Commission, HM King Mohammed VI publicly announced the new reforms based on the recommendations to create in his words, a "modern Family Law which is consistent with the spirit of Islam and yet eradicates the inequity imposed on women" and submitted to Parliament in October 2003. Parliament debated the reforms extensively, making some 110 amendments before unanimously approving the final text in January.[37] Finally, on January 25, 2004, the government of Morocco adopted a new law that replaced the laws included in the *Moudawana.*

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[36] For example, various women's rights organisations, organised within the *Printemps de l'Egalité* network, analysed the details of the draft legislation's text and organised workshops, round tables, and discussion groups to prepare for lobbying efforts in Parliament and to educate the public about the reforms. Also, as pointed out by Bordat and Kouzzi, "the reforms' smooth passage was mainly a product of the changed political environment following the May 2003 terrorist attacks in Casablanca, in which Islamic extremists were implicated. In the aftermath of the attacks some Islamist groups were repressed and others were put on the defensive, which had the effect of muting religious opposition to the revision". For details, see S Bordat and S Kouzzi 'The Challenge of Implementing Morocco's New Personal Status Law' (September 2004) 2 *Arab Reform Bulletin* 8 (published by Carnegie Endowment for International Peace).

[37] In contrast, both the original 1957 *Mudawwana* and minor revisions in 1993 were simply enacted by Royal Decrees.

5. Notable Features of Personal Status Laws in Tunisia[38]

a) Minimum age for marriage

Both males and females in Tunisia are protected from child marriage. The minimum age of marriage is 20 for males and 17 for females. According to article 5 of the Code, marriage below these ages requires special permission from the courts, which may be given only if there are "pressing reasons" and on the basis of a "clear interest" or benefit to be realised by both spouses of to the marriage. Marriage below the age of legal majority requires the consent of the guardian and, since 1993, of the mother.[39] In the event of their refusal, recourse may be had to the judge under Article 6. The age of legal majority is 20 for both males and females, but according to Article 153 marriage gives rise to legal majority for matters of personal status, civil and commercial transactions provided the party concerned is over the age of 17. Marriage can be proven only by an official document as prescribed by law.[40]

b) Consent to marriage

Neither the father nor any other guardian can force a woman either minor or major to marry without her consent. Prior to the introduction of the Personal Status Code (and still in some countries like Algeria), although women's consent was required, they could

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[38] The information used to discuss the notable features of the Tunisian Personal Status Code have been gathered from Kelly (n.24 above) and from the Law and Religion Program of Emory University *Study of Islamic Family Law (IFL)*, available at http://www.law.emory.edu/ifl/legal/morocco.htm#text (Last accessed 10.10.2004), Kelly (n.16 above). For full version of the Tunisian Code, see- n.1 above.

[39] See the text of the Tunisian Code, n.1 above.

[40] Ibid.

not formally represent themselves in the marriage contract and were instead represented by their fathers and or other male delegates. Women are now legally capable of representing themselves in a marriage contract, although they may appoint a delegate if they choose under Articles 9 and 10 of the Code.[41]

c) Duty of obedience

Another notable feature of Tunisian Code is that the "duty of obedience" by the wife, which is common in many Muslim societies, no longer exists in the Code.[42] As has been discussed elaborately in Chapter 4, the verse or *ayah* which is often cited as proof that Islam allows male dominance over women and imposes upon a wife a duty of obedience or *ta'a* to her husband is verse 4:34 of *surat al-Nisa* of the *Qur'an.*[43] As has been discussed, on the basis of the patriarchal interpretation of this verse, traditional Islamic jurisprudence provides that a wife owes a duty of obedience to her husband, failure to comply with which makes her *nashiz*. The concept of *ta'a* is also associated with the concept of *tamkin*, or availability which provides that a Muslim wife must submit to sex with her husband as and when he chooses. Moreover, this verse has also been interpreted to give power to the husband to beat or strike his wife if she is not obedient.

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[41] n.38 generally.

[42] Kelly, n.224 above. She notes that the *Dar Ejwad*, or "house of Obedience" (elsewhere called *Bayt Al-Ta'a*), no longer exists in Tunisia. Until the 1950s, women who disobeyed their husbands could be confined to a designated room or house, where they would stay until they recanted.

[43] The first part of the verse is as follows: "Men are the protectors and maintainers of women, because God has given the one more (strength) than the other, and because they support them from their means." The second part of verse 4:34 reads as follows: "So good women are the obedient, guarding in secret that which God hath guarded. As for those of whom ye fear rebellion, admonish them and banish them to beds apart, and scourge them beat them. Then if they obey you, seek not a way against them. Lo! God is ever High, Exalted, Great." See English translation of the Holy *Qur'an* by Abdullah Yusuf Ali at http://web.umr.edu/msaumr/Quran .

It has been noted that there is a considerable amount of controversy among academics regarding the interpretation of the verse and the rights and obligations derived from it. In particular, some Islamic feminist writers such as al-Hibri[44], Eissa[45] and Riffat Hassan[46] have provided an interesting challenge to the traditional meaning attributed to this verse.[47]

An amendment to the Tunisian Code in 1993 replaced the clause which prescribed that "a woman must obey her husband and respect his prerogatives". Article 23 of the amended Code in Tunisia lays the obligation upon both spouses of treating each other with mutual respect and assisting each other in managing the household and children's affairs. As "head of the family" the husband is responsible for the maintenance of his wife and children, while the wife is to contribute to family maintenance if she has the means to do so.[48]

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[44] A al-Hibri 'Deconstructing Patriarchal Jurisprudence in Islamic Law: A Faithful Approach', in A Wing (ed) *Global Critical Race Feminism: An International Reader* (New York: New York University Press, 2000) pp.221-233.

[45] D Eissa *Constructing the Notion of Male Superiority over Women in Islam: The Influence of Sex and Gender Stereotyping in the Interpretation of the Quran and the Implications for a Modernist Exegesis of Rights* (Occasional Paper No11) (London: WLUML, 1999).

[46] R Hassan 'Equal before Allah? Woman-Man Equality in the Islamic Tradition' (Jan-May, 1987) *WVII Harvard Divinity Bulletin* 2.

[47] According to al-Hibri's (n.44 above) analysis of the first part of the verse can alternatively read as follows: "Men are [advisors/providers of guidance] to women [because/in circumstances where/in that which] God made some of them different from some others and [because/in circumstances where/in that which] they spend their own money". Eissa (see n.45 above) points out that if seen from a different perspective the second part of this controversial verse can simply mean that good women are God fearing and that when a man fears that his wife's conduct is disobedient to God, he should admonish her for such conduct, take separate sleeping quarters, and possibly "strike out" of the marriage. The alternative interpretations by them have been discussed in details in Chapter IV.

[48] See generally- n.38 above.

d) Marriage with a non-Muslim

The Code does not mention religion as an impediment to marriage. Tunisia has ratified without reservation the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (1962)[49], which confirms the equality of men and women in respect to their choice of marriage partner, without discrimination as to race, sex, or religion. Although the wording in the Code makes no mention of religion, it has been interpreted as incorporating the Islamic legal ban on marriages of Muslim women to non-Muslim men.[50] Tunisia's position in this regard is quite similar to Pakistan and Bangladesh where a Muslim man may contract a valid marriage with a woman of either Christian or Jewish faith (*kitabia).* As explained in Chapter II a man also can marry a Hindu or Buddhist woman and the marriage would not be void but irregular with the effect that in such cases the children born out of such marriage would be legitimate but the parties would not inherit from each other. A Muslim woman on the other hand, may not contract a valid marriage with anyone else but a Muslim man. A marriage with a *kitabia* would be irregular while a marriage with Hindu etc. would be invalid and any children born out of the wedlock shall be illegitimate. [51]

[49] G.A. Res.No. 1763A (XVII) of 7 November 1963, *entered into force* on 9 December 1964. Full text of the convention is available at: http://www.unhchr.ch/html/menu3/b/63.htm (Last accessed 18.10.04).

[50] As Kelly points out the interpretation of the relevant Article in the Code was confirmed by a directive in 3 November 1973 from the Minister of Justice which in the past used to prohibit Civil Status Officers from registering marriage between a Muslim woman and a non-Muslim man. For details, see Kelly, n.24 above.

[51] For details, see Sobhan *Legal Status of Women in Bangladesh* (Dhaka: Bangladesh Institute of law and International Affairs-BILIA, 1978).

e) Polygamy

One of the most notable features of the Tunisian Code is that polygamy is prohibited and offenders are liable to a prison sentence of one year and/or a fine under Article 18 of the Code. As has been pointed out in Chapter II, one of the main obstacles to abolishing polygamy is the argument put forward by some that polygamy is explicitly permitted by the *Qur'an*. In support of their argument they cite verse 4:3 which is traditionally interpreted as giving permission to Muslim men to marry up to four times and keep four wives simultaneously.[52] But as has been discussed in Chapter IV, some feminist writers and reformists do not accept this interpretation and argues that permission to engage in polygamy is subject to the condition that the man can do full justice to all of the wives which require equality in love, affection and esteem.[53] The Islamic position on polygamy is therefore not of encouragement but prohibition as it is arguably impossible for any man to give equal love, affection and esteem to all his wives.

Following the progressive interpretations of the *Qur'anic* verses and arguments against polygamy, Tunisian lawmakers have prohibited polygamy altogether. In this regard, Kelly points out that M T al-Snoussi, who was the minister of justice in Tunisia when the Code was adopted, agreed that the prohibition of polygamy is based on several centuries of proof that a husband cannot treat his wives equally. A basic principle of Islamic law is that actions which are permitted but not obligatory or recommended can

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[52] Verse 4:3 of the *Qur'an* states: "If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hand possesses. That will be more suitable, to prevent you from doing injustice." See – al-Hibri n.44 above.

[53] A Serajuddin *Shari'a Law and Society: Tradition and Change in the Indian Subcontinent* (Dhaka: Asiatic Society of Bangladesh, 1991) p.118.

be justly restricted if necessary for the public interest. Thus, since polygamy is permitted—as opposed to obligatory or recommended - it can be regulated or even abolished by the state.[54]

f) Divorce

Along with the elimination of polygamy, a reformed divorce law with increased women's access to divorce and abolished oral repudiation, is one of the best known features of Tunisia's Personal Status Code. Under the Code, divorce is a judicial matter and extra-judicial divorce or *talaq* (which is a common practice in some Muslim societies including Bangladesh) has no validity. No divorce may be decreed until a judge appointed by the Court has tried and failed to reconcile the couple.[55] Where divorce is not by mutual agreement the Court may award compensation for the injury.

Both men and women can initiate divorce. The individual seeking the divorce petitions to the lower court, after paying a fee. According to Article 31, the court may grant divorce based on- 1) mutual consent or agreement of the spouses; 2) a petition from one spouse by reason of injury caused by the other; or 3) a petition from the husband or the wife[56]:

i) Divorce by mutual consent: Divorce in this process can be initiated when both spouses agree to the divorce and to the arrangements for custody and maintenance. The

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[54]See Kelly, n.24 above, p.89.
[55] For general details, see n.38 above.
[56] Ibid.

court in these cases does not determine which party as at fault in the divorce, and neither party is eligible to receive compensation.

ii) Divorce by a petition from one spouse by reason of injury caused by the other: Either spouse may request a divorce based on failure of the other to respect the rights and obligations outlined in the Personal Status Code.

iii) Divorce by a petition from the husband or the wife: This clause allows either spouse to obtain a divorce without the obligation of proving fault. Compensatory payments have been introduced to limit the abuse of this kind of divorce.

g) Custody of Children

Under the prevailing law in Tunisia if the marriage ends by death of one of the spouses, custody goes to the surviving spouse. If it ends by divorce, the judge is required to take the best interest of the child into account in assigning custody either to one of the parents or to a third party. The court retains the power to decide whether custody will be granted to the mother who remarries (article 58). In all cases, the interests of the child take precedence.[57]

h) Division of property

Property acquired during the marriage belongs to the spouses individually and each may independently manage their own property. Article 11 of the Code allows for limited community of property as an optional property regime. In this case, what is acquired by

[57] Ibid.

the couple during the marriage is held in common, while the property each brought to the marriages held separately. Limited community of property protects the wife's personal goods from being appropriated by the husband, while allowing for the fair distribution of goods acquired jointly.[58]

6. Notable Features of the Moroccan Personal Status Code [59]

a) The minimum age for marriage

The minimum age of marriage is 18 for both men and women. Marriage of a minor below the age of majority (*rushd*) requires the guardian's consent, and if the guardian refuses, the parties may take matter to Court. A guardian cannot contract the marriage of his ward unless she authorises it.[60] The guardian's right of coercion (*ijbar*) under certain circumstances was revoked under the 1993 amendments to the Moroccan Personal Civil Status Code. The ward may take the matter to court if her guardian refuses consent for her marriage, and if a ward of the age of majority has no father, she may choose either to appoint a *wali* (guardian) of her choice or contract her own marriage.[61] Husband and wife share joint responsibility for the family and most notably the wife is no longer

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[58] Ibid.

[59] As English versions of the old or the amended Code were not available, the information used in the discussion below on the notable features of the present personal status law in Morocco and its difference with the previous law have been gathered from secondary sources which are as follows: l'Association Démocratique des Femmes du Maroc (ADFM) 'Comparison of former Moroccan Family Law with the new provisions', accessible at http://www.learningpartnership.org/events/newsalerts/moroccofamlaw.pdf (Last accessed 15.11.04); Law and Religion Program of Emory University *Study of Islamic Family Law (IFL)*, available at http://www.law.emory.edu/ifl/legal/Tunisia2.htm#text (last accessed 17.10.04); and F Sebti *Rights of the Muslim Women in Morocco*, internet version available at http://www.techno.net.ma/femmes/e-guide.htm (Last accessed on 10.11.04).

[60] See- ADFM, n.59 above.

[61] Ibid.

legally obliged to obey her husband. Before the amendment in 2004, the family was the responsibility of the husband only and the wife was required to obey his reasonable orders.

b) Polygamy

Although the new law in Morocco does not prohibit polygamy altogether, it subjects polygamy to the judge's authorisation and to stringent legal conditions that make it difficult to practice.[62] According to the new law, the judge must make sure that there is no presumption of inequity before authorising a second marriage.[63] The judge must also be convinced that the husband has the ability to treat the second wife and her children on an equal footing with the first, and also ensure that they enjoy similar living conditions. In addition, a woman has the right to impose a condition in the marriage contract requiring that her husband refrain from taking other wives. If there is no pre-established condition, the first wife must be informed of her husband's intent to remarry, the second wife must be informed that the man is already married, and moreover, the first wife may ask for a divorce due to harms suffered.[64]

c) Divorce

In Morocco, according to the newly reformed law, the right to divorce is a prerogative of both men and women, exercised under judicial supervision.[65] Before the reform,

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[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Ibid.

divorce was left to the discretion of the husband only and was often exercised in an arbitrary way. The new law has also established divorce by mutual consent. To protect the wife against possible misuse of the exclusive and unrestricted right to divorce by the husband, the new law has made divorce conditional upon the court's prior authorisation and enhanced the scope for reconciliation both through the family and the judge.[66] The new law also requires that all monies owed to the wife and the children should be paid in full by the husband before divorce can be registered. Verbal repudiation is no longer valid as divorce is now subject to a court ruling.[67]

d) Custody of children

In Morocco, the custody of the children is to be granted to the mother, then the father, then the grandmother on the mother's side. If this proves to be impossible, the judge will entrust custody to the best qualified relative in the child's family, keeping in mind the best interest of the child. According to the new law, a mother can retain custody of her child under certain conditions, even upon remarrying or moving out of the area where the husband lives. She may also regain custody if the reasons which caused her to lose this right cease to exist. Under the old law, a woman irrevocably lost custody in the above conditions. In addition, the new law has also made provision to provide the boys with an option to choose their custodian at the age of fifteen similar to the girls. This alters the previous position under which the boys could choose their custodian at the age of twelve, whereas the girls had to wait until they were fifteen.[68]

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[66] Ibid.
[67] Ibid.
[68] Ibid.

e) An examination of the reforms in *Moudawana*

As seen above, the new reformed law in Morocco has brought some important changes in the area of personal status law which may contribute to improving the possibility of legal status of the Moroccan women. Notable among them are the raising of the minimum age of marriage for women, establishing the right to divorce by mutual consent, subjecting polygamy and divorce under strict judicial control, abolishing the wife's duty of obedience to her husband and making the family the joint responsibility of both spouses and abolishing the requirement of a marital tutor (*wali*) for women to marry.

However, whether these reforms will be able to bring any substantive change in the status of women in Morocco still remains to be seen. Although various women's groups and activists have supported the reform, they have also raised some concerns and identified some factors which in their opinion may serve to limit or obstruct the realization of some of these rights by Moroccan women in practice. Bordat and Kouzzi identifies and summarises some of these impediments and concerns as follows:[69]

i) One of the impediments which can obstruct women's newly granted rights is in the authors' opinion, the Moroccan judiciary's lack of familiarity with the reforms and the lack of institutions to monitor the judiciary's performance. According to the revised text, judges are still allowed to use religious principles to decide matters not covered in the text which leaves ample room for them to apply the most conservative religious interpretations. Although the Ministry of Justice in Morocco has begun training

[69] See Bordat and Kouzzi, n.36 above.

programmes for some of the judges specialising in family issues, as the authors point out, such training may not suffice given that the commitment of the judiciary to the spirit behind the reforms is uncertain. In this regard the authors also highlight the concerns of various women's groups who hold that the Moroccan judges had failed in the past to adhere even to the more modest reforms enacted in 1993. It is therefore, not certain whether the judges will be able to break away from the traditional approach of interpretation while applying the law. The new law also assigns judges the role of overseeing mandatory reconciliation in divorce cases, which has also raised concern among women's organizations that judges may prioritise reconciliation even at the cost of women's right to divorce in the interest of "family harmony".

ii) The second impediment identified by the authors is the structure of the judiciary. The new law calls for the creation of family courts, separate from the ordinary courts of first instance that previously had jurisdiction over family law matters. The government's present plan to establish seventy family courts or one per province is, as the authors observe, inadequate to serve the 50 percent of the population residing in remote rural areas. In addition, they also point out that removing family law cases from the general courts may result in a lower standard of justice for these cases.

iii) Under the old laws, *adouls* (who are similar to notary publics but have a religious character) alone had the authority to officiate marriages and to draw up marriage contracts. The new law transfers this role to the new family courts and relegates *adouls* to mere "court clerks" with a symbolic religious function. This prompted *adouls* to stage a protest at the Ministry of Justice. According to the authors the opposition of *adouls*

may pose some problems in implementing the newly granted rights. Also, even after the passing of the new law, the conservative *adouls* (who often have orthodox views about women's rights because of their religious role) may still retain their huge influence over marriage anyway because of the fact that many Moroccans consider the *adouls* and not the judges to be the community legal experts, and also because, unlike the new family courts, *adouls* are present throughout the country.

iv) The final challenge for the proper implementation of the law lies in ensuring that the public knows about and accepts the reforms. In this regard, the high illiteracy rates among women in Morocco and the propaganda of various extremist religious groups against the law at the grass root level can serve as major obstacles in the realization of the rights given under the new law. According to official estimates, 42 % of urban women and 82 % of rural women in Morocco are illiterate. According to another survey, female adult illiteracy is 66%, compared to 40% for males. In rural areas, female illiteracy may be as high as 90%.[70]

The above discussion demonstrates that while the recent reforms in Morocco have succeeded in improving women's formal position with respect to their legal rights, it still remains to be seen how far this will actually benefit women and how far the rights granted therein will be achieved in reality.

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[70] See- n.16 above.

7. Possibilities for reform in Bangladesh

Foregoing discussions have highlighted that it is possible to improve the legal status of women in a Muslim society within the framework of Islam. This Chapter therefore concludes that reforms introduced in Tunisia and especially in Morocco which explicitly took a reform approach consistent with the values and spirit of Islam in various areas such as divorce, polygamy and custody of children can serve as examples to be followed to reform the relevant provisions of the personal status law for the Muslim community in Bangladesh. For example, it has been observed in Chapter II that the divorce procedure followed in Bangladesh is discriminatory towards women as it in practice leaves the husband's arbitrary right to divorce intact.[71] In this regard, drawing on the provisions in Tunisia and Morocco, this Chapter argues that the Muslim Family Laws Ordinance (1961)[72] that regulates the divorce procedure in Bangladesh should be amended to make all divorce subject to judicial process instead of leaving it to the non-judicial Arbitration Council. It is argued that the difficulty and expense of going through a judicial process may serve to reduce the number of arbitrary divorces by men. With regard to polygamy, it has been pointed out in Chapter II that Bangladesh has not prohibited polygamy altogether but has imposed some procedural restrictions on it through the Muslim Family Laws Ordinance (1961)[73]. In this regard Chapter II has also drawn attention to a decision of the High Court Division of the Bangladesh Supreme Court in which the Court examined the issue of whether Islam truly approves of

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[71] The procedure for divorce under the Muslim Family Laws Ordinance (1961) [(VIII 1961) 14 PC 67] and some of the problems that arise while complying with it have been discussed in details in Chapter II.
[72] (VIII 1961) 14 PC 67.
[73] Ibid.

polygamy. As has been pointed out, the High Court Division of the Supreme Court of Bangladesh in Jesmin Sultana v. Mohammad Elias (1997)[74], by accepting the arguments put forward by some modern commentators that the permission to take a second wife amounts virtually to a prohibition under Islamic law, held that section 6 of the Ordinance is against the principle of Islamic Law as it does not prohibit polygamy altogether. The Court also noted that the Tunisian Code of Personal Status has given legislative effect to this interpretation by abolishing polygamy and recommending this section be deleted and substituted with a section prohibiting polygamy altogether.[75] This Chapter therefore argues that the example of Tunisia can be followed in Bangladesh to abolish polygamy outright. Alternatively, if abolishing polygamy outright proves to be difficult due to the fear of political backlash from religious fundamentalist groups, Bangladesh can at least follow the example of Morocco by making polygamy subject to the prior authorisation of the court. If, following Morocco, the requirement of doing justice between co-wives and equal treatment of them is made a condition precedent to polygamous marriage, the abuse of polygamy can be effectively curtailed if not stamped out altogether. In the cases of guardianship and custody of children, the prime consideration should be the welfare of the child and both the guardianship and custody should be placed in one person. The prevailing law, the Guardians and Wards Act (1890)[76], in this area clearly affirms the importance of considering the child's welfare in deciding these cases. There is no reason therefore to deprive the mother of the

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[74] 17 BLD 4.

[75] The Court referred the judgment to the Ministry of Law for amending the law accordingly but no action is known to have been taken on it.

[76] (VIII of 1890) 3 BC 292, 3 PC 300.

guardianship or custody where she is financially capable of taking care of the child's educational and other expenses.

8. Conclusion

The Tunisian and Moroccan experiences of law reform show us that it is possible to improve the status of women within the framework of Islamic law by invoking egalitarian principles of Islam. For reforms to personal laws in Bangladesh the experience of Morocco becomes valuable as it shows that the legal position of women can be substantially improved within the framework of Islam although, as has been pointed out in the foregoing discussion, how far this will advance women's rights in reality remains to be seen. While it is accepted that the ultimate success of the newly reformed law in Morocco will depend to a large extent on how the problems and concerns discussed above are addressed and resolved, it is nevertheless evident that the reforms mark a step forward for women's rights. The progressive reforms in Tunisia and Morocco can thus, serve as examples for Bangladesh for similar reforms and achieving a substantive guarantee of equality in future.

CHAPTER VIII

CONCLUSION

1. Summary of arguments in favour of extending the equality principle in the sphere of religious personal laws

This Chapter summarises the findings of the previous Chapters and points out possibilities for reform of the religious personal laws in Bangladesh drawing on the discussions and arguments put forward in earlier Chapters. Chapter I of the thesis has discussed the framework of the legal system of Bangladesh within which the religious personal laws operate and examined the scope of the equality provision of the Constitution with regard to reform of the personal laws on the basis of gender equality. The Chapter has concluded that there is scope to interpret the equality guarantee under the Constitution so as to extend its applicability to the personal sphere, thus making it obligatory upon the state to reform the personal laws so as to bring them in line with the guarantee of gender equality enumerated under the provision. Chapter II in this regard

has highlighted the discriminatory aspects of the religious laws, in particular aspects of the Islamic law operative in Bangladesh, that are clearly contradictory with the guarantee of gender equality under the Constitution, which is also the supreme law of the land. The chapter has also highlighted disadvantages to women flowing from some of the provisions of Islamic family law drawing on a range of statistics and other data. Chapter III has examined the public-private dichotomy operating in the legal system of Bangladesh and located the issue of reform of religious laws within public/private discourse. The Chapter has concluded, in light of the critique and arguments put forward by feminist scholars regarding the dichotomy that to ensure equality in one sphere i.e., the public (which is expressly guaranteed by the Constitution), it is imperative to ensure equality in the private sphere as well. Chapter IV has taken a closer look at the equality provision of the Constitution, its nature, scope and possibilities. The Chapter argued that although the meaning, scope and application of equality under the equality provision of the Constitution has been mostly informed by the formal understanding of equality, there is scope to interpret the provision to embrace a more substantive approach to equality and that certain aspects of Islamic law are reconcilable with gender equality. Chapter V, VI and VII have located the development and application of equality as a norm and strategic goal in four different jurisdictions. The first two of the four are western and non-Muslim contexts namely, Canada and South Africa. The second two are Muslim contexts namely Tunisia and Morocco. These Chapters have traced the development of equality and examined what kind of equality is emerging in these two different sets of contexts.

The key findings and arguments in the preceding Chapters are summarised as follows:

a) The scope of the equality guarantee under the Constitution can and should be interpreted to extend to the private life including the religious personal laws

It has been observed in the earlier discussions in Chapters I, II, III and IV that the issue of reform to the personal laws or indeed the very validity of those laws under the supreme law of the country the Constitution of Bangladesh depends to a great extent on how the scope of the equality guarantee of the Constitution is interpreted. If its application is interpreted to be limited to public sphere only, then religious personal laws operating in the family sphere falls outside its scope. On the other hand, if its application is interpreted to embrace the personal sphere as well, then it gives the state the legitimacy and the authority under the Constitution, the supreme law of the land, to intervene in the religious personal laws and reform them accordingly (either by replacing them with a secular family law regime or in the form of piecemeal reform to the personal laws) so as to bring them in line with the concept of gender equality.

As has been explained in Chapter I, it can be argued on the one hand that the equality provision (Article 28) of the Constitution can be interpreted to confine the application of equality guarantee (as the touchstone for judging the validity of any law in the country) to the public sphere only as the wording of the subsection 2 of Article 28 affirms the responsibility of the state to ensure gender equality in the "public life" of the citizens and is silent about personal life which includes family life where the religious personal

laws operate.[1] As has been elaborated in the earlier Chapters (I and III) with regard to this issue, this thesis takes the position that there is scope to interpret Article 28 to include the personal sphere and the religious personal laws operating therein within the ambit of the equality guarantee for two specific reasons:

First, Although subsection 2 specifically refers to "state and public life", it does not explicitly exclude the personal sphere if it is read together with the first part (subsection 1) of Article 28 which lays down a general equality guarantee which is not confined to any specific sphere.[2] In this regard the study argues in Chapter I that subsection 2 which refers to "state and public life" only affirms a strong commitment by the state to ensure gender equality in the public sphere and the fact that this subsection is silent about private life does not amount to wholesale exclusion if these two subsections are read together. Subsection 2 therefore should not be read and interpreted in isolation of the whole Constitution but should be read together with other provisions such as the preamble to the Constitution which affirms the state's commitment to ensuring gender equality, and Article 27 which provides "all citizens are equal before law and are entitled to equal protection of law".

This approach of reading and interpreting a specific provision in the light of the overall spirit of the Constitution laid down in the preamble, the fundamental policy of the state and other relevant provisions is supported by various established rules of interpretations such as harmonious construction, purposive interpretation etc. As seen below, this

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[1] Article 28 (2) of the Constitution states: "Women shall have equal rights with men in all spheres of the State and of public life".

[2] Article 28 (1) states "the State shall not discriminate against any citizen on grounds only of religion, race caste, sex or place of birth".

argument has been strengthened further by the discussions and arguments put forward in Chapter III relating to the public-private dichotomy, and in Chapter IV relating to equality and Islam.

Second, in light of the discussion on the public-private dichotomy in Chapter III and the arguments put forward therein, it can also be argued that even where the responsibility of the state to ensure gender equality is confined only to the public sphere, in order to actually achieve that in reality, the state must ensure gender equality in the personal sphere as well because of the interdependent and overlapping nature of the public-private divide. It is therefore argued in this study that to ensure meaningful and equal participation in "state and public life", the state needs to create the opportunity and environment in the private sphere which will allow women meaningfully to participate in public life. This needs among other things, the removal of restrictions and obstacles that the religious personal laws often impose on women either directly or indirectly so as to restrain them from participating in the public sphere.[3]

b) The right to religion is not an obstacle in reforming the personal laws

The thesis has argued that the opposition of freedom of religion and gender equality is a false dichotomy. There is no necessary reason why religious freedom cannot be enjoyed simultaneously with the equality of women in the personal sphere. Firstly, as seen in Chapter III, many aspects of Islamic personal law may be reconcilable with particular

[3] See Chapter II for detailed discussion on how some of the values underlying religious personal laws and some specific rules of the religious text promotes the idea of subordination of women and operate to obstruct women's participation in the public life as self-sufficient individuals.

notions of gender equality. Secondly, the idea of freedom of religion does not necessarily entail the right to enact laws which govern those whose religious or personal moral convictions may be different and thirdly, as has been discussed in details in Chapter I and III, the right to freedom of religion under the Constitution of Bangladesh is a qualified right subject to law, public order and morality.

It has been pointed out in Chapter I that the traditionalists use the right to freedom of religion and preservation of the cultural identity of religious communities to deploy arguments in favour of restraining the state from reforming the personal laws and bring them in line with the gender equality guarantee. This view is sometime evident in various decisions, reports and activities of the policy-making bodies of the State which demonstrate the tendency of privileging the right to religion over the right to equality for women.[4] It has been observed in Chapters I and III that freedom of religion is a qualified right as it is subject to law, public order and morality. As has been observed in the *Fatwa* case[5], there is a need to interpret and set clear guidelines as to what constitutes "public order and morality". It is argued in this thesis that "public order and morality" should be interpreted to uphold gender equality in situations of conflict between religious rights and gender equality where upholding religious rights means causing significant disadvantages to women. In this regard it also needs to be pointed out that by focusing exclusively on group rights to practice religion and in considering the fundamentalist religious leaders as the sole representatives of the religious communities, the state may disregard difference of interest within groups which can result in the marginalisation of women's interests. Among other things, it can bind Muslim and

[4] See Chapters I and II.

Hindu women to an essentialist notion of identity that denies the possibility of internal challenge to Muslim and Hindu laws.[6] It is, therefore, submitted that there is a pressing need to problematise the notions of "culture" and "group identity" in this regard. While acknowledging the importance of protecting group rights and the cultural identities of religious communities, the thesis argues that the recognition of group identity must be informed by an understanding of both the situation of women within the collectivity and of the systematic disadvantage of women as a group.[7] It is submitted that the state while protecting cultural identity, should make sure that this is not used as a device to disadvantage women within a community. In this context, it is argued that the best possible approach to legal reform in Bangladesh is to pursue a uniform family law applicable to all citizens irrespective of their gender and religion. It is also argued that religions in this regard should take an inspiring role only. In other words, religious values should be respected as a personal spiritual choice but should not be the basis of the personal laws. The feasibility of this option in the present socio- political context of Bangladesh is discussed further below.

c) Certain aspects of Islamic law are reconcilable with gender equality

It has been observed in Chapter IV that there are certain aspects of Islamic law that are reconcilable with a notion of gender equality. It has been pointed out that Islam acknowledges equality between the sexes in terms of spirituality and equal worth as

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[5] The case has been discussed in detail in Chapter I.

[6] See-- V Narain *Gender and Community: Muslim Women's Rights in India* (Toronto: University of Toronto Press, 2001).

human beings but ascribes different social roles to men and women. In Chapter IV, some of the provisions of Islamic law such as maintenance, divorce, the duty of obedience causing inequality and significant disadvantages to women have been challenged as the product of biased interpretation and it has been argued that there is scope to reform some of these provisions to eradicate gender-based disadvantage and bring them closer to the notion of gender equality. Discussions in Chapter VII have examined how the issue of reform to religious personal law has been approached in two Muslim societies, Tunisia and Morocco. Although the reform approach undertaken in these two countries and the concept of equality emerging as a result is different from South Africa and Canada, this examination has nevertheless been useful as it demonstrated that (a) it is possible to have a unified personal status law and (b) it is possible to initiate equality-enhancing reforms in a Muslim society. It is however, accepted that change in the legal status of women through legal reform does not automatically guarantee the improvement of social or economic status or the overall status of women in a society. Particularly in case of Morocco it still remains to be seen whether the recent reforms initiated there will improve the overall status of women in any substantial way. In Tunisia as well, it is difficult to confirm how far the reforms to personal laws have changed the overall position of women in the society as not enough data is available conclusively to prove a position. This thesis nevertheless argues that the reform approach pursued in Tunisia and Morocco may serve as a stepping stone towards developing a substantive understanding of equality in Bangladesh, as witnessed in South Africa and Canada. It is clearly necessary to improve the legal status of women

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[7] Narain makes a similar proposition in the context of reforming Muslim Law in India. For details see ibid.

considering the close link between religious laws and women's rights and the fact that some of the rules and values underlying religious laws (as has been discussed in Chapter III), obstruct women's participation in public life as fully autonomous individuals and hence impede their economic empowerment, leaving them subservient to men in the society.

d) Lessons from Canadian and South African equality jurisprudence: The equality guarantee should be interpreted to embrace the concept of substantive equality.

South Africa and Canada demonstrate the possibilities that equality offers for improving the status of women through adopting a substantive version of equality. While it is accepted that these two countries have little in common with the socio-cultural background and condition of women in Bangladesh, the lessons learned from the South African and Canadian equality jurisprudence can nevertheless be valuable for understanding as well as developing the problems and prospects of equality jurisprudence in Bangladesh. In this regard Chapter IV has already discussed the Case Shamima Sultana Seema and Others v Bangladesh and others[8] where the Petitioners have argued that the Constitutional guarantee of equality embraces the concept of "substantive equality". It yet remains to be seen if the Court endorses this argument or not but if it does then this will further strengthen the argument of this thesis that there is scope and need for embracing the concept of substantive equality in the equality jurisprudence in Bangladesh.

Chapter V and VI have pointed out that while it is difficult to adopt a substantive version of equality analysis, it can sometimes be even more difficult and complex to actually apply and develop it in practice. We have to bear in mind that while developing and implementing substantive equality analysis new problems are emerging in South Africa and Canada.[9] In Bangladesh it is not possible to foresee how substantive equality analysis, if adopted will be translated on the ground and what sort of problems will emerge. But it is nevertheless useful as these two jurisdictions helps us to identify the possibilities equality may offer as a concept and a strategic goal and the problems that may occur in implementing and achieving equality and how some these countries have sought to overcome such problems. While it still remains to be seen if the Bangladeshi courts and the government take on the challenge to accept and interpret equality in a substantive way or to provide the institutional framework for implementing it, the lessons learned from the Canadian and South African experience can be helpful in helping us think about how to achieve a more meaningful guarantee that can substantially improve the position of women in Bangladesh in the future.

In both South Africa and Canada the form of equality that is emerging is substantive equality requiring a contextual analysis that focuses on disadvantage instead of formal attributions of similarity or difference. As has been observed in Chapter V and VI, the substantive approach to equality may be useful in developing equality jurisprudence and pushing reform of personal laws in Bangladesh as it may be less prone to accusations of "Westernization" because of its focus on disadvantage rather than difference between the sexes. As it has been observed in Chapter IV, Islam propagates equal worth of

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[8] WP No. 3304/2003.

human beings but different provisions of Islamic law consider women as inherently different from men and ascribe different social roles for men and women. Gender equality understood as formal equality in some instances, prescribes equal treatment between men and women insisting on their similarity. As has been observed in Chapter IV for a large part of the nineteenth century, women's struggle in the West under the formal equality paradigm was a fight for inclusion by insisting that women are similar to and just as "good" as men and therefore should qualify for equal treatment. This succeeded in securing some important rights for women such as the right to vote, equal treatment in the workplace and so forth. However, the formal approach to equality may be considered as contradictory to the values and lifestyle prescribed by Islamic law which insists on difference. On the other hand, the kind of equality approach emerging in the South African and Canadian equality jurisprudence adopts a contextual analysis that focuses on the "disadvantages" that flow from differential treatment rather than "difference" between the sexes per se. Under this approach therefore, different treatment is invalid/suspect only when it causes systematic disadvantage to a class or group. Viewed thus, the substantive approach to equality becomes much less contradictory to Islam which prescribes as its overarching aim to ensure, arguably, overall justice between the sexes and hence eradicate disadvantage, which as Islamic law prescribes, sometimes require treating women differently. (For example, women as a general rule get half the share of men in inheritance because they have no formal obligation to contribute towards household expenses; the actual guardianship of children lies with the father as he has the ultimate responsibility to provide for the child's needs). While the thesis accepts that these underlying notions of religious laws are problematic as they

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[9] See Chapters V and VI for details.

reinforce stereotypical assumptions about women and contribute to their subordination, the acknowledgement of difference nevertheless creates the possibility of dialogue, compromise and flexibility in these kinds of contexts. The point is that substantive equality creates the possibility for discursive movement in an equality context which a formal equality approach precludes. Also, because substantive equality adopts a contextual analysis that involves taking into account while judging disadvantage the relevant socio-legal and economic context, it can be argued to be less susceptible to accusations of imposing an "alien" culture or of fostering Westernisation and the cultural imperialism of the West.

2. The Possibilities for Reform of the Personal Laws in Bangladesh

The above discussion has highlighted the possibilities and arguments in favour of extending the equality guarantee in the sphere of the religious personal laws in Bangladesh with a view to reforming them accordingly. It has been noted that in Bangladesh any reform approach to personal laws needs to be consistent with the letter and spirit of the Constitution and should be assessed in the light of the overall socio-political context of Bangladesh. This part of the discussion will examine which type of reform approach is suitable and feasible considering the present socio-cultural and political situation of Bangladesh. It needs to be noted that those involved in debates relating to reforms of personal laws and women's rights in Bangladesh consist of two opposing groups. On the one side are the traditionalists who are hostile to any changes in the religious-based laws. This group advocates strict adherence to norms and laws as

prescribed by the religious sources and their interpretations by the classical jurists. They tend to view any reform attempts with extreme suspicion. In the opposite camp are secular and modernist women's rights activists who vociferously demand replacement of religious-based personal laws with a uniform and secular legal regime based on equality. This group mostly includes people educated in the West and NGO (foreign aid-based Non Government Organisations) activists. They base their claim on the relevant Constitutional provisions guaranteeing formal gender equality[10] and argue that a uniform personal status code should be introduced which will be based on gender equality and will be applicable to all citizens irrespective of their religion or sex. In between these two views, one can find a middle position which although sceptical about gender equality as a strategic goal in a Muslim society, is nonetheless unsupportive of the arguments of the conservatives that Islam requires women to be kept subordinated, disadvantaged and secluded. The proponents of this approach argue that there is no alternative to finding a solution within the framework of religious personal laws. They argue that the crux of the problem is that women are in fact deprived of rights guaranteed by religious laws. The proponents of this view thus insist on the proper implementation of rights and duties guaranteed to women under Islamic law instead of bringing any substantive change to it on the basis of gender equality. For example, Monsoor argues that the concept of equality dominating current legal scholarship is not compatible with the socio-cultural realities of Bangladesh. As such, she opts for "gender

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[10] Article 28 of the Constitution states: "(1) The State shall not discriminate against any citizen on grounds only of religion, race caste, sex or place of birth. (2) Women shall have equal rights with men in all spheres of the State and of public life. (3) No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational

equity" instead of "gender equality". Believing that "gender equity" can be ensured by better enforcement of existing rights guaranteed under the Islamic law, she suggests that Bangladeshi women should insist that men fulfil their respective obligations of maintaining and protecting them.[11] The main argument against this approach is that the concept of "equity" is not expressly recognised by the Constitution. It has been noted in earlier discussions in Chapter IV that the Constitution of Bangladesh is vested with the authority for determining the validity of all existing laws. It specifically guarantees gender "equality" to all citizens and does not acknowledge the concept of gender "equity", either directly or indirectly. Furthermore, there exists a strong argument in feminist scholarship against the idea of women as a class in need of protection and man as the sole provider. It is argued that the representation of women as a "protected species"[12] operates against their dignified existence, reinforces subordination and dependence and tends to conceal the reality of discrimination and violence suffered by them in the home.[13]

Traditionalists versus Seculars

One of the arguments usually put forward against the idea of secular and uniform family laws is that it undermines key factors of the social reality of societies such as

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institution. (4) Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens".

[11] T Monsoor *From Patriarchy to Gender Equity: Family Law and its Impact on Women in Bangladesh* (Dhaka: The University Press Ltd, 1999) p.57.

[12] The analogy of "protection—endangered species" was drawn by S Sobhan *Legal Status of Women in Bangladesh* (Dhaka: Bangladesh Institute of law and International Affairs—BILIA, 1978).

[13] Some of these feminist arguments have been highlighted in Chapters III, IV. Chapter II has highlighted how some of the provisions of the *Shar'ia* operate to reinforce dependence and subordination and disadvantage of women in society.

Bangladesh where religion and religious beliefs form a critical point of reference for both individual conduct and institutional development.[14] It is argued that if the concept of secularity is incorporated into the sphere of family laws, it will disturb the equilibrium of the social fabric that has been developed over centuries[15]. It is also argued that in the complex social and political context of Bangladesh, any attempt at secularisation or unification of family laws will be met with political backlash and with accusations of "westernisation". An example of this is the *Eva Sunanda* case[16] where the Court recommended adopting a unified marriage and divorce law for all religious communities. After the judgment, various fundamentalist Islamic organisations organised violent protest and even declared a price on the head of the presiding judge.

As has been explained in Chapter I, after independence, to give effect to the ideals and aspirations that led the nation to the liberation movement, the first Constitution of Bangladesh in 1972 affirmed the equal rights of women and incorporated "secularism" and "social justice" as two of its fundamental pillars. Unfortunately, in later years, between 1975 and 1990 during most of which the country was under pro-Pakistan and pro-Islamic military dictatorship, the Constitution underwent some major surgery and the principles of secularism and social justice were scrapped and replaced with diametrically opposed principles such as "absolute trust and faith and trust in almighty Allah" and adoption of Islam as state religion.[17] The impact of this shift away from

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[14] TM Murshid, *The Sacred and the Secular* (Dhaka: The University Press Limited, 1996).
[15] Monsoor, n 11 above
[16] Eva Sunanda Chowdhury v Subir Sardar (2000) 5 BLC 660-661.
[17] The process of moving away from the basic ideals of the independence war, including secularism, started after the brutal killing of Bangabondhu Sheikh Mujibur Rahman, the founding father of Bangladesh, together with his family on 15 August 1975. After his killing the country was under military dictatorship for several decades. An amendment to the Constitution in 1977 removed the

secularism has been disastrous as it has not only tampered with the basic structure of the Constitution but has also strengthened the hands of Islamic fundamentalist forces who are opposed to any reform of traditional Islamic law. Among other things, this has also taken away from the religious minorities their sense of belonging and security and made any reform attempts by the State of the religious personal laws of the minority communities a truly difficult task.

Since Islam has been declared the State religion, it has often been argued by the traditionalists that the idea of a secular and uniform personal status law applicable to all citizens is against the values and ideology of an Islamic State. To examine the validity of such an argument, one should take notice of two things. First, as Anisuzzaman[18] points out, there was never any public demand to do away with secularism or to declare Islam as a state religion. On the contrary, it created grave concern and sparked protests from various citizens' groups. For example, after declaring Islam as a State religion through the Eighth Amendment, some women's groups challenged this amendment in the highest court on the ground that it is inconsistent with the spirit of the Constitution and with various United Nations Conventions (W.P. No. 1330 of 1988). They also argued that this amendment will strengthen the authority of the religious fundamentalist forces to police women's participation in public life and expose them to more discriminatory

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principle of secularism and replaced it with "absolute trust and faith in Almighty Allah" by Arts 8(1), (1A) of the Constitution of Bangladesh. Finally, in 1988, the Eighth Amendment, (The Constitution (Eighth Amendment) Act (1988) (Act XXX of 1988) section 2 inserted Article 2A, affirming, "[t]he state religion of the Republic is Islam, but other religions may be practiced in peace and harmony in the republic."

[18] Anisuzzaman 'Religion, Politics and the State' in Mohiuddin Ahmed (ed.) *Bangladesh Towards 21st Century* (Dhaka: CDL, 1991) pp.5-7.

laws.[19] Second, it also needs to be pointed out that compared to other Muslim countries such as Iran and Pakistan, the official attempts to "Islamise" the legal system in Bangladesh have been more muted and cautious. For example, there has been no attempt to bring criminal laws, which are applied to all citizens irrespective of their religion and sex, in line with Islamic penal law by introducing traditional Islamic modes of trial and punishment.[20] Also, as Kabeer points out, there has been an absence of any sustained attack on women's rights, for example, with regard to deportment of dress. Despite pressure from fundamentalists, the more drastic step of declaring Bangladesh "an Islamic Republic", in place of its present denomination as "a People's Republic", has not yet been taken.[21] Anisuzzaman[22] points out that although the process of Islamisation has undoubtedly led to some increase in religious activities in Bangladesh at the private level, at the public level the process has been muted and cautious. In this regard, it

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[19] The Eighth Amendment incorporated two fundamental changes in the Constitution: 1) It made Islam the state religion of Bangladesh and 2) It created six more permanent benches to the High Court Division of the Supreme Court of Bangladesh in different parts of the country in place of the existing on High Court Division with its permanent seat in the capital city of Dhaka. Several writ petitions were made challenging the validity of the amendment. Three writ petitions (C.P. No 207 of 1988, C.P. No 208 of 1988 and C.P. S.L. No 3 of 1989) were filed in the High Court Division challenging the validity of the amendment so far as it related to the creation of six extra benches of the High Court Division of Bangladesh Supreme Court, while three more writ petitions, one by Nari Pokkha (an women rights organisation in Bangladesh) (W.P. No. 1330 of 1988), one by Citizens' committee for Resisting Communalism and Autocracy and another by Mr. Shakti Das Goswami (W.P. No. 1177 of 1988) were filed challenging the state religion part of the impugned amendment. Writ petitions relating to the creation of six extra benches to the High Court Division were summarily rejected by the High Court Division. On appeals, the Appellate Division in its judgment delivered on 2 September 1989 found the relevant part of the amendment *ultra vires* of the Constitution and declared it invalid. For a detailed critique of the Eighth Amendment, see S Alam 'State-Religion in Bangladesh: A Critique of the Eighth Amendment to the Constitution' (1991) 4 *South Asia Journal* 3, pp.313-334.

[20] Anisuzzaman, n.18 above.

[21] N Kabeer *The Quest for National Identity: Women, Islam and the State in Bangladesh* (Discussion Paper No.268) (Brighton: Institute of Development Studies, October 1989).

[22] Anisuzzaman, n 17 above.

should also be noted that, despite all efforts, there was never any public demand to do away with secularism or to have a state religion.[23]

It can, therefore, be argued that in the light of the spirit of the Constitution set out in its preamble,[24] the fundamental principles of state policy and guarantee of gender equality set out in article 28, the best possible approach to legal reform in Bangladesh is to follow the instance of Tunisia and pursue a uniform personal status law applicable to all citizens irrespective of their gender and religion. The next obvious question therefore, is whether such a uniform personal status law is achievable given the present socio-political situation of Bangladesh. As has been mentioned above, viewing some of the provisions of *Shari'a* law and Hindu law as oppressive and incompatible with basic western values like human rights and equality, the proponents of the secularist approach concludes that for the sake of women's rights, personal laws must be substituted by a secular legal regime. They base their claim on the relevant Constitutional provisions guaranteeing formal gender equality and argue that a uniform family code should be introduced which will be based on absolute gender equality and should be applicable to all citizens irrespective of their religion or sex. In Bangladesh, the first draft of a "Unified Family Code" was proposed by Mahila Parishad, which is one of the leading

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[23] According to Kabeer, this apparent lack of confidence by the State in implementing its Islamic goals stems from a central ambivalence in relation to prevailing notions of national identity, an ambivalence which relates to the significance attached by different political constituencies to the place of "Islamic" versus "Bengali" values in determining national identity. She further points out that while Islamic religion and Bengali culture are the very essence of the community's separate identity, its historical experience has prevented the two from being successfully moulded into a coherent community. For details, see Kabeer, n 20 above.

[24] The Preamble of the Constitution of Bangladesh sets out clearly the philosophy, aims and objectives of the Constitution and describes the qualitative aspects of the state the Constitution is designed to achieve. The Preamble refers to the historic war of national independence and declares the fundamental aim of the State to be the establishment of a society in which the rule of law,

women's rights organisation in Bangladesh. Since then, the project of unification and secularisation of personal laws has been taken up with increasing enthusiasm by various other NGO-based activists and, as a result, a couple of other drafts of the Code were presented by several other organisations, such as ASK (Ain O Shalish Kendra) and BNWLA (Bangladesh National Women's Lawyers Association) etc. All of these drafts, although they have some difference in their approach to addressing the issue of unification and reform, nevertheless share some common feature such as banning polygamy and child marriages, allowing inter-faith marriages, providing equal rights in the area of marriage, divorce, guardianship, and inheritance etc.

The proposals of unification and reform of personal laws however were not met with much enthusiasm by the government or the judiciary. The scepticism of the judiciary in this regard is evident from the judgments of the Supreme Court in recent years. As has been mentioned earlier, in Eva Sunanda Chowdhury v Subir Sardar (2000)[25] which was a divorce case filed by a Christian woman, the High Court Division of the Supreme Court of Bangladesh recommended that Parliament should enact a "unified Marriage and Divorce Act for all the citizens to keep in pace with the modern time".[26] The court also ordered a copy of the judgment to be sent to the Ministry of Law. Unfortunately, later, acting on the petition filed by an organisation called Islamic Law Research and Legal Aid Bangladesh, the recommendation of High Court Division's Justice Golam Rabbani was expunged by the Appellate Division of the Supreme Court.[27]

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fundamental human rights and freedom, equality and justice are ensured. For details see M Islam *Constitutional Laws of Bangladesh* (Dhaka: BILIA, 1995) p.45.

[25] 5 BLC 660-661.

[26] Ibid. p. 661.

[27] The Appellate Division of the Supreme Court pointed out that the judgment of the High Court Division regarding the Uniform Civil Code was a mere recommendatory observation of Justice

The way forward

The above discussion has highlighted some of the problems associated with the practical application of the different approaches (traditional, secular and the approach in between) to legal reform existing in the legal scholarship in Bangladesh. In light of the above discussion, it seems doubtful that a unified and secular personal law regime applicable to all religious communities as in Tunisia, can be achieved presently, given the socio-political situation in Bangladesh. In this regard it is submitted that while the ultimate objective of legal reform should be to ensure a uniform and equality-based personal law, there are different strategies that can be pursued to further the same goal. One such strategy can be to reform the personal laws through progressive interpretations of the religious sources and doctrines or judicial *ijtihad*, side by side facilitating feminist reinterpretation of religious texts. The benefits of pursuing such a strategy are three fold: (a) It can serve to broaden the base of support for women-friendly legal reforms and will be less susceptible to accusations of westernisation and political backlash; and (b) It can help to create the necessary atmosphere in the future for the judiciary and women activists to pursue a uniform personal status law based on gender equality; and (c) a piecemeal reform approach to religious laws can serve as a testing ground for developing a more substantive understanding of equality.

Rabbani. The Appellate Division also observed that the said recommendation was unrelated to the matter before the High Court for disposal. For details, see—Islamic Law Research Centre and Legal Aid Bangladesh v Eva Sunanda Chowdhury and others (2002) 54 DLR (AD) 168.

3. Possibilities and prospects of piecemeal reform of Islamic law

As has been discussed, judicial *ijtihad* has been successfully used in the past to achieve some important rights for women in Bangladesh and it still holds real promise in reforming the personal laws relating to polygamy, divorce etc to bring them in line with the notion of equality.

In this regard, the thesis concluded in Chapter VII that reforms introduced in Tunisia and especially in Morocco (which explicitly took a reform approach consistent with the values and spirit of Islam) in various areas such as divorce, polygamy and custody of children can be followed to reform the relevant provisions of the personal status law for the Muslim community in Bangladesh. For example, drawing on the provisions in Tunisia and Morocco, the Bangladeshi Muslim Family Laws Ordinance (1961) should be amended to make all divorce subject to judicial process instead of leaving it to the non-judicial Arbitration Council.[28] With regard to polygamy, it has been proposed in this thesis that the example of Tunisia can be followed to abolish polygamy outright. Alternatively, if abolishing polygamy outright proves to be difficult due to the fear of political backlash from religious fundamentalist groups, Bangladesh can at least follow the example of Morocco by making polygamy subject to the prior authorisation of the court. In the cases of guardianship and custody of children, the prime consideration should be the welfare of the child and both the guardianship and custody should be placed in one person.

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[28] The procedure for divorce under the Muslim Family Laws Ordinance (1961) and some of the problems that arise while complying with it have been discussed in details in Chapter II.

In addition to the above, reforms should be made to the Family Courts Ordinance (1985) so as to make the function of the Family Courts more expeditious. As has been pointed out in Chapter I, the power and function of the Family Courts under the Ordinance is an important issue because of the possibility they offer for a unified system of family law at least at the procedural level. Chapter I of the thesis has already highlighted some of the problems relating to the function of the Family Courts under the Ordinance. In this regard it is suggested that in light of some of the problems identified in Chapter I, that the Family Courts in Bangladesh would be more effective if they were made separate and independent courts dealing with all family and personal matters. It has been pointed out that as there are at the moment no separate Family Courts and the Assistant Judges' Courts acting as Family Courts, because of their workload are not in a position to give the time or effort necessary to handle family issues, including the conduction of reconciliation between the parties as prescribed by the Family Courts Ordinance (1985). As has been suggested in Chapter I the family courts should also be given some criminal jurisdiction as well as civil jurisdiction so that all issues could be handled by it. In this regard it is suggested that the list of issues should be expanded under the present section 5 of the Family Courts Ordinance (1985) which gives exclusive jurisdiction to the Family Courts to try and dispose of suits relating to the dissolution of marriage, restitution of conjugal rights, dower, maintenance, and guardianship and custody.[29] Moreover, although the Ordinance gives exclusive jurisdiction, it does not give any

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[29] The above mentioned reforms relating to the functions and powers of the Family Courts under the Ordinance have been suggested by the participants at a two-day workshop entitled *Workshop on Uniform Family Code and Problems of Enforcement of Equal Rights of Women in Bangladesh: Legal Policy and Social Dimension* (September 22-23, 1992), organised jointly by Bangladesh

grounds or guidelines on the basis of which these powers may be exercised or relief sought by parties[30]. The benefits of developing a clear set of guidelines are many. Most importantly this will give the Family Courts the chance to apply law progressively without confining them to the restrictive boundary of the various regressive rules and practices of the religious laws and develop the law progressively and in tune with the needs of modern times.

4. Concluding remarks

The above discussion has pointed out some examples and suggestions for piecemeal reform to the personal laws. It has been seen that this piecemeal reform approach, although not based on gender equality as such, can nevertheless serve towards eradicating glaring inequality and disadvantages and thus contribute towards building up an environment for adopting a substantive understanding of equality in the future. It is noted that approaches to reform in a Muslim society often rely heavily on religious principles and interpretation of Islamic sources either to support or to reject the notion of gender equality. In this regard, the recent reform experience of Morocco becomes valuable as it shows that the legal position of women can be substantially improved within the framework of Islam. Foregoing discussions also illustrate the clash of approaches relating to the issue of personal law reform in Bangladesh where patriarchal attitudes and cultural traditions disguised as religious norms are seen to be in conflict with the constitutional guarantee of equality between the sexes. Although orthodox

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Institute of Law and International Affairs (BILIA) and the Mahila Parishad. Its proceedings were not published.

[30] Ibid.

Islamic views may be appearing as a strong force militating against change to the personal laws at present, countervailing forces of equality and secularism are also becoming potent as a result of social and economic transformation in Bangladesh. In this context, the progressive reforms in Tunisia and Morocco can serve as examples for Bangladesh for similar initiatives which in the long run may serve as a stepping stone towards replacing the prevailing patriarchal practices guised as religious norms and towards developing a substantive understanding of equality.

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Constitution (Eighth Amendment) Act (1988) (Act XXX of 1988)
Charter of Charles II in 1661
Charter of King George I in 1726
Child Marriage Restraint Act (1929) (Act XIX of 1929) 8 PC 430, 11 BC 77
Child Marriage Restraint (Amendment) Ordinance (1984) (XXXVIII of 1984) 36
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Christian Marriage Act (1872) (V of 1872) 2 BC 140, 2 PC 142
Code of Civil Procedure (1859) Act XV of 1859.

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Code of Criminal Procedure (1898) (V of 1898) 4 BC 90, 4 PC 10
Dissolution of the Muslim Marriages Act (1939) (VIII of 1939) 9 PC 716
Dissolution of Muslim Marriages (Amendment) Ordinance (1986) (XXV of 1986) 38 DLR (Sta) 105
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[1] Keeping in mind their common legal heritage and history of development which is very closely linked, municipal laws of the Indian Subcontinent are listed here under the same sub-sub-heading. For details on this, see- M P Jain *Outline of Indian Legal History* (5th edition, reprinted) (Nagpur: Wadhwa & Co., 2003).

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3.2. Canada

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3.3. Germany

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3.4. Morocco

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3.5. South Africa

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3.6. Tunisia

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3.7. United States

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[2] Ibid.

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4.4. United States

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