

## In Search of Equality and Fairness in Rights of Marriage and Divorce for Muslim Women in Bangladesh

**[Bangladesh is yet to adopt a Uniform Family Code on Marriage related laws. The legal system, which is based on common law applied during the colonial period of British India, is still largely in force, subject to a few reforms through piecemeal legislative interventions.]**

This area is still governed by personal law, which finds a shape by religious laws, as customarily practiced. The religious laws concerning Muslim marriage, as it is currently in force, are still in need of substantive reform in order for bringing in equality and fairness more comprehensively. A few of these laws are effectively in prejudice of women for not being fully commensurate with the laws prevailing in other Muslim countries or with classic Muslim tradition.

As distinct as it is from a commercial transaction, a marriage is a social contract between a man and a woman of sound mind, who attained puberty. Determinants of sound mind may well be very broadly featured. Clearly it excludes the “insane” and the “lunatic” from having a valid capacity for entering into a valid marriage contract. In biological sense, average women attain puberty at the age of 12, whereas average men attain puberty at the age of 15. According to Hanafi school, a woman attains her puberty at the age of 15. However, any marriage given in by parents, before the girl attained her puberty is not void. This however allows the girl a right to repudiate the marriage when she reaches her puberty. The Child Marriage Restraint Act 2017 defined the terms of contracting a valid marriage which provides for the minimum age for marriage for a girl to be 18 and for a boy to be 21. In special circumstances, however, with parental consent the Court may allow such marriage, if the Court deems that to lie in the best interest of the child. This does not however render a marriage under this age void but merely allows the parties to repudiate the marriage after they attain majority. Though a minor can be given in marriage, no minor may contract herself in marriage during her minority and such marriage is void in the eyes of law. Where a minor has been given in marriage during her minority and the marriage has been consummated, that of itself, does not deprive the minor from repudiating the same after attaining puberty.

In the classic Muslim tradition, a Muslim man can validly marry a kitabi (A Christian or a Jewish)

woman, which would entail a valid marriage. A Muslim man cannot marry a non kitabi, for example a Hindu. However, in case such a marriage takes place, the marriage would be merely irregular but not void. The marriage would become fully legal when it becomes regular, for example, when she converts to Islam. On the other hand, marriage with a Kitabi man by a muslim woman is not prima facie void but irregular. Any marriage by a Muslim woman with a man of other religion would be a void marriage.

A Muslim man can have four wives at the same time. Accepting a fifth is not however illegal but would give rise to an irregular situation. Women are however prohibited from polyandry. The primary argument against having multiple husbands is the inability to determine paternity, whereas in polygyny, determination of maternity is not subject to question. Muslim Family Laws Ordinance 1961 provides that any man seeking to accept a second wife, during the subsistence of a marriage must first obtain permission from the Arbitration Council. The Arbitration Council however, at the time of granting such permission, would consider the necessity of such marriage and whether prior permission of the existing spouse was obtained. In practice, the Arbitration Council allows remarriage even at the slightest pretexts.

The right of divorce is exclusively in the domain of men. Classic Islamic Law provides for different procedures for divorce. There are divorces that are executed through oral pronouncement (talaq-i-ahasan, talaq-i-hasan, talaq-ul-biddat or talaq-ul-badai) and divorce executed in written form (talaq-i-bain) and takes effect immediately on its execution. Talaq-i-khula may also be summoned, when there is an element of mutuality between the parties, in regards divorce. The remarriage between the same parties following a divorce, in Classic Islamic Law, is absolutely forbidden, unless an intervention of another marriage with a third party is concluded and divorced thereafter upon consummation. However, a man is not required to be married to a third party for the remarriage. After the enactment of Muslim Family Laws Ordinance 1961, the intervening marriage is no longer required for a remarriage between the same parties, following a divorce (Section 7).

The wife generally does not possess any power to divorce as it is exclusively in the domain of men, exposed to scopes of arbitrary exercise. A woman can however, obtain a divorce, by a court order only in certain limited circumstances, such as a long absence of the husband without information, long imprisonment, refusal to provide maintenance for his wife, impotence etc. Further, either party can obtain an order of divorce in cases of chronic disease, insanity, deceptive misrepresentation and desertion. The only way a woman may divorce her husband, without court proceedings, is by exercise of Talaq-i-Tawfeez. This is a delegated power of divorce conferred by the husband on his wife at the time of the marriage contract. Such a consent is now obtained by default, unless otherwise dictated, under Clause 18 of the Standard Nikahnama. Bangladesh has adopted only one form of Talaq, by a procedural amendment of divorce laws for Muslims and effectively removed the scope of all other forms of talaq, but for Talaq-e-Ahsan. Talaq-e-Ahsan is the most proper form of repudiation of marriage. The reason is twofold: First, there is possibility of revoking the pronouncement before expiry of the Iddat period. Secondly, the evil words of Talaq are to be uttered only once. Being an evil, it is preferred that these words are not repeated. In the Ahsan Talaq there is a single declaration during the period of purity followed by no revocation by husband for three successive period of purity. In this form, the following formalities are required:

(a) The husband has to make a single pronouncement of Talaq during the Tuhr of the wife. Tuhr is the period of wife's parity i.e. a period between two menstruations. As such, the period of Tuhr is the period during which cohabitation is possible. But if a woman is not subjected to menstruation, either because of old age or due to pregnancy, a Talaq against her may be pronounced any time.

(b) After this single pronouncement, the wife is to observe an Iddat of three monthly courses. If she is pregnant at the time of pronouncement the Iddat is, till the delivery of the child. During the period of Iddat there should be no revocation of Talaq by the husband.

Revocation may be express or implied. Cohabitation with the wife is an implied revocation of Talaq. If the cohabitation takes place even once during this period, the Talaq is revoked and it is presumed that the husband has reconciled with the wife.

When the period of Iddat expires and the husband does not revoke the Talaq either expressly or through consummation, the Talaq becomes Irrevocable and final.

It may be noted that the characteristic feature of the Ahsan form of Talaq is a single pronouncement followed by no revocation during the period of three month's Iddat. Therefore, where a husband makes any declaration in anger, but realising his mistake afterwards, wants to cancel it, there is sufficient time for him to do so. Single pronouncement of the civil words of Talaq and sufficient opportunity to the spouses for reconciliation, are the two reasons for calling this form as the 'most proper' form of Talaq. The Muslim Family Law Ordinance 1961 has provided provisions for Arbitration. It is mandatory for parties issuing divorce to serve a notice on the Chief of the Local Administrative Unit. He shall constitute an Arbitration Tribunal and the same Tribunal may seek to reconcile between the parties within 90 days if they at all appear voluntarily. It cannot however stall the process of divorce or otherwise prevent it unless the husband revokes the divorce within 90 days.

The Dissolution of Muslim Marriage Act 1939 added some grounds for a woman to seek judicial divorce. They include, neglect or refusal of husband to pay maintenance for at least 2 years at a stretch and if the husband brings a false charge of adultery against the wife. The wife however, cannot complain if she has voluntarily refused to perform her conjugal duties without a reason or without a reason stayed separate from the husband. Apostasy from Islam by a woman does not dissolve the marriage, whereas the apostasy of the husband dissolves the marriage immediately.

A fair and equal opportunity regarding marriage and divorce for Muslim women is still a far cry. Although there were legislative reforms on a piecemeal basis, such reforms have not looked into issues comprehensively, which therefore at times, succeeded to resolve one issue and triggered a problem elsewhere. This necessitates formation of a Unified Family Code, which would seek to address all issues comprehensively and accurately.

End.

<p><b>Author:</b> Asif Bin Anwar, Barrister &amp; Advocate of Supreme Court of Bangladesh Email: asif@grayschambers.com</p>
---

**End of the Volume—III [2017 (2)]**