

**Impact Of Marriage And Social Norms In  
Determining Women's Property Rights  
Within The Muslim Communities Of  
Bangladesh**

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## **Abstract**

The Bangladeshi Muslim society like most Islamic societies lacks advancement of women's rights, seen in most western societies, in the context of property rights, access to land and ability to enforce their rights. Furthermore, the absence of a codified jurisdiction on marital property puts divorced and separated women in Bangladesh at far greater risk of economic hardship and poverty than the men. Considering the importance of Muslim women's rights to access, control and own land through both inheritance and marriage, it is important to assess Bangladeshi Muslim women's status in family, marriage, and society as a whole. With the aim to establish that women's marital property rights would improve their overall well-being, this study will adopt a desk-based research in exploring the deep-rooted issues involving the construction of gender and marriage in context of Muslim women's rights to own, access and control land in Bangladesh. In order to analyse the best approach to introduce community property regime in the Muslim society of Bangladesh, the level of development and the status of women's property rights in six different Muslim countries, namely Tunisia, Morocco, Malaysia, Indonesia, Turkey, and Iran, have been thoroughly analysed to demonstrate the extensive benefits of community property regimes. This non-empirical research will mostly include studying through religious scriptures, archives of libraries, online resources, published academic journals and articles, policies, and reports. Furthermore, taking a Human Rights based approach this paper will examine women's rights and property rights as basic human rights. Essentially, this research will focus on the Muslim women and their land rights in Bangladesh in the context of marital impact, religious beliefs, and influences of long-practiced traditional social norms in order to evaluate the degree of

reworking of rules and norms surrounding marriage and family would be required to facilitate joint marital property regime in the Muslim society of Bangladesh.

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# Contents

|   |           |
|---|-----------|
| <b>Chapter 1: Introduction .....</b>  | <b>7</b>  |
| 1.1 Background .....  | 7         |
| 1.2 Research Questions And Chapter Summaries .....  | 10        |
| 1.3 Aims And Objectives Of The Research .....   | 13        |
| 1.4 Methodology .....   | 14        |
| 1.5 Scope And Limitations .....   | 18        |
| <b>Chapter 2: Literature Review And Legal Framework.....</b>  | <b>20</b> |
| 2.1 Literature Review .....   | 24        |
| 2.2 Muslim Women’s Property Right Under Legal Pluralism Of<br>Bangladesh .....  | 36        |
| <b>Chapter 3: Influences Of Gender Biased State Policy And Social Norms<br/>And Property Rights Of Bangladeshi Women.....</b> | <b>45</b> |
| 3.1 State’s Failure To Ensure Women’s Property Rights .....   | 48        |
| 3.2 A Patriarchal Setting That Overlooks Women’s Rights To Land ....  | 61        |
| <b>Chapter 4: Marital Property And The Muslim Communities.....</b>  | <b>73</b> |
| 4.1 Matrimonial Property Regimes In The Muslim Communities .....  | 75        |
| 4.2 Dower (Mahr) vs Matrimonial Property vs Maintenance (Nafaqa,<br>Mata’a) .....   | 93        |
| 4.3 Distinguishing Between Inherited Property And Marital Property....  | 104       |

|  |            |
|--|------------|
| <b>Chapter 5: Acknowledging The Significance Of Community Property Through Marital Dynamics And Roles Of Married Women In Bangladesh</b> | <b>109</b> |
| 5.1 Marriage Norms   | 112        |
| 5.2 Divorce Reality  | 135        |
| <b>Chapter 6: Interjecting The notion of community property in the society and legal system of Bangladesh</b>                            | <b>146</b> |
| 6.1 Secular Approach To Marital Property Rights  | 154        |
| 6.2 Marital Property Rights Through Ratification Of CEDAW  | 162        |
| 6.3 Reform Of Existing Domestic Laws And Social Practices To Provisions For Marital Property   | 171        |
| 6.4 Alternate Interpretation Of Shari'a Law To Include Marital Property Rights   | 179        |
| <b>Chapter 7: Final words</b>  | <b>187</b> |
| 7.1 Evidence Analysis  | 187        |
| 7.2 Findings   | 189        |
| 7.3 Recommendations  | 202        |
| 7.4 Concluding Remarks   | 215        |

# Chapter 1: Introduction

## 1.1 Background

Gender inequality is a stark reality in most parts of the world, particularly with respect to land and property rights. In Bangladesh, women are often considered to be subordinate to men and generally incapable of upholding their individual rights. Women's equal property rights appear radical and their socio-basic rights to education, work, and property are complex and need to be understood in their social, economic, and political context. Equal rights of a woman to own land are located in the fundamental right of every human being. Land provides the sense of personal empowerment by ensuring adequate standard of living and financial independence. A woman's rights to own, control and access to land also have major implications for the achievement and enjoyment of her human rights such as the right to equality, food, health, housing, water, work, and education. However, with only 4% of total privately owned land being registered under women's name in Bangladesh, the area demands particular attention for real development (Sarwar, Islam and Monzoor, 2007)<sup>1</sup>. There are a range of actors from the government, judiciary, and civil society to family, community, women's groups, and religious leaders who need to work together to ensure that women have the rights to a better life with self-esteem, social respect, and independence. There are two parts to a feminist Ideology, the normative framework of equal rights to land as well as the operational and strategic part of realising those rights.

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<sup>1</sup> Sarwar, G., Islam, R. and Monzoor, S. (2007). *Women's Rights to Land in Bangladesh: Roles, Limitations and Transformation*. [online] unnayan.org. Available at: [http://unnayan.org/documents/RightsParticipation/Women\\_Land\\_Right\\_in\\_Bangladesh.pdf](http://unnayan.org/documents/RightsParticipation/Women_Land_Right_in_Bangladesh.pdf)

A women's access to land and property arises at various stages in her life, such as personal property before her marriage, marital property during her marriage and inheritance and other rights. Women's property and land rights are a wide area of research, but the focus of this research is to explore the land rights of women in Bangladesh in relation to marriage and inheritance. Undoubtedly problems related land rights of women in Bangladesh, are more multifaceted than what meets the eye, the third largest Muslim-majority country of the world.

The Sunni sector of Muslim society of Bangladesh abide by the sharia interpretation of Hanafi madhab. Essentially, all Islamic madhabs agree that Muslim women have the rights to own, control and access properties. The Islamic Jurisprudence stresses the protection of women's rights to personal property in marriage and possible separation (Ahmad, 1992). While sharia law concerning women's inheritance rights have gathered attention from most western societies, the total absence of women's marital property rights in Islam have not attracted quite the attention it requires. In Islam, there is no provision that restricts women from having equal property and rights (Sait, 2015), with the exception of inheritance law. Interestingly, Muslim women often prefer their share of inheritance to be taken into account only after considering the interlinked intra-family and intergenerational property flow systems which in turn compensate for their inheritance gap (Sait, 2015). The accepted norm in most Muslim societies dictates that men are the sole financial providers within the family, and women are the sole caregivers within the family. Therefore, the unjust division of inheritance is often justified by enlisting husbands as the breadwinner of the family and their inheritance would be utilized to fulfil his financial obligations towards the family, whereas women's inheritance is considered as her own property. However, the absence of concept of marital asset, insufficient dower

and restricted access to maintenance compel many divorce-seeking Muslim women towards poverty or to become dependent on natal family and in majority of scenarios they simply choose to remain in an abusive marriage. Considering the importance of Muslim women's rights to access, control and own land through both inheritance and marriage, it is important to assess Bangladeshi Muslim women's status in family, marriage, and society as a whole. Therefore, this research will focus on the Muslim women and their land rights in Bangladesh in the context of marital impact, religious belief, and influences of long-practiced traditional social norms.

## **1.2 Research Questions And Chapter Summaries**

The research ventures to respond to the following overarching question:

**To what extent would the reworking of marriage and social structures allow the introduction of community property regime and overall improvement of Women's Property Rights within the Muslim communities of Bangladesh?**

This broad question is addressed through the various chapters of this thesis, which are drawn up to respond to the following subsidiary questions and issues.

**Chapter 2: How do property laws operate under the legal pluralism of Bangladesh?**

In context of Bangladesh, in a rare scenario when a woman owns property, she mostly passes it down to the next generation but when a man owns property, not only he passes to his offspring but also dispose at his will for he is regarded as the head of households. Therefore, a study of different models of marital property regimes would reveal instruments to assess striking rights for Bangladeshi Muslim women in marriage considering property is never a static entity but is constantly evolving during the course of a marriage, partly due to couple's work and partly due to negotiations during the subsistence of marriage with a mutual understanding for the common benefit of the household (Jacobsen, 2015). This in turn will require the legal experts to attune to the social and economic and gendered context in regard to cases where these negotiations end in court. Thus, converging legality of marriage and land rights of Muslim women, this chapter is divided into two parts. The first part will focus on the research conducted by

various academics on issues related to women's land rights and the second part will focus on Bangladeshi women's land under legal pluralism Bangladesh.

### **Chapter 3: In what manners do the current state policies and social norms controls women's access to property rights?**

There are numbers of factors restricting a woman's ownership and access to land in Bangladesh. These issues vary from state policies to social norms of the country. Even if a woman succeeds in claiming her proprietor right after going through various hurdles, her access and control over the land stay limited. The government of Bangladesh is doing little to nothing in improving the situation regarding women's right to land and the customary regulations seem to exist only to ensure the retrogressing of the condition. This chapter, thereby, closely scrutinize the whys and wherefores behind the ongoing struggles of majority of women of Bangladesh in claiming their land rights and related benefits. The study will include restrictions imposed by both the state and society. The first part of the chapter will focus on the failure of the existing laws and policies in ensuring women's rights in relation to land and second part will deal with the conventional practices restricting women's land rights as imposed by the society.

### **Chapter 4: How do matrimonial property rights operate in other Muslim majority countries? Why dower and maintenance should not be reckoned as marital property? Why is it necessary to distinguish between inherited properties and marital properties?**

This chapter extensively looks into approaches taken by different Muslim majority nations in allocating marital property to compare and define the just method for distributing them at a global stage. In order to comprehend the joint marital property regimes in Muslim communities, it is also important to look at dynamics that play a major factor in determining the how Muslim marriages work as factors, such as dower and inheritance, can easily be and often is misconstrued as tools for influencing women's rights to land and other resources. This chapter is divided into three segments. The first part scrutinizes the mechanisms of community property regimes adopted by Muslim-majority countries, the second part is designed to dissect the concepts of Mahr and nafaqa, which are often considered as the determining tool for barring women's marital property rights and the final part is assembled to extricate the marital property from the inherited property to maintain tranquil division of marital assets in case of dissolution.

### **Chapter 5: How does status of a woman influences her access to property rights in terms of marriage, polygamy and divorce?**

While the previous chapter lay out different approaches for joint marital property regimes in some progressive Muslim majority countries, this chapter attempts to analyse the marital dynamics in Bangladeshi society and how it differs from traditional understanding of Islamic marriages. Furthermore, an in-depth scrutiny of the general duties expected from married Bangladeshi women will assert the nonfinancial contributions made by them while establishing their legal statuses as married women which in turn may enable a suitable route for them to have an equitable, if not equal, claim to the matrimonial property.

**Chapter 6: Why is it important to introduce marital property laws in Bangladesh and in what ways can these law be incorporated by comparing the current scenario surrounding property related issues and marital laws of other Muslim majority counties?**

Given the undeniable significance for Muslim married women's rights to marital property, this chapter explores possibilities through which the notion can be incorporated in Bangladesh and tries to do so without offending the sentiments of its Muslim community. Drawing parallels with the various methods of adoption of community property regime in other Muslim majority countries including those which have been discussed in chapter 4, this chapter further explores all the appropriate approaches for launching joint property regime in the Muslim community of Bangladesh while acknowledging their diverse cultural background and social construction.

**Chapter 7: What steps could be taken by both the State and the society to improve the current property laws and encourage incorporation of marital property laws?**

The purpose of this study is to establish the significance of Muslim women's marital property rights and to introduce the concept of community property regime in the Muslim society of Bangladesh without offending their core beliefs and long-practiced social norms. This chapter illustrates the final findings on women's land rights in Bangladesh and offers recommendations to improve their existing condition through thorough analysis of all previous chapters of this research.

### **1.3 Aims And Objectives Of The Research**

- I.** To establish the extent to which the construction of gender and property enable and deny women's rights to inheritance among the Bangladeshi Muslim communities under the influence of religion, social norms, customary rules, and long-practiced traditions.
- II.** To evaluate the degree of reworking of rules and norms surrounding marriage and family would be required to facilitate joint marital property regime in the Muslim society of Bangladesh
- III.** To establish how introducing notion of "Marital Property" would enhance the status of Muslim women of Bangladesh through theoretical approaches and comparison with other Muslim-majority states.
- IV.** To develop arguments and ideas to improve safeguarding Bangladeshi women's marital land rights

## 1.4 Methodology

With the aims in mind, this study will adopt a desk-based research in exploring the deep-rooted issues involving the construction of gender and marriage in context of Muslim women's rights to own, access and control land and property in Bangladesh. A thorough desk research would allow me collect and analyse published studies and reports in relation to Islamic doctrines on rights and status of women, women's property rights, social, political, and legal status of Muslim women in Bangladesh, different type of marital property regimes, and women's marital property rights in Muslim-majority countries.

There are vast amounts of literature that have been published in journals, newspapers, online databases, government websites, NGO reports and a range of other sources which are not only cost effective but also could be accessed any time. Adopting a desk research to study the issues surrounding the status of Muslim women, in determining their legitimate claim in marital property, would enable me to understand the research problem, generate hypotheses and determine the most effective methodology and sample for future research.

Since this is a desk research, it will rely on secondary sources of data. The primary method of the research will involve data collection and analysis of published records on topics related to women's property rights, women's property and inheritance rights in Islam, women's rights in Bangladesh and other related fields in order to address the key objectives of the thesis . This non-empirical research will mostly include studying through religious scriptures, archives of libraries, online resources, published academic journals and articles, policies,

and reports . Taking a Human Rights based approach this paper will examine women's rights and property rights as basic human rights.

Given the different opportunities and expectations for men and women in Bangladesh that illustrate gender inequality and gender-based discrimination in relation to property rights, theoretical perspective which focuses on legal and socio-political norms will be also taken into consideration for this research. A desk-based research will also provide for analytical base for scrutinizing the Muslim women's property rights under legal pluralisms in Bangladesh (Bickman and Rog, 1998).

In order to analyse the best approach to introduce community property regime in the Muslim society of Bangladesh, I have examined the level of development and the status of women's property rights in six different Muslim countries to demonstrate the extensive benefits of community property regimes. I have chosen Tunisia, Morocco, Malaysia, Indonesia, Turkey, and Iran because these countries provide a comprehensive approach to community property regime in the vast Islamic world from east to west. Furthermore, the countries selected for this analysis observe Sharia according to the laws of different schools which provide for opportunity to securitize their take on marital property regimes in order to study the best approach for Bangladesh. For instance, Maliki school is predominant madhhab in Tunisia and Morocco, Malaysia, and Indonesia favour Shafi code and Iran follows the Shiite Jafri School. On the other hand, secular Turkey, although largely influenced by the rules of Hanafi school, does not base its laws on the Quran . Moreover, Iran standing at the conservative end of the spectrum, continue to implement some of the strictest form of sharia laws where ulemas are the ultimate authority whereas, Turkey stands at the other end of the spectrum with no legal application of Sharia codes. The rest of the countries fall

in between. Therefore, a methodical analysis of the approaches taken by these countries to protect women's rights to marital property, would allow me to assess the plausible routes for successfully establishing community property regime in Bangladesh.

## **1.5 Scope And Limitations**

### **Scope**

This study is aimed at establishing theoretical approaches for introducing the notion of marital property in the Muslim community of Bangladesh. In doing so, this research paper will extensively explore the current family dynamic and economic reality of married Muslim women of Bangladesh. Considering the complex issues surrounding underlying gendered, social, cultural, and religious factors in determining women's land rights, this paper aims to provide reasoning and approaches for ensuring women's rights to marital property through comprehensive scrutiny of existing women's property rights in Bangladesh in context of their legal and social status through marriage, influence of religious beliefs and long-practiced customary norms. This purposively theory driven paper is designed to contribute to future research and practical developments on the possibility of establishing community property regime in the religion infused patriarchal society of Bangladesh.

### **Limitations**

Since this paper is based on secondary research by design, no primary data was collected which essentially involved relying on data and surveys conducted by other academics in the related fields. Therefore, lack of available and reliable data, particularly lack of prior research studies on the Land Rights of Bangladesh in the context of legal and practical view, has restricted the scope of this study. Furthermore, it is likely that few of the findings through secondary research may

be biased and/or may not be independently verified. While it may appear that carrying out a primary research would benefit this paper, but then it would mean to effectively diverge from the original objective of this study which is to produce conceptual theory on the possibility of establishing joint marital property regime within the Muslim community of Bangladesh by thoroughly and critically analysing published data in various forms such as religious scriptures, decrees by religious leaders, legal documents, domestic and international policies, surveys, NGO findings, scholarly articles, journals and so on. On the other hand, a primary research would allow to study the circumstances of Bangladeshi women in real time. However, the study is designed in a manner that restricts carrying out a primary research which would otherwise enhance the quality of discoveries made in this study.

## **Chapter 2: Literature Review And Legal Framework.**

Since the birth of mankind, human beings have been divided into two genders and thus are identified as male and female: as like any other living creature in this wide world. Both male and female have the same features, but are different in physical appearance, strength, and posture. Usually, males are said to be predominantly stronger than the female, which is inherent by birth. Thus, they are capable enough to establish their rights over almost everything by their abilities if not by gentle nature, then by their physical force. Thus, women are considered to be, and in still in many parts of the world, addressed as subordinate to men. They are incapable to uphold their individual rights from men or against men without being subject to something, for least criticisms. This has resulted into a revolution to treat women equally. To grant them their basic social rights, enable them to receive education, work, and treatment; and to allow them to stand strong to protect their family, their home, and their country, same as men. Such discrimination against women has been rendered ridiculous by the educated and socially aware society.

Government organisations, pressure groups, agencies and many individuals have worked ridiculously hard, even devoted their life, to ensure that women live a better life with her self-esteem and social respect. Ideology, called the Feminism, has been created to allow women to contribute her efforts, thoughts, and strategies for the world to have a better tomorrow. So, men and women should have same rights, if not then similar rights.

Usually, natal relationship is based on blood ties through the male keen in almost every society and women have been placed under the authority of men through provisional protocols of behaviour, gender segregation and philosophy connecting family honour to female virtue. Men have been granted the right to make all important decisions for women, almost unilaterally deciding whether they shall get education and permitted to pursue a career outside the home. Furthermore, in many societies like Bangladesh, men are also assumed to have the right to choose husband for their female dependants, decide when they shall get married or split, when and how many children they shall have, and. Across culture, incorporation of legal measures and social practices are designed in a manner, to somewhat varying degree, that ultimately protects the superior position of men (Mertus, 2018).

The mainstream publication of Engel's scholarly masterpiece "The Origin of the Family, Private Property and the State" in 1972 may be referred to as the beginning of the serious academic discussion on women issue, especially in regard to their inferior status in both private and public area. With the emergence of the women's movement during the 19th century, a number of comprehensive literature speculative, literacy, scholarly and empirical publications identifying and documenting the backward position of women in the society were brought to light (Shiuly, 2016). However, although most developed countries have taken initiative to protect women's rights in both private and public spheres, under developing states, such as Bangladesh, are still in search of instruments for improving female citizen's position in the society. Afterall, women's rights are human rights and human rights begin at home. Thus, the question rises "what is the right of a woman to own land which is a fundamental right of every living human being?"

This is because land provides the sense of personal empowerment by ensuring adequate standard of living and financial independence.

Furthermore, in Bangladesh when women get married, it is assumed that she leaves her identity to become a single person with her husband. As a result, it is often seen that women's legal identity have to be entwined to their husbands in order to preserve their land rights even if it means for them to endure domestic violence and other marital conflicts. A woman's right to own, control and access to land also have major implications for the achievement and enjoyment of her human rights such as the right to equality, food, health, housing, water, work, and education. However, with only 4% of total privately owned land being registered under women's name in Bangladesh, the area demands particular attention for real development (Sarwar, Islam and Monzoor, 2007) . Undoubtedly problems related land rights of women are more multifaceted that what meets the eye in Bangladesh, the third largest Muslim-majority country of the world.

In most of the developed western societies, the relationship between husband and wife in regard to property has varied between both total communion of property which is governed singly by the husband or jointly by the spouses and total separation of property with each spouse governing her or his own property, along with a numerous of variations in between (Jacobsen, 2015) . On the other hand, most Muslim societies operate under strict separation of property, with only a few handful exceptions.

In context of Bangladesh, in a rare scenario when a woman owns property, she mostly passes it down to the next generation but when a man owns property, not only he passes to his offspring but also dispose at his will for he is regarded as the head of households. Therefore, a study of different models of marital property

regimes would reveal instruments to assess striking rights for Bangladeshi Muslim women in marriage considering property is never a static entity but is constantly evolving during the course of a marriage, partly due to couple's work and partly due to negotiations during the subsistence of marriage with a mutual understanding for the common benefit of the household (Jacobsen, 2015). This in turn will require the legal experts to attune to the social and economic and gendered context in regard to cases where these negotiations end in court. Thus, converging legality of marriage and land rights of Muslim women, this chapter is divided into two parts. The first part will focus on the research conducted by various academics on issues related to women's land rights and the second part will focus on Bangladeshi women's land under legal pluralism Bangladesh.

## 2.1 Literature Review

Generally, women's status in the Muslim world has always been a rather debated topic but what accounts for the persistent gender inequality in Muslim majority countries? The blend of various pre- and post-Islamic cultural norms and values, which are often patriarchal in nature, have crept into the body of religious corpus and worsened women's position in the society (Mahmud, Kabir, Hossain and Chawdhury, 2021). As a result, Muslim women are often deprived the status and rights granted to them by the Quran and sunnah of the Prophet as their position in the society depends on the diverse practices of various Muslim societies. While religion-based patriarchal social practices are often labelled as the main culprit for barring gender equality, women's rights activism and the promotion of core rights are assumed to contest the long-practiced discriminatory laws and social norms (Bishin and Cherif, 2017).

Most academics tend to explore two key factors, religion, and patriarchal culture, to examine various aspects of women's rights, which often results in observationally equivalent outcomes (Bishin and Cherif, 2017). However, an in-depth study of property rights would help overcome this limitation. This is because even with restriction to inherit, Islam advocates for women's equal rights to own and control property. Muslim women have enjoyed property rights long before the women of western societies, many of which are considered the epitome of gender equality today. Therefore, examining the degree to which Muslim states extend equal property rights to women allows us to differentiate between religious and cultural accounts of gender inequality.

The right to own, control and access property is profoundly significant. The rights related to land have been considered as to a women's social and political status

as it provides both a sense of independence and empowerment as well as economic opportunities. Women usually have a greater sense of self-reliance where they enjoy some form of land rights (Boserup, 1986) and women's right to access to land indicates empowerment (Kabeer, 1999). However, the index of rights and empowerment varies drastically among almost a billion Muslim women from diverse Muslim communities which reflects the nature of their diverse political, economic, legal, and religious structures and contexts. O'Driscoll and Hoskins (2003) identify property as the means for differentiating between poverty and prosperity. Hayes also asserts that private property guarantees ultimate freedom (Aslam and Kazmi, 2009). Consequently, Agarwal too has indicated that the danger of poverty and physical wellbeing of women largely relies upon her capacity to have direct access to income and resources like land and other productive assets without any intermediation from their husbands or male guardians (Agarwal, 1994).

The interrelation and indivisibility between individual freedoms and economic development has been long asserted and established (Sait, 2017). However, in Bangladesh only 4% of total private property is registered under women's name and therefore requires special attention for real development (Sarwar, Islam and Monzoor, 2007). Bangladesh is the third largest Muslim-majority country in the world accommodating 150 million population of Islam faith (Pew Research Center's Religion & Public Life Project, 2011) (Harrison, 2013). Thus, Islam being the state religion of the "secular" nation, it is only natural to realise that Islam plays a vital role in manipulating the legal, political, and socio-cultural norms of the patriarchal and class society of Bangladesh. Consequently, women's land and property rights are partly mediated by the Sunni denominations of Islam within the Hanafi school of thought (Madhhab) (Veil.unc.edu, n.d.). Furthermore,

like most societies, family laws and practices in Bangladesh tend to perpetuate patriarchal structure in which women are subordinate to men, and in which male economic and decision-making powers are enhanced (Mertus, 2018). Nevertheless, women in Bangladesh are largely responsible for producing food, managing natural resources, earning income, and taking care of the household assets and nutrition security and yet their access to and control over land is restricted and their role remain unacknowledged.

To dig further how ensuring women's property right could really improve the socio-economic status and decision-making capacity of women, especially in rural settings, Sourav (2015) has asserted that one of the most crucial economic influences making women vulnerable in gender gap lie within right, control, and access to land since access to arable land strongly determines empowerment, social-status, and well-being of Bangladeshi citizens. In the same study Sourav draws strong connection between access to land and rural poverty. Sourav also recognizes the unjust land rights as one of the key factors that subdue women being the subordinate gender. This is because women with land and fixed assets have a stronger bargaining power in decision making and choosing their own lifestyle (Sourav, 2015).

On the other hand, a commonly held belief in the Western societies prevail that the religious teachings of Islam are opposed to feminism and progress in women's rights, including but not limited to property rights. Islamic teachings are often wrongfully accused of enabling the existing lack of egalitarian principles in most Muslim majority countries but in reality, there is a distinct discord between Islamic theology and practice concerning the status of Muslim women (Khan, 2021). Although the general consensus about Muslim-majority countries is that they lag behind other nations in regard to women's rights, but it must be

understood that these countries are not a monolithic entity that unilaterally support progress in education, economy, and politics for women. The key differences lie in the practices employed by diverse cultures of the Muslim communities around the world (Alexander and Parhizkari, 2018). For instance, Turkey, a Muslim-majority country with 99.2% Muslim population<sup>2</sup>, long has established women's rights similar to those in Western countries. In contrast, Saudi Arabia persists on implanting some of the strictest gender segregation laws in today's modern world and, as per The World Bank, women make up only 15.8% of the workforce. All other Muslim-majority countries, fall in between these two extremes (Alexander and Parhizkari, 2018, p.476). Furthermore, in most Muslim-majority countries, religious leaders and rulers interpret Islamic doctrines in a manner that reinforce and legitimize the patriarchal social structure at both political and institutional levels (Khan, 2021). Thus, it is more often witnessed that women's access to and control over land is limited as the land is owned by the men, and their livelihood and interests depend on men.

Like most Muslim-majority countries with Islamic teachings combined with patriarchal values, in Bangladesh women's rights to use the land depend on the continuity of their relationship with these men who are mostly either their father or husband as correctly pointed out by Agarwal (1994). Women's lack of ownership of land and other resources put profound impact towards their low socio-economic status and thus, making them dependant on male authority figures. Furthermore, in rural areas of Bangladesh women often are not provided with rights to education and the lack of education leads to the exploitation and denial of women's rights to enjoy the ownership of land. This is evident from

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<sup>2</sup> Worldpopulationreview.com. 2022. *Muslim Population by Country 2022*. [online] Available at: <<https://worldpopulationreview.com/country-rankings/muslim-population-by-country>> [Accessed 14 March 2022].

Arens' study where a woman's statement portrays the real scenario in regard to acquisition of land:

"I inherited 9 bigha (3 acres) of land from my mama (mother's brother) who brought me up, but my sons have registered my land in their names, they took my fingerprint" – Khadija (Arens, 2011, p.191) .

Women's rights to own, access to and control over land are often exploited and their names are rarely registered on the land titles, certificates, leases, and contracts. Jinnah (2013) also had a similar observation. Both legal and social constraints prevent many women from owning or inheriting land, water rights or livestock, borrowing money and making decisions regarding the use of family assets. This has a direct and detrimental impact on their ability to manage security (Jinnah, 2013). Jinnah (2013) has justly pointed out the women's involvement in economic decision is extremely limited as they have little access to asset ownership because of the prevailing culture that prevent from owning land and other physical assets.

Ownership of land is regarded as a source of income that is a crucial factor for production and can be used as collateral for obtaining credit. It facilitates long term security and incentivises investment and increases co-ordination among the individuals and groups in an economy and facilitates trade (Aslam and Kazmi, 2013). On the other hand, the lack of land ownership and other assets restricts their access to institutional credit resulting in limiting self-employment opportunities and their financial decision-making ability even within the family sphere (Jinnah, 2013). Moreover, Jinnah (2013) has suggested that women's risk of poverty would significantly be reduced, and welfare would be enriched if they had direct and effective access to land and it is evident from all around the globe

which proves that women use land more efficiently and they can choose appropriate cropping patterns.

Moni and Sumaiya (2013) have identified the significant link between women's land rights and agriculture industry of Bangladesh. In Bangladesh, the agriculture sector is being feminized with the shifting social context. For instance, male members of the family are migrating to the urban area in search of a better earning source and substantial number of households in the rural area are headed by women who are also responsible for cultivation. Unfortunately, these women do not hold titles of the lands where they carry out farming activities which in turn, deny them of the resources that are exclusively accessible to title holders such as institutional credit, extension of services and technologies, required to run their farms smoothly. Moni and Sumaiya, thus argue "ensuring women's access to land will be increasingly crucial, not just for welfare, but also to improve the overall efficiency of farming" (Moni, Sumaiya, 2013, p.1) . Furthermore, ensuring Bangladeshi women's land rights would improve overall treatments towards them by enabling to them to gain access to rural decision-making associations and farmers' institutions.

Gender issue is a complex one around the globe, which is evolving everyday through dialogues, dissolution of disputes and embracing diverse culture but in a third world patriarchal society like Bangladesh, the pace of development in this particular area is so relaxed that it goes unnoticed. The denial of women's rights to control property contributes to the gender-biased system of Bangladeshi society. All the debates in the context of equal rights for women in family law related disputes are governed by the social, political, and religious sets. Hashmi has identified the issue of gender inequality in Bangladesh as a third-world syndrome (Hashmi, 2000). There are hardly any legal clauses that supports

gender-based inequality except for religious personal laws but the social practice is discriminatory. Even though women in Islam are legally entitled to inheritance and ownership of land, the reality is a far starker in Bangladeshi scenario. Various socio-economic, religious, and cultural factors synergistically result in deprivation of women from effective right and access to land. The proportion of women having ownership of land in terms of registered title is limited and the obstacles to access to land extensive.

Muslim women in Bangladesh find it difficult to claim their property rights due to the strict interpretation of sharia law entwined with the gender-biased customary norms. Sait's observation about Muslim women's rights fits perfectly to the Muslim women in Bangladesh that anticipates Muslim women seeking her legal rights while striving to be good Muslim at the same time are likely experience frustration and conflict when faced with the patriarchal construction of laws and customs (Sait, 2006). The social norms reveal that most of the Muslim women in Bangladesh give up their share of parental property in favour their brothers in exchange of the right to visit their parental home and seek their brothers' assistance in case of marital conflicts. This is perhaps because Muslim women are often encouraged to believe in waiving their rights to parental property for the security of their male counterparts as pointed out by Kabeer (1999).

Observing the Hanafi madhab, Muslim women in Bangladesh are entitled to inherit parental property but the concept of inheritance through marriage does not exist in within the Muslim communities of Bangladesh. The Islamic Jurisprudence stresses the protection of women's rights to personal in marriage and possible separation (Ahmad, 1992) and although women only inherit half of their male counterpart, there is no provision that restricts women from having equal property and rights (Sait, 2015). Interestingly, most Muslim women often prefer their share

of inheritance to be considered after contemplating the interlinked intra-family and intergenerational property flow systems which in turn compensate for their inheritance gap (Sait, 2015). The accepted norm in most Muslim societies dictates that men are the sole financial providers within the family, and women are the sole caregivers within the family. Therefore, the unjust division of inheritance is often justified by enlisting husbands as the breadwinner of the family and their inheritance would be utilized to fulfil his financial obligations towards the family, whereas women's inheritance is considered as her own property and only for her to enjoy.

The classical rulings created by jurists relating to marriage are one aspect of the larger concept that has come to be known as *qiwamah*. The term '*qiwamah*' is derived from the word *qawwamun* in Surah an-Nisa' (Quran: 4:34). This verse has been read and interpreted by Muslim jurists over several centuries to become the main textual basis for male authority and hierarchical gender relations in Muslim societies. In this interpretive process, '*qawwamun*' evolved into '*qiwamah*,' a core construct in Muslim legal tradition that shapes the framework for gender responsibilities and rights in the family. *Qiwamah*, as a juristic construct, is not simply confined to men's responsibility to provide in exchange for their spouses' obedience. It has been used to justify and legitimize men's right to control the mobility of their wives, unilaterally repudiate their wives, take multiple wives (up to four), manage the affairs of their dependents in the family, and inherit double the share of their sisters (Musawah, 2018) .

While unequal inheritance ruling in Islam has received global attention over the years, the absence of the notion of matrimonial property in most Muslim majority countries has been overlooked. Women's rights to own and control land and other productive resources lays foundation for women empowerment by ensuring their

food security and improving their decision-making ability in the household. In a south-east Asian country like Bangladesh, women empowerment can be termed as the process in which women challenge the existing norms and culture to effectively improve their well-being. Consequently, introducing the concept of marital property would progressively strengthen the issue of gender equality in marriage.

Following Islamic jurisprudence for personal laws, the provision for women's rights to marital property is non-existent in Bangladesh. Marital property can be defined as the legal ownership of assets which have been brought to and acquired during marriage which exclude any non-marital property which is owned by either spouse as an individual or has been attained as an individual inheritance, income, or gift during the marriage (Sait, 2016). Matrimonial property regimes are usually divided into community property and separate property regimes (Sait, 2016). The community of property enables legal presumption of equal joint ownership of any property owned or acquired during marriage and treats both the spouses as tenants in common and subject to division on the same basis in case of divorce or separation. The community property regime further distinguishes between the "full" and "partial" communal values of the property depending on what happens to the ownership of properties inherited prior and acquired during the marriage (Sait, 2016).

However Islamic jurisprudence does not recognise the concept of matrimonial property regimes making it impossible for women to claim any ownership in marital assets. Most of the third world Muslim majority countries, including Bangladesh, adhere to the separation of property regime. This means that each spouse is entitled to properties, including land, which are registered in his/her own name regardless of whether the properties were acquired prior or during the

marriage and in case of dissolution of marriages each spouse receives properties which are registered in that individual's name. Thus, the separate property regime does not create any legal presumption of co-ownership of the properties acquired by one spouse during the course of marriage (Sait, 2016). Since women in Bangladesh usually do not have their name registered on the deeds, they have no property rights over acquired or accessed or ownership interest in their marital home or land. Usually, women only have access to mahr (dower) and nafaqa (maintenance) for 3 months of iddat (waiting) period when the marriage falls apart. Furthermore, Sait has pointed out that conservative Islamic jurists hold that divorced wives have no financial rights against their former husbands except for the agreed mahr and mutat (compensation) in some cases (Sait, 2006). The practices of separation of property regimes fail to detect the financial contributions of women in the household and their unpaid labour as the primary caregiver by providing them no compensation when marriages dissolve. Historical evidence show that women were granted more rights within Muslim legal tradition than any Western legal tradition until the nineteenth century (Musawah, 2018). While Muslim women's independent property was established in the 7th century, British women were granted the right to hold separate property only in 1870 through Married Women's Property Act (Sait, 2016).

Gaining economic security through marriage is the sad reality for many women in Bangladesh. However, marriage is also the culprit behind economic instability as seen in many cases when women are either forced to leave labour force to do household works, or to handover their earnings to their husbands and thus, they lose control over their incomes and savings. A government study undertaken in 2006 found that 78 percent of participants, who were married with job, could not spend their earnings without consulting their husbands first (Human Rights

Watch, 2012, p.21). Married women make contributions to family homes, businesses, and other assets in one way or another, but it is nearly never possible to recover those contributions if their marriages end in divorce (Human Rights Watch, 2012). Under these circumstances, it is vital that women in Bangladesh have the basic rights of claiming a fair share in the marital property.

Sait (2015) has rightly recognized that marital property regimes in Muslim societies are negotiated not only from religious standpoint but also through its connection with custom, family, kinship and the construction of property itself. The absence of marital asset, insufficient dower and restricted access to maintenance push many divorce-seeking women towards poverty or to become dependent on natal family and in worse scenarios they simply choose to remain in an abusive marriage. Moreover, due to their near non-existent socio-economic status, Muslim women in Bangladesh are not in a position to be pitted against the remarriage of their husbands in a system with no provision for marital property and alimony for the divorced women (Hashmi, 2000). Thus, the need for reform of matrimonial laws in context of marital property in Muslim countries calls for urgent attention. Over the years many evolving Muslim-majority countries like Tunisia, Turkey, Indonesia, Malaysia, Morocco, and Iran have adopted different approaches to marital or community property regimes. However, most of the middle eastern countries and South-Asian countries including Bangladesh lag behind while still ruling under separate property regime without any legal presumption of co-ownership of assets acquired by the other spouse.

Women's right to land contributes to her identity, security, and empowerment besides just being an ideal abstract or a mere matter of legal principle (Agarwal, 1994). However, it is shaped by her social status, place in life cycle and family dynamics (Sait, 1996). The Bangladeshi Muslim society like most Islamic

societies lacks advancement of women's rights which is seen in most western societies in the context of property rights, access to land and ability to enforce their rights (Sait, 2006). Furthermore, unequal status in marital life is identified as a crucial factor for poverty and particularly extreme poverty among female-headed households in Bangladesh. The possibility of driving into poverty is particularly high among Bangladeshi women who lose their male wage earner of the family due to abandonment, divorce, or death (Human Rights Watch, 2012) . The absence of a codified jurisdiction on marital property puts divorced and separated women in Bangladesh at far greater risk of economic hardship and poverty than men.

All of the above-mentioned studies focus specifically on the profound significance of property rights and the urgent need of establishing marital property regime in Muslim societies to improve women's status in marriage. Thus, reworking for marriage related laws and norms in Bangladesh which would ultimately pave way for establishing marital property rights holds utmost importance in current reality. This research is intended to serve as an extensive overview on issues, obstacles, and implications in regard to women's rights to land in Bangladesh. Understanding the complex issues relating women's rights to property through inheritance and marriage, this paper aims to provide reasoning and approaches for ensuring women's rights to property under marital property regime by scrutinizing existing women's property rights in Bangladesh in context of their legal and social status through marriage and influence of their religious beliefs and long-practiced customary norms.

## 2.2 Muslim Women's Property Right Under Legal Pluralism Of Bangladesh

Muslim women's property rights are constructed by social and political forces, particularly in patriarchal context. The multifaceted complexity of laws based on religion and age-old practices, twisted with civil law has been precisely analysed by Mertus, as she writes:

*“family law is complicated in many regions of the world by the potential application of contradictory religious/ customary laws and constitutional laws. at times states have avoided from readdressing inequalities in religious laws and civil laws on the ground that such restrain best respect culture and traditions and/or is most consistent with the state secular ideology. but states sometimes directly advance our religious legal code when doing so is steamed necessary or desirable, repressing the internal contradiction and interpretive difficulties usually present in religious law”* (Mertus, 2018, p. 136).

Unlike the largely secular populations in Western countries, Southeast Asian societies, including Bangladesh, are still profoundly religious, and it is of paramount importance to many people that they conform to religious and customary laws. Therefore, the prevalence of different streams of law creates legal pluralism. Considerable osmosis between three major legal system-civil law, common law, and Islamic law- is the source of legal pluralism and hybridity in most Muslim majority countries. This is particularly true in determining Muslim women's property right in Bangladesh.

The concept of legal pluralism in literal terms can be defined as a condition in which citizens of a nation are abided by more than one body of decree that

represents a general premise in the sociology and anthropology of law in addition to legal theory. Socio-legal studies have been perceived as so prominent in recent times by the legal-pluralist advocates that it was hailed as "the new paradigm, as far as the social scientific study of law is concerned, is legal pluralism"(Shahar, 2008, p.112) Furthermore, researchers who studied the intricacies of the legal realms in Muslim communities were among the first academics to draw on legal pluralism although the studies were not focused on Sharia law (Shahar, 2008). While many academics relies on the legal-pluralist standpoint to study links between Islamic law, state law and local customs in both premodern and contemporary Muslim nations, some focuses on juggling between the major four madhhabs (schools of thoughts) and others emphasize on interrelations between Islamic law and secular legal systems, as developed and maintained in modern Western nations (Shahar, 2008). Moreover, the notion of legal pluralism is often used as an instrument to devise comprehensive economic and cultural generalizations about Muslim societies (Shahar, 2008).

Legal pluralism comes with its own baggage, especially when- dealing with individual who has valid claims under different and contrary jurisdictions, categorizing someone under certain body of law, and an individual refuses to be ruled under the prescribed legal body. Tamanha has warned scholars who advocates for legal pluralism without a consciousness of its implications, "will risk building upon an incoherent and unstable foundation" (Tamanha, 2008, p.376) .

Nevertheless, advocates for legal pluralism argue that legal pluralism works fairly well and offers rational solution in multi-ethnic, multireligious nations like those in Southeast Asia (Hussain, 2013). Hussain (2013) argues that unlike the concept of uniform legal code, legal pluralism accounts for personal beliefs, religious law, and traditional norms of diverse groups and respects individual rights to be

governed by personal law of his/her community with prevailing authority of state laws while dealing with common interest of the community as whole. However, in context of Bangladesh, existence of legal pluralism can be interpreted as the enabler for gross human rights violations, domestic violence against women and children, and child marriage.

The judiciary system of Bangladesh is based on common law system. Therefore, all the civil and criminal matters are dealt by the statutes enacted by the parliament with the exception of personal laws. In addition, the existence of the informal Shalish system in rural Bangladesh creates further complications. Shalish is a traditional democratic mode of conflict resolution. The shalish can be defined as a social system for informal adjudication of petty disputes both civil and criminal, by local notables, such as matbars (leaders) or shalishkars (adjudicators) (Silvee, 2011) . In rural Bangladesh, there exists two sets of adjudications and they are shalish and extension of the state judicial arm into the rural areas through specific legislation. Although this procedure is found to be uniform throughout the country, there are local discrepancies depending on local customs and tradition.

Shalish is supposed to lead to conciliation between the contesting parties. But, in reality shalish seems to have more often than not been used as an appendage of the existing rural power structure, sometimes, of religious bigotry in the context of rural social structure of Bangladesh. The relationship between law and shalish has remained yet a disintegrated phenomenon in Bangladesh local administration system. Shalish sometimes recreates confusion and controversy that lead to conflict and contradictions with the domestic law, e.g., declaring fatwas in individual cases which results in extrajudicial punishments, often

against women for their perceived moral transgressions (Silvee, 2011). The gross injustice served the shalish was clearly evident in the case of Nur Jahan.

Shalish accounts for gender-based violence and human rights violations in form of fatwas on marital issues including Hilala marriages. Fatwa is construed as a response by an Islamic jurist, known as Mufti, to a factual or theoretical question and reflects the personal interpretation of the Islamic scriptures by the mufti. Many regard Fatwa as “the meeting point between legal theory and social practice” (Hossain and Nahar, 2015, p.51). Hilala marriage is an intervening marriage that enables divorced Muslim woman to remarry her former husband. Although hilala marriage has been prohibited by law in 1961 but its practice still persists in some parts of the country even if in small numbers (Hossain and Nahar, 2015). Furthermore, most Fatwas about Hilala marriage explicitly declare that the practice of Hilala marriage is immoral and thus, not authorized in Islamic family law (Ali, 2010). Yet, like in most south Asian countries, Hilala marriage is practiced in Bangladesh where most of the Muslim populations are followers of the Hanafi madhab and scholars mostly refers to Qur’anic verse which state:

*“So, if a husband divorces his wife (irrevocably), he cannot, after that, remarry her until after she married another husband, and he has divorced her. In that case there is no blame on either of them if they reunite, provided they feel that can keep the limits ordained by Allah. Such are the limits ordained by Allah, which He makes plain to those who understand” (Quran 2:230).*

Hilala marriage is rather an institutional social setting that is imposed on Muslim women in Bangladesh as forms of gender-based violence. This is evident from several Shalish declaring fatwas imposing hilala marriage on Muslim women

where the husband simply uttered talaq during marital disputes without actually meaning it or even going through any formal proceedings. In 2013, news regarding unethical practice of hilala surfaced on a national newspaper, when an angry Hemaz Uddin had uttered triple Talaq to his wife and the neighbours informed the Matobbor, who then along with other mullahs declared Fatwa of Hilala marriage on the couple to continue conjugal relationship. However, when Hemaz Uddin and Mamtaz denied this Fatwa, they were outcasted by the village. In another scenario, the couple was forced to leave the village while another couple was forced to accept Hilala marriage in a different locale (Hossain and Nahar, 2015). Forcing Muslim women to perform hilala marriage accounts for physical, sexual, and mental violence against them. Most of the fatwas in Bangladesh violate Muslim women's rights to live a decent life. The existence of shalish system creates legal pluralism not only in terms of conflict with state laws but also in terms of conflict with multiplicity of Sharia law, especially those concerned with Fatwas related to hilala marriage.

While shalish system with its fatwas and decrees creates informal legal pluralism in Bangladesh, religion-based personal laws create formal legal pluralism. Islam is recognised as the State religion although the state itself is a Secular state (Alam, 1991). Furthermore, secularism is restored as one of the four fundamental principles of the state policy in addition to nationalism, socialism and democracy as protected under article 8 of the constitution and is one of the core value for governing the state, enacting legislation, and interpreting constitutional and other laws (The Constitution of the People's Republic Of Bangladesh - Part II Fundamental Principles Of State Policy) . Despite Islam playing a noteworthy role in the life and culture of the Bangladeshi people, there are no Sharia courts in the country and its legal system has a statutory form, founded on the basis of English

common law system, whereby the legislations are enacted by the Legislatures but interpreted by the Judges in the higher courts. Moreover, the Supreme Court has the authority to declare an Act of Parliament as void and null in case it is incompatible with the fundamental rights of the citizens (Sial, 2008). Yet, Islamic jurisprudence has become an integral part of the state's legal system.

Contrary to the Secular essence of the legal system of Bangladesh, family law consisting of marriage, divorce, inheritance, and related issues are ruled by personal law based on the religion of the particular individual. In Bangladesh, Family law produces a vital tool through which the government can sustain or interrupt existing family arrangement as well as influence women's capability to partake fully in the social and political sphere. Women's obligation in Bangladeshi society is usually defined based on their obligations in the family. Thus, by suggesting women's role in society as producer, reproducer, or a mixture of both, and by controlling women's access to valuable resources, especially the right to own property and inheritance, family law has an overwhelming impact on women's socio-economic status, prompting everything from women's access to education and healthcare to their rates of fertility and mortality (Mertus, 2018). Essentially, existing inheritance laws in Bangladesh are based on religion scripture and vary between the different religious groups (Sial, 2008) .

In Bangladesh three sets of legislation exist for determining the inheritance rights of land. In first, the Muslim Personal Law and Administration of Justice (Shariat) application Act of 1937 and the Muslim Family Laws Ordinance (1961) govern all Muslim citizen of the country according to which the daughters inherit half of their male counterpart, and the widow of the deceased inherits one-eighth of his property contrary to the husband inherits one-fourth property of his deceased wife (Maynard, 2011).

The property rights of Hindu women in Bangladesh are determined by the Hindu Inheritance (removal of disabilities) Act of 1928 and Hindu law of inheritance (amendment) Act of 1929. According to these legislation widow of a Hindu deceased person receives life estate, daughters who are not married and daughters with sons inherit can inherit. However, a married daughter who gives birth to daughters and who is childless does not inherit (Huda, 2011) .

The Christian citizens are ruled by the Succession Act of 1925 which implies that Christian widow receives one third of her deceased husband and other successors receive two thirds of the deceased person's estate regardless of whether they are son or daughter (The Succession Act 1925 (ACT NO. XXXIX OF 1925) .

Contrary to the existing Personal law of the country, Article 28 of the constitution provides provision against discrimination on grounds of religion, race, caste, sex or place of birth and article 28(2) ensures equal rights for women in "all spheres of the State and of public life" (The Constitution of the People's Republic of Bangladesh - Part III - Fundamental Rights) . Since the majority of the country's women are governed by the Sharia Law involving complex issues my research will primarily attend to land rights of Muslim women in Bangladesh.

Although the personal law is vague in a number of areas regarding public and personal life especially in the areas such as citizenship rights and property rights, but the constitution provides sufficient provisions to ensure equal rights if there is any doubt in case of an unequal perception, either in personal or public aspect of life. Therefore, it is natural to assume that inserting a provision equalizing women's property rights in the context of inheritance and community property would ease the issue of women's access to land. However, in reality the

situation is rather complex since Islam plays a major role in determining the parliament practice for passing a piece of legislation even though the constitution does not explicitly mention the role of Islam while dealing with state affairs.

The Muslim Personal Law and Administration of Justice (Shariat) application Act of 1937 applies to over 90% of the Bangladeshi citizens. According to that legislation, women inherit land in accordance with the Islamic law which provides that women inherit but not equally to their male counterpart. The unjust share is widely believed to be compensated through dower (Mahr) and maintenance provided to Muslim women as per Islam. The adoption of Sharia law in blend with English Common law based legal system to govern the personal and family law of the majority of the population of a secular nation has been criticised as an obsolete present for Muslim societies as pointed out by Brandt and Kaplan:

*“[f]or Muslims this resulted in the formulation of Anglo-Muhammadan law where misconceived and fossilized Muslim laws based on centuries-old misinterpretations of history became the rule of law .... the inequities of family law have been difficult to displace”* (Brandt and Kaplan, 1995, p.121).

With two pieces of edicts being two poles apart in determining women's rights in Bangladesh, it is only right to wonder which law prevails in case of a conflict. Essentially, Part 2 of the Constitution consisting of articles 8- 25 were envisioned to safeguard equality while the document as a whole was 'conceived as a charter for a programme of extensive affirmative action' as emphasised by Kamal Hossain, the chief designer of the original constitution (Shahid, 2013) . On the other hand judges' power to interpret statute as suitable places doubts on the supremacy of the constitution as seen in the case of Md. Chan Mia vs. Rupanahar whereby the High Court had overruled the decision of Khodeza Begum vs. Sadeq

Sarkar, which held that the personal law of conjugal rights ought to be regarded as completely void for its unconstitutional nature in the context of equality, and ruled that the laws on marital rights does not disrupt the equality clause of the constitution as it is reciprocal in nature (Shahid, 2013). Many argue that all fundamental rights must be interpreted in a manner that is compatible with the Islamic jurisprudence as Islam is the state religion of the Republic. Therefore, an urgent reform in personal law and interpretation of constitutional law in relation to Bangladeshi women's property right is long overdue in order to guarantee gender equality and elimination of gender-based discrimination. The possible reforms of personal and constitutional laws to overcome these multi-dimensional issues needs to be explored sooner than later.

The statutory absence of a dominant provision for equal rights when clashed with the principles of Islamic jurisprudence and the discretions of judicial interpretations in personal law cases evidently demonstrate the limitations of the secular constitution in employing equal rights for Muslim women. Furthermore, the constitutional clause of equality is hardly cited in personal law cases, which concerns safeguarding and enhancing women's rights in general, with only exceptions of women's existence in the labour force and parliament and has rather been the primary platform for women activists seeking equality.

Therefore, realizing the undeniable Islamic influence in social, political, and judicial fields of Bangladesh, reworking of personal laws and norms related to marriage and family needs to be assessed to find suitable grounds to establish women's rights to inherit and control land through marriage, a rather alien concept in one of the world's largest Muslim-majority country with a woman as the commander-in-chief.

## **Chapter 3: Influences Of Gender Biased State Policy And Social Norms And Property Rights Of Bangladeshi Women**

The debate concerning the representation of Muslim women and their Islamic rights have been the lead issue of cultural clash among the West and Muslim world. While Muslim women are often perceived as passive victims of oppression in the west, the women of the west are condemned of being immoral, temptress and greedy by the Muslim world. Interestingly the analyzation of these prejudiced insights of both West and Muslim world reveal that it is the women's outlooks that are in the vulnerable position in both cultures and appears that true emancipation of women would in fact become a threat to the ethics and welfares of the male counterparts. As correctly pointed out by Simone de Beauvoir, in a society that is shaped by men, women are seen as subordinate and as relative beings existing only in relationship to men (Beauvoir, 2011). The gender issue is a complex one around the globe, which is evolving everyday through dialogues, dissolution of disputes and embracing diverse culture but in a third world patriarchal society like Bangladesh the pace of development in this particular area is so relaxed that it goes unnoticed especially in the context of equal rights for women in family law related disputes.

The concept of patriarchy in Bangladeshi context can be described as a distribution of power and resources within a family framework whereby men have the power and control over property and other and women are mere dependent upon these men (Cain, Khanam and Nahar, 1979). Such patriarchal value builds

discrimination against the women of Bangladesh regardless of their religion which ultimately adds to the obstruction of their progress. Therefore, it can be safely construed a social construct that assigns to the unjust distribution of resources according to the roles and realms of men and women as set by the society.

The pioneer of equal rights for Muslim women in the undivided Bengal is the legendary Bangladeshi woman, Begum Rokeya Shakhwat Hossain (1880-1932), who unapologetically criticised the gender-biased social and religious discriminations through her analytically powerful writings and advocated women liberation which she believed can be achieved through education and economic independence. She continued her battle to achieve gender equality in Muslim society and women's rights to education, economic independence and hold public offices through her organization Anjuman-e-khawatin-e-Islam (Muslim Women's Society), founded in 1916. She encouraged and inspired Muslim women to only adhere to physical purdah for covering their modesty but break free from the "social" purdah which is intended to repress and confine the Muslim women from public participations by the male-controlled secluded society, thereby refusing equal rights and opportunities for women (Mahmud, 2016) . After a century since Begum Rokeya introduced the battle for advancing the equal rights for Muslim women and successive women prime ministers for the past 26 years, the Bangladeshi women still find themselves trapped under the social purdah and have remained as subservient to men.

There are numbers of factors restricting a woman's ownership and access to land in Bangladesh. These issues vary from state policies to social norms of the country. Even if a woman succeeds in claiming her proprietor right after going through various hurdles, her access and control over the land stay limited. The government of Bangladesh is doing little to nothing in improving the situation

regarding women's right to land and the customary regulations seem to exist only to ensure the retrogressing of the condition. This chapter, thereby, closely scrutinize the whys and wherefores behind the ongoing struggles of majority of women of Bangladesh in claiming their land rights and related benefits. The study will include restrictions imposed by both the state and society. The first part of the chapter will focus on the failure of the existing laws and policies in ensuring women's rights in relation to land and second part will deal with the conventional practices restricting women's land rights as imposed by the society.

### **3.1 State's Failure To Ensure Women's Property Rights**

One of the biggest economic issues concerning gender-based inequality in Bangladesh occurs due to social limitations placed upon women's right to access and control over assets mainly land. Although the recent initiatives taken by the Government of Bangladesh through annual plan and ten-year plan focus on the development of women by increasing literacy, providing better access to health and nutrition needs, and creating employment opportunities and credit facilities but it makes no indication of easing women's better access to property nor even state provision of allocating land to the landless women (Sourav, 2015) . In a country where women are generally considered as the second gender especially in the family sphere, land plays a crucial part in encouraging women empowerment and their well-being. This is simply because women with land and other fixed resources are in a stronger bargaining position to enforce gender equality within both the family and communal spheres. On the other hand, poverty in the rural area is connected to women's restrictions to access and control over land. In addition to the unfair social norms and customary practices that belittle women, the Government bodies have done extraordinarily little ensuring women's rights to land are protected or laws promoting women empowerment through land rights are implemented. There are a range of factors whereby the State is failing the women's right to property.

#### **Obsolete regulations**

One of the initiatives taken by Government to further women's growth is the National Women Development Policy which was adopted in 1998 and amended

in 2004 and 2008, respectively. However, the revised National Women Development Policy 2011 fails to establish equal rights to land and other productive resources. Instead under section 25, it finds women's right to control properties which have been earned, inherited, and acquired through credit or land and market management. Even in case of Khas (public) land which grants access to landless people comprising 50% of total population, several provisions fail to recognize women's rights to land. Although the Khas Land Management and Distribution Policy recognize joint ownership of land by both husband and wife, however, it only accepts applications from women made jointly with their husbands or sons in absence of husbands. The same was evident in the case of Cluster Village Program and Char Development and Settlement Project (1987) (Moni and Sumaiya, 2013) . When the state's policies represent such sharp apology for patriarchy by undermining women as individuals, it is only usual that social norms and practices to be biased towards the male counterparts. It is apparent from various surveys that 48% of women in Bangladesh are denied the access to land despite the fact that they are heavily engaged in the agriculture process and even worse they are not even identified as farmers. Although Article 2(5) National Food Policy Action Plan 2008-2015 recognizes women's participation in agricultural process and other rural activities but fails to grant them the title of farmer despite their contribution. Further statistic shows that 80% (HDRC, 2002) of Bangladeshi women contribute to food production and yet not being recognized as famers surely renders them to a disadvantaged position as the lack of "farmer" title prevents their access to government provided agricultural assistance such as seeds, fertilizer, and small credit. Although various tools of both national and international nature have been introduced that ensure equal right for men and women but with no avail to women's land rights or their

livelihood. A large number of rural women being left with primary responsibility of farming due to social changes with the male members migrating to city for better scope of income and without the title of land they cultivate, these women are denied resources needed for running their farm smoothly which are only available to title holders such as extension of services and technologies and institutional credit. Therefore, safeguarding women's access to land will play progressive role not just in welfare, but also improving the overall competence of farming (Moni and Sumaiya, 2013). Women's land rights will also ensure their empowerment by improving their access to rural managements and farmer's institution (Moni, 2012). However, the lack of these factors promotes eventual rejection of receiving credit and damaging their productive capacity. Nevertheless, the Government of Bangladesh had attempted to mend the inheritance law through National Women Development Policy (NWDP) (2011) which was aimed at constituting equal property share to both men and women. Sadly, the proposed legislation met with nationwide backlash from the supporters of Shari'a law which also include the religion-based political parties followed by a strike that saw men, women and adolescent demanding to block the policy. The women's policy was retracted shortly after with the state minister of the Ministry of Women and Children Affairs and the Prime Minister announced that no laws contradicting with Quran will be enacted and removed such clauses from the Policy.

*"After examining the Quran, especially Surah Al-Nisa, we have removed existing contradictions from the policy"* – Sheikh Hasina, Prime Minister of Bangladesh (Gayen, 2019)

Instead of upholding a law that promotes women's empowerment in the country, the ruling party gave in to the demand of some "religion-based" crowd in order to maintain their popularity among the groups. The decision to retract a clause which

ensures equal inheritance in property has a huge setback within the Hindu community of the country as well since Hindu women do not have any access to inheritance under the current law. It is high time for Bangladesh to follow the footsteps of its neighbouring country, India and Nepal, and other Muslim countries like Egypt, Tunisia and Senegal who have adopted equal property rights after modifying the religion-based laws. Even though the equal inheritance has been hailed as anti-Islamic by these groups, it is worth noting that state-head of Bangladesh is a woman and hypocrisy is witnessed at its best when these religious-based political parties have made alliances with women-led political parties as both are also considered anti-Islamic within the strict orthodox setting. Furthermore, Bangladesh has a population of 165 million and the state actors have been promoting “two children is enough and even better if it is one child” policy for over two decades now. In this context it only seems fair that paternal property is distributed equally among the children especially when a man only has daughters in order to avoid exploitation from male relatives. This is not the first instance which requires revision of personal laws. Over the years the state has reviewed and amended many personal laws based on religion to accommodate societal changes and requirements. Under the 1937 Muslim Personal Law, minors were not entitled to inherit property from either their grandparents if their parents before their grandparents. This provision was abolished in the clause 4 of the Islamic Family Law of 1961 which allowed the children to inherit property from their grandparents even if their parents are deceased. Furthermore, Islamic law allows Muslim males to have four wives at a time but according to clause 6 of the Muslim Family Law 1961, it is a punishable offence by law if anybody marries for the second time without the permission of

the Salish Parishad<sup>3</sup>. The Family Law Ordinance 1961 prohibits “hilla” marriages and can only be considered (not mandatory) when a man tries to re-marry the same woman for the fourth time. Moreover, 'Muslim Divorce Law 1939' allows women to divorce their husband if they are absent for four years or more which was not the provision in the religious law and the Shufa Law of the Islamic provision has been replaced by the State Acquisition Law 1950. These amendments in personal laws makes it clear that it should not be considered an anti-religious concept to make amendments in laws related to property and inheritance and state has a duty to deliver according to the needs of an evolving society. This is also evident from a study on land-related laws of Bangladesh conducted by Human Development Research Centre which found that there are a total of 146 laws on land related issues, most of which are neither time-befitting nor people-friendly. Most of the laws were branded as outdated for being enacted during British and Pakistani period, inconsistent with one another and unsuitable in ensuring rights of landless, poor, ethnic minorities, and women on the land [New Age, 2015] . These obsolete regulations rely mostly on land officers, revenue collectors and surveyors which paved the way for corruptions. Thus, these laws do not in any way accustomed to the needs of the people of Bangladesh.

Bangladesh is a country which is not only based on religion grounds but also on laws and regulations that are democratic and secular in nature. In fact, 90% of laws that we use on a daily basis are secular and constant. Furthermore, articles 10, 19 (1, 2), 27, 28 (1, 2, 3, 4), 29 (1, 2, 3-A) of the Constitution ensure equal rights for all men and women in every sphere of life<sup>4</sup>. The state does not have a

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<sup>3</sup> *The Muslim Family Laws Ordinance ( Ordinance NO. VIII OF 1961 )*. 6.

<sup>4</sup> *The Constitution of the People's Republic of Bangladesh ( ACT NO. OF 1972*. 10, 19, 28, 29.

separate religious regulation for civil and criminal laws and same could be implemented for family laws. If family laws could be brought under Uniform Civil Code, then all the differences would be wiped out and improve the inheritance situation for Bangladeshi women of all communities and religion, not the just the Muslim women. Alternatively, if the Government actually wants to advance women's rights to land, then it could resuscitate and implement the initially drafted Women Development Policy of 1997, particularly Section 7(2) which assures women to be given "full and equal rights, and control over earnings, inheritance, wealth, loan, land and wealth earned through technology and market management, and new laws would be enacted to achieve this goal" (Gayen, 2019). Section 7(2) of the 1997 policy was dropped in the third version of the policy in favour of section 9(13) of Women Development Policy 2008 which eliminated the provision of right to equal share of property through inheritance and adopted a provision whereby women would receive "equal opportunity and control over wealth earned through the 'management of market'" (Gayen, 2019). The latest draft, Women Development Policy of 2011, also excluded the provision on equal property rights through inheritance to avoid aggression from some so-called religion groups.

Throughout the policy, there are various provisions which can be interpreted as inconsistent with religious doctrine, but the frantic religious mob are seen on the streets demanding the ban of only one clause which deals with equal property rights. Therefore, the designers of women's policies, the oh-so-silent political groups and the ones creating turmoil out of it all are simply strengthening the wave of refuting women's access to equal property rights (Gayen, 2019). Undoubtedly, the revised Women Development Policy 2011 is a step backwards from the original draft, at least in terms of the right to inherited property.

Under the 2011 policy women would get the control over their property only if it is already allowed by religious laws, which is definitely not how it was initially envisioned under the 1997 policy. In this crucial stage the government should reconsider if they must play patriarchal agents and submit to the demands of the religious fundamentalist forces or take initiatives to prepare people's mentalities and join the public themselves in the fight for women's rights which has been promised by the Constitution. Furthermore, women's contribution agriculture must be acknowledged, and immediate action must be taken to give women the recognition of farmer enabling them to compete with the hybrid seeds and advanced technology by taking advantage of the government provided facilities like small credit, seeds, fertilizer, and other benefits.

### **Gender-based violence**

With two out of three women having encountered violence in their lifetime, gender-based violence in Bangladesh has been a major issue in context of social, cultural, and economic growth and a major share of violence against women results due to land-related disputes. The gender-biased socio-political attitude that encourages women in being subordinate men also weakens them in terms of their economic status by restricting their access to land and thereby, making it a vital factor in triggering domestic violence in both private and public sphere. Women in Bangladesh, in general, become the most vulnerable victim of discrimination and non-structural violence while claiming for their land rights. Even though violence against women and land related violence are common occurrences in Bangladesh, there is no recorded data to identify the link the between these two phenomena which is a clear indication on governmental

negligence which in turn has made women susceptible in claiming their right to land (Moni and Sumaiya, 2013) . Therefore, women often limit their access to land by letting go of their land rights due to fear of physical assaults which ultimately results in threatening the food security of the country.

The state failed its women by neglecting to acknowledge gender-based violence against women due to land related disputes which in turn discourages them from claiming land rights due to fear of life. It is estimated that more than 3.2 million land-related cases are pending before the judiciary and 80 per cent of criminal offences today stem from land disputes (Al Mahdi, 2015) . The recorded data on violence against women is not enough to pronounce the seriousness of the issue but statistic shows that 66% of Bangladeshi women are subjected to domestic violence and most of these cases are disputed related to dowry (Dhaka Tribune, 2018) , a concept of transferring wealth and/or properties from the bride's family to the groom or his family as gift for the newlyweds. Furthermore, Land disputes account for the highest occurrences of acid attacks on women in Bangladesh with 27% of total acid victim in 2003 (Farouk, 2005) , 43.5% victim in 2005 and 30% victim in 2014 (Rahman, Bhuiyan and Lovely, 2014) .

Furthermore, 109,621 police complaints were filed from 2010-2012 concerning numerous types of violence against women among which only 18,484 complaints were authoritatively investigated and only 6875 cases had further proceedings. Furthermore, as per the Bangladesh Mahila Parishad report (2011), 1,373, 1,377 and 1,450 women died in 2009, 2010 and 2011 respectively due to various forms of violence. All these numbers however do not provide an actual scenario of violence against women due to lack of documented data on this matter and there is no official record on land related issue which has steered women's vulnerability regarding their land rights (Moni and Sumaiya, 2013). It is often witnessed that

women relinquish their land rights by not making a legal claim as they fear physical assault which ultimately leads to restricting their access to land and promoting much risk to our food security. Zaman (1999) in his study reported that patrilineal inheritance and ownership system in Bangladesh perpetuating the male domination in interpersonal and social relationships which trigger and perpetuate the abuse of women. This unequal property right of women ultimately results in discrimination and exploitation in nearly all aspects of life which is legitimized and reinforced by the existing socioeconomic system and increases women's powerlessness and vulnerability to the male member of the family which causes domestic violence for life long (Zaman, 1999) .

The rural arbitration setting paints a much worse picture in regard to violence against women. Women's participation in decision making is always ignored and their arguments are regarded as void within a Shalish system (rural arbitration system of Bangladesh) (Moni and Sumaiya, 2012). In majority of time women do not get the justice they deserve due to the patriarchal values of the shalish system. Victim blaming is the typical norm of the shalish where justice is almost always denied, or even worse women get punished for being unchaste. Women almost never get a fair dealing of land related disputes whether it is inherited land rights or their own property within this corrupt rural shalish system which does not have any legality. All the past and present governments are very well aware of the existence of the Shalish system in the rural, but no initiatives have been taken to abolish it. All these dynamics prevent women from claiming their rights over land and other natural resources which pose a major hurdle in establishing women's rights to land.

Undoubtedly, land related violence is a common occurrence in Bangladesh and government surely failed to address to the seriousness of the issue. On the

positive note, the Government have taken measures in accordance with Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in order to prevent violence against Bangladeshi women in general (Moni and Sumaiya, 2012). The existing laws dealing with violence against women include Domestic Violence Act 2010 and Suppression of Violence against Women and Children Act 2000. Domestic Violence Act 2010 has correctly been hailed as a revolutionary tool for preventing dowry-based violence against women by their husband and in-laws. Although dowry often comprises of materialistic items including properties and other assets but there is neither any provision that specifically deals with land nor any initiative has been taken that deals to prevent property related violence against women.

### **Weak land administration**

Another factor that discourages women from owning and controlling land is the registration process. There is no denial that land plays a vital role within both social and economic context of Bangladesh. The current land management system is inadequately designed to cope with the demands placed on it by a growing population and increased developmental needs. In general land management in Bangladesh is looked after by 2 separate Government departments. Ministry of Land (MoL) is responsible for undertaking surveys and arbitration process and collecting land development tax. On the other hand, Ministry of Law, Justice and Parliamentary Affairs (MLJP) are responsible for storing records of land mutation and transfer. The present administration is not only women-unfriendly but also characterised as inefficient, complex, expensive, time consuming, rigid, and corrupted (Masum, 2017) . This insufficient and

undignified registration system of land in Bangladesh makes it difficult for most women to register their property especially for the illiterate women as in many family's female children are not given equal access to education and other facilities. Additionally, the implementations of digital system that preserves and examines records are yet to be introduced. Moreover, the processes of mutation, partition, survey, payment of land development tax are not women friendly since most of the officials are males and they usually fail to realize the complications of women and women are subjected to various forms of harassments.

The Government has introduced Land Use Policy which aims at reforming the present land administration system. The Land Use Policy designed to zone land and keep various land management laws up to date and . The policy also deals with prevention of soil degradation, further loss of farming land by encouraging their ideal use and irresponsible usage of acquired land. Furthermore, Land Use Policy is aimed at protecting the state-owned land to meet the needs of the development projects and establishing a data bank for khas land, fallow land, acquired land, char land and others (International Monetary Fund, 2005) . However, even after the reform in the land management, the system is still does not work due to the existing corruption. This can be evident from the survey led by TIB (Transparency International Bangladesh) in 2012 which concluded that 54.8% of the households that received services from the land administration paid bribe and unregulated money and 59% were victims of corruption and harassment (Saleh, 2015). The survey also shows that the households in Bangladesh paid TK 22.612 billion during the period between May 2011 and April 2012 as bribe or illegal money in land administration sector (Saleh, 2015). Nevertheless, the situation has improved compared to the 2005 finds whereby a household study in Bangladesh (Transparency International, 2005a) of 3000

households shows that 97% households that bought land had to pay bribes for land registration, 85% of the households who mutated their land ownership had to pay bribes for land mutation, 85% households who collected land related documents had to pay bribes, 83% households had to pay bribes for land survey, and 40% households who received land had to pay bribes . People often take aid from middlemen to do registration of their acquired land and women are often exploited due to their vulnerability and ignorance in the matter. The registration system is complex and corrupted as it is, women tend to evade the entire system altogether to avoid further discrimination and harassment. Therefore, the State should take initiatives to remove these barriers from the land administration in order for the women to be able to register their land easily and without any complexity.

Another proof of weak and corrupt land administration lies within the Khas land management and its distribution policy. Even though the government has a khas land distribution policy, the poor people who received land under it are hardly able to retain the land (Human Right Watch, 2012). The influential and powerful land grabbers inevitably force them to leave the land. They are arrested and labelled as dacoits if these peasants complain to the local police which is not only a serious form of corruption but also extremely inhuman. The police always sides with influential people for their own benefits. Furthermore, the renounced and retired political leaders are also the bug land grabbers, exacerbating the situation.

The basic problems with Khas land lie in identifying whether or not a particular land is a Khas land and their surveying procedure. Most of the time khas land is not properly surveyed or not surveyed until occupation is well underway. These lands are often occupied by influential people of the locality who provide bribe to the authority and doctor false ownership documentation. The people in charge of

distribution of Khas Land more time than often spread news of an available khas land among their own contacts meaning potential and eligible parties do not find out about these lands until it is too late. False applications made by the large landowners are not only accepted but prioritized due to their powerful connections and ability to pay large amount of money in bribe. Even if a genuine landless peasant miraculously manages to cross all the barriers and finally gets to apply for a Khas land, they are pushed two steps back due to the complex nature of application form of Khas land. The khas land distribution “application form” is a complicated one, which is difficult to complete even by an educated person. This allows the land officials to exploit the landless peasants by either asking for bribe or a share of the land produce to accept and support their application (Saleh, 2015). The Khas land policy is designed to provide land to the landless peasants, but the distribution system does not tailor to the poor. The underlying problem of corruption in the Khas land policy and need of reform were identified by Dr. Abul Barakat in his book Political Economy of Khas Land in Bangladesh as he wrote: “Identification and management of khas land (state owned land) and water bodies, distribution of the same to the landless and poor people, retention of such land waterbodies by the landless and pertinent rules and practices within the prevailing social-political context of Bangladesh constitute prime issues of agrarian reform” (Saleh, 2015).

A reform in Khas distribution policy will not only guarantee middle-sized family food supply through farming in the granted land but also solve the housing problem. It is undeniable if the existing khas land distribution system is so corrupt and complex towards poor people in general then it is near impossible for women to have granted piece of khas land due to their vulnerable nature and lack of education.

### **3.2 A Patriarchal Setting That Overlooks Women's Rights To Land**

The issue of gender inequality in Bangladesh is a third-world syndrome one as well in addition of being one of the regressive poor Muslim societies and is a social manifestation than a legal one. This is because there is hardly any constitutional clause that supports gender-based inequality except for those personal laws. The women of Bangladesh are largely responsible for producing food, managing natural resources, earning income, and taking care of the household food and nutrition security and yet their access to and control over land is restricted and their role remain unacknowledged. It is more than often witnessed that women's access to and control over land is limited as the land is owned by the men. Thus, their livelihood and interests depend on men. Bangladeshi women's rights to use the land depend on the continuity of their relationship with these men who are mostly either their father or husband although it has been long argued that the women's lack of ownership of land and other resources put significant impact towards their low socio-economic status.

Though Women are the primary manager of natural resources and their role in agriculture is praiseworthy, women's limited access to land constrains agricultural productivity. The socio-political context of Bangladesh does not offer women to take part in decision making; as a result, they have to depend on male members from personal to social life including land use. Since women's land rights depend on the relationship with male members, insecurity subsists to lose the use rights if woman get divorced or in widowhood. This insecurity bound women to tolerate domestic violence and all other injustice against them silently.

Gender-biased sanctions on women in Bangladesh are a cultural phenomenon rather than an Islamic one. Islam establishes women's empowerment from the moment they are born by ensuring proper physical and economic growth as per their abilities. Women in Islam are thoroughly empowered in context of family life as women just like men are regarded as individuals and equal entities in terms of deeds. The same is supported by Sura 4 of the Quran:

*“O people Be conscious of your Sustainer, who has created you out of one living entity, and out of it created its mate, and out of the two spread abroad a multitude of men and women. And remain conscious of God, in whose name you demand (your rights) from one another, and these ties of kinship. Verily, Allah is ever watchful over you.”* (Quran, 4:1)

It is clear of the above-mentioned verse that both men and women are created as equal if they are different outside, but their core remain the same and hence, will be judged by their deeds not appearances. It is also evident from the same verse that men are not superior to women as they both have rights on each other which establish women as an empowered individual entity as person rather than an inferior person. The Muslim women in Bangladesh are, therefore, victim of the cultural mistreatments due to the lack of knowledge about their status within the family which is bestowed upon them by Islam.

Furthermore, women's opinions are often not valued within the context of Bangladeshi families. Their freedom to express opinion about family matters is often restricted due to their low position. The Quran explicitly addresses both men and women without discrimination:

*“Indeed, the Muslim men and Muslim women, the believing men and believing women, the obedient men and obedient women, the truthful men and truthful*

*women, the patient men and patient women, the humble men and humble women, the charitable men and charitable women, the fasting men and fasting women, the men who guard their private parts and the women who do so, and the men who remember Allah often and the women who do so - for them Allah has prepared forgiveness and a great reward.” (Quran, 33:35).*

From this verse it is clear that both men and women are equal in the eye of Islam, and they will be judged for their deeds not their gender. The verse addresses both men and women with same effect without any discrimination but discrimination exists when Islamic teachings are interpreted giving to the social norms. The mixture of social norms and Islamic teachings give birth to the toxic masculinity that ultimately shapes the society which is prone to treat the women as the subordinate gender. The same patriarchal values prefer son for various social customs like dowry, thereby son is frequently sent for education than female child, get better food, better healthcare and preference in decision making. This is also evident from women’s literacy rate at 52.2% compared to 61.3% for their counterpart (Moni and Sumaiya, 2013). Such discriminatory attitudes towards women prevent them from claiming their rights in every aspect of their life including land rights. In fact, the social setting is designed in a manner that prevent women from claiming land rights by placing several socially endorsed concepts on how women should behave.

### **Community sanctions on women**

In the rural areas of Bangladesh arable lands measures to the status of the household in the society and women accounts for a great deal in maintaining their welfare. The women are not only responsible for household works such as

cooking, cleaning, and other chores but they also actively participate in the agriculture production process by undertaking various activities such as land and seed preparations, storing grains mowing and weeding. Yet their contributions are regarded as mere general housework at the same time facing seclusion in many cases due to disallowance of finding employment outside the home. Such discrimination provides women with inadequate power to make finance related household decisions. A woman's right to access and control property and other fruitful resources has a direct impact on the well-being of the family's health and finance. Social practices often prevent many women from owning or inheriting properties and making decision regarding the use of the family assets (Unnayan Onneshan, 2007) .

Acquiring land rights through inheritance is possibly the best option available to the women of Bangladesh as most of the agriculture lands are controlled by private individuals and any other means of owning land are extremely limited due to their poor economic status. The law of inheritance and other related issues are ruled by the religion-based Personal laws. Therefore, Muslim women of Bangladesh are governed by Sharia Law which generally allows women to inherit half compared to their male counterparts. Even though women do not inherit equally under Sharia law but at least it provides clear provision on women's right to inherit, own and control land. However, the complex issues lie in its practice when combined with the customary values. Under the rulings of Sharia's law, a daughter is entitled to half of her late father's estate if she is an only child, two-third together when a man has more than two daughters and half of her male counterparts if the man has any son. In case of the widow of the deceased, she is entitled to receive one fourth of the total property if there are no children or grandchildren in the scenario and one eighth of the property in case of any

children. Rest of the property will be distributed among other relatives of the deceased including his brothers and their sons. However, the Law Commission of Bangladesh has recently proposed to amend the rule in light of Quran to give the daughter larger amount of share from her father's estate. Nevertheless, the father has an option to will his property in his daughter's name. However, according to Muslim law no one can more than one third of his/her total property if there is another inheritor. In that case the person can gift his total property to his daughter or his wife (Sourav, 2015) . Although as established Sharia Law derives from two main sources: Quran and hadith but , in Bangladeshi context, the practices are influenced by culture as well as Sharia law whereby women hardly receive what they are legally entitled to get, due mainly to patriarchal family system and other factors. Even though women can inherit or own, to a limited extent, a part of their father or husband's property, this right is reportedly rarely exercised in practice (Jinnah, 2013) . The absence of a legal regime governing marital property puts women at higher risks of poverty after divorce as most of the property during marriage is acquired by men (Kashyap, 2012) .

Although Bangladesh is a state party to International Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) and other international instruments which safeguard women equality and dedicated to promoting the right of equal ownership over all kinds of property to women as of men and yet various socio-economic, religious, and cultural factors synergistically results in deprivation of women from effective right and access to land. The practice of execution of ownership right in the land by women significantly lies in the cultural customs of the Muslim society. It is often witnessed that only men, especially in the rural settings, have the right to make decisions regarding the use and exploitation of the land. Women hardly have their names on land titles,

certificates, leases, and contracts. Even in rare cases when women have the legal papers and deeds for their land ownership it does not mean actual rights at all. Since women landowners do not control their land and other resources, it cannot be anticipated that their economic and social status would be the same as male landowner. Due to these prevailing traditions and practices very, few women have access and control over land that they have ownership of. The gap between owning and controlling land also plays a key role in obtaining credit. A woman who has control over her owned land is more likely to be self-employed using credit available for agriculture purposes than a woman who lacks such right. However, Bangladeshi women, in general, are unlikely to claim their share of family property unless it is offered to them but that is a rare scenario. Women lack resources and knowledge of the law; lack of education make them unaware about their legal rights.

### **The concept of “good sister”**

Muslim women can hardly realize the rights that law has promised them and are discouraged from asserting their rights over their fathers' estate because of the concept of 'good sister.' Even to the limited degree women can inherit, there is social pressure to forego this right. Some families use what might be women's future inheritance as dowry payments to husbands' families at the time of marriage and later leaving women out of inheritance while other married women decline their inheritance in deference to brothers with the hope to receive support from them in the event of marital breakdown (Kashyap, 2012). Women's material empowerment through claiming their property rights usually comes with a hefty price i.e., loss of family support as well as community sanctions which fails to

recognize legitimacy of women's claim over her ancestral property. The established values and norms reveal that a "good sister" should surrender her share on paternal property in favour of her brothers. The social practices demand that sisters should show affection towards their brothers by transferring their share of paternal property to their brothers.

Women of all class and background face hurdles while claiming property rights through inheritance. With the elite class women, despite having proper education and marriage stability, the choice still remains whether they want to maintain a good relationship with the natal family or have a share in the ancestral property. The poor lower-class women, who usually live in the rural areas with no access to education and proper healthcare, have no way of asserting control over their own life let alone property rights. These women may their names in Revenue record as legal heirs and successors, but they are not encouraged to demand their rights in property. Moreover, these women are given control of the house with limited funding to run the household expenses in order to restrict their activities. The job also includes controlling the behaviour of daughter in laws, sons and daughters while maintaining customs and traditions of the community. However, poverty, for some women, plays as an inducement for resistance from general social norms and claim their share in property, but only when they get no support from their family, both natal and marital, and from their community. Assertion to property right is most difficult for women belonging to the middle class of the society even though they are educated, working women living in the urban areas. A lot of these women do not even think of demanding property rights in order to compensate for the money spent on their education and marriage by their family awhile some face violent conflict even death threats from paternal family if they demand their share in property. Some women are forced to claim

the inheritance by husband and his family, but they put up resistance while other middle-class women bargain away this right to gain decision making power in family (Holden, 2019). Irrespective of class and background, “good mothers” are expected to discourage daughters to claim their share in family’s property.

### **Social Purdah:**

The concept of “purdah” in Islam provides proper dress code for women which they should follow to stay righteous and within the teachings of Islam. The notion of Purdah in Islam also provides guidance on how women ought to dress in presence of their Mahram and unrelated men. The rules are laid out in Holy Quran.

The basic rule is that clothing worn by Muslims should be clean and decent, neither excessively fancy nor ragged. One should not dress in a manner intended to gain the admiration or sympathy of others.

*"O children of Adam, we have provided you with garments to cover your bodies, as well as for luxury. But the best garment is the garment of righteousness. These are some of God's signs, that they may take heed." (Quran 7:26)*

Secondly, women must maintain their modesty and cover their bosoms.

*"And tell the believing women to subdue their eyes and maintain their chastity. They shall not reveal any parts of their bodies, except that which is necessary. They shall cover their chests, (with their Khimar) and shall not relax this code in the presence of other than their husbands, their fathers, the fathers of their husbands, their sons, the sons of their husbands, their brothers, the sons of their brothers, the sons of their sisters, other women, the male servants or employees*

*whose sexual drive has been nullified, or the children who have not reached puberty. They shall not strike their feet when they walk in order to shake and reveal certain details of their bodies. All of you shall repent to God, O you believers, that you may succeed.”* (Quran 24:31)

Finally, women should lengthen their garments.

*“O prophet, tell your wives, your daughters, and the wives of the believers that they shall LENGTHEN their garments. Thus, they will be recognized and avoid being insulted. God is Forgiver, Most Merciful.”* (Quran 33:59)

From the above mentioned three verses it is clear that the term Purdah in Islam guides women to dress modestly while maintain a distance from unrelated men. Nowhere it is mentioned that women should avoid working in public places. However, in Bangladeshi context Purdah is often understood as the practice of female seclusion which is intertwined with patriarchal and religious practices. Institutionally and culturally sanctioned, purdah exerts important parameters for which women’s positions, responsibilities and social participation are governed (Agarwal, 1994). Amin (1997) regards it as a widespread structural set of norms creating standards defining female morality . Social purdah is constructed by the society to confine women from asserting rights including land rights. It is the social purdah that refrain women from claiming their share in paternal property as well as husband’s property. When a man dies, it is highly unlikely that she will bring a claim for her share of the assets left behind by the deceased. Widow women usually forgo their right to property in favour of their sons with hope to be taken care of, especially in their old age.

Around 8% of households in Bangladesh are headed by women (Moni and Sumaiya, 2013). In many cases these women are bound to sell either full or

partial portion of their land after the demise of their husbands or separation and even if they manage to gain formal ownership of their land, they often fail to retain the control of it. Most of the time they put their brothers or in-laws in charge of cultivation and in many cases they get cheated of partial or full profits and in worse scenarios they do not get the land back. Regardless of the factor they depend on male members of their family as they could not go to see the crops because it would have meant going into the field which is disrespectful within the social context of many rural areas of Bangladesh. The practice of social purdah in Bangladesh restricts women's mobility. Usually, women are expected to avoid spaces where men congregate which include farming areas. This social taboo hinders women from going to the field either for harvesting or for supervising labours in the field with the justification that such activities are not for respectful women, widowed and abandoned in particular. As a result, day by day women are losing their control over and access to land (Moni and Sumaiya, 2013). The social purdah also restricts women from taking legal actions when their rights are violated. As long as women are wrapped in this social purdah, their empowerment will ensue only in theory but not in practice even if and when there is a nationwide movement ensuring women's empowerment through land rights and/or when the state presses regulations eliminating gender-based gaps.

The consequences are substantial when women's rights are violated. It makes a stark difference whether or not a woman has access to land and other resources in determining her social status and decision-making abilities. Children usually do not take care of their aging and ailing mothers who do not have any property. Women become vulnerable if they get divorced, become widows, or their husbands take another wife without a sheltering piece of property. Women are excluded from participating in community decision making. Even, within the family

settings women have little to no control in controlling and managing the household resources. Women are only considered responsible for maintaining the household, childrearing, and subsistence farming. Denial of women rights to own, access and control land can also contribute to women's tolerance of domestic violence. Without security of tenure, it is difficult for women to leave abusive and violent households. At the same time, a lack of security of tenure means that women can be forcibly evicted from their homes and lands on the whim of an angry spouse or male relative upon dissolution of a marriage or widowhood which invariably leads women to poverty, exposing them to further violence and exploitation. The constant renunciation of women's land related rights is one of the underlying impediments to women's empowerment. Women's disadvantaged economic position creates a structural dependence on men for access to resources which, in turn, subjects women to insecurity. This is particularly damaging to women in today's privatization-driven economy where economic assets and resources are increasingly determinants of power and independence. Until women have a strong status in the system that confers economic power, they will continue to be subordinate to men.

Women's risk of poverty would be reduced, and their welfare would be enhanced if women have direct and effective access to land. Evidence from around the world suggests that women can use land more efficiently and they can choose appropriate cropping patterns. Women entitlement with land would not only empower them by enhancing their economic status, but also strengthen their ability to challenge social and political gender related issues. It is high time that both legal and social measures in the form of social movement are taken for ensuring women's just land right in Bangladesh. There is a great need for legislative and organizational reforms to establish women's rights and effective

control over land, which need a neutral political stand that will improve the situation. In addition, the Govt. needs to formulate a new land policy and legislation to ensure equality for women. More mechanisms should be available which are solely targeted at safeguarding women's right to land and identifying the policy areas where state's long and short-term intervention are required to improve the present status of women in Bangladesh. There is also need for raising awareness and knowledge about gaps in land rights, gender, and legal issues to enhance women's capacity to bargain with the community, state and within the households.

## Chapter 4: Marital Property And The Muslim Communities

In general, the term matrimonial property or marital property refers to all properties and other assets acquired after marriage and any property attained by either partner prior to marriage including inherited property and business property is considered non-marital property. In case of dissolution of marriage all the matrimonial properties are to be divided among both the spouses.

Different countries have different jurisdictions over distribution of marital property when a marriage falls apart. In the UK, the courts have extensive discretion in redistribution of property and incomes of separating spouses in light of various aspects. For instance, in *White v White* (2002) the House of Lords had suggested courts to use “yardstick of equality” as principle of sharing whereby the marital property to be shared once the needs of each of spouse is met. Later, in *Miller v Miller and McFarlane v McFarlane* (2006) the House of Lords ruled that the redistribution of property is influenced by three principles: needs, compensation and sharing (The Law Commission, 2011) . Furthermore, the English legal system enables spouses and civil partners to obtain a charge known as “Matrimonial Homes Rights” notice which guarantees home rights to the spouse who does not own the family home<sup>5</sup>. Unlike the English legal system, the guidelines for matrimonial property rights are not as advanced especially in Muslim majority countries. Although some nations have taken initiatives in establishing marital property rights, only few have succeeded in imposing the

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<sup>5</sup>HM Land Registry (2012). *Notice of home rights: registration (HR1)*. [Online]. Available at: <https://www.gov.uk/government/publications/notice-of-home-rights-registration-hr1>

laws and other Muslim majority countries including Bangladesh have no provision for the concept.

This chapter extensively looks into approaches taken by different Muslim majority nations in allocating marital property to compare and define the just method for distributing them at a global stage. In order to comprehend the joint matrimonial property regimes in Muslim communities it is also important to look at dynamics that play a major factor in determining how Muslim marriages work as factors, such as dower and inheritance, can easily be and often is misconstrued as tools for influencing women's rights to land and other resources. This chapter is divided into three segments. The first part scrutinizes the mechanisms of joint marital property regimes adopted by Muslim-majority countries, the second part is designed to dissect the concept Mahr and nafaqa, which are often misinterpreted as the determining tool for barring women's marital property rights and the final part is assembled to extricate the marital property from the inherited property to maintain tranquil division of marital assets in case of dissolution.

## **4.1 Matrimonial Property Regimes In The Muslim Communities**

Islamic law governs the lifestyle, scope of empowerment and rights of almost one billion Muslim women all over world. The entwinement and unified bond between individual freedoms and economic development has been long acknowledged and established as evident from the Sen's study of linking individual capabilities and economic opportunities (Sen, 1999) and is apparent among Muslim communities (Sait, 2017).

The traditional Islamic sharia Laws, derived from the basic sources, are elaborated through jurisprudential interpretations by different schools of law (madhhabs) prominently by Hanafi, Maliki, Shafi and Hanbali schools of law and their juristic interpretation is known as fiqh. Although all the Islamic Jurisprudence stresses the protection of women's rights to personal in marriage and possible separation, but it does not recognise the concept of matrimonial property making it impossible for women to claim any ownership in marital assets. In case of dissolution of marriages each spouse is entitled to properties which are registered in that individual's name. Usually, women only have access to mahr (dower) and nafaqa (maintenance) for 3 months of iddah (waiting) period when the marriage falls apart. However, the absence of marital asset, insufficient dower and restricted access to maintenance push many divorce-seeking women towards poverty or to become dependent on natal family and in worse scenarios they simply choose to remain in an abusive marriage. Thus, the need for reform of matrimonial laws in context of marital property in Muslim countries calls for urgent attention.

Over the years many evolving Muslim-majority countries like Tunisia, Turkey, Indonesia, Malaysia, Morocco, and Iran have adopted different approaches to marital or community regimes. However, most of the middle eastern countries and South-Asian countries including Bangladesh lag behind while still ruling under separate property regime without any legal presumption of co-ownership of assets acquired by the other spouse. This section actively looks and examines into the different approaches taken by different countries with significant Muslim population in order to establish women empowerment through joint matrimonial property regimes. A thorough study on approaches taken by some Muslim majority countries will also reveal the truth about their practice in real world and help understand and compare these approaches to ultimately find the most suitable method for incorporating the notion of matrimonial property to the existing laws of Bangladesh.

**Tunisia: A rather secular approach adopted in midst of waves of legal reforms.**

After gaining its independence, Tunisia established the Code of Personal Status, which was considered to be the first women-friendly legislation promulgated in the country and a drastic retreat from the sharia and has undergone four waves of reforms- first during the French Protectorate, second in the 1950's with the collation of Tunisia's family law, third in the 1990's with alterations to the Code of Personal and the latest wave of reform begun in 2010. The spouses were enabled to negotiate and include additional provisions in relation to marital properties in to their Nikkah Nama (marriage contract) under article 11 of Tunisian Personal Status Code (Majallah), 1956. However, women were absolutely freed from the

conventional interpretations of Islamic laws only after the secular approach was taken by President Habib Bourguiba which outright abolished polygamy, established minimum age for consenting marriage and established laws enabling women to obtain divorce and inherit and divide properties. These new additions to the 1956 version of Code of Personal Status, had changed women's legal status significantly and placed them in a better bargaining position. The Tunisian Code of Personal Status does not contain explicit references to Islam, though Islamic values played a role in its crafting. The government had successfully developed a new phase of Islamic interpretation (Ijtihad) distinct from the Islamic law in other Muslim countries. This new thinking has included reforms to create gender equality in the areas of marriage, divorce, child custody, and women's social independence (Grami, 2008) .

Furthermore, an optional regime for communal property was introduced through the Laws of 98-91 of 9 November 1998 which created legal possibility to draw up a framework for joint management and investment of assets acquired during marriage. However, maintaining separate marital property regime for assets acquired during marriage remains the regular norm. Any possibility of an agreement under the Laws of 98-91 of 9 November 1998 to have practical effect, it must be notified to both parties by the adoul (registrar) at time of marriage in written document separate from marriage contract. However, if the parties are unable to agree how their property should be divided and there is no written agreement on the subject, the court is to evaluate the relative contribution of each to the household capital acquired during the marriage, including contributions from the wife.

However, these legal provisions for the Tunisian women in regard to marital property rights do not reflect in their practical use. This is because women hardly

get a real chance to consider the community property regime as they are only provided with previously completed marriage contract by the adoul. Thus, they usually do not have the opportunity to study and negotiate the terms of the marriage contract. The gap between legality and reality of Tunisian women's rights to marital assets still exists and must be assessed responsively.

### **Morocco: An innovative approach to Sharia law**

Morocco is a part of the Middle East & North Africa (MENA) region where issues related to personal status including marriage, divorce, child custody and support, alimony, and inheritance are governed by Family code. The extent to which religious principles are reflected in respective family codes within the MENA region varies by country. In 2004, Morocco adopted a new Personal Status Code (Moudawana) which was hailed for establishing equal status for women and men within the family, a great step towards state's obligation to protect women's rights domestically. The Moudawana enhanced the rights of women in terms of equality within the family, increasing their rights within the household on two levels. In first husbands and wives were granted joint responsibility in family affairs, making both de jure heads-of-household and secondly, women were no longer required to be obedient to their husbands in return for exercise of other rights, such as the rights to financial maintenance or employment outside of the home . Moudawana also established an option for married couples to sign a supplementary contract at the time of marriage, separate from the marriage contract, allowing for designation of a community property regime. Under the Moudawana of 2004, couples may agree on how to divide assets acquired during marriage in case of a divorce in a document. Like the Tunisian system, an adoul (public notary) is

required to advise the future couple of this provision prior to signing the marriage contract.

The Moudawana Family code 2004 was addressed as the most innovative and modern interpretation of the Islamic law since it originated from the Islamic law, Maliki School of Jurisprudence in particular, unlike modernist codes from other Muslim countries that derived from secular, civil or customary laws. The aim of the codes of Moudawana appears to be to slow the process down for marriage dissolution which would allow more opening for intervention resulting in the possible reconciliation of the spouses. However, if reconciliation proves impossible, the new code obliges the husband to provide the wife with her rightful chattels which includes any unpaid dower, payment, or pension during the period between the talaq and the 'idda' (three-month waiting period following commencement of divorce procedures), and mout'a, which is essentially a consolation gift or settlement paid to the wife upon repudiation. The new code also enables women to live in the marital home or another location provided by the husband as per his means (Weingartner, 2005) .

The Moudawana expands the roles of judges and adouls (public notaries) requiring them to play central decision-making and oversight roles in marriage, divorce, and child custody. Although the Moudawana (2004) provides greater equality between the spouses; equality can only be attained in reality practice if the judges interpret the provision in a manner that is compatible with that goal. This is because of the amplified degree of discretion power judges have while dealing with the provisions of the Moudawana which are not always as specific as in Morocco's other civil law derived codes and are left ambiguous by the Parliament resulting from political compromise (Zoglin, 2009) . Therefore, judges must exercise more discretion while interpreting certain articles of the

Moudawana than he ordinarily does in rulings under other codes. The family code provides general guidance for judges when they exercise discretion in these grey areas and if the judges come across subject matters which are not expressly articulated in the Moudawana, they should refer to principles of justice and equality under Morocco's Malekite school of Islam. Such discretion allows judges to sway their rulings based on their subjective views on the family issues instead of the law. Therefore, it is often seen that progressive judges are more inclined to adopt broader interpretations in favour of gender equality whereas the conservative judges tend to opt for more restrictive interpretations of women's rights that they justify with religious citations.

Article 49 in Morocco's 2004 Moudawana gives the judge discretion to divide the property acquired by the couple during the marriage based on evidence of each spouse's financial and unpaid contributions. However, the successful implementation of community property regime in marriage also vastly depends on the approach of the adoulas, marriage registrars with religious characters. Like the conservative judges, traditional Adouls who expressly oppose the new codes for restricting their powers as well as conservative interpretation of Islamic Law, are also reluctant in its application. The Adouls very rarely inform the future couple about the option of opting out for joint marital property regime. Some adouls dismiss the idea of discussing assets right before contracting marriage as inappropriate timing which could result in fall-out of the wedding while others express lack of confidence in the young couple to make decision regarding their future assets. Furthermore, these adouls refuse to discuss and draw contracts on marital properties in the absent of a wali (guardian) even though the new Moudawana explicitly enables adult women to sign their own marriage contract. In the absent of a prenuptial agreement as to how the marital assets to be divided

in marital dissolution, the court is to evaluate the relative contribution of each to the household capital acquired during the marriage at its discretion. However, with 4500 adouls across the country and 66 specialist Family Courts dealing with marital properties, judges are heavily dependent on the adouls and their approach especially in the rural areas where courts do not have much reach. Only 424 marital property contracts were concluded out of the 289,281 marriages in 2006 and 900 marital property contracts were drawn for 316,411 marriages in 2007 as reported by Global Rights (Sait, 2016). Interestingly, a study from 2014 conducted by the Ministry of Family, Solidarity, Equality, and Social Development which surveyed 1200 women and men, reports that 84.7 per cent had a favourable view of article 49 and the equal distribution of marital assets acquired during the marriage at the time of the dissolution of the conjugal bond (Moroccan Ministry, 2016). It is, therefore, evident that in Morocco, despite the broad support for the reforms to the Family Code in regard to joint marital property regime, resistance to its full applications still persists. The judiciary in particular plays a critical role in enforcing the provisions of the Moudawana: it has the ability to make the legal reforms a reality or alternatively to disregard the change.

### **Indonesia and Malaysia: Legal binding of customary laws**

Malaysia and Indonesia are the only two Southeast Asian Muslim majority countries which have adopted community property regimes allowing wives to have a share in the matrimonial assets based on their contributions as wives and as mothers even when they do not make monetary contributions. Recognizing such contributions depict that the husbands were able to acquire assets because of the nonfinancial contributions made by the wives in running the household.

The concept of marital property in Malaysia derives from customary rule (adat) of harta sepencarian which is incorporated in article 2 of Islamic Family Law Act (Federal Territories) 1984. Harta Sepencarian constitutes marital property as property which is jointly acquired by husband and wife during their subsistence of marriage according to Hukum Syarak as provisioned under section 142 (3) of the Enactment. Under Section 122 of the Malaysian Islamic Family Law (Federal Territories) (Amendment) Act 2006 the Shariah Courts, when dealing with divorce, are required to divide any assets acquired by the parties during the marriage either through their joint efforts or by the sole efforts of one party to the marriage including any sale proceedings of such assets (Musawah, 2018, p.18).

Even where a woman has not made any financial contributions to the acquisition of the marital assets, her role as wife and mother are considered as indirect contributions and she is usually granted at least a third of the share of assets. It has been observed that the extent of homemaking contribution is confined to her physical efforts to serve her family as a wife and mother in taking care of the husband and the family. Section 122 (3) recognizes the division of any assets acquired during the marriage by the sole effort of one party. The courts are at discretion in deciding as to what should be constituted as marital property in harta sepencarian and the proportion in which these properties are should be divided. Section 122 (4) requires the courts to also consider the “extent of the contributions made by the party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family”. Furthermore, assets acquired prior to marriage by one party which have been developed by the efforts of the other party or both the parties after marriage should also be regarded harta sepencarian and thus, to be divided reasonably among both the parties as

prescribed under Section 122 (4) of the Malaysian Islamic Family Law (Federal Territories) (Amendment) Act 2006.

Although the Malaysian National Fatwa Committee recognizes Employee Provident Fund (EPF) as individual property and outside the parameter of section 122 (4) but there still exists uncertainty as to whether EPF is to be considered as harta sepencarian or individual property especially when the fund was used in acquiring assets (Norliah Ibrahim, 2007). Both monetary and indirect contributions in households were recognized in cases like *Kamarulzaman v Umni Kalthom* [1966] and *Rokiah bte. Haji Abdul Jalil v. Mohamed Idris bin Shamsudin* [1989]. In *Kamarulzaman v Umni Kalthom*, a divorced Muslim husband could claim a half share as harta sepencarian of immovable property jointly acquired by both spouses during the subsistence of their marriage, although it was registered under the name of the wife. The fact that it was sole registered was not a bar to his claim. The same case also demonstrated that the wife was entitled to half share of harta sepencarian even though her financial contribution was far less than the husband as her indirect contributions made to the welfare of the family was taken into consideration. Similarly, in *Rokiah bte Haji Abdul Jalil v. Mohamed Idris bin Shamsudin*, the wife was entitled to one third of marital assets purchased using the husband's money only based on the indirect contributions made by her in maintaining the family and home.

In Malaysia, the joint marital property regime has become more Islamic and gender neutral since the enactment of Islamic Family Law (Federal Territories) (Amendment) Act 2006 whereby section 121 requires all issues relating to Islamic laws including marital property claims by any Muslim to be brought in the Sharia courts. At the same time the courts have the authority to divide marital assets upon the application of either husband or wife. However, there is no provision

under the law regarding a wife's right to harta sepencarian if her husband contracts another marriage except by way of judicial circular in which the court may issue an order pertaining to the division of harta sepencarian in case of polygamous unions approved by the court. In case if a polygamous union takes place in contravention of provisions in the law, the existing wife's rights to any assets acquired during her marriage are not protected by the law or even by any judicial circular. This is evident from section 123 of the 1984 Act which provides that polygamy without the court's permission is an offence and is punishable by law but the marriage itself can be registered given its validity under Islamic Law of Marriage (Hukum Shara). So, the point remains that the existing wife lost the possibility of the court issuing a harta sepencharian order since the polygamous marriage had already been contracted. Such lacuna in law allows husband to transfer any assets acquired during his existing marriage to the new wife leaving the existing wife's right vulnerable in jointly acquired property (Abdullah, Martinez and Radzi, 2010) . Although the incorporation of adat into the sharia's has enabled the rights of Muslim women specifically in the form of harta sepencharian, it is also argued that Muslim women have fewer rights than Non-Muslim women who come under the jurisdiction of civil law. Sisters in Islam, the leading Muslim women's NGO, are fighting to bridge the gap in laws of harta sepencharian in regard to polygamous union and for equal share of marital properties instead of the current one-third share usually granted to the wives who made no monetary contributions in acquiring the assets (Sait, 2016) .

In Indonesia, on the other hand, the development of the doctrine of Islamic marital property dates back to at least the eighteenth century and Indonesian Islamic tribunals have applied a doctrine of joint marital property for more than 100 years. The adat (customary) rule concerning the principle of joint property regime in

Indonesia is known as harta bersama. Harta bersama is not dealt within any traditional Islamic doctrine, but rather it is adopted and developed in the social life of Indonesian society. This local practice has been sustained by Indonesian state law by administering equal rights to property acquired during marriage for both husband and wife who are bound in a contract of marriage. The application of harta bersama was formally incorporated through the Marriage Law of 1974. Section 35 lays out the guidelines on what constitutes as marital property. According to Section 35 any property acquired during the marriage shall be considered joint property while any asset brought into the marriage by the husband and the wife respectively and property acquired by either of them as a gift or inheritance shall remain under their respective control, unless otherwise agreed between the parties. Furthermore, Article 97 of the Compilation of Islamic Law of 1991 provides that upon divorce, each party has the right to receive half of the marital property unless they had agreed otherwise in the marriage contract. While the joint ownership of marital assets is recognized by the Indonesian marital property law, the regulations remain silent as to how such property should be titled which is governed by the Indonesian Registration Law. Furthermore, only 5% of properties are under the name of both the spouses as evident from a study undertaken in 2003 while marital properties are almost always registered under the husbands' names who are considered the heads of the households (Sait, 2016). Only one third of these properties being registered under women's name and the lack of correlation between co-ownership and joint titling of marital properties raise concerns that women's land rights are vulnerable as found by Brown in Java (Sait, 2016). While the lack of awareness of titling plays a major factor, the actual struggle for both men and women in property rights lies within their customary norms irrespective of the records on the titles and other official

documents. Similarly marital property norms are “reinforced by custom and supported by Islamic law” as emphasised by Brown (Sait, 2016).

On the positive note, the original doctrine that is currently spelled out in both the National Marriage Law, which is applicable to Indonesians of all religions, and is in the Compilation of Islamic Law (Compilation), a code of family, inheritance, and charitable foundation rules that has been formally designated as binding on the Islamic courts. The Compilation provides that marital property, referred to with both the Indonesian term "harta bersama" and the Arabic derived words "syirkah" or "syarikat," is all property that is acquired during the marriage either by the husband and wife individually, or through their joint efforts, regardless of who holds title to the property. Therefore, despite Indonesian marital property being an Indigenous Southeast Asian practice in an Islamic conceptual structure, the customary concept of marital property encountered relatively little resistance from Islamic authorities of the country. By analogizing household economic production to a commercial partnership, Islamic jurists were able to embrace joint marital property by recasting the doctrine as an Islamic institution (Cammack, 2007).

### **Turkey: Participation by default**

A number of legal reforms were founded with the founding of the Republic of Turkey in 1923 and all of these reforms sought to convert the country’s existing norm in line with the western norms as a part of incessant process of modernization. The Islamic Sharia Law was abolished and replaced with a “flexible adaptation” of the Swiss Civil Law in 1926 as a measure to break with Turkey’s Islamic past. However, the adapted Swiss Civil law retained a number of features directly from the Islamic Law (O’Neil and Toktas, 2014) . Since its

adoption, the 1926 Civil Law has undergone a number of revisions; and in 2001 major amendments were introduced through A new Civil Law (Law No. 4721) resulting from campaigning on the part of feminist and women's groups. There exist four different marital property regimes which are accepted by Turkish Civil Code and under current Civil Code no. 4721 of 2002 - "participation in acquired properties" or partial community property regime is accepted as the default state for all marriages unless a couple specifies otherwise and opts out for one of the three optional regimes which include property division in Turkey, shared property division and joint property sharing.

According to the partial community property regime each spouse has equal rights on every property which is acquired during the marriage, and it does not matter whether one of the spouses is registered as sole owner. The default partial community system identifies two types of property: communal and individual. All assets acquired before the marriage are regarded as personal properties which are not subject to division. Furthermore, Article 220 of Civil Code also demonstrate that properties which are solely allocated for the personal usage of the spouse, properties which are acquired through inheritance or by other means of donation, compensation claims against damages for pain and suffer, and assets replacing personal properties are regarded as individual property even if they are acquired during the marriage. Communal property is acquired during marriage. It includes income generated through wages, social security fund, compensation received as a result of accidents and loss of ability to work, and any revenues stemming from individual property. Interestingly, even though individual properties are not subject to division, any incomes generated through these properties, such as rents and interest, are pooled and considered

community property and therefore to be split equally between the spouses in case of divorce.

For couples that do not wish to participate in the default regime (Participation in Acquired Properties), the law allows them to choose between either a full community property system or a complete separation of property and assets. A valid written agreement recognized by a court of law must be executed if a couple prefers to opt out for any regime other than the default marital property system. Articles 256–281 of the Civil Law provide rules for full community property option which stipulates that all assets acquired by both the spouses before and after marriage are considered as joint property of the couple and are pooled together (O'Neil and Toktas, 2014, p.32). Under a full community property system, the idea is that each party acquires a one-half share in all property acquired, even if the property remains in one person's name. By contrast, Articles 242–243 stipulates the option of complete separation of property where assets acquired by each spouse prior to or during the marriage remain individual property, including earnings generated from this property and any individual earnings such as wages or salaries (O'Neil and Toktas, 2014, p.33). A third option known as Division of Shared Property Regime has been established under Articles 244–255 of the Civil Law, which stipulates that any property acquired by one spouse but used and improved jointly by for the benefit of the family, or investments which have been invested for the future economic benefit of the family or corresponding assets shall, in the event of the termination of the property regime, be shared equally between the spouses (O'Neil and Toktas, 2014, p.33).

The de jure framework regulating property acquisition through marriage does not necessarily reflect the social practices of property acquisition and ownership. Amnesty International reported that men own 92 percent of all immovable

property in Turkey while only eight percent was under women's names (Amnesty International, 2004, p.9). The de facto situation in Turkey seems to be different from what the law requires. Despite the attempts of Turkish modernist project to establish a uniform legal reality, there exists a situation of a hybrid rule system in which diverse sources of law compete namely the Civil Law, Islamic Law and customary law. The Turkish state hoped that with modernization and westernization people would replace custom and religious law with an adherence to official law but in reality, practice of legal pluralism still exists along with the challenge of unofficial Islamic norms and customs. The plurality of diverse sources of law unfolds the scope of property acquisition through marriage and inheritance and this may be, in part, responsible for the gender gap in property ownership. Nevertheless, the Turkish legal modernity is one of the remarkable examples of prevailing nature of Islamic interpretations and customary norms among the Muslim communities around the world when dealing with marital and property rights.

### **Iran: Bound by contract**

Generally, Iranian family law regulations rest on the Shiite Jafari School of law and largely reflect the traditional conception of husband and wife and their respective rights and duties. It is another Muslim majority country which recognizes the concept of marital property and equal division of such properties among both the spouse, albeit by contractual agreement. Prior to the Islamic revolution, the Family Protection Law (ghanoon-e hemaayat-e khanevadeh, enacted in 1967 and revised in 1975) curtailed some of the unilateral rights of men in divorce and polygamy which marked the first step towards the modern

reform in Iran. However, After the Islamic revolution, this law was suspended by the communique of Ayatollah Khomeini and was replaced by a Special Civil Court (daadgaah-e madani-e khaas) that restored some of men's exclusive rights in divorce. The intent behind repealing Family Protection Law was to unfetter the Iranian society from western influenced laws and restore Islamic balance in the society.

The reinstatement of men's rights in unilateral divorce resulted in widespread abuse and the state authorities modified the law by providing women with more protection. In the process of amending those decrees, the state revisited and reinstated several provisions of western gender equality laws which were found compatible with Islamic laws. This gave birth to "hybridized Islamico-civil legal system" of Iran which included provisions for equitable share of matrimonial property (Sait, 2016). In the post-revolutionary Iran new standardized marriage contracts were drawn in 1982 which established a new legal regime. The new contract stipulates that a wife is entitled to half of the wealth acquired during the marriage, provided the divorce has not been initiated or caused by any fault of the wife (McGlenn, 2002). The marriage contract is binding upon the parties once signed. Prior to this, women could only seek adequate maintenance (nafaqa) through the courts, but the new regulation enabled the Iranian women to negotiate their marital property rights through the marriage contract and enforce them in courts. Furthermore, the 1992 Amendment to Divorce Regulations enables the court to place a monetary value on women's housework, and to force the husband to pay her *ujrat al-mithl* (wages in kind) for her work during marriage, provided that divorce is not initiated by her or caused by any fault of hers. The fiqh principle and local customs are combined to recognize women's contributions and women's share in marital property is determined by the courts

on the basis of the years of marriage and status of the couple. However, it is often seen that in practice, men in difficult marriages who do not want to share the marital wealth would refuse to initiate divorce but make life so miserable that the wives would have no choice but to forfeit her financial rights by obtaining a 'khul' divorce (Mir-Hosseini, 2000) .

Even with the gap in practical implementation, the bargaining power of the Iranian women has been strengthened through these laws especially by rectifying some of the existing imbalance in custody and divorce provisions for women (Sait, 2016). In the modern Iranian society of the 21st century, women are increasingly literate, have entered the workforce, and provide for themselves and their families. Household maintenance is shouldered de facto by both spouses and fighting the traditional conception of husband and wife and their respective rights and duties. Instead of suffering in silent the Iranian women are fighting, negotiating, and demanding for their pecuniary rights within the framework of Islamic Law.

The acknowledgements of women's marital property rights in these Muslim majority countries mark progression of socio-economic status of the female citizens, albeit the existing gaps in the implementation. Whether through optional or mandatory community property regimes, these countries have realized both direct and indirect contributions of women in the household. The domestic laws of these countries have taken measures to protect the marital property rights of the women which are improving with time. Maldives being a constitutionally Islamic republic have also incorporated equal share of marital properties through enactment of family law reform in 2001 and ratified the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), on 13 March 2006. The legal system of Maldives including the family

courts is based on the principles of Islam. Indeed, the constitution states that no law contrary to Islam may be applied. However, through the family law reform in 2001 first-ever codified Family Law was implemented which departs from the traditional features of Islamic family law in several areas in order to accommodate the needs of an evolving society. One momentous feature appears to be the community of marital properties. Whether it is Malaysia's legality of customary rules or Maldives's codification of reformed family law, one thing is clear, i.e., possibility of co-existence of division of marital property and Islamic Family law under one jurisdiction.

## **4.2 Dower (Mahr) vs Matrimonial Property vs Maintenance (Nafaqa, Mata'a)**

Most of the traditional Islamic jurisdictions and most Muslim family laws recognize the separate property regime whereby each spouse is entitled to individual property acquired before or during the marriage in their individual name. The notion of communal property may not explicitly exist in Islamic law, but the concept cannot in anyway be considered un-Islamic given its adoption in several Muslim-majority countries as mentioned earlier. Muslim women, in general, often forfeit their claim in assets acquired during marriage unless the property is registered in their own name and thus, direct, and indirect, financial, and non-financial contributions made by women to the acquisition of matrimonial property are left unrecognized. Many understand the concept of community property as a western concept which has no application in Islamic marriage laws and the provision of mahr and nafaqa are regarded as Muslim women's only right in marital property. While many argue that Islamic provisions of Mahr and Nafaqa are adequate to compensate and safeguard divorced women in Islam, other reason that the manifestation of women's rights though these provisions in Islamic marriage negates women's marital property rights. Therefore, it is necessary to examine the disputes over Muslim women's rights to dower and maintenance allowance in regard to their matrimonial property rights to establish its application in Islam.

Marriage (Nikkah) in Islam is as a social contract between two sane and consenting man and woman of right age. Like most contracts, the Islamic marriage contract requires the making of an offer (ijab) and acceptance (qabul)

at the same meeting in the presence of two male witnesses. All Islamic marriage contracts recognize the agreement to pay Mahr (dower) to the bride as an essential condition for the legality of the marriage (Jindani, 2004). The absence of Mahr labels an Islamic marriage void and null. Mahr is the amount to be paid by the groom to the bride at the time of marriage, some of which may be delayed according to what is agreed upon by the spouses. The mahr is for her to spend as she wishes (Quran, 4:4, 4:24, 5:5). It can be cash, jewellery, or any other valuable gift. If it is not specifically mentioned in the contract it will be adjudged according to definite principles. The legal effect of the marriage contract is that it confers on the parties' conjugal rights. The husband is obliged to pay the agreed mahr, fulfilling requisite marriage contract (Jindani, 2004) .

There are two principal methods of mahr payment according to Islamic scholars. The first method of payment is known as Specified Mahr or Mahr e Mosawamah which has been agreed upon by the parties at the time of marriage. Specified Mahr or Mahr e Musawamah can further be divided into two categories- Prompt/Immediate or Mahr e Mu'ajjal, payable immediately upon the marriage and Deferred or Mahr e Muakkhar, payable upon dissolution of a marriage either by divorce or by death of a husband. Under the scheme of prompt mahr, a bride has the right to demand her full specified mahr immediately after contracting the marriage and refuse cohabitation (intercourse) with the husband until she is paid the mahr within the limitation period of three years. If she surrenders once willingly without demanding the mahr, she loses her right of refusal. However, Prompt dower (mahr) does not become contrasted after consummation and the wife has the right to demand and enforce her claim in the court at any time. In case if the bride is a minor unfit then it is up to her wali (guardian) to demand her mahr (Ahammad, 2016). Like prompt mahr, the promise to pay the full amount of

mahr in deferred mahr is legally binding. The deferred dower, especially when sets in larger amount, often acts as a constraint on the husband's ability to divorce his wife-by making divorce an expensive endeavour. The payment of the deferred mahr is taken very seriously in Muslim countries, as it is legally considered an unsecured debt ranking equally with other unsecured debts that must be paid by court order or jail term if necessary . There are differences between the nature of mahr, definition of proper contract and conditions of enforceability depending on the regional fiqh and school of Islamic Jurisprudence (Ahammad, 2016).

The second method of dower payment is known as Customary Mahr or mahr al-mithl whereby mahr is not fixed in the marriage contract. However, the bride is still legally entitled to a proper dower even if the marriage has been contracted on the condition that the wife will not claim any mahr. The amount of monetary value of the dowry is to be settled based on the bride's father's family meaning the sum of the Mahr is predetermined by the same amount the women of that family usually receive at the time of marriage in addition to consideration of the bride's beauty, age, and virginity (Ahammad, 2016). If there are no other women in the family, then the amount will be assessed by the Mahr's of other women outside the family who belong to same social class as the bride. Nevertheless, mahr is the pre-requisite for marriage as mentioned throughout the Quran and Sunnah and is one of the fundamental rights of Muslim women that is sincerely given by the husband to the wife, without exception, as an expression of his love and responsibility. One of the main objectives of mahr is to offer protection to the wife against the arbitrary powers of the husband in exercising the right of divorce. While dower is a pre-requisite for an Islamic marriage providing some sense of protection to the Muslim women in marriage, communal marital property rights recognize women's contributions in marriage and ensures the protection of their

socio-economic status. It is, therefore, necessary to look into arguments related to mahr and community property to establish the necessity of shared rights on family home and other marital assets, and the equitable share of matrimonial assets.

Many argue that the mahr provision is similar to a prenuptial agreement and the mahr amount paid to the wife refutes her right to claim any marital property as seen in the case of *Chaudry v. Chaudry* (1978)<sup>6</sup> whereby the US court had ruled that the existence of a dower banned wife's claim for equitable allocation of marital property. Qaisi (2001) argues that treating mahr provisions as prenuptials "is an appropriate way to interpret and enforce" them but he fails to explore whether the categorization of mahr as a premarital agreement would prevent women from exercising their additional rights under equitable distribution of joint marital property regimes. This is simply because in most scenarios, arguing that the mahr is a prenuptial agreement often has the unfortunate effect of leaving Muslim women unfairly destitute (Blenkhorn, 2002).

While many have reasoned that mahr provisions are synonymous to prenuptial agreements, a comparison between the two indicates that mahr agreements, by religious tradition and legal definition, are far different both in purpose and effect. Prenuptial agreements, unlike mahr, are not designed to make payment solely to the wife in order to compensate for inequities in marital law. Instead, prenuptial contracts usually seek either to protect the separate character of property owned before marriage or to define the character of any property acquired during the course of the marriage. In contrast, mahr provisions were created in adherence to Quranic teachings to protect women from the harsh effects of unilateral divorce

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<sup>6</sup> *Chaudry v. Chaudry*, (1978). 388 A. 2d 1000 - NJ: Appellate Div.

and abandonment in a patriarchal society (Blenkhorn, 2002). Moreover, a prenuptial agreement is gender-neutral which enables both men and women to reach agreement on joint marital property rights whereas the mahr is gender-specific by definition and design. Therefore, it is safe to state that provisions of mahr and prenuptial agreement are not the same thing and the existence of mahr in Islamic marriage contract does not prevent Muslim women from claiming her share in the marital property as evident from *Ahmed vs Ahmed* (2001) where the US court had rejected the idea that the mahr provision negated the wife's claim of marital property<sup>7</sup>.

In traditional sense, Mahr operates to secure a woman's economic position after marriage, either on the death of her husband or the dissolution of the marriage by the husband as well as adds value to women's portion in the imbalanced distribution of Islamic inheritance. While the provision of Mahr is sometimes regarded in strictly contractual terms enforceable in court *Ali v Ali* (2000), it is also regarded as a bargaining tool (Muslim Women's Network UK, 2016). Mahr affords a means for a woman to buy her way out from her marriage, especially a bad or abusive one, by surrendering deferred mahr which she is otherwise entitled to legally. It may also be interpreted that husband can avoid paying mahr in khul divorce ("divorce for compensation") which requires the relinquishment of the mahr where the divorce is initiated by the wife, and thus, risking leaving women impoverished especially when there is no other provision for alimony and right in marital property.

The existence of pluralism in Islam makes it difficult to generalise the uniformity of Islamic marriage and its related features. Diversity in Islam is extreme between

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<sup>7</sup> *Ahmad v. Ahmad* (2001) No. L-00-1391, 2001 WL 1518116, (Ohio Ct. App. Nov. 30, 2001)

schools, cultures, and countries. The degree of pluralism that exists within the Sharia law, the schools and even the social and legal orders of Islamic countries is significant. The schools differ on a number of stipulations regarding marriage: in relation to the wali, the mahr, witnesses and the requirement for female consent (Ali, 2009). Correspondingly, the purpose and nature of the mahr is highly variable between legal codes, legal schools, social-status, economic class, and even between urban and rural areas of the same country. For example, the tradition of deferred mahr does not exist in Saudi Arabia and usually paid directly into the bank account of the wife (Spencer, 2011) whereas, in Iran mahr is rather index linked meaning a monetary value on women's housework for full length of marriage is added to the mahr agreed.

Considering Iran's approach of index-linked divorce, one possible argument could be that women rights in assets acquired during the course of marriage should be regarded as Customary Mahr where the exact amount of dower is not fixed at time of marriage and can be negotiated at the dissolution of marriage after careful consideration of household contributions made by both the spouses as well as their socio-economic status. Moreover, it is also plausible to treat Mahr for what it is in literal context: an essential part of the Islamic marriage contract intended as the husband's gift to the wife (Quran, 4:4) and thus, does not bar Muslim women's rights in equitable allocation of Marital property.

Apart from Mahr, Nafaqa is another provision that secures women's financial rights in marriage. In literal Islamic sense Nafaqa can be termed as maintenance owed by a man to his dependants generally, and, in the case of his wife, is often held to cover such things as food, clothing and lodging (sukna). The Arabic term Sukna can be translated as by 'the right to board' (Schacht, 1967, p.225). The husband's responsibility to maintain his wife begins at the time of the marriage

contract. Although men are obliged to pay for maintenance whether or not the marriage was consummated but in practice Nafaqa does not begin until the couple begin to cohabit. In a way Nafaqa is customarily understood to be the price of legal access to the wife. Thus, as long as they live together, and she permits her husband to cohabit with her she is entitled to Nafaqa (Safwat, 1995). It is understood that Tamkin (unhampered sexual access) is a man's right and thus a woman's duty, whereas nafaqah (shelter, food, and clothing) is considered a woman's right and a man's duty. A woman becomes entitled to nafaqah only after consummation of the marriage and loses her claim if she is in a state of nushuz (disobedience) and in the event of divorce, he is also responsible to provide maintenance to his wife only up to the expiration of iddah (waiting) period which is 3 months unless she is pregnant. The Iddah of a pregnant woman is up to the time of delivery, irrespective of the fact whether the marriage was ended by divorce or death of the husband, and thus, entitled to both lodging and nafaqa throughout pregnancy (Ahammad, 2016).

While there is no dispute among Islamic scholars regarding general provisions of maintenance to the wife during her Iddah, there is no unanimity of opinion regarding post-divorce maintenance beyond this period which generally extends until her death or remarriage to another man (Moosa and Karbanee 2010), and hence the possible application of mata'a come into play. A payment by the former husband to his ex-wife after the expiry of the iddah period is Mata'at-al-Talaq; payment by a husband to his wife upon divorcing her, also known as consolation gift. Whether this "gratification," "gift" or "payment" has been intended as real compensation or simply a consolation to a divorced wife, has been a matter of contention in classical and contemporary jurisprudence, including determining if such payment or gift is compulsory since it is often perceived unfair to burden a

man with the obligation of post-divorce maintenance beyond iddah period (Shahid, 2018).

Although the Quran makes specific reference to provision for divorced women by way of maintenance, its application beyond iddah period remain uncertain. The Qur'anic verse 2: 241 maintains:

*“For divorced women maintenance (should be provided) on a reasonable scale. This is a duty on the righteous.”*

It does not set any time limit for maintenance to divorced women, nor does it specify a limit to the amount of Matala, mentioning 'reasonable maintenance' only, and thus, simply sets out minimum requirement. Furthermore, verse 2:241 of the Quran is often interpreted in association with verse 2:242 which delivers:

*“Thus doth God make clear His signs to you: in order that ye may understand.”*  
(Quran, 2:242)

Therefore, on the one hand the Qur'an makes a specific provision on maintenance, on the other hand it also reminds us that we are continuously provided with signs for guidance so that we may comprehend and behave accordingly. However different madhabs have different understandings on how matala should be interpreted. Hanafi scholars have adopted a stricter approach. The Hanafi madhab interprets matala very narrowly in coordination with Quranic verse 2:236 which reads:

*“There is no blame on you if you divorce women before consummation or the fixation of their dower but bestow on them (a suitable gift), the wealthy according to his means and the poor according to his means a gift of reasonable amount is due from those who wish to do the right thing.”* (Quran, 2:236)

Thus, the Hanafi jurists recognized payment of maa'ta obligatory only when the woman has been divorced before consummation in circumstances where no mahr has been set instead of the reference made in 2:241. The Hanbali madhab also adopted a similar position and refused to recognize post-divorce maintenance beyond iddah period. Compared to Hanafi and Hanbali scholars, the other Sunni schools, and the Shias regard maa'ta as a compensation which the husband is obliged to provide to his wife in addition to her mahr in every case of divorce by talaq. The Shaafi School has adopted a more balanced view, considering that any divorced woman, who is not responsible for the divorce, is entitled to post-divorce support (Rahman, Hossain, Sirazi, 2018). These different interpretations have created confusion in understanding women's rights in dissolution of marriage since that mataa as post-divorce maintenance beyond iddah period has been included within the family law of countries like Qatar, Egypt, Malaysia, and Morocco.

However, compulsory or not, any mataa payment cannot be termed same as women's allocation to marital property nor as a tool for negating women's rights for matrimonial property. At best, mataa can be construed as compensations, even alimony to some extent, for divorced women, whereas joint marital property rights appeal to recognition of contributions made by both spouses in acquiring assets during marriage. Iranian law can be considered close to the Islamic concept of Mata'at-ul Talaq, with recognizing Mata'a as compensation for housework as well as the claim to expenses incurred by the wife for 3 years where the divorce was contracted without her fault (Rahman, Hossain, Sirazi 2018).

At the same time, Iranian law acknowledges the concept of marital property and equal division of such properties among both the spouse through contractual agreement as mentioned in the marriage contract. Similarly, Tunisia recognizes

Mataa as alimony for maintaining wife's marital standards of living and operates a Community of Property Law whereby spouses can enter into a contract either at the time of marriage or any time during the marriage to regulate immovable properties like the matrimonial home to be in the joint name (Shahid, 2018). Malaysia, on the hand, recognizes mataa according to the hukum syara of Verse 2:241 as post-divorce maintenance right for women who have been divorced without just cause in addition to equitable allocation of matrimonial asset under the adat rule of harta sepencarian (Othman, 2017). Clearly, while these Muslim-majority countries have taken advanced attitudes by acknowledging women's contributions in households and societies as whole, other Muslim-majority countries have turned a blind eye to the contributions made by the women both in private and public spheres. Forsaking Muslim women's rights to equitable share in the marital assets is forsaking women's labour within the home where they perform majority of the household work for no pay and even when they work outside the home and contribute to household expenses.

Operating under a general assumption that men are heads of households while in reality women equally shares the responsibilities of heading the household or carries most of the weight through their financial contributions and/or unpaid labour or caregiving. Although the traditional Islamic jurisdictions regard men as the providers for their families but it is not always possible given economic realities and women often undertake double burden of household work in addition to the waged work. This means women are contributing to acquiring and improving household assets either implicitly or explicitly. Therefore, Muslim women's rights to marital property must be acknowledged and protected without any prejudice including but not limited to diminishing their marital property rights using dower and maintenance as cutting weapons. Undoubtedly, the internal

dynamics and distribution of responsibilities within households have evolved and the interpretations of Islamic Law are in dire need of liberal reform in recognizing equitable distribution of marital assets in case of the dissolution of the marriage.

### 4.3 Distinguishing Between Inherited Property And Marital Property

Islamic law gave women the rights to own and inherit property. A Muslim woman is considered a completely independent personality. She can make any contract or bequest in her own name. She is entitled to inherit in her position as mother, as wife and as daughter. In general sense, the women inherit half of their male counterparts from their deceased fathers' estates after payment of legacies and debts and as a wife, she usually receives one-eighth of her deceased husband's estates and one-fourth if there are no children. The distributing mechanisms of inheritance are laid out in Surah An-Nisa verses of 4:11 and 4:12.

Qur'an 4:11 states:

*“Allah instructs you concerning your children: for the male, what is equal to the share of two females. But if there are [only] daughters, two or more, for them is two thirds of one's estate. And if there is only one, for her is half. And for one's parents, to each one of them is a sixth of his estate if he left children. But if he had no children and the parents [alone] inherit from him, then for his mother is one third. And if he had brothers [or sisters], for his mother is a sixth, after any bequest he [may have] made or debt. Your parents or your children - you know not which of them are nearest to you in benefit. [These shares are] an obligation [imposed] by Allah. Indeed, Allah is ever Knowing and Wise.”*

Qur'an, 4:12 states:

*“And for you is half of what your wives leave if they have no child. But if they have a child, for you is one fourth of what they leave, after any bequest they [may have]*

*made or debt. And for the wives is one fourth if you leave no child. But if you leave a child, then for them is an eighth of what you leave, after any bequest you [may have] made or debt. And if a man or woman leaves neither ascendants nor descendants but has a brother or a sister, then for each one of them is a sixth. But if they are more than two, they share a third, after any bequest which was made or debt, as long as there is no detriment [caused]. [This is] an ordinance from Allah, and Allah is Knowing and Forbearing.”*

In Fiqh Islam, the phrase 'ilmu al-fara'id' describes the system of inheritance as a whole which consists of the science of duties or obligations, and more specifically, religious obligations (Musawah, 2018). To reason with the unequal share in inheritance, the Islamic jurists developed the concept of qiwamah and wilaya which are commonly understood to place women under male authority. Classical jurists defined qiwamah as a set of obligations and rights for men and women in marriage whereby husbands protect and provide in exchange of obedience and submission from the wife. Jurists understood wilayah to refer to the right and duty of fathers or male family members to exercise guardianship over their dependents.

Evolving from the term qawwamun mentioned in Surah an-Nisa' 4:34 as men being providers and protectors of women, the concept of qiwamah have become the main textual basis for male authority and hierarchical gender relations in Muslim societies (Musawah, 2018). Qiwamah is regarded as a core construct in Muslim legal tradition that shapes the framework for gender responsibilities and rights in the family. It has been used to justify and legitimize men's right to control the mobility of their wives, unilaterally repudiate their wives, exercise polygamy, manage the affairs of their dependents in the family, and inherit double the share of their sisters. In other words, men are entitled to receive double share than

women in inheritance as the Quran charges men with the maintenance of all the women and children in the family whereas, the half share inherited by women may be considered a generous one as it is meant for her alone (It, 2017). This also means, under rigid interpretation Muslim women are only entitled to inherit portion of assets acquired during marriage in the dissolution of marriage by death of the husband. In Muslim classical legal thought, and most Muslim family laws, marriage does not create a matrimonial regime of community property. Each spouse is entitled to individual property acquired before or during the marriage in their individual names. However, in the current family dynamic and economic reality, when assets are acquired with the aid of financial and non-financial contributions made by the wife, the operation of separate property regime is not only unfair but also has dire consequence in the general well-being and socio-economic status of Muslim women.

Almost all Muslim-majority, with few exceptions like secular Turkey and adat (customary law) infused Sharia law of Indonesia, are abided by characterises the Islamic law of inheritance and many have codified Sharia law as the main regulatory tool for personal and family law. However, many Muslim majority countries as mentioned above, operating sharia law to govern personal lives of the Muslim citizens, have adopted the community property regime in one way or another to accommodate the need of ever-so-evolving society. These countries acknowledge Muslim women's rights to inherit, rights to mahr and rights to matrimonial property. The general consensus is that any asset acquired during the course of marriage, with except for inheritance and gift, is to be divided equitably among both the spouses in the event of divorce. Any property received as gift and inheritance would remain under the sole control and ownership of the individual spouse and is not to be divided among the spouses in divorce.

One issue in regard to marital asset and inherited property is if the inherited property should be considered as marital property at any point. From Malaysian Harta Sepencarian rule it is apparent that Employee Provident Fund (EPF) should be treated as individual asset. However, if the wife makes financial contributions to buy marital property through deposition without having to withdraw fund from the husband's EPF then it may be considered as marital property and the wife is entitled to a fair share of the fund (Sait, 2005). So, the accepted norm should be that when an inherited property is used as family home or marital home, it should be considered as marital property to be divided in event of divorce. Furthermore, if any improvement is made to a property inherited by one spouse with the aids and contributions of both the spouses should be considered as marital property. Furthermore, even though individual properties are not subject to division, any incomes generated through these properties throughout the course of marriage, such as rents and interest, may also be considered as marital asset and therefore, to be split equally between the spouses in case of divorce as seen from the community property regime of Turkey.

In today's increasingly interrelated global economy, it is difficult for one spouse to support the entire family alone and both spouses are responsible to provide for, protect, and care for each other, children, and other family members. Rather than gender specified roles, marital responsibilities of maintenance, protection, and care are shared between spouses to promote the interests of the family as a whole. In contrast to Community property regime, separate property regime does not only risk divorced Muslim women into destitution but also fails to realize women's contributions in maintaining households especially in today's societal reality. Both men and women are regarded equal in Islam as evident from various

Quranic Verses. One crucial Quranic verse that explicitly lays the ground for the concept of equality between men and women can be found in 9:71 which reads:

*“The believers, men and women, are allies (awliya) of one another. They enjoin the ‘common good’ (al ma’ruf) and forbid the bad (al munkar), they observe prayers (salat) and give charitable alms (zakat) and obey God and his Prophet.”*

The term awliya in this verse means alliance, mutual assistance, and mutual reinforcement (Lamrabet, 2012). It perceives the subliminal closeness between men and women whereby one is part of the other in communion and harmony. However, the gender equality is understood only in spiritual sense by the rigid interpretation of most Islamic jurists who usually depict religious compromise between gender equality in worship practices and traditional gender hierarchy and complementarity which seems to be the norm (Lamrabet, 2012). Alternative, if the term awliya can be implied to describe the spouses in a marital relationship where both husband and wife conserve their family and household with mutual assistance and mutual reinforcement, then equality in marriage can be perceived. When spouses are deemed equal in marriage, both their contributions are realized and assumption of joint ownership of marital property becomes the norm. Another dissimilar outlook would reveal that, a reform in interpretation of sharia law enforcing marital property rights will surely facilitate transformation in marital relationships, leading to equality in marriage and a transformation of society.

## **Chapter 5: Acknowledging The Significance Of Community Property Through Marital Dynamics And Roles Of Married Women In Bangladesh**

Bangladesh gained independence from Pakistan in 1971 prior to which Bangladesh was known as East Pakistan and majority of its population had been Muslim since India was partitioned on the basis of the Two-Nation theory – Hindu and Muslim in 1947. Finally, the East Pakistan became Bangladesh after nine months of bloody war known as Liberation war in 1971 which resulted from cultural and linguistic conflict between two discontinuous territories of East and West Pakistan as well as economic exploitation of then the East Pakistan by the dominant West Pakistan. In the new independent Bangladesh, a new constitution was adopted stating “secularism” as one of the policies in the preamble which was eventually changed by an amendment. All the citizens, however, were put as equal before the law. Nonetheless, no uniform code for family matters were adopted, and personal law were still existed on the basis of religious rules and customs. Although the legal system of Bangladesh is based on common law which was applied during the colonial regime of British-India, provisions of personal laws from the British period, governed by religion and custom remained, untouched and valid. While majority of the population in Bangladesh is Muslims, other religious minorities exist too such as the Hindus, Christians and Buddhists and each individual is governed by his/her own religion when it comes to family related matters.

Unlike the west, in Bangladesh a woman remains under her father's shelter until she is married off and then the position shifts to her husband with her marital status regardless of her religion. The social norms usually require the married women to take care of the children and conduct household chores, and thus making them financially dependent upon their husbands. Although neither Islam nor the Government prohibits women to participate in economic undertakings but in reality, in between taking care of children and other household errands with no help from the husbands it becomes difficult for these women to find jobs to become financially independent. The issue of inequality for women in Bangladesh is rather a social one than a legal one since inequalities rarely exist in the provisions of law except for personal matters. Personal matters, on the other hand, are regulated by religious and customary laws. In the legal system of Bangladesh though these laws or customs are incorporated separately under the head of Personal Law, these are not, however, as a whole derived from religious laws or customs. Some changes through introducing enactments or publicizing decrees were made in their application (Hossain, 2003). Yet these decrees have demonstrated to be insufficient in establishing equality between women and men.

Legal status of Muslim women in Bangladesh is determined by both Sharia based personal law and constitutional law with secular characteristics. Although women rights in general are administered by the statutory laws including The Civil and Criminal Procedure Codes, Penal Codes, Evidence Act and so on but personal matters regarding marriage, divorce, maintenance, guardianship of children and inheritance are governed by Muslim personal law. While Muslim personal law in Bangladesh is not the same as in other Muslim countries, it also does not reflect the classical rules of Islamic tradition.

While the previous chapter lay out different approaches for joint marital property regimes in some progressive Muslim majority countries, this chapter attempts to analyse the marital dynamics and realities in Bangladeshi society and how it differs from traditional understanding of Islamic marriages in order to conclude possible incorporation of marital property through diverse means. Furthermore, an in-depth scrutiny of the general duties expected from married Bangladeshi women will assert the nonfinancial contributions made by them while establishing their legal statuses as married women which in turn may enable a suitable route for them to have an equitable, if not equal, claim to the matrimonial property.

## 5.1 Marriage Norms

Marriage is a social institution as marital coupling pattern largely depends on the cultural and socio-economic conditions of the society. Marriage can be understood as a formal device through which rights and responsibilities are established between spouses themselves as well as between their respective social groups and any children born within the marriage (Ahmed, 1986). The marital rights and responsibilities are allocated evenly in all societies whereby they are openly stated and subject to both the informal social control of public opinion and the formal control of the legal systems (Mitchell, 1964). Types, forms, and norm of marriages, thus, differ from societies to societies ranging from trial marriage to polygamy marriages. Similarly, Islamic marriages have their own characteristics and Muslims are divided into two main sects namely Shia and Sunni. Both groups agree on three fundamental Islamic principles which are monotheism (Tawhid), Day of Judgment (Qiyamah) and Prophethood (Nubuwwah). Although they have similar beliefs, rituals and practices, some minor differences make them distinct from one another (Ameli and Molaei, 2012).

Under Islamic law marriages are professed as a social contract between a single man and a single woman of sound mind who have attained puberty. However, the legal effects of marriage depend on the validity of marriage. Under Islamic jurisprudence a marriage can be categorized as sahi (full valid), fasid (irregular) or batil (void). There are no legal consequences for a batil or void marriage since according to Islamic law, it is not a marriage at all and irregular or fasid marriages only have limited legal implications. A valid Islamic marriage contract also requires an offer (ijab), an acceptance (qabul), two male witnesses and an

agreement to pay dower (mahr) to the bride (Hossain, 2003). While the term “sound mind” has broad meaning, in case of valid marriage contract it refers to sane people. Attaining puberty is particularly important for a marriage contract. It demonstrates that parties to the contract are mature enough to independently express their consent. However, the different schools of thought have different opinion on when one reaches puberty (Hossain, 2003). While Hanafi school of thought agrees that the minimum age when a girl reaches puberty is 15, other school of thoughts consider the puberty age to be lower. However, Hanafi School holds that contracting marriage before the age of 15 does not make marriage contract void rather the school allows the right to repudiate the marriage once she attains puberty. In this case the marriage contract is arranged by their guardians (Hossain, 2003).

Besides perpetuating life, in Islam marriage is considered as a tool that regulates emotional well-being and spiritual harmony. Love and mercy are understood to be the foundation of Islamic marriages. Extramarital affairs or any sexual relationships outside marriage are strictly prohibited. Therefore, marriage also indicates legalization of sexual intercourse and procreating. Unlike Sunni doctrines of Sharia law, Shia doctrine recognizes two kinds of marriages: first, marriage through a regular contract which is called “permanent,” and second muta marriage, a temporary marriage for a fixed term. Muta is distinguished from regular, permanent marriage on the basis of its nature. Muta marriages do not have any comprehensive consequences because of their temporary nature. Muta marriage does not create mutual rights of inheritance between the man and the woman. However, any children conceived during the period of Muta marriage are legitimate and capable of inheriting from both parents. The only requirement for Muta is to have a valid contract with the mention of a specified period and a fixed

amount of dower (Hossain, 2003). However, like permanent marriages two witnesses are required for a valid Muta marriage. Rather than focusing on Muta, this paper will only refer to elements of regular/ permanent Islamic marriage in order to distinguish between the mechanism of traditional Islamic marriage and marriage within Bangladeshi muslim community since majority of Bangladeshi citizen belong to the sunni sect and cohered by Hanafi madhab.

Following, the jurisprudence of Hanafi madhab (school of thought), Bangladeshi personal law for Muslims recognizes marriage as a social contract, requiring two eyewitnesses, binding between two sane individuals who have attained puberty (usually at age 15) and abolishes the concept of wali (Guardianship) in marriages. Free consent is a requirement for a valid marriage under Bangladeshi law. A free consent to contract the marriage is a vital requirement in Bangladesh which must be expressed in front of at least two witnesses and thereafter to be properly signed in order to have the effect of valid marriage.

Although marriage is governed by personal law in Bangladesh, the term puberty is not relevant in a marriage contract rather the concerning matter is whether one has crossed the age of minority. Laws regarding majority were enacted at contrasting times and in response to different situations. The concept of minor or child has, thus, been given varied definitions by different acts and statutes in force in Bangladesh. The Bangladesh Majority Act of 1875 defines a person below the age of 18 years to be a child<sup>8</sup>. The Guardians and Wards Act of 1890 states that if a child is made a ward of court, then he/she will remain a ward until the age of 18 as prescribed under Majority Act thereby, defining him/her as a child up to that age<sup>9</sup>. The Children (Pledging of Labour) Act of 1933 regards a person below the

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<sup>8</sup> *The Majority Act (ACT NO. IX OF 1875)*. 3.

<sup>9</sup> *The Guardians and Wards Act ( ACT NO. VIII OF 1890 )*. 4.

age of 15 years as being a child<sup>10</sup>. The Bengal Vagrancy Act 1943 considers a person below the age of 14 years as a child<sup>11</sup>. The Factories Act of 1965 defines a child as a person who has not completed 16 years of age. The Children Act of 1974 states that a child is a person below the age of 16 years<sup>12</sup>. The legal system in the country also makes a distinction between boys and girls in defining a child. This is especially apparent in now repealed Child Marriage Restraint Act of 1929 which clearly sets the age for men at 21 and women at 18 for undertaking a valid marriage contract<sup>13</sup>. Yet, Bangladesh holds the highest rate of child marriage in Asia with 52% of girls married before attaining the legal age of 18. Furthermore, recently passed Child Marriage Restraint Act 2017 now legally allows child marriage, with no regard to minimum age, under “special conditions” with consent from their parents and court (Girls Not Bride, 2017) . Keeping these in mind it should be noted that marriages in Bangladeshi Muslim community are almost always arranged and with the recent enactment of Child Marriage Restraint, marriage can be arranged by the parents and/or guardians when and with whom they think is suitable. While a minor may be given in marriage, no minor may contract herself in marriage during her minority and any such marriage would be held to be void. Furthermore, a minor in marriage reserves the right to reject consummation until she reaches the age of majority and even if the marriage is consummated it does not invalidate her right to repudiate while she is still a minor (Hossain, 2003). Nevertheless, ignoring the issue of puberty in favour majority is not only a clear retreat from traditional Islamic marriage contract but it opens

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<sup>10</sup> *THE CHILDREN (PLEDGING OF LABOUR) ACT [ACT NO. II OF 1933]. 2.*

<sup>11</sup> *The Vagrancy Act (Bengal Act) ( ACT NO. VII OF 1943 ). 2(3).*

<sup>12</sup> *The Factories Act (ACT NO. IV of 1965). 2(C).*

<sup>13</sup> *The Child Marriage Restraint Act ( ACT NO. XIX OF 1929 ). 2(A).*

scope for other progressive changes within the marriage pattern of Bangladeshi Muslim community.

The Muslim Marriages and Divorces (Registration) Act 1974 makes it mandatory to register all Muslim marriages in accordance with its provisions and the Kazi (qadi), who is also a Nikah registrar, is under an obligation to register marriages. Failure to do so is a criminal offence and is punishable by law<sup>14</sup>. The abolishment of wali and the marriage registration requirement certainly upsurge the Muslim women's legal status in Bangladesh by allowing women to make decision regarding marriage themselves without permission from their guardians and hold their husband responsible during any dispute. Yet, like most Muslim societies, arranged marriage is dominant in Bangladesh and since marriage is arranged, the interests of the families get priority over the interests of the couple themselves (Ahmed, 1986). In early days, many couples would not even get a chance to see one another until the wedding day. However, the situation has since improved, and couple are granted the chance to meet within a family setting and often their decisions are taken into consideration before conducting the marriage. The practice of arranged marriages continues to be dominant over choice/love marriage as arranged marriage is believed to have helped in maintaining social stratification in general and keeping the family values and traditions intact (Ahmed, 1986).

On the other hand, the tradition of joint family still operates in Bangladesh. While some couple have opted out in favour nuclear family framework in the urban areas, joint family continues to expand in the setting. Therefore, Bangladeshi women are responsible for managing the household as well as provide care for

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<sup>14</sup> *The Muslim Marriages and Divorces (Registration) Act ( ACT NO. LII OF 1974 ).* 3-14.

their in-laws in addition to their husband and children. In general, a regular household of a married woman consists of her husband, children, father-in-law, mother-in-law, brothers-in-law, and sisters-in-law. Furthermore, in the current economy it is difficult to run a household on husband's income only and women are taking job to make the ends meet. In other word, women often undertake double burden of household work in addition to the waged work (Chowdhury, 2010) and therefore, contribute to acquiring and improving marital assets. Educated women in urban areas are more prone to get a job not only to further their career but also to cope up with the expenses of living in a city. Since sons are expected to look after their parents financially, Bangladeshi men often gives a chunk of their earnings to their parent whether or not they are living under the same roof. In most cases, men send money to their parents when they are living separately, especially in separate cities. The responsibility to run two households with one person's income becomes an impossible task and wife's income becomes essential means to take care of the basic needs of a household. Therefore, it would be immoral and unfair to turn a blind eye to woman's contribution in marital home and deprive her right to marital property.

The eliminations of wali and puberty as a requirement of valid marriage contract are not the only factors that distinguish Bangladeshi marriages from traditional Islamic marriages, there are other factors too. For instance, while polygamy practice is strongly discouraged in Bangladeshi Muslim society which is permissible in conventional Islamic Law to ensure welfare of women, dowry practice among Bangladeshi citizen continues to be the norm. Furthermore, interfaith marriages are legal in Bangladesh under Special Marriage Act of 1872 given the woman declare herself non-believer before signing marriage contract with a non-Muslim man, even though Islamic law forbids such marriage. These

elements will be discussed in detail to establish how marriage in Bangladeshi Muslim society deviates from traditional Islamic marriage to adapt to customary rule, albeit negative, as well as to tailor to the fluctuating need of the societies, thus, making joint marital property regime a more tangible and acceptable concept when introduced in a suitable manner.

## **Dowry**

The wide practice of dowry among Muslims in Bangladesh is a major factor which distinguishes Bangladeshi Islamic marriages from traditional Islamic marriages. The concept of dowry must not be confused with dower payment. While dower (Mahr) is fundamental right of every Muslim woman which is given to her as gift during marriage by the groom, the dowry is considered a “gift” consisting of cash and/ or other valuables given to the groom by the bride’s family and is dubbed as a condition of marriage set by the groom’s family (Saleh, 2004). Furthermore, unlike dower (mahr) the concept of dowry is not a product of Sharia law and is neither registered nor recorded on the marriage contract (Ambrus, Field and Torero, 2010).

Although the dowry system dates back to ancient Greco-Roman world (Anderson, 2003), it remains unclear when the practice had emerged Bangladesh. The common hypothesis remains that it originated and was copied from the tradition of giving wedding gifts to the groom among the higher Hindu castes (Amin and Cain, 1997) (Mannan, 2003) (Saleh, 2004). The concept of dowry is understood to have coined from Hindu religious practice of Kanyadan (gift of a virgin) and varadakshina (voluntary gifts given by the bride’s father to the groom) (Nasrin, 2011). As traditional Hindu law does not provide for

inheritance of daughters, dowry became perceived as a substitute for succession (Huda, 2006). However, it would be a mistake to trace the origins of dowry to Hindu practices alone since bridal gift similar to dowry have become part of Muslim marriage transactions for decades. For example, the Urdu terminology “jahez” is dubbed as gifts given by the bride’s side which is often a big drain on the family’s economic resources and yet a symbol of social status whereas Arabs have coined an innovative word ba’ana’, which means money or property which the bride brings to the house of the bridegroom (Huda, 2006). While dowry systems are practiced in many Muslim countries in various forms, it should be pointed out that the dowry practice in Bangladeshi Muslim community is influenced from Hindu customs on marriage transactions through close interaction and contact with Hindu society which led to the adoption of dowry among many other customs (Islam, 2004).

The dowry system emerged in Bangladesh in the 1950s after gradually extracting from the earlier practice of bride-wealth (pon) which favoured the bride and her family and the practice of “demanding dowry” came in full force after Bangladesh gained its independence in 1971 (Nasrin, 2011). However, the only form of marriage payment required by Muslim law is the promise of dower (mahr) by the groom to the bride, thus, somewhat supporting the practice of bride-wealth. Although dowry practice has no Islamic sanction, it is often witnessed that dowry exceeds the amount fixed for dower. Chaudhury and Ahmed (1988) rightly observe that while religion has made provision for mahr, society has made provision for dowry in forms of money, jewelleryes and other luxury goods bestowed upon the bridegroom. In Bangladesh, dowry practice is referred as joutak which is the marriage payment of goods or property by the bride’s side

(konya paksha or meye paksha) to the groom and/or his family (bor paksha or chele paksha) as consideration for the marriage (Huda, 2006).

Dowry practice in Bangladesh is also viewed as a result of increased competition for high-quality grooms. Parents prefer their daughters to marry educated men with urban jobs, higher status, and a certain level of income which in turn would increase their social and economic status. Furthermore, dowry has become a vital instrument for achieving social standing and show off newfound prosperity among some wealthy people who have previously struggled to assert status in the community. In other word, the practice of dowry is perceived as a strategy to increase class status reflecting social prestige associated with hypergamy which refers to a system of selecting a spouse of higher status in terms of social and political rank, income, or education. For instance, an illiterate rich farmer marries his daughter off to a doctor or college teacher by means of dowry and thus establishes social standing in the community (Nasrin, 2011).

Since its independence, the dowry practice in Bangladesh gradually moulded into a prenuptial ultimatum from the bridegroom's family which must be accepted by the bride's family as a condition of marriage. It is generally agreed that dowry first emerged among elite class in metropolitan areas before it spread to all segments of the population including the most penurious households (Nasrin, 2011). Although the trend of dowry practice started as a gift made by the bride's family to help newly married couple to set up their marital household, but the modern phenomenon of dowry has shaped to become an extortionate practice whereby bride's family is often compelled to provide dowry in the name of gift-giving. To prevent this practice, the of Bangladesh enacted the Dowry Prohibition Act 1980 which was later amended through Dowry Prohibition Bill 2018 by incorporating a punishment provision of maximum five-year imprisonment or Taka 50,000 in fines

or both for demanding and giving dowry<sup>15</sup>. However, the Act fails to recognise the gravity of the crime and the immorality involved in 'taking dowry' by placing dowry giver and dowry taker on an equal level. The Act also fails to recognize the unequal power balance in operation since dowry-takers are motivated by greed and utilise the groom's superior bargaining position as the deeply embedded socio-cultural values attached to a 'marriageable daughter' force parents to offer dowry (Begum, 2014).

Despite enactment of the bill the practice of dowry keeps flourishing. Although most women and men are aware of the law, they still follow society's contemporary trends in relation to practice of dowry and if they do not, they risk their daughters to remain unmarried, which is not a viable alternative. The existence of laws prohibiting dowry payments are perceived as vague threats compared to the immediate and practical issue of having unmarried daughters on their hands (Huda, 2006).

Another major reason for practice of dowry is to ensure the welfare of daughters. It is evident from Rozaio's (2009) study which concludes that payment of full dowry amount as stipulated during marriage negotiations can safeguard women from dowry-related ill-treatment. The study also concludes that the practice of dowry improved bride's status and bargaining power which in turn improve her security in her husband's home. In contrast, a study conducted by Suran, Amin, Huq and Chowdhury (2004) found that dowry is associated with the likelihood of domestic violence. The demands for dowry often continue after marriage and failure to fulfil these demands results in violence against women, ranging from

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<sup>15</sup> *Dowry Prohibition Act (Act No. XXXIX of 2018)*. 3.

non-violent forms of mental torture, such as the constant threat of abandonment and divorce, to physical acts of violence, beatings or even murder (Huda, 2006)

Furthermore, the rise of dowry practice has become a factor in rise in child marriage in Bangladesh. This is because the amount of dowry or bride price is usually significantly smaller in a child marriage than when married off at young age since the society considers the chastity or virginity of the girls is of utmost value and if it becomes known that a girl is no longer a virgin then it becomes difficult for parents to find a suitable husband for her and thus, she remains at risk of staying spinster. Therefore, fear factor plays a major part in inducing parents to marry off their daughters as soon as possible (Chowdhury, 2012). The practice of dowry often cancels women's claim in natal property since dowry payment paid in full is used as an excuse to deprive her of her rightful inheritance.

Nevertheless, the practice of dowry is almost like an accepted norm in the Bangladeshi society and has become a significant customary practice among Muslims even though it is not supported either by religious or state laws. However, if any dowry payment made by the bride's family were to be considered as contribution to the marital household of the bride, then her claim to marital property would become substantially stronger whereas, in reality the practice of dowry makes the groom richer and cheats woman from her right to inheritance.

The dowry payment is almost always paid to the groom and his family, is usually greater than dower (mahr) and the woman gets no share in it. Because there is no concept of community property in Bangladesh, woman is left with almost nothing in case of dissolution of marriage. Hypothetically, the transmission of any material goods and wealth in connection with marriage should be considered as marital property and is within the scope of division in divorce. With the decade

long practice of dowry in Bangladesh, which continues to rise and evolve, the application of joint marital property regime has become crucial more than ever.

In an ideal scenario, dowry payment would be considered as part of woman's financial contribution made to the marital household while her unpaid labour in managing the household and caregiving would be considered as non-financial contributions made by her to the marital household. Subsequently, both financial and non-financial factors would contribute to determine woman's right share in the marital home. Furthermore, the rise and practice of dowry over the last few decades is a clear indication of absorbing nature of customary rule within the Bangladeshi Muslim society, and thus the prospect of gradual introduction of community property as a custom may seem far-fetched but not impossible.

### **Interfaith Marriage**

In Islam, marriage is considered a sacred covenant which is essential to realizing the essence of Islam. All the major schools of Islamic jurisprudence share the same basic conception of the marital relationship which includes the rules for interpretations of interfaith marriage. The classical Islamic tradition holds that a Muslim man can marry a woman of the book (kitabi), meaning a woman who is Muslim, Christian or Jew. A marriage contracted between a Muslim man and non-Muslim woman of book is fully valid. However, a Muslim woman cannot contract a valid marriage with a non-Muslim man, even a kitabi, unless he becomes Muslim. This is evident from the following Qur'anic verses which are narrated in relation to interpretation of interfaith marriage.

Qu'ran 2:221 provides:

*“And do not marry polytheistic women until they believe. And a believing slave woman is better than a polytheist, even though she might please you. And do not marry polytheistic men [to your women] until they believe. And a believing slave is better than a polytheist, even though he might please you.”*

Qu’ran 5:5 provides:

*“And [lawful in marriage are] chaste women from among the believers and chaste women from among those who were given the Scripture before you, when you have given them their due compensation, desiring chastity, not unlawful sexual intercourse or taking [secret] lovers”*

Qu’ran (60:10) provides:

*“O you who have believed, when the believing women come to you as emigrants, examine them. Allah is most knowing as to their faith. And if you know them to be believers, then do not return them to the disbelievers; they are not lawful [wives] for them, nor are they lawful [husbands] for them. But give the disbelievers what they have spent. And there is no blame upon you if you marry them when you have given them their due compensation. And hold not to marriage bonds with disbelieving women but ask for what you have spent and let them ask for what they have spent. That is the judgement of Allah; He judges between you. And Allah is Knowing and Wise.”*

From the above passages Islamic instance on interfaith marriage holds that a Muslim man may not marry non-kitabi woman or non-believer but marriage with a woman of book is valid. This is because Islam recognizes two classes of unbelievers. While people of the Book are not followers of the true faith of Islam, they follow recognized prophets of Islam: Abraham and Jesus. Muslims believe that Christians and Jews have strayed from the pristine teaching of Islam but

nevertheless they follow some of the teachings of Islam. While Islam takes a tolerant position with People of the Book, it does no such thing with the second class of unbelievers: atheists, idolaters, and polytheists who are destined to be the “inmate of fire” (Leeman, 2014). However, such marriage does not become void but irregular and once she converts to Islam, the marriage becomes regular or valid from the time of her conversion (Hossain, 2003). Moreover, the above-mentioned passages are traditionally interpreted as a general prohibition on marriage outside Islam for Muslim women. Although the above-mentioned Qur’anic verses do not provide a clear prohibition against marrying people of the Book, traditional scholars have reasoned that since men are required to be given explicit permission to marry a non-Muslim, women are required to be given similar explicit permission too and as they were not given such permission then they must be barred from marrying a non-Muslim (Leeman, 2014).

Many also argue that Islam rules that a non-Muslim may never exercise authority over a Muslim under verse 4:141 of the Quran and since men are given authority over their wives under verse 4:34, a non-muslim man may never marry a Muslim woman even if he belongs to the Book (Leeman, 2014). However, it should be noted that marriage with a kitabi man is not prima facie void, but irregular until he converts to Islam. Irregular marriage is a legitimate contract where wife can claim her dower under existing law but does not create any mutual rights of inheritance (Hassan, 2018). Even though Muslim men are allowed to marry non-Muslim women of the Book, it is advised that marriage to a Christian or Jewish woman should proceed with caution. Some Muslim clerics have instructed that the couple must agree ahead of time that they will raise their children as Muslims, and that the wife will face restrictions on the practice of her faith whereas others have

discouraged interfaith union altogether, citing differences in cultural values and family background (Leeman, 2014).

Like most secular societies, interfaith marriage or mixed marriage exists in Bangladeshi society and even though majority population are Muslims they live in close proximity with other minorities like Hindus, Christians, Buddhists, and other ethnic groups. In the context of Bangladeshi society, the practice of interfaith marriage has been gradually increasing due to mixed cultural attachments and as an outcome of love marriage. The right to marry in mixed religion is protected by the constitution. Although the Constitution of Bangladesh holds that Islam is the religion of the state, it also protects equal status and equal right for citizens to practice their religions as they choose under article 2A, secularism under article 12 and freedom of religion, elimination of communalism, abuse of religion for political aggression, discrimination, and harassment against persons for practicing particular religion under article 28.

Furthermore, Marriages between people from different religions are recognized under the Special Marriages Act of 1872 which was enacted during the British colonial era especially in the interest of inter-caste and inter-religion couples of the undivided India. The general consensus among Bangladeshi societies stays that a non-Muslim is required to convert to Islam if he/she wishes to marry a Muslim and then the pair can be wed under the Muslim Marriages Act. The Special Marriages Act comes in action when the non-Muslim party in marriage declines to convert to Islam. Interfaith marriages are registered before the Metropolitan Magistrate after the interfaith couple declare that they are not follower of any particular religious domination and therefore, they wish to marry before the Metropolitan Magistrate. The Magistrate then solemnizes the marriage and registers it on a standardized Registration Form (Kamruzzaman, 2016). By

enabling mixed marriage between any two individuals Marriage, Bangladeshi marriage system diverges from the traditional Islamic law which dictates that no Muslim woman can validly marry a non-Muslim man, albeit from the Book.

While the Special Act of 1872 has been in force since the British colonial era, it fails to identify the glitches related to interfaith marriage between a Muslim and a non-Muslim such as maintenance, divorce, custody, religious identity, adoption, guardianship, and succession rights (Hassan, 2018). In addition, couples in interfaith marriages find it difficult to gather social, religious, and legal recognition. The initial resistance to interfaith marriage starts within the family. In Bangladesh, marriage is seen as a union of two families rather than just two people. Therefore, it is especially important to share the same religion and similar family values, traditions, and background. When the family accepts a marriage, the community will too. Such resistance is much more likely to be encountered in rural areas than in cities and towns, where mixed marriages are more frequent. Interfaith couple with low socioeconomic status is more prone to persecution from their families and peers. This is because harassment of mixed marriage couples of usually depends on their respective social class and economic status and it is unlikely that couples of the elite class, upper-middle classes, and the intellectual community of the middle-class would face problems of harassment by the general population (Kamruzzaman, 2016).

Over the years, the concept of love marriage has seen a considerable hike and has been widely accepted, even encouraged in rare cases, by families within Bangladeshi societies. However, inter-religion marriages face the most extensive form of scrutiny as it is least acceptable form of marriage as interfaith marriage are often regarded as imperfect or irregular marriage destructs conjugal life as well as the future of their offspring and family members. The practice of interfaith

marriage is deemed to be one of the most sensitive and complicated issue among the Muslim communities of Bangladesh. It is often seen to be offensive to society, community, and relatives because of its anti-religious and troublesome understandings. Yet, the practice of interfaith marriage in Muslim community of Bangladesh can be traced back to Mughals' era of the Indian Peninsula when interfaith marriage was considered as a notion of old traditional practices in the society rather than a religious phenomenon (Hassan, 2018).

Since Bangladesh has inherited various socio-religious cultures from long-standing tradition, it can be, thus, perceived that mixed marriage is kind of an old marriage practice in Bangladesh which have gradually mainstreamed in the society. Although interfaith marriage may look like a challenging undertaking in Bangladesh because of the existing social and religious taboos, its practices have rapidly changed the present social norms due to worldwide correspondence and multi-cultural conduct. Now almost every Bangladeshi citizen knows at least one interfaith couple found in the neighbourhood, among friends, relatives, or acquaintances. In many cases Muslim women residing in urban setting are also seen to have taken non-Muslim husbands without much fuss and eye roll from the community. Of course, it all depends on her socio-economic background and geographical setting. Nevertheless, the practice and gradual acceptance of interfaith marriages is a clear indication that Bangladeshi society is admirably adapted for changes whether as a matter of globalization or welfare of the local community. Thus, the transition from separate property regime to community property regime in Bangladesh can be perceived as a widely accepted notion to safeguard the rights of Muslim married women whether given in tradition Islamic marriage or interfaith marriage.

## Polygamy

The practice of polygamy has been in play since pre-Islamic era, and it emerged as a result of a traditional practice rather than a religious one. The system of polygyny and polyandry has existed in various societies depending on their social and cultural conditions. It usually is a result imbalanced sex ratio in the demographic context. For Instance, polygamy was acceptable in some European, Asian, and Latin American countries acceptable temporarily after World War II due to the high death rate of young males during wartime. Similarly, polyandry was practiced in Toda tribe of India since the ratio of men outnumbered the ratio of women of the tribe as result of high rate of female infanticide

Polygamy in Islam is a very contentious issue and is a demonstration of how patriarchal interpretation can prevail and dominate. The practice of polygyny is permissible where a Muslim man can have four wives at the same time. On the other hand, the practice of polyandry is prohibited, and women are only allowed to marry again if they are widowed or divorced. The provision for polygamy is explicitly mentioned in the Qur'an.

Qu'ran 4:3 states:

*“And if you fear that you will not deal justly with the orphan girls, then marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only] one or those your right hand possesses. That is more suitable that you may not incline [to injustice]”*

The above-mentioned verse has been interpreted by Islamic fundamentalist to justify the practice of polygyny in Islam. In addition, to support their position these fundamentalist also cite a hadith (saying of Prophet Muhammad) stating “Be married. The most blessed in Islam are those who have many wives” which is

then supported by Quranic verse “And whatever the Messenger has given you - take; and what he has forbidden you - refrain from” (Quran 59:7). The crystallization of Quranic and hadith teaching also allow some clerics to improperly declare that the more wives a Muslim man had, the more rewards he is entitled to by the Almighty (Rohman, 2013). However, even a casual reading of the same verse would reveal that it does not encourage polygamy or deem it an absolute right of men, but rather it permits polygamy only in specific circumstances. Moreover, polygamy is conditional on the capacity to deal justly with the co-wives and if he is unable to be fair to his wives and treat them equally, then he may marry only one (Mashhour, 2005). Therefore, the question rises whether a Muslim man possesses the capacity to practice perfect justice as between women and the answer is also present in Quranic verse 129 of Sura Nisa.

Quran 4:129 provides:

*“And you will never be able to be equal [in feeling] between wives, even if you should strive [to do so]. So do not incline completely [toward one] and leave another hanging.”*

It is clear from this verse that no ordinary man possesses the ability to practice just dealing of a perfect nature and thus, monogamy should be practiced as general rule of matrimonial behaviour. Moreover, it should be pointed out that permission for a man to marry up to four wives was actually introduced as a limitation since in pre-Islamic polygyny was unrestricted, and therefore, should be regarded as reform to raise women's status.

However, those who are in favour of polygyny often justify the practice by providing that women often outnumber men in a community which can be a result

following a war as witnessed in Battle of Uhud or simply because women have a greater life expectancy than men. Since women are, in general, dependable on men and Islam prohibits women seeking refuge and protection from any man other than her husband and mahram, it is acceptable for men to have multiple wives up to four. Furthermore, since Islam discourages female infanticide or celibacy, polygyny practice seems to be the only alternative to meet the needs of women for protection and care (Mashhour, 2005). Another justification for polygamy is that if a woman cannot procreate, due to infertility or age, marrying a second woman would enable the man to have legal (male) heirs. Otherwise, the man might be forced to divorce the woman in exchange for a fertile wife. Polygyny allows for procreation and protection of the first wife who would arguably not be abandoned. Similarly, if a wife is diseased or disabled and is unable to reproduce or to care for the existing children then marrying a second wife will help care for the needs of the husband and children as well as attend to the ailing wife (Mashhour, 2005). Other sympathizers of polygyny practice argue that polygyny can prevent men from committing zina (adultery) since men have a “greater appetite” for sex and the practice of polygyny will prevent from getting involved in extramarital affairs and seek sex from prostitutes (Rohman, 2013).

In reality the practice of polygyny is not as simple as sounds since it is almost always a negative and oppressive experience for women. From Qur’anic verse 129 of Sura Nisa, it is apparent that men are not capable of treating multiple wives equally which results in grave injustice and oppression towards women. Polygyny often causes severe depression for Muslim women frequently resulting in isolation it causes a sense of emotional abandonment and inadequacy among them. It is even more critical for the women who are able to reproduce and have attended to every need of their husbands. Furthermore, wives are often jealous

of one another in regard to their husband's love and attention for themselves and their children which often erupt into perpetual conflict. Polygyny may only work in the context where a woman only requires sustenance as a man might be able to manage the sexual desires of multiple women but not their emotional needs.

In context of Bangladesh, Polygamy is although an uncommon concept but not rare one. About 10% of men practice polygamy marriages and polygamy is legalized by the Government with few restrictions. In Bangladesh, a Muslim man is permitted to marry up to four wives at the same time subject to the permission of his existing wives under Muslim Family Laws Ordinance, 1961. According to section 6(1) of the Act men are prohibited from contracting another marriage during the subsistence of an existing marriage without the permission of the arbitration council. An application for permission must be submitted to the council stating the reasons for the proposed marriage and with the consent of the existing wife or wives and if the arbitration council is satisfied that the proposed marriage is necessary and just then he will be granted the permission to take another wife<sup>16</sup>. However, this law fails to illustrate as to what may render as necessary and just grounds in relation to polygamous marriage. The council may take into consideration several circumstances such as sterility, physical infirmity, unfitness and unwillingness for conjugal relations, and insanity on the part of an existing wife before determining the justification of the proposed marriage in reference to court's ruling on *Makbul Ali & Others v Munwara Begum*. Therefore, subsequent marriages are no longer a matter of right but of permission and discretion, and the Arbitration Council has a wide discretionary power to rule under what circumstances polygamy should deem necessary and just, and therefore making

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<sup>16</sup> *Muslim Family Laws Ordinance ( Ordinance NO. VIII OF 1961 )*. 6.

this provision prone to exploitation and the Councils are often found to allow the subsequent marriage based on insignificant excuse (Biswas, 2007).

Moreover, a study conducted on 40 women in polygamous marriage by Human Rights Watch (2012) found that none of the consented to polygamy or faced an arbitration council review and in all cases, it had an adverse impact on women and their rights. Polygamy practice in Bangladesh most often result in abandonment of the first wife causing loss of housing and economic support (Human Rights watch, 2012). Due to their near non-existent socio-economic status, Muslim women in Bangladesh are not in a position to be pitted against the remarriage of their husbands in a system with no provision for marital property and alimony for the divorced women (Hashmi, 2000). Women in polygamy marriages are usual victims of domestic violence when voiced against remarriage of their husband.

The presence of polygyny marriage in Muslim society has been a topic of ridicule in the west and women's rights in Islam, in general, continue face numerous challenges when compared to increasing rights obtained by women in modern western societies. On grounds of its irregular and oppressing nature towards women, the practice of polygyny in Bangladesh has seen a sharp decline over the years. The Bangladeshi society is constantly evolving to cater to the progressive change in the society. The system of polygamy has been condemned as an 'outdated' practice by the City Corporation Mayor of Rajshahi, Mijanur Rahman Minu and imposed taxes on polygamists to discourage the practice (Costa, 2006). The plodding instillation of modernity into the religious influenced customs of Bangladeshi Muslim society has concluded in abandonment of several Islamic laws which are reckoned to be inapplicable in today's social and cultural setting and polygamy practice being one of them. The practice of

polygamy has been witnessed to have negative impact in all of Bangladeshi societies and it is now perceived as an offensive practice, unless deemed absolutely necessary. For example, a man with a dying wife and young children may marry another wife to provide him with emotional support and help in caring for the first wife and her children. Any man marrying a second wife without a valid reason, which is accepted by the society, risks of facing ostracism and being regarded as dishonourable by the society.

Any deviation from classical interpretation of Sharia law in regard to women's status within Bangladeshi Muslim community is a result of flexible interpretation of Sharia Law and progressive customary practice among them. The Muslim community often favours these improvements on the ground that enhanced status of women introduced by Islam in the seventh century, in comparison to pre-Islamic times as well among women from western society until early 19<sup>th</sup> century, indicates emancipation (tahrir) of women and women's rights introduced in the seventh century should not be the only rights they possess in today's reality. Therefore, Islam allows greater flexibility to Sharia Law interpretation in light of history and modern developments. On such reading it would not be wrong to assume that the chances of joint marital property regime being accepted by the Bangladeshi Muslim community is quite high and the development of community property regime is more vital now than ever in order to shield the marital rights of Muslim women in interfaith and polygamous marriage, and against the repressive practice of dowry.

## 5.2 Divorce Reality

In Islam, marriage serves as a means to emotional and sexual gratification, to procreate children and live together in peace and tranquillity to the commandments of Allah. Islam encourages reconciliation between spouses when a dispute arises rather than dissolution of their marriage. Moreover, divorce was denounced by the Prophet, who said "Of all the things that Islam has permitted, divorce is the most hated by Allah" (Mashhour, 2005). Even the major four schools of Islamic jurisprudence are in agreement over disapproval of divorce unless it becomes absolutely essential; any chance of reconciliation becomes non-existent, or unless the continuity of marriage would pose danger on either husband or wife (Mashhour, 2005). Nevertheless, Islam also recognises that sometimes situations may occur where conjugal relationship between the spouses become insufferable and resolution is not possible and termination of the marriage through divorce is the only viable choice. Islamic teaching also dictates that when divorce becomes necessary, it should be conducted with consideration, dignity, and kindness. Divorce existed before Islam, but the advent of Islam made the divorce process much more favourable to women. While Sharia law recognizes talaq being man's right to conduct divorce unilaterally, it also recognizes woman's right to terminate marriage through mubarat and khula divorce.

### **Talaq**

In Islamic context divorce is usually referred to as talaq which means 'repudiation' in literal sense. The term "talaq" comes from tallaqa which means to discharge a

human being from any obligation made binding upon him (Mashhour, 2005). The Sharia law recognizes Talaq as husband's unilateral right to divorce his wife by making a pronouncement that the marriage is dissolved. Talaq can be quoted as an absolute right of husband to divorce his wife without having or citing any reasons for such action. The pronouncement of talaq can be made even in the absence of, and without the involvement of, the wife in the process (Rehman, 2007). On the other hand, the right to pronounce talaq can also be delegated to the wife under the doctrine of Talaq Tafwid which enables women to divorce at will. The delegation can take place before or after contracting the marriage and, hence, can be included in the marriage contract. While talaq tafwid grants wife right to divorce at will, it does not, however, deprive the husband of his original right to exercise divorce. The concept of qiwama which considers male to be the provider of family plays a part in placing the right to divorce directly in the hands of the husband as he has financial responsibilities as a consequence of divorce meaning he has to pay all of wife's material rights ascended as consequence of the marriage contract.

In Islamic law, talaq can be categorized into two forms: talaq al Sunna, which is consistent with the Prophet's teachings, and talaq al bidaa, which is considered an innovation that does not follow the Prophet's teachings. Talaq al Sunna follows that in order for talaq to come in effect the husband must refrain himself from having any sexual relations with his wife during the iddah period, which is considered to be three months once he utters a single pronouncement of divorce. The period leaves room for reconciliation and reconsideration of the husband's decision to divorce and is revocable during the whole period of iddah. Once the iddah period passes, the divorce becomes irrevocable. Remarrying the same wife after the iddah period has passed would result in a new marriage contract and a

new dower (mahr). Furthermore, if the husband has divorced his wife three times, it is unlawful for him to remarry her for the fourth time unless she has married another man, consummated that marriage, and got divorced (Mashhour, 2005). Talaq al bidaa divorce, on the other hand, enables husband to pronounce the three formula, i.e., the three pronouncements of divorce: I divorce you, at once. The separation then takes effect definitively once the iddah requirement is fulfilled. It is innovated against Islamic arranged conditions for example when the woman is menstruating or going through her Nifas (postnatal bleeding) period. The talaq (three times) repudiation during the period of iddah known as talaq al bidaa is not supported in the Quran and Sunna. Furthermore, it is against the whole philosophy behind the iddah period because it ruins any chance for reconciliation (Mashhour, 2005). Yet under Sharia law, it is a valid practice.

### **Khula**

A Khul or Khula Muslim woman's right to buy divorce in exchange of part or entirely of her dower and can be obtained with or without the consent of the husband. The permission of khul is deduced directly from the Quran.

Quran 2:229 provides:

*"Divorce is twice. Then, either keep [her] in an acceptable manner or release [her] with good treatment. And it is not lawful for you to take anything of what you have given them unless both fear that they will not be able to keep [within] the limits of Allah. But if you fear that they will not keep [within] the limits of Allah, then there is no blame upon either of them concerning that by which she ransoms herself."*

Quran 4:128 provide:

*“And if a woman fears from her husband contempt or evasion, there is no sin upon them if they make terms of settlement between them - and settlement is best. And present in [human] souls is stinginess.”*

All classical jurists agree on the legality of khul. The Maliki jurists define khul as a divorce obtained in exchange of something else while the Hanafi jurists considers khul as the dissolution of a conjugal relationship by consent which is attained either through the utterance of the term khul or of something with similar meaning. The Sahafi jurists define the separation with something given in return" through the pronouncement of the word of khul or divorce in return (Mashhour, 2005). A khul divorce can also be obtained either through mutual consent or order of the Qadi (judge) at the behest of the wife which is known as faskh (annulment or abrogation). While all the Islamic schools recognize the legitimacy of Khul divorce, they are significantly diverse over the grounds upon which a wife could claim annulment of the marriage. The Hanafi school, being the narrowest school of all, allows Khula divorce only where the marriage cannot be consummated resulting from husband's impotence or a husband's desertion or where the wife can exercise the 'option of puberty' (Rehman, 2007) and a wife is unable to divorce even in cases of maltreatment, cruelty, or the husband's inability to support her (Carroll, 1996). Alternatively, the Maliki School, being the most liberal school of all, grants Khula divorce on the basis of cruelty, refusal, or inability to provide maintenance, desertion by the husband or disease or ailment of the husband. Furthermore, marriages in Islam are regarded as a contract which can include any condition that the couple approves, and any breach of any of such condition can be a basis for divorce. One of the most common clauses observed in marriage contracts is that the first wife will be automatically divorced if the husband takes another wife. Other common provisions also include woman's

right to divorce at her will, divorce through mutual consent only, and the prohibition of polygyny practice. However, only Hanabali School out of all schools endorses the condition in a marriage contract which prohibits polygamy.

In regard to observing Iddah in Khul divorce, the rule remains same as in case of talaq. The couple must refrain from sexual relations during the iddah period which is usually considered to be three months and divorce becomes irrevocable at the end of the iddah period. In Khula divorce husband cannot get back with his wife and reconcile the marriage but the right to reconcile is granted to the wife. She can return to the ransom she has paid to her husband in Iddah period which in turn grants husband the right to return to his wife. Furthermore, khula divorce diminishes rights to inheritance between the spouses since they are no longer a couple as consequence of khul. However, if the husband revokes after returning to ransom in Iddah period then they will be deemed as husband and wife, and inheritance between them will be established (Borna and Hamedani, 2012).

### **Mubarat**

Mubarat divorce is based on mutual dislike of the spouses in which case the wife seeks the divorce in exchange for compensation to the husband which does not exceed the value of her marriage portion. Therefore, mubarat differentiate from khula in the sense that the pronouncement of the divorce should be reciprocated with mutual dislike between the spouses whereas in Khula divorce is the only wife who is in abomination. Other than that, the works of both Khula divorce and Mubarat are identical and have no significant difference. To summerize “the difference between a revocable divorce and Mubarat divorce and disarmament is in a revocable divorce the husband should munificence and give a dowry, but

in Khula and Mubarat divorce, dowry is the first alternative is also considering sharing these divorces is to have disdain” (Mirshahzadeh and Karimi, 2016, p.236).

### **Divorce norms applicable to Muslim women of Bangladesh**

While the Muslim community of Bangladesh share some common values, beliefs, and codes of ethics with other Muslim communities in the world, the socioeconomic, political, and cultural realities of Bangladesh vary considerably from those other Muslim communities. The socioeconomic, political, and cultural variations exist in all Muslim societies and have given rise to different interpretations and different practices of Islamic teachings. Like all other Muslim communities in the world, oppression of women's rights in Bangladesh is made in the name of Islam, and thus women are treated inferior to men. Almost all Muslim communities claim that certain discriminatory practices are consistent with Sharia law and that the Personal Law of these respective communities are based on Sharia Law. Most Muslim societies seek justifications by applying conservative and literal interpretations of various Quranic texts or by extracting certain passages out of their contexts. Such practice allows Muslim societies to provide with a sacred reasoning for any existing discrimination or inequality or that could be stipulated in the future and Bangladeshi Muslim community is a devotee of this practice. The existing gender inequalities in Bangladesh are rather a consequence of traditional and patriarchal practice which is aimed to dominate women and to find any pretext to suppress than an Islamic ruling.

Divorce is not only a social stigma in Bangladeshi Muslim society but access to divorce is a gender-biased provision. Abolishing the traditional concept of triple

talaq, Muslim Family Laws Ordinance 1961 requires formal written notice for the recognition of talaq divorces in Bangladesh. When a man decides to divorce his wife, he must notify the chairman of local administrative unit of his intention in a written form and send a copy of the notice to the wife. The divorce becomes irrevocable after 90 days from the issuance of the notice to the chairman and failure to notify the chairman renders the divorce ineffective. The Chairman on receipt of the notice would constitute an Arbitration Council to assess if reconciliation is possible between the couple and if the council concludes that reconciliation is impossible then the divorce becomes effective. Under this ordinance Muslim women can file for divorce without giving up her rights and consent of the husband if the provision for talaq-i-tafwid (delegation of divorce authority to the wife) is mentioned in the nikkah contract (Kashyap, 2012). Talaq-i-tawfeez enables a husband to delegate his power to divorce to his wife with or without any condition and breach of any stipulated condition would allow the wife to seek divorce even without the consent of the husband. Furthermore, under the Dissolution of Muslim Marriage Act 1939 Muslim women have the right to obtain judicial divorce on any ground recognized by Islam such as maltreatment, desertion, impotency and so on<sup>17</sup>. However, if the wife refuses herself to her husband without any valid reason and/or abandons her husband or refuses to perform her marital duties then she loses her right to maintenance and risks her right to divorce being denied.

Although rules regulating divorce exist in the Bangladeshi legal system, the patriarchal understanding of divorce-related issues prevails and dominates the Bangladeshi Muslim society. Polygyny and gender-biased divorce are practiced despite the presence of these laws. Lack of local administrative support at

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<sup>17</sup> *The Dissolution of Muslim Marriages Act (ACT NO. VIII OF 1939)*. 2.

divorce, among other factors, contributes to women's lack of awareness about the legal procedure of divorce and divorce related issues such as polygamy without consent, unpaid maintenance and illegitimacy of verbal divorce, and thus helps the aspirants practice the divorce culture in Bangladesh (Rahman, Giedraitis and Akhtar, 2013). The discriminatory divorce practice in Bangladesh, in addition to social stigmas attached to divorce, often engages women in abusive marriage rather than protecting them or pushes many of them into poverty in case of marriage dissolutions. Furthermore, if a woman decides to go through a divorce to end her distressing marriage, she has to face the depressive consequence of changes in her lifestyle as a result of transition of divorce. A divorced woman in Bangladeshi Muslim community is more likely to encounter a number of social exclusion and stigmas ranging from financial instability to lack of support during the time of her divorce and if or when she decides to remarry (Bhuiya, Chowdhury, Momen and Khatun, 2005). She also risks of being subject to raising children alone, harassment in both private and professional sphere, marital difficulties if she remarried, recession changes in lifestyle in the face of social expectations, and psychological and physiological disturbance in post-divorce situations (Parvez 2011).

Although the Muslim Marriages and Divorces (Registration) Act 1974 requires compulsory registration of all Muslim marriages and divorce and Local Arbitration councils are designed to mitigate divorce procedures and other family disputes without any biases, but in reality, the scenario is far from the theory as the marriages and divorces often remain unregistered and patriarchal values echo among local arbitrators when dealing with divorce. While the local Arbitration council have no legal authority to convict anyone as per Village Courts Ordinance of 1976 and the Conciliation of Disputes (Municipal Areas) Ordinance of 1979, it

is often witnessed that these council in village have tried, convicted, and sentenced people, mostly women, for alleged criminal offences (Amnesty International, 1993). Such reality results in grievous injustice, even death, to those women as evident from the case of Nurjahan (Amnesty International, 1993).

Nurjahan, aged 21, was sentenced to death by public stoning for allegedly committing adultery. In reality she was remarried by her parents after her first marriage had dissolved. However, the local arbitration council held that while her divorce from her first husband was legal, her second marriage was illegal under Shar'a law without giving any ground for their ruling and consummation of her second marriage rendered her guilty for adultery. Both Nurjaham and her second husband were sentenced to public stoning and while the husband survived the stoning, she did not. Moreover, both Nurjahan's parents were sentenced to 50 lashes each for conducting un-Islamic marriage for their daughter (The World Bank, 2008). Although reports conflict on whether Nurjahan's death was a consequence of stoning or suicide due to shame she felt after the incident, but the truth remains that she died as consequence of the failed administration system that adheres to patriarchal values and discriminatory practices against women.

In the current reality, Bangladeshi Muslim women refrain from seeking divorce in fear of financial uncertainty and social stigma that comes with it. Where a woman may be able to ignore the social stigmas of divorce, the concerns of financial insecurity and raising children without support ceases her from obtaining a divorce and vice versa, even it meant for her to endure misery, domestic violence, and mental abuse. However, the prevalence of divorce has been increasing in Bangladesh, especially in the cities. Over the last seven years divorce rate has

increased by 34% and 70% of these divorces are initiated by women (Sourav, 2019). Educated and working women living in urban settings are emancipating themselves from suffering a period of psychological breakdown and deep emotional distress of bad marriages. It shows that a financially independent woman is more likely to seek divorce to unshackle herself from an abusive and toxic marriage where she can maintain her living condition without the fiscal support of her husband. However, the same cannot be said about rural women and women who are financially dependent on their husbands. The absence of the notion of marital property adds to woman's apprehension about her living condition if she were to even consider divorce and often toss the idea. Furthermore, woman who is financially solvent to seek divorce also suggests that she must have made financial contributions in her marital household which have either directly or indirectly contributed to acquiring and improving marital assets and therefore, under fair assumption she should be entitled to her share of marital assets if the marriage dissolves. Wife contributes to her household either through financial support or labour or both and denying her rights to marital assets advocates that she made no contributions in the marriage which could not be any further from the truth.

In Bangladesh, the blend of Shari'a law and the practiced customs usually spare the women from claiming any land rights in both the cases of deceased husband and divorce/ separation. A widow usually gives up her rights due to the common social norms which include keeping peace with the in laws and/or children. During any divorce or separation, the customs usually prohibit the women from claiming any rights and let alone be the land rights. The husbands are at least required to provide for maintenance only during the period of Iddah (waiting) and even that is commonly disregarded in Bangladeshi Muslim society. The absence of joint

marital property regime denies women of their land rights in divorces which lead to grievous injustice to these women as women too have made contributions either by providing monetary supports or managing the household and caring for the family so that husband could earn without worrying about the household which has led to acquiring of marital asset. Considering all the factors discussed in this chapter it is safe to conclude that community property regime will not just ensure gender equality in marriage in Bangladesh but also improve Bangladeshi Muslim woman's financial and social position and contribute to her welfare in general and the advent of community property regime in Bangladeshi Muslim community is long overdue.

# **Chapter 6: Interjecting The Notion Of Community Property In The Society And Legal System Of Bangladesh**

Bangladesh has made great improvements towards gender equality in recent years and has maintained its topmost ranking among all the South Asian nations for assuring gender equality for seven straight years since 2014 according to the latest report from World Economic Forum (WEF) (Dhaka Tribune, 2021) . Yet all Bangladeshi societies are very traditional when it comes to marriage regardless of their geographical position or religious beliefs. Several revisions have been adopted in the context of Bangladeshi society and culture through social development process. However, the concept of marriage and marital dynamics have not changed much as old patterns persists widely albeit revised process of family formation and mating. Matrimony, after all, is a family decision which is taken by the elders of the family often with assistance from distant relatives and professional matchmakers or marriage brokers and since most marriages in Bangladeshi Muslim society are arranged, the interests of the families prevail over the interests of the couples themselves (Ahmed, 1986) .

Consent and Mahr are the two most requisite elements for Islamic marriages in the most traditional sense but most Bangladeshi Muslim women usually do not have a say in the matter. The Mahr is usually decided by the elders which they see as fit and as far as a 'consent' is concerned, it is not usually never free of influences of parents. One of the main reasons for such influence occurs as a matter of early social interaction which makes children psychologically,

emotionally, socially, and financially dependent on their parents. Another factor is the restricted social interactions between both sexes including widely accepted segregated nature of education system whereby girls and boys are sent to separate schools; thus, restricting social interactions between girls and boys from an early age and minimizing the chance of finding suitable partners for themselves. Furthermore, Bangladeshi parents often prefer marrying off their children at an early age in order to maintain authority over their children. Therefore, arranged marriage remains the most accepted method of mating process in the Bangladeshi society.

The dominance of religious laws and social norms regarding marriage is apparent in almost all marriages in Bangladesh. Almost all marriages within Muslim community of Bangladesh, with the rare exception of interfaith civil marriages performed under Special Marriage Act 1872, are identical and conducted following the “Islamic” norms and age-old customs. These inherent traditions, which portray women as the inferior gender and financial burden, are also the main culprit behind the incessant practice of child marriage in Bangladesh, a hub to 38 million child brides. Bangladesh has the highest rate of child marriage in South Asia and ranks among the top ten (at eighth position) countries in the world with the highest levels of prevalence of child marriage with 51% of the young women married off before attaining the state legal age of 18 (UNICEF Bangladesh, 2020) . The state’s failure to protect its women from these destructive and repressive marriage norms can be easily deemed to be political manoeuvres to gain mass support in elections. Child marriage is not only a common phenomenon in Bangladeshi society, but it can also not be held void or illegal because the Islamic laws endorse child marriage regardless of the facts that these laws were enacted at a time when people rarely lived past the age of

40, that child rights are human rights, and that Bangladesh is a party to the CRC 1989. The poorly enforced law and maximum one month prison sentence and/or a fine of up to Tk. 1000 (£8.50) hardly acts as a deterrent (Girls Not Brides, 2017)

Bangladesh remains an under developing country where women are regarded as the inferior gender in both society and the family. Thus, women remain dependent on male authoritative figures such fathers, husbands, brothers, and sons, which is a direct result of the existing patriarchal values and culture which are often influenced by religious beliefs. Women are regarded as vulnerable to physical and social risks, and it is believed that women can achieve absolute security only through marriage (Chowdhury, 2012) . Therefore, child marriage and staying in an abusive marriage are often preferred over staying unmarried or being divorced to avoid unwarranted scrutiny over women's chastity and related social stigma. The dowry culture in Bangladesh is born as a result of such repugnant mentality which the increases Muslim women's vulnerability by depicting them as liabilities for their families while using dowry payments as the justification to deny them of their inherited property rights, stipulated under Islamic law. However, the dowry is paid to the groom and his family, and women do not benefit from these payments other than being treated decently and may be with some dignity in their marital homes. Moreover, dispute over dowry payments is one of the major causes behind domestic violence against women in Bangladesh, which often results in serious injuries and even death. Geirbo and Imam (2006) duly find the motivation behind dowry practice in Bangladesh pointing out that father of the bride gives in to the dowry demands to secure a happy married life for the daughter. The expectation is that the woman will be provided for her necessities and treated well, with love and respect in her in law's house if she brings a handsome amount in dowry payments and in full. However, if the dowry is not

paid as agreed, the woman remains in danger of being abused in the hands of the husband and her in laws.

The patriarchal teachings in Bangladeshi society depict that any work which does not bring in monetary remuneration is typically not regarded as real work and thus, fails to recognize the unpaid labour of women in the family sphere especially when most women in Bangladesh are homemakers. A homemaker's non-monetary contributions in the household are simply overlooked and are regarded as wifely duties and not as real contributions. According to the UNDP Human Development Report 1995 women spend more hours in unpaid work and fewer hours in paid work compared to men revealing women spend that one-third of their working time in paid jobs and two-thirds in unpaid housework (Chowdhury, 2009). Yet, homemakers are perceived as just housewives with no actual profession and living off their husbands.

Interestingly, a married woman's unpaid labour can easily be divided in to three main categories namely housework, mother-work, and wife-work (Chowdhury, 2009). Housework includes managing all variety of household chores ranging from, but not limited to, cooking, cleaning, doing laundry, caring for the in-laws and so on and so forth. Mother-work consists of the childbearing and child-raising activities such as feeding, clothing, nurturing, instilling moral values and integrity. Finally, wife-work is the job that requires attending to the husband's emotional and sexual needs, supporting him for better or worse, and continuing his legacy through giving birth to his offspring (Chowdhury, 2009). In short, the job of a Bangladeshi homemaker requires her to prioritize everyone's interests before her own, and to work long hours without any remuneration and recognition. That is truly appalling. A man is able to work hard and receive promotion in a paid job because his wife maintains the household and perform duties on his behalf. The

failure to recognize women's contributions through unpaid labour and service to the household and the society as a whole only strengthen patriarchy by enabling husband to appropriate wife's unpaid labour without any repercussions. The implications of such dismissive treatment of women are far worse than it seems. The children raised in such households where women are treated as subordinate to men and their contributions are disparaged are likely to grow up accepting this neglect as normal. As a result, they fall victim to such discrimination themselves, or becoming the oppressor and a vicious cycle of repression and disempowerment continues.

On the positive note, in recent times more women of Bangladeshi Muslim community are getting educated and joining paid employment as a result of rapid change in socio-economic status, urbanization, acceptance of the notion of nuclear family and positive attitude towards working women, although the main motive behind female education remains finding a better groom. In Bangladesh, Muslim women's access to education has improved significantly but the aim is to acquire the certificate rather than acquiring knowledge or having a successful career because the female education is only meant to improve social standing of their families and attract better marriage proposals. Nevertheless, more women are joining the labour force due to increased prices of essential commodities and gradual renunciation of previously reserved prejudice against working women (Chowdhury, 2012) . While women from upper class and upper middle class tend to seek high status job with prospects for future career growth, middle-class and lower middle-class are satisfied with good salaried and clerical jobs which can essentially pay for their living. Moreover, the growth of garments and textile sector in Bangladesh has open enormous job opportunity for women with little to no education from underprivileged background (Chowdhury, 2016). The universal

consensus is that women are more empowered when they are financially independent but sadly, because Bangladeshi married women are considered as their husband's property, their incomes are also regarded as their husband's property. In Bangladesh, married women's incomes are usually thought as just another source for their husbands to accumulate wealth to enhance their own standard of living. Thus, women's incomes are controlled and appropriated their husbands and husbands' families (Chowdhury, 2012). A study shows that only about 35% of female garment workers in Bangladesh had full discretion to spend their earnings however they wanted whereas 43% spent their incomes in joint decision with others while 23% had absolutely no control over their own earnings (Chowdhury, 2016).

Even the strictest interpretation of Shari'a law reveals that Muslim married woman's rights to Mahr (dower), maintenance and control all her wealth, including her savings and, property and gold ornament inherited from her paternal family, and earnings, whether through investments, property inheritance or as a result of paid employment, are absolute. Therefore, it is husband's obligation to provide his wife with accommodation, medical care, seasonal clothing, food, and other necessities even if the wife is richer than him and the wife is not required to spend a penny of her earnings and/or wealth for household maintenance unless she insists to do so on her own (Patoari, 2019) . However, in the patriarchal setting of Bangladesh, the norms of controlling and appropriation of wife's earnings and properties by her husband persist. Some husbands simply take their wives' earnings without any explanation while others apply a number of tactical schemes in order to devour and control their wives' salaries. For example, some withdraw and/or limit their financial support which would in turn, compel their wives to spend their incomes to pay for their basic necessities and household expenses.

Some would take out bank loans to buy properties in their own names and use their own income in instalments to repay the loans while wives' earnings are bound to be spent on family expenditures. Likewise, falsifying loan information to assume wife's incomes, using wife's incomes to invest in business and maintain his paternal family are quite common occurrences. In many cases, husbands often resort to threat of preventing their wives from continuing their jobs if they dare to refuse to provide a portion or whole of their incomes to their husband and/or in household budgets (Chowdhury, 2012).

Bangladeshi men now prefer working wives over dowry defined through classical interpretations. The intention, sadly, is not to empower women by making them financially independent but to inherit wives' income and subsequently, enhance their living standards. The practice of appropriating or controlling wives' income and properties is the emerging alternate and innovative form of dowry as Women's income is considered as sufficient reimbursement for renouncing dowry demands. The general consensus is that a well-paid job is supposed to emancipate any woman making her financially independent but in patriarchal Bangladeshi society, a paid job often imposes double burden on a married woman for juggling two jobs- maintaining household while taking up a paid employment- and receiving extraordinarily little to zero monetary remunerations.

It is, thus, an undeniable fact that married women from Bangladeshi Muslim society contribute equally as their husbands, or even more in some cases but never less, to maintain the households, to acquire properties, to improve the marital home conditions and to enhance the living standards for her husband, children, and in-laws. This is especially true in case of multi-generational households where married women do not only contribute to marital households

with their husbands but to households they share with their in-laws and essentially belonged to their fathers-in-law.

The contributions made by married woman come in various forms, ranging from easily disregarded and unpaid household and care giving labour, to direct financial aids made to her husband and household through dowry payments and handing her earnings and/or savings over to her husband to meet household expenditures. Yet in Bangladeshi Muslim society, husband typically owns and controls family assets- both moveable and immoveable and wife's contributions to the household are not recognized to confer any right to a share in marital assets during subsistence and dissolution of the marriage (Human Rights Watch, 2012). In Bangladesh, Muslim married woman's lack of share, ownership and control over marital assets is the common theme regardless how boundless their contributions to the marital household or the growth of husbands' careers or businesses are, and how much they sacrificed their own careers or earning capacity in order to focus primarily on the wellbeing of the family and maintaining the households.

Given the undeniable significance for Muslim married women's rights to marital property, this chapter explores possibilities through which the notion can be incorporated in Bangladesh and tries to do so without offending the sentiments of its Muslim community. Drawing parallels with the various methods of adoption of community property regime in other Muslim majority countries have been discussed in chapter 4, this chapter further explores all the appropriate approaches for launching joint property regime in the Muslim community of Bangladesh while acknowledging their diverse cultural background and social construction.

## 6.1 Secular Approach To Marital Property Rights

Founded on secular principles, Bangladesh is a nation that equally embodies commitments to both Islamic and customary principles. Bangladesh is a constitutionally secular nation in essence with Islam reserved as that state religion. The term “secular state” means that it is officially neutral in terms of religion, meaning secular states support neither religion nor irreligion and does not have an official religion (Usturali, 2015). However, the precise nature of the secular and the religious realm of life is subject to interpretation. While some states, such as Turkey and France, practice exclusionary form of secularism through absolute separation of religion and state, states like India and Bangladesh opt out for inclusive secularism. Those in favour of religious influence in public arena argue that religion promotes positive social values and an ethical approach to public discourse, and thus prohibiting the use of religious reasoning in the public domain is an autocratic and a dogmatic approach (Kettell, 2019). In contradiction, secularists assert that the separation of religion and state provides uniform set rules that ensures equal rights and freedoms to all citizens, including the freedom of religion, irrespective of their religion or belief and thus, secularism acts as a double agent that protects the state from religious influence and protects religion from the state interference (Kettell, 2019).

Islam, society, and politics are intimately interrelated and intertwined in the secular state of Bangladesh. The secular status itself is not absolute secularism as apparent from the constitutional removal and reinstate of the provision for secularism even -though the country was founded on four pillars of fundamental

principle- nationalism, socialism, democracy, and secularism<sup>18</sup>. Secularization is a process of replacing religious influence with worldly influence in society (Jacobson, 1992). Initially, the secular ideology was introduced by the governing party, Awami League, following the independence of Bangladesh in 1972 to prevent any uprising of religion-based politics and religious symbols in state activities similar like Turkey. However, after receiving mass backlash by interpreting non-use of religious symbols as an anti-Muslim ideology and, thus, with a shift in tone secularism was defined as equal status of all religions in the public domain (Chowdhury, 2012). The subsequent government formed by Bangladesh Nationalist Party (BNP) in 1975, replaced 'secularism' with 'absolute trust and faith in the Almighty Allah and the phrase "Bismillah-Ar-Rahman-Ar-Rahim" (In the name of Allah, the Beneficent the Merciful) was added at the beginning of the Constitution through Fifth Amendment and the ban on religion-based political parties was lifted (Rahman, 2020) . Later, in 2011, secularism status was restored as a fundamental principle of the state policy and Islam was declared as the state religion through 15th amendment to the constitution (Rahman, 2020). Essentially moulding the secular model into Islamic secularism through enactment of Article 2A of the Constitution, which incorporates Islam as the state religion of the Republic while ensuring "equal status and equal right in the practice of the Hindu, Buddhist, Christian and other religions"<sup>19</sup>, Despite harbouring separate set ideologies for governing the state, both major political parties employ Islamic values to secure mass support. Like Turkey, Bangladesh is a constitutionally secular state with majority of population being Muslim but unlike Turkey which governs under exclusive secular, the subsisting Islamic influence in politics in Bangladesh is inevitable and indisputable. Therefore, the

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<sup>18</sup> *The Constitution of the People's Republic of Bangladesh ( ACT NO. OF 1972)*. 8.

<sup>19</sup> *Ibid.* 2(A).

secular style for establishing community property regime that worked for Turkey will not necessarily work in Bangladesh.

The emergence of secularism as mainstream political ideology transpired in Western Europe during the enlightenment era due to gradual ascension of science, technology, and intellectual interchange, and developing tension between scientific finds and traditional value of Christian churches, which posed threat to the developmental process and advancement of society in whole. Thus, in the western society it is perceived that the religious doctrines do not have enough political and social resources and philosophies to run a state in the era of modern democracy and pluralism (Ziad Esa et al., 2014) . The notion of secularization in the west does not necessarily invalidate or displace religion altogether rather reserves religious notations to private lives of people leaving the state affairs free from religious influences and manipulation. While secularization is identified as a balanced ideology in the West which ensures peaceful practice of every religion, in Bangladesh “secularism” often translates to “anti-Islamic” and “impious.”

As Bangladesh is a constitutionally secular nation, at onset it may seem that the most feasible approach for introducing community property regime in the Muslim community is through enactment of a uniform set of marriage and divorce laws for all its citizens which will ensure equal marital property rights irrespective of their gender and religious beliefs. However, it is not that simple given the fact that the majority of Muslim women in Bangladesh, who are devoted to Islamic doctrines, are unlikely to accept the notion community property regime if it is promoted in a manner that contradicts with their core values. Numerous researchers, national and international women’s organization and local women rights activists have previously argued and continue to argue that Muslim

personal law on marriage and divorce is oppressive to women, and it needs substantive legal reform, and that the introduction of Uniform Family Code following a secular approach would solve the issue by guaranteeing equal rights and responsibilities between Muslim women and men in marital relationship (Chowdhury, 2012). While reform in the existing Muslim personal law is necessary to consider and remedy under the current reality of Muslim married women in Bangladesh, any reform in Muslim Family law through application of secular approach is simply not possible (Chowdhury, 2012). Effectiveness of the Muslim family law reform in Bangladesh will depend entirely on its acceptance by the entire Muslim citizens rather than the legislative body and Muslim community of Bangladesh will readily accept the reform if it is consistent with their religious beliefs and customary values and able to demonstrate an ongoing connection between the reform and past tradition (Chowdhury, 2012).

In order to ensure both incorporation and implementation of Muslim women's rights to marital property in Bangladesh, it is of highest significance to realize the attitude of majority of Muslim citizens and thus, provisions for community property regime through equality basis of secular approach will render ineffective. Similar sentiment echoed in the response of The Law Commission for rejecting the idea of a Uniform Family Code in 2005 presented jointly by UNESCO and Women for Women, Local women's rights organization. The commission (2005) states:

*“Muslim family law affairs covering marriage, divorce, maintenance, dower, guardianship, inheritance etc. are all included in the huge mass of Muslim law developed over a period of fifteen hundred years. To take up a position that these laws should be suitably changed so as to fit in with a Common Family Code of all faiths and denominations is not merely an intellectual decision, but basically a decision as to whether the Muslims of Bangladesh should give up Qur'an as a*

*revealed Book or not. has no hesitation to say that the Muslims of Bangladesh would rise in revolt as one man if they are asked to give up a basic tenet of their faith”* (The Law Commission, 2005, p.2).

The consequences of seeking Bangladeshi Muslim women’s right marital property through secular provisions of the Constitution can be dire and have an adverse outcome. Any drastic reform outside the Islamic and customary framework to avail Muslim women’s property rights in Bangladesh is likely give rise to further conservatism and get scrapped altogether. Comparable situation was observed in the Indian case of Mohammed Ahmad Khan vs. Shah Bano Begum (1985) whereby the presiding judge in the Supreme Court, granting Shah Bano’s plea under section 125 of the Code of Criminal Procedure 1973, upheld her right to receive alimony from her divorced husband after dissolution of their marriage of 46 years while asserting the importance of Uniform Civil Code for family law<sup>20</sup>. The landmark decision was, however, met with widespread criticism and protest from the Muslim community of India. Like Bangladesh, Secularism in India does not separate Religion and State exclusively, and while civil and criminal laws are statutory, personal laws derive from the religious scriptures. Accordingly, the Muslims in India are governed under The Muslim Personal Law (Shariat) Application Act 1937 for family matters related to marriage, divorce, inheritance, and guardianship. Therefore, the verdict of Shah Bano case was declared unacceptable and invalid by large sections of the Muslim community for its inconsistent and intolerable nature in relation to Islamic jurisprudences of divorce and maintenance. In response to the mounting resistance and criticism among substantial number of Muslims following the verdict, the Government

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<sup>20</sup> “Mohammad Ahmed Khan v. Shah Bano Begum” 1985 (1) SCALE 767; 1985 (3) SCR 844; 1985 (2) SCC 556; AIR 1985 SC 945, Available at: <https://indiankanoon.org/doc/823221/>

introduced the Muslim Women (Protection of Rights on Divorce) Bill in 1986, which unequivocally barred Muslim women from seeking remedy under Criminal Procedure Code that is readily available to all other citizens (Deb, 2004).

In pursuit of redefining the legal grounds for Muslim women's maintenance, the Act (1986) essentially imperil their religious rights in addition to their secular right through provisions included by skirting around the Qur'an, which protects women's property and maintenance rights and demanding the natal families to support their divorced or separated women. However, if the natal family is not able to support her then the responsibility is placed upon the largely defunct the Muslim welfare board (waqf). In other words, Muslim women's rights have been significantly diminished due to prevalent control of conservative men of the waqf. This confirms that the Muslims identify themselves through the teachings Islam and can be fiercely protective of the Islamic rulings when they feel that it is under attack from an outside force.

The Muslims in the secular India are regarded among the minority group and yet, the effect of secular ruling of Muslim personal law drew nationwide unrest. Bangladesh, on the other hand, is a Muslim-majority country and if Muslim women's marital property rights were to be established, it must be done without hurting their sentiments and in a manner where they do not feel that their identities and values are under attack. Furthermore, in Bangladesh the secular basis of uniform rights is often understood to be parallel with feminist agenda influenced by the western culture and thus, might be deemed to be inconsistent with the Muslim culture of Bangladesh. While provisions for equal rights in circumstances such as voting, earning capacity and property ownership, are already guaranteed to all Muslim women in Bangladesh by law, it might not be a perfect fit in areas of family laws dealing with marriage and divorce, which are the

key requirement for establishing community property regime in the Muslim community. This is because unlike women from the western countries, Bangladeshi women do not seek absolute gender-neutral society, and sexual equality and liberation instead they strive for equal worth and equal dignity for their roles within social contexts (Chowdhury, 2012). Furthermore, designing a secular form of community property regime poses risk of relinquishing women's right to mahr and maintenance granted by existing Shari'a-based Muslim Personal law in Bangladesh (Chowdhury, 2016). Consequently, an equitable approach to community property regime within the traditional framework is desirable for securing Muslim women's rights to claim a share in the marital property.

The argument for a uniform set of personal laws to govern all citizens irrespective of gender, religion and background does have a soothing tone to it without a doubt. A society where women have equal status and opportunities in both public and family realm, is an ideal society that does not yet exist anywhere in the world. Therefore, protesting over equal rights for women in Bangladesh or arguing that that its high time that Bangladeshi Muslim women should finally have their constitutional due is rather futile as it is not going to happen any time soon. Similarly, seeking women's rights to marital property exclusively through secular constitutional provisions, even if they contradict with the Islamic and cultural values, will be most likely to end up as a failed attempt. In context of most societies of Bangladesh, the secular approach through a uniform set of rules is not just a matter of gender justice but it is also an issue on how the nation contains its own diversity. All personal laws of Bangladesh are founded in religious sanctions, devotion and beliefs, and these personal laws are sensitive, complex and of diverse origin. Thus, it is an impossible task to standardize these varying

laws through modification or reforms in order to merge them in a Uniform Civil Code for family laws. An attempt to do so is likely to upset the religious sentiment, devotion, and beliefs of the people of the country (Law Commission, 2005).

## **6.2 Marital Property Rights Through Ratification Of CEDAW**

Since gaining independence from Pakistan in 1971, Bangladesh government has been a signatory to most of the international treaties and declarations and has ratified all the core human rights treaties- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of Discrimination against Women (CEDAW), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Rights of the Child (CRC) and International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families (ICMRW), and is subject to Universal Declaration of Human Rights (UNFPA, 2004). Over the years Bangladesh has adopted numerous instruments and procedures through ratification of these international human rights treaties to ensure that human rights are respected, protected, and implemented at domestic level.

With concerns to importance to women's issues, Convention on the Elimination of Discrimination against Women (CEDAW) is designed to combat discrimination against women and to protect and promote women's rights. CEDAW was adopted by the United Nations in 1979 and entered as an international treaty in 1981. It has been ratified by 189 states till date with Bangladesh ratifying the convention in 1984. (Bhuiyan, 2011) . Hailed as 'International Bill of Rights' for women, CEDAW is regarded as an international instrument giving ethical and legal basis to the protection and promotion of women's rights (Bhuiyan, 2011). Ratification of CEDAW by Bangladesh Government provides necessary grounds to explore

Muslim women's marital property rights in light of CEDAW provisions and Muslim community of Bangladesh.

The fundamental purpose of the convention is to obligate the participating states to denounce all sort of discriminations against women. Requirements under Articles 1, 2, 3, 24 are the true powerhouses of CEDAW which express the objectives and purpose' of the Convention. State parties are required to act, to apply reforms that will progress women's equality and positively change women's lives in both legal and practical sense. Accordingly, Article 2 of CEDAW urges the state parties to incorporate legislatures for equal treatment in their domestic legal system and reform all existing legislation, customary rules and traditions which constitute discrimination against women and repeal all discriminatory penal obligations. Subsequently, the state parties are prescribed to pursue "by all appropriate means and without delay a policy of eliminating discrimination against women".<sup>21</sup> Article 3 of CEDAW obligates state parties to adopt appropriate measures to ensure development and advancement of women all fields to enable "the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."<sup>22</sup> Under article 24 of CEDAW, state parties are required to "adopt all necessary measures" to fully realize the rights recognized in the treaty<sup>23</sup> .

The Convention is divided into six parts consisting of thirty articles. The first part of the convention, through Articles 1 to 6, provides instruments, guidelines, and obligations to the state parties for ensuring effective incorporation of gender-neutral decrees in their domestic legal system. Articles 7 to 9, under part II,

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<sup>21</sup> UN General Assembly (1979) *Convention on the Elimination of All Forms of Discrimination against Women*, /RES/34/180. [Online]. Available at:

<https://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>

<sup>22</sup> *ibid*

<sup>23</sup> *ibid*

focuses on women's equal participation in political and public life, equal opportunity and equal treatment in laws relating citizenship<sup>24</sup>. Part III, incorporating Articles 10 through 14, explores measures assuring women's equal rights in economic, social, and cultural matters such as education, employment, healthcare, and rural development. Articles 15 and 16 under Part IV addresses legal equality and equality in personal laws relating family and marriage. Part V, through Articles 17 to 22, outlines CEDAW's supervisory mechanism through formation of a committee of 23 member and a reporting system requiring state parties to provide updates about measures adopted to implement the Convention after one year of ratification and every four years thereafter<sup>25</sup>. Finally, Part VI covers CEDAW administration through revisions, entry into force and reservations through Articles 24 to 30 (Brandt and Kaplan, 1995).

Any reservation to any provision of the convention by a state party articulates its desire to depart from specific obligation required by the treaty which otherwise is understood to be equally binding to all the state parties by simply comprehending CEDAW to be a unanimous bill. Furthermore, reservations to provision of articles 2 and 16 are deemed impermissible due to the principle of incompatible with the object and purpose of the Convention expressed under Article 28(2) and yet, several partial or complete reservations are made to these articles. Entering into reservation allows state parties to minimize the scope of their obligations and direct condemnation of their CEDAW progress reports (Brandt and Kaplan, 1995). Therefore, the right to hold reservation assaults the core idea of the multilateral Convention. Nevertheless, CEDAW accounts for largest number of reservations, with a total of 61 state parties filing reservation, among all the core

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<sup>24</sup> *ibid*

<sup>25</sup> *ibid*

human rights treaties endorsed by the United Nation (Alves de Miranda, 2016) . Many of these reservations are the basis of contradiction with religious-based laws and customary rule especially those in connection with Article 16.

In fact, most of the Muslim majority state members have explicitly reserved more than just few provisions of the convention due to their adherence to Islamic law while distinguishing objections to these reservations as anti-Islamic. Although Bangladesh is neither an Islamic Republic nor governs through Sharia law or court per se, the government has ratified CEDAW with reservations to the terms of Articles 2, 13 (a) and 16 (1)(c)(f) but later withdrawn reservations to Article 13(a) and 16(f). Currently, Bangladesh retains reservations to article 2 and article 16(1)(c) on the basis of confliction with the religious-based personal laws (Brandt and Kaplan, 1995). Article 2 provides provisions for conforming to mechanisms through which CEDAW can be implemented and Article 16(c) ensures elimination of discrimination in marriage and family. From outset Bangladesh's reservation to the provision of Article 16(c) can be construed due to incompatibility with state's personal and family laws but reservation to Article 2 remains a dubious affair and cast reasonable doubt on the state's commitment to the Convention. Scholars believe that reservation to the conditions outlined under Article 2 enables states to escape from the obligation of reforming existing domestic law to abolish discrimination against women (Brandt and Kaplan, 1995).

Several national and international women rights and development organizations in Bangladesh are actively pursuing the Government to withdraw its reservations to the CEDAW articles through various demonstration of various constructive aspects of the reserved articles in terms of socio-economic advancement of both the nation and its women. Within hypothetical context of women's rights to marital property, ratification of CEDAW without any reservation to article 16 will

automatically assume equal co-ownership of all assets, both movable and immovable, acquired during the subsistence of marriage. At the same time withdrawal of reservation of article 2 will effectively abolish any discriminatory provisions of personal laws including those in The Muslim Family Laws Ordinance of 1961 as well as enable enactment and implementation of statutes for equal rights in marriage and divorce. Effectively, Muslim women rights to claim share in marital properties will become norm and binding. Bangladeshi Muslim married woman shall finally be able to assert her constitutional rights based on equality without being contested and ridiculed while claiming her share in the marital property even in absence of a specific bill on Marital Property Rights.

On the other hand, as illustrated in earlier section the true success of establishing the notion of marital property rights of Muslim women of Bangladesh depends entirely upon its acceptance by its Muslim community or else it is a moot point. Many argue that CEDAW is not some kind of magic remedy or one stop solution for all women coming from diverse socio-cultural backgrounds and treating the Convention as such rather risks doing more harm to their development process. Similar concerns of acceptance of CEDAW provisions among majority of citizens of Bangladesh echoed in country's eighth periodic report for defending its sustained reservations to the clauses of Article 2 and 16(C). The report asserts: "The personal laws are in light with the religious provisions of different religious faiths, which in some cases have discriminatory provisions in marriage and divorce, inheritance, guardianship, etc. Modification of personal laws needs agreements by the leaders of all religious faiths. The society is not yet ready to accept such modification and the Government being mindful of the possible repercussion of the conservative religious groups, taking cautious steps." (Committee on the Elimination of Discrimination against Women, 2015, p.13)

Instinctively, the Convention has been accused of disguising Western norms as universal value, promoted by an elite group of Western women claiming that both men and women should simply be recognized as equals by law without anticipating its next to impossible practical manifestation. The convention simply fails to acknowledge any kind of equitable treatment and remedy which enables local women from around the world to live with dignity and to the best of their ability given unique circumstances, and thus, CEDAW should be commendable for only pointing out the essential elimination of unwarranted discrimination against women (Menski, 2002). Therefore, to contend for absolute equal treatment in all matters, including in marriage and its dissolution, for women from both urban and rural part of Bangladesh is not only unfeasible but also unrealistic.

Further criticisms of CEDAW in Bangladesh context, include being tone-deaf and adhere to literal application of equality which assumes that deprivation and gender-based discrimination are a result of traditional norms and values and thus, elimination of laws and social practices that treats men and women differently is the only way forward (Chowdhury, 2012) and the convention only works for the privileged women, usually from elite class, who are able to afford and conform to male standards with little to no involvement in household management and child bearing and rearing activities. In other words, CEDAW stipulations of equality appears to be male standards and fails to consider if male standards are appropriate for women of all class and background (Chowdhury 2012). Although several scholars have argued that CEDAW and Shari'a law are consistent with each other by implying a general understanding that under Islam both men and women are assured similar rights, if not same, based on their roles and responsibilities in the society. Some uncovers possibility of compatibility of

CEDAW and Islam through mainstream model of non-discrimination based on gender while other depends on progressive interpretation of Shari'a law. Nevertheless, several studies shows that CEDAW is inconsistent with some provisions of Shari'a law especially those concerns personal and family issues.

Additionally, measuring Muslim family and marital issues in equal terms for all genders as stipulated under Article 16 of CEDAW, will relinquish Muslim women's right to mahr and maintenance which ensures women's financial security in marriage. Islam assures Muslim woman's right to maintenance from her husband in form of housing, clothing, food and other necessities and her earning capacity and/or wealth does not absolve husband's duty to provide for his wife. On the other hand, requiring women to undertake same responsibilities as their husbands will bound them to join paid labour force to financially support themselves and share household expenses. Essentially neglecting women's non-financial contributions to the household and burdening them with double obligations (Chowdhury, 2009). Therefore, the likelihood of successfully establishing Bangladeshi Muslim women's marital property rights through CEDAW framework, which can easily be perceived to have western outlook, is quite narrow and can easily be misinterpreted as culturally inappropriate as well as anti-Islamic.

Nevertheless, the aim remains to find a common ground between Islam, customs and CEDAW through which Muslim women's rights to marital property can be established in Bangladesh. Alternatively, the CEDAW committee also entails state to ensure both formal and substantive right under which the government must adapt to an enabling environment that results in equality by distinguishing between biological, social, and cultural reality of men and women. In effect, CEDAW recognizes that "identical or neutral treatment of women and men might

constitute discrimination against women if such treatment resulted in or had the effect of women being denied the exercise of a right because there was no recognition of the pre-existing gender-based disadvantage and inequality that women face” (CEDAW Committee, 2010, p. 3) . Similarly, Islam recognizes substantive equal rights in addition to formal rights of women including those arising through her marital relationship. In Islam, the concept of substantive equality realizes the difference between male and female in determining the significance of complementary yet equally important roles of men and women in the family. In regard to assessing substantive equality arising within marriage, the Qur’an specifies:

“The Believers, men and women, are protectors, one of another: they enjoin what is just and forbid what is evil” (Qur’an: 9:71)

Therefore, the concept of substantive equality appears to have more potential in achieving fair and just outcome in determining Muslim women’s share in the marital property than relying on strict interpretation of equal rights of CEDAW. It acknowledges that equal treatment of women and men is likely to result in discriminatory and unequal outcome for women by neglecting to contemplate differences in their familial role, social status, cultural background, and physical appearance. Coincidentally, the absence of any formal or informal Shari’a court in Bangladesh mandates the judges in Family Courts to enjoy authority and legitimacy to develop Shari’a based personal to establish justice. Although judges refrain from producing any radical decree in relation to Shari’a law, but they usually determine fitting legal balance as cases arise and in numerous occasions judges’ commitments to prioritize rights and development of Muslim women over strict interpretation of Islamic law have been apparent. And, although provisions of CEDAW have no legal jurisdiction in Bangladesh until the reservation to Article

2 is revoked, its influence in enacting domestic legislation and displaying the nation's positive image at international stage is undeniable. Following Ghana's exemplary approach to substantive equal rights to establish of community property regime (Sam, 2012) and considering the vulnerable reality of Muslim married women's position in Bangladesh and clinging relationship with Islamic and social practices, it is plausible to establish Bangladeshi Muslim women's rights to claim equitable share in communal properties through judicial activism by carefully and precisely balancing Sharia Law, CEDAW clauses and communal practices in line with the concept of substantive equality.

### **6.3 Reform Of Existing Domestic Laws And Social Practices To Provisions For Marital Property.**

Under current regime, Bangladeshi Muslim women do not have any claim over share of the marital properties, which could be acquired only as a result of their contributions that comes in many shapes and forms. It is especially true for divorced Muslim women, who have to leave their marital home and seek shelters at their parents' or relatives' residences. During the subsistence of marriage, a Muslim woman contributes to acquisition of marital assets in many ways, but the existing legal and social systems fail to appreciate the fact. It is true that most Bangladeshi Muslim married women are homemakers and dependant on their husbands, but it is also true that the prevailing patriarchal society compels Muslim women to be housewives by stereotyping women's roles as caregivers and men's as breadwinners of the family. To survive under such social construction many Muslim married women, especially in urban setting, sacrifice their careers or compromise their earning capacities to care for their families and household, even after possessing proper education and required skill sets to succeed. While assuming the role of the primary caregiver, a Muslim married woman in Bangladesh usually has no financial income and no share in the marital properties, acquired at the cost of her contributions. This arrangement does not only deprive the Bangladeshi Muslim women from their share in marital property but also force them to continue to stay in abusive and repressive marriage. Therefore, the urgency to reform both legal and traditional practices to endorse Muslim married women's property right in Bangladesh is paramount.

Many argue that failure to apprehend Muslim women's rights to inherit equal share as their counterpart as stipulated under the current Muslim Personal Laws is the main culprit for undermining their economic security and opportunity. This is simply because inheritance is considered as the primary channel for Bangladeshi women to acquire and control land. However, Muslim's women right to own, access and control property through marriage is unrecognized especially when their contributions in acquiring marital party is far greater than inherited property. In an ideal circumstance, a constructive trust would come in action as soon as a property is purchased assuming both spouses as equitable owner and beneficiary of the property, even if only one spouse retains the title of the legal owner. Attempting to reform Shari'a law related to inheritance, which governs the Muslim community of Bangladesh, is highly likely to be met with severe backlash from the Muslim community including vast majority of Muslim women due to their attachment to their faith, which was previously witnessed in 2011 when the Government proposed equal inheritance rights regardless of gender as part of its National Women Development Policy (Ahmed, 2019). On the hand, as there is no precise and previous provision of women's right to inherit property through marriage either in Islamic jurisprudence or in civil legislations of Bangladesh, it can effectively be added to complement the existing Shari'a-based personal law, if done so in appropriate manner. There are several channels through which Bangladesh Government and Bangladeshi society as whole can promote the notion of marital property right of Muslim women to insist better status of women in marriage and family.

In order to establish the concept of marital property in Bangladesh, the procedure for contracting Muslim marriage and marriage deed (Nikah nama) must go through some basic transformations. The responsibility of revising the marriage

procedural successfully will depend largely on the Qadi and marriage registrar alike. Islam recognizes marriage as a legally binding contract between a man and a woman and, in addition to agreement to pay Mahr (dower) to the bride, an offer and acceptance are essential elements of an Islamic marriage. Treating Muslim marriage contract like any other kind, will facilitate the option of including clauses for marital property as well as other stipulations for drawing duties and responsibilities for both the husband and wife. Due to its contractual form, the agreed terms will be legally binding as well as consistent with the Shari'a Law. However, in reality no Muslim woman in Bangladesh has the capacity to negotiate terms of her marriage.

Both Muslim bride and groom are served a standard deed by the Qadi, who usually also act as or on behalf of the marriage registrar. All the clauses of the marriage deed are predetermined and prefilled by the Qadi with exception of personal details of the bride and groom, and mahr amount. A close inspection of a standard marriage deed would reveal that column 18 of Form D of the Muslim Marriages and Divorces (Registration) Rules 2009 is already filled out in favour of the bride. This particular clause deals with Talaq-e-Tawfiz whereby the authority to exercise divorce is delegated to the wife by the husband. This form of delegated divorce does not only allow wife to seek divorce without any intervention from the court but also provide her the same right to divorce as her husband. In Bangladesh, Talaq-e-Tawfiz is a part of the standard Nikah Nama, which is stipulated without any prior permission from the husband, otherwise required under strict Shari'a, to balance the unilateral right to divorce of husband granted under Islamic jurisprudence (Patwari, Ali, 2020) .

Furthermore, in 2019, the High court of Bangladesh upheld the petition to remove the derogatory term 'Kumari' (virgin), mentioned in column 5, for defining a

woman's legal status in the Nikah Nama as well as include the legal status of the groom which was not mentioned before. The legal representatives for the petitioners asserted Bangladesh's signatory position with CEDAW and its confliction with column 5 of the marriage deed curtailing equal rights of Bangladeshi Muslim married women at the very start of the marriage. Not only the petition was upheld by the High Court but there was no backlash from general public (The Daily Star, 2019). Such reform of the marriage deed in Bangladesh shows the willingness to deviate from the strict interpretation of the Shari'a law to enhance and protect Muslim married women's rights in marriage. Therefore, by enlightening the Qadis and Marriage registrars about the significance of marital property, it is plausible to include a specific provision for marital property in the marriage deed as seen in case of Iran (Sait, 2016).

Apart from reforming the marriage deed, the possibility of establishing marital property rights of Muslim women of Bangladesh through enactment or reform of existing domestic legislations has significant potentials. Despite CEDAW reservation, over the years the Bangladesh Government has enacted several religion-neutral bills to ensure protection and advancement of women of all age and background. These bills include: Domestic Violence (Prevention and Protection) Act 2010 was enacted to establish and protect women's and children's rights against all form of domestic violence; Demanding and providing dowry in any form was made criminal offence under Dowry Prohibition Act 1980; Repression against Women and Children (special provision) Act 1995 and Women and Children Repression Prevention Act, 2000 and 2003 (Amendment), ensuring prevention and deterrent sentence against cruel treatments against and abduction of women and children; to put an end to the rising incidents of acid attack against women, Acid Crime Control Prevention Act 2002 and Acid Control

Act 2002 were introduced essentially restricting free trade of acid and sentencing with death penalty for acid related convictions. Additionally, in 2009 two more bills, namely National Human Rights Act and Right to Information was introduced which are expected to boost women's rights to information and human rights (Bhuyan, 2011). Likewise, a legislation can be enacted that introduces the concept of marital property, its definition in context of Bangladeshi society and instrument for determining the share of each spouse.

Following Tunisia's footsteps of Moudwana, a new code of personal status can be introduced in Bangladesh as a supplement to the existing personal laws including the Muslim Marriages and Divorces (Registration) Act 1974, outlining the significance of roles played by, and financial and non-financial contributions made by both spouses. Furthermore, the Married Women's Property Act 1874 already outlines the means of preserving Bangladeshi married woman's rights to own and control properties and earnings on the basis of separate property regime. However, considering present socio-economic reality where both the spouses make similar contributions, amending the bill has budding prospect in order to encompass new provisions for properties acquired and improved by joint effort of the spouses during marriage, and mechanisms for calculating share of both spouse in case of dissolution of marriage by death or divorce. A reform as such will balance the marital dynamic between spouses and provide means for calculating share of each spouse in the marital assets.

Again, the effectiveness of any new legislation among the majority of Muslim community of Bangladesh will depend on its acceptance. Therefore, all publicity for marital property laws must be done in positive light so that the citizens can reason with it. For instance, even with the gap with legality and reality, Dowry Prohibition Act and both Repression against Women and Children Acts were

embedded successfully on moral grounds without inflicting injuries to anyone's religious and social beliefs. The general consensus holds that both the acts of taking dowries and treating women and children with cruelty are immoral, and thus, interest of any potential victim prevailed over long-practiced social norms. Similarly, in order to establish community property regime in the country, the focus must be on recognizing paid and unpaid contributions of Muslim married woman to safeguard her status in marriage. On the other hand, if the focus is made primarily on division of the marital assets and safeguarding Muslim women's property rights in divorce, it can easily be misconstrued as promoting divorce and breaking family in the name of marital property rights, and thus, may backfire severely.

Another aspect of establishing community property regime in Bangladesh is through judicial activism. In literal term, judicial activism can be defined as a theory which enables judge to consider their personal views on certain public policies to guide their decisions. A closer look into the theory will reveal that courts do, can and should go beyond any statute to provide just outcome by considering the wider public consequences of its decisions (Franek, 2014) . While practicing judicial activism, judges use their discretionary power to interpret the laws to facts which they see as fit, oppose to judicial restraint whereby the judges apply the law exactly in line with the statute. Therefore, the practice of judicial activism allows the court to assume authority to ensure rule of law and to demand more responsibility, accountability, efficiency, and transparency from the government officials. The process allows the judiciary to reach decision by reviewing public and/or community interest on that particular issue and to determine accessible remedies for the victims or vulnerable group of society (Mollah, 2014). Thus, by exercising judicial activism, the courts, "being sentient of existing socioeconomic

realities, voluntarily implements social justice” (Mollah, 2014, p. 477). Essentially, this approach of judiciary seems to be a more effective instrument for ensuring social justice compared to the conventional approach of judicial review. Hence, marital property rights of Muslim women of Bangladesh can be attained if the court plays an active role in shaping the societal norms through its rulings.

Although, in context of Bangladesh, judicial activism, with no definite classification, is an extensive topic of discussion among all sector of the society, NGOs and bureaucrats (Law Teacher, 2019). However, the practice of judicial activism in Bangladesh can be traced back to 1992 in the case of State v. DC Satkhira when the High Court Division issued a suo motu rule on the basis of a newspaper report , directing the Deputy Commissioner of Satkhira to release a child named Nazrul Islam from custody (Mollah, 2008) . Again in 1995, the High Court Division essentially disregarded the section 9 of the Muslim Family Laws Ordinance of 1961 and ruled that the Muslim divorced wife is entitled to get maintenance from her former husband till her remarriage or death in the case of Hefzur Rahman v Shamsun Nahar Begum (Masum, 2020) . Although the verdict was subsequently overruled by the Appellant Court, but it shows the willingness to go beyond written statute to rule in favour of social justice.

In case of establishing community property regime, the judiciary of Bangladesh can follow the example of judiciary activism of Ghana. Even though Ghana is not a Muslim majority country but like Bangladesh, there was no specific law for determining women’s rights to marital property until the judiciary took up an active role to introduce one based on. Substantial contributions of each spouse in the acquisition of any property during the subsistence of marriage. To elaborate further, basing on the principle of “equality in equity”, in Gladys Mensah v. Stephen Mensah (2011), the court held that woman’s contributions in maintaining

the household and creating a homogeneous atmosphere as a housewife is enough to earn her an equal share in marital property because of the simple fact that the husband is able to acquire property due to the contributions made by his wife (Gyepi-Garbrah, 2017) . Likewise, if the importance of domestic labour performed by wives, especially homemakers, is redefined by Bangladeshi judiciary to having same effect as monetary value as seen in Iran as well, their substantial contributions in acquisition of marital properties will be recognized and used as an effective tool to assess women's equitable shares in the said property.

## **6.4 Alternate Interpretation Of Shari'a Law To Include Marital Property Rights**

Like most Muslims in the world, the Muslim community of Bangladesh believes that the words of Qur'an are sacred that provides the ultimate guidelines for governing Muslim lives. However, the disagreements on the interpretation of Qur'anic verses and their application in certain scenarios persist among Muslim jurists and scholars alike. Hence, Shari'a Law, derived from Qur'anic verses, is subject to interpretation and reform to meet the needs of the evolving society. The tenets of the Sharia law were designed to guide and protect Muslims from all social classes, instead of the widespread belief that it is a set of fixed rules to which all Muslims must abide by (Smock, 2004). Over the past three decades, the Muslim community has been subject to constant reforms in family laws, most of which are highlighted on Muslim women's rights in matters relating to marriage and divorce. These reforms have taken place either by adopting secular law and abolishing Islamic personal law altogether, as seen in the case of Turkey, or by amending the law by amending the Islamic personal law itself to cater to the norms of today's society, as seen in Tunisia and Iran (Feroz, 1962). Therefore, it is necessary to examine the reform possibilities of Shari'a law in context Bangladesh to establish Muslim women's rights to claim share in the marital property.

In context of Bangladesh, the possibility that the concept of communal property rights of women may easily be misconstrued as a western concept among majority of Muslim citizen is not a negligible factor, and thus, risks getting scrapped on arrival. While most Muslims in Bangladesh are inclined to accept

modernization in social reform, they viciously oppose to accept any form of westernization of their culture and social norms (Chowdhury, 2012). Therefore, after carefully distinguishing between modern and western values, the notion of Muslim women rights to marital property rights has to be explored by assessing the roles of Islam in the modern society.

It is often seen that many progressive Muslim women in Bangladesh choose to follow all the traditional key features of weddings but opt out for an insignificant mahr amount due to its patriarchal connotation (Chowdhury, 2012). The patriarchal setting of Bangladeshi Muslim community teaches that mahr (dower) and maintenance (Nafaqa) grant husband some sort of ownership over their wives and thus, conveniently leave out the portion of Qur'an that states "husband and wife are each other's garments" (Quran: 2:187). The patriarchal practice of Islam exaggerates the view that dower payment is same as "bride price" that is determined on the basis of her "chastity" and "modesty." On the other hand, husband's duty to provide maintenance is directly linked with wife's sexual availability. Thus, both the terms "dower" and "maintenance" is sometimes misinterpreted in a manner that manages to somehow demean and degrade the status of Muslim women in Bangladesh. Hence, in order to improve their bargaining position in marriage, many Muslim women, who consider themselves to be progressive, waive their right to mahr and make financial contributions, in addition to their non-financial contributions, to their marital household by joining labour force and/or using earnings from their inherited property. In this reality, the absence of marital property rights for Muslim women is highly likely to unwittingly lead them in an inequitable marriage and divorce.

Most modern Muslim jurists and scholars argue that traditional comprehensions of marriage and divorce in terms of both legal and social theory are deplorable,

and a radical transformation of Islamic marriage is absolutely essential. Thus, the question arises as to whether it is possible to understand marital property rights of Bangladeshi Muslim women through modern interpretation and what constitutes as 'modern interpretation.' Furthermore, the Muslim community of Bangladesh almost blindly follow traditional Islamic clerics as source of authentic interpretation of Islamic jurisprudence and the validity of any revised clause of Islamic jurisprudence will depend on the reliability of the source. However, to tackle the evolving issues of modern society, the role of Islam and Islamic jurisprudence must evolve too, and the kind of proficiency required to attain modernity under Islam is far beyond the competence of the traditional ulemas (Chowdhury, 2012).

In order to establish marital property rights of Bangladeshi Muslim women, Bhuiyan's (2007) take on modern approach to Sharia law through liberal interpretation on the basis of ethico-religious principle of equality, justice, and human rights can provide some guidance, which provides similar ultimate objective as reforms for a secular family law. She believes there are sufficient reasoning within Shari'a law behind reforms in marriage and divorce law. According to her the modern approach to Islamic doctrines will require a complete departure from the traditional interpretation of Shari'a law to provide clauses that will protect helpless divorced women's by granting them their due share in the marital property and alimony to meet her needs so that they can live like their husband (Bhuiyan, 2007). However, recommendation of replacing the existing Shari'a law, developed by traditional jurists for over thousand years, in favour another Sharia law, summoning the non-discriminatory clauses to allow complete equality between both gender is a rather drastic shift. The likelihood of embracing

such radical change by the majority of Muslim citizens of Bangladesh is little to none.

Realizing the mindset of majority section of Muslim community of Bangladesh, Bhuiyan further suggests that the reforms should be introduced by moving stage by stage. To begin with she suggests “separate reforms of personal laws on marriage and divorce of Muslims and Hindus, are desirable in the interest of a comparatively smooth transition from the era of traditionalism to that of modernity in Bangladesh” (Bhuiyan, 2007, p.300). Furthermore, Bhuiya insists on assuming Muslim women’s rights to marital property ensues by default in marriage and considering mahr as an optional requirement for marriage. Mahr is the essence of Muslim marriage contract and repealing and/or replacing it, will obliterate the true nature of the contract. She argues that mahr is for show only since most wives waive their mahr and Bangladeshi men are unlikely to be interested in supporting both mahr and share in the marital property, which is for more essential for the wellbeing of women (Bhuiyan, 2007). Although, it is true that most Muslim husbands in fact exempt themselves from paying mahr to their wives, but it is highly likely that the majority of Muslim citizens Bangladesh will not allow this legal reform by finding it to be utterly contradictory with Islamic jurisprudence.

Another possibility to establish Muslim women’s marital property rights is through well-established process of innovation called *ijtihad*. *Ijtihad* requires interpretation of Islamic teachings on the basis of reason, deduction, and prioritization, in addition to the Qur’an and Islamic tradition (*Sunna*) (Smock, 2004). Muslim jurists and scholars have relied on the practice of *Ijtihad* as an essential instrument to deal with the varying needs of Muslim societies. John Esposito and Natana DeLong-Bas (2001) precisely summarize the position and purpose of *Ijtihad*

practice in today's Muslim societies. Encouraging the Muslim societies to depart from medieval interpretation of Islamic doctrines to deal with current circumstances, they write:

“The task of Muslim exegetes is a systemic study of the value system of the Quran and the construction of a hierarchy of its ethico-religious values... it would provide a context within which one could understand the value of specific Quranic regulations. Emphasis would be shifted beyond the specific regulation to its intent, to the value it sought to uphold. Thus, a Quranic prescription has two levels of importance - the specific injunction or command, the details of which may be relative to its space and time context, and the ideal or Quranic value, the realization of which the specific regulation intends to fulfil” (Esposito, DeLong-Bas, 2001, p.132)

The illustration of *ijtihad* can be traced back to as early as the 7th century. For instance, fifteen years after the demise of Prophet Muhammad, Caliph Omar ibn-al-Khattab decided against the cutting off thieves' hands since most of them were stealing simply to survive due to rise in hunger, poverty, and drought. He based his decision on the ultimate principle of justice and fairness and thus, the inconsistency of his judgement with Qur'anic verse was justified. In equivalent manner, councils of Muslim scholars in Europe and the United States, in 2002, ruled in favour of paying mortgage and loan interest to buy house by the Muslim citizens contrary to the Islamic jurisprudence against charging and paying interest. It was understood that such permission was necessary for Muslims to meet their financial and social needs in the West. Furthermore, when Imam Muhammad Ibn Idris al-Shafi'i, one of the founders of Islamic jurisprudence, was questioned for departing from his own year-old legal opinion on a certain situation

in Baghdad to fit Cairo's narrative, he replied: "That was in Baghdad, and this is in Cairo. That was last year, and this is now" (Smock, 2004, p.2).

From the above illustrated instances, it is clear that before rendering religious advice and opinions, Muslim scholars are jurists are required to consider the time, place, norms, and prevailing conditions while practicing *ijtihad*. Thus, the practice of *ijtihad* provides tools and reasoning required to reform Muslim family law without dissing current framework of Shari'a Law. Moreover, Sharia Law and the science of *fiqh* (School of thought) can be distinguished on the basis that sharia is 'the totality of God's law as revealed to the Prophet Mohammad' and it is 'sacred and eternal whereas, *fiqh* is regarded as 'human science and changing' (Mir-Hosseini, 2003, p.2) .

The wide-spread practice of *Ijtihad* had facilitated Muslim societies to constantly adjust in the face of changing societal conditions and new advances in knowledge until about 15th century when the advancement of Muslim civilizations somewhat collapsed as result of rapid Western spreads. This is simply because Muslim jurists' efforts of preserving traditional values and institutions through rigid stances and became susceptible to new innovation and adaptation. It is believed that the reluctance to adhere to the new surroundings, the Shari'a law has gradually got detached from reality and modernity (Smock, 2004). Subsequently, most Muslim-majority nations have limited their acceptance of legal interpretation to four prominent scholars: Malik Ibn Anas, Abu Hanifa al-No'man, Muhammad Ibn Idris al-Shafi'i, and Ahmad Ibn Hambal—the leaders of the Maliki, Hanafi, Shafi'i, and Hambali schools of thought (Smock, 2004).

All four major Islamic school of thought had developed hundreds of years ago based on customs and traditions of specific Muslim community and its culture

suiting for that particular era. Since all these ancient communities embraced some form of patriarchal values, the process of *ijtihad* was itself often unwittingly reflecting these values. Furthermore, the judiciary was predominantly the domain of men and thus, issues concerning wellbeing and rights of women were ultimately overlooked (Chowdhury, 2012). Therefore, the opportunity to exercise *ijtihad*, which is free from all patriarchal biases in context of Bangladesh, will inevitably provide for Muslim women's rights to a substantial share in the marital property. However, given the fact that most prominent Ulemas of Bangladesh are neither ready, nor own the expertise for substantive reinterpretation and reform, the responsibility to establish marital property through *ijtihad* is shifted on to the Judiciary to get creative and rational with their legal reasoning to articulate a situation-specific decisive ruling while dealing with issues in relation to Muslim marriage and divorce.

While living in an evolving society that embraces modernity and innovations as its central theme, most Muslim citizens of Bangladesh search for an Islamic solution to their modern issues. Hence, it is important that Muslim women's contributions in acquisition and expansion of marital property are recognized and their rights to claim a substantial share of it. Accordingly, promoting the renewal of *ijtihad* in the mainstream of the judiciary section of Bangladesh and using the process as the crucial ground for judicial activism in order to develop modern interpretations of Islamic principles to establish Muslim women's marital property rights which is deemed as both fair and just, and consistent with the words of Qur'an and Hadith, can be perceived to have a promising outcome.

The possibilities of establishing Muslim women's marital property rights in Bangladesh are endless and doing so will not be contemplated as an alien practice or departure from Islam. Several other Muslim-majority countries have adopted the

notion of community property regime, and many other will follow. However, establishing community property regime in Bangladesh will surely set an example for other Muslim-majority countries, especially in the southeast Asia and middle east, and a lot will depend on the attitude of the Government on the subject. Bhuiyan has very precisely summarized the view on Government's position on embracing, promoting, and implementing much needed reforms in Family Laws in favour of community property regime as she writes:

"It depends entirely on the Government and political will, when and how these reforms would take place-whether the reforms will take the form of a secular uniform marriage and divorce law-applicable to all, irrespective of gender and religion, or a reformed marriage and divorce law for Muslim men and women within Shari'a, and a reformed marriage and divorce law for Hindu men and women" (Bhuiyan, 2007, p.292).

## **Chapter 7: Final Words**

### **7.1 Evidence Analysis**

In order to analyse the objectives of this study, it is important to establish a rational and effective link between the used data and the appeal of this paper which is to assert that introducing Bangladeshi women's right to claim share in marital property would improve their existing land rights and overall well-being. Furthermore, adopting a desk-based research methodology, this thesis explores the deep-rooted issues involving the socio-political status of Muslim women in determining their rights to own, access and control land and other assets in establishing theoretical approaches to incorporate community property regime within the Muslim society of Bangladesh. Consequently, I have thoroughly reviewed journals, scholarly articles, NGO reports and surveys, statutes, policies, Quranic verses, and their various interpretations in relation to Muslim women's property rights, socio-political status of Muslim women, inheritance laws and customs, marital dynamics, traditional norms, and shifting demands of evolving Muslim society of Bangladesh to determine the right and just methods for introducing and establishing community property regime in Bangladesh.

The purpose of this study is to establish the significance of Muslim women's marital property rights and to introduce the concept of community property regime in the Muslim society of Bangladesh without offending their core beliefs and long-practiced social norms. In doing so, I have thoroughly researched the correlation between women empowerment and their land rights, the existing land rights

available to Muslim women under the pluralized legal framework of Bangladesh in chapter 2 and the stark opposite realities of their land rights and social statuses in chapter 3. Furthermore, I have analysed how other Muslim-majority nations have incorporated the notion of community property regime to protect their women's legal interest and social status, while differentiating marital dynamics between traditional Islamic marriages and traditional Bangladeshi marriages to understand the suitable route for Bangladeshi Muslim society through chapter 4 and chapter 5, respectively. Consequently, in chapter 6, I have detailed arguments for the urgent need of establishing community property regime within the Muslim society of Bangladesh and explored different approaches for doing so while staying in line with their religious beliefs, customary rules, and social norms.

The previous chapters exhibit the gap between legal and social status, and ever-so-evolving roles of Muslim women in Bangladesh, and after thoroughly studying their legal and socio-economic realities and their rights related to owning, accessing, and controlling land through chapter 2 to 6, it became clear that introducing the concept of community property regime in the Muslim society of Bangladesh will be faced with inevitable obstacles and oppositions. There are few significant factors which play prominent role against establishing Bangladeshi Muslim women's rights to marital property such as misinterpretation of Islamic teachings, glorified patriarchal social system and prevention of gender-equitable society. These barriers to establishing community property regime are discussed in this chapter along with recommendation to overcome these barriers.

## 7.2 Findings

### **Glorified Patriarchy**

The term “Patriarchy” can literally be defined as “the rule of the patriarch (father),” which was originated to address “the herding societies of the Old Testament where the father's authority over family members was absolute” (Chowdhury, 2009, p.600). Today, the term is referred to male domination and power relationships by which men dominate women, and to characterize a system whereby women are kept subordinate in a number of ways” ( Sultana, 2012, p.2). Additionally, feminists usually use the term a tool to help us understand women’s realities by illustrating the power relationship between men and women ( Sultana, 2012).

In context of Bangladesh, patriarchy can be identified as a product of “patrilineal descent “and “patrilocal residence” (i.e., the practice of women living with their husband’s relatives after marriage). In Bangladesh, patrilineal descent is mainly organized along the patrilineal lines which directly affects women’s position in the society (Monsoor, 1999) as men are deemed to inherit and continue the family name and legacy whereas women are deemed as subordinate to men (Sultana, 2012). Essentially, patriarchal society of Bangladesh can be described a set of social relations between men and women with a material base, and which, though hierarchical, establish or create independence and solidarity among men that enable them to dominate women ( Sultana, 2012). Accordingly, children in Bangladesh are introduced to gender stereotypes according to the existing socio-cultural practices as early as they are born. Most of these customs and practices

amount to discrimination against women in Bangladesh regardless of their religious background. The conventional society of Bangladesh imprints people's thoughts at an early age with ideas about what is acceptable and what is unacceptable, work division, social rules & regulation, dress code, rights, and power. The socio-cultural norms perceive male to be the dominant gender and female to be the subservient gender. Such gender stereotypes create the patriarchal society of Bangladesh. Therefore, it is safe to state that the socio-cultural values and norms play a strong role in gender-based discrimination in the Muslim dominated country of Bangladesh, where Muslims consist of around nine-tenth of the total population. This system grants Bangladeshi Muslim men with certain rights and authorities over women while depriving Muslim women of rights granted to them by both Islam and the Constitution.

In Bangladesh, girls start experiencing discrimination on a regular basis within their household at an incredibly early age (Zaman, 1996). Gender ideology is usually hindered by patriarchal ideology that ranks males over females nearly in all situations. Therefore, Bangladeshi society can be interpreted as a typical example of patriarchy that endorses male dominance as part of the natural order of things (Sayem et al., 2013). Women are relatively powerless in the public as well as the private spheres. Men are considered to be economic producers, while women are regarded as reproducers who are dependent on and subordinate to men. Like other patriarchal societies, men in Bangladesh have greater power and authority simply by virtue of being men; consequently, men are considered the head of the family (Schuler et al., 1996).

The patriarchal social system regulates power relations and bargaining power within Bangladeshi households and their members through the establishment of the family, kinship and marriage, inheritance rules, and associated principles

(Kabeer, 2005; Naved, 2000; Parveen, 2007). Several studies suggest that girls in most Bangladeshi household engage in domestic chores at an early age including cooking, cleaning, babysitting younger children and so on (Sayem et al., 2013). Women in Bangladesh are at further disadvantageous position since the social norm dictates female family members are deemed liabilities which is especially true in case of daughters as they move to their husbands' households once married. Furthermore, as role of women in Bangladesh is perceived as nothing more than a caregiver, whether as a mother or wife, has serious implication in their development process. Subsequently, most of the women are culturally dominated and are more likely to follow the traditional ideology in Bangladesh (Sultana, 2010).

In the patriarchal society of Bangladesh, where women are denied several human rights, gender inequality is widespread. According to one UNDP report Bangladesh ranks at 142 out of 188 countries in the Gender Development Index and Gender Inequality Index (United Nations Development Programme (UNDP), 2015)<sup>26</sup>. In Bangladesh, gender inequality can be identified as a result of restricting women's access to higher education, employment, land, and other economic resources, confining women's roles to household chores and within the private sphere, male authority over social institutions and guidelines, male guardianship, and a remarkably high prevalence of violence against women (Karim et al., 2017).

Interestingly, in Bangladesh gender-based discrimination is somewhat less severe in urban area than rural areas. For instance, 39% of urban women are able to spend their own earnings as they see as fit compared to that of 29% of

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<sup>26</sup>United Nations Development Programme (UNDP) (2015) *Human development report 2015*. New York: United Nations, p.210.

rural women. Additionally, 26% of urban women face restriction from leaving home compared to 32% of rural women who are restricted from leaving their homes. Furthermore, 25% of urban women justify wife beating compared to 30% women from rural setting (Karim et al., 2017). It is, thus, clear that women's geographical setting has an influence on the severity of patriarchal social setting within the Muslim society of Bangladesh. However, the idea of breaking the patriarchal society and creating a human society that grants similar, if not same, rights and power to both men and women is a distant dream in the context of Muslim society of Bangladesh. Therefore, it is vital to create means for incorporating community property regime while navigating through the patriarchal setting of Bangladeshi Muslim society without upsetting their fundamental belief system.

Patriarchy is considered as one of the key obstacle to women's advancement and development. Although Bangladeshi women are responsible for domestic chores and to care for all household necessities, they usually have no power to make any vital decision for benefit of the same household due to persisting patriarchal ideologies. The same patriarchal social structure of Bangladesh is most likely to be the key factor in impeding Muslim women's rights to own, access and control marital properties because granting such rights to women would also enhance their socio-economic status and shift marital dynamics between couples by improving their bargaining and decision-making power within the marital household and Bangladeshi men prefer their women to be subordinate to them who they can control and dominate.

Over the past three decades discrimination against women has emerged as one of the most visible and articulated social issues in Bangladesh. Long-practiced traditions such as child marriage, dowry system and abandonment by husbands

make Bangladeshi women of all religious background more vulnerable to exploitation. To resist patriarchy, a significant percentage of women in Bangladesh are now pursuing higher education and taking up paid employment. Sadly, education and paid jobs have not able to emancipate women completely as patriarchy has now disguised in new forms. For instances, parents now educate their daughters with the aim of finding a better bridegroom and women's earnings can easily be regarded as the prolong form of dowry system. Cain et al. (1979) describes patriarchy in Bangladesh as a "distribution of power and resources within families such that men maintain power and control of resources, and women are powerless and depended on men. The material base of patriarchy is men's control of property, income, and women's labour" (Chowdhury, 2009, p. 605). Furthermore, the patriarchal social structure of Bangladesh does not recognize women's unpaid labour and, thus, are considered only as passive dependants on male authoritative figures. Therefore, granting Muslim women rights to have an equitable claim in the marital assets would be a first step toward breaking free the shackle of patriarchy in the Muslim society of Bangladesh and move towards a more gender-equitable society .

### **Misinterpretation of Islam**

Islam does not differentiate between men and women since both are promised same rewards for virtuous deeds and punishment for wrongdoings. Furthermore, the Quran grant similar rights to both men and women. Quran states:

*"And for women are rights over men similar to those of men over women."* (2: 228)

In pre-Islamic Arabian Peninsula, women were subject to inhuman treatments and grave discrimination, and their status in the society was that of a slave with no rights including rights to inherit or own properties (Patoari, 2019). Moreover, there was no laws regulating marriages and men were allowed to marry as many times as they wished, even two blood sisters at the same time (Patoari, 2019). Islam not only provided rules and regulations for marital affairs but also ensured rights, dignity, honour, and social standing for women. Islam guaranteed women's rights to inherit and own land, and right to divorce many centuries before such rights were accorded in the western countries (Sechzer, 2004 ). Thus, Islam does not deprive women of their rights but in fact demands these rights for them. However, like many other Muslim communities, Muslim communities of Bangladesh have their own cultures and customs, and women are subject to cultural issues, patriarchal features of the society and political oppression (Sechzer, 2004). Practice of these customs and ideologies often deprive women of rights granted to them in Islam. As established in this study, majority of the people in Bangladesh are Muslim and Islam plays a significant role in the country. Although Quran and Islamic teachings emphasize on equity and rights, and dignity and status of women but often some Quranic verses and hadiths are misinterpreted and manipulated in a way that exploits and discriminates against women.

Many misapprehensions in regard to women's rights in Islam are prevailing in Bangladesh for long time. In order to establish men's superiority, to dominate women and to deprive them of their rights in Islam, manipulated versions of Islamic teachings are founded as rule of Islam. The purposeful misinterpretations of these Islamic ideologies neglect, dishonour and discriminate against women. Furthermore, these misconceptions surrounding women's rights in Islam

continues to prevail due to lack of true religious knowledge, lack of awareness among women regarding their rights granted to them in Islam, the predominant customary norms and patriarchal influence and ideologies (Patoari, 2019). For instance, the Muslim society of Bangladesh teaches that Islam promises heaven for women only when they completely submit themselves to their husbands. The patriarchal society of Bangladesh uses religion to support this argument and also adds that a wife's heaven lies at the feet of her husband. However, this statement is not found anywhere in the Quran or Hadith (the words of the Prophet). Bangladeshi patriarchal society spreads this message in the name of Islam which enables men to exploit women and most women tend to believe this statement to be true and obey accordingly due to their lack of proper religious education, and thus patriarchy is maintained through the misinterpretation of Islam (Chowdhury, 2012). Furthermore, women are told in religious sermons that the parts of their bodies beaten by their husbands would go to heaven and therefore, they should endure beatings from their husbands without any protest and complaints. So, when men beat their wives, they justify the beatings through the misinterpretation of Islam. Children growing up in such abusive households learn that boys have right to beat up their wives and girls have the duty to endure beating from their husbands without any complaints and thus, the cycle of abuse and oppression against women continue (Chowdhury, 2012).

In Bangladesh, erroneous belief regarding women's rights exists as a result of the absence of proper religious knowledge, misinterpretation of Quran and hadiths. The skill set required to explain the religious rules is preserved by men in Bangladesh as women are deemed unqualified in religious knowledge to preach it. As a result, patriarchal importance is reflected and politicized in interpretation of Islamic rule as most of the Ulema (religious scholars) are men

(Siddika, & Khatun, 2014). Due to these persisting misconceptions and misinterpretations of Islamic rules, Muslim women in Bangladesh are not only oppressed but also deprived of rights, dignity, honour, and status assured under Sharia law and Islamic teachings.

The misinterpretation of Islamic teachings blended with patriarchal ideologies poses great threat to the establishment of community property regime in Bangladesh. Although men in Bangladesh pride themselves as devout Muslims but when it comes to issues regarding women, they do not shy away from misinterpreting Islam and discriminating against women (Chowdhury, 2012). Thus, Men in Bangladesh misinterpret Islam to protect their own interests and maintain patriarchy. Furthermore, popular books on Islam regarding husband-wife relationships have greater influence on shaping marital dynamics than the Quran itself. This is simply because women do not have knowledge on Islam, and they do not know their rights and responsibilities granted to them by the Quran as most women read the Quran in Arabic without learning its meaning. Furthermore, Muslim regulated patriarchal society of Bangladesh discourages women to acquire knowledge and develop critical or analytical abilities in the name of Islam. Therefore, Bangladeshi women turn to popular textbooks to learn about basic tenets of Islam rather than trying to understand the Quran through its Bengali translation. Most of the bestselling books are written by male authors and their interpretations on women's roles in Islam misinterpret Islam in order to legitimize and rationalize male sovereignty and the subjugation of women in the name of Islam (Chowdhury, 2012).

Although Islam plays a vital role in Bangladeshi society and politics, many customary practices involve a misinterpretation of Islam that serves the interests of husbands in order to control their wives' properties, earnings, and other

economic resources. Therefore, introducing joint marital property regime in Bangladeshi Muslim society that serves women's interest for a change is likely be faced with criticism and cynicism for being "un-Islamic" and thus, unacceptable. Hence, in order to establish women's rights to marital property through Islamic channels, all sorts of misinterpretations of Islam which deny rights of women in Bangladesh which are bestowed upon them by Islam and glorify domination of male and subordination of women must be abolished by essentially providing women with true religious knowledge and awareness.

### **Women against women's development**

In Bangladesh, women are expected to maintain traditional gender norms which are exceptionally influenced by patriarchal ideologies. This is because they have limited or no alternative to dissolution of marriage. Therefore, it is challenging to change their outlook towards equitable gender norms because disadvantaged women cannot consider their own rights beyond the attitudes of their male counterparts until and unless their susceptible circumstances are altered (Sayem et al., 2013). To make matters worse, women are not united to fight against patriarchy and men use this limitation to their advantage as they continue to exploit and oppress women. While most women in Bangladesh do not want patriarchal control for themselves, they want other women to be controlled and dominated by patriarchal values (Chowdhury, 2009). For instance, women subjugate their daughters-in-law using patriarchal ideologies, but at the same time they want liberation for their own daughters. Thus, they participate in maintaining patriarchy without even realizing.

The process of socialization among men and women starts at early age and children learn by observing and imitating the behaviour of adults. Therefore, inequitable gender roles, norms and conduct are adopted during this socialization process are like to continue into adult relationships (Archer, 1984; Barker, 2000a,b). Children are reinforced for gender appropriate and inappropriate behaviour in both positive and negative manner (Burn, 1996; Wharton, 2005). Thus, exposure for a prolonged period of time to societal dominance of men over women might collectively influence women in a manner that they cannot come out from the forced subdued position simply through participation in a few decision-making issues within the private spheres of life (Sayem et al., 2013).

Patriarchal values echoing in women's attitude as a result of prolong exposure to patriarchal social setting is nothing new. History is evidence that some of the loudest voices against women's rights and advancement were also women. Women's willingness to fight against their own development was seen during women's suffrage movement in the early 19<sup>th</sup> century where some of the most significant campaigns for anti-suffragists was in fact led by women. The National Association Opposed to Woman Suffrage (founded and chaired by Josephine Jewell Dodge) and Women's National Anti-Suffrage (League led by Mary Ward in 1908) were two key anti-suffragists organizations of women in United States of America and United Kingdom respectively (Schmidt, 2020) (Bush, 2018). When a substantial percentage of women were fighting for their rights to vote, which would ensure women's reproductive and economic progress, they were met with an unlikely opponent, women anti-suffragists.

Few of the noteworthy arguments made by these women anti-suffragists include that granting women same voting rights as men would make men and women compete rather than to co-operate, that it would bring turmoil in the existing

familial values, destroy the essence of life as they know it and that it would be foolish to risk the good system they already had in favour of evil that may occur as result of the suffrage movement. One may argue that that was then, and this is now, and women are more educated and smarter now and yet, five decades later the same sentiment echoed in the voice of conservative Phyllis Schlafly when she successfully launched the primary campaign against the Equal Rights Amendment in the 1970s in USA. She also argued that granting women equal rights would lead to “a disruption of the family unit, of a woman’s role as a wife and mother, and of what they considered a privileged place in society” (Schmidt, 2020). Sadly, these themes are still parallel to those of Bangladeshi women of today.

One would think that women should know better than to oppose their own rights but in reality, they are programmed by their patriarchal upbringing to believe that they are already granted more rights and privileges by their male counterparts. This is especially true for Muslim women in Bangladesh. Since there is no clear provision for community property regime in Islam, it may become a challenging task to convince them that it is for their own good. Interestingly, women who had advocated against women suffragism and equal rights were educated and had come from privileged backgrounds themselves. These women were already enjoying the rights and privileges other women were fighting for and more. So, they lacked the capacity to comprehend the urgent need to protect women’s rights in both private and public spheres. Hypothetically, if similar parallel were to be drawn in context of Bangladesh, it would appear that Bangladeshi women with privileged background are more likely to oppose the notion of women’s marital property rights. In this case, privileged background can mean either they have

only male offspring or benefits from access to housing separate from marital home, or both.

Since gender ideology is influenced by patriarchal ideology in Bangladesh, Muslim women appear to be reluctant to mess with what they believe is the natural order of life and women hold men's status and well-being above their own. Majority of married women conform to traditional ideology of patriarchal society of Bangladesh as evident from a study conducted by Sultana (2012) where interviewed 340 married women in Bangladesh to understand women's to examine women's gender ideology in regard to educating their children, which also gives an overview of women's gender ideology in general. The study found that 67.7% of the respondent either strongly agreed or agreed that son's education is more important than daughter as son contribute family income, 68.8% either strongly agreed or agreed that Parents should give less priority to daughters' education because they leave for marital home once married, 67.4% either strongly agreed or agreed girls should be given priority on training the domestic chores rather than to their education while 66.7% either strongly agreed or agreed that role and duty of women is to taking care of the children and the household only (Sultana, 2012, p.124). The respondent's ideals are, thus, a crucial factor in determining patriarchal influence that reflects women's gender ideology.

Due to patriarchal ideology, women in Bangladesh discriminates against other women which has a direct adverse effect on women's development as well as limits their rights and opportunities. Thus, interventions should take place that focus more on the younger generation to improve their understanding of gender equity as since they are more likely to have equitable gender norms. As already mentioned, most of the theories on gender socialization indicate that men and

women learn gender ideology from an incredibly early age. Therefore, any behavioural intervention for both younger men and women would bring about more effective outcomes (Sayem et al., 2013).

## 7.3 Recommendations

### **Islamic knowledge through Education is the key**

In Bangladesh, often little to no attention is paid to, and emphasis is placed on girls' education as a result of prevailing patriarchal ideology shaping the society. Previously women were barred from getting any education at all through misinterpretation of Islam, but later people started to send their girls to school once they realized that education does not conflict with Islamic values. In fact, education is a right and Muslims, both women and men, are encouraged to seek knowledge from wherever they can. Yet, in rural Bangladesh, only a handful number of girls are sent to schools.

When Bangladesh gained its independence in 1971, the number of boys enrolled in primary school was twice as many as girls. This gender gap in primary schools started to decrease in the 1980s and 1990s. In fact, by 2005 gender parity in enrolment in primary schools was observed and as of 2005 female-to-male ratio of gross enrolment increased to 1.05 compared to 0.39 of 1970 (Chowdhury, 2012). Over the years, the level of education girls would generally acquire has increased too. For instance, in the 1970s girls were provided with primary education till only class 5 because to find a suitable groom the girls were expected to know how to keep basic accounts and write letters. As time passed by, demands of the "suitable mate" increased and women were encouraged to at least acquire the Secondary School Certificate (SSC) or the Higher Secondary School Certificate (HSC). Today, parents encourage their girls to get bachelor's degrees and master's degrees, but the purpose remains the same - to find a good groom. However, even if in small number, the mindset of some parents has

changed too, and they encourage their daughters to get higher education so that they can land a decent job (Chowdhury, 2012). On the other hand, Bangladeshi education system is based on memorizing essays and theories and does not require any critical thinking. Therefore, it can be stated that Muslim women in Bangladesh are encouraged to pursue higher education to acquire certificate but not knowledge, and thus, most of them are left in the dark about their rights and status granted them to by both Islam and the constitution. Since Male-female relationships in Bangladesh are determined by Islam and Muslim women are discriminated in the name of Islam, it is important that Islamic educations are provided in school in addition to regular curriculum.

Like most Muslim majority nations, education system in Bangladesh is divided in two categories - modern national schools and traditional Islamic schools, also known as madrassas. These two systems are responsible for providing two completely differing and competing worldviews. Authors Esposito and DeLong-Bas have noted in the implication of such divisive education system as they write:

*“Western educated elites possessed of modern scientific and technological skills but little intellectual knowledge of or appreciation for their tradition lacked the vision to draft reforms that took into account the history and values of their culture. Traditionally educated individuals encountered a limited curriculum that provided neither a full appreciation of modern problems nor an intellectual outlook that incorporated a sense of the creative, dynamic process which characterized the formative period of Islam. Thus, they were less open to substantive reinterpretation and reform.”* (Esposito and DeLong-Bas, 2001, p.160)

Therefore, in order to reform the Muslim community of Bangladesh, reform in the education system is crucial.

In order to reform the current divisive nature of education system, the state can initiate to merge the national schools and madrassas as one to avoid spreading conflicting perspectives regarding gender roles in the society and children from all background receive extensive knowledge about both Islam and science. Alternatively, Islamic knowledge must be incorporated as a part of regular school curriculum. Although, the Bangladeshi government keeps insisting on the importance of religious knowledge, Religious education is tactfully avoided. For instance, religious education is provided to students from Class-3 till class 8 only which is further divided into two categories: religious education and ethical education (Chowdhury, 2012). Making religious studies an optional subject cast doubt as to how much importance is really given to religious education. Since Bangladeshi society is so heavily influenced by Islam that the State has named Islam the official religion even though the country itself identifies as a secular nation, it is important to have Islamic responses to the modern problems, which can be achieved through critical analysis of Islamic teachings. Therefore, education continues to thrive as the most crucial catalyst for changing the society and reforming Islamic interpretation in general and regarding status of women on particular. Esposito and DeLong-Bas also suggest that both scientific knowledge and religious values must be incorporated the educational system so that appropriate Islamic responses to contemporary issues in changing contexts can be developed. They point out:

*“The basic fight against illiteracy and the struggle to reform the educational systems of both secular and religious institutions are essential. An important task in educational reform is the implementation of measures which ensure that the educational system incorporates the best of both scientific knowledge and religious value.”* (Esposito and DeLong-Bas, 2009, p.160).

In order to establish Muslim women's rights to marital property, it is crucial that women must have necessary data, both Islamic and legal, so that they are able to scrutinize these data thoroughly themselves rather than relying on Ulema's interpretation which are heavily influenced by patriarchal ideology. Doing so, would help Bangladeshi Muslim to recognize their rights and responsibilities and that marital community property regime is not contradictory to Islam in anyway. Majority of Muslim women in Bangladesh are unaware that nowhere in Quran it is mentioned that one gender is superior to another. In fact, Quran makes it profusely clear that the sole basis the basis for superiority of any person over another are devotion, virtue, and righteousness and not gender, colour, or nationality. Hence, recognizing both financial and non-financial contributions made by Muslim married women's by caring for the family and maintaining the household and enabling them to claim their rightful share in the marital property is indeed an act of virtue and righteousness, and thus, compatible with the Islamic principles. This is only possible through proper Islamic knowledge and education.

Furthermore, Krivenko points out that equality between men and women can be achieved through reformed understanding and interpretation of Islam developed by modernist Muslim scholars. Modernist Muslims should work to convince or remind ordinary Muslims that 'diversity of opinions, new interpretations and constant change' are essential in Islamic tradition, so new perception on the status of women can come from within the Islamic tradition itself (Krivenko, 2009, p.212).

**Social media influence and positive promotion of community property regime**

In recent times, the Internet and social media have gained the reputation of empowering people by enabling them to document oppression in various spheres of life and thereby discouraging abuse in the future. At the same time, social media has given platform for people from different social classes to create awareness around countless social issues and taboos. Furthermore, these social media platforms have birthed a number of cyber-collective movements surrounding women's issues that captured ample attention and made news headlines. Hence, it is imperative to examine the potentials of social media influence to create awareness and promote about community property regime through positive reinforcement within the Muslim community of Bangladesh.

Traditional media has had a massive impact on people's perceptions and ideas about the role of girls and women in society and thereby tend to perpetuate gender inequality. Prolonged exposure of gender stereotype portrayal in the media through what is deemed as gender appropriate media content influence people's attitude towards expectations and aspirations for trajectories of life (International Media Support, 2020). On the other hand, social media has given women around the globe the platform to speak up about injustices and unfair treatments they have received and continue to receive and be heard. Social media has now become the frontier for women's rights activists to organize and allies to join the fight for equality and justice due to its power to encourage solidarity and collect shared experiences.

The magnitude of "Me Too" movement can be felt around the globe even till this date after four years since it launched. #Metoo hit social media platforms like a tsunami with reports of sexual harassments experienced by women on a regular basis from all over the world. Over time, the digital campaign has accounted for actual results by holding perpetrators accountable and face justice, forcing

companies and other entities to adjust their policies accordingly, and by facilitating dialogues among people all over the world on consent and ending sexual harassment. Similarly, the “He For She” campaign was launched and men across the globe were invited to join the movement for gender equality. Since the launch, men and women across the globe have used #HeForShe to pledge to end gender discrimination and to invite others to join the movement. More digital campaigns such as #OrangeTheWorld which was aimed to raise awareness and prevent violence against women and girls and #WomenShould which highlighted the major global issue of gender equality by exposing widespread prevalence of sexism and discrimination against women had exploded across social media and generated worldwide dialogue (UN Women, 2019).

In Bangladesh, Muslim women’s rights are violated on regular basis in both the public and private spheres, at both personal level and systemic level due low their socio-economic status and these violations often range from discriminatory customary practices to physical violence. Therefore, assuring women’s land rights through inheritance and equitable share in marital property will enhance their status significantly. Nevertheless, the government of Bangladesh, can simply enact a legislation installing Muslim women’s marital property rights but laws are only effective to the degree that they are enforced and give persisting poor condition of legal system of Bangladesh, it seems farfetched. Indeed, most human rights organizations continue to herald that freedom of media is essential for holding government accountable to improving a wide range of human rights (Whitten-Woodring, 2016). Furthermore, the need for media freedom and increased access to online media have been long advocated by organizations such as Amnesty International and Human Rights Watch arguing that independent news media and online outlets will improve human rights by letting

citizens know and spread the word about repression while reporting the horrific consequences for journalists who dare to voice against human rights abuse in Bangladesh (Amnesty International, 2006)

Several scholars maintain that women's condition can be significantly improved through globalization in general and globalized communication in particular (Whitten-Woodring, 2016). In this regard Howard-Hassman (2011) point out that globalization has facilitated the international women's movement as result of easier travel and communication among women from all over the world which enabled them to unite together and work towards common issues and that this in turn has helped the movement to minimize potential harmful effects of globalization such as sex trafficking (Whitten-Woodring, 2016). For instance, when the news broke of two Dalit sister in India in August 2015, who were threatened with a rape verdict by the local authority as a punishment for their brother's alleged elopement with a married woman, #dalitwomanfight began to trend over all social media platforms, drawing attention of national and international news portals on the repression and sexual violence against Dalit women. As the news made headlines around the world, several members of the British Parliament instigated to call for their government pressurize the Indian government to protect the Dalit sisters. Amnesty International circulated a petition calling on the Indian Supreme Court to protect the sisters (Basu, 2015). Even though it is unlikely that this incident will lead to any long-term improvements for the Dalit community, it, however, successfully exemplifies that news about violence and repression against women can spread like wildfire around the world.

Global activism through the use of social media and international media enables Marginalized women to pressure their government to improve their situation.

Thus, social media can serve as instruments to spread information as the Internet in makes it easy to communicate information around the world (Whitten-Woodring, 2016). In Bangladesh, the freedom of press and media are restricted, and news reports are censored to protect the image of the country on the International stage. Furthermore, it is often seen that news outlets are reluctant to cover the repression until the violations breach cultural tolerance or there is some sort of external pressure which could be generated from citizens of Bangladesh using social media platforms to draw attention to the violations. Furthermore, social media-generated pressure could also garner attention from international groups and international news media, which in turn could lead to international governments and nongovernment organizations pressuring the domestic government to stop the repression (Whitten-Woodring, 2016). On the other hand, cultural attitudes toward gender equality are likely to influence not only whether women's rights are respected, but also the amount of attention and quality of news coverage the media provide. However, if journalists are truly able and willing to provide a voice to the voiceless, it stands to reason that by drawing attention the plight of marginalized women, journalists and news media might be able to make a difference.

Access to the Internet makes rapid spread of the news and information about subjugation of women possible across the globe. Similarly, access to the internet makes it possible for activists at both the domestic and international levels to use social media to pressure local journalists to cover domestic repression, and thereby, getting around the custodial role of traditional media. Therefore, exposing repression, discrimination and violence against Muslim women in Bangladesh due to their low socio-economic status on social media while asserting the urgency of community property regime to improve their condition,

can be deemed as a viable instrument to raise awareness on both national and international level, at the same time can garner enough attention from international media to pressure Bangladeshi government to ensure that legislation for Muslim women's property rights is not only enacted but also enforced. Alternatively, activists and journalists alike can employ social media to mobilize international support for women's issues and pressure governments to bring about reform (Whitten-Woodring, 2016). Thus, media freedom and Internet access could be the mechanisms to bring a positive effect in reinforcing the urgent need for improving the socio-economic status by ensuring Muslim women's right to claim equitable share in the marital property.

### **Judicial activism is the way forward**

There exists no judiciary in the world which has been left untouched by the surge of judicial activism. Clearly, a "general trend" encourages superior courts across the world "to indulge in judicial activism in order to do effective justice liberally" (Hoque and Khan, 2007, p.205). Although a legion of socially sensitive judges some parts of South Asia, such as India, have developed activist jurisprudences, most of South Asian judicial activism has stayed constrained within the realm of public law. Furthermore, there is evidence of extraordinarily little judicial activism taking place in issues regarding personal laws (Chowdhury, 2012). This reflects two things. In first, a prolonged attitude of judicial reverence towards the legislature and secondly, reluctant attitude of judges to interfere with issues regarding personal laws in general" (Hoque and Khan, 2007).

The theory of judicial activism provides that the judicial verdicts should be based on what is deemed fair and just and what is perceived to have a positive

reinforcement for the public welfare and thus, should not be based only on judicial precedents. The theory of judicial activism, thus, can be defined as ‘an enlightened and modernist judicial application of ijtiḥād’ (Chowdhury, 2012, p.57). Hoque and Khan (2007) define Ijtiḥād as offering new rulings on the basis of evidence and the interpretation of diverse sources of laws by jurists. They also agree with Menski’s (2006) hypothesis that Islamic legal system is, in fact, plural in nature despite having uniform set basic norms which apparent from diverse views on the same legal issue offered by different Islamic madhabs. In relation to existing pluralism in Islamic legal system Hoque and Khan ( 2007) point out:

*“Rules are not the same across the board, and in the absence of consensus (ijma) on a particular point there is much scope for juristic disagreement or ikhtilaf, which allows or legitimises the use of “inferential reasoning” to formulate a situation-specific decisive rule. This interpretive diversity offers modern jurists or judges the opportunity to exercise ijtiḥād or judicial activism”* (Hoque and Khan, 2007, p. 206-207).

Essentially, the effectiveness of family law reform to incorporate community property regime in Bangladesh depends on the acceptance by the majority member of its Muslim community. As noted earlier, the citizens of Bangladesh have strong attachments to Islam even if there is no strong Islamic revival effort in the society in general (Chowdhury,2012). Therefore, to establish Bangladeshi women’s rights to equitable share in the marital property, it must be done in compliance with the religious customs, practices, and beliefs. As judicial activism can be considered to be enlightened by Islamic theory of ijtiḥād, it is highly likely that community property regime as result of judicial activism will be accepted by majority member of the Muslim community of Bangladesh.

Although judicial activism seems to have strong potentials to reform family law in Bangladesh, it is apparent that the judges had been hesitant to apply innovative interpretation to Islamic family law due to their generally outdated, positivism-inspired legal orientation as well as fear of causing possible socio-political repercussion in absence of a specific piece of legislation (Chowdhury, 2012) . Hoque and Khan (2007) agree that judicial activism is provides for essential mechanism for protecting women's right in Bangladesh as they write: "in a society like Bangladesh where legislative activism in Islamic family law is, for distinct reasons, unlikely to occur spontaneously, judicial activism can be a potent tool for better protecting the rights under shariah" (Hoque and Khan, 2007, p.236).

Moreover, most of the judges in Bangladesh do not possess the Islamic expertise to interpret sharia law innovatively and judges could achieve more in reforming Islam personal law through judicial activism if they were provided with enlightened interpretations by the Bangladeshi judiciary. In this regard example can be extracted from Pakistan. A number of progressive judges in began to participate in and apply innovative analysis of the early texts in order to rectify harsh rules and to revise the conventional rules in a manner that is compatible with modern issues and modernist notions including constitutional gender-equality.

The judicial revolution in Pakistan also played part in ratifying the modernists' assessment of decisions made early jurists were indeed the product of "the reasoning of men in a patriarchal era," that tactfully abandoned the opinions and needs of women and thus, is contradictory to the very essence of Islam. Therefore, Islamic rulings should also evolve to accommodate the change in circumstances of the evolving society and in doing so, early analyses are regarded as mere tools of aid in interpreting a rule rather than absolute ruling on

the matter. Applauding this significant accomplishment of Pakistani judiciary, Serajuddin (2001) writes:

*“By asserting the right to independent interpretation of the Qur’an, denied by the ijma of the classical jurists to later generations of Muslims and to differ from the doctrines of the traditionally authoritative legal texts, not based on injunctions of the Qur’an and Sunnah, the courts have freed Sharia law from some of the illogical restrictions and anachronistic interpretations and greatly facilitated the process of liberalization of law.”* (Serajuddin , 2001, p.29).

Islam holds foremost importance on justice and the act of adjudication is considered a divine occupation in Islam. The feature of internal legal pluralism in Islamic legal system that encourages judicial activism and ijtihad paves way for judicial activism while staying within the Islamic framework. Unfortunately, during the 15<sup>th</sup> century, the door to ijtihad gradually began to close as a result of shifting societal circumstances, new innovations in knowledge and western advance. So, in order to conserve traditional norms and institutions, Muslims began to embrace a rather conservative attitude and consider innovation and adaptation in a negative light (Smock, 2004). Thus, closing the doors of ijtihad have irrevocably hindered advancement of the Muslim world by preventing thousands of potential mujtahids and scholars from critically analysing and offering practical solutions to evolving issues.

It is undeniable that there is much scope for awarding Muslim women’s rightful share in the marital property while staying within the framework of Islamic family. This is especially true due the existence of internal pluralism in Sharia law because it is not possible to bring legal change and adaptability without diversified opinions. On the other hand, judicial activism allows judges to rule and interpret

bills on the basis of fair and just. Improving Bangladeshi's Muslim women's socio-economic status by allowing them to claim their rightful and equitable share in the marital asset is only fair. Judges, therefore, as Hoque and Khan (2007) put it "must be ready, and have training to use, their legal and procedural skills to interpret and apply Sharia or statute-based Islamic family law in a way that responds to the needs of the modern age" (Hoque and Khan, 2007, p.234). An enlightened judge through his/her rulings on Islamic family law issues is able to enlighten public about various equitable and equality provisions of the Quran and Hadith which provide for an equitable legal relationship between men and women and thus, create basis for Muslim women's equitable rights in marital property among other things. Thus, it can be concluded that judicial activism through ijtihad in the context of Bangladeshi Islamic family law has potential for delivering desirable results for establishing Muslim women's marital property rights in Bangladesh.

## 7.4 Concluding Remarks

This research paper aims to establish the necessary grounds for establish Muslim women's marital property rights in Bangladesh while navigating through various influential factors within the Muslim community of Bangladesh. The myriad of contributions made in the marital house by Muslim Married women in Bangladesh in form of monetary support and nonmonetary support is undeniable. Yet, their continuous contributions in improving and acquiring marital assets have been overlooked for decades in addition to improving their social status. No wonder, most divorced or separated women have face severe economic hardship with no available compensation or housing aid from the state government. Circumstances for some of these women are so poor that they are forced to beg for food to survive, halt their children's education, take job of live-in housemaids for the sake of ensuring roof over their head while some simply becomes homeless, living on the street. After considering the fact that socio-economic status of Muslim women is so low that they are borderline marginalized. In order to improve their status as well as to recognize their abundant contributions and compromises for the benefit of their marital households, the establishment of community property regime in the Muslim community of Bangladesh requires urgent attention.

Undoubtedly, there is more than enough scope within both Islamic framework and statutory framework of Bangladesh to establish and enforce community property regime in the Muslim community. As Mashhour (2005) points out:

*“The dynamic nature of Islamic teachings, the evolving character of Sharia, the spirit of Islam towards women's rights, the principles of justice and public welfare, and the essentiality of feminist Ijtihad leave no room for doubt that a common*

*ground could be found between Islamic law and gender equality” (Mashhour, 2005, p. 596).*

However, the patriarchal ideology fuelled Islamic misinterpretation and customary which are likely to restrict granting women equitable rights to marital in the Muslim Community of Bangladesh, but all the governmental and non-governmental actors have to work together to abolish all form discrimination against women at both private and public realm. Doing so will allow peaceful transition of community property regime. Furthermore, establishing women’s rights to claim equitable share in marital asset will not only empower and improve socio-economic status of women in Bangladesh but also improve the socio-economic status of the country as whole. This is especially true because a state cannot thrive when half of its citizens are oppressed in the hand of the other half.

In this paper, I have argued the case for urgent need of establishing Muslim married women’s rights to claim equitable share in the marital properties. After traversing through various mechanisms for installing community property regime in Bangladesh, I have come to the conclusion that there is both Islamic and constitutional scope for doing so but establishing women’s marital property rights through viable Islamic channel has more chance of being accepted by the Muslim community of Bangladesh due their overt conviction and attachment to Islam. Simply enacting a piece of legislation to establish Bangladeshi Muslim women’s marital property rights appears to ineffective if it is disregarded by majority member of the Muslim community and hesitantly enforced by judiciary of Bangladesh. Therefore, reform in education system in Bangladesh is an integral ingredient for improving women’s status in the society by intervening children from an early age from engaging in gender stereotypical attitude and adopting a

patriarchal gender ideology that discriminates against women, and by educating both male and female students about the equitable and equality provisions of the Qur'an through Islamic studies so that they are able use equity and good consciousness to navigate through future trajectories of their lives. Nevertheless, the existing Muslim family law needs to be reformed to incorporate the concept of marital property and this reform can be achieved by government initiatives on enlightening Bangladeshi citizens about true values and laws of Islam and the concept of ijtiḥad and encouraging judges to readily participate in judicial activism while dealing family law related issues.

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