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বিষয়

**Report on a reference by the Government under section 6 (Yo)
of the Law Commission Act, 1996 relating to reservation by
Bangladesh in respect of certain articles of *The Convention on
Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW)***

০১ জুলাই ১৯৯৭

পুরাতন হাইকোর্ট ভবন

ঢাকা-১০০০

Report on a reference by the Government under section 6 (Yo) of the Law Commission Act, 1996 relating to reservation by Bangladesh in respect of certain articles of the Convention on Elimination of All Forms of Discrimination Against Women, 1979

This is a reference by the Government under **section 6 (T)** of the Law Commission Act, 1996.

The points of reference are in the note dated 22/6/97 submitted to the Commission by the Ministry of Law, Justice and Parliamentary Affairs, the relevant portions of which runs as follows:

- ৩৮। ১৯৭৯ সালের ১৮ই ডিসেম্বর জাতিসংঘ কর্তৃক নারীর প্রতি সকল প্রকার বৈষম্য বিলোপ সনদ (সিডো) **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)** অনুমোদিত হয়। বাংলাদেশ ১৯৮৪ সালে সিডোর কয়েকটি ধারা-উপধারা সংরক্ষণ সাপেক্ষে উহাতে অনুমোদন ও স্বাক্ষর দান করে। এই ধারা-উপধারাগুলি হইল ২, ১৩ (ক) ১৬ এর ১ (গ) ও (চ)।
- ৩৯। সিডো এর উপরোল্লিখিত সংরক্ষিত ধারা-উপধারাগুলি বাংলাদেশে প্রচলিত ধর্মীয় আইনের পরিপন্থী কিনা এবং বর্তমান পর্যায়ে উক্ত সংরক্ষিত ধারা-উপধারাগুলির সংরক্ষণের অবসান ঘটানো যায় কিনা সেই বিষয়ে আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয়ের মতামত চাওয়া হইয়াছে।
- ৪০। বিষয়টিতে সর্বোচ্চ পর্যায়ে জাতীয় সিদ্ধান্ত গ্রহণ করা আবশ্যিক। তবে বিষয়টির উপরে আইনগত দিকগুলি বিবেচনা করার জন্য নথিটি আইন কমিশনের নিকট প্রেরণ করা যাইতে পারে।
- ৪১। এমতবাস্তায় উক্ত সিডোতে বাংলাদেশ যে সমস্ত ধারা উপধারা সংরক্ষণ করিয়াছেন উহা বর্তমান পর্যায়ে অবসানের কোন সুযোগ আছে কিনা এই মর্মে সদয় মতামত প্রদানের নিমিত্ত নথিটি আইন কমিশনে প্রেরণ করা যাইতে পারে।

আমিন উল্লাহ
সচিব

আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয়
গণপ্রজাতন্ত্রী বাংলাদেশ সরকার।

(See paras 38, 39, 40, and 41 of File No, Date mt 258/97)

2. From the reference, it appears that Bangladesh is a State Party to the Convention on Elimination of All Forms of Discrimination Against Women, 1979 hereinafter called the Convention having made reservations to effect that it would not be bound by **Articles 2, 13(a) and 16(1)(c) and (f)** of the Convention. It further appears that the questions of withdrawal of these reservations is under consideration of the Government and as such, opinion of the Law Commission has been sought as to whether withdrawal of the above reservations, or in other words, implementation of the principles incorporated in the above articles after withdrawal of the reservation in respect thereof will conflict with “religious laws (agx©q AvBb) prevailing in Bangladesh, and, (2) whether in the prevailing situation in Bangladesh there is any scope for withdrawal of those reservations.
3. A study of the Government file shows that Bangladesh acceded to the Convention on 6 November, 1984 with reservations in following terms, “The Government of the People’s Republic of Bangladesh does not consider as binding upon itself the provisions **of Articles 2, 13 (a) and 16 (1) (c) and (f)** as they conflict with Shariah Law based on Holy Quran and Sunna.”
4. Presumably, while making the reservations as quoted above, the Government took into consideration only the provisions of Islamic law in absolute vague and general terms. The provisions of other laws based on religion such as, Hindu Law governing the Hindus and the Buddhists, Christian Law governing the Christians and various tribal laws governing different tribes inhabiting Bangladesh were not taken into account. Moreover, it is also not clear which provisions of Islamic Law in force in Bangladesh would conflict with the provisions **of Articles 2, 13 (a) and 16 (1) (c) and (f)** of the Convention. Since the terms of the reservations show that these reservations with respect to the above articles of the Convention were made in order to avoid “conflict with Sharia Law based on Holy Quran and Sunna” in force in Bangladesh, the commission proposes to examine the question with reference only to those rules of Islamic Law which are applicable to Bangladesh.
5. The sources of Islamic Law are, (1) the Holy Quran; (2) The Hadis or Sunna (traditions handed down from the Prophet); (3) Ijmaa or concordance or agreement amount highly qualified legal scholars (not contrary to the Holy Quran or Hadis); and (4) Qiyas or the exercise of analogical reasoning. There are different schools of Islamic Law on the acceptance of Hadis and importance of Ijmaa and Quyas but all schools are unanimous on what is specifically laid down in the Holy Quran and also on the Divine origin of the Holy Book which, according to the belief of all Muslims irrespective of sects or sub-sects, “was revealed to the Prophet by Gabriel (**Mulla, Principles of Muhammedan Law, Nineteenth Edition, P. XIX**). So, Islamic Law is divine law or religious law as distinct from temporal law.

6. In spite of the above position of the pure rules of Islamic Law in Bangladesh the extent of their applicability has been defined by various legislative enactments. Enactments have been made to completely discontinue, to limit, and to made specifically applicable various rules of pure Islamic. For example, Islamic Criminal Law, both substantive and procedural and Islamic Law of Evidence have no applicability in Bangladesh and statutory laws have substituted them. So far as applicability in concerned, as regards Bangladesh, the rules of Islamic Law fall under three divisions, namely.
 - i. those which have been expressly directed by the Legislature to be applied to Muslims, such as, Succession and Inheritance, among others;
 - ii. those which are applied to the Muslims as a matter of justice, equity and good conscience, such as, the rules of the Islamic Law of Pre-emption; and
 - iii. those which are not applied at all although the parties are Muslims, such as, the Islamic Criminal Law and the Islamic Law of Evidence.
7. For the purpose of this reference, the first category of Islamic Law alone will be relevant and as such, were propose to death only with this category of the rules of Islamic law in this reference.
8. **Section 2** of the Shariat Act, 1937 (**Act XXVI of 1937**) specifically lays down in which matters pure rules of Islamic Law will apply where the parties are Muslims. It runs as follows:- “Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females including, personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including **talaq, ıla, zihar, lian, khula and Mubaraat** , maintenance, dower, guardianship, gifts, trust and trust properties and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (shariat).”
9. By Section 6 of the Shariat Act, 1937, certain enactments which were inconsistent with section 2 thereof were repealed.
10. The scope and purpose of enacting section 2 of the above Act are to abrogate all customs and usages which displaced the pure rules of Islamic Law in the Indian sub-continent including Bangladesh in respect of the Muslim Personal Law relating particularly to intestate succession, special property of females, marriage, all forms of dissolution of marriage, maintenance, dower, guardianship, gift, trust properties and wakfs. So, in respect of the above matters the pure rules Islamic Personal Law laid down in the Holy Quran and derived from the Hadis, Ijmaa and Quiyas will apply to all Muslims in Bangladesh. It must also be emphasised that though different schools of

Islamic law have differently interpreted certain Hadis, Ijmaa and Qiyas, the courts, in administering Islamic law cannot, as a rule, put any new interpretation on their own on construction on the Holy Quran in opposition to the express ruling of Islamic commentators of great antiquity and high authority (*See Aga Mahomed Gaffa v. Koolsom Beebee (1887) ILR 25, Calcutta PP. 9, 18; 24 Indian Appeals, pp.196, 204*)

11. It is in the above context that the effect of withdrawal of the reservations in respect of the above articles of the Convention, or, rather the effects of implementing the said articles on Muslim Personal Law after withdrawal of the reservations will have to be considered.

Succession and Inheritance

12. So far as the law of succession and inheritance is concerned according to the pure rules of Islamic Law which apply to Bangladesh in view of section 2 of the Shariat Act, 1937, the estate of a deceased Muslim devolves on his heirs after meeting successively (1) his funeral expenses and death-bed charges; (2) expenses of obtaining probate, letters of administration, or succession certificate; (3) expenses towards wages due for service rendered to deceased within three months next preceding his death by any labourer, artisan or domestic servant; (4) expenses towards payment of other debts of the deceased according to their respective priorities; and (5) legacies not exceeding one-third of what remains after all the above payment have been made, according to the sect to which he belongs. The heirs succeed to the estate of the deceased in specific shares. These shares which each sharer is entitle to get is specifically determined in the Holy Quran. The share of each sharer is laid down in the Holy Quran and is not derived from the Hadis or Ijmaa or Qiyas. According to the mandate in Sure Nesa: "A male shall have as much as the share of two females; but if they be females only, and above two in number, they shall have two-thirds parts of what the deceased shall leave; and if there be but one she shall have the half; and the parents of the deceased shall have each of them a sixth part of what he shall leave if he have a child; but if he have no child, and his parents be his heirs, then his mother shall have the third part; and if he have a brethren, his mother shall have a sixth part, after the legacies which he shall bequeath, and his debts be paid.....". Again "..... ye may claim half of what your wives shall leave, if they have no issue; but if they have issue, then ye shall have the fourth part of what they shall leave, ; they also shall have the fourth part of what ye shall leave, in case ye have no issue; but if ye have issue, then they shall have the eighth part of what ye shall leave..... If a man die without issue, and have a sister, she shall have the half of what he shall leave; and he shall be heir to her, in case she have no issue, but if there be two sisters, they shall have, between them, two thirds part of what he shall leave; and if there be several, both brothers and sisters, a male shall have as much as the portion of two females." (*See Sura IV, Sura Nesa, verses, 3,12,13,14,15,57 and 175*).

Without entering into the details of the tables of sharers, residuaries and distant kindred according to Shia and Sunni laws the position of female heirs under the pure rules of Islamic law may be very aptly summarised in the following words, “Females, co-existing with males of the same degree (or of a lower degree, but entitled to succeed with them) take a smaller share than the males.....” (*See Syed Ameer Ali, Mohommedan Law, Seventh Edition, Vol. II, p.31*).

All authorities are unanimous on the above interpretation of the mandate of the Holy Quran (*See Baillie, Digest of Moohummudan Law Part first second Edition, 1875, Chapters II and III*)

13. There is, therefore, no doubt that according to the pure rules of Islamic law by which all Muslims of Bangladesh are governed the share of the female heir is half the share of the male heir of the same degree (or of a lower degree but entitled to succeed) in the property left by a deceased.

Marriage

14. Marriage, according to Islamic Law, is a civil contract and in general, the right and duties of the contracting parties i.e. the husband and the wife are almost evenly balanced-rather in some respect are in favour of the wife, such as, right of the wife to dower and to claim maintenance from the husband without such corresponding right of the husband-except in respect of the number of wives that a husband may marry and the right of divorce. We, therefore; propose to confine ourselves to polygamy and divorce.
15. According to the principles of Islamic Law, a Muslim male may have as many as four wives at the same time but not more. This principle also follows from a verse of the Holy Quran which runs thus:- “**Ye may marry** whatsoever women are agreeable to you, two, three or four..... but if ye cannot be just, be content with one wife.” (*Sura IV, sura Nesa, verses 2,3 and 4*.)” According to Hedaya, “It is lawful for a freeman to marry four wives, whether free or slaves: but it is not lawful for him to marry more than four....” (*See Hamilton, Hedaya, p.88*). Baillie says, “It is not lawful for any man to have more than four wives at the same time.” (*See Baillie, Digest of Moohummudan Law, 1865, p.30*). Syed Ameer Ali writes, “Nor, according to these schools, can a man marry a fifth wife when he has completed the number tolerated in the Koran, viz., four”. (*See Syed Ameer Ali, Mahommedan Law, Vol., II, Fifth Edition, p. 280*). “A Mahommedan may have as many as four wives at the same time but not more.....” (*See D.F. Mulla, Principles of Mahommedan Law, Nineteenth Edition, section 255, p.225*). On the other hand, plurality of husbands for a Muslim woman is absolutely prohibited and a marriage by a woman who has her husband alive and who has not been divorced by him is void (*See Ibid, section 256 p.225*). The consequence is that such a marriage by a woman will make her guilty of bigamy punishable under

section 494 of the Penal Code, whereas, a Muslim husband taking even more than four wives will not be guilty under that section as such a marriage by a Muslim male is not void but merely irregular. Although this pure rule of Islamic law of polygamy allowing a Muslim male to marry more than one wife during the subsistence of the first marriage has been very severely restricted in Bangladesh by laying down procedures for such marriage by enacting the Muslim Family Laws Ordinance, 1961, the fact remains that polygamy has not been totally prohibited and the rule of Islamic Law granting the right to a Muslim male to take more than one wife subsists.

Divorce

16. According to the principles of Islamic Law, “any Mahomedan of sound mind, who has attained puberty, may divorce his wife whenever he desires without assigning any reason.” (*See Ibid, section 308 p-258; Hamilton, Hedaya, Chapter II and Baillie, Digest of Moohumadan Law, second Edition, 1876, pp-208-209*). There are various forms of divorce or talak but there is no necessity of any detailed discussion thereof and although divorce or talak has been condemned as detestable both in the Holy Quran and in the sayings of the Prophet, the rule of Islamic Law has conferred almost absolute power on the husband to divorce his wife. According to Islamic Law the husband may, however, delegate this power to the wife or even to a third person either absolutely or conditionally. (*See D.F. Mulla, Principles of Mahomadan Law, Nineteenth Edition, section 314, p. 263*). Such delegation is of course the absolute right of the husband. The wife can, however, secure judicial divorce under certain contingencies. (*See the dissolution of Muslim Marriage Act, 1939*). By the Muslim Family Laws Ordinance, 1961 certain procedures have been laid down for talak or divorce proceeding from the husband or the exercise of the delegated right of divorce by the wife, to be effective. But the fact remains that under the existing law also the pure rule of Islamic Law that a Muslim male has absolute power to divorce his wife and that a Muslim female can have the power to divorce her husband if the latter delegates his power to her remains good law. So, according to the rules of Islamic Law prevailing in Bangladesh Muslim women do not have equal right with Muslim men as regards divorce.

Guardianship and Wardship

17. According to Islamic Law, the mother is entitled to the custody of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child unless she marries a second husband in which case the custody belongs to the father. The father is entitled to the custody of a boy over seven years of age and of an unmarried girl who has attained puberty. Failing the father, the custody belongs to the paternal relations in order of priority. The father, the executor appointed by the father’s will, the father’s

father and the executor appointed by the will of the father's father are the guardians of property of the minor in successive order of priority. In absence of any legal guardian of the person or of the property of the minor, the Kazi i.e. the Court is empowered to appoint his guardian. (**See D.F. Mulla, Principles of Mahomedan Law, Nineteenth Edition, sections 352,358,359, 360; p.p. 287, 292, 293,294**). These rules of Islamic Law have lost much of their relevancy after enactment of the Guardians and Wards Act, 1890 (**Act VIII of 1890**) . According to this Act, an application for the appointment of a guardian of the person or of property or of both of a minor may be made to the court and the court may, if satisfied that it is for the welfare of the minor, pass order appointing any person as a guardian of his person or property or both. In appointing such guardian the paramount consideration for the court is the interest and welfare of the minor and also the preference of the minor if he is capable of forming intelligent preference. (**See the Guardians and Wards Act, 1890, section 7,11 and D.F. Mulla, Principles of Mahomedan Law, Nineteenth Edition, sections 349,350,351 p.p. 285, 286**). Consequently, so far as guardianship of minor children is concerned, there is very little scope of discrimination against women and in this respect, men and women enjoy equal rights as the provisions of the Guardians and Wards Act, 1890, are invariably applied when disputes as to the custody of the person or property or both of a minor Muslim child arise.

Maintenance, Dower, Gifts, Trust and Trust Properties, Wakfs, Adoptions, Family Benefits etc.

18. Regarding maintenance and dower Muslim women enjoy better rights than Muslim men. These are primarily exclusive legal rights of Muslim women. Regarding gifts, trust and properties and wakfs, women have the same rights and duties as men. (**See D.F. Mulla, Principles of Mahomedan Law, Nineteenth Edition, sections 138, 139, 182, 203: p.p. 112, 151, 173**).
19. In the light of the legal positions of Muslim Person Law as explained above, it has now to be seen whether withdrawal of the reservations in respect of **Articles 2, 13 (a) and 16 (1) (c) and (f)** of the convention is likely to conflict with any of the above provisions and in this connection, we propose to consider each of the above article separately.

Opinion of the Commission

20. Article 2 of the Convention runs of follows:

“States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and to this end, undertake.

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle.
 - (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
 - (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
 - (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
 - (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
 - (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
 - (g) To repeal all national penal provisions which constitute discrimination against women.
21. **Article 2 (a)(b) and (f)** enjoin the State Parties, among other things, to modify and repeal all existing laws, regulations, customs and practices which discriminate against women and also to enact new laws in order to secure equality of the rights of men and women in all spheres. As soon as reservation in respect of **Article 2** of the Convention is withdrawn, **Article 2 (a) (b) and (f)** will apply to Bangladesh and Bangladesh will be under an obligation to enact legislation to secure equality of Muslim males and females in respect of inheritance, marriage and divorce and any legislation aimed at securing

equality of men and women in respect of the above matters will conflict with the Muslim Personal Law in force in Bangladesh in respect of those matters. So, withdrawal of reservation in respect of **Article 2** of the Convention or, rather, implementation of the provisions of **Article 2** of the Convention after such withdrawal will conflict with the provisions of Muslim Personal Law relating to succession and inheritance, marriage and divorce.

22. Article 13 (a) of the Convention as follows:

“States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on the basis of equality of men and women, the same rights, in particular:

(a) The right to family benefits

The words, “family benefits”, are not defined in the Convention. Presumably, these mean social welfare benefits provided by the State to a family, such as, unemployment allowances, medical benefits, children’s educational allowances, housing benefits, etc. Muslim Personal Law does not prohibit granting of such benefits to male members and female members of a family on the basis of equal rights. It appears to us that **Article 13 (a)** of the Convention does not conflict with any provision of Islamic Law and as such, withdrawal of the reservation in respect thereof will not militate against any-principle of Islamic Law in force in Bangladesh.

23. Article 16 (c) and (f) run as follows:

“1. States Parties shall take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relation and in particular shall ensure, on a basis of equality of men and women:

.....

(c) The same rights and responsibilities during marriage and its dissolution ;

.....

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exists in national legislation; in all cases the interests of the children shall be paramount.”

We have already seen that in respect of marriage and divorce the Muslim Personal Law in Bangladesh does not provide equal rights and responsibilities or men and women. As such, **Article 16 (c)** militates against Muslim Personal Law on marriage and divorce in force in Bangladesh. So far so guardianship, wardship, and trusteeship are concerned, we have already commented that the provisions of

Muslim Personal Law coupled with statutory laws enacted by the legislature do not militate against the concepts of equality of men and women and do not also create any discrimination against women. There is no law, custom, usage or practice of adoption of children among Muslims of Bangladesh and adoption is not recognised in Islamic Law. In this circumstance, **Article 16 (f)** does not conflict with any provision of Muslim Personal Law in force in Bangladesh.

24. The first part of the reference as to whether **Articles 2, 13 (a) and 16 (1)(c) and (f)** conflict with the rule of Islamic Law is answered as follows:

(1) **Article 2** of the Convention conflicts with the rules of Islamic Law in force in Bangladesh in respect of succession and inheritance, marriage, and dissolution of marriage.

(2) **Article 13 (a)** does not conflict with any provision of the rules of Islamic Law in force in Bangladesh.

(3) **Article 16 (c)** conflicts with the rules of Islamic Law in force in Bangladesh in respect of marriage and dissolution of marriage.

(4) **Article 16 (f)** does not conflict with the rules of Islamic Law read with statutory laws in force in Bangladesh in respect of guardianship, wardship, trusteeship, and adoption of children.

25. So far as the second part of the reference as to whether Bangladesh should withdraw reservation in respect of the above articles of the Convention is concerned, the Commission do not express any opinion as no legal question is involved therein.

1st July, 1997

Singed / = 01.07.1997
(Justice Dr. F.K.M.A. Munim)
Chairman

Singed / = 01.07.1997
(Justice Amin-ur-Rahman
Khan)
Member

Singed / = 01.07.1997
(Justice Naimuddin Ahmed)
Member