

**IMAGINARY LINES?**  
**'ISLAM,' 'SECULARISM,' AND THE**  
**POLITICS OF FAMILY LAWS IN**  
**BANGLADESH**

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# Abstract

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With the world's fourth-largest Muslim population, Bangladesh is an important case study in the exploration of what it means to be a 'secular' country with Islam as a state religion. One important mechanism through which to analyse the relationship between religion and the state is through the country's laws, and family laws are especially significant in that they represent the state's determination of which long-standing social and religious practices find their way into legislation as a representation of societal values. As with many other countries with significant Muslim populations, personal status legislation has remained relatively static in the years following independence, despite attempts at change.

Inspired by studies of negotiations between state and civil society actors in bringing about changes in law, this study analyses the evolution of family laws for Muslims in Bangladesh, revealing a range of voices using such laws in their negotiations between competing notions of 'Islam' and 'secularism' and their role in governance. Using parliamentary and Supreme Court records, newspaper archives, expert interviews, and secondary literature, I show that there has been little change in personal status legislation beyond procedural simplification, and that the judiciary and policymakers have had a tendency to support freedom of religious practice *except in family laws*. This study explores why this is the case, and focuses on the discourse around the National Women Development Policy and its clause on property and inheritance as the greatest point of contention in enhancing women's rights in family laws.

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# Glossary

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## of Bengali, Arabic, and legal (Arabic and Latin) terminology

<b>birangona</b>	war heroine
<b>dhormo niropekkhotā</b>	religious neutrality
<b>fatwa</b>	religious edict
<b>fiqh</b>	Islamic jurisprudence
<b>hartal</b>	protest or strike action that involves the shutting down of workplaces and especially places of business, including schools, offices, shops, and others
<b>iddat</b>	post-divorce maintenance from ex-husband to ex-wife, traditionally lasting for the length of three menstrual cycles
<b>ijma</b>	consensus reached among religious scholars in Islam
<b>ijtihad</b>	use of reasoning, through mechanisms such as ‘qiyas’ and ‘ijma,’ to interpret the meaning of the Quran and Sunnah
<b>khula</b>	type of divorce that can be initiated by a wife, if delegated by husband and willing to give up post-divorce maintenance and in some cases also return ‘mehr’
<b>maddhab or maddhahib</b>	school or schools of ‘fiqh’ or Islamic jurisprudence
<b>madrasah</b>	religious schools for Muslims (in the context of South Asia)
<b>mehr</b>	negotiated amount of money a groom or his family gives to a bride upon marriage and over which she is to have sole

	control during the course of her life
<b>nari</b>	woman or women
<b>pardah</b>	tradition of women's seclusion from male contact outside of their immediate families
<b>qadi</b>	judges trained in Islamic jurisprudence to administer law
<b>qiyas</b>	form of analogical reasoning in which a legal decision is based on historical rulings by notable religious scholars on cases similar to the one under discussion
<b>shari'a</b>	Islamic principles
<b>Sunnah</b>	Prophet Mohammed's teachings and practices, records of which are known collectively as the Hadith
<b><i>suo motu</i></b>	a query that a court initiates of its own volition, that is inspired by but not part of the original case under judgment
<b>syasa-shari'a</b>	ruler's prerogative to implement a beneficial law that does not contradict shari'a
<b>takhayyur</b>	legal transplantation from alternative schools of jurisprudence or 'maddahib'
<b>takhsis al-qada</b>	ruler's right to determine courts' jurisdiction
<b>taqlid</b>	imitation, in the context of this study of medieval legal judgments
<b>ulema</b>	religious scholars
<b>zamindar</b>	landowners, historically a term that refers to feudal lords in South Asia

# CHAPTER I

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## Introduction

On 11 March 2008, the caretaker administration of the Bangladeshi government declared that it would not pass legislation equalising inheritance rights for men and women.<sup>1</sup> This announcement took place against a backdrop of violence inflicted by religious protestors concerned about the reformist implications of a newly instituted 'Jatiyo Nari Unnoyon Neethi' or National Women Development Policy (NWDP). In fact, the policy contains no provision for women's equal inheritance rights, and the Law Advisor of the caretaker government at that time went as far as to say that there was "no question of enacting such a [equal inheritance] law."<sup>2</sup> The NWDP of 2008 was ultimately withdrawn.

Three years later history repeated itself under the administration of the Awami League party when the latest draft of the National Women Development Policy was approved by Cabinet on 8 March 2011. Once again, politicians and civil society members of the religious right, as well as several local newspapers, claimed that the document gave women and men equal inheritance rights, and that such equality defied Islamic principles. Prime Minister Sheikh Hasina Wajed repeatedly pointed out in public forums that this was

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<sup>1</sup> "Govt Won't Pass Any Anti-Islam Law," *The Daily Star (online)*, 12 March 2008.

<sup>2</sup> *Ibid.*

not the case, and that her party would “never enact any law or adopt a policy which conflicts with the Quran and Sunnah.”<sup>3 4</sup>

The approval of the NWDP was nevertheless followed by a nationwide and day-long general strike on 4 April 2011 called by Islami Oikyo Jote, a coalition of religious right groups.<sup>5</sup> A few weeks later, the Jatiyo Mahila Sangstha or National Women’s Organisation held their own protests across the country in a show of support for the policy and its prompt implementation.<sup>6</sup> The issue of equalising inheritance rights between men and women in Bangladesh has been a particular stumbling block in implementing the NWDP because, even though it has not been an explicit goal of the policy, critics infer that equal inheritance rights are implied.

## 1. The Case of Bangladesh and Purpose of this Study

As Shahra Razavi and Anne Jenichen have argued, “One important prism for analysing the relationship between religion and the state is through the legal framework.”<sup>7</sup> The state has the legal authority to determine which long-standing social and religious practices find their way into statutory laws,<sup>8</sup> and family laws such as inheritance rights are

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<sup>3</sup> ‘Sunnah’ refers to records of the Prophet Mohammed’s teachings and practices and is considered to exemplify an Islamic way of life.

<sup>4</sup> Kaberi Gayan, “‘Equal Property Right’: Much Ado About Nothing,” *Forum, magazine of The Daily Star newspaper (online)*, May 2011.

<sup>5</sup> Ibid.

<sup>6</sup> Naimul Haq, “Women Defy Islamic Clergy,” *Inter Press Service (online)*, 28 April 2011.

<sup>7</sup> Shahra Razavi and Anne Jenichen, “The Unhappy Marriage of Religion and Politics: Problems and Pitfalls for Gender Equality,” *Third World Quarterly* 31, no. 6 (2010): 835-36.

<sup>8</sup> Abdullahi A. An-Na’im, ed. *Islamic Family Law in a Changing World: A Global Resource Book* (London: Zed Books, 2002), 2.

especially significant in representing these religious practices relative to other areas of the law in Bangladesh. Furthermore, where “differential treatment of men and women in the application of family law exists ... the main differences centre around whether women are considered full and autonomous persons in the legal sense, with the right to consent to marriage, to inherit equally, and to contract a divorce with rights equal to those of a man.”<sup>9</sup> These differences are intimately bound to conceptions of women’s roles in the family as symbolic of the core norms and traditions in a society.<sup>10</sup>

Personal or family laws in Bangladesh for the 89.6 percent of its population that is Muslim<sup>11</sup> are determined through the interpretation of ‘shari‘a’ or Islamic principles. They determine the rules of marriage, inheritance, divorce, and child custody. As these principles are currently applied to inheritance, for example, Muslim women have the right to inherit only half of what their male counterparts receive. Regulations around inheritance rights are the most difficult to change among shari‘a-guided family laws; a range of country cases from the Muslim world<sup>12</sup> demonstrate that, while legal reforms have accorded greater rights to women in areas such as marriage, divorce, and child custody, the sexual equalisation of inheritance rights is almost non-existent. The Ottoman Land Code of 1857 still offers perhaps the most significant precedent for equality of the sexes in inheritance rights - to

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<sup>9</sup> Valerie M. Hudson, Donna Lee Bowen, and Perpetua Lynne Nielsen, "What Is the Relationship between Inequity in Family Law and Violence against Women? Approaching the Issue of Legal Enclaves," *Politics & Gender* 7, no. 4 (2011): 454.

<sup>10</sup> Nira Yuval-Davis, *Gender & Nation* (London: Sage Publications, 1997); Sita Ranchod-Nilsson and Mary A. Tetrault, *Women, States, and Nationalism: At Home in the Nation?* (London: Routledge, 2000).

<sup>11</sup> "Mapping the Global Muslim Population: A Report on the Size and Distribution of the World's Muslim Population," (Washington, D.C.: Pew Forum on Religion & Public Life, Pew Research Center, 2009), 5.

<sup>12</sup> There is little consensus on what countries or communities lie within the boundaries of this term ‘Muslim world’ but here ‘Muslim world’ or ‘Muslim countries’ can be considered a shorthand label for countries whose personal or family laws for their Muslim citizens have been guided by shari‘a, including countries with significant minority Muslim populations such as India and Ethiopia.

land, in the case of this particular reform - among countries spanning the modern Muslim world, and very few truly significant changes have been enacted in this area of shari'a-guided laws since then.

In the context of the politics around women and religion, there are several reasons why Bangladesh provides an interesting case for study. Despite its geographically small size, the country's population represents 9.3 percent of the world's 1.57 billion Muslim population and, with 145,312,000 self-identified Muslims, constitutes the world's fourth-largest Muslim population after Indonesia, India, and Pakistan.<sup>13</sup> Compared to its historically closest and better-off South Asian counterparts, India and Pakistan,<sup>14</sup> Bangladesh has fared better on numerous indices measuring the status of women, including the United Nations Development Programme's Gender Inequality Index,<sup>15</sup> the Organisation for Economic Co-operation and Development's Social Institutions and Gender Index,<sup>16</sup> and the World Economic Forum's Global Gender Gap Index.<sup>17</sup>

The Bangladeshi government has a history of pursuing gender equality through a range of development programmes, with its extensive and highly successful education policy to increase the school enrolment of girls being especially notable. Another well-known Bangladeshi phenomenon is the non-government movement towards providing access to

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<sup>13</sup> "Mapping the Global Muslim Population: A Report on the Size and Distribution of the World's Muslim Population," 5.

<sup>14</sup> According to the World Bank, in terms of 2010 GDP per capita (current US\$): India \$1,477, Pakistan \$1,008, and Bangladesh \$609 "World Development Indicators (Wdi)," ed. The World Bank (Washington, D.C.: The World Bank, 2011).

<sup>15</sup> United Nations Development Programme, "Human Development Report: Table 4 - Gender Inequality Index and Related Indicators," (New York: United Nations Development Programme, 2011).

<sup>16</sup> "Social Institutions and Gender Index (Sigi)," ed. Organisation of Economic Co-operation and Development (Paris: Organisation of Economic Co-operation and Development, 2009).

<sup>17</sup> Ricardo Hausmann, Laura D. Tyson, and Saadia Zahidi, "The Global Gender Gap Report," (Geneva: The World Economic Forum, 2011), 18.

finance to women through microcredit. Other developments have had indirect and sometimes unintentional benefits for women's empowerment, such as the government's family planning and health programmes, improved sanitation and infrastructure, expanding communications and entertainment industries, and the country's rapid expansion of garment factories and their employment of young, unmarried women.<sup>18</sup> Many of these improvements have been brought about in the context of encouraging economic development, with women's increasing participation in the country's economy and politics treated by successive governments as key to growth and modernisation.

**The purpose of this analysis is to trace the evolution of shari'a-guided family laws in Bangladesh and explain the lack of change in such laws since the country's independence, culminating in clashes over the inheritance rights clause of the country's National Women Development Policy.** As a country carved out of two partitions, one in 1947 on the basis of religion and another in 1971 on the basis of perceived ethnic differences, communal conflicts hampering efforts at legal reforms relevant to Muslim women are not as significant a factor in Bangladesh as they are in India and Pakistan.<sup>19</sup> That is not to say that some heterogeneity of religious and ethno-linguistic affiliation does not influence the politics of family laws in predominantly Muslim Bangladesh, but it is important to note that 98 percent of the country's population identified themselves as Bengali in 2004.<sup>20</sup> This study analyses a range of other factors slowing the pace of change in enhancing

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<sup>18</sup> Maitreyi Das (Lead Author), "Whispers to Voices: Gender and Social Transformation in Bangladesh," (Washington, DC: The World Bank, 2007), 8-9.

<sup>19</sup> Although Hindu, Christian, Buddhist, and 'adivasi' (Garo, Chakma, Marma, and Santal, for example) family laws have seen even less change in what is now Bangladesh since as far back as 1947, their political context as laws of relatively small minority groups are very different from that of the overwhelming Muslim majority.

<sup>20</sup> "Bangladesh," <https://www.cia.gov/library/publications/the-world-factbook/geos/bg.html>.

family laws for Muslim women, despite advances in so many other areas of sexual equality in Bangladesh.

## 2. Competing Voices and Definitions of Secularism and Religion

The starting point for this analysis is that the current state of family laws for Muslim women in Bangladesh is guided by a patriarchal interpretation of ‘fiqh’ or Islamic jurisprudence. Struggles over the NWDP suggest that there are movements in favour and against reforms of these laws. In discussing the competing discourses on the role of religion and its impact on women’s rights in family laws, I draw inspiration from two scholars who have sought to explain legal change with regard to shari‘a-guided law, often described simply as Islamic law. Alfred Stepan uses the example of Senegal and its anti-AIDS and anti-female genital mutilation (FGM) policies to suggest that even in countries with a great deal of religious practice and high respect for religious leaders, a level of cooperation between the secular and religious space in state policies through what he calls ‘rituals of respect’ can enhance rights where such rights may be negatively impacted by religious laws.<sup>21</sup>

Stepan argues that religious institutions should not have the authority to determine policies within democratic states but, at the same time, they should also be able to “advance their values in civil society.”<sup>22</sup> He dubs this mutual recognition between religious institutions and the democratic state the ‘twin tolerations.’ My analysis describes the variety of values that both religious institutions and activists that describe themselves as secular have

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<sup>21</sup> Alfred Stepan, "Rituals of Respect: Sufis and Secularists in Senegal in Comparative Perspective," *Comparative Politics* 44, no. 4 (2012): 388.

<sup>22</sup> Alfred Stepan, *Arguing Comparative Politics* (Oxford: Oxford University Press, 2001), 217.

expressed through formal and informal mechanisms with regard to the role of religion and the interpretation of its principles in establishing rights within family laws. Secularism and shari'a take on different characterisations depending on the members of the political elite<sup>23</sup> who use these terms to state their positions, and both terms allow a mechanism for critiques of existing state policies and laws.

This range of interpretations is not exclusive to the setting of Bangladesh. In his discussion concerning 'public' and 'private' religion, José Casanova makes distinctions between different theories and manifestations of secularisation as: (i) the institutional differentiation between secular spheres and religious spheres, (ii) the declining religiosity with increasing modernisation, and (iii) the increasing privatisation of religious practices.<sup>24</sup> However, such analyses do not necessarily capture the situation of regions such as South Asia, where countries that deem themselves secular explicitly define secularism as accommodation of the practices of all religious groups within their constitutions. India, Pakistan, and Bangladesh all consider family laws to be defined by the practices of individual religious groups.

“Modernist and secularist pretensions notwithstanding, few ‘secularist’ states [in the twentieth century] were willing to risk their political survival by radically interfering in matters of the family, marriage and personal laws, which were widely seen as the domain of religious authorities. The price paid for this pragmatic non-interference was state endorsement of gender inequality in family and personal status, and sometimes also criminal, laws.

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<sup>23</sup> It is worth noting that, in the context of Bangladesh, “Recent research on Bangladesh has pointed to a remarkable congruence between the ideals and vision of the elite and the people regarding poverty and development at the national level ... elites in Bangladesh are relatively new and still maintain their links with their rural roots” (Das (Lead Author), "Whispers to Voices: Gender and Social Transformation in Bangladesh," 9).

<sup>24</sup> José Casanova, *Public Religions in the Modern World* (Chicago; London: University of Chicago Press, 1994).

Hence, in many nominally secularised states, such as Israel and India, religious precepts continued to hold sway.<sup>25</sup>

This study focuses on the myriad voices that define secularism and shari‘a and how they influence women’s rights in family laws for Muslims. The variables influencing contemporary family laws in Bangladesh are reflected in processes of the state, but a comprehensive analysis of the discourse around these processes would not be complete without reference to informal mechanisms of expression outside of the state, such as street protests and media campaigns.

Mounira Charrad’s work is important here in the context of state processes. She analyses family laws from the perspective of a time of state-building in Tunisia, Algeria, and Morocco. Seeing Islamic law as a means of legitimising and uniting patrilineal tribal kin groupings, Charrad shows that the outcome that she analyses, that is, the family law code of each country, is specific to the way in which political power was structured in each of them. The more centralised and less based on tribal kinships the society of each country, the less dependent that country’s government was in uniting each country through Islamic family law.<sup>26</sup> She argues that where pre-existing, patrilineal kinship networks were stronger, states made more extensive use of Islamic law to appropriate those networks. For example, at their independence, Tunisia already had a more homogenous legal system relative to Algeria and

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<sup>25</sup> Razavi and Jenichen, "The Unhappy Marriage of Religion and Politics: Problems and Pitfalls for Gender Equality," 835-36.

<sup>26</sup> Mounira M. Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco* (Berkeley: University of California Press, 2001), 6.

Morocco, whereas the latter two were subject to more localised variations based on customary practices prior to independence.<sup>27</sup>

Shari‘a-guided laws as an expression of religious identity similarly provide a sense of unity in Bangladesh – but one that is in direct opposition to the conception of the country at independence, that is, of a secular country breaking away from another that was created on the very basis of unity among South Asian Muslims. The Bangladeshi Constitution and its incorporation of secularism as a fundamental principle, followed by the amendment of this principle, followed again by a reconsideration of this amendment by the Supreme Court, is an expression of this struggle that exists along the spectrum of positions between the two poles of secularity and religiosity.

Applying Stepan’s framework for change, one would expect to observe a process of negotiation between political interest groups and positions from along this spectrum, resulting in the outcomes that we see today, the current state of family laws for women. While this negotiation has indeed taken place, however, the terminology of ‘secular’ and ‘shari‘a’ can be insufficient to describe the impact of these actors on the actual law. Much of the negotiation has taken place in the legal and political space of the Constitution, with little impact on family laws. Interpretations of the terms, furthermore, are inconsistent in the practice of family laws and the result is that ‘secular’ and ‘religious’ are employed as bargaining tools for political platforms, while patriarchal structures can be easily located within both secular and religious discourse. Nevertheless, those who support patriarchal or non-patriarchal structures employ these tools in certain ways over time, as is evident in the transition of women’s rights activists’ - from proposals for dramatic change and the rejection

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<sup>27</sup> Ibid., 10.

of shari'a as a guide altogether towards proposals for incremental change within the framework of Islamic principles. This transition on the part of women's rights activists, meanwhile, has been accompanied by increasingly specific demands on the part of those who support patriarchal structures and their explicit outlining of what Islamic principles supporting these structures should mean in the context of women's rights.

### 3. Analytical Approach

There are a number of ways to analyse family laws for Muslims as a means of assessing the relationship between religion and the state. For example, a cross-country analysis with India and Pakistan would allow a useful comparative view. As mentioned before, Charrad uses a comparative analysis between three countries of the same region, focusing on their periods of state formation to analyse the family laws that resulted from this period for Muslims across these countries. She uses John Stuart Mill's 'Method of Difference' in her analysis, assessing different outcomes across these three examples otherwise matched on several dimensions. The comparative outcomes of the political forces that she analyses are their Codes of Personal Status or Family Codes, seeing them in terms of negative rights with regard to women in that they act as a restriction on choices, drawing the figurative boundaries or values of a nation.<sup>28</sup>

The cases of Bangladesh and, due to a shared history of colonial legislation, South Asia more broadly, warrant some modifications to this method. As Chapter II demonstrates, the history of establishing family laws goes far back into the era of the British Raj. Although

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<sup>28</sup> Ibid., 5, 11.

little may have changed in this area of legislation since the independence of Bangladesh, analysing the fear of or enthusiasm for change amongst both state and non-state groups over Constitutional amendments, landmark legal cases, and policy initiatives reveals a struggle between different sources of power that has so far stymied significant review of existing legislation. Restricting this study primarily to post-independence Bangladesh allows for a more in-depth analysis. While the “trade-off between temporal and spatial bounds”<sup>29</sup> is noted, therefore, this study focuses on variables across time rather than across space. I employ a different test in that, unlike Charrad, I take a single country case and look at variations across time, in which Constitutional amendments and legislative and judicial outcomes differ.

In tracing such events, I use a form of systematic process analysis, described by Peter Hall as a set of theories that “not only identify a few variables thought to have an especially important impact on the outcome [under analysis] but also outline the processes whereby those variables are thought to secure such an impact.”<sup>30</sup> These theories lead to predictions that are tested against a number of observations<sup>31</sup> and, in the following chapters, these observations are made up of legal cases concerning family law since 1971. Observations of the application of family laws allow a study of the variables – the Constitution, existing legislation, and the National Women Development Policy – representing the current status of women in such laws.

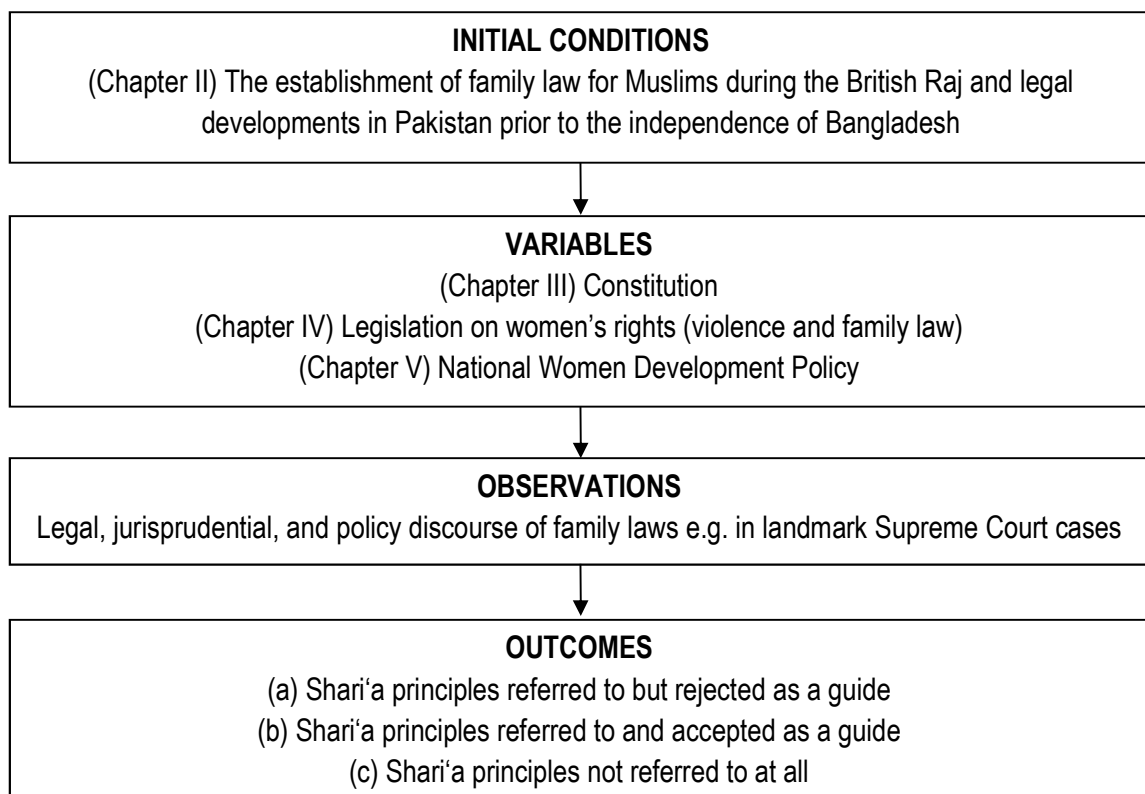
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<sup>29</sup> Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton, NJ; Oxford: Princeton University Press, 2004), 170.

<sup>30</sup> Peter A. Hall, "Systematic Process Analysis: When and How to Use It," *European Management Review* 3(2006): 27-28.

<sup>31</sup> Tulia G. Falletti, "Theory-Guided Process-Tracing in Comparative Politics: something Old, Something New," *Newsletter of the Organized Section in Comparative Politics of the American Political Science Association* 17, no. 1 (2006).

Reflecting on Hall’s explanation of process analysis, Matthew Nelson points out that “social science is moving away from ‘a one-to-one correspondence between distant factor X and ultimate outcome Y’ in favour of an account of processes marked by ‘extensive interaction effects in which X ... *conduces* towards Y ... via a series of intermediary stages in which the interaction of other variables ... is also important.”<sup>32</sup> This is the nature of the analysis that follows in subsequent chapters and, as shown in the diagram below, is organised according to the categories of variables under study.



<sup>32</sup> Matthew J. Nelson, *In the Shadow of Shari’ah: Islam, Islamic Law and Democracy in Pakistan* (London: C Hurst & Co Publishers Ltd, 2011), 9.

Chapter II describes initial conditions, a foundation for family laws that is common across Bangladesh, Pakistan, and India and was largely established during the era of the British Raj. These initial conditions also include the decades that followed immediately after Indian and Pakistani independence, including developments such as the last major act in relation to family law for Muslims in what is now Bangladesh, the Muslim Family Laws Ordinance (MFLO) of 1961. They are important in understanding family law in post-independence Bangladesh because the “emergence of particular institutional arrangements” and their “stickiness” provide a framework within which to consider more recent legislative changes, or the lack thereof.<sup>33</sup> The processes through which variables influence outcomes “[are] frequently distorted when they are ripped from their temporal context,”<sup>34</sup> and the influence of the Bangladeshi Constitution, legislation on women’s rights, and the National Women Development Policy on family laws are analysed here in the context of historical developments leading up to and immediately after the independence of Bangladesh.

So Chapter II provides a historical background to the variables analysed in this study. In addition to describing specific developments in the arena of family law, the chapter defines shari’a and Islamic law, including an explanation of the distinctions between shari’a and fiqh, the four different schools of Sunni law or ‘maddhahib’ (plural form of ‘maddhab’) and a general description of the understanding of women’s roles and rights across these different schools. It focuses in particular on the Hanafi school during the colonial era, and evolving perceptions of Muslim women, particularly in Bengal. The chapter also briefly traces the chain of events leading to the Shariat Validation Act of 1937 and the Dissolution of Muslim Marriages Act of 1939, the first of which purported to make the inheritance

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<sup>33</sup> Pierson, *Politics in Time: History, Institutions, and Social Analysis*, 27.

<sup>34</sup> *Ibid.*, 2.

claims of women uniform across Muslim communities in India while the second gave women the right to initiate divorce based on certain conditions. Post-Raj developments in family laws are also discussed, the most significant of which was the MFLO of 1961, which gave women even greater rights in areas such as the initiation of divorce and maintenance but left inheritance rights for women largely unaffected.

Chapter III traces constitutional developments, explaining: (i) a shift between emphasising secularism versus the significance of Islam within the Constitution and (ii) the impact these shifts have had, if any, on the observations under analysis, that is, judgments on family law. It is important to define what the terms secularism and Islam might mean for the Constitution, for the political groups who support the dominance of either of these terms, and for how those definitions may find their way into family law. Along with Chapters IV and V, this chapter provides insight into the range of activists employing the term ‘secularism’ as a mechanism for enhancing women’s rights, those who seek ways to enhance women’s rights through applications of fiqh instead, and the evolution and diversity of those who support patriarchal interpretations of shari‘a and their political expression through parties such as the Islami Oikyo Jote.

The Constitution reflects the ultimate legal authority in the processes of nation-building and state formation that Charrad analyses in the development of family laws.<sup>35</sup> Like Casanova, Stepan’s work is important in the context of this constitutional analysis in that he points out that the terms ‘secularism’ and ‘state religion’ should not be assumed to have a single or static definition.<sup>36</sup> This chapter, too, discusses how changes in this document

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<sup>35</sup> Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco*, 18.

<sup>36</sup> Alfred Stepan, "Religion, Democracy, and The "Twin Tolerations"," *Journal of Democracy* (2000): 42.

regarding secularism and the role of Islam have found their way to family laws, if any, in light of what those terms are understood to mean by those who interpret them.

In Chapter IV, I look at family laws after the independence of Bangladesh, studying legislative and judicial outcomes to compare trends in laws against gender-based violence with developments in family laws. The historical analysis here explains the nature and influence of different variables, identifying why certain outcomes have occurred over others.<sup>37</sup> However, an initial glance over a legislative timeline would suggest that very few substantive changes have come about among personal laws in post-independence Bangladesh compared to those that have been made in relation to violence against women. In Chapter IV on legislative developments, therefore, the field of comparison to alternative outcomes must be extended beyond the range of family laws themselves to laws on women more broadly.

I explain why such outcomes vary for different kinds of legislation on women, such as violence against women versus family laws. Judicial interpretation, furthermore, is an important feature of legislative outcomes and practice and Chapter III will have already introduced issues of interpretation in light of the Constitution. Chapter IV will take this further in terms of analysing how existing legislation is employed in evaluating family law cases and assessing whether any patterns emerge.

Chapters III and IV introduce the primary outcome under analysis: references to shari'a as a guide to the law in legal cases. Analysing variables such as the Constitution and legislation provide a framework within which to evaluate such references. The ways in which

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<sup>37</sup> Theda Skocpol, *Vision and Method in Historical Sociology* (Cambridge: Cambridge University Press, 1984).

secularism and the role of religion are conceptually employed and the subsequent impact that these terms have on women's rights in family laws, if any, are analysed in the context of the National Women Development Policy, the primary focus of Chapter V.

The National Women Development Policy first emerged in 1997 while the Awami League party was in power. As mentioned earlier, one of the key areas of contention that this policy has raised in all of its drafts (in 1997, 2004, 2008, and 2011) is its articles on the inheritance and property rights of women. It is important to note that this is not a legally binding document, and can easily be viewed as a largely aspirational statement of what the government plans to do about gender equality. Even despite the non-binding nature of this policy, however, its declarations of equality for women aroused a level of anger sufficient to lead to violent riots upon its announcement.

Although the NWDP does not directly influence changes in family laws, the policy carries substantial symbolic value as a statement aspiring to such changes. The discourse around this policy, that is, the degree to which opposition and support to the policy are phrased by its opponents and proponents in the language of religiosity versus secularism is assessed in this chapter. The primary disputes over carrying the NWDP forward with initiating reforms have focused largely on family laws. Chapter IV analyses why this is the case, and how these disputes have been expressed in terms of rejecting, reinterpreting, or maintaining the current understanding of shari'a in relation to family laws. This chapter, therefore, answers two questions in particular: (i) why the phantom clause of the NWDP regarding equality in family laws, and especially of inheritance rights, arouses such conflict and (ii) how such conflict may influence interpretations of shari'a in the practice of those laws.

Family laws influenced by shari'a continue to impose a major stumbling block in ensuring a comprehensive implementation of the NWDP. A number of women's rights organisations and activists have argued that the aspirations of the NWDP demand that shari'a should be removed altogether as a guide for reform. Salma Sobhan points out that, "The argument of radical women's groups, that countering the fundamentalist brand of religion with religious argument still leaves the door open to fundamentalism, is a cogent one. In the context of Bangladesh the question is whether there is any other choice."<sup>38</sup>

Meanwhile, Siraj Sait argues that:

"Those advocating women's equal land rights in Muslim societies face pragmatic choices over whether or not to deploy Islamic arguments. If they do not explore positive Islamic interpretations, they abandon the field to dominant patriarchal voices and fall prey to customary practices which often diminish or altogether extinguish women's property rights. Those who rely exclusively on international human rights formulations or statutory equality provisions find the rights mostly remain on paper and are not implemented as their legitimacy in communities is clouded. Discounting religious practices not only alienates believing women but also misses a wide range of practices that could have positive implications for women's lives."<sup>39</sup>

This study discusses examples of other leading activists and legal scholars who have decided that the best choice to make in the context of Bangladesh is to find ways of equalising women's rights in family laws using mechanisms from within Islamic jurisprudence, and how they have presented their case in relation to those that suggest that only an outright rejection of shari'a as a guide to law will effectively lead to such equalisation.

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<sup>38</sup> Salma Sobhan, "National Identity, Fundamentalism and the Women's Movement in Bangladesh," in *Gender and National Identity: Women and Politics in Muslim Societies*, ed. Valentine M. Moghadam (London: Published for the United Nations University World Institute for Development Economics Research by Zed Books, 1994), 79.

<sup>39</sup> Siraj Sait, "Islamic Land Tools to Empower Women: A Global Land Tool Network Initiative," ed. Mona E. Brøther and Jon-Andreas Solberg, *Legal Empowerment – A Way out of Poverty* (Oslo: The Norwegian Ministry of Foreign Affairs, 2007), 72-73.

Study of the disputes over the NWDP allows a deeper analysis of the informal mechanisms through which different parties exert authority over family laws as well. This is because the conflict over its implementation is largely played out in the streets rather than in the parliament or the courtroom. Each chapter assesses the extent to which shari'a has guided legislators in framing or maintaining those laws and judges in the judgments following from them.

Chapter IV, in particular, focuses on tracing legal developments in the domestic sphere by comparing violence against women legislation to personal status legislation. Following this comparison, Chapter V goes on to discuss family laws on women in the context of development theory and the dual influences of the international and domestic sphere on Bangladeshi policies regarding women more broadly. After Chapter II and III provide a background in the evolving legal structure underpinning family laws in Bangladesh, Chapter IV and V thus offer an analysis of the ways in which engaging with both local and international actors have shaped the state's response to the status of women in family laws.

It should be noted that, in assessing the outcomes of legal cases and the policies that influence them across this study, there are closely related variables here that will not be discussed. I will not be analysing legislative implementation or the nature of women's access to justice in Bangladesh and the independence of the judiciary, subjects that both deserve a much greater depth of analysis than possible within the scope of this study. Rohit De points out with India in mind that "legal reform has little input on the lives of women in the

absence of legal awareness and networks of support that can help access those rights.”<sup>40</sup> In the case of inheritance, for example, a 1995 survey on property inheritance showed that only 32% of rural widows in Bangladesh received their rightful share of inheritance even according to existing laws; even when women do own land, this may not necessary indicate control over it.<sup>41</sup>

Nevertheless, reform is certainly a necessary stage in instituting changes that enhance rights and, even though paper legislation does not equal social reality, “The existence of [equal] legal rights does not mean that deeply rooted cultural norms immediately change... When legislation conflicts too sharply with customary law, problems can surface. Still, even if laws are not self-enforcing, they are a necessary first step toward gender equity.”<sup>42</sup> While this study recognises that this is indeed the case, I analyse that first step here, while also studying ways in which the boundaries of laws have been tested in individual court judgments; I do not, however, analyse the degree to which women across different socio-economic classes are aware of or able to access formal legal mechanisms underpinned by such legislation.

Judicial bias is also not studied at great length. It is certainly the case that most members of the judiciary are male and of the middle class, but the extent to which these traits may or may not influence their decisions on cases concerning women’s equality is not incorporated in this study. While the political and personal biases reflected in certain judicial interpretations of shari‘a are highlighted where notable, a systematic analysis of their extent,

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<sup>40</sup> Rohit De, "Personal Laws: A Reality Check," *Frontline, magazine of The Hindu newspaper (online)*, 6 September 2013, 7.

<sup>41</sup> "Inter-Ministerial coordination for Maximum Use of Gender Responsive Budget Stressed," *The Financial Express (online)*, 10 February 2012.

<sup>42</sup> *World Development report 2000/2001: Attacking Poverty*, (Oxford: Oxford University Press, 2001), 120.

patterns, or foundations are not included here. The effective implementation of specific legal developments and women's access to justice are very important issues worthy of exploration, and they warrant a detailed analysis that lies outside of the scope of this study. For the purposes of this analysis, it can be assumed as given that women's access to justice and legislative implementation on the ground is limited and judicial independence, at best, fluctuates.

#### **4. Sources of Data**

Qualitative analysis is more conducive to process tracing than quantitative data in that it is better suited to “exploring the tipping points that play a critical role in shaping long-term processes of change, and for providing more nuanced insight into [quantitative] findings....”<sup>43</sup> Qualitative data in this study has been collected through a close reading of documentary evidence, backed up by the reading of background papers and newspaper coverage, and afforded by interview data. The primary units of observation here, particularly for Chapter III and Chapter IV, are landmark Supreme Court cases. Given time constraints and the magnitude of the task of sifting through over 40 years of Supreme Court cases, I take the distinction of ‘landmark’ to be defined by existing legal scholarship. I selected records of individual case judgments accordingly, and Appendix C provides a list of the cases discussed at some length in this study. The use of other primary documents enhanced analyses of these cases, including successive drafts of the Bangladeshi Constitution, parliamentary records on legislative enactments, Bangladesh Law Commission reports on

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<sup>43</sup> Henry E. Brady and David Collier, eds., *Rethinking Social Inquiry: Diverse Tools, Shared Standards* (Lanham, MD; Oxford: Rowman & Littlefield, 2004), 29.

legislative proposals, and copies of the National Women Development Policy of 1997, 2004, and 2011.<sup>44</sup>

As is often the case with historical events, or “situations that cannot be investigated by direct observation or questioning,”<sup>45</sup> tracing the responses of different actors to legislative and policy aspirations and developments are explored through newspaper sources and expert interviews. I use newspaper sources such as the *Daily Star*, *New Age*, and the recently launched *Dhaka Tribune*, the three most prominent and widely circulated English language newspapers, as well as articles from *Prothom Alo*, the most widely circulated Bengali language newspaper, and newspapers closely associated with individual political parties, such as *Daily Ittefaq*, *Daily Amar Desh*, *Daily Dinkal*, and *Daily Naya Digonto* among others, all of which are known for their affiliation with specific political parties.

In addition to newspapers, my research is informed by interviews with experts on family laws and women’s rights in Bangladesh, a combination of practising lawyers, law professors, and women’s rights activists. As Oisin Tansey points out in describing elite interviewing techniques relevant to process tracing, “The aim is not to draw a representative sample of a larger population of political actors that can be used as the basis to make generalisations about the full population, but to draw a sample that includes the most important political players who have participated in the political events being studied.”<sup>46</sup> With this in mind, I interviewed a non-random sample of experts, selected from a collection of personal and professional connections to activists, lawyers, scholars of jurisprudence, and

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<sup>44</sup> The 2008 policy was retracted and details of this policy were drawn from interviews and documentation given to me by women’s rights NGO staff who had contributed to that draft.

<sup>45</sup> Jane Ritchie and Jane Lewis, *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (London: Sage Publications, 2003), 45.

<sup>46</sup> Oisin Tansey, "Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling," *PS - Political Science & Politics* 40, no. 4 (2007): 765.

heads of government-affiliated think-tanks, all of whom are known to have been active – either academically or politically – in the field of family law. Among them were leading representatives of legal aid and women’s rights NGOs, government departments, law professors, and activists with widely known links to political parties such as the Awami League, the Bangladesh Nationalist Party, and the Jamaat-e-Islami.

Although this analysis does not extend beyond the end of 2012, events since that time have required that I maintain the anonymity of my interviewees. A brief explanation of events since the end of 2012 is discussed in Chapter V, as are my concerns regarding a number of primary documents that may have been at least slightly edited in response to fears of retribution from either the government or the opposition. Individuals known to be active against religious extremism have been killed by militants at an increasing rate, while those who are critical of government policies have also been increasingly censored by the government through the police and the judiciary. I have thus identified them purely by their professions and, where my interviewees may wear different hats – for example, of activist, professor, and lawyer – I will generally refer to them by the capacity in which I have interviewed them. An anonymised list of my interviewees, categorised in this way but reflective of the number of people interviewed for this study and in which capacity, are included in Appendix A.<sup>47</sup> My main interview schedule is offered in Appendix B. One weakness in the dataset of people who agreed to speak to me is the lack of politicians. Although I was able to speak to several interviewees who had known affiliations with political parties, I was not able to secure any interviews with current or recent Members of

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<sup>47</sup> Interview data that was collected from these interviews can be produced upon request. I have included only the categories in which I organised the data as in some cases the actual data allows for identification of the interviewees, particularly in the case of judges and lawyers who worked on the landmark cases discussed here.

Parliament or Ministers. Due in part to both pre- and post-election instability in the country, I assess their perspectives instead through secondary sources, newspaper articles, or through documentation such as party manifestos that may or may not reflect individual points of view.<sup>48</sup>

Two other aspects of my data collection are worth noting. It is possible that carrying interviews out in English rather than Bengali - and thus being perceived as foreign rather than local - has introduced some element of bias into the data. A number of sources will have been influenced, furthermore, by the fact that ten leaders of the Jamaat-e-Islami party and of the most significant opposition party of Bangladesh Nationalist Party have been under trial for war crimes<sup>49</sup> since 2009, which has posed an additional barrier to reaching those who are more likely to express support for continuing to interpret family laws in terms of religious practice. Although I cannot identify party affiliations or any other indicator that may reveal the identity of interviewees,<sup>50</sup> I should point out that my dataset of interviews is far more represented by those in favour of legal reform towards enhancing women's rights than those who practice the type of religious activism that categorically views such enhancement as anti-Islamic.

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<sup>48</sup> Anticipating greater stability, I had hoped to correct this shortcoming but the rate of high-profile killings and censorship-related jail sentences between 2012 and 2015 suggest that the situation is still deteriorating.

<sup>49</sup> "Mojahed Indicted for War Crimes," *The Daily Star (online)* 2012.

<sup>50</sup> I also do not identify my interviewees by gender or, in the case of judges, in which type of court they adjudicate.

## 5. Motivation and Contribution of Analysis

A number of gaps in academic and policy-oriented literature motivated the choice of topic under analysis here. Much of the contemporary literature on legal issues for women in the Muslim world and their political context focuses on the Middle East and North Africa. And yet, the region with the overwhelming majority of the global Muslim population, South Asia, has been explored to a much lesser extent in academic literature on legal reform in modern-day Muslim countries. Furthermore, a large portion of the existing analytic work on legislative developments in family law for Muslims or South Asians focuses on the transition between eras of colonialism and independence.<sup>51</sup> My study's primary concern is with developments following the transition from dictatorship to democracy, taking electoral pressures as a significant factor in much of the debate described in my analysis. This work has implications far beyond South Asia, as more and more Muslim majority countries beyond South and Southeast Asia struggle with their own transitions from dictatorship to democracy.

Family laws in much of the world offer lesser rights to women than men,<sup>52</sup> and a conflict between individual and group rights arises when religious or cultural practices are used as a justification for maintaining this inequality. Although Susan Okin analysed such practices primarily in the context of multiculturalism and the protection of minority rights, her work bears relevance to the cultural or religious argument for discriminatory practices in

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<sup>51</sup> Urvashi Butalia, *Legacies of Departure: Decolonization, Nation-Making, and Gender*, ed. Philippa Levine, *Gender and Empire* (Oxford: Oxford University Press, 2004); Mrinalini Sinha, "Nations in an Imperial Crucible," in *Gender and Empire*, ed. Philippa Levine (Oxford: Oxford University Press, 2004).

<sup>52</sup> Hudson, Bowen, and Nielsen, "What Is the Relationship between Inequity in Family Law and Violence against Women? Approaching the Issue of Legal Enclaves," 469.

any context. She points out that “[B]y failing to protect women and sometimes children of minority cultures from male and sometimes maternal violence, cultural defences violate women and children’s rights to equal protection of the laws ... Those who defend group rights on liberal grounds need to address these very private, culturally reinforced kinds of discrimination,” adding that, “In its demand for equality for women, feminism may set itself in opposition to virtually every culture on earth.”<sup>53</sup>

Beyond the basic human rights aspect of sexual equality, however, it is also true that “nation-states with higher degrees of inequity in family law favouring men, codifying an evolutionary legacy of male dominance and control over female reproduction, will experience higher rates of violence against women.”<sup>54</sup> Countries where women have lesser rights than men in terms of divorce and marriage, child custody, and succession “are set under the protection of an extended male kin network” and unequal treatment under the law is “justified by suggesting that men are thereby obligated to protect women because women are handicapped by this inequity.”<sup>55</sup>

However, this expectation of men’s protection of women does not lead to lower levels of violence against women. “Perhaps the most problematic articulation of gender justice in law is the one that posits the relationship between women and law as one of protection ... The effect [of this] is to infantilize women and pursue an agenda that merely reinforces this infantilization as it is contingent on male or state protection.”<sup>56</sup> “Cultures in

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<sup>53</sup> Susan M. Okin, and respondents, *Is Multiculturalism Bad for Women?* (Princeton, NJ: Princeton University Press, 1999), 20-21, 27.

<sup>54</sup> Hudson, Bowen, and Nielsen, "What Is the Relationship between Inequity in Family Law and Violence against Women? Approaching the Issue of Legal Enclaves," 453.

<sup>55</sup> *Ibid.*, 462-63.

<sup>56</sup> Ratna Kapur, "Challenging the Liberal Subject: Law and Gender Justice in South Asia," in *Gender Justice, Citizenship, and Development*, ed. Maitrayee Mukhopadhyay and Navsharan Singh (New Delhi:

which women are profoundly dependent upon men in an economic sense are cultures in which the structural control of women can be extended beyond purely economic spheres.”<sup>57</sup> Unequal family laws can have multiple negative effects for women within and beyond the arena of the law.

Law is also perceived as a means of ‘social engineering’ and the National Women Development Policy is among the initiatives that posits family laws in this light. Legal change has both a practical and symbolic value. Although critics of such change point out that its implementation would demand an unrealistic shift in social norms, legislation can also be seen as an aspirational statement of where a society should be within a certain period of time even when effective implementation has yet to be reached.<sup>58</sup> Archana Parashar points out that “instead of dismissing law reform as a means of achieving equality for women, it is more productive to realize the limitations of law and have appropriate expectations that law reform by itself will be insufficient to change society and end women's oppression ... Symbolic legislation can be of liberating value as it can provide a focus around which forces of change can mobilize.”<sup>59</sup>

Apart from the symbolic and human rights aspect of equality in family laws, there are also positive effects for economic and political development, particularly where access to property and inheritance is concerned. “Increasing women’s access to immovable resources [has] multiple benefits for women themselves and for their families and communities, both

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Zubaan, an imprint of Kali for Women ; Ottawa : International Development Research Centre, 2007), 118, 20.

<sup>57</sup> Hudson, Bowen, and Nielsen, "What Is the Relationship between Inequity in Family Law and Violence against Women? Approaching the Issue of Legal Enclaves," 468.

<sup>58</sup> Kapur, "Challenging the Liberal Subject: Law and Gender Justice in South Asia," 121-22, 36.

<sup>59</sup> Archana Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (New Delhi; Newbury Park, CA: Sage Publications, 1992), 30, 33.

in terms of productivity gains (Mason and Carlsson, 2004) and welfare benefits, including in relation to children's health and education (Quisumbing and De la Brière, 2000)."<sup>60</sup> Greater rights for women within family law and their subsequently higher socio-economic participation benefit the economic status of households as well as their own individual freedoms. Recognising the need for women's greater control over economic resources is hardly new – Mill opposed coverture precisely because “having control over economic resources is essential to women's ability to maintain their independence within marriage and particularly to exit an abusive one. Property is thus fundamentally tied to women's individual freedom and equality.”<sup>61</sup>

Very little literature exists, however, that brings all of these frameworks together in the way that I do here. With this work, I hope to contribute to the literature that explores the contemporary nexus between the politics of gender and Islam and the law in South Asia, a subset of a much larger body of literature on gender and nation represented by works such as Charrad's *States and Women's Rights*. Although specific to Bangladesh, the range of my argument on the debate between and within the religious right and women's rights activism has, as Chapter II will show, many similarities across the Muslim majority world. Indeed, perceptions of the dichotomy between the religious and the secular exist, as Stepan and Casanova point out, in non-Muslim countries, too. Furthermore, the conflict between multiple actors in framing policy and legislative initiatives in the discourse of protection

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<sup>60</sup> United Nations, "2009 World Survey on the Role of Women in Development: Women's Control over Economic Resources and Access to Financial Resources, Including Microfinance," (New York: United Nations, 2009), 42.

<sup>61</sup> Nancy J. Hirschmann, "Mill, Political Economy, and Women's Work," *American Political Science Review* (2008): 203.

versus empowerment of women is evident in a range of issues pertinent to women across the world.<sup>62</sup>

There are, at the moment, distinct gaps in the literature on Bangladesh in particular, not least in capturing the diversity of the voices contributing to the debate on change in family laws and the role of religious interpretation in that debate. Although frequently posited as an exclusively secular and therefore non-religious movement, women's rights activism increasingly includes those who are either willing to accept or eager to promote a continuing view of family laws through the lens of religious practice. Ziba Mir-Hosseini discusses this recent development in Islamic legal thought: the increasing engagement of female scholarship of fiqh, previously seen as the exclusive arena of male scholars.

“A growing number of women came to see no contradiction between fighting for equal rights and remaining good Muslims, no inherent or logical link between patriarchy and Islamic ideals. In so doing, they came to free their feminism from the straitjacket of anti-colonial and nationalist discourses...Its advocates do not reject an idea simply because it is Western, nor do they see Islam as a blueprint with an in-built programme of action for the social, economic, and political problems of the Muslim world.”<sup>63</sup>

In contrast to Mir-Hosseini's description, some activists have expressed the view that a preferable framework offered by Islam is one of complementary rather than egalitarian roles of men and women. They reject ideals considered to be “Westernized” or influenced by a “liberalized–secularized modernity and the latter's ‘propaganda’ against ‘real’ Islam and

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<sup>62</sup> For example, recent debates in wealthier, non-Muslim countries on the right to terminate pregnancies, paid parental leave, affirmative action for women, and the regulation of supply and demand for prostitution all reflect the same diversity of views evident in countries such as Bangladesh on framing policies pertinent to women, often similarly originating in arguments posited by representatives of the religious right in those countries.

<sup>63</sup> Ziba Mir-Hosseini, "The Construction of Gender in Islamic Legal Thought and Strategies for Reform," in *Sisters in Islam Regional Workshop, 'Islamic Family Law and Justice for Muslim Women,' 8–10 June 2001* (Kuala Lumpur: HAWWA, Koninklijke Brill NV, 2003), 19-22.

observant Muslims.”<sup>64</sup> One of the contributions this study makes is to explore the diversity of voices on Muslim women’s rights, and the extent to which the role of religion in delivering or restricting those rights is endorsed by those voices.

The issue of a supposed dichotomy between the religious right and the feminist movement in Bangladesh is a crucial element to investigating changes in personal laws for Muslim women. The potential overlap between the two, either in the form of those who seek rights only within their interpretation of Islamic principles, or those who see no such dichotomy at all is important in this study. Sylvia Vatuk, writing on the feminist Muslim movement in India, shows that this overlap may well be of increasing influence among organisations pushing for a gender-neutral Uniform Civil Code in India<sup>65</sup> but, at least in terms of formal representation, there is little evidence that such an influence has yet to make its way into the implementation of legislative change.

Maimuna Huq’s study of informal religious lesson circles in Bangladesh shows a growing number of women raised in “standardized, nationalized education systems,” largely based on secular curriculums, gaining access to Islamic scholarship under the supervision of a Jamaat-e-Islami student organisation.<sup>66</sup> This trend is reflective of Jamaat recruitment more broadly, and implies the possibility of a crossover between the secular and the Islamist. Chowdhury, meanwhile, argues that the nature of the national women’s movement is such it has “remained secular in orientation as a means to create a distinct identity from the

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<sup>64</sup> Maimuna Huq, "Reading the Qur'an in Bangladesh: The Politics of 'Belief' among Islamist Women," (2008): 485.

<sup>65</sup> Sylvia Vatuk, "Islamic Feminism in India: Indian Muslim Women Activists and the Reform of Muslim Personal Law," *Modern Asian Studies* 42, no. 2-3 (2008): 489-90.

<sup>66</sup> Huq, "Reading the Qur'an in Bangladesh: The Politics of 'Belief' among Islamist Women," 457. Jamaat-e-Islami is an Islamist political party, the most prominent party on the religious right of the political spectrum in Bangladesh.

colonising West Pakistani state ideology of “authentic” Islam,” and that the movement is distinguished by its largely urban-based membership and anti-Islamist stance.<sup>67</sup> On the other hand, Elora Shehabuddin points out that women engaged in NGO or factory work simply do not “see themselves as either rejecting religion or embracing a secular modernity,” traditional Islamic segregation or ‘purdah’ being seen rather as a “state of mind” rather than a requirement defined by a more visible segregation in terms of restricted mobility or clothing.<sup>68</sup>

Outside of Bangladesh, the Al-Huda movement in Pakistan formally train women to influence others on Muslim piety.<sup>69</sup> The most common recipients of such teaching are their own families, but they also lecture in schools and universities across their cities, engaging in the public sphere through their roles as preachers and teachers.<sup>70</sup> Firdous Azim et al raise the subject of “politically active women in the religious right” in the context of Pakistan<sup>71</sup> - but is this sort of activism relevant to the topic under analysis here? In Indonesia, among its other activities, a women’s group called Fatayat NU attempts to reclaim otherwise male-dominated interpretations of Islamic principles through organising study groups at private homes.<sup>72</sup> More importantly in the context of influencing policy, the group has in the past allied with

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<sup>67</sup> Elora H. Chowdhury, "'Transnationalism reversed': Engaging Religion, Development and Women's Organizing in Bangladesh," *Womens Studies International Forum* 32, no. 6 (2009): 415.

<sup>68</sup> Elora Shehabuddin, *Reshaping the Holy: Democracy, Development, and Muslim Women in Bangladesh* (New York ; Chichester: Columbia University Press, 2008), 4.

<sup>69</sup> Sadaf Ahmad, "Identity Matters, Culture Wars: An Account of Al-Huda (Re)Defining Identity and Reconfiguring Culture in Pakistan," *Culture and Religion* 9, no. 1 (2008): 65.

<sup>70</sup> Ibid.

<sup>71</sup> Firdous Azim, Nivedita Menon, and Dina M. Siddiqi, "Negotiating New Terrains: South Asian Feminisms," *Feminist Review*, no. 91 (2009): 3.

<sup>72</sup> Pieternella Van Doorn-Harder, "Translating Text to Context: Muslim Women Activists in Indonesia," in *Women, Leadership and Mosques: Changes in Contemporary Islamic Authority*, ed. Masooda Bano and Hilary Kalmbach (Leiden: Brill, 2012), 415.

secular women's health groups in demanding better health care for women as well as launching an anti-trafficking campaign in 2002.<sup>73</sup>

My study does not suggest that women's right activists in Bangladesh avoid engaging with fiqh in pushing for equality. However, those activists who do are rarely, if ever, drawn from the ranks of the religious right. Bangladesh has yet to see religious activism among women influencing the public sphere of law and policy, and in this study I refer to women's rights activists as those who do not approach the role of women from an exclusively religious perspective. In addition to the women's wing of the Jamaat-e-Islami, a number of female 'madrassah' or religious school graduates from other groups such as Deobandis have been increasingly involved in preaching and in study groups discussing scripture in Bangladesh. They have had a limited influence "on the male dominance of public religious institutions and practices," with "their increasing participation in public religious institutions and forums [having] given them defined, although confined, opportunities."<sup>74</sup> As Momotaj Begum and Humayun Kabir point out, however, "they do not appear to be motivated by a desire to dilute the dominance of men. Therefore, it would be naive to conceptualise religiously-educated Muslim women as having the agency to potentially resist the status quo."<sup>75</sup>

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<sup>73</sup> Ibid., 431-32.

<sup>74</sup> Momotaj Begum and Humayun Kabir, "Reflections on the Deobandi Reformist Agenda in a Female Quomi Madrasah in Bangladesh," *South Asia-Journal of South Asian Studies* 35, no. 2 (2012): 373-76.

<sup>75</sup> Ibid. An early assessor of my study suggested that I have ignored religious women's discussion over women's roles and regulations, that hails from within an exclusively Islamic framework. My reasoning for the absence of this material is that, first of all, this study is not intended to provide a theological or anthropological basis for Islamic jurisprudence on women except to the extent that it is cited in individual legal cases. And, second and more importantly, I have found no evidence that such discussion has had any influence on changing or formulating legislation or policy in either Bangladesh or beyond.

As for the parties that run on the basis of religious platforms, they too have widely differing agendas for religion in the governance of Bangladesh, as well as a range of views on what that might mean in terms of the role of women in both public and private life. Jamaat-e-Islami is perhaps the most significant such party in terms of electoral impact, and Fauzia Ahmed points out that “though the Jamaat has repeatedly emphasized that a vote in favour of the Jamaat is a vote for God, it has never held power in Bangladesh. Its constituency has remained steady at 7 percent.”<sup>76</sup> Shehabuddin, moreover, suggests that Jamaat has changed its platform regarding gender roles in an effort to secure women’s votes as social norms change in regards to their position at home versus the workplace.<sup>77</sup> Masooda Bano, on the other hand, suggests that the correlation between Jamaat’s changing stance on women’s roles and voting patterns has yet to be proven and may well be a genuine reflection of changing views within the party regarding the engagement of women in politics and welfare activities.<sup>78</sup>

Additionally, variations among the groups concerned with promoting their interpretations of Islamic principles in governance and legislation such as Deobandis, Barelvis, Fultalis, and Ahle-Hadith, and their formal political expression of such views with regard to religion and to women’s rights, require deeper analysis. This has become especially significant in the period beyond the scope of this study in light of the seemingly sudden prominence and political activity of the group known as Hefazat-i-Islam. Hefazat represents the leadership of the most influential Deobandi Qwami madrassah, and their demands

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<sup>76</sup> Fauzia E. Ahmed, "Ijtihad and Lower-Middle- Class Women: Secularism in Rural Bangladesh," *Comparative Studies of South Asia, Africa and the Middle East* 31, no. 1 (2011): 126.

<sup>77</sup> Elora Shehabuddin, "Jamaat-I-Islami in Bangladesh: Women, Democracy and the Transformation of Islamist Politics," *Modern Asian Studies* 42, no. 2-3 (2008): 578.

<sup>78</sup> Masooda Bano, "Marker of Identity: Religious Political Parties and Welfare Work - the Case of Jam'at-I-Islami in Pakistan and Bangladesh," (Oxford: Religions and Development Research Programme, 2009), 19.

regarding the creation of a shari'a state and restrictions on women's movements. Importantly, Hefazat has moved away from its alliance with Jamaat-e-Islami since 2012, and categorically differs on women's rights issues such as purdah and employment in the formal labour force. Although these distinctions will not be discussed here, it is the announcement of the NWDP in 2011 that is most often held responsible for spurring the creation of Hefazat in the first place, and this emergence will be discussed in greater detail in Chapter V.

The desire to capture the range of all of these voices is borne of the debate over the most practical and effective means of giving women greater rights within personal status legislation. Terms like 'secularism' and 'Islam' have a wide variety of meanings in the context of this legislation, but their symbolism in the debate over whether Islamic principles must be reinterpreted, rejected, or accepted in their current form as a guide to the law is a significant one in the politics of law-making – particularly where women's socio-legal status is concerned.

In tracing the processes of such law-making, legislative examples from other Muslim countries provide partial points of comparison, particularly recent reform movements. Many Muslim countries have incorporated reforms since the advent of the twentieth century, with the right to divorce, minimum marriage age, and restrictions on polygamy experiencing the greatest extent of reform.<sup>79</sup> Most recently, the Moudawana reforms of Morocco, for example, were presented by the country's government as based on reinterpretation of Islamic principles, much like the MFLO of 1961 in Pakistan. The key commonality to note in these two cases, perhaps, is not the fact that the reforms were presented in this way but

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<sup>79</sup> Hudson, Bowen, and Nielsen, "What Is the Relationship between Inequity in Family Law and Violence against Women? Approaching the Issue of Legal Enclaves," 458.

that they were presented by a monarchy and a dictatorship, and thus unconstrained by electoral concerns.

Reinterpretation has its limitations in practice, not least of which is the question of who holds the greatest authority in interpreting laws associated with religious practices. Most notably, the equalisation of inheritance rights remains among the most difficult areas of personal status laws to change in terms of legislation or fiqh, representing a final frontier of sorts with regard to the lines drawn between secular and shari‘a-guided law. It is important to note the nature of the single country where inheritance rights have been equalised between men and women, that is, Turkey. In 1923, when the Turkish government under Kemal Atatürk appointed a committee to review Islamic family law so that it could be made more equitable to women, it was unable to find a religious basis for significant reform; Turkey chose to reject shari‘a as a guide for its family laws and abolished its Islamic family code altogether, replacing it with a civil code based on that of Neuchatel, Switzerland.<sup>80</sup>

Although the ability of fiqh to provide women with greater rights in family laws is not under scrutiny here, some would argue that even in inheritance, provisions can be made for women to equalise the benefits of succession. Siraj Sait suggests that:

“While women’s inheritance shares are unequal to men[’s] (based on the reasoning that women have no obligation to provide for the family), there is nothing within Islamic law that negates a women’s right to equal property through a ‘compensatory’ scheme. Under the integrated Islamic approach to women’s property rights, her reduced inheritance rights are expected to be compensated by other means of wealth generation. These methods include a woman’s equal access to purchase through earnings, endowments and gifts as well as special supplements such as savings (from lack of financial obligations within the family), dower and maintenance.”<sup>81</sup>

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<sup>80</sup> Leila Ahmed, "Feminism and Feminist Movements in the Middle East," in *Women and Islam*, ed. Azizah Al-Hibri (Oxford: Pergamon Press, 1982), 156.

<sup>81</sup> Sait, "Islamic Land Tools to Empower Women: A Global Land Tool Network Initiative," 72-3.

In addition to access to property and inheritance, the question of women's agency in demanding property and inheritance rights is also a significant one. Bina Agarwal points out that, although rural women in India may not necessarily demand further rights to land, it is nevertheless "critical to recognize that the deprived may have incomplete information about all options, and thus fail to mention those that seem out of reach. Or they might shape what they reveal about their priorities according to how an interview is conducted."<sup>82</sup> Quoting Amartya Sen on his 'capabilities approach,'<sup>83</sup> Agarwal points out that the potential failure of women to express their needs in this regard may well be due to their adaptation of needs and preferences, adding that "the deprived adapt what they reveal of their needs and preferences according to who asks the question and how, and what the respondent thinks the researcher wants to hear."<sup>84</sup>

This would be an important point to take into account in collecting data on women's access and understanding of their legal rights in Bangladesh. However, this study focuses on a specific set of actors rather than the population-wide beneficiaries of enhancing legal rights for women. Subsequent chapters here focus on the negotiations between ruling and opposition parties, the judiciary, and a range of pro- and anti-NWDP civil society groups. As Bina Agarwal points out, it is important to distinguish actors even within state and non-state groups, arguing in her work that "contestations can be at multiple levels: between State

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<sup>82</sup> Bina Agarwal, "Gender and Land Rights Revisited: Exploring New Prospects Via the State, Family and Market," *Journal of Agrarian Change* 3, no. 1 and 2 (2003): 189.

<sup>83</sup> The 'capabilities approach' refers to an approach in economic development theory that recognises non-material opportunities such as access to health and freedom of political participation as elements of enhancing an individual's resources and sense of wellbeing. Amartya Sen, *Development as Freedom* (London: Anchor Books, 1999).

<sup>84</sup> Agarwal, "Gender and Land Rights Revisited: Exploring New Prospects Via the State, Family and Market," 190.

officials within a department, between different tiers of the State apparatus, and/or between different regional elements of the State structure, with some arms of the State pursuing gender-progressive policies even if the overall State structure is gender-regressive ... the State is not being seen here as a monolithic structure which is inherently, uniformly or trans-historically 'patriarchal.'<sup>85</sup> Following from this, I discuss, for example, ways in which government ministries and commissions have responded to calls for changes in family laws, treating them as evolving institutions, negotiating with women's rights groups whose agendas shift over time as well. Comparisons between such negotiations and strategies over time will reveal the most successful mechanisms for reform in favour of women's equality thus far, and identify ways through which these mechanisms may be imitated for family laws in Chapter VI's concluding remarks.

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<sup>85</sup> Ibid., 3.

## CHAPTER II

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# Before Bangladesh: A History of Family Laws for South Asian Muslims

The diversity of fiqh and reforms among Muslim majority countries in the last century alone show that legal systems commonly referred to as ‘Islamic law’ should be seen in a country-specific light. On the other hand, there are similarities in the conditions that lead to periods of change in personal status laws across such systems. This chapter analyses trends in the history of personal status or family laws in what is now Bangladesh. Section 1 presents an introduction to how ‘shari‘a’ or Islamic principles acts as a guide to Islamic jurisprudence or ‘fiqh.’ Section 2 discusses the evolution of personal law as a distinct area of the law with the rise of the British Raj, while Section 3 focuses on more recent events, including notable substantive reforms to shari‘a-guided personal laws since the advent of the 20<sup>th</sup> century, ending at the point where Bangladesh gains independence.

The emergence of the British Raj had a deep impact on conceptions of the family in South Asia, not least of which was the development of a new, standardised legal structure for laws governing the family among each of the religious groups present in the Raj. If colonialism was in part a civilising project, then the British Raj certainly saw the role and status of women in the family as central markers of this project. A particular theme that begins to emerge throughout this and subsequent chapters is the relationship between the role and ideals of women as representations of society. Ideals of womanhood are closely associated with ideals of society as a whole, as women are perceived to be at the heart of the

family and thus carriers of tradition, “especially during times of rapid social change.”<sup>86</sup> This chapter describes how these ideals came to be reflected in legal systems across South Asia.

Much of the literature on the development of family laws during the former British Raj emphasises the fact that the Raj administration rigidified such laws, constraining their flexibility and often implementing the more orthodox variations of such laws across the subcontinent.<sup>87</sup> It has also been argued that common law (British) judges, then and now, actively ‘make the law’ via the setting of precedents, and that the primacy of precedents would have stifled interpretive shifts relative to jurisprudence in the Mughal era.<sup>88</sup> As the next section will demonstrate, precedents are also significant in Islamic jurisprudence, although they are not binding to the same degree as was characteristic of British common law by then. Importantly, the underlying philosophy of British law was itself in transition during the course of their experimentation with adapting Mughal laws in the Raj, so that what emerged as personal status law for Muslims was neither British nor Mughal but an amalgam that was deemed ‘Anglo Muhammedan Law.’

Section 4 follows by delving into Pakistan’s passing of the Muslim Family Laws Ordinance (MFLO) of 1961, the last significant substantive change to Muslim marital contracts, inheritance rights, divorce proceedings, and child custody in Bangladesh to this day. The setting for this change arose from a combination of deeply centralised power under

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<sup>86</sup> Shirin Rai, *Gender and the Political Economy of Development: From Nationalism to Globalization* (Cambridge: Polity, 2002), 28.

<sup>87</sup> Ibid; Alamgir M. Serajuddin, *Shari'a Law and Society: Tradition and Change in South Asia* (Oxford: Oxford University Press, 2001); Rina V. Williams, *Postcolonial Politics and Personal Laws: Colonial Legal Legacies and the Indian State* (New Delhi; Oxford: Oxford University Press, 2006); Flavia Agnes, *Law and Gender Equality: The Politics of Women's Rights in India* (New Delhi: Oxford University Press, 2001).

<sup>88</sup> Ridwanul Hoque and Md. Morshed Mahmud Khan, "Judicial Activism and Islamic Family Law: A Socio-Legal Evaluation of Recent Trends in Bangladesh," *Islamic Law and Society* 14, no. 2 (2007); "Professor 2, Interview by Tahrat Naushaba Shahid," Dhaka (February 2013); Serajuddin, *Shari'a Law and Society: Tradition and Change in South Asia*.

the military rule of General Ayub Khan (1907-1974), who sought to weaken the Islamic right in Pakistan, and a strong, country-wide women's movement. However, Ayub Khan's rule did not survive the opposition created in part by the passing of the Ordinance, and this may be responsible for the hesitation of subsequent leaders, even those with similarly centralised power, to attempt such extensive changes in either Pakistan or Bangladesh since. The final section concludes with a brief history of the breakaway of East Pakistan, setting the scene for the constitutional and legal developments discussed in subsequent chapters.

## 1. The Development of Shari'a and Islamic Jurisprudence

Shari'a is the term used to describe the will of God and the revelation of this will to the Prophet Muhammad. Fiqh, on the other hand, represents Islamic jurisprudence. "In other words, while the Shari'ah is sacred, eternal and universal, *fiqh* is human and – like any other system of jurisprudence – mundane, temporal and local."<sup>89</sup> Referring again to the universality and permanence of one versus the other, Umar Nasaruddin further points out that, "The former is principled teachings, universal and permanent. The latter is non-principled, local, elastic, and not permanent. In this light, *fiqh* is a cultural interpretation of the shari'ah, and as such *fiqh* is the result of Islamic scholars' efforts."<sup>90</sup> Fiqh and the terms 'shari'a law' or 'Islamic law' are nevertheless used interchangeably in much of the existing literature regarding personal laws in the Muslim world. The distinction between *fiqh* and

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<sup>89</sup> Ziba Mir-Hosseini and Zainah Anwar, "Decoding The "Dna of Patriarchy" In Muslim Family Laws," openDemocracy, <http://www.opendemocracy.net/5050/ziba-mir-hosseini-zainah-anwar/decoding-%E2%80%9Cdna-of-patriarchy%E2%80%9D-in-muslim-family-laws>.

<sup>90</sup> Umar Nasaruddin, "Gender Biases in Qur'anic Exegesis: A Study of Scriptural Interpretation from a Gender Perspective " *HAWWA* 2, no. 3 (2004): 356-57.

shari'a is important in that shari'a is treated as an immutable set of ethical principles while fiqh is very much a product of the human interpretation of those principles, driven by local and temporal contexts. John Bowen describes fiqh as "best characterised as a human effort to resolve disputes by drawing on scripture, logic, the public interest, local custom, and the consensus of the community."<sup>91</sup> Fiqh has four primary sources. In order of highest to lowest levels of authority in determining legal outcomes, they are: (i) the Quran, (ii) the Sunnah, (iii) 'qiyas,' and (iv) 'ijma.'<sup>92</sup>

The Quran is considered the ultimate source of jurisprudence, providing a group of "broad moral directives of the aims and aspirations of Muslims" and holding the greatest authority as a representation of the direct word of God or Allah.<sup>93</sup> The Sunnah, or the Prophet Mohammed's teachings and practices, records of which are known collectively as the Hadith, is considered the second-most important source of Islamic jurisprudence. Qiyas, a third source, is a form of deductive analogical reasoning.<sup>94</sup> It is used to make legal decisions by taking into consideration historical rulings of notable religious scholars after the death of the Prophet, many of the earliest of whom derived their authority from their status as the Prophet's companions, on cases similar to one under discussion. Ijma refers to consensus reached between those with religious and scholarly authority in Islam.<sup>95</sup> It is worth noting, however, that the determination of who holds such authority can vary widely across groups. Examples of how this lack of a universally accepted hierarchy presents itself in legal

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<sup>91</sup> John R. Bowen, *Islam, Law, and Equality in Indonesia: An Anthropology of Public Reasoning* (Cambridge: Cambridge University Press, 2003), 9.

<sup>92</sup> Noel J. Coulson, *A History of Islamic Law* (Edinburgh: University Press, 1964), 59.

<sup>93</sup> John L. Esposito and Natana J. DeLong-Bas, *Women in Muslim Family Law*, 2nd ed. ed. (Syracuse, N. Y.: Syracuse University Press, 2001), 3.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

interpretation will be revealed in the details of legal cases and challenges discussed in subsequent chapters.

The term ‘ijtihād’ refers to making use of qiyas or ijma, when juristic scholars try to identify the true meaning of the Quran and Sunnah. Ijtihad is said to have been banned by leading ‘ulema,’ or religious scholars, as a jurisprudential method between the 10<sup>th</sup> and 13<sup>th</sup> centuries.<sup>96</sup> It was decided, by consensus, that ijtihad had reached its limits in terms of interpretive bounds and that the corpus of fiqh was complete. ‘Taqlid,’ or the imitation of previous rulings, largely replaced ijtihad at this point.<sup>97</sup> Although the specific details of this ban and the fact of whether it came to pass at all are contested, there appears to have been a perception that greater cultural preservation was necessary in the face of external threats such as invasion by the Mongols. Many Muslim societies returned to employing ijtihad by the 18<sup>th</sup> century,<sup>98</sup> reflected in trends among South Asian Muslim reformers discussed later in this chapter in Section 2. Even if, as Wael Hallaq argues, the so-called ‘gates of ijtihad’ was not in fact closed,<sup>99</sup> the uncertainty that this concept of closure brought about had a deep influence on the role of ijtihad in Islamic jurisprudence moving forward.<sup>100</sup>

Due in part to the lack of a universally accepted hierarchical structure among scholars and clergy across Muslim communities, conflicts over which practices constitute authentic Islam and who is qualified to make these determinations go as far back as the

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<sup>96</sup> Ibid., 11.

<sup>97</sup> Ziba Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law - Iran and Morocco Compared* (London: I.B. Tauris & Co., 1993), 7.

<sup>98</sup> Rabia Bhuiyan, "Gender and Tradition in Marriage & Divorce: An Analysis of Personal Laws of Muslim and Hindu Women in Bangladesh," (Dhaka, Bangladesh: UNESCO, 2010), 25-27.

<sup>99</sup> Wael B. Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001).

<sup>100</sup> Hoque and Khan, "Judicial Activism and Islamic Family Law: A Socio-Legal Evaluation of Recent Trends in Bangladesh," 207; Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law - Iran and Morocco Compared*, 7.

immediate aftermath of the death of the Prophet. As a result, fiqh varies greatly across the Muslim world. The spread of Islam to regions outside of the Arabian Peninsula saw an increasing diversity of doctrine, and there are now four main schools of jurisprudence or ‘maddhahib’ among Sunni Muslims: Hanafi, Shafi’i, Hanbali, and Maliki.<sup>101</sup> Nasaruddin points out that the ulama after which these four maddahib are named were relatively moderate for their time but, “It was their students and followers, or rulers, who insisted their beliefs be strictly professed ... they were tied by socio-cultural realities of when and where they lived. The *fiqh* which was written from within male-dominated cultures, such as the Middle Eastern, would certainly have resulted in a patriarchal *fiqh*.”<sup>102</sup> Although not discussed in detail here, feminist interpretations of fiqh have since put the development of these schools in their historical context, arguing not only that women were once deeply influential in the evolution of fiqh, particularly the wives of the Prophet in the early years of jurisprudential development, but also that women’s equality can be achieved through fiqh were it applied as originally intended.<sup>103</sup>

Even within each maddahib, different interpretations exist across and within countries, adapted as they are to local customs and contexts. It would be challenging to separate contemporary customary practices from religious ones in many a rural area across South Asia and, despite the predominant influence of Hanafi jurisprudence among the Muslim population of the region, personal laws and their application vary widely nonetheless. Matthew Nelson describes the diversity of Islamic law with these examples:

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<sup>101</sup> Coulson, *A History of Islamic Law*, 52.

<sup>102</sup> Nasaruddin, "Gender Biases in Qur'anic Exegesis: A Study of Scriptural Interpretation from a Gender Perspective ": 356-57.

<sup>103</sup> Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (Yale U.P., 1992); Nasaruddin, "Gender Biases in Qur'anic Exegesis: A Study of Scriptural Interpretation from a Gender Perspective "; Fatima Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam* (Reading, Mass.: Addison-Wesley, 1991).

“Max Weber (1978),<sup>[104]</sup> for instance, drawing attention to the terms of what he called ‘qadi’ [traditionally, a Muslim judge whose legal decisions are based on shari‘a] justice, argues that local articulations of Islamic law are simply too unpredictable ... In effect, he notes, the terms of Islamic jurisprudence tend to be rather arbitrary, unreliable, and capricious ... Scholars like Lawrence Rosen (1989, 1999), writing about the terms of Islam, Islamic law, and Islamic legal debate in Morocco; Brinkley Messick (1993), writing about the terms of Islamic jurisprudence in Yemen; Daniel Brown (1996), writing about Islamic jurisprudence in Egypt and Pakistan; Michael G. Peletz (2002), writing about Islamic law in Malaysia; and John R. Bowen (2003), writing about Islam in Indonesia have all gone out of their way to show that the notion of Islamic law as a ‘fixed’ or ‘impenetrable’ law set apart from specific historical circumstances and multiple legal (and political) influences is little more than an ‘illusion.’”<sup>105</sup>

As a result of these differences, rules and regulations on the roles of men and women in the family can diverge between and within maddahib as well. The rights of a woman in initiating divorce in the predominantly Hanafi law practised in Bangladesh, for example, are different from her rights in Hanafi law as practised in Egypt. A number of Muslim countries, furthermore, have made polygamy nearly impossible with the setting up of significant legal hurdles to such marriages, even if falling short of an outright ban. Additionally, implementation of such laws varies immensely, with women having very different levels of access to justice depending on their socio-economic class and geographic location.

A long history of changes in Muslim family laws and the claims of women within them have led to a wide range of interpretations from an intertemporal perspective as well. It is worth noting that, in theological terms, these regulations are not perceived as a contract

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<sup>104</sup> Nelson refers here to Max Weber’s seminal ‘Economy and Society,’ first published posthumously in 1922 (Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1978)).

<sup>105</sup> Matthew J. Nelson, "Who Speaks for Islam?: 'Authenticity' and the Interpretation of Islamic Law in America's War on Terror," *Australian Journal of International Affairs* 61, no. 2 (2007): 250-52.

with God but rather a contract between people (but nevertheless guided by a definition of morality determined by God). For example, marriage is not treated as a sacred institution in Islam. “The goal of the canon law was primarily the regulation of a spiritual institution whereas for the Muslim jurists, the Islamic law of marriage was primarily concerned with the secular institution of marriage.”<sup>106</sup>

### **a. Inheritance in Islam**

Guidelines to succession or inheritance rights, however, are far less open to interpretation than other areas of family law. “[The Quran] states that ‘Men have a share in what parents and relatives leave behind, and women also have the right to a share,’” and that “‘Man is entitled to the fortune of two women.’”<sup>107</sup> The Quran also specifies the ranking of heirs and their shares of inheritance. This level of specificity contributes substantially to the difficulty of any reinterpretation of inheritance laws. Compared to a number of other regulations, where the Quran largely provides broad ethical guidelines that are combined with other sources to lead to a conclusive ruling, inheritance rights remain very similar across all four Sunni maddahib. This difficulty of reinterpretation has had a significant bearing on the clause of the National Women Development Policy in Bangladesh calling for equal access to property between men and women.

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<sup>106</sup> Mohammad Fadel, "Review of the Book *the Islamic Marriage Contract: Case Studies in Islamic Family Law* Edited by Asifa Quraishi and Frank E. Vogel (Cambridge, Ma: Harvard University Press, 2008)," *Journal of Islamic Studies* 22, no. 3 (2011): 416.

<sup>107</sup> Nawal el-Saadawi, "Women and Islam," in *Women and Islam*, ed. Azizah al-Hibri (Oxford: Pergamon Press, 1982), 201.

“Muslim laws of inheritance ... are widely regarded as the most important and progressive laws in the whole corpus of Islamic jurisprudence,” in that they acknowledge a women’s right to have exclusive control of her wealth and income, a level of independence less apparent in other shari‘a-guided family laws regarding women.<sup>108</sup> It is nevertheless the case that men inherit double the shares of their female counterparts in all four of the previously mentioned schools of Islamic law.<sup>109</sup> This means, for example, that one’s daughter will automatically receive half of the assets accorded to one’s son. Justifications for this inequality have included the fact that men are expected to be exclusively responsible for financial maintenance of families,<sup>110</sup> and that women are supposed to be provided with ‘mehr’ upon marriage, that is, a negotiated amount of money a groom or his family gives to a bride upon marriage and that she is to have sole control over during the course of her life.

Despite such specific Quranic prescriptions, however, even the stickiness of inheritance laws is contested. These prescriptions were detailed after a major battle, the Battle of Uhud in 625 AD, suggesting that the formula for inheritance shares was to be applied only in “the special case where there are no wills” and that the writing of wills be encouraged.<sup>111</sup> In a highly gender-biased environment, however, the option of writing wills may make no difference in how parents choose to assign shares of their assets. Since the word of Allah as presented through the Quran is considered to be eternal by most ulema, furthermore, it is unlikely that extensive modification would be easily accepted on this basis.

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<sup>108</sup> Nelson, *In the Shadow of Shari‘ab: Islam, Islamic Law and Democracy in Pakistan*, 79.

<sup>109</sup> Esposito and DeLong-Bas, *Women in Muslim Family Law*, 40.

<sup>110</sup> *Islam and Equality: Debating the Future of Women's and Minority Rights in the Middle East and North Africa*, (New York: Lawyers Committee for Human Rights, 1999), 43.

<sup>111</sup> Zeeshan Hasan, "Investigating Qur'anic Inheritance Laws," *The Daily Star (online)* 2011.

Interestingly, Ja'fari fiqh, the maddhab of the majority (Ithna'ashariyyah or Twelver) Shi'a Muslims, is distinct from Sunni law with regard to inheritance in that its concept of family is based on a much smaller unit consisting exclusively of immediate family. The Sunni notion of a family unit, on the other hand, emphasises extended family or tribal ties. Men inherit double of their female counterparts within this smaller unit in Ja'fari law, just as with Sunni maddahib. However, if a deceased person had only the one child who is female, Ja'fari law would recognise the daughter and spouse as sole heirs, rather than distributing a portion of that person's estate to male relatives outside of the immediate family as with Sunni maddhahib.<sup>112</sup>

## **b. Mechanisms of Change**

In other areas of personal law besides inheritance, Muslim majority countries have tended to pursue changes by presenting them as interpretations of the Quran, such as “the reaffirmation of the uniqueness of the [Quranic] experience.”<sup>113</sup> This last takes into account the specific circumstances and social context of the time in which the Quran was written, much like citing the context of the Battle of Uhud in the case of determining the rules of inheritance. But, as mentioned before, the question of who has the power to interpret the Quran or carry out ijihad will arise in any reassessment of existing laws. In much of the contemporary Muslim world, religious scholars and clergymen are viewed as akin to jurists in areas of personal law, in sharp contrast to Christian clergymen, who are largely seen as

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<sup>112</sup> Doreen Hinchcliffe, "Women and Law Reform in Contemporary Islam," in *Women in the Muslim World*, ed. Lois Beck and Nikki Keddie (Cambridge: Harvard University Press, 1978), 46-47.

<sup>113</sup> Abdullahi A. An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse University Press, 1990), 406-07.

theologians with little power to influence state laws in modern-day practice.<sup>114</sup> Fareed Zakaria argues that the source of ultimate religious authority, however, has not been fully determined in (Sunni) Islam and, due to the lack of official clergy such as a Pope or a central religious establishment, for example, “Bin Laden has as much authority to issue *fatwas* [a type of edict, usually issued by religious scholars, on a specific point of interpretation of shari‘a] as a Pakistani taxi driver in New York City.”<sup>115</sup>

Regardless of the lack of formal authority (beyond that of one Muslim among other, equal Muslims), the recognition of such edicts acts as a self-reinforcing mechanism in which scholars of Islam, acknowledged by their surrounding community as such, are perceived as an authority on Islamic jurisprudence. In seeking guidance on a dispute, a community member may approach more than one recognised scholar before receiving a judgment with which he or she is satisfied. “Taking advantage of the concept of necessity, modern Muslims, whether muftis or laity, scour the opinions of the *madhabs* [*sic*] seeking out the opinion most in conformity with their perceived needs.”<sup>116</sup> This issue of religious authority becomes particularly important, of course, in areas of law that come to be contested on the basis of religious authenticity. Additionally, the ability to issue and implement fatwa at all has been challenged in recent years in Bangladesh, a case that will be discussed in much greater detail in the following chapter.

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<sup>114</sup> Shahrough Akhavi, "Islam and the West in World History," *Third World Quarterly* 24, no. 3 (2003): 546.

<sup>115</sup> Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (New York ; London: W.W. Norton, 2007), 5.

<sup>116</sup> Ihsan Yilmaz, in *The Islamic School of Law: Evolution, Devolution, and Progress*, ed. Peri Bearman, Rudolph Peters, and Frank E. Vogel (Cambridge, Mass.: Harvard Law School, 2005), 262.

### c. Legislative Changes in the Muslim World

In analysing patterns of change in Bangladeshi family laws, it is important to look at legislative reforms in the wider Muslim world. “As the state strengthens and expands, it often - but not always - seeks to seize control over family law from churches, clans, tribes, and other cultural communities. These sub-national rivals to the state were historically the undisputed authorities over marriage, birth, inheritance, and other family law matters.”<sup>117</sup> Across countries with significant Muslim populations, critical junctures where openings existed for change through a combination of electoral or state support, feminist pressure, and weak opposition have worked together to spur new legislation.<sup>118</sup> While there may not always be such clear divides between political actors, the larger point that “Historical legacies of religion-state relations help us understand patterns of cross-national variation in family law” is an important one, even for understanding intertemporal developments in a single country case.<sup>119</sup>

The Ottoman Law of Family Rights of 1917 was the first modern code of Islamic family law, instituting civil marriage, banning marriages without the consent of both parties, and offering greater rights to women in terms of the ability to initiate divorce proceedings.<sup>120</sup> The primary method of interpretation employed in this last case of expanding the right to initiate divorce employed the practice of ‘takhayyur,’ or legal transplantation from alternative

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<sup>117</sup> Mala Htun and Laurel Weldon, "Sex Equality in Family Law: Historical Legacies, Feminist Activism, and Religious Power in 70 Countries," in *World Development Report 2012 Background Paper* (Washington, DC: The World Bank, 2011), 3.

<sup>118</sup> Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge, Mass. ; London: Belknap Press of Harvard University Press, 1992); Mala Htun, *Sex and the State: Abortion, Divorce, and the Family under Latin American Dictatorships and Democracies* (Cambridge: Cambridge University Press, 2003).

<sup>119</sup> Htun and Weldon, "Sex Equality in Family Law: Historical Legacies, Feminist Activism, and Religious Power in 70 Countries," 4.

<sup>120</sup> *Ibid.*, 12-13.

maddahib, adapting a feature of Maliki law to the otherwise predominantly Hanafi law practised in Ottoman Turkey at that time. The 1917 Code had reverberations around the Muslim world. Egypt followed in the 1920s with a process of legal reforms using the same technique and in 1926 saw the creation of a committee to recommend changes in Islamic marriage and divorce laws, formerly based entirely on Hanafi jurisprudence.<sup>121</sup> Laws instituted by the committee included the expansion of maternal custody rights over sons up to the age of nine years and daughters up to the age of eleven years. The Egyptian committee also revised laws on divorce, mimicking the Turkish adaptation of Maliki law and giving women the right to initiate divorce.<sup>122</sup> Additionally, the committee made a recommendation for abolishing polygamy through a reinterpretation of the Quran, but this was never implemented due to subsequent protests from the religious orthodoxy.<sup>123</sup>

Besides *takhayur*, another two methods through which changes to *shari'a*-guided laws have been justified are '*takhsis al-qada*,' or the "right of the ruler to define and confine the jurisdiction of his courts," and '*syasa-shari'a*,' or the "discretion of the ruler to implement administrative regulations which are beneficial and not contrary to *shari'a* [*sic*]."<sup>124</sup> In 1979, Egypt was able to further reform women's child custody and divorce rights by applying *takhsis al-qada* through a presidential decree, issued by Anwar Sadat during a parliamentary recess.<sup>125</sup> Sadat confirmed support from members of the religious clergy before issuing this

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<sup>121</sup> Esposito and DeLong-Bas, *Women in Muslim Family Law*, 50.

<sup>122</sup> Htun and Weldon, "Sex Equality in Family Law: Historical Legacies, Feminist Activism, and Religious Power in 70 Countries," 12-13.

<sup>123</sup> Esposito and DeLong-Bas, *Women in Muslim Family Law*, 50.

<sup>124</sup> An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law*, 46.

<sup>125</sup> Aziza Hussein, "Recent Amendments to Egypt's Personal Law," in *Women and the Family in the Middle East: New Voices of Change*, ed. Elizabeth W. Fernea (Austin: University of Texas Press, 1985), 230; Amira Mashhour, "Islamic Law and Gender Equality - Could There Be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt,"

decree, so that the three most influential Egyptian religious leaders at that time publicly and fully endorsed the new legislation with religious justifications based on a combination of takhayyur, takhsis al-qada, and a reinterpretation of the Quran.

In what was another major development in family laws among Muslim countries, meanwhile, Tunisia outlawed polygamy altogether while creating its Code of Personal Status in 1956. As with reform programmes in Egypt and Turkey, this change was instituted under a dictatorship, that is, under Habib Bourgiba.<sup>126</sup> Article 18 of the Code made polygamy punishable with a year of imprisonment, a 240,000 Tunisian franc fine, or both,<sup>127</sup> in “one of the boldest moves [on personal status laws] in the Arab-Islamic world, especially in 1956.”<sup>128</sup> Despite the resistance of the ulema, Bourgiba and supporting legislators justified this ban on the Prophet’s suggestion that polygamy is only permissible if all wives are treated equally.<sup>129</sup> It is widely accepted that after his first wife, Khadija, with whom the Prophet had a monogamous marriage until her death, he famously favoured Ayesha above all the other wives with whom he was subsequently in a polygamous marriage.<sup>130</sup> He subsequently observed that it was impossible for a husband to treat all his wives equally. In addition to employing this logic to challenge polygamy, the 1956 Code allowed Tunisian women greater equality with men in decisions regarding marriage, divorce, and child custody.<sup>131</sup> Following

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*Human Rights Quarterly* 27, no. 2 (2005); John L. Esposito, *Women in Muslim Family Law* (Syracuse, N.Y.: Syracuse University Press, 1982), 585-86.

<sup>126</sup> Mashhour, "Islamic Law and Gender Equality - Could There Be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt," 585-86.

<sup>127</sup> "Resources: Family Laws in Muslim Majority and Minority Contexts," Muslim Marriage Contract, <http://muslimmarriagecontract.org/laws.html#genderneutral>.

<sup>128</sup> Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco*, 15-16.

<sup>129</sup> Nowrin Tamanna, "Personal Status Laws in Morocco and Tunisia: A Comparative Exploration of the Possibilities for Equality-Enhancing Reform in Bangladesh," *Feminist Legal Studies* 16(2008): 331.

<sup>130</sup> Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco*, 15-16.

<sup>131</sup> Sangeeta Sinha, "Women's Rights: Tunisian Women in the Workplace," *Journal of International Women's Studies* 12, no. 3 (2011): 187-88.

the changes brought by the Code, “In [a] second wave under President Ben Ali, Tunisian society witnessed a rise in women’s activism ... For the first time a Tunisian woman could pass her nationality to a child born abroad, regardless of the nationality of the father.”<sup>132</sup>

The 2004 Moudawana reforms of Morocco are perhaps the most recent such significant reforms of personal law in a Muslim majority country. Although hailed as a uniquely bold and progressive step by a number of human rights organisations, the Moudawana appears to have largely served to bring the country’s personal status laws closer to Tunisian standards. The 2004 reforms do not, however, go as far as to ban polygamy altogether, opting instead for a version of regulation similar to Bangladesh in that polygamy is made “difficult to practise by subjecting it to judicial authorisation and strict legal conditions.”<sup>133</sup> These conditions include requiring legal documentation demonstrating that existing wives have been notified, and that subsequent potential wives are made aware of pre-existing marital contracts prior to their marriage. As a result of the Moudawana, furthermore, it is also possible for Moroccan women to specify in their marriage contracts that polygamy is never to be permitted at all.<sup>134</sup> To what extent this condition is written into such contracts since the reforms, however, remains open to question.

Turkey offers a unique example among countries with Muslim majority populations in that, in the process of reviewing the potential for Islamic family law to offer equality to women, shari’a as a guide to the law there was ultimately removed altogether. Turkey had already paved the way for changing basic tenets of Islamic family law as early as 1858

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<sup>132</sup> Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco*, 24.

<sup>133</sup> Tamanna, "Personal Status Laws in Morocco and Tunisia: A Comparative Exploration of the Possibilities for Equality-Enhancing Reform in Bangladesh," 331-32.

<sup>134</sup> Ibid.

through the Ottoman Empire's Land Law,<sup>135</sup> which included a clause giving male and female children equal rights to inheritance - a move that has yet to be replicated anywhere else in the Muslim world.<sup>136</sup> Less than a decade after the 1917 Family Code came into place, the Turkish government under Mustafa Kemal Atatürk appointed a committee to review Islamic family law with the intention of making such regulations more equitable to women. However, the committee was unable to find a religious basis for significant reform, and the Islamic Family Code was replaced altogether, by a civil code based in large part on that of Neuchatel, Switzerland.<sup>137</sup> Deniz Kandiyoti makes the observation that women had little participation in the dialogue leading up to the new code in 1923, to such an extent that they were taken to task in the media for this passivity at the time.<sup>138</sup> Atatürk also had the word 'Islam' removed from the Turkish Constitution and banned the wearing of the veil in public institutions.<sup>139</sup>

Many of the reforms to Islamic family laws that occurred in the earlier portion of the 20<sup>th</sup> century were features of systematic efforts to modernise, with the equality of men and women perceived as a crucial aspect of this modernisation. The Ottoman Empire was the last bastion of a great Islamic empire and deeply influential throughout the Muslim majority world, much of which had been under its rule at one time or another. As Ottoman and later Atatürk's Turkey began to implement more and more changes in its family laws, demands

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<sup>135</sup> Deniz Kandiyoti, "End of Empire: Islam, Nationalism, and Women in Turkey," in *Women, Islam and the State*, ed. Deniz Kandiyoti (Basingstoke: Macmillan, 1991), 27.

<sup>136</sup> *Ibid.*, 36.

<sup>137</sup> Ahmed, "Feminism and Feminist Movements in the Middle East."; Kandiyoti, "End of Empire: Islam, Nationalism, and Women in Turkey."

<sup>138</sup> Kandiyoti, "End of Empire: Islam, Nationalism, and Women in Turkey," 37-38.

<sup>139</sup> June Starr, "Islam and the Struggle over State Law in Turkey," in *Law and Islam in the Middle East*, ed. Daisy H. Dwyer (New York: Bergin & Garvey Publishers, 1990), 90.

for reforms to family laws grew among other Muslim communities as well. These demands led, for example, to the Shariat Application of 1937 in British India.<sup>140</sup>

Tracing the conditions leading to change suggests that democracy has tended to weaken the push for reform. Most significant alterations to personal status laws that enhanced Muslim women's rights in terms of divorce, marriage, and child custody were almost entirely passed during eras of dictatorship and monarchy. As Kandiyoti suggests, "Authoritarian rulers might have ventured into territory where others feared to tread."<sup>141</sup> Or, from the perspective of the negotiations required to make such alterations, "Change has occurred, almost exclusively, in a political climate defined by a certain 'immunity' from the terms of multi-party (or cross-party) bargaining. Indeed, only unrivalled political elites have tended to be, legislatively, in a position to stand up and 'speak for God.'"<sup>142</sup>

Additionally, past reform attempts demonstrate that there is a notable scarcity of changes equalising inheritance and property rights between Muslim men and women. Inheritance and property rights, with their strong implications for the division of economic power and potential for redistribution of wealth between the sexes, have yet to see significant reform among Muslim communities. Changes have primarily dealt with marriage and divorce laws rather than enhancing women's control of economic resources and this pattern, common to many Muslim majority countries, is well-reflected in the political and legal discourse over such change in modern-day Bangladesh.

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<sup>140</sup> Amrita Chhachhi, "Forced Identities: The State, Communalism and Women in India," in *Women, Islam and the State*, ed. Deniz Kandiyoti (Basingstoke: Macmillan, 1991), 160.

<sup>141</sup> Deniz Kandiyoti, ed. *Women, Islam and the State* (Basingstoke: Macmillan, 1991), 13.

<sup>142</sup> Matthew J. Nelson, "Inheritance Unbound: the Politics of Personal Law Reform in Pakistan and India," ed. Sunil Khilnani, Vikram Raghavan, and Arun K. Thiruvengadam, *Comparative Constitutionalism in South Asia* (Delhi: Oxford University Press, 2013). 3.

## 2. Family Laws in the British Raj

Islam first spread to the Indian subcontinent with the conquest of Sindh (now in Pakistan), in the early 8<sup>th</sup> century, by Umayyad-period Arabs. They were primarily traders, and a number of Hindu trading communities converted to Islam after their arrival. The Arabs that followed settled along the Malabar Coast and adapted to local customs. A broader introduction to Islam came with Afghan and Turkish rule in the 12<sup>th</sup> century, and shari‘a acted as an formal guide to law in South Asia by the 13<sup>th</sup> century.<sup>143</sup> Evidence of Sufi influence in what is now Bangladesh exists before that time, as well. “According to local legends, prominent Sufis from places like Mecca, Balkh, Yaman, Bistam, Ghazni and Delhi came to Bengal even before the conquest of North-West Bengal by Bakhtyar Khaliji”<sup>144</sup> at the start of the 13<sup>th</sup> century.

The Moghul emperors who followed brought Hanafi jurisprudence with them and appointed ‘qadis’ or judges trained in Islamic jurisprudence to administer law. A collection of fatwas were collected in the Fatawa-e-Alamgiri during the rule of Emperor Aurangzeb in the late 17<sup>th</sup> century and this, along with the Hedaya, were treated as the two most significant works in the determination of Hanafi fiqh during Moghul rule.<sup>145</sup> Literally translating to ‘guide,’ the Hedaya is a famous work of Hanafi jurisprudence from the 12<sup>th</sup> century, used during this period as the primary source of Hanafi fiqh in Central and South Asia.

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<sup>143</sup> Bhuiyan, "Gender and Tradition in Marriage & Divorce: An Analysis of Personal Laws of Muslim and Hindu Women in Bangladesh," 38.

<sup>144</sup> Bano, "Marker of Identity: Religious Political Parties and Welfare Work - the Case of Jam'at-I-Islami in Pakistan and Bangladesh," 12.

<sup>145</sup> Agnes, *Law and Gender Equality: The Politics of Women's Rights in India*, 31.

Notably, despite attempts at establishing a universal fiqh code for Muslims under Moghul rule, a number of communities continued to follow their own customary laws by the time of British rule. For example, the Mopilla community along the Malabar Coast followed matrilineal practices, with inheritance being passed primarily from mother to daughter rather than father to son.<sup>146</sup> Kutchi Memons of Bombay followed their own customs as well, excluding women from inheritance of property altogether.<sup>147</sup> Bhagwanis and Satyadharmis in Bengal, meanwhile, followed a combination of both Hindu and Muslim laws.<sup>148</sup>

### **a. Jurisprudence during Colonial Rule**

With the advent of colonial rule, British administrators found a variety of legal models in practice across the Indian subcontinent. Initially, they sought to leave personal status laws as they were and avoid confrontations over local customs. British judges frequently turned to qadis in determining cases for Muslims, and family laws were applied according to community affiliations just as they had been during Moghul rule. During this early period of British rule, the Presidency of Calcutta, under the administration of Governor Warren Hastings (1732-1818), adopted the “Roman model of differentiating between Canon and Civil law,” while the Presidency of Bombay, under the administration of Governor Mountstuart Elphinstone (1779-1859) and influenced by Jeremy Bentham (1748-1832), adopted an “English model of King’s law and Common law, providing greater scope for

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<sup>146</sup> Gregory C. Kozlowski, "Mopilla Uprisings," in *Historical Dictionary of the British Empire*, ed. James Stuart Olson and Robert Shadle (Westport, Conn. ; London: Greenwood Press, 1996), 754.

<sup>147</sup> Bhuiyan, "Gender and Tradition in Marriage & Divorce: An Analysis of Personal Laws of Muslim and Hindu Women in Bangladesh," 38-40.

<sup>148</sup> Ibid.

validating customary law.”<sup>149</sup> Ultimately, however, both Presidencies moved towards the Bengal Presidency model.<sup>150</sup>

This variation of models demonstrates the contestation in legal philosophies that the British were themselves undergoing during the course of their colonial rule of India. As Scott Kugle points out:

“The Whig position conceived of law as built on accumulated experience, with an aim to promote private rights in property, especially land, in order to prevent encroachment by the state. The Utilitarian position, advocated by Mill and Bentham, denounced experience piled on top of experience as ‘groping blindly in the dark’. Instead they demanded a systematized, hierarchical legal structure. Utility-minded reformers criticized both English and Indian systems of jurisprudence, but were more able to formalize codes of law in India, where power was already in the hands of a few, and arbitrary government could overpower opposition. Although Whigs and Utilitarians were in conflict in England, these philosophies were freer to overlap in South Asia; the same series of Regulations by the colonial state established private property in land *and* rationalized the administrative system.”<sup>151</sup>

The Warren Hastings Plan of 1772 explicitly protected the rights of Hindus and Muslims in their application of personal status laws in matters such as inheritance, marriage and, in the case of Hindus, caste.<sup>152</sup> Qadis were also replaced by formal judges in the late 18<sup>th</sup> century, following the passing of the Hastings Plan.<sup>153</sup> Plurality among the practices of Muslim communities caused jurisprudential confusion, and the British began to translate Hindu and Muslim religious texts to English for direct access. Such translations were carried

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<sup>149</sup> Agnes, *Law and Gender Equality: The Politics of Women's Rights in India*, 41-45.

<sup>150</sup> *Ibid.*, 41.

<sup>151</sup> Scott A. Kugle, "Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia," *Modern Asian Studies* 35, no. 2 (2001): 277.

<sup>152</sup> Agnes, *Law and Gender Equality: The Politics of Women's Rights in India*, 42-43.

<sup>153</sup> Hoque and Khan, "Judicial Activism and Islamic Family Law: A Socio-Legal Evaluation of Recent Trends in Bangladesh," 209-10.

out largely in Bengal, thus potentially influencing the law with primarily Bengali traditions and interpretations.<sup>154</sup>

Flavia Agnes and Rina Williams, among others, argue that British rule thus constrained flexibility within the law, as they sought increasingly to systematise family laws for Muslims, Hindus, and other religious communities through such texts and the input of religious scholars.<sup>155</sup> What was once a diverse and varied body of law drawn from a range of texts became increasingly narrow and even distorted.<sup>156</sup> This led to the treatment of certain Islamic texts by British Indian judges as if they were binding and universal, and the conclusions drawn from them unchangeable.<sup>157</sup>

It is worth noting in advance of considering subsequent legislative acts concerning Muslim personal status that the official colonial principle of non-interference meant that any type of reform or change, however, would have had to be initiated from within the community in which those laws were prevalent.<sup>158</sup> However, Kugle argues, "The indigenous codes provided the substance of the law, and the British state provided the procedure which administered this substance. ... the British did not simply step into the enforcing role

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<sup>154</sup> Agnes, *Law and Gender Equality: The Politics of Women's Rights in India*, 44.

<sup>155</sup> Ibid; Manisha Desai, "Legal Pluralism Versus a Uniform Civil Code: The Continuing Debates in India," in *Family Gender and Law in a Globalizing Middle East and South Asia*, ed. Kenneth M Cuno and Manisha Desai (Syracuse: Syracuse University Press, 2009); Williams, *Postcolonial Politics and Personal Laws: Colonial Legal Legacies and the Indian State*; Hoque and Khan, "Judicial Activism and Islamic Family Law: A Socio-Legal Evaluation of Recent Trends in Bangladesh."; Rai, *Gender and the Political Economy of Development: From Nationalism to Globalization*.

<sup>156</sup> Williams, *Postcolonial Politics and Personal Laws: Colonial Legal Legacies and the Indian State*, 6-7.

<sup>157</sup> Hoque and Khan, "Judicial Activism and Islamic Family Law: A Socio-Legal Evaluation of Recent Trends in Bangladesh," 210-11.

<sup>158</sup> Williams, *Postcolonial Politics and Personal Laws: Colonial Legal Legacies and the Indian State*, 9.

vacated by the Mughal-patterned Bengali Nawabs. ... A system of law cannot be divided between substance and procedure and retain its former character and use.”<sup>159</sup>

Despite the fact that the British both rigidified and distorted Muslim and other religious communities’ personal status laws in practice, however, available secondary evidence suggests that there was much inconsistency of application as well. Local customs were allowed to prevail in many cases. It was this very inconsistency as well as the internalisation of the aspiration for systematisation so prominent in English law and jurisprudence<sup>160</sup> - albeit inconsistently applied - that would have built the rhetorical foundation for universalising inheritance rights through the Shariat Validation Act of 1937, based on demands from political representatives of Indian Muslims themselves. For example, the British emphasis on the primarily Hanafi text of the *Al Sirajiyah* to determine succession supposedly set strict guidelines on inheritance rights.<sup>161</sup> Eleanor Newbiggin, however, points out that “Directives to include daughters in the division of a father’s estate were, in many parts of India, ignored in favour of customary practices, which sidelined women heirs and limited a woman’s hold over property to her lifetime only.”<sup>162</sup> In Punjab, although British administrators attempted to push for “individual landed property rights,” the challenges of local politics ultimately encouraged them to support “unanticipated adjustments in favour of tribal customs instead.”<sup>163</sup>

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<sup>159</sup> Kugle, "Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia," 280.

<sup>160</sup> *Ibid.*, 282.

<sup>161</sup> Eleanor Newbiggin, "Personal Law and Citizenship in India's Transition to Independence," *Ibid.* 45(2011): 12.

<sup>162</sup> *Ibid.*

<sup>163</sup> Nelson, *In the Shadow of Shari'ah: Islam, Islamic Law and Democracy in Pakistan*, 17.

Furthermore, home-grown British law influenced areas of personal law as well, with mixed results for women's rights. In the Bombay Presidency where, as mentioned before, there was greater scope for pursuing customary law, Chief Justice Erskine Perry (1806-1882) refused the inheritance claims of three women based on his reading of Islamic law on 11 October 1847, commenting not only that an inability to claim any inheritance was "perfectly acceptable in the eyes of English law" and that "since the attempt of the young women to disturb the course of the succession, which has prevailed among their ancestors for many hundreds of years, has failed, they must now pay the price of this unsuccessful experiment by paying the cost to the defendants."<sup>164</sup>

Williams argues that in restricting and codifying formerly flexible customs, some women were "robbed" of their traditional rights.<sup>165</sup> The superiority of these customary rights to those available to them in Muslim personal law would have been restricted to a very small percentage of the Muslim Indian population at that time, however. Muslim women's property rights in other communities, such as within the Bengal Presidency, may well have been strengthened with an increasing reliance on religious texts. "In a number of prominent cases, the colonial courts ruled in favour of a Muslim woman's right to mehr, granting her control over part of her husband's estate until this was paid."<sup>166</sup> Much of the resistance to the uniform application of Hanafi succession rights through the Shariat Validation Act came precisely from the preference of some Muslim communities to continue practising their

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<sup>164</sup> Agnes, *Law and Gender Equality: The Politics of Women's Rights in India*, 50-51.

<sup>165</sup> Williams, *Postcolonial Politics and Personal Laws: Colonial Legal Legacies and the Indian State*, 41.

<sup>166</sup> Eleanor Newbiggin, "Personal Law and Citizenship in India's Transition to Independence," *Modern Asian Studies* 45(2011): 32.

customary laws, which as Newbiggin points out, often excluded women from inheriting altogether.<sup>167</sup>

Critiques of British rule with regard to its influence on family law for Muslims, then, range from the conclusion that the British constrained its former flexibility to, paradoxically, the observation that this constrained set of laws was only inconsistently applied with regard to women's claims. Complex interactions between changes within both Muslim and British communities' perceptions of women's roles in their families are worth noting, as well, as these were to lead to changes within family laws prior to independence from the British Raj. Hindu personal status laws saw more legal reform throughout the era of British rule, largely due to pressures exerted from within Hindu communities themselves. The Hindu practice of 'sati,' or the burning of widows on their husbands' funeral pyre as a symbolic act of devotion and ultimate purification was banned in 1829; Hindu widows were allowed to remarry through the Widow Remarriage Act of 1856; and Hindu marriage ceremonies were required to exclude certain orthodox practices in 1872.<sup>168</sup> Muslim women would have been in a better position to begin with, and none of these reforms would have been necessary for Muslim women. Indeed, at the "time of independence [from the British Raj] women's rights under Muslim laws were far superior to both Hindu and Christian laws."<sup>169</sup>

British law in Great Britain itself posed severe restrictions on women's rights during this period. Married women were not considered to have individual legal 'personhood' according to British law until 1929 and women were not allowed to even own property until

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<sup>167</sup> Ibid.

<sup>168</sup> Bhuiyan, "Gender and Tradition in Marriage & Divorce: An Analysis of Personal Laws of Muslim and Hindu Women in Bangladesh," 48.

<sup>169</sup> Agnes, *Law and Gender Equality: The Politics of Women's Rights in India*, 35.

1882.<sup>170</sup> Contestations within British law on the status of women and their representations of multiple understandings of European modernity reflect much the same upheaval and, indeed, are likely to have interacted greatly with understandings of modernity and their representations in the law among Muslims of the British Raj. This is evident, for example, in the aforementioned 1947 case of inheritance administered by Chief Justice Erskine Perry. The personal status legal systems that emerged towards the end of British rule for Muslims, Hindus, and Christians alike would have been a complex mix of influences and procedures drawn from both rulers and their former subjects.

## **b. Muslim Reformists in British India**

Much of the literature focused on the legal aspects of colonial rule tends to ignore social transformations among and within Muslim communities themselves. While Muslim reformist movements pre-date British rule, it is worth noting the nature of those that emerged during the course of the British Raj and how they may have influenced religious practices and contributed to interpretations of the law. These movements were precursors to groups and political parties participating in politics in Bangladesh today and their development, particularly of Jamaat-e-Islami and the Deobandis, will be pertinent to subsequent chapters, especially in the context of the National Women Development Policy in Chapter V.

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<sup>170</sup> Ibid., 53-54.

Reformers intended “to review the knowledge handed down from the past to see what should be used to enable them to operate effectively in the present.”<sup>171</sup> Increasingly, ulema such as those associated with the Ahle-Hadith movement turned away from using the precedents of medieval Persian scholarship represented by taqlid and towards the reasoning of ijtiḥad.<sup>172</sup> Islamists headed by Abul Ala Maududi (1903-1979) and the Islamic modernists of Sir Syed Ahmed Khan (1817-1898) followed suit,<sup>173</sup> exercising ijtiḥad with varied conclusions.

On the other hand, Deobandis, a group formed soon after the Indian Uprising of 1857 and inspired by the teachings of Indian Islamic scholar Shah Waliullah Dehlawi (1703–1762), continued to practice taqlid.<sup>174</sup>

“The first Deobandi seminary was set up in 1866 in the North Indian town of Deoband by conservative Sunni clerics who had survived the wave of executions, exile and imprisonment imposed by the victorious British authorities in retaliation for the proclamation of *jihad* during the War of 1857. Deoband’s primary mission was to preserve a brand of orthodox Sunni Islamic revivalism that had begun to grow in influence in the declining Mughal Empire. Although it sought to ‘purify’ Islamic practice and thought it freely borrowed from (then) modern institutional innovations of Western education.”<sup>175</sup>

Maududi’s Islamist movement differed from the Deobandis in that he spoke of a more dramatic break with the past, idealising the years during which the Prophet lived but generally seeing the remainder as providing less reliable guidance. Meanwhile, Syed Ahmad

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<sup>171</sup> Francis Robinson, "Islamic Reform and Modernities in South Asia," (2008): 261-62.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid., 262.

<sup>174</sup> Ibid.

<sup>175</sup> Johann C. Chacko, "Pakistani Deobandis and the Afghan Taliban: The Drivers of Solidarity," ESRC Knowledge Exchange Collaborative Project (London: Foreign & Commonwealth Office, 2013), 3.

Khan differed even more dramatically, moving away from both of the latter reformist traditions.<sup>176</sup> He “devoted himself in the decades following [the Uprising of 1857] to fostering intellectual and political reconciliation between the Muslim service elite and the colonial power. In 1875, he established the Muhammadan Anglo-Oriental College at Aligarh (now Aligarh Muslim University), an English-style institution that cultivated gentleman Muslims.”<sup>177</sup> Importantly, he rejected the maddahib and the authority of the ulema “in favor of the belief that any educated Muslim could turn to the sacred texts, to the Qur’an above all and in some cases to the hadith, in order to interpret Islamic principles appropriately for the current day.”<sup>178</sup> Both Islamists and modernists chose to interpret the Quran and the Hadith anew and Francis Robinson suggests that in doing so “they cast aside a thousand years of intellectual effort in fashioning a Muslim society, and the authority that came with direct connection to that effort.”<sup>179</sup> With the end of the Turkish Khilafat during 1919-1923, furthermore, came the “breaking symbolically of the continuous chain of leadership of the Muslim community back to the Prophet,” a break that would have had a deep psychological impact on Muslim communities across the world.<sup>180</sup>

What did such scholars and movements say of the role and responsibilities of women? Deobandi scholar Ashraf ‘Ali Thanawi’s (1863-1943) *Bibishti Zewar* or *Heavenly Ornaments*, written at the start of the 20<sup>th</sup> century, is one of the key reformist texts in explaining the role of women in Muslim societies. As with other reformist movements during this period, its primary concern is with the individual and their relationship to

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<sup>176</sup> Robinson, "Islamic Reform and Modernities in South Asia," 264.

<sup>177</sup> Barbara D. Metcalf, ed. *Islam in South Asia in Practice* (Princeton, NJ; Woodstock: Princeton University Press, 2009), 22.

<sup>178</sup> Ibid., 23.

<sup>179</sup> Robinson, "Islamic Reform and Modernities in South Asia," 267.

<sup>180</sup> Ibid., 268.

society.<sup>181</sup> Thanawi moves away from the view that women were to have little knowledge of Islamic teachings, and that men were exclusively responsible for the guardianship of Islamic tradition.

“For women to act as they should, this work argues, they must be instructed. Basic to this confidence in the power of instruction is an implicit conviction that women are essentially the same as men, neither endowed with a special nature for spiritual or moral virtue nor handicapped in any way by limitations of intellect or character. This book is interesting not only for what it does but also for what it does not do, for it makes no effort to elaborate physiological or intellectual differences between women and men.”<sup>182</sup>

As public spaces for the performance of collective religious identity began to shift throughout the era of colonial rule,<sup>183</sup> the home began to be increasingly identified as a “locus of cultural tradition, the rock against an encroaching alien world,” a development that Barbara Metcalf argues was specific to the colonial and post-colonial era.<sup>184</sup> With this came Thanawi’s conviction that women were equal partners in the performance of religion, even despite the performance itself being one of subordination to men in the home. He believed that men and women were equally capable of learning how to be ideal Muslims and guardians of tradition, a perspective that at that time did not align with either Maududi’s Islamists or Syed Khan’s modernists.<sup>185 186</sup>

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<sup>181</sup> Ashraf 'Ali Thanawi and Barbara D. Metcalf, *Perfecting Women: Maulana Ashraf 'Ali Thanawi's Bibishti Zewar: A Partial Translation with Commentary* (Delhi: Oxford University Press, 2002), 4-5.

<sup>182</sup> *Ibid.*, 1-2.

<sup>183</sup> Faisal F. Devji, "Gender and the Politics of Space: The Movement for Women's Reform in Muslim India, 1857–1900," *South Asia: Journal of South Asian Studies* 14, no. 1 (1991).

<sup>184</sup> Thanawi and Metcalf, *Perfecting Women: Maulana Ashraf 'Ali Thanawi's Bibishti Zewar: A Partial Translation with Commentary*, 8.

<sup>185</sup> *Ibid.*, 11-13.

<sup>186</sup> Interestingly, Mahatma Gandhi’s speeches reflect a similar point of view, and Debali Mookerjee-Leonard quotes him as having said the following at a 1918 meeting of Bhagini Samaj, a women’s organisation, in Bombay: “Woman is the companion of man, gifted with equal mental capacities,”

Syed Khan saw “women as both helpless and spiritual,” while Maududi similarly saw women as “passive and submissive but endowed with a special spiritual capacity.”<sup>187</sup> In contrast to Thanawi, Maududi believed that men were naturally superior to women in Islam; although he believed that women’s education was as important as that of men, like Thanawi, his version of women’s education was to prepare them for their duty in the home, and remaining exclusively within that home.<sup>188</sup> Syed Ahmed Khan, similarly, believed that women should be taught exclusively in and about the home.<sup>189</sup> Maududi’s published works suggest a preoccupation with “abuses of women in the west. His works, like the works of others in his movement, drew not on western legal or religious texts, but newspaper accounts, investigations of abuses, conservative etiological critiques, and medical accounts written by Europeans themselves.”<sup>190</sup> He particularly took issue with the concept of equality between the sexes, women’s economic independence, and “the free intermingling of the sexes.”<sup>191</sup> These were the starting points for what would later evolve into groups such as the modern-day Jamaat-e-Islami and Deobandi Hefazat-e-Islam in Bangladesh.

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and “[S]he has an equal right to freedom and liberty with him. She is entitled to a supreme place in her own sphere of activity as man is in his. This ought to be the natural condition of things. ... Man and woman are of equal rank, but they are not identical. ... Man is supreme in the outward activities of the married pair and, therefore, it is in the fitness of things that he should have a greater knowledge thereof. On the other hand, home life is entirely the sphere of women and, therefore, in domestic affairs, in the upbringing and education of children women ought to have more knowledge” (Debali Mookerjee-Leonard, "To Be Pure or Not to Be: Gandhi, Women, and the Partition of India," *Feminist Review*, no. 94 (2010): 39.).

<sup>187</sup> Thanawi and Metcalf, *Perfecting Women: Maulana Asbraf 'Ali Thanawi's Bibishti Zewar: A Partial Translation with Commentary*, 11-13.

<sup>188</sup> Barbara D. Metcalf, "Reading and Writing About Muslim Women in British India," in *Forging Identities: Gender, Communities, and the State* ed. Zoya Hasan (New Delhi: Kali for Women, 1994), 16.

<sup>189</sup> Tahera Aftab, "Negotiating with Patriarchy: South Asian Muslim Women and the Appeal to Sir Syed Ahmed Khan," *Women's History Review* 14, no. 1 (2005).

<sup>190</sup> Metcalf, "Reading and Writing About Muslim Women in British India," 15.

<sup>191</sup> *Ibid.*

### c. Landmark Legislation for Muslims

Changes were not only afoot among perceptions of Muslim women but also among women themselves, particularly notably in Bengal. As the 20<sup>th</sup> century approached, prominent Muslim scholars in South Asia, influenced no doubt by reformist movements in Turkey and the wider Middle East, came to recognise female education for Muslim women as a positive, ‘civilising’ contribution to society, although initially restricted to only Islamic education. In Bengal, a number of women spearheaded education for women beyond Islamic studies, particularly among the middle class, through their publications in the vernacular Bengali and teaching of girls in both English and Bengali. This would have been a significant move in light of the emphasis on Urdu, Persian, and Arabic as the primary mode of communication for upper and middle class Muslim women, educated largely in Islamic studies if they were educated at all.

Begum Rokeya Sakhawat Hossain (1880-1932) is perhaps the most famous of such women. She was also author of the feminist Bengali science fiction work *Sultana's Dream*, which imagined a world where ‘purdah,’ the tradition where South Asian women remain secluded from male contact outside of their immediate families, was reversed so that men were secluded and women ran the world, aided by technology. She first published this work, among the earliest examples of feminist science fiction in the literary world, as far back as 1905. She never came out of purdah herself, and “remains the prototype of a devout Muslim who sees clearly the dangers of obscurantism.”<sup>192</sup> Trailblazing as such individuals were, however, even educated women were expected to represent, first and foremost, the

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<sup>192</sup> Sobhan, "National Identity, Fundamentalism and the Women's Movement in Bangladesh," 68.

traditionally feminine features of virtue and spirituality,<sup>193</sup> particularly those that were seen to set Indian modernity apart from its European counterpart.

Nevertheless, political participation among women in British India increased with time. In the years leading up to independence from British rule, Muhammad Ali Jinnah (1876-1948), then leader of the All-India Muslim League and future Governor-General of Pakistan, set up a female branch of the League, known as Anjuman-e-Khawatin-e-Islam or the All-India Muslim Ladies' Conference.<sup>194</sup> The League passed a resolution in 1932 in favour of women's suffrage and equality.<sup>195</sup> With the Government of India Act of 1935, women were given "6 out of a total of 150 seats in the council of state and 9 out of 250 seats in the federal assembly," representing the first time that women were able to participate in British India's provincial and federal assemblies.<sup>196</sup> Furthermore, the League's "resounding success in the crucial 1945-46 elections owed much to enthusiastic campaigning by its women's wing and to those thousands of burqa-clad Muslim women who stepped out of the four walls for the first time in their lives to cast votes in the urban constituencies."<sup>197</sup>

Two major reforms were implemented among Muslim personal laws during these final decades of British rule: the Shariat Validation Act of 1937 and the Dissolution of Muslim Marriages Act of 1939. The first made the inheritance claims of women uniform across Muslim communities, while the second enhanced the right of women to initiate

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<sup>193</sup> Partha Chatterjee, "The Nationalist Resolution of the Women's Question," in *Recasting Women: Essays in Indian Colonial History*, ed. Kumkum Sangari and Sudesh Vaid (New Brunswick: Rutgers University Press, 1990), 244-5, 49.

<sup>194</sup> Ayesha Jalal, "The Convenience of Subsistence: Women and the State of Pakistan," in *Women, Islam and the State*, ed. Deniz Kandiyoti (Basingstoke: Macmillan, 1991), 83.

<sup>195</sup> Ibid.

<sup>196</sup> Ibid.

<sup>197</sup> Ibid., 84.

divorce. The push for these reforms came largely from the All-India Muslim League, who sought to represent the Muslim community throughout British India.

The first factor driving the passing of the Shariat Validation Act was that customary succession often excluded women from inheritance altogether,<sup>198</sup> whereas shari'a-guided laws required that women inherit at least a portion of their family estate, even if less than their male counterparts. The second was that Jinnah, and presumably his supporters within the Muslim League, saw the introduction of the Act as a symbolic unification of Muslims across British India. Justification for the act was framed in terms of interpreting Hanafi fiqh, thus "responding to colonial jurists' preoccupation with textual sources and the primacy of scriptural authority over custom."<sup>199</sup>

Many Muslim communities were following local customs of property inheritance more akin to Hindu laws at that time, including the aforementioned Kutchi Memons, Muslims in Punjab, and Muslims in the North-West Frontier Province or NWFP (known as Khyber Pakhtunkhwa since 2010). In an effort to impose a uniform Muslim personal law across such communities, as well as on the matrilineal Mopillas, a Mopilla Succession Act was passed in 1918, and a Kutchi Memons Act followed in 1920.<sup>200</sup> Although similar bills were introduced in the Punjab and NWFP legislatures, the Punjab bill was defeated, while the NWFP took until 1936 to pass their own, just a year before the Shariat Validation Act imposed Muslim personal status law across British India.<sup>201</sup>

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<sup>198</sup> Agnes, *Law and Gender Equality: The Politics of Women's Rights in India*, 69-70; Jalal, "The Convenience of Subservience: Women and the State of Pakistan," 86-87.

<sup>199</sup> Newbigin, "Personal Law and Citizenship in India's Transition to Independence," 31-32.

<sup>200</sup> Williams, *Postcolonial Politics and Personal Laws: Colonial Legal Legacies and the Indian State*, 83-84.

<sup>201</sup> Ibid.

The Shariat Validation Act, however, held an exception for agricultural land, the result of a concession made to the Punjabi legislature, among others. Over 90 percent of property in British India was thus “automatically excluded from its domain.”<sup>202</sup> The case of Punjab exemplifies some of the conflicts internal to the Muslim community prior to reaching the critical juncture of the Shariat Validation Act, a subject that Matthew Nelson’s *In the Shadow of Shari’ah* discusses in detail.

Punjab had long represented a case where local politics drove British administrators to allow customary practices to exclude women from succession. Punjab was annexed by the British in 1849, and then Governor-General Dalhousie (1812-1860) of India stated that “native institutions and practices” would be allowed to continue there.<sup>203</sup> Simply put, this meant that units of taxation were considered to be represented by a village community or tribe rather than by individual landowners or ‘zamindars’ as in the Bengal, Madras, and Bombay Presidencies.<sup>204</sup> This system had a lasting effect in that, within the large landholdings common to Punjab, emphasis was maintained on keeping land within families and communities rather than splitting up such holdings by allowing women to inherit. As Nelson points out:

“In fact by 1895 a prominent group of colonial administrators had submitted a brief-but-urgent memorandum to endorse the possibility of sweeping restrictions on the power to alienate specific interests in land for the sake of existing landowners and the survival of the colonial state. ‘We are not concerned with the individual’, they wrote. ‘Our sole object is to save the land of the family.’”<sup>205</sup>

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<sup>202</sup> Ibid., 86-87.

<sup>203</sup> Nelson, *In the Shadow of Shari’ah: Islam, Islamic Law and Democracy in Pakistan*, 58.

<sup>204</sup> Ibid.

<sup>205</sup> Ibid.

This concern with family land was solidified in the Punjab Alienation of Land Act of 1900, and the early 1900s saw a distinction between the desires of the majority of Punjabis, rural and supporting of the Punjabi Unionist Party, versus those of urban Punjabis, represented largely by the All-India Muslim League. It was the League that was supportive of women's inheritance rights as prescribed by fiqh, while the Unionist Party unequivocally opposed such rights. Ultimately, however, Jinnah retreated on the issue of Muslim communities exclusively applying shari'a-guided law. The Shariat Act was passed in a highly diluted form relative to its original proposal, and large landholders such as those in Punjab were placated by the exception to Islamic inheritance rights in the case of agricultural land. The purpose of symbolic Muslim unity was achieved but since, as member of legislative assembly Mohammad Ahmed Kazmi put it, almost 99.5 percent of land was agricultural, women did not experience any significant changes and "provincial norms prevailed."<sup>206</sup> In the end, the Shariat Act "simply listed the areas of law to which Indian Muslims were to be subject, giving Muslim jurists considerable power and autonomy to interpret what this in fact entailed."<sup>207</sup>

The Dissolution of Muslim Marriages Act in 1939 made changes to women's rights in divorce. While the Dissolution Act continued to give men the right to unilateral divorce without cause, it also allowed Muslim women in India to initiate divorce for the first time. This would have mimicked a number of changes happening in other corners of the Muslim

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<sup>206</sup> Ibid., 56; 64-65; 96; 103.

<sup>207</sup> Newbigin, "Personal Law and Citizenship in India's Transition to Independence," 29-30.

world at that time. In terms of changes to family laws, the Act of 1939 is thus seen as “the most important piece of legislation promulgated in the subcontinent during British rule.”<sup>208</sup>

Women, however, were still required to show evidence of certain faults to obtain a divorce such as cruelty, grounds for which “were expansive and included inequitable treatment by husbands who had taken on additional wives,” lack of financial maintenance, apostasy, and false accusations of adultery by one’s husband.<sup>209</sup> Interestingly, the Act provided for an immediate dissolution of marriage upon apostasy of a husband from Islam but not in the case where a wife became an apostate from Islam.<sup>210</sup> This is likely because Islam is traditionally seen to be automatically carried on by men rather than women. Initiation of divorce by a wife on any other grounds than those cited in the Act would require that she forego her mehr.<sup>211</sup> Using the mechanism of takhayyur, the Dissolution Act adapted Maliki laws on divorce to existing laws guided by Hanafi fiqh.<sup>212</sup> This landmark Act responded not only to a need for greater protection of women’s rights, but also to prevent conversion of women out of Islam in order to initiate divorces,<sup>213</sup> and provided a further symbol of unity amongst Muslim Indians in the political climate leading up to the Partition of India.

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<sup>208</sup> Shahnaz Huda, "Personal Laws in Bangladesh: The Need for Substantive Reforms" *The Dhaka University Studies, Part F* 15, no. 1 (2004): 110-11.

<sup>209</sup> Htun and Weldon, "Sex Equality in Family Law: Historical Legacies, Feminist Activism, and Religious Power in 70 Countries," 13.

<sup>210</sup> Sultana Kamal, "Law for Muslim Women in Bangladesh," *United Nations Statistics Division: Civil Registration and Vital Statistics Knowledge Center*,

<http://unstats.un.org/unsd/vitalstatkb/Attachment390.aspx>; Taslima Monsoor, "Dissolution of Marriages on Test: a Study of Islamic Family Law and Women," *The Dhaka University Studies, Part F* 15, no. 1 (2004): 11.

<sup>211</sup> Monsoor, "Dissolution of Marriages on Test: a Study of Islamic Family Law and Women," 13.

<sup>212</sup> Agnes, *Law and Gender Equality: The Politics of Women's Rights in India*, 37.

<sup>213</sup> Bhuiyan, "Gender and Tradition in Marriage & Divorce: An Analysis of Personal Laws of Muslim and Hindu Women in Bangladesh," 56-57.

Williams points out that “A reliance on Muslim Personal Law for community identity and the definition of the Muslim community itself as resistant to change or reform were part and parcel of the legacy of colonial legal policy that persists up to the present day.”<sup>214</sup> However, such perceptions of resistance to change were not specific to British India, and it is difficult to assess the potential significance of family laws as markers of identity, or lack thereof, outside of the actual historical context in which they developed. I would argue that the extent to which the legacy of colonialism can be held responsible for the drawing of such boundaries or attitudes towards reform within a Muslim community is open to a more comparative discussion of the wider Muslim world during and prior to this period. That family laws were crucial to marking community identity in British India nevertheless provides further support for Mounira Charrad’s analysis demonstrating the close relationship between nation-building and the establishment of personal status codes in Tunisia, Algeria, and Morocco in *States and Women’s Rights*.

### 3. Landmark Legislation in Pakistan

The most significant change in family laws for Muslims in Bangladesh since 1947 remains a feature of the Pakistan era: the Muslim Family Laws Ordinance or MFLO of 1961, which resulted from a growing feminist movement with regard to personal status laws. Inspired in part by the United Nations Declaration of Human Rights after World War II,<sup>215</sup> the All Pakistan Muslim Women’s Association or APWA pushed for reforms towards

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<sup>214</sup> Williams, *Postcolonial Politics and Personal Laws: Colonial Legal Legacies and the Indian State*, 88.

<sup>215</sup> Bhuiyan, "Gender and Tradition in Marriage & Divorce: An Analysis of Personal Laws of Muslim and Hindu Women in Bangladesh," 62.

greater equality between men and women in family laws, with a movement that gained particular traction in 1955 when the Prime Minister of Pakistan at that time, Muhammad Ali Bogra (1909-1963), formerly Foreign Minister of Pakistan and grandson of a former Nawab of Bengal, entered a polygamous second marriage. That a government official of his stature had entered into such a marriage sparked off widespread protests, as well as many critiques of his second wife in the media, particularly by members of the APWA. The Prime Minister responded by forming a Commission on Marriage and Family Laws to assess potential changes to family laws.

The Commission consisted of seven members, including three women and a member of the ulema and formally “reopened the door of ijihad” citing the teachings of Sir Muhammad Iqbal (1877-1938), a renowned Pakistani philosopher, poet, and politician who was widely regarded to have inspired the movement leading up to an independent Pakistan.<sup>216</sup> They “adopted the procedure that anything that is not categorically prohibited by a clear injunction of the Quran or Sunnah is permissible if the welfare of the society or the individual demands it,”<sup>217</sup> arguing that the Quran had intended for the interpretation of its principles to be carried out in a context-specific manner.<sup>218</sup>

The Commission’s report was published in June of 1956, followed by a “long-winded note of dissent”<sup>219</sup> in August by the one member of the ulema on the Commission. The Commission suggested ways to expand woman’s rights in divorce proceedings, restrictions on polygamy, tighter restrictions against child marriage, compulsory registration

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<sup>216</sup> Serajuddin, *Shari’a Law and Society: Tradition and Change in South Asia*, 35-36.

<sup>217</sup> Bhuiyan, "Gender and Tradition in Marriage & Divorce: An Analysis of Personal Laws of Muslim and Hindu Women in Bangladesh," 64.

<sup>218</sup> Serajuddin, *Shari’a Law and Society: Tradition and Change in South Asia*, 38.

<sup>219</sup> Jalal, "The Convenience of Subsistence: Women and the State of Pakistan," 93-95.

of marriage, and adjustments to the inheritance rights of orphaned grandchildren, that is, the right of children whose parents had passed away to inherit from their grandparents. “The report was immediately attacked by the ulema,” and the government refrained from acting on the report until Ayub Khan came to power under military rule in 1958.<sup>220</sup>

Much of the criticism of the Commission’s report came from the aforementioned Maulana Maududi, founding head of the Islamist party Jamaat-e-Islami, precursor to the Jamaat-e-Islami in Bangladesh. He opposed the Commission’s recommendations for compulsory registration of marriage and a minimum age for marriage, claiming that these were not required by the Quran or Sunnah and were therefore against Islamic principles.<sup>221</sup> He also argued that restrictions on polygamy would compel men to stray from their marriages.<sup>222</sup> Interestingly, he even opposed the Commission on beliefs that he held himself. For example, he had spoken against men’s rights to a unilateral divorce in the past and yet opposed the Commission’s recommendation to restrict arbitrary divorce, arguing that such decisions lay only in the jurisdiction of the ulema rather than laymen.<sup>223</sup>

Led by Maulana Maududi and Deobandi Maulana Muhammad Shafi (1897-1976), ulema across both wings of Pakistan came together to express their opposition to the Commission’s recommendations through a memorandum submitted to Ayub Khan. Women’s activists in both East and West Pakistan also reacted by coming together in public support of the Commission and approached Ayub Khan with a memorandum of their own, urging him to act on the Commission’s recommendations. Ayub Khan was “highly

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<sup>220</sup> Bhuiyan, "Gender and Tradition in Marriage & Divorce: An Analysis of Personal Laws of Muslim and Hindu Women in Bangladesh," 64-65.

<sup>221</sup> Serajuddin, *Shari'a Law and Society: Tradition and Change in South Asia*, 52-54.

<sup>222</sup> Shehabuddin, *Reshaping the Holy: Democracy, Development, and Muslim Women in Bangladesh*, 60.

<sup>223</sup> Serajuddin, *Shari'a Law and Society: Tradition and Change in South Asia*, 52-54.

contemptuous of the ulema<sup>224</sup> and, ignoring their resistance to almost everything that the Commission had recommended, passed the Muslim Family Laws Ordinance in 1961, five years after the Commission's report had been published.

The 1961 Ordinance is perceived to be a "high point in the [Pakistani] state's relationship with women."<sup>225</sup> Lucy Carroll deems it "revolutionary," particularly in that Section 4 on the aforementioned rights of orphaned grandchildren redefined a portion of succession rights, overturning a long-standing feature of succession rights across all four maddahib.<sup>226</sup> Ulema were vocal in their critique of this reform, pointing out that the children of daughters were to be considered distant kindred according to religious law and yet they were able to inherit according to the Ordinance on an equal footing with sons and daughters of the deceased.<sup>227</sup> They argued that orphaned grandchildren were traditionally cared for by their uncles and aunts anyway, so what need was there to provide additional financial support? Those who supported the changes introduced by the MFLO, however, argued in turn that that conception of family structure was increasingly out of date, and orphaned grandchildren could not simply depend on the voluntary kindness of their extended families. Even worse for the ulema was that the MFLO allowed a scenario where a granddaughter whose father had passed away could inherit more from her father's father than a daughter of that grandfather. Granddaughters, they suggested, were far too distant relatives to be inheriting so much of an estate.

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<sup>224</sup> Ibid., 61.

<sup>225</sup> Jalal, "The Convenience of Subsistence: Women and the State of Pakistan," 93-95.

<sup>226</sup> Lucy Carroll, "Orphaned Grandchildren in Islamic Law of Succession: Reform and Islamization in Pakistan," *Islamic Law and Society* 5, no. 3 (1998): 415-16.

<sup>227</sup> Serajuddin, *Shari'a Law and Society: Tradition and Change in South Asia*, 88; Syed Tahir Mahmood, *Family Law Reform in the Muslim World* (Bombay: N. M. Tripathi, 1972), 252.

I would nevertheless argue that from the perspective of the wider Muslim world the Ordinance was not an especially radical move. New codes had already been enacted in Tunisia, Morocco, Syria, Iraq, among others, during the 1950s, with Tunisia going as far as to ban polygamy altogether. There were, furthermore, a number of attempts to repeal the Ordinance in the years that followed, from both the National and West Pakistan Assemblies, and it became a significant point of opposition to Ayub Khan's rule as a whole. The Jamaat-e-Islami's East Pakistan branch was especially aggressive in its opposition.<sup>228</sup> In 1961, 137 ulema from East Pakistan and 72 ulema from West Pakistan issued a statement saying that the Ordinance was "repugnant to the express injunctions of the Qur'an and the Sunnah."<sup>229</sup> In July 1963, furthermore, the West Pakistan Provincial Assembly attempted to have the Ordinance repealed, but Ayub Khan, the Minister of Law, the APWA and associated women's groups, and members of the press came together to defeat the bill for repeal on 26 November 1963, "after a marathon debate of twenty two hours."<sup>230</sup>

Serajuddin argues that the role of judiciary was crucial in implementing the MFLO, with Supreme Court judgments that both reflected the constitutional protection clause for the Ordinance as well as its substance in the years that followed.<sup>231</sup> Although the Pakistan Constitution allows laws to be reviewed on the basis of fundamental rights, including freedom of religion, the 1962, 1972 (interim), 1973 and 1985 Constitutions of Pakistan also included a clause precluding the Federal Shariat Court, a court that is otherwise responsible for ensuring that the country's laws are in keeping with Islamic principles, from challenging

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<sup>228</sup> Shehabuddin, *Reshaping the Holy: Democracy, Development, and Muslim Women in Bangladesh*, 60.

<sup>229</sup> Serajuddin, *Shari'a Law and Society: Tradition and Change in South Asia*, 68.

<sup>230</sup> Shehabuddin, *Reshaping the Holy: Democracy, Development, and Muslim Women in Bangladesh*, 60; Serajuddin, *Shari'a Law and Society: Tradition and Change in South Asia*, 70-71.

<sup>231</sup> Serajuddin, *Shari'a Law and Society: Tradition and Change in South Asia*, 336-37.

the MFLO.<sup>232</sup> Judicial activism in favour of the Ordinance was especially important for the continuation of Ordinance in its early years of 1961-1967, “when the issue of family law reform was highly politicised and became a Presidential election issue.”<sup>233</sup>

In 1964, Ayub Khan banned the Jamaat-e-Islami.<sup>234</sup> By 1965, the Jamaat-e-Islami went as far as supporting Fatima Jinnah (1893-1967), sister of Muhammad Ali Jinnah, against Ayub Khan during the presidential elections held that year, despite their previous position against women being heads of state.<sup>235</sup> When Ayub Khan eventually lost power in 1969, the MFLO was an important issue contributing to his loss of support.<sup>236</sup> Members of the National and Provincial Assemblies continued to raise the possibility of repealing the Ordinance as late as 1965<sup>237</sup> and in Pakistan, controversy has continued as to its validity, particularly in the context of Section 4. There has been considerably less controversy in Bangladesh in this regard, as no serious attempts have been made to repeal the Ordinance since independence. If anything, I find that women’s rights activists in Bangladesh have continued to employ the MFLO as rhetorical proof that change to supposedly immutable rules and regulations can and has been implemented, and will come about again.

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<sup>232</sup> Ibid., 70-71. In 1963, the Fundamental Rights Bill, the first amendment to the Constitution, specified that the Muslim Family Laws Ordinance was not open to judicial review (An-Na'im, ed. *Islamic Family Law in a Changing World: A Global Resource Book*, 205.).

<sup>233</sup> Serajuddin, *Shari'a Law and Society: Tradition and Change in South Asia*, 336-37.

<sup>234</sup> An-Na'im, ed. *Islamic Family Law in a Changing World: A Global Resource Book*, 205.

<sup>235</sup> Serajuddin, *Shari'a Law and Society: Tradition and Change in South Asia*, 70-71.

<sup>236</sup> Ibid; Elora Shehabuddin, *Reshaping the Holy : Democracy, Development, and Muslim Women in Bangladesh* (New York ; Chichester: Columbia University Press, 2008), 60.

<sup>237</sup> Serajuddin, *Shari'a Law and Society: Tradition and Change in South Asia*, 70-71.

## 4. Conclusion: A New Setting for East Pakistani Muslims

This chapter provides an introduction to the basic terminology and history of recent developments in Muslim personal status laws in Bangladesh that will be analysed in subsequent chapters. It is important to note the multiple understandings and variations of fiqh, theoretical and applied, which have existed and continue to exist across the Muslim majority world in intertemporal analyses of family law. Although colonial rule can be said to have imposed rigidity to this area of the law in South Asia, it is also true that there continued to be an active element of reinterpretation of Islamic practices within the larger Muslim community. As Robinson points out, reform movements focusing on modern life had also emerged across Hindus, Sikhs, and Buddhists, as well as in the Muslim world outside of South Asia<sup>238</sup> - and indeed, as discussed in Section 2 of this chapter, among their British rulers as well. Conceptions of modernity vary across communities and across time, and “Thus, Islamism, which is the current end point of Islamic reform, is not only a profoundly modern phenomenon but also offers an answer to widely shared modern anxieties. ... It is clear that there is no one modernity, as once Western modernisation theorists vainly believed, but many or multiple modernities. Different societies fashion their modernities as arguably do different individuals.”<sup>239</sup> Today, this is reflected in the multiple meanings of words such as ‘reform’ and ‘secularism’ and indeed what religiosity even constitutes in the context of Bangladeshi politics.

To this day, the most notable development in the post-Raj period in family laws for Muslims in what is now Bangladesh occurred during the Pakistan era with the MFLO 1961.

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<sup>238</sup> Robinson, "Islamic Reform and Modernities in South Asia," 278.

<sup>239</sup> Ibid., 281.

Despite a great deal of opposition, this Ordinance not only passed but has been sustained since its passing. And, while Pakistan has seen continuing conflict over the legality and substance of the Ordinance, Bangladesh has seen little controversy over the MFLO since its independence. How have Bangladesh and Pakistan diverged so greatly in this area, despite its shared history?

Anthony Smith points out that, “The idea of a Pakistani state would have had no collective force of meaning, unless the mass of Muslims in northern India had already acquired a vivid sense of common ethnicity based on their shared religion, one which differentiated them from other Indians.”<sup>240</sup> But East Pakistan was not in northern India, and a distinct Bengali Muslim political identity had been developing since long before the creation of Pakistan. A number of prominent Bengali Muslim politicians had supported an autonomous, united Bengal prior to independence from British rule, convinced finally by Jinnah that the needs of the majority of Bengali Muslims - or, from a more cynical point of view, their own capacity to exert power and influence - would be best served by a split, with the eastern portion of Bengal becoming East Pakistan in 1947.

A violent break-away into independent Bangladesh by 1971 lay ahead. The central government in West Pakistan attempted to use the unifying factor of Islam to cultivate a sense of nationhood among the two non-contiguous wings of Pakistan. ‘At a mass rally held in [what was then] Dacca on March 21, 1948, Jinnah stated: “Islam has taught this, and I think you will agree with me, that whatever else you may be and whatever you are, you are a Muslim. You belong to a Nation now; you have carved out a territory, vast territory, it is all

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<sup>240</sup> Anthony D. Smith, *Nationalism and Modernism: A Critical Survey of Recent Theories of Nations and Nationalism* (London: Routledge, 1998), 130.

yours; it does not belong to a Punjabi or Sindhi, or a Pathan, or a Bengali; it is yours.”<sup>241</sup> The government combined this emphasis on Muslim identity with an approach of cultural assimilation in the years preceding the 1971 war, attempting to promote Urdu – the language associated previously with Muslim aristocracy and of the Muslims of British India more broadly - as the one and only state language of Pakistan. This led to violent protests in 1952, known as the Bengali Language Movement or Ekushey February, literally translating to 21<sup>st</sup> of February, the date of the protests. That day, the police opened fire and killed unarmed student protestors agitating against the proposal. In response, the government gave Bengali equal status with Urdu in the Pakistani Constitution of 1956,<sup>242</sup> although Bengali literature and art continued to be restricted and discouraged in terms of dissemination and obtaining government grants.

Women became significant symbols of Bengali resistance during the years leading up to the Bangladesh Liberation War of 1971, particularly in their dress. Bengali women would wear ‘bindis’ or ‘teeps’ on their forehead, red dots that were traditional usually worn by Hindu women. They would also wear red and yellow saris and sing songs by Rabindranath Tagore (1861-1941), a world-famous and, perhaps more importantly at that time, Hindu Bengali writer, poet, and composer.<sup>243</sup> Bengali nationalism was framed very much in secular terms, and demonstration after demonstration focused on that characteristic of the movement, emphasising that Islam was not a sufficient unifying factor for East and West Pakistan to remain as one. What followed during the course of the nine-month Liberation

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<sup>241</sup> Martin Lau, "Islam and the Constitutional Foundations of Pakistan," ed. Rainer Grote and Tilmann J. Röder, *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (Oxford ; New York: Oxford University Press, 2012). 176.

<sup>242</sup> Naila Kabeer, "The Quest for National Identity: Women, Islam and the State in Bangladesh," in *Women, Islam and the State*, ed. Deniz Kandiyoti (Basingstoke: Macmillan, 1991), 121.

<sup>243</sup> *Ibid.*, 120.

War drove this point further home. The systematic rape and genocide of the Bengali population by the Pakistani military, particularly of Hindu Bengalis, that characterised this brief but bloody war – with the aim of ‘purifying’ that population – dispelled much of the remaining sentiment supporters of the Bangladesh independence movement might have had for a national identity based on religion. The first Constitution of independent Bangladesh emphasised secularism, as did those who took charge of the new and fragile country in much of their public speeches and dialogue.

As subsequent chapters here show, secular Bengali nationalism struggled to sustain itself constitutionally during the years that followed, and confusion regarding both the role and interpretation of Islamic jurisprudence of family laws persists to this day, as in many other modern-day Muslim majority countries. The patterns that emerge from past reforms across the Muslim world are the same that emerge for Bangladesh in particular. The first is that significant changes to family laws are almost always implemented during times of deeply centralised power, when authoritarian governments can push through changes without having to bargain extensively with multiple actors. The second, and one that will become increasingly clear in Chapter IV, is that significant changes are far more likely in areas of family law focused around child marriage, child custody, and rights to initiate divorce proceedings rather than inheritance or post-divorce maintenance, that is, any family laws associated with the redistribution of wealth and financial empowerment of women.

## CHAPTER III

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# The Bangladeshi Constitution: Secularism, Islam, and Sexual Equality

The creation of a Constitution was among the first significant legal developments that Bangladesh saw upon independence. In analysing patterns of change in family laws, associated as they are with religious practices, I start by assessing the role of religion in this document representing the country's ultimate legal authority. Democracy, nationalism, secularism, and socialism were stated to be the four guiding principles of the state in the original 1972 Constitution, but the word 'secularism' was dropped in 1975 with a Fifth Amendment. In 2010, the Supreme Court of Bangladesh held that this Amendment was null and void, upheld in a Fifteenth Amendment. The Court also cut the phrase 'absolute trust and faith in the Almighty Allah' from the Constitution's Preamble. An Eight Amendment in 1988 declaring Islam to be the state religion, however, was not addressed in this judgment or the Fifteenth Amendment. The Constitution also continues to categorically confirm that women have "equal rights with men in all spheres of State and public life"<sup>244</sup> but no such confirmation is made for equality in the private sphere, over which family laws govern. Through the lens of these varying and at times seemingly contradictory references to secularism, Islam, and sexual equality, this chapter assesses the influence of the Constitution in personal status laws for Muslims.

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<sup>244</sup> "The Ornamented Constitution of Bangladesh," Prime Minister's Office, <http://lib.pmo.gov.bd/constitution-en/index.html>.

To begin with, however, it is important to recognise contextual variations in the application of secularism. Religion has tended to be treated as antithesis to democratic government and, to some degree, as “a backward looking remnant of the past.”<sup>245</sup> The idea that secularism is a rejection of religion altogether, however, has come under scrutiny in recent years. Joan Wallach Scott points out that rather than being diametrically opposed, laws based on constitutions and religious practices based on sacred texts can be viewed as “parallel systems of interpretation,” and that, “Thinking this way opens the relationship between the state and its religions to negotiation without either forcibly repressing religion or giving up on democracy.”<sup>246</sup> There are very few examples of fully secular countries that reject all religious association from the workings of the state. Alfred Stepan points out that a number of European countries have established churches, and religion-based “Christian Democratic parties have frequently ruled in Germany, Austria, Italy, Belgium, and the Netherlands.”<sup>247</sup> According to him, “Virtually no Western European democracy now has a rigid or hostile separation of church and state. Most have arrived at a democratically negotiated freedom of religion from state interference, and all of them allow religious groups freedom not only to worship privately but to organize groups in civil society and political society.”<sup>248</sup> This chapter takes Stepan’s theory of what he calls the twin tolerations between religion and democratic government for granted in accepting that secularism is not a necessary characteristic of democracy. The robustness of Bangladesh’s democracy is not under analysis here so much as the relevance of its Constitutional references to religion or secularism to family laws.

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<sup>245</sup> Niamh Reilly, "Rethinking the Interplay of Feminism and Secularism in a Neo-Secular Age," *Feminist Review* 97(2011): 15.

<sup>246</sup> Joan Wallach Scott, *The Politics of the Veil* (Princeton: Princeton University Press, 2007), 96.

<sup>247</sup> Stepan, "Religion, Democracy, and The "Twin Tolerations"," 41.

<sup>248</sup> *Ibid.*, 42.

Having accepted that democratic government and religious practices can and have been accommodating each other peacefully (although to varying degrees with tension, or even antagonistically) in many countries, this chapter studies the frequency with which the Constitution is referenced in court cases and movements towards changing family laws guided by shari'a in Bangladesh. Abdullahi An-Na'im argues that "Muslims everywhere are bound to observe Islamic Law as a matter of religious obligation, but that can best be fulfilled when the state is neutral regarding all religions."<sup>249</sup> The Bangladeshi Constitution shifts back and forth in its neutrality regarding all religions, and Chapter III explores these shifts and their impact, if any, on the application of personal status laws for Muslim women in Bangladesh.

## 1. The Constitution and its Amendments

The World Bank's latest gender assessment report on Bangladesh suggests that, "The newly independent state in 1971 had a dream of a new society, for which the state created a Constitution that focused on principles of equality and liberty."<sup>250</sup> However, widely varying understandings of the original document and subsequent amendments have rendered these principles highly challenging to navigate from a judicial perspective. This section describes the ways that the Constitution evolved during the period covered in this study.

After the proclamation of independence and interim Constitution announced on 10 April 1971, the first formal Constitution of independent Bangladesh was adopted on 4

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<sup>249</sup> Abdullahi A. An-Na'im, "The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law," *Modern Law Review* 73, no. 1 (2010): 9.

<sup>250</sup> Das (Lead Author), "Whispers to Voices: Gender and Social Transformation in Bangladesh," 8.

November 1972. The 1972 document contains 1 Preamble, 153 Articles, and 4 Schedules. By 2011 there were 7 Schedules in the Constitution, the three additional ones containing speeches composed or delivered by Sheikh Mujibur Rahman, leader of the Bangladesh independence movement and first Prime Minister of the country as head of the Awami League party. The Constitution provides for a unicameral legislature under Article 65, a parliamentary system in which executive power is to lie in the hands of a cabinet of ministers headed by the Prime Minister.<sup>251</sup> Constitutional amendments require a two-thirds parliamentary majority and do not require the consensus of all parties represented in parliament. When the Appellate Division of the Supreme Court reviewed the Fifth Amendment in 2010, it became clear that, “Of the total of 14 amendments made to the Constitution since 1973, only the eleventh and twelfth amendments were brought with the consensus of both ruling and opposition parties in parliament,” with the Twelfth Amendment having been reviewed by a select parliamentary committee made up of both ruling and opposition party members and subsequently reported to the parliament with recommendations.<sup>252</sup> Both amendments concerned the structure of government, with the Eleventh legitimising interim caretaker governments and the Twelfth bringing back a parliamentary system of government.

The following table lists all of the Constitution’s amendments up to this day, and notes the political party in power at the time of each amendment. To construct this table, I have drawn from amendments noted in the Constitution of 2011 and compared it to previous versions of the Constitution, as well as extracting material from recent newspaper

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<sup>251</sup> "The Ornamented Constitution of Bangladesh."; *The Constitution of the People's Republic of Bangladesh*.

<sup>252</sup> Shakhawat Liton and Kajali Shehreen Islam, "Interview with Suranjit Sengupta - Constitutional Reform: Where Does the Power Lie?," *Forum, magazine of The Daily Star newspaper (online)*, November 2010.

articles. I have combined these amendments with a historical timeline of which party was in power during the passing of each one, bringing together a Constitutional and political timeline to assess whether any significant patterns emerge. The Sixteenth Amendment was passed beyond the time period under analysis in this study, on 7 September 2014. This Amendment restored Article 96 from the original 1972 Constitution allowing Supreme Court judges to be impeached for misconduct or inability by a two-thirds majority in the legislature, although the power to remove a Supreme Court judge pending investigation remains with the President.<sup>253</sup>

To understand the evolving nature of the Constitution and explore its impact on family laws, it is important to take note of its many amendments regarding the role of Islam and of secularism as one of the fundamental principles stated in Article 8 of the Constitution. The Fifth Amendment was particularly significant in this regard as it legitimised the introduction of martial law after 1975 and, with it, a number of key changes enhancing the centrality of religion in the Constitution. With this Amendment, secularism was removed from the Constitution as a fundamental principle,<sup>254</sup> the words “absolute trust and faith in almighty Allah” were included instead, and the words ‘Bismillahir Rahmani Rahim,’ the traditional start of a blessing in Islam, meaning ‘In the name of God, the Beneficent, the Merciful,’ was inserted in its Preamble.

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<sup>253</sup> Anisur Rahman, "16th Amendment of the Constitution: Another View," *The Daily Star*, 23 September 2014; Kamran R. Chowdhury, "Parliament to Sit Sept 1, Bill on Impeaching Supreme Court Judges Likely," *Dhaka Tribune (online)*, 12 August 2014; "Judges' Impeachment: Bill Set to Be Placed," *Dhaka Tribune (online)*, 7 September 2014; Mohosinul Karim, "Sangsad to Get Back Power to Impeach Judges," *Dhaka Tribune (online)*, 17 July 2014.

<sup>254</sup> Krishnadas Gopal, "A 'Secular' Bangladesh: Country's Top Court Lifts 4-Year Stay on Order Banning Religion in Politics," *IndianExpress (online)*, 7 January 2010.

**TABLE 1. Timeline of 15 Constitutional Amendments (Amendments on Islam or status of women highlighted)**

No.	Date	Ruling Party	Description
1	15 July 1972	Awami League	As a response to crimes committed during the course of the Liberation War, this allowed for the trial of those who had committed war crimes, genocide, crimes against humanity, and crimes under international law, as well as making certain fundamental rights inapplicable to the accused
2	22 September 1973	Awami League	This was created with a view to suppressing far left opponents of the head of the Awami League and founder of the Bangladesh independence movement Sheikh Mujibur Rahman, as well as activists of the Chittagong Hill Tracts (a long-standing indigenous rights movement), allowing for the declaration of a state of emergency suspending citizens' fundamental rights
3	28 November 1974	Awami League	Passed to ratify a border treaty between Bangladesh and India, this Amendment gave up Berubari and retained Dahagram and Angorpota; although Bangladesh respected the terms of this treaty, India did not give Bangladesh land access to the Dahagram and Angorpota enclaves until 2011
4	2 January 1975	Awami League	This replaced the parliamentary system of government with a one-party presidential system, while the powers of the judiciary were greatly restricted, including the power of the Supreme Court, to enforce fundamental rights; Sheikh Mujibur Rahman was assassinated within months of this Amendment (on 15 August 1975)
5	6 April 1979	Bangladesh Nationalist Party	With this Amendment, all proclamations made under <b>Martial Law</b> between 15 August 1975 and 9 April 1979, were legitimised, including Proclamation Order No. 1 of 1977 (issued 23 April 1977, two days after General Ziaur Rahman, founder of the Bangladesh Nationalist Party came to power under military rule), which had the Muslim start to prayer or blessing 'Bismillahir Rahmani Rahim' added to the beginning of the Preamble, secularism removed and replaced with 'absolute trust and faith in the Almighty Allah' in Article 8 on fundamental principles, Article 12 promoting secularism omitted, Article 25 added to promote relations with other Muslim countries 'based on Islamic solidarity,' and Article 42 on the nationalisation of property revised

6	10 July 1981	Bangladesh Nationalist Party	This allowed the Vice President to participate in presidential elections, ensuring that a Member of Parliament or Vice President running for such elections would be considered to have vacated his or her former office upon entering the office of the President
7	10 November 1986	Jatiya Party	The second era of <b>Martial Law</b> under General Hussain Muhammad Ershad was legitimised, shortly after the party that he created, Jatiya Party, was elected to power, while also raising the age limit of Supreme Court justices from 62 to 65 years of age
8	9 June 1988	Jatiya Party	With this Amendment, Islam was declared the state religion and the High Court Division was decentralised so that six of its benches were set up outside of Dhaka
9	11 July 1989	Jatiya Party	This Amendment limited the post of a person to the Office of President to two consecutive five-year terms and allowed for the appointment of a VP to President during a vacancy of the Office of the President with the approval of parliament
10	12 June 1990	Jatiya Party	Among others, Article 65 was amended to increase the 15-seat reservation for women in parliament to 30 for the next 10 years, to be elected by Members of Parliament
11	6 August 1991	Caretaker government	This legitimised the administration of caretaker government, headed by Shahabuddin Ahmed at the time, ratifying his appointment from Chief Justice to VP, and later to become Acting President on 6 December 1990 after President Ershad's resignation, and allowing Ahmed's return to the position of Chief Justice of Bangladesh on 9 October 1991 when Abdur Rahman Biswas was elected as President
12	6 August 1991	Caretaker government	This Amendment brought back a parliamentary system of government following elections held under a caretaker government through which the President was appointed the constitutional head of state and elected by parliament, the position of VP was abolished, and the Cabinet was to be headed by the Prime Minister as head of the executive branch
13	26 March 1996	Caretaker government	An interim, non-party caretaker government system assisting the Election Commission in holding free and fair elections was formally established with this Amendment, made up of a Chief Advisor and up to 10 additional advisors who were to be held accountable to the President and dissolved upon the Prime Minister entering office

14	16 May 2004	Bangladesh Nationalist Party	This increased the number of reserved women seats in parliament from 30 to 45 and raised the age limit of Supreme Court judges from 65 to 67 years of age
15	30 June 2011	Awami League	After a 2010 Supreme Court verdict upholding a High Court ruling partially repealing the Fifth Amendment, the Fifteenth Amendment removed the caretaker government system provision and made the following revisions regarding secularism: (1) In the Preamble, 'In the Name of Allah, the Beneficent, the Merciful' was extended to include 'In the Name of the Creator, the Merciful,' and secularism was among the four fundamental principles mentioned here, (2) Article 2A still confirms Islam as the state religion but the Article also specifically names Hinduism, Buddhism, and Christianity among other religions, not only to be freely practised but also given equal status and equal rights of practice, (3) Article 8 mentions secularism as a fundamental principle again, (4) Article 12 on secularism and freedom of religion have been re-instated, (5) Article 19 has had a clause added explicitly mentioning the 'equality of opportunity and participation for women in all spheres of national life,' and (6) Article 65 has been revised to increase the number of reserved seats for women in parliament from 45 to 50
16	7 September 2014	Awami League	This Amendment restored Article 96 from the original, 1972 Constitution, allowing Supreme Court judges to be impeached for misconduct or inability by a two-thirds majority in the legislature, although the power to remove a Supreme Court judge pending investigation remains with the President

## a. Party Politics and the Constitution

Noting the timeline highlighted amendments in Table 1, I would argue that there are particular tendencies within each party for constraining or enhancing the role of Islam in the Constitution. The two main parties, Awami League or AL and Bangladesh Nationalist Party or BNP, are generally perceived as taking opposing positions to the role of religion, with AL having a more secular orientation than that of BNP. In response to the perception that the Pakistan government was employing Islam to strengthen national identity and violently suppress Bengali culture in its eastern wing, the independence movement of Bangladesh and subsequent Liberation War in 1971 was structured largely along secular Bengali lines. Sheikh Mujibur Rahman, leader of this movement, headed up AL at the country's independence and became Prime Minister in 1972. During his time in power, he either eliminated much of his opposition or absorbed them into his party.<sup>255</sup> His rhetoric throughout emphasised the Constitution's four fundamental principles, and AL continues to associate itself closely with these founding principle of nationalism, socialism, democracy, and secularism. Additionally, "constitutional provisions were inserted banning the use of religion for political purposes and also banning communal political parties,"<sup>256</sup> parties which notably included the Jamaat-e-Islami.

Towards the end of his regime, however, Mujibur Rahman began to make concessions to the Islamic right in an effort to establish recognition and secure financial assistance from Muslim majority countries. He reluctantly participated in the Organisation of

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<sup>255</sup> "Bangladesh Profile," *BBC News (online)* 2012.

<sup>256</sup> Amena Mohsin and Meghna Guhathuakurta, "The Struggle for Democracy in Bangladesh," in *Democracy in Muslim Societies: The Asian Experience*, ed. Zoya Hasan, *Observer Research Foundation Studies in Contemporary Muslim Societies* (London: Sage Publications, 2007), 51.

Islamic Cooperation or OIC's summit in Lahore in 1974,<sup>257</sup> despite Bangladesh having yet to be recognised by Pakistan as an independent country.<sup>258</sup> He also created the Islamic Foundation,<sup>259</sup> an institution under the Ministry of Religious Affairs originally intended to research and advise on Islamic affairs. Most significantly in the context of domestic policies, he declared a general amnesty for those who collaborated with the Pakistan army during the 1971 war and who were subsequently being tried as war criminals upon independence.<sup>260</sup>

Nevertheless, the original Constitution that was created shortly after independence and under AL rule "enshrined secularism as one of the basic tenets of the state."<sup>261</sup> This principle was removed, however, when General Ziaur Rahman, who later formed BNP, came into power under military rule. "Religion ... can serve as a source of legitimacy for national leaders who are developing new political institutions, or who are trying to bolster their legitimacy in times of crisis,"<sup>262</sup> and this was in large part the drive behind Ziaur Rahman's amendments to the Constitution. Ziaur Rahman's leadership emerged after a military coup in 1975 during which Mujibur Rahman was assassinated, elevating Mujibur Rahman further to near cult-like status in the eyes of a population still struggling with the

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<sup>257</sup> Shelley Feldman, "(Re)Presenting Islam: Manipulating Gender, Shifting State Practices, and Class Frustrations in Bangladesh," in *Appropriating Gender: Women's Activism and Politicized Religion in South Asia*, ed. Patricia Jeffery and Amrita Basu (New York: Routledge, 2011), 39.

<sup>258</sup> Pakistan had delayed the recognition of Bangladesh's independence by fellow members of the OIC but was pressured by other Muslim countries such as Jordan to invite Sheikh Mujibur Rahman to its summit in Lahore, leader as he was of the second largest Muslim state at that time. In the end, "Mujib was flown by a special aircraft from Dhaka to Lahore," and Pakistan, Iran, and Turkey, the last few members of the OIC to withhold their recognition of independence, did so on 22 February 1974. (Craig Baxter, "Bangladesh's Foreign Relations," in *South Asia in World Politics*, ed. Devin T. Hagerty (Lanham, MD; Oxford: Rowman & Littlefield Publishers, 2005), 73.)

<sup>259</sup> Feldman, "(Re)Presenting Islam: Manipulating Gender, Shifting State Practices, and Class Frustrations in Bangladesh," 39.

<sup>260</sup> Tazeen M. Murshid, "State, Nation, Identity: The Quest for Legitimacy in Bangladesh," *South Asia: Journal of South Asian Studies* 20, no. 2 (1997): 12-13.

<sup>261</sup> Sobhan, "National Identity, Fundamentalism and the Women's Movement in Bangladesh," 73.

<sup>262</sup> Razavi and Jenichen, "The Unhappy Marriage of Religion and Politics: Problems and Pitfalls for Gender Equality," 837.

after-effects of a brutal civil war. In attempting to solidify his own power and popularity, Ziaur Rahman tried to create an equally strong and popular persona that was distinguishable from that of Mujibur Rahman. He began to downplay secularism as a feature of Bangladeshi nationalism and strengthen his leadership through Islamic affiliations.

“The Islamic card became all the more critical to Bangladeshi politics under the military regime that displaced Sheikh Mujibur Rahman within four years of the birth of the country. General Zia ... needed an ideological platform to justify military involvement in politics and build resistance to the Awami League. He chose to play the Islamic card and his party, the Bangladesh Nationalist Party, allied with Islamic forces in the country.”<sup>263</sup>

Bangladesh attended its first Islamic summit meeting as a recognised, independent country in 1975.<sup>264</sup> Although this might be interpreted as a special effort on the part of Ziaur Rahman to express Bangladesh’s sense of Muslim solidarity, despite its failure to remain one with a country created on that very premise, Mujibur Rahman had already attended an earlier summit meeting in an effort to cultivate financial assistance from other Muslim majority countries. As Ziaur Rahman continued Bangladesh’s presence at OIC summits, thousands of Bangladeshi workers headed to the Middle East during this time.<sup>265</sup>

Ziaur Rahman’s administration also removed Mujibur Rahman’s ban on political parties running on Islamic platforms. These parties were thought to have supported Pakistan during the war, through both the provision of intelligence to the Pakistani military and their ruthless treatment of fellow East Pakistanis. Their leaders had been deemed traitors and war criminals by Mujibur Rahman, reflecting the sentiments of the majority of the newly

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<sup>263</sup> Masooda Bano, "Allowing for Diversity: State-Madrassa Relations in Bangladesh," in *Religions and Development Research Programme* (Birmingham: International Development Department, University of Birmingham, 2008), 20.

<sup>264</sup> Sobhan, "National Identity, Fundamentalism and the Women's Movement in Bangladesh," 72-73.

<sup>265</sup> Ibid.

independent population, but they were permitted to once again participate in elections when Ziaur Rahman came to power.<sup>266</sup> By the time of Proclamation Order No. 1 of 1977, a crucial feature of the Constitution's Fifth Amendment excluding secularism as a fundamental principle, solidarity with the Muslim world and associated alliances with the Islamic right had clearly become an important item on the BNP agenda. Even the slogan that had once been the rallying cry of the independence movement, 'Joi Bangla,' "linguistically of Bengali origin, was replaced by *Bangladesh Zindabad* where *Zindabad* is of Urdu and Persian derivation."<sup>267</sup> 'Joi Bangla' continues to be the slogan of AL while 'Bangladesh Zindabad' remains the slogan of the BNP to this day.

At the same time, Ziaur Rahman enthusiastically took up the cause of the UN Decade for Women that was initiated globally in 1975. His expressions of affiliation towards the Muslim world and his enthusiasm for women's empowerment as part of economic development were both seen as an intention to take advantage of the aid associated with the two, and to capitalise politically on its distribution.<sup>268</sup> Women's rights activists who argue that secularism is the key to women's equality nevertheless tend to support AL, largely sharing the view that AL is more secular than BNP and, due to AL's association with secularism, more interested in enhancing women's rights.<sup>269</sup> The reality is that, while in opposition, both parties allied with groups running on Islamic platforms in an effort to consolidate power

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<sup>266</sup> Individual members of the most prominent such party at the time, the Jamaat-e-Islami, are currently under trial for war crimes.

<sup>267</sup> Murshid, "State, Nation, Identity: The Quest for Legitimacy in Bangladesh," 17.

<sup>268</sup> Kabeer, "The Quest for National Identity: Women, Islam and the State in Bangladesh," 126-28.

<sup>269</sup> "Leading Lawyer Activist 2, Interview by Tahrat Naushaba Shahid," Dhaka (March 2013); "Leading Ngo Activist 5, Interview by Tahrat Naushaba Shahid," Dhaka (February 2013); "Ngo Activist 2, Interview by Tahrat Naushaba Shahid," Dhaka (February 2013); "Leading Ngo Activist 1, Interview by Tahrat Naushaba Shahid," Dhaka (February 2013).

against the ruling party, and the fear of hurting such alliances stymied movement on women's rights once in power. This will be discussed in further detail in Chapter V.

Ziaur Rahman became President in 1977 and lifted martial law after winning elections in 1979. Like his predecessor Mujibur Rahman, he was assassinated in 1981 and, after another military coup, General Hussain Muhammad Ershad took over government in 1982, suspending the Constitution and all political parties for four and a half years. He made himself President within a year, winning elections and lifting martial law in 1983. In response to growing opposition, Ershad declared a state of emergency in 1987, but he stepped down in 1990 after mass protests, and BNP won the elections that followed.<sup>270</sup>

The timing of the Constitutional amendments shown in Table 1 reveals that AL has been keen to undo whatever efforts BNP has taken to 'Islamise' the Constitution. By contrast, AL has done little to repeal amendments put in place by Ershad, who carried on Ziaur Rahman's legacy in terms of making concessions to the religious right. Although President Ershad continued to promote Islam to combat the Awami League's core base, he did not share power with the religious right. His personal reputation may have had some negative impact in terms of perceptions of his sincerity regarding the practice of Islam. In 1983, he proposed that readings from the Quran should open the annual commemoration of Ekushey February, the aforementioned Bengali Language Movement of 1952.<sup>271</sup> He also proposed replacing English as the second language of Bangladesh with Arabic and requiring the teaching of the Quran across Bangladeshi schools, but this proposal was met with

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<sup>270</sup> "Bangladesh Profile."

<sup>271</sup> Kabeer, "The Quest for National Identity: Women, Islam and the State in Bangladesh," 130-33.

intense opposition and never carried forward.<sup>272</sup> Twenty-three opposition party leaders issued a warning that this and yet another proposal, that Bangladesh be declared an Islamic state, “would lead to civil war,” and he backed down.<sup>273</sup>

After lifting the suspension of the Constitution and simultaneously passing a Seventh Amendment retroactively legitimising martial law on 10 November 1986, however, Ershad further amended the Constitution to declare Islam the state religion in 1988.<sup>274</sup> Despite Ershad’s apparent inclinations towards ‘Islamisation,’ however, the largest Islamist party in Bangladesh, the Jamaat-e-Islami, supported the movement to depose Ershad. This may have been in part due to his failure to go even further and declare the country an Islamic state<sup>275</sup> or, in my view, a perception that his gestures were disingenuous, and the hope that a democratic system might prove to be a better mechanism to achieve the goal of Bangladesh as an Islamic republic in the future.

None of the three parties that have been in power - AL, BNP, and Ershad’s Jatiya Party - have exhibited any genuine ideological commitment towards transforming Bangladesh into an Islamic state. Despite Islam being the state religion, the application of shari‘a as a binding legal guide remains restricted to personal status law. However, in their mutual opposition to AL and their desire to attract popular support through some platform other than the secular Bengali nationalism that AL claims for itself, the Islamic right and past

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<sup>272</sup> Janice H. Lam, "The Rise of the Ngo in Bangladesh: Lessons on Improving Access to Justice for Women," *George Washington International Law Review* 38(2006): 109.

<sup>273</sup> Kabeer, "The Quest for National Identity: Women, Islam and the State in Bangladesh," 130-33.

<sup>274</sup> Lam, "The Rise of the Ngo in Bangladesh: Lessons on Improving Access to Justice for Women," 109. Ershad also set up family courts in 1985 to expedite the resolution of family law cases, and put in place a number of ordinances raising the penalties for violent crimes against women (Kabeer, "The Quest for National Identity: Women, Islam and the State in Bangladesh," 126-28.).

<sup>275</sup> Shehabuddin, "Jamaat-I-Islami in Bangladesh: Women, Democracy and the Transformation of Islamist Politics," 589-90.

military dictators have become allies in their attempts to enhance the role of religion in governance. One effect of these alliances has been that, over the years since Bangladesh's independence, the Constitution has become a battleground in which the country's two main parties of AL and BNP assert the extent of their influence. The fact that three additional Schedules were added to the Constitution during AL's term in power in 2011, all of them Mujibur Rahman's speeches, are a striking reminder of the influence that AL wielded with its strong parliamentary majority during that term and one way in which they chose to exert that influence on the Constitution.

## **b. The Fifth and Fifteenth Amendments**

A Fifteenth Amendment has brought this battleground back to prominence. Although a particularly contested feature of the Fifteenth Amendment was its removal of the provision for caretaker government prior to national elections, other aspects of the Amendment are more pertinent to the place of Islam in the Constitution. In this regard, the Fifteenth Amendment must be seen in the context of the development and eventual annulment of the Fifth Amendment. As shown in Table 1, the Fifth Amendment was put in place by Ziaur Rahman to legitimise Proclamations made under his rule, most notably replacing secularism with the phrase 'absolute trust and faith in the Almighty Allah' as a guiding principle.

The Supreme Court case that overturned the Fifth Amendment began not over a question of secularism or Islam in the Constitution, but over an abandoned property dispute, leading to a Writ Petition challenging the constitutionality of the Amendment in 2000. The

391-page High Court ruling of 2005 responding to this Petition describes how Moon Cinema Hall, the construction and ownership of which was registered by Pak Italian Marble World Limited in East Pakistan in 1964, was considered to be abandoned property upon Bangladesh's independence and taken over by the Bangladesh Freedom Fighters' Welfare Trust. Although ownership was re-registered with Bangladesh Italian Marble Works Limited in 1972, a 1976 judgment in favour of the latter's ownership was dismissed due to martial law regulations that were validated by Proclamation Order No. 1 of 1977, which also validated the removal of secularism as a fundamental principle of the Constitution.<sup>276</sup>

The 2005 High Court judgment addresses the issue of secularism only after much discussion of constitutional law more broadly, delving deep into historical sources. That the issue is addressed at all suggests the recognition that, although the original case questioning the validity of the Fifth Amendment is one over a property dispute, there is much more at stake. The justification for the Fifth Amendment's annulment in the High Court judgment is couched in a long discussion of British parliamentary and constitutional legal history as far back as the reign of Edward I, drawing on the British Bill of Rights and the constitutions of the United States, France, and India.<sup>277</sup> Notable, it also makes careful and repeated reference to the failure of Islamic solidarity in the history of Bangladesh, pointing out that, "The vast majority of the people of this part of the world are God-fearing Muslims but their religion could not even save the fellow Muslims from being persecuted, killed and raped and their

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<sup>276</sup> A. B. M. Khairul Haque, "Judgment on Writ Petition No. 6016 of 2000: In the Matter of 'an Application under Article 102 of the Constitution of the People's Republic Bangladesh' and in the Matter of 'Bangladesh Italian Marble Works Limited Versus Government of Bangladesh'," (Dhaka: High Court Division, The Supreme Court of Bangladesh, 2005), 2-6.

<sup>277</sup> *Ibid.*, 38-102.

belongings being plundered and all ironically in the name of Islam... Bangladesh was dreamt of as a secular country and came into being as a secular country.”<sup>278</sup>

It becomes clear from a reading of the judgment that the case was about both the validity of martial law and the role of religion in governance. Military dictators, most notably Ziaur Rahman, are repeatedly labelled ‘usurpers,’ and their unlawful actions viewed as almost flippant, as in the description, “on the early morning of August 15, 1975, Khandaker Moshtaque Ahmed [very briefly immediate predecessor to Ziaur Rahman] merrily changed the Constitution of Bangladesh and seized the office of President although without any legal authority.”<sup>279</sup> A careful reading of the ruling, furthermore, reveals the view that religious extremism and unlawful military activity are intimately entwined in the history of Bangladesh, with the suggestion that military takeovers have tended to be justified through religion both during and since Pakistani rule: “It appears that all usurpers seize powers though fully and wholly illegally but ironically always in the name of God and the people.”<sup>280</sup>

The Writ Petition to which the Bangladesh High Court was responding in this judgment was filed while AL was in power, but the 2005 judgment in favour of repealing the Fifth Amendment was issued while BNP was head of government. Anticipating the appeal’s dismissal if AL took over government as they were expected to do after BNP’s term concluded during the following year, the BNP Secretary General and three advocates of the Supreme Court filed two applications that stayed the High Court judgment. Five years later, when AL was indeed back in power, the High Court judgment was upheld by the Appellate Division of the Supreme Court, who stated that the “Preamble [*viz*] and the relevant

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<sup>278</sup> Ibid., 222-23.

<sup>279</sup> Ibid., 132.

<sup>280</sup> Ibid., 271.

provisions of the Constitution in respect of secularism, nationalism and socialism, as existed on August 15, 1975, will revive,<sup>281</sup> referring to the date of Mujibur Rahman's assassination.

The Appellate ruling of 2010 is significantly shorter than the earlier judgment to which it responds, and limits its analysis to more recent historical precedents, although momentarily harking back to “the glory of independent Bengal [that] faded away and sank in [the Battle of] Palassy [*sic*].”<sup>282</sup> The judgment provides a legal analysis of constitutional developments since the creation of Pakistan, in contrast to the earlier High Court ruling's analysis of constitutional law going far back into British history. There is more emphasis here, as well, on the invalidity of martial law rather than the links between military dictatorship and the Islamic right.

Interestingly, the ruling chooses to quote Jinnah in describing its understanding of secularism. Justice Taffazzul Islam quotes from Jinnah's first Presidential speech to the Constituent Assembly of Pakistan upon independence in 1947:

“..... You are free; you are free to go to your temples, you are free to go to your mosques or to any other places or [*sic*] worship in this State of Pakistan. You may belong to any religion or caste or creed- that has nothing to do with the business of the State.

..... Now, I think we should keep that in front of us as our ideal and you will find that in course of time Hindus would cease to be Hindus and Muslims would cease to be Muslims, not in the religious sense, because that is the personal faith of each individual, but in the political sense as citizens of the State.”<sup>283</sup>

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<sup>281</sup> Md. Taffazzul Islam, "Judgment of Civil Petition for Leave to Appeal Nos. 1044 & 1045 of 2009 (from the Judgment and Order Dated 29th August Passed by the High Court Division in Writ Petition No. 6016 of 2000): Khondker Delwar Hossain, Secretary, B.N.P. Party, and Munshi Ahsan Kabir and Others Versus Bangladesh Italian Marble Works Ltd., Dhaka and Others," (Dhaka: Appellate Division, The Supreme Court of Bangladesh, 2010), 125.

<sup>282</sup> *Ibid.*, 45.

<sup>283</sup> *Ibid.*, 46.

The inclusion of this quote is perhaps intended to underscore the failure of the Pakistani government to deliver on Jinnah's vision. The document goes on, like the earlier High Court judgment, to mention the Liberation War in highly emotive language: "...on 25 March, 1971 the Pakistan army unleashed a reign of terror. The genocide committed by them is one of the worst known in the history... a nation was ultimately born with blood and tears."<sup>284</sup> Both the High Court and Appellate rulings share this portrayal of Pakistan as having failed to remain secular and democratic and manipulated religious identity to justify brutal military force in its eastern wing. The Appellate ruling in particular reflects and supports the view that secularism or, ironically, Jinnah's and therefore Pakistan's founding interpretation of secularism, and the strain of Bengali nationalism that led to independence are a natural fit.

The Appellate judgment concluded by once again emphasising the word 'usurper' to refer to, among others, Ziaur Rahman, and categorically dismissing the legality of martial law:

"While dismissing the leave petitions we are putting on record our total disapproval of Martial Law and suspension of the Constitution or any part thereof in any form. The perpetrators of such illegalities should also be suitably punished and condemned so that in future no adventurist, no usurper, would dare to defy the people, their Constitution, their Government, established by them with their consent. However, it is the Parliament which can make law in this regard. Let us bid farewell to all kinds of extra constitutional adventure for ever."<sup>285</sup>

A year after this statement, the AL-dominated parliament passed a Fifteenth Amendment. At the time of the Appellate judgment upholding the repeal of the Fifth

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<sup>284</sup> Ibid., 52-53.

<sup>285</sup> Ibid., 184.

Amendment, the AL-led government made an effort to mitigate the potential backlash in advance of passing another Amendment, albeit with some confusion. Attorney General Mahbubey Alam pointed out that although the secular status of the Constitution had been restored, the phrase ‘Bismillahir Rahmanir Rahim’ would be retained in the Preamble and Bangladesh would continue to be an Islamic republic.<sup>286 287</sup> This is, however, misleading in that the Bangladeshi Constitution has never described the country as an Islamic republic, and it is formally known as the People’s Republic of Bangladesh instead. Mahbubey Alam was likely referring to fact that the status of Islam as the state religion was to remain intact. A senior AL politician, who was Minister of Railways at this time, nevertheless suggested in an interview that since the phrase ‘Bismillahir Rahmani Rahim’ preceded the text and Preamble of the Constitution, it did not affect the secular status of the Constitution.<sup>288</sup> Furthermore, “‘In the light of the verdict, the secular Constitution of 1972 already stands to have been revived [*sic*],’ Law Minister Shafique Ahmed said ... ‘Now we don't have any bar to return to the four state principles of democracy, nationalism, secularism and socialism as had been heralded in the 1972 statute of the state.’”<sup>289</sup> Indeed, the content of the Fifteenth and Sixteenth Amendments both suggest a concerted effort on the part of the AL-dominated legislature to “get back to the original spirit of 1972 [*sic*] constitution.”<sup>290</sup>

Opposition party BNP’s Standing Committee member Moudud Ahmed pointed out that, if the Constitution was to begin with such a phrase it could hardly be considered

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<sup>286</sup> Gopal, "A 'Secular' Bangladesh: Country's Top Court Lifts 4-Year Stay on Order Banning Religion in Politics."

<sup>287</sup> See Table 1, Amendment No. 15 for the exact status of the phrase in the Preamble at this time.

<sup>288</sup> Liton and Islam, "Interview with Suranjit Sengupta - Constitutional Reform: Where Does the Power Lie?."

<sup>289</sup> "Bangladesh Set to Return Constitution to Secular Roots," *Reuters (online)*(2010), <http://in.reuters.com/article/2010/02/21/idINIndia-46335720100221>.

<sup>290</sup> Chowdhury, "Parliament to Sit Sept 1, Bill on Impeaching Supreme Court Judges Likely ".

secular, pointing also to the fact that the Eighth Amendment declaring Islam as a state religion remained untouched.<sup>291</sup> Ahmed also suggested that the special parliamentary committee set up to review the Constitution prior to the Fifteenth Amendment had little representation from the opposition, who were appointed only one seat among 15.<sup>292</sup> The BNP had only 31 seats in a 345-member parliament at that time, however, so their representation on the Constitution Review Committee may well have merely reflected their representation in parliament.

The Fifteenth Amendment massaged the role of Islam in the Constitution further by refining the Preamble to include 'In the Name of the Creator, the Merciful' rather than referring only to the opening blessing of a Muslim prayer. Although Islam remains a state religion, the Constitution now also specifically names other common religions in Bangladesh including Hinduism, Buddhism, and Christianity as religions that are not only to be freely practised but also given equal status and equal rights to Islam. On women, a new clause has been added to promote the 'equality of opportunity and participation for women in all spheres of national life,'<sup>293</sup> which is as vague, if not more so, than the earlier version of this clause where women were guaranteed equal rights with men in all spheres of public life.

Most significantly, the Fifteenth Amendment returned secularism to the four fundamental principles of the Constitution. Despite the number of times the Constitution has gone back and forth between prescribing a lesser or greater influence of Islam in law-making, there remains some confusion on how to interpret its role. Bangladesh is not alone in this ambiguity; Brunei, Morocco, and Tunisia, for example, all declare Islam to be the state

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<sup>291</sup> "Don't Amend Bangladesh Constitution in Haste," *Tajikistan News (online)*, 25 July 2010.

<sup>292</sup> *Ibid.*

<sup>293</sup> *The Constitution of the People's Republic of Bangladesh.*

religion in their constitutions<sup>294</sup> without establishing exactly what that means for the role of fiqh in determining the practice of the law.

However, the significance of the timing of 'Islamising' and 're-secularising' the Constitution cannot be ignored, and it seems that the Constitution has been a means of expressing party positions on the role of Islam through the Fifth, Eighth, and Fifteenth Amendments. After 16 amendments in just over four decades, many of them passed under military rule, there is nevertheless some hesitation among law-makers to call on the authority of the Constitution. Kamal Hossain, widely acknowledged as "the principal architect of Bangladesh's 1972 constitution," as well as being a former AL member who broke away at one time to form his own party, has publicly expressed disappointment in the lack of consensus-building around such amendments.<sup>295</sup>

## 2. Interpretations of the Constitution

Section 1 of this chapter discusses the hypothesis that shifting references to the role of Islam in the Constitution reflect, at their heart, the ideological positions of different parties. Section 2 asks whether these shifts have an impact on family laws. Much has already been written on the subject of whether the application of laws associated with religion and Islam in particular precludes sexual equality.<sup>296</sup> This study accepts as given that there are

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<sup>294</sup> Tad Stahnke and Robert C. Blitt, "The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries," *Georgetown Journal of International Law* 36(2005): 10.

<sup>295</sup> "Don't Amend Bangladesh Constitution in Haste."

<sup>296</sup> Okin, *Is Multiculturalism Bad for Women*; Gita Saghal, "Two Cheers for Multiculturalism," in *Warning Signs of Fundamentalisms*, ed. Ayesha Imam, Jenny Morgan, and Nira Yuval-Davis (London: Women

jurisprudential avenues within fiqh to offer women greater equality, as discussed in Chapter II. It is also important to note that the term secularism has come to mean a variety of orientations towards religious practices by a state. The way in which secularism has been broadly defined in Bangladesh, touched upon here in the context of the Fifth and Fifteenth Amendments in Section 2, has implications for the extent to which fiqh is used as a reference in cases of personal status law, as well as the ways in which state and non-state actors choose to engage with Islamic jurisprudence.

As shown in Section 1, the symbolic value of secularism in the Bangladeshi Constitution has been interpreted in part “as a response to Pakistani zealotry during the war.”<sup>297</sup> Supreme Court judgments on the Fifth Amendment provide plenty of evidence to support this view. As with most constitutions, the Bangladeshi one does not clarify its position on the meaning of secularism for specific legislation, but its broad intent is one of religious neutrality or, in Bengali, ‘dhormo niropakkhota.’<sup>298</sup>

My analysis so far demonstrates that there are three major issues of contention over the role of Islam in the Constitution: 1) The Preamble that starts in the name of Allah, 2) Islam as the state religion, and 3) secularism as one of its four fundamental principles. Prior to the repeal of the Fifth Amendment and to the passing of the Fifteenth Amendment, the document’s Article 8(1) had secularism replaced with the phrase “Absolute trust and faith in the Almighty Allah,” followed by Article 8(1A), stating that “Absolute trust and faith in the

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Living under Muslim Laws, 2004); Judith Butler, "Sexual Politics, Torture, and Secular Time," *British Journal of Sociology* 59, no. 1 (2008).

<sup>297</sup> Ziauddin Chowdhury, "The Bumps and Grinds on Our Journey to Secularism," *Forum, magazine of The Daily Star newspaper (online)*, November 2010.

<sup>298</sup> Ibid.

Almighty Allah shall be the basis of all actions.”<sup>299</sup> The second part of that Article said that the four fundamental principles, while necessary for governance, the making of laws, and interpreting the Constitution, “shall not be judicially enforceable.”<sup>300</sup> This Article remains the same since secularism has been restored, leading to the conclusion that these principles might influence legislative development but, in the end, be somewhat meaningless in the actual practice of the law in individual cases - all of which seems highly contradictory.

### **a. The Religious Right and the Constitution**

The Constitution’s declaration of Islam as the country’s state religion may not at first glance have much impact on legal practices, but I show here that the clause nonetheless holds great symbolic value for both secular women’s rights activists and the religious right. A range of women’s rights activists challenged the Eighth Amendment on Islam as state religion on the basis that it exposed women to the possibility of discrimination through religious practices. Naripokkho, one of the most prominent organisations representing such activists, argued that only a version of secularism that excludes Islam as a state religion can be conducive to protecting women’s rights, and that the Amendment allows too easy an abuse of religion to constrain such rights.<sup>301</sup> Similarly, the largest women right’s organisation in the country, the Bangladesh Mahila Parishad, “strongly endorses the [current] fundamental principles of the Bangladesh Constitution, including secularism, and there have

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<sup>299</sup> *The Constitution of the People's Republic of Bangladesh*; "The Ornamented Constitution of Bangladesh."

<sup>300</sup> *The Constitution of the People's Republic of Bangladesh*.

<sup>301</sup> Sohela Nazneen, Naomi Hossain, and Maheen Sultan, "National Discourses on Women's Empowerment in Bangladesh: Continuities and Change," (Dhaka: Pathways of Women's Empowerment, BRAC Development Institute, BRAC University, 2011), 18.

been various confrontations with religion-based parties over issues such as the National Women's Development Policy. More than other political and civil interest groups, women's organisations have been upfront in identifying threats to women's rights and empowerment from the political use of religion and have protested this.<sup>302</sup>

The Constitution also calls for the equality of women in Articles 27 through 29, with Article 29 allowing for the option of special provisions made for women or any other "backward section of citizens" to ensure their "adequate representation in the service of the Republic."<sup>303</sup> <sup>304</sup> Nothing in the wording of the Constitution endorses the precedence of religious practice where it might clash with providing equality to women. Current Prime Minister Sheikh Hasina Wajed and head of AL, furthermore, has publicly stated that it is important to "remain vigilant" on misinterpretations of the Quran and, in her speech addressing the National Conference of Trained Imams in 2011, pointed out that "Secularism means that people belonging to different religions will perform their religious rituals independently which is the main message of Islam."<sup>305</sup>

The lines between personal and national or public lives are arguably blurred in certain areas of the law, most noticeably so in the context of citizenship and property rights. Inheritance laws, for example, falls under the purview of personal status law but can be just as easily defined as an issue of public interest given its significant impact on economic and political matters. Furthermore, a close reading of the Constitution reveals that it includes provisions to equalise rights where there is a perception of disparity, without specifying the

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<sup>302</sup> (Ibid.).

<sup>303</sup> *The Constitution of the People's Republic of Bangladesh.*

<sup>304</sup> The problematic nature of identifying women as a 'backward section of citizens' will be discussed at greater length in Chapter 4.

<sup>305</sup> "Pm Urges imams to Remain Alert against Misinterpretation of Islam," *The Financial Express (online)*, 9 February 2011.

public or private nature of such disparity. In an interview on the direction that the Constitution has taken since its creation, Kamal Hossain pointed out that Part 2 of the document, that is, Articles 8 through 25, was intended to “ensure equality” while, as a whole, it was “conceived as a charter for a programme of extensive affirmative action.”<sup>306</sup>

The two main parties’ wrangling over the status of secularism in the Constitution, and the alliances with Jamaat-e-Islami and other parties on the religious right that this wrangling intermittently entails, reflects in part the views of the Islamic right on the Constitution. Of the “seven distinct camps of Islamist parties and organizations” noted by Ali Riaz<sup>307</sup> and analysed further in Chapter V, the Jamaat-e-Islami has historically emerged as the largest and most influential in terms of having a parliamentary presence. In the past four elections, with a growing number of voters and votes cast, Jamaat-e-Islami has also had a declining share of popular votes (1991: 12.13 percent, 1996: 8.61 percent, 2001: 4.29 percent, and 2008: 4.6 percent).<sup>308</sup>

Jointly, Jamaat-e-Islami and another major Islamist party, Islami Oikyo Jote, “secured about 7 percent of popular votes in the 2008 elections.”<sup>309</sup> The two parties have largely dismissed the original, 1972 Constitution emphasising secularism and the reversal back to much of it through the partial overturn of the Fifth Amendment. They perceive the version of this document that emphasises secularism as a tool of AL, promoting secularism and even

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<sup>306</sup> Kamal Hossain, "Interaction of Fundamental Principles of State Policy and Fundamental Rights," in *Public Interest Litigation in South Asia, Rights in Search of Remedies*, ed. Sara Hossain, Shahdeen Malik, and Bushra Musa (Dhaka: University Press Limited, 1997), 49.

<sup>307</sup> Ali Riaz, "Unpacking the Islamist Agenda," *The Daily Star (online)*, 4 May 2013.

<sup>308</sup> Ibid.

<sup>309</sup> "Reader's Comments On "'Minority Islam' in Muslim Majority Bangladesh: The Violent Road to a New Brand of Secularism" By Md Saidul Islam," *Journal of Muslim Minority Affairs* 31, no. 4 (2011): 633.

the persecution of Islamists.<sup>310</sup> This is hardly surprising considering that the Fifteenth Amendment endangers their very existence, as the re-insertion of secularism in 2010 came hand-in-hand with a return to banning religious politics. Although outside the scope of this study, in 2013, Jamaat-e-Islami was prevented from running for national elections by the Supreme Court ahead of elections that were held in January 2014 on the basis of being in violation of the country's secular Constitution.<sup>311</sup>

During recent years, other Islamist groups and alliances have come to prominence as well, some with more explicit demands with regard to the Constitution, as well as considerable power to attract popular support despite their lack of a parliamentary presence. As a number of leaders of the Jamaat-e-Islami find themselves under trial for war crimes, Hefazat-e-Islam has emerged as one such significant alliance. Hefazat was formed in 2011 as an alliance of parties to challenge the National Women Development Policy announced at that time. The 2008 announcement of this policy saw protests by a variety of Islamist organisations, too, and the Islami Oikyo Jote took a leading role in organising them. When AL announced the National Women Development Policy in 2011, Islami Oikyo Jote called a general strike. Leading ulema from Qwami 'madrassah' or religious schools<sup>312</sup> in the greater Chittagong area seized the opportunity to create Hefazat with the support of other such madrassah across the country, bringing a number of other parties, including the Islami Oikyo Jote, under the same umbrella.

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<sup>310</sup> Md. Saidul Islam, ""Minority Islam" In Muslim Majority Bangladesh: The Violent Road to a Newbrand of Secularism," *Ibid.*, no. 1: 33.

<sup>311</sup> "Bangladesh Court Declares Jamaat Illegal," *AlJazeera (online)*, 1 August 2013.

<sup>312</sup> Qwami madrassah are not under the administration of the Bangladeshi government, unlike Aliya madrassah.

The head of Hefazat, Mufti Shah Ahmed Shafi, is not only the Director General of the powerful Hathazari Madrassah in Chittagong, but also the Chairman of the Bangladesh Qwami Madrassah Board, and insists that the Hefazat is apolitical in nature.<sup>313</sup> The group nevertheless organised a march to Dhaka in April 2013, culminating in a rally of 500,000 protestors in Motijheel, a busy and central intersection of the capital city. They demanded “the application of 13 measures, including a ban on mixing of men and women in public places ... and demands for the former wording of the constitution to be reinstated, affirming ‘absolute trust and faith in Almighty Allah.’”<sup>314</sup> Hefazat continues to make these demands, and followed up after their demonstration with an announcement in May 2013 that they had formed teams of over 10,000 volunteers who had sworn to “sacrifice their lives” to meet these demands.<sup>315</sup>

Despite what might seem like a straightforward relationship between Islamist groups demanding further emphasis on Islam in the Constitution and supporting patriarchal interpretations of fiqh, Elora Chowdhury warns against over-simplifying public discourse around the terminology of secularism and Islam. She points out that:

“The challenges that the women's movement in Bangladesh currently confronts require a more nuanced analysis that goes beyond the Islamist/secular–nationalist binary and engages a more self-reflexive lens to acknowledge the linkages that connect disparate power structures, including feminist ones, that have differential implications for differently located women.

The landscape of contemporary Bangladeshi politics is such that divisions like nationalist, secularist, and Islamist are no longer clear, if they ever were at all. Too often the women's movement (and feminist politics generally) in

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<sup>313</sup> Riaz, "Unpacking the Islamist Agenda."

<sup>314</sup> Julien Bouissou, "Bangladesh's Radical Muslims Uniting Behind Hefazat-E-Islam," *Guardian Weekly (online)*, 30 July 2013.

<sup>315</sup> Manik Miaze, "Hefazat Supporters Take En Masse Oath to Sacrifice Their Own Lives," *Dhaka Tribune (online)*, 3 May 2013.

Bangladesh is uncritically coupled with the secularist one of the civil society or the NGO sector.”<sup>316</sup>

As Chowdhury points out, Islamist groups do not share common interpretations of Islamic principles. One of Hefazat’s demands is the restriction of women from public forums, a demand that excludes both the current head of AL and Prime Minister and the current head of BNP from running for office. The Jamaat-e-Islami, on the other hand, has adjusted its platform to allow for women to hold public office and participate in the formal labour force, thus encouraging more women to vote in their favour.<sup>317</sup> As Stepan points out, the “assumption of univocality,”<sup>318</sup> that religious groups speak with one voice on all matters, is invariably inaccurate in such a complex context.

On the other end of the political spectrum from the views of the Islamic right, the assumption that those working for women’s equality are necessarily doing so in an exclusively secular space is also mistaken. The AL have just entered a second consecutive term leading the Bangladeshi government but during its last term, the head of the Bangladeshi government’s Law Commission, a government think-tank under the umbrella of the Ministry of Law, M. Shah Alam, suggested legal change in favour of women through Islamic jurisprudence.

Law Commission reports published during his chairmanship demonstrate that he argued that those who interpret Islam as restricting of women’s right are wrong, suggesting that the spirit of Quran is one that promotes their equality:

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<sup>316</sup> Chowdhury, "Transnationalism reversed: Engaging Religion, Development and Women's Organizing in Bangladesh," 415.

<sup>317</sup> Ahmed, "Jihad and Lower-Middle- Class Women: Secularism in Rural Bangladesh."

<sup>318</sup> Stepan, "Religion, Democracy, and The "Twin Tolerations"," 44-45.

“The problem is, and it is gradually and ominously growing worse, that those who seek a true interpretation and understanding of Islamic scriptures in the Holy Qur’an and Sunnah to protect and promote human rights, find hostile groups of bitter opponents who, for the reasons of their own, are ready to do anything and everything to resist the truth seekers. These groups called by names like extremists, traditionalists, fundamentalists, Islamists etc. are often well organized militants, and are trained to resort to any means including physical annihilation of the truth seekers.”<sup>319</sup>

Shah Alam draws most of his support from Iranian and North African legal scholarship and suggests that a time of reform may be ahead. He says that scholars from these regions “are shaping what may turn out to be Islam’s equivalent of the Christian Reformation: a period of questioning traditional practices and beliefs and, ultimately, of upheaval.”<sup>320</sup>

Additionally, female scholarship of Islam is growing through a number of Islamist groups with female wings running discussion groups on the ideals of pious Muslim women. The extent to which they revise existing interpretations of those ideals and stray from male-dominated main party lines in their discussion requires further research, but for now it appears that the most vocal Islamist groups in Bangladesh consider only a Constitution recognising the ultimate legal authority of Islamic principles as valid. Despite the diversity of such groups, it seems their publicly stated understandings of those principles, furthermore, do not allow for equal rights for women in family laws or, for that matter, in any other arena.

Prior to Shah Alam’s chairmanship, past statements of the Law Commission support the Islamist view. In a response to the Supreme Court’s review of the proposal for a Uniform Family Code or UFC, which aims to standardise personal status laws across all

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<sup>319</sup> M. Shah Alam, "In Pursuit of True Interpretation of the Islamic Scriptures to Promote Human Rights," Law (University of Chittagong, 2013), 1-2.

<sup>320</sup> Ibid., 8-9.

religious groups in Bangladesh while also enhancing women's rights in those laws considerably, the Law Commission referred to the much debated Article 8 of the Constitution:

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

From the above quoted provision of Act XXVI of 1937 supported by the provisions of the Constitution, it can be said that the Muslim personal law is an eternal law prevailing as the only law for all Muslim Family Affairs and hence there cannot be any change in it nor can it be amalgamated with any other personal law of any other religion.<sup>321</sup>

As an arm of government, the Law Commission changes hands depending on which party is in power, and more recent Commission publications indicate a stronger inclination towards changes in family laws, although leaning primarily towards incremental changes rather than dramatic shifts such as a Uniform Family Code. It remains to be seen whether the change in Article 8 towards secularism will have any impact on the movement for the Uniform Family Code but the movement, discussed further in Chapters IV and V, appears to have lost traction in recent years.

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<sup>321</sup> M. Enamul Hoque, Md. Sirajul Islam, and Mustafa Kamal, "Opinion on the Study Report for Marriage, Inheritance And family Laws in Bangladesh Towards a Common Family Code," (Dhaka: The Law Commission, Government of the People's Republic of Bangladesh, 2005).

## **b. The Constitution in the Case of Fatwa**

For now, however, as a point of judicial reference in personal status law cases, the Constitution is restricted in terms of influencing the rights of Muslim women. Even in its current form, the document contradicts itself with regard to the role of religion and the extent to which it is necessary to exert Islamic jurisprudence in supporting the equality clause of the Constitution for women, as opposed to stepping outside of religious frameworks altogether. Furthermore, its primary reference to women's equality in national or public life, though it can be interpreted in a number of ways, has so far been interpreted for the most part to refer to matters such as the presence of women in the formal labour force and in parliament rather than in matters such as inheritance or citizenship rights. With the exception of a handful of conjugal rights cases, the Constitution has thus rarely been referred to in cases concerning women's rights in personal status law. A related landmark case on fatwa, more pertinent to violence against women, however, did discuss the Constitution in the context of laws on religious practices.

In response to a spate of violence directed at young rural women and girls as part of sentencings by fatwa, the Supreme Court declared such sentences to be unconstitutional in 2001. When Writ Petition 5897 on the validity of a fatwa regarding divorce and forced marriage came up to the High Court Division for consideration, Justices Gholam Rabbani and Nazmun Ara Sultana<sup>322</sup> banned the issuing of fatwa altogether through a *suo motu* rule, that is, a ruling initiated by the Court itself rather than one requested by petitioners. The ruling was considered the result of having a highly activist judge, Rabbani, hearing the case days away from retirement - and his desire to end his career as Supreme Court Justice with

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<sup>322</sup> Justice Sultana is the first female judge to be appointed to the Supreme Court of Bangladesh.

an especially provocative statement.<sup>323</sup> AL held parliamentary majority at the time but was expected to lose national elections later that year. Indeed, after stepping down in July 2001, BNP took over government in the elections that followed.

Although women's rights activists may have been perceived as pleased with the results of the case,<sup>324</sup> many of them were in fact disappointed by the outright ban, suggesting that it was excessive and blind to the realities of implementation.<sup>325</sup> Ali Riaz suggests that the fact that the ban was ultimately withdrawn is a demonstration of Islamist influence. He points out that the street protests following the High Court judgment in 2001 "forc[ed] the state to retreat," quoting the aggressive announcements of prominent Jamaat politician Delwar Hossain Sayedee, that "courts won't be allowed to control fatwas, instead fatwas would control the courts."<sup>326</sup> But women's rights activists were deeply uncomfortable with a ban as well, and were looking forward to Jamaat-e-Islami responding in a way that allowed for a more realistic and implementable compromise. The later modification to the ban reflects also a desire on the part of women's rights activists to head back to court and present an option that would avoid overly radical change. My analysis is supported by Dina Siddiqi, who argues that:

"In public, most feminists and human rights activists, as well as mainstream political organizations, hailed the judgment as a huge victory in the ongoing

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<sup>323</sup> "Leading Lawyer Activist 3, Interview by Tahrat Naushaba Shahid," Dhaka (January 2013); "Leading Lawyer Activist 2, Interview by Tahrat Naushaba Shahid."

<sup>324</sup> "Professor 1, Interview by Tahrat Naushaba Shahid," Dhaka (February 2013); "Head of Government Department 3, Interview by Tahrat Naushaba Shahid," Dhaka (January 2013); "Professor 4, Interview by Tahrat Naushaba Shahid," Dhaka (February 2013); "Professor 2, Interview by Tahrat Naushaba Shahid."

<sup>325</sup> "Leading Ngo Activist 2, Interview by Tahrat Naushaba Shahid," Dhaka (January 2013); "Leading Lawyer Activist 3, Interview by Tahrat Naushaba Shahid."; "Leading Lawyer Activist 2, Interview by Tahrat Naushaba Shahid."; "Professor 5, Interview by Tahrat Naushaba Shahid," Dhaka (January 2013).

<sup>326</sup> Ali Riaz, "The Politics of Islamization in Bangladesh," in *Religion and Politics in South Asia*, ed. Ali Riaz (London: Routledge, 2009), 65.

struggle against religious extremism, and as a watershed event in the protection of secularism and women's rights. ... In private, however, some feminists expressed serious reservations about the scope of the ruling and the potential difficulties of countering the resistance that would inevitably follow."<sup>327</sup>

The conclusion of the 2001 judgment even implies that religious education encourages extremism: "we find it necessary to answer a question as to why a particular group of men, upon either getting education from maddrasah or forming a religious group, are becoming fanatics with wrong views. There must be defect [*sic*] in their education and their attitude."<sup>328</sup> This statement was followed with the suggestion that the Bangladeshi education system be made more uniform. This would have added to the anger of the religious right, madrassah students and graduates in particular. Seven people died in the ensuing clashes,<sup>329</sup> with one legal analyst commenting, "I don't really know how that judge lives with himself," while another suggested that he had gone as far as to do a disservice to his office as Justice.<sup>330</sup> The ruling itself is strikingly brief for a Supreme Court judgment, at a length of only seven pages explaining its reasoning.<sup>331</sup>

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<sup>327</sup> Dina Mahnaz Siddiqi, "Islam, Gender and the Nation: The Social Life of Bangladeshi Fatwas," in *Communalism and Globalization in South Asia and Its Diaspora*, ed. Deana Heath and Chandana Mathur (London: Routledge, 2011), 195.

<sup>328</sup> M. Gholam Rabbani and Nazmun Ara Sultana, "Judgment on Writ petition No. 5897 of 2000: In the Matter of 'an Application under Article 102 of the Constitution of the People's Republic Bangladesh' and in the Matter of 'Editor, the Daily Banglabazar Patrika and Two Others' Versus 'District Magistrate and Deputy Commissioner, Nagaon'," ed. The Supreme Court of Bangladesh High Court Division (Dhaka: The Dhaka Law Report, 2000), 6.

<sup>329</sup> "Ban Fatwa, Make It Punishable Offence," *The Daily Star (online)*, 14 February 2012.

<sup>330</sup> "Leading Lawyer Activist 3, Interview by Tahrat Naushaba Shahid."; "Leading Lawyer Activist 2, Interview by Tahrat Naushaba Shahid."

<sup>331</sup> M. Gholam Rabbani, "Judgment on Writ petition No. 5897 of 2000: In the Matter of 'an Application under Article 102 of the Constitution of the People's Republic Bangladesh' and in the Matter of 'Editor, the Daily Banglabazar Patrika and Two Others' Versus 'District Magistrate and Deputy Commissioner, Nagaon'," ed. The Supreme Court of Bangladesh High Court Division (Dhaka: The Dhaka Law Report, 2000).

The judgment was stayed after these protests, and from here, perspectives differ greatly on why the Appellate Division took another decade to rule on the subsequent appeal. One such perspective is, as mentioned before, that those rights' activists and associated lawyers who were 'anti-fatwa' but 'pro-moderation' were forced to wait for lawyers supported by the religious right to react and initiate new cases to be considered for a hearing. The other is that, like any other case in the Bangladeshi judicial system, the everyday administrative backlog required that a decade would have to pass before the original High Court case could come up again for review.<sup>332</sup> However, my analysis of Supreme Court judgments, listed by date in Appendix C, suggests that this backlog usually leads to a delay of five to six years (as with the Fifth Amendment case) rather than a full decade, so it is likely that influences from the BNP-led government between 2001 and 2006, allied as they were with several Islamist parties, and followed by a military-backed caretaker government from 2006 to 2008, were sensitive to further provoking the Islamic right until AL returned to power in 2009.

After two high-profile fatwa-related killings,<sup>333</sup> the issue came to a head in May 2011 with an Appellate ruling. There is notably very little available analysis or attention brought to what would seem to be a significant development prior to this ruling - the High Court Division also heard three new Writ Petitions in 2010, during which it once again banned punishment by fatwa but not the issuance thereof. Even more interestingly, one of the two justices hearing these Petitions was Hindu,<sup>334</sup> a feature that was likely to have been flagged as

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<sup>332</sup> "Professor 2, Interview by Tahrat Naushaba Shahid."

<sup>333</sup> "Bangladesh Girl Bled to Death after Lashing Say Doctors," *BBC News (online)*, 9 February 2011.

<sup>334</sup> Syed Mahmud Hossain and Gobinda Chandra Tagore, "Judgment on Writ Petition No.5863 of 2009 With writ Petition No.754 of 2010 And writ Petition No.4275 of 2010: in the Matter of 'an Application under Article 102 of The constitution of the People's Republic Of bangladesh' and in the Matter of 'Bangladesh legal Aid and Services Trust and Others Versus Government of Bangladesh

highly problematic by many of those opposing the banning of Islamic religious edicts. The absence of protests and even media attention is perhaps due to the fact that the 2010 High Court ruling on the three petitions was made while the upcoming, higher level Appellate ruling on the fatwa ban of 2001 was still pending. One analyst also pointed out that the 2010 judgment had yet to be approved for issuance in the public domain.<sup>335</sup>

During the course of the Appellate hearing in 2011, the Court carefully ensured consultation with five Islamic scholars nominated by the Islamic Foundation, a body that describes itself as autonomous but is administered by the Ministry of Religious Affairs.<sup>336</sup> The Foundation is largely seen as an extension of the Bangladeshi government and frequently lacks credibility on religious affairs with orthodox Muslim scholars, depending on the relationship of those scholars with whichever party is in power at any given time. The five scholars consulted on the 2011 case suggested that fatwa were intended to be informed opinions rather than definitive legal rulings.<sup>337</sup> They also added, however, that “Banning fatwa will ultimately put a ban on the holy religion of Islam. As a result, all the people of the state would become sinner [*si*] for lack of adequate knowledge on Islam.”<sup>338</sup> Meanwhile, the head of the right wing group Islami Oikyo Jote at that time, who was also responsible for organising the riots that followed the declaration of the National Women Development Policy during the same year, “claimed that no court can ban *fatwa* [and] threatened to wage a vigorous movement if *fatwa* was banned.”<sup>339</sup>

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and Others'," ed. The Supreme Court of Bangladesh High Court Division (Special Original Jurisdiction) (Dhaka: The Dhaka Law Report, 2010).

<sup>335</sup> "Leading Lawyer Activist 3, Interview by Tahrat Naushaba Shahid," Dhaka (May 2014).

<sup>336</sup> "Ulema Favour Fatwa," *The News Today (online)* 2012.

<sup>337</sup> Ibid.

<sup>338</sup> Fahud Khan, "Sc Verdict on 'Fatwa' Thursday," *Priyo News (online)*, 11 May 2011.

<sup>339</sup> "Ulema Favour Fatwa."

Appellant lawyers, considered in private to be allied with the Jamaat-e-Islami,<sup>340</sup> argued their case using the Eighth Amendment. If Islam is the state religion, they said, then all fundamental rights must be interpreted in that light, and the right to give and receive fatwa must be seen in this light as well. They did, however, concede that their argument could not justify the carrying out of a fatwa sentence, that is, the actual punishment of individuals based on such an edict. Lawyers opposing the appeal, on the other hand, argued that Islam did not characterise the country's larger legal framework and was restricted to family laws alone.<sup>341</sup>

The Appellate Division finally adjusted the High Court's initial 2001 ban to a 'regulation,' specifying that fatwa can indeed be pronounced, but only by individuals with the appropriate qualifications to do so, further specifying that no fatwa can be issued in defiance of existing laws of the country and, even when issued, cannot be enforced;<sup>342</sup> there were no details included in this judgment on what such qualifications might entail. This was seen as a happy compromise, welcomed by both sides in the case. Opposition to the judgment in public forums was minimal, and the choice to consider the voices of the ulema was seen as responsible for this development, despite the aggressive words expressed by the Islami Oikyo Jyote in response to the Supreme Court's earlier judgment.

Notably, the 2011 Appellate case was presided over by the very same Chief Justice who declared the Fifth Amendment excluding secularism to be unconstitutional, A. B. M. Khairul Haque. At the time of adjusting the earlier fatwa ban, he said that "the High Court verdict should have specified the type of fatwa... that would be illegal, instead of saying 'all

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<sup>340</sup> "Leading Lawyer Activist 2, Interview by Tahrat Naushaba Shahid."

<sup>341</sup> Ibid.

<sup>342</sup> "Bangladesh Court Lifts fatwa Ban," *BBC News (online)*, 12 May 2011.

kinds of fatwa.”<sup>343</sup> As of July 2013, he is the current Chairman of the Bangladesh Law Commission following the chairmanship of Shah Alam.<sup>344</sup>

One area of the case that was flagged as a major concern by women’s right activists was the use of Islam as a state religion.<sup>345</sup> The Fifteenth Amendment, in this context, has “cast a dark shadow” in one analyst’s view, in that it affirmed that the status of Islam as a state religion was not to be removed.<sup>346</sup> The implication of the fatwa case and the later Fifteenth Amendment is that family laws continue to come under the constitutional protection of religious freedom, and landmark cases discussed here and in Chapter IV demonstrate that religious freedom has tended to be interpreted as a group right, defined not by individual choice of religious practice but by group consensus on what those practices should be. While there may be more scope to argue for women’s rights within a robustly secular framework that pays no heed to the limits of religious tradition, Muslim family law cases continue to have to be argued from within an Islamic framework, and can only go as far as reinterpretations of Islamic traditions may go. As the next chapter will show, this could pose only as much of a challenge as those who are interpreting such traditions choose to make it, but the mere mention of religious interpretation in a public forum is a red flag for activists throughout the political spectrum.

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<sup>343</sup> M. Moneruzzaman, "Ag Opposes Blanket ban on Fatwa," *New Age (online)*, 28 April 2011.

<sup>344</sup> Former Justice Khairul Haque is also a former commissioner on the Rana Plaza Commission, set up in conjunction with the International Labour Organization and responsible for distributing the Rana Plaza Trust Fund of US\$ 30 million, created as compensation for the victims and victims’ families of the Rana Plaza garment factory collapse in 2013 that killed over a thousand people and injured two thousand more. ("Law Commission: Members," The Law Commission, Government of the People's Republic of Bangladesh, <http://www.lc.gov.bd/members.htm>.)

<sup>345</sup> "Leading Lawyer Activist 2, Interview by Tahrat Naushaba Shahid."

<sup>346</sup> Ibid.

As mentioned earlier, in the context of family law cases reported at the Bangladesh Supreme Court level so far, there are only a small number of cases where the Court has passed judgment using the Constitution as a point of reference, all to do with conjugal rights.<sup>347</sup> In three cases, *Sharmin Hossain alias Rupa vs. Mizanur Rahman*, *Nelly Zaman vs. Giasuddin*, and *Sherin Akhter and another vs. Md Ismail*, the High Court held that ordering a husband and wife to live together would be unconstitutional, suggesting that the Constitution guarantees “women’s equality before the state and in public life, and to life, personal liberty, and body.”<sup>348</sup> In *Nelly Zaman vs. Giasuddin Khan*, the sexual equality clause of the Constitution’s Article 28 was cited and, in *Khodeza Begum vs. Sadeq Sarkar*, the High Court suggested that, based on the same clause, the law on restitution of conjugal rights was so unconstitutional as to be entirely void.<sup>349</sup> This was subsequently overruled in *Md. Chan Mia vs. Rupanabar* and *Hosna Jaban (Munna) vs. Md. Shajaban (Shaju)* – both cases where women petitioned for, rather than against, conjugal rights – when the High Court pointed out that conjugal rights are reciprocal and therefore not in violation of the clause.<sup>350</sup> Chapter IV will discuss these individual family law cases and their implications in greater detail.

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<sup>347</sup> ""Will I Get My Dues ... Before I Die?" Harm to Women from Bangladesh' Discriminatory Laws on Marriage, Separation, and Divorce," (USA: Human Rights Watch, 2012), 10.

<sup>348</sup> *Ibid.*, 77.

<sup>349</sup> Hoque and Khan, "Judicial Activism and Islamic Family Law: A Socio-Legal Evaluation of Recent Trends in Bangladesh," 233-4.

<sup>350</sup> *Ibid.* And Faustina Pereira, *The Fractured scales: The Search for a Uniform Personal Code* (Calcutta: Stree, 2002), 90.

### 3. Conclusion: Judicial Interpretation is Key

With its 15 amendments, the Constitution of Bangladesh remains a continually evolving document and highly reflective of party politics. The Constitution continues to leave a great deal open to the intersection of legal and political argument, providing an introduction to the conflicting issues and contexts at stake in pursuing changes in family laws in Bangladesh. In terms of the outcome under analysis here, that is, personal status laws for Muslim women, the implications of these amendments have been limited. And yet the overwhelming majority of women's rights activists in Bangladesh continue to promote secularism as a means of attaining women's equality in personal laws. Part of the reasoning behind this is that, as prominent activist and international relations analyst Meghna Guhathakurta has suggested, while women's rights in the economic and political sphere have tended to be "most heavily determined by the flows of the political economy than by Islamist ideology," "Islamization has tended to influence restrictions on women's rights in the legal arena."<sup>351</sup> The prevailing perception among such activists is that opening the door of religion leaves women's rights open to discriminatory interpretations of Islam.

As Mounira Charrad shows in the case of Algeria, Tunisia, and Morocco,<sup>352</sup> religion in Bangladesh, too, has been employed as a means of consolidating power when competing with other bonds such as Bengali nationalism. This is evident in the constitutional amendments made during governments headed by BNP and Jatiya Party versus those headed by AL. Still seen as representative of the larger independence movement founded on Bengali nationalism, AL already has a strong base of support outside of the Islamist right

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<sup>351</sup> Chowdhury, "'Transnationalism reversed': Engaging Religion, Development and Women's Organizing in Bangladesh," 416-17.

<sup>352</sup> Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco*.

and, during its terms in power, some judges have also shown a tendency to take greater risks in raising the ire of the right in their interpretations of the Constitution relative to terms when BNP has been in power.

So the history of the Constitution and its many amendments in moderating the role of secularism versus the country's majority religion of Islam demonstrates that the Constitution has largely been amended in line with the agendas of ruling parties. While this may lead to the conclusion that these parties are expressing their positions on a largely imaginary line in the sand between secularism and Islam, that line may be a very real one in terms of legislative developments, even if it appears to be less so in the actual practice of the law. My interviews of scholarly and legal experts within Bangladesh suggest a genuine ideological conflict between secularism and Islam as a representation of the country's 'core values' and a common perception among them that the two are diametrically opposed. However, it is debatable whether a genuine ideological conflict lies between the two main parties of AL and BNP or if, instead, they choose to tap into and exacerbate the sentiments of their most easily attracted voters.

In some ways, changes to the Constitution have been largely cosmetic in terms of their potential impact on the practice of the law so far, and almost certainly so on family laws. The processes behind those changes, however, do reflect trends and conflicts in Bangladeshi politics that find their way into family law cases. A hypothesis emerges from the cases discussed here that will be further tested in the following chapter, that legislative change requires the congruence of a specific political environment or, in this case, a specific party – or in the past, dictator - in power, and a proactive judiciary. Does this hold true for legislative developments concerning women beyond the Constitution? Chapter IV explores

this question, and it is worth noting that a number of the judges in key cases discussed in Chapter III overlap with those of landmark family law cases cited in Chapter IV (and listed in Appendix C).

Just as Islamic jurisprudence can be interpreted to be both discriminating against and promoting of women's rights, the Constitution can be interpreted as requiring for such laws to be interpreted and modified only within the context of Islamic jurisprudence or ignore the influence of Islam altogether. The meaning of secularism, too, varies across countries and across time, and cannot be assumed to refer to a single approach to religion. The factor that emerges as key to resolving this confusion is the power and inclinations of judges in interpreting the Constitution. As the next chapter will discuss, judges have tended to show less of a tendency to reflect the agenda of ruling parties than the Constitution they are responsible for interpreting, but political biases still emerge from the evidence presented. In the end, the Constitution is more a reflection of trends in politics than of potential patterns in legislation relevant to women's equality in family laws.

## CHAPTER IV

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### Sexual Equality in Family Laws: A Fear of Change

Chapter II described how the history of personal status laws in what is now Bangladesh has remained relatively static, while Chapter III discussed the extent to which religious practices carry legal authority through the country's Constitution. Chapter IV builds on the previous chapter to show that personal status laws have remained relatively static relative to other Bangladeshi laws enhancing women's rights, and explains why this might be the case. As was evident in the fatwa case discussed in Chapter III, and will become more so in this chapter, the state and the judiciary have both seen fit to protect women's physical security with increasingly harsh and specific penalties, even when this may clash with perceptions of religious practices. The same, however, cannot be said for divorce, polygamy, citizenship, inheritance, and other areas of the legal system relevant to women's status within a family, be they related to their financial or social equality with men.

I will argue that two notable patterns emerge in this chapter. First, I confirm that there has been little change in personal status legislation since the country's independence beyond procedural mainstreaming. Second, as I briefly touched upon in Chapter III, I will provide further evidence that judicial interpretations of freedom of religious practice are crucial to the ways in which the law is applied, and can vary immensely both in favour of and against protecting women's equality. I also continue Chapter III's discussion of religion being perceived as a hindrance to women's rights by secular rights activists or, to be more specific, the way religious discourse has been employed in political activity, limiting the

boundaries of legislation and judicial interpretation. I show that the lack of change in family laws, in the end, is due to a continuing view of women as victims in need of protection rather than agents deserving of legal equality in every area of life.

## 1. Family Laws, Identity Formation, and Implementation

In her work analysing women and family law for Muslims in post-independence Tunisia, Algeria, and Morocco, Mounira Charrad explains the trend towards radical reform in Tunisia, conservative policies in Morocco, and long delays in Algeria before choosing a conservative policy by analysing the nature of nation-building and state formation. She discusses the differing roles that religion had to play in those processes, suggesting the following:

“State formation involves the expansion of administrative reach over a territory combined with authority within national boundaries. Nation building refers to the development of a collective identity and the integration of separate collectives into a national whole. Some countries face nation building and state formation all at once. Others already have a collective identity when they develop a central state. Still others become national entities only after the development of a central state.”<sup>353</sup>

Given the relative ethno-linguistic homogeneity of what is now Bangladesh, it can easily be said to have had a strong collective identity prior to the development of a central state.<sup>354</sup> Nevertheless, it is also true that a collective identity is an ever-

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<sup>353</sup> Ibid., 18.

<sup>354</sup> A collective identity that, admittedly, still ignores both non-Bengali Bangladesh such as Chakmas, Garos, and Santals, and variations of Bengali Bangladesh such as Sylhet, where the last Sylheti Nagri script printing press (distinct from but related to Bengali script) was destroyed during the 1971 war.

evolving one. This is perhaps most obviously embodied in the country's Constitution and its Amendments. As with shifts in the status of Islam in the Constitution and competing party claims to defining an authentic Bangladeshi identity that these shifts reflect, much of the material presented here from individual landmark cases discusses competing interpretations of societal norms regarding the role of religious interpretation in determining women's status. Furthermore, in terms of the legislation underpinning such cases, I argue that they demonstrate both competing understandings of current socio-legal norms as well as varying aspirations for future such norms.

How are these norms on women's status in a household or family tied to the collective identity that Charrad refers to? Family laws determine the "rules governing marriage and birth ... [and] who can become a member of the group and who is responsible for maintaining its values and ways of life."<sup>355</sup> They "fulfil a task similar to that of citizenship law for a state ... [they] provide the bonds which connect the past to the future, by identifying who is considered part of the tradition"<sup>356</sup> or, in Charrad's work, part of the nation.

Besides the significance of women's family laws to national identity and perceptions of social order, the effective implementation of these laws also influence what may or may not come to pass in terms of legislation. Using the example of Senegal, Alfred Stepan suggests that, in democratic environments, the frequency of polygamy may be reduced but, unless the majority of public opinion opposes this practice, it is unlikely to be effectively

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<sup>355</sup> Htun and Weldon, "Sex Equality in Family Law: Historical Legacies, Feminist Activism, and Religious Power in 70 Countries," 6.

<sup>356</sup> Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001), 45.

abolished.<sup>357</sup> The discourse around personal status laws suggests that effective implementation is recognised as a constraint in introducing change to certain areas. A lack of change is difficult to test as a case, however. Although not directly related to family law, the landmark fatwa ban followed by regulation discussed in Chapter III perhaps best illustrates the recognition of existing social norms and their constraints on implementation over the course of a single case.

It is clear from the aforementioned fatwa ban and several other cases discussed in detail here, moreover, that judges have tended to show more activism in areas concerning the role of religion than parliament. In a democratic environment where the tenure of judges far outstrips that of elected officials, judicial interpretations of existing laws may vary greatly. As a result, legislative changes passed by parliament do not paint a comprehensive picture of the state of family laws for Muslims in Bangladesh. The remainder of this chapter, therefore, discusses both legislation and their interpretation in individual case judgments, touching upon issues of judicial activism.

I find that legal reforms relevant to violence against women are the only significant ones enhancing women's rights that have been passed since the country's independence. Partly in response to the realities of implementation, in cases where the law relates to religion as it does in matters of personal or family laws in Bangladesh, changes have been rare and largely of a procedural nature. I show that, even where violence against women has overlapped with religious concerns, legislation has faced greater challenges in terms of being passed relative to laws that are less easily associated with religion.

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<sup>357</sup> Stepan, "Rituals of Respect: Sufis and Secularists in Senegal in Comparative Perspective," 401.

I also argue that a recent trend may have emerged in terms of the Bangladeshi government showing increasing willingness to make interpretations of family laws in favour of women, a finding that will be further discussed in Chapter V. Additionally, judicial interpretations have demonstrated sympathy towards enhancing women's rights, and this is especially the case where child custody or the granting of divorce is concerned, but less so where financial resources are at stake as in the case of maintenance or inheritance. I offer evidence of these trends, identifying factors that are common across laws and judgments favourable to women.

## 2. Existing Legislation and Structure of the Judiciary

The Bangladeshi judiciary consists of two levels: the Supreme Court, with Appellate and High Court Divisions, and subordinate courts. The Chief Justice, head of the judiciary, is appointed by the President, and other judges of the Supreme Court are appointed upon consultation between the two; terms of Supreme Court judges end at the age of 67 years.<sup>358</sup> The 1974 Muslim Marriages and Divorce (Registration) Act enforced the civil registration of Muslim marriages, while the 1985 Family Courts Ordinance established Family Courts as the courts of first instance in cases of personal or family law. Their jurisdiction includes exclusive coverage of marital contract issues such as conjugal rights and dower, divorce, maintenance, and child custody.<sup>359</sup> Polygamy cases, on the other hand, are adjudicated in

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<sup>358</sup> S. M. Hassan Talukder, *Independence of Judiciary in Bangladesh: Law and Practice* (Dhaka: Book Syndicate, 1994), 94; *The Constitution of the People's Republic of Bangladesh*.

<sup>359</sup> Family Courts were first set up in Pakistan with the West Pakistan Family Courts Act of 1964 upon the recommendation of the Commission on Marriage and Family Laws, subject to the provisions of the MFLO of 1961. They were intended to deal with marital disputes swiftly and allow

criminal courts, while inheritance issues are addressed in civil courts, despite otherwise falling under the aegis of 'family law.' Unlike Pakistan and a number of other Muslim majority countries, Bangladesh does not have a specialised shari'a court.

Although I focus primarily on landmark cases that reach the Supreme Court, it is worth noting the number of cases heard at the level of Family Courts. They face a particularly high case load in densely populated areas, and "... one former judge said that he dealt with a backlog of 700 family court cases in one district alone," while in "Dhaka, for instance, there are only three family courts to serve a vast area covered by '43 police stations.'"<sup>360</sup> Approximate numbers show the case load at the level of these three Family Courts, before the occasional high-profile case makes its way all the way to the level of the Supreme Court: in 2009, the number varied from 850 to 1102 cases across each of the three Dhaka courts, while in 2010 it ranged from 706 to 958 cases across the same courts.<sup>361</sup> However, my interview data from 2014 suggests that the three Family Courts of Dhaka each address approximately up to a 100 cases per day.<sup>362</sup> Many of these cases address simple procedural issues, but the extreme disparity between my data and that of earlier reports suggests that one or both may be unreliable. Multiple sources suggest, however, that due to the general overload these Courts face, "family matters are not given the due attention and

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women easier access to justice. The 1964 Act, however, had no bearing in East Pakistan, and Bangladesh set up Family Courts over two decades later with the 1985 Family Courts Ordinance. (Serajuddin, *Shari'a Law and Society: Tradition and Change in South Asia*, 67-68.)

<sup>360</sup> "Will I Get My Dues ... Before I Die?" Harm to Women from Bangladesh' Discriminatory Laws on Marriage, Separation, and Divorce," 63-64.

<sup>361</sup> Ibid.

<sup>362</sup> "Judge 4, Interview by Tahrat Naushaba Shahid," Dhaka (June 2014); "Judge 2, Interview by Tahrat Naushaba Shahid," Dhaka (June 2014); "Judge 1, Interview by Tahrat Naushaba Shahid," Dhaka (June 2014).

time necessary for proper disposal of cases.”<sup>363</sup> Cases at the Family Courts level are not reported as Supreme Court cases are and, as the former remain confidential, are both extremely difficult to access and possibly unethical to use. This study focuses, however, on interpretations of legislation at the very highest levels of the judiciary.

### **a. Family Laws Today**

The remainder of this section describes the regulations that apply to each area of personal status law for Muslim women. In theory, marriage under Bangladeshi Islamic law is a contract where there is a sum of money or other form of property transferred from a husband to his wife prior to consummation of marriage, although half of this payment can be deferred until the contract is dissolved, either by divorce or death. Traditionally, the dower is negotiated by male guardians of the bride and groom prior to wedding vows and the dower amount can vary greatly between families. Men are responsible for all financial costs of the family. Husbands are responsible for their wives’ and children’s maintenance even if wives are able to provide for themselves or choose to reside outside of their marital home,<sup>364</sup> although the latter case becomes considerably more complex in the case of conjugal relations claims. Any property or income that the wife owns or gains, prior to or during the course of the marriage, is hers and hers alone. However, all of this frequently diverges greatly from practice.

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<sup>363</sup> Pereira, *The Fractured scales: The Search for a Uniform Personal Code*, 193; "Professor 5, Interview by Tahrat Naushaba Shahid."; "Leading Lawyer Activist 2, Interview by Tahrat Naushaba Shahid."; "Leading Lawyer Activist 3, Interview by Tahrat Naushaba Shahid."

<sup>364</sup> Sayeeda Anju, "Muslim Wives' Right to Maintenance in Bangladesh: The Role of Ngos in Rajshahi District," *Rajshahi Law Journal* (2005): 87.

In case of death, as pointed out in Chapter II, the Quran outlines inheritance shares to different heirs with great specificity, with male relatives generally receiving double of their female counterparts. For example, in the event of a man's death, his son will receive double the share of his daughter(s). Only a third of a person's estate can be assigned to a specific heir or group of heirs through a will in Bangladesh. In reality, women are rarely able to access even their inequitable inheritance shares from either their natal or marital families, often giving up the right to demand their shares in the hope of continued support, financial and otherwise, from their family networks. As Shahra Razavi points out in the context of South African widows, "even where women have been listed as independent household heads and as beneficiaries in their own right, their access to land has been mediated overwhelmingly through their membership in patriarchal households."<sup>365</sup> Although her study suggests that women would like greater equality between the sexes, they would like to "redress the inequalities in gender relations that hamper their access to household resources and impinge negatively on their security, and not necessarily to opt out of the household in order to make it on their own in isolation."<sup>366</sup>

With regard to divorce, the Muslim Marriages and Divorces (Registration) Act of 1974 includes a Section 6 where divorce by a wife can only be registered if her right to initiate divorce was delegated to her by her husband in the marriage contract. There is a tendency to include this stipulation in marriage contracts,<sup>367</sup> assuming that marriages are in reality registered as required by law in the first place. It is important to note that a woman gives up her right to post-divorce maintenance upon initiating divorce through this

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<sup>365</sup> Shahra Razavi, "Liberalisation and the Debates on Women's Access to Land," *Third World Quarterly* 28, no. 8 (2007): 1497.

<sup>366</sup> Ibid.

<sup>367</sup> Hoque, Islam, and Kamal, "Opinion on the Study Report for Marriage, Inheritance And family Laws in Bangladesh Towards a Common Family Code," 9-12.

mechanism, known as 'khula.' Additionally, the 1985 Muslim Family Courts Ordinance allows women to initiate divorce at Family Courts, with or without being delegated the right in their marriage contracts, on the basis of any one of nine grounds for divorce, including such grievances as lack of maintenance, impotence, insanity or serious illness, imprisonment, and cruelty, be it physical or otherwise. Unfortunately, in reality, cases of cruelty are often converted to khula divorces so that women are not only abused during the course of their marriage but also left without any post-divorce maintenance upon initiating divorce proceedings.<sup>368</sup> Men, on the other hand, are able to divorce their wives at any time, without any specific grounds for doing so. They must give written notice of divorce to the head of local government before the divorce can be deemed complete.

In non-khula divorces, the period of post-divorce maintenance from ex-husband to ex-wife or 'iddat' only lasts for the length of three menstrual cycles, that is, the length of time seen as ensuring that a divorced woman is not carrying her ex-husband's child. This was contested in the landmark 1995 case *Hefzur Rahman vs. Shamsun Nahar Begum*, when the High Court Division of the Supreme Court ruled for maintenance until remarriage.<sup>369</sup> However, the Appellate Division overturned this precedent-setting decision in 1998 and returned to the traditional iddat period.<sup>370</sup>

Men are permitted to be married to up to four wives simultaneously in classic Hanafi law, with the permission of other wives and the stipulation that they are able to treat all four wives equally. In Bangladesh, Section 6 of the Muslim Family Laws Ordinance of 1961,

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<sup>368</sup> Monsoor, "Dissolution of Marriages on Test: a Study of Islamic Family Law and Women," 30.

<sup>369</sup> *Hefzur Rahman (Md) Vs. Shamsun Nahar Begum and Another*, 47 Dhaka Law Report 54(1995).

<sup>370</sup> Anju, "Muslim Wives' Right to Maintenance in Bangladesh: The Role of Ngos in Rajshahi District," 88; *Hefzur Rahman (Md) Vs. Shamsun Nahar Begum and Another*, 51 Dhaka Law Report 172(1999).

established under Pakistani rule, requires that husbands have written permission from a formal Arbitration Council for second, third, and fourth marriages. Failure to notify the Council is penalised by full payment of dower money to the earlier wife or wives, a fine of a mere 10,000 Taka, or up to one year of imprisonment, rather than an invalidation of marriage.<sup>371</sup> Additionally, “statistics reveal that permission for a second marriage is hardly ever refused by the Arbitration Council.”<sup>372</sup>

Child custody is determined by the Guardians and Wards Act 1890, passed during the time of the British Raj, where a divorced Muslim mother has custody over boys until the age of seven years and girls until puberty, as prescribed by classic Hanafi law. However, case history suggests that the Bangladeshi judiciary has generally perceived custody with the mother as being in the best interests of the child, and this has taken primacy over all other considerations. An examination of the Appellate Division judgment in *Muhammad Abu Bakar Siddique vs. S. M. A. Bakar and others* in 1985 shows that the mother’s case was argued on the basis of whether the right of *ijtihad* could be exercised in her favour.

The judges considered both the Hedaya and the Fatawa-e-Alamgiri and, in differing from the position of the Hedaya, pointed out that there is no clear rule for child custody in either the Quran or in the Sunnah.<sup>373</sup> Given the lack of a unanimous position on this between the four Sunni maddahib, they pointed out that existing Hanafi laws “would not seem to have any claim to immutability” on child custody.<sup>374</sup> Their judgment broke from traditional Hanafi law by agreeing that *ijtihad* was permissible in this case, and that children’s

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<sup>371</sup> Hoque and Khan, "Judicial Activism and Islamic Family Law: A Socio-Legal Evaluation of Recent Trends in Bangladesh," 215-16.

<sup>372</sup> Tamanna, "Personal Status Laws in Morocco and Tunisia: A Comparative Exploration of the Possibilities for Equality-Enhancing Reform in Bangladesh," 330-31.

<sup>373</sup> *Md. Abu Bakar Siddique Vs. S. M. A. Bakar and Others*, 38 Dhaka Law Report 106, 113-14 (1986).

<sup>374</sup> *Ibid.*

welfare should take precedence over all other considerations.<sup>375</sup> Martha Nussbaum observes that the judges on this case were in a relatively non-controversial position due to the lack of consensus among maddahib, and the Court did not attempt to make any broad conclusions in terms of women's rights.<sup>376</sup> Their judgment nevertheless has continuing impact on child custody cases. Using *Muhammad Abu Bakar Siddique vs. S. M. A. Bakar and others* as precedent, the 1997 High Court case of *Nargis Sultana vs. Md. Amirul Bor Chowdhury* also gave child custody to a mother despite a prior agreement that surrendered her right to that custody. The 1997 judgment included few references to an Islamic jurisprudential basis for the decision but much the same sentiment in terms of children's welfare being best protected by mothers.<sup>377</sup>

## **b. Post-Independence Changes to Family Laws**

Historically, as Chapter II revealed, the most significant changes to family laws in what is now Bangladesh were made during the British Raj and Pakistan eras. The next table demonstrates that, since independence, legal changes relevant to violence against women are the only significant ones that have been passed with regard to enhancing women's rights. They include: the 1980 Dowry Prohibition Act, the 1983 Cruelty to Women (Deterrent Punishment) Ordinance, the 1984 Child Marriage Restraint (Amendment) Ordinance, the 1995 Oppression of Women and Children (Special Provisions) Act, the 2000 Repression against Women and Children Act, the 2002 Acid Crime Prevention and Acid Control Act,

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<sup>375</sup> Ibid.

<sup>376</sup> Martha C. Nussbaum, *Sex and Social Justice* (New York; Oxford: Oxford University Press, 1999), 99.

<sup>377</sup> *Nargis Sultana Vs. Aminul Bor Chowdhury*, 50 Dhaka Law Report 532(1998).

the 2010 Domestic Violence (Protection and Prevention) Act, and the 2012 Human Trafficking Suppression and Deterrence Act. On the other hand, only two laws were instituted to change family laws for Muslims, with no changes for any other religious group during the period under analysis: the 1974 Muslim Marriages and Divorce (Registration) Act and the 1985 Family Courts Ordinance.

These two changes focus on procedural matters, reformed to expand women's access to justice rather than change their substantive rights within the law itself. Procedural issues are not insignificant to the equalisation of rights in matters of family law,<sup>378</sup> however, as gaining access to justice is an ongoing obstacle to the overwhelming majority of the population in Bangladesh, and women in particular. There is no specific pattern evident in the nature of the ruling party in power and the legislation that has been passed during that party's term, as there was in the case of the role of religion in the Constitution. I would argue that this is due, in part, to the fact most of those changes in legislation have been about violence, a non-controversial area of the law that rarely requires a reinterpretation of the role of women in Bangladeshi society. This should not be interpreted, however, as an indication that personal status laws have never come under scrutiny. Instead, they have come under repeated scrutiny and efforts at both enhancing and further limiting women's equality have been met equally with little response from successive governments other than the maintenance of the status quo, discussed in further detail in Section 4 of this chapter.

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<sup>378</sup> "Leading Lawyer Activist 2, Interview by Tahrat Naushaba Shahid."

<b>Table 2. Timeline of Legal Enactments: Violence and Personal Status</b> (Enactments on personal status highlighted)		
<b>Year</b>	<b>Ruling Party</b>	<b>Legislation</b>
1974	Awami League	<b>Muslim Marriages and Divorce (Registration) Act:</b> Enhanced the registration requirements of the Muslim Family Laws Ordinance of 1961 by enforcing the civil registration of Muslim marriages, although failure to register was to be punished with a prison sentence and/or fine rather than invalidating the marriage
1980	Bangladesh Nationalist Party	<b>Dowry Prohibition Act:</b> Penalised the murder or attempted murder of a woman for dowry by her husband or his family with death or life imprisonment
1983	Military dictatorship (of President Ershad, later head of the Jatiyo Party)	<b>Cruelty to Women (Deterrent Punishment) Ordinance:</b> Outlawed abduction of women and acid attacks on women, and mandated the death penalty or life imprisonment for causing the death of a rape victim, expediting court procedures and enhancing punishments for these crimes and providing the first piece of legislation explicitly outlawing women-trafficking
1984	Military dictatorship (of President Ershad)	<b>Child Marriage Restraint (Amendment) Ordinance:</b> Amended the Child Marriage Restraint Act of 1929 to raise the age of marriage from 14 to 18 years for girls and from 18 to 21 years for boys but, as with the 1929 Act, penalises child marriages without invalidating them <sup>379</sup>
1985	Military dictatorship (of President Ershad)	<b>Family Courts Ordinance:</b> Specified the jurisdiction and functions of Family Courts as courts of first instance for personal status cases and limiting them to civil suits, thus implementing a portion of the Muslim Family Laws Ordinance of 1961 that was not promptly implemented in East Pakistan after the 1961 Ordinance was originally passed
1995	Bangladesh Nationalist Party	<b>Oppression of Women and Children (Special Provision) Act:</b> Repealed the 1983 Ordinance so that this new act with more severe penalties was to take precedence, specifying death and life imprisonment for acid attacks leading to death, rape leading to death, gang rape, and attempts to cause death while committing rape, as well as life imprisonment for women-trafficking and holding children for ransom

<sup>379</sup> Although this may not be a form of legislation directly related to violence, it can have an impact on domestic violence-related issues in the case of young women and girls.

2000	Awami League	<b>Repression against Women and Children Act:</b> Enhanced earlier laws on violence against women, including the recognition of sexual assault and sexual harassment as crimes and the provision of 'special tribunals' to keep women in protective custody - against their will, if necessary - for their safety
2002	Bangladesh Nationalist Party	<b>Acid Crime Prevention Act and Acid Control Act:</b> Introduced the death penalty for acid attacks and restricted sales and imports of acid, making penalties on such attacks harsher and highlighting the increasing concern over this particular form of violence against women
2010	Awami League	<b>Domestic Violence (Protection and Prevention) Act:</b> Criminalised domestic violence in the form of physical, emotional, and sexual abuse, although spousal rape was not specifically prohibited
2012	Awami League	<b>Human Trafficking Deterrence and Suppression Act 2012:</b> Defined trafficking with greater specificity than before, prescribing penalties for trafficking as individuals (with a maximum punishment of life imprisonment) and as organised crime (with a maximum punishment of death), and made various provisions for the protection of victims <sup>380 381</sup>

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<sup>380</sup> M. Golam Sarwar, "Fighting against Human Trafficking," *The Daily Star (online)*, 18 February 2014.

<sup>381</sup> This may not be aimed exclusively at curbing violence against women, but trafficking is certainly a major concern for women in that they are particularly vulnerable to trafficking and especially sexual trafficking in Bangladesh (and elsewhere).

### 3. Judicial Interpretation

The ban on fatwa and their subsequent regulation by the Supreme Court, discussed in Chapter III, and a number of significant family law cases at this level reflect a willingness on the part of the judiciary to broaden interpretations of laws applicable to Muslims. “[While] statutorily enacted or modified *shari‘ah* law principles (such as those in the MFLO) have provided the judges with a relatively convenient and more secure opportunity to do justice to women by simply applying these statutory laws, factual and social circumstances have often demanded their progressive interpretation, eventually necessitating judicial engagement.”<sup>382</sup> This post-independence judicial trend follows from the Pakistan era, when judges began to depart from the rulings of earlier jurists to reassess existing understandings of the Quran and the Sunnah. “In a forceful defence of their right to depart from the ancient jurists, the Pakistani Supreme Court in *Mst. Khurshid Bibi vs. Muhammad Amin* PLD 1967 SC 97 [a case concerning the validity of an instance of polygamy and then divorce, ruled ultimately in favour of the wife Khurshid Bibi’s desire for a divorce] held : ‘If the opinions of the jurists conflict with the Qur’an and the Sunnah, they are not binding on Courts, and it is our duty, as true Muslims, to obey the word of God and the Holy Prophet (ati-ullah; wa’ati-ur-Rasul).’”<sup>383</sup>

Indeed, as discussed in Chapter II, the MFLO took advantage of precisely this trend to make instances of polygamy significantly more challenging to legitimise,<sup>384</sup> allow orphaned grandchildren to inherit from their grandparents, and enhance women’s rights to initiate

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<sup>382</sup> Hoque and Khan, "Judicial Activism and Islamic Family Law: A Socio-Legal Evaluation of Recent Trends in Bangladesh," 217.

<sup>383</sup> *Ibid.*, 212.

<sup>384</sup> Agnes, *Law and Gender Equality: The Politics of Women's Rights in India*, 38.

divorce. The majority of judgments according women greater equality have been in areas that allow reinterpretation within an Islamic legal framework. As I also point out in Chapter II, this is not possible for every area of family law, such as inheritance rights. The fact that inheritance laws are the least open to reinterpretation has led to little change in the equalisation of succession rights for women,<sup>385</sup> a lack of development that will be discussed in greater detail in the context of the National Women Development Policy in Chapter V.

Ayesha Shahid's work supports my findings. She argues that, even among family laws, some areas have seen a wider range of judicial interpretation than others. In her study comparing Pakistan and Bangladesh, she points out that:

“On the one hand, in matters relating to divorce, custody of children and payment of dower, the courts have taken a broader perspective by considering the ethical, moral, and universal principles of Islamic law. By doing so, the courts have avoided the literal interpretation of the Qur’anic text and have deviated from the strict/classical interpretation of Islamic laws. However, when it comes to the issue of post-divorce maintenance, the response of the judges has not been very sympathetic towards women.”<sup>386</sup>

Although some judges have made rulings with a view to enhancing women's rights regardless of existing laws, particularly in the arena of child custody, the same is not true of post-divorce maintenance. Even if a judge rules in favour of post-divorce maintenance, however small, an ex-husband can obtain a stay order on payment of this maintenance on the basis of a procedural loophole and, due to court backlogs, the case is not heard for three or four years. Pro-active judges, however, hear on such stays in groups, or in an “omnibus order,” to reduce delays in women receiving their maintenance.<sup>387</sup> In child custody cases,

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<sup>385</sup> An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law*, 46.

<sup>386</sup> Ayesha Shahid, "Post-Divorce Maintenance for Muslim Women in Pakistan and Bangladesh: A Comparative Perspective," *International Journal of Law, Policy and the Family* 27, no. 2 (2013): 201.

<sup>387</sup> "Leading Lawyer Activist 2, Interview by Tahrat Naushaba Shahid."

judges have even been known to carry out hearings of women and children in private for the sake of sensitivity; other judges, however, are not inclined to such special treatment.<sup>388</sup>

### **a. Landmark Cases in Family Law**

There are a number of instances where one division of the Supreme Court has taken a stance towards expanding women's rights while another took one of constraining them, as with the aforementioned *Hefzur Rahman vs. Shamsun Nahar Begum* cases. Described as "one of the most striking examples of Ijtihad in the modern Sunnite world,"<sup>389</sup> they mirror and were influenced by a landmark case in India similarly concerned with post-divorce maintenance, known as the Shah Bano case and that came to a head in 1985. In 1978, the Shah Bano case reached the Indian Supreme Court and, although Shah Bano eventually won maintenance beyond the traditional iddat period in 1985, she "backed down"<sup>390</sup> and did not accept her enhanced allowances at the urging of religious clerics and leaders. The case caused great controversy when the 1985 judgment pointed out that Islam could be said to give women unfair treatment. The Shah Bano case also raised the issue of the Uniform Civil Code that proposed the universalisation of family laws across religious groups in India. Instead of enhancing Muslim women's rights, however, the Indian government at the time bowed to

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<sup>388</sup> Ibid.

<sup>389</sup> Rachel Anne Codd, "A Critical Analysis of the Role of Ijtihad in Legal Reforms in the Muslim World," *Arab Law Quarterly* 14, no. 2 (1999): 125-26.

<sup>390</sup> Williams, *Postcolonial Politics and Personal Laws: Colonial Legal Legacies and the Indian State*, 130.

the demands of protestors and passed the Muslim Women's Act of 1986, which returned the law back to a more traditional interpretation of iddat.<sup>391</sup>

Although Chapter III highlighted the fact that the Constitution has rarely found its way to a case of family law, *Hefzur Rahman vs. Shamsun Nahar Begum* and other cases discussed here represent the rare occasions when the Constitutional right to equality and the right to freedom of religion are explicitly discussed in a Supreme Court level courtroom with regard to family law. As personal law is treated as a matter of religious freedom, the question of whether a particular interpretation of religious practices is or is not in keeping with that freedom is frequently at the core of such cases.

*Hefzur Rahman vs. Shamsun Nahar Begum* came to the High Court Division in 1995 when Shamsun Nahar Begum attempted to obtain her three months' worth of iddat, which had been reduced by the District level case leading to its hearing at the High Court level. The two judges on the High Court benches were Justice Gholam Rabbani - he who later banned fatwa – and Syed Amirul Islam. As with the fatwa ban case years later, they introduced a *suo motu* query “as to whether the first opposite party could have claimed maintenance beyond the period of Iddat,”<sup>392</sup> introducing their own interpretation of the Quran's guidelines on this matter and using a widely known English translation of the Quran by Abdullah Yusuf Ali.

The judgment shows that the crux of the two judges' reasoning lay in the following points:

- (i) The Quran is intended to be easy to understand, so it can be taken literally in its directive to support destitute women, and the meaning of its guidelines on post-

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<sup>391</sup> Agnes, *Law and Gender Equality: The Politics of Women's Rights in India*, 102-03.

<sup>392</sup> *Hefzur Rahman (Md) Vs. Shamsun Nahar Begum and Another*.

- divorce maintenance is to specify an appropriate amount rather than a period of time for such maintenance
- (ii) The Quran indicates that its “continuous study” is “in conformity with the dynamic, progressive and universal character of Islam,”<sup>393</sup> thus justifying the exercise of ijihad
  - (iii) That denying these characteristics of the Quran in applying family law is tantamount to denying the constitutionally mandated freedom of religion

The last two of these are particularly interesting in that reinterpretation is framed as a matter of freedom of religion, rather than in the language of women’s equal status. Ultimately, they ruled not only for Begum to receive her iddat in full for the three months owed to her according to traditional Hanafi law but also that maintenance payments continue until she remarried, well beyond what she had asked for.

The ruling went to appeal and was heard in 1999, by Chief Justice A. T. M. Afzal and Justices Mustafa Kamal, Latifur Rahman, Mohammad Abdur Rouf, and B. B. Roy Choudhury. Notably, Justice Kamal was later the head of the Law Commission during the issuing of its report criticising the proposal for a Universal Family Code discussed later in this chapter. Their judgment, which is considerably longer than the judgment of the High Court case, reveals that Kamal was responsible for writing the majority of the ruling, almost twice the length of the Chief Justice’s explanation in the same document. They shot down the High Court decision led by Rabbani, declaring that the *suo motu* ruling was “a sad case of judicial excess defying all judicial norms and trampling the judicial procedure” and, furthermore, an “act of extreme judicial indiscretion.”<sup>394</sup>

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<sup>393</sup> Ibid.

<sup>394</sup> *Hefzur Rahman (Md) Vs. Shamsun Nahar Begum and Another*.

Their reasoning was based primarily on the following points – the first two of which may seem contradictory but, thanks to the loopholes provided by the Constitution, entirely legitimate:

- (i) As the earlier decision relied heavily on the wording of the Quran, it defied secular principles
- (ii) The reasoning for the High Court decision offended personal law for Muslims as this law is eternal “since the days of Prophet Muhammad” and any attempts to revise the law would be politically problematic, as with the Shah Bano case of India<sup>395</sup>
- (iii) Only those with a command of Arabic should find the Quran easy to understand, and that *ijtihad*, though permissible, can only be exercised by those who are perceived to be expert scholars of Islam and Islamic jurisprudence, and the High Court had not consulted any scholars of Islam or Islamic law during the course of their case
- (iv) There was no opportunity for the Appellant, ex-husband Hefzur Rahman, to respond to the *suo motu* ruling despite being subject to an added liability as a result of the ruling
- (v) The perception of the earlier ruling that women are discriminated against by “a male-dominated interpretation of the Holy Qur-‘an or a male dominated judiciary pronouncing against the interests of women”<sup>396</sup> is shocking in that all believers of Islam are brothers and sister and equal in the eyes of the religion
- (vi) The translation of the Quran used in coming to the High Court decision had been revised in areas that were key to the High Court’s reasoning

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<sup>395</sup> Ibid.

<sup>396</sup> Ibid.

The Appellate bench also critiqued the fact that Justice Rabbani had published an op-ed in the *Daily Star* newspaper, the most widely circulated English daily in Bangladesh, justifying his views regarding post-divorce maintenance while the Appellate case was ongoing. In addition, the bench quoted a number of other translations and assessments of relevant portions of the Quran, including those of Jamaat-e-Islami founder Maududi. The quoting of Maududi's writing is likely to have been a deeply politicised choice, given his reputation in challenging the reforms of the MFLO and as the founder of the Jamaat-e-Islami party.

The two cases are a prime example of the nexus between politics and law in family matters at the heart of this larger study. Justice Kamal, despite not being the Chief Justice in the case, is largely viewed as the 'culprit' in rejecting the earlier High Court decision, and he was known to be deeply conservative in his interpretation of the law.<sup>397</sup> Despite attempts to at least secure the pre-divorce maintenance for Begum that she had been unable to secure during the contract of her marriage, one activist and lawyer supporting Begum suggested, "We failed miserably. The court said 'go to the streets and lobby for it,' which was very unbecoming of a Chief Justice."<sup>398</sup> The lawyer added that, "... the maulanas [or Islamic scholars] took over. They were sitting in the court trying to intimidate people ... they hit the streets – and there was no equivalent movement on the feminist side. Then the Court took an easy way out. We thought, we're majority-Muslim, we're not going to have to deal with the fallout like Shah Bano in India."<sup>399</sup>

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<sup>397</sup> "Leading Lawyer Activist 3, Interview by Tahrat Naushaba Shahid."; "Professor 2, Interview by Tahrat Naushaba Shahid."

<sup>398</sup> "Leading Lawyer Activist 3, Interview by Tahrat Naushaba Shahid."

<sup>399</sup> Ibid.

That judges in these two cases brought their personal and political views to the table in making their rulings is amply evident in the two clashing judgments. As is also evident from the table of legislative acts presented earlier in this chapter, the secular versus 'less' secular binary that is often suggested between AL and BNP does not manifest itself in these cases as AL was in power during the Appellate case while BNP was in power during the time of the High Court ruling. This would suggest a certain level of judicial independence from contemporary events, even if political or personal beliefs on the part of individual judges had their part to play nonetheless.

The 1997 case of *Mohammad Ilias vs. Jesmin Sultana* similarly saw the High Court Division "order[ing] that a recommendation be sent to the Law Ministry so that they could scrutinise whether or not polygamy could actually be banned. The recommendation suggested that the same line of reasoning used in Tunisia to ban polygamy could be used in Bangladesh."<sup>400</sup> Once again, the bench making this statement consisted of Justice Rabbani, along with M. Bazlur Rahman Talukder. When the case progressed to the Appellate Division in 1999, the High Court ruling was overturned on the basis that challenging polygamy was un-Islamic,<sup>401</sup> implying that the MFLO itself was un-Islamic in its Section 6, which is the clause requiring permission from an Arbitration Council to contract a polygamous marriage.

As observed in the previous chapter, conjugal rights cases have tended to dominate the handful of Supreme Court family law cases where the Constitutional provision of

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<sup>400</sup> "Resources: Family Laws in Muslim Majority and Minority Contexts."; *Islam and Equality: Debating the Future of Women's and Minority Rights in the Middle East and North Africa*, 55; *Mohammad Ilias Vs. Jesmin sultana*, 17 Bangladesh Legal Decision 4(1997).

<sup>401</sup> *Mohammad Ilias Vs. Jesmin Sultana*, 19 Bangladesh Legal Decision(1999).

freedom of religion and its Article calling for sexual equality have clashed.<sup>402</sup> At first glance, the High Court's decisions on the forced restitution of conjugal rights over the years exhibit deep inconsistencies. However, key judgments show evidence of the opposite - a consistent and predominant desire to attend to women's welfare. In five such cases, *Nelly Zaman vs. Giasuddin Khan* in 1982, *Hosne Ara vs. Albaj Md Rezaul Karim* in 1991, *Sharmin Hossain alias Rupa vs. Miżanur Rahman* in 1997, *Khodeja Begum vs. Sadaq Sarkar* in 1998, and *Sherin Akbter and another vs. Md Ismail* of 1999, the High Court ruled against forcing a wife to live with her husband.

In *Nelly Zaman vs. Giasuddin Khan*, the 1982 case's primary argument rested on the validity of the couple's divorce and a technicality regarding the time of Zaman's sending of a divorce notice and leaving the couple's home. The tone of the judgment in addressing this technicality is contemptuous:

“7. It is however, curious to note that the Courts below have imported the principle of common law doctrine of *lespendens* in a suit for restitution of conjugal rights. The principle of *lespendens* ... relates to the transfer of any immovable property during the pendency of a suit connected therewith. It is difficult to appreciate that the right of conjugal relationship with one's wife can be compared with the transfer of any immovable property unless a woman is considered as immovable property. The above proposition laid down by the Courts below on this question must be held to be erroneous and absurd on the face of it.”<sup>403</sup>

As to the principle upon which the call for conjugal rights was ultimately rejected, the judgment goes directly to the Constitution as its reference point:

“9. ... by lapse of time and social development the very concept of the husband's unilateral plea for forcible restitution of conjugal rights as against a wife unwilling to live with her husband has become outmoded and does not

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<sup>402</sup> ""Will I Get My Dues ... Before I Die?" Harm to Women from Bangladesh' Discriminatory Laws on Marriage, Separation, and Divorce," 10.

<sup>403</sup> *Nelly Zaman Vs. Giasuddin Khan*, 34 Dhaka Law Report 221(1982).

fit in with the accepted State and Public Principle and Policy of equality of all men and women being citizens equal before law entitled to equal protection of law and to be treated only in accordance with law as guaranteed in Articles 27 and 31 of the Constitution of Bangladesh. ... A reference to Article 28(2) of the Constitution of Bangladesh guaranteeing equal rights of women and men 'in all spheres of the state and public life' would clearly indicate that any unilateral plea of husband for forcible restitution of conjugal rights as against a wife unwilling to live with her husband is violative [*sic*] of the accepted State and public Principle and policy."<sup>404</sup>

'State and public life' here, then, was defined broadly enough to consider family law matters within its remit. Importantly, the judgment notes that there is "no mutuality and reciprocity between the respective rights of the husband and the wife, since such pleas for restitution of conjugal rights is not available to a wife as against her husband apart from claiming maintenance and alimony."<sup>405</sup> This view is, however, categorically reversed in later judgments of the High Court.

In *Hosne Ara vs. Alhaj Md Rezaul Karim* in 1991, the High Court Division bench suggested that forcing a wife to undertake domestic work in a well-to-do family is an act of "physical and mental torture," and that any earlier judgment accepting the forced restitution of conjugal rights here "was guided by the archaic concept of absolute dominion of the husband over the wife and children when the wife and children were treated as chattels under the Roman law and could be sold by the husband to pay his debt to the creditor and they even could be killed by him."<sup>406</sup> There is a running theme, both here and in other cases, of the need to update views on women in keeping with modern life in Bangladesh.

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<sup>404</sup> Ibid.

<sup>405</sup> Ibid.

<sup>406</sup> *Hosne Ara Begum Vs. Alhaj Md. Rezaul Karim and Others*, 43 Dhaka Law Report 543(1991).

The *Khodeja Begum vs. Sadaq Sarkar* ruling rested on the perception that the law of conjugal rights is not in keeping with a number of Articles of the Constitution and is therefore altogether void.<sup>407</sup> While the earlier *Nelly Zaman vs. Giasuddin Khan* case set precedent against the forced restitution of conjugal rights, *Khodeja Begum vs. Sadaq Sarkar* did not make the distinction of 'forced' and abolished the concept of conjugal rights altogether. However, this was soon overruled in *Hosna Jahan (Munna) vs. Md. Shajahan (Shaju)* in 1998 and *Md. Chan Miah vs. Rupnabar* in 1999.

This may seem like a step backwards in terms of women's status in personal law, but both cases had women petitioning for conjugal rights rather than against them. "Intriguingly, the *Hosna Jahan* Court also declared *Nelly Zaman* as having stood void due to the subsequent enactment of the Family Courts Ordinance 1985, which recognised the restitution of conjugal life as litigable. The correctness of this proposition is open to doubt, given that *Nelly Zaman* did not abolish the restitution-right altogether but merely made it conditional [on the lack of force]."<sup>408</sup>

Evidence from *Md. Chan Miah vs. Rupnabar* reveals some of the challenges faced by those women demanding conjugal rights. Rupnabar was a member of domestic staff who was sexually assaulted by the son of the family she worked for, after which the surrounding community demanded that he marry her to protect her honour. She was abused during the course of her marriage and eventually forced out of her marital home, without maintenance and eventually with child. Restitution of conjugal rights in this case was a mechanism for demanding maintenance from her husband. The judgment stated that:

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<sup>407</sup> *Khodeja Begum Vs. Sadaq Sarkar*, 50 Dhaka Law Report 181(1998).

<sup>408</sup> Hoque and Khan, "Judicial Activism and Islamic Family Law: A Socio-Legal Evaluation of Recent Trends in Bangladesh."

“23. The restitution of conjugal right is a reciprocal right thus it is neither discriminatory nor violative [*vis*] of any of the provisions of the Constitution.

24. However, it is neither desirable nor expected that the Court should pass a decree of restitution of conjugal rights where the relationship of adjustment between the husband and wife is lost or it is otherwise inequitable impractical or impossible to implement. In the present case it has been rightly ordered that if the husband fails to live together in the discharge of his marital obligations he is to pay a sum of Taka 500.00/=per month for her maintenance.”<sup>409</sup>

The judgment specifically disagreed with the earlier *Khodeja Begum vs. Sadaq Sarkar* and, taking the completely opposite view of *Nelly Zaman vs. Giasuddin Khan*, said that conjugal rights are reciprocal. In 1999, however, judges in *Sherin Akbter and another vs. Md Ismail* cited the case of *Nelly Zaman vs. Giasuddin Khan* and repeated the earlier case’s citation of the same Articles of the Constitution to deny conjugal rights.<sup>410</sup> In this case, however, the wife was once again fighting against conjugal rights rather than for them.

This case history shows that, regardless of the nature of legislation, there are judges who have chosen to use whatever tools at hand to rule in favour of women in certain areas, even making contradictory rulings that ultimately lead to the best possible outcome for the woman’s welfare. Citing the Constitution in some cases, moreover, some of these judges have suggested that any other ruling would be out of sync with the social and economic reality of Bangladeshi society.

One area of family law that has received little to no attention at the Supreme Court level with regard to women’s status is inheritance rights. This is an area in which there is little room for reinterpretation and notable inheritance cases that have reached this uppermost

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<sup>409</sup> *Md. Chan Miah Vs. Rupnabar*, 51 Dhaka Law Report(1999).

<sup>410</sup> *Sherin Akbter Vs. Md. Ismail*, 51 Dhaka Law Report(1999).

level of the judicial system have been almost entirely about procedural issues, such as the legitimacy of a child or the validity of ownership of an estate or portion thereof. One small exception is the 1992 Appellate Division case of *Sheikh Ibrahim vs. Nazma Begum*, when the Bangladesh Supreme Court held that an orphaned grandchild could still inherit even if the deceased parent through whom they were to inherit had passed away before the passing of the MFLO that permitted them to do so.

The five-member bench of the Appellate Court ruled that the only time of death that was pertinent to inheritance was that of the grandparent from whom the orphaned grandchild was to inherit.<sup>411</sup> The orphaned grandchild was a woman and the parent through whom the grandchild was to inherit was her mother, and one small feature that is notable is that the Court decided that the granddaughter would inherit the entire share her mother would have inherited.<sup>412</sup> This is despite the fact that the Court had the option, in Hanafi succession law, of treating the mother's share as it would have been treated had the share passed through her prior to being handed down to her daughter, that is, a portion of it would have gone to the orphaned granddaughter's mother's brothers since the granddaughter had no brothers of her own. This suggests a potentially generous view towards women's inheritance in this one case.<sup>413</sup> Interestingly, despite being noted for his conservatism, Justice Mustafa Kamal was among the five judges on this case, which also included Latifur Rahman, A. T. M. Afzal, M. H. Rahman, and Shahabuddin Ahmed.<sup>414</sup> And, like Justice Kamal, Latifur Rahman and A. T. M. Afzal were also judges in the later Appellate

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<sup>411</sup> *Sheikh Ibrahim Vs. Nazma Begum*, 21 Dhaka Law Report(1992).

<sup>412</sup> Carroll, "Orphaned Grandchildren in Islamic Law of Succession: Reform and Islamization in Pakistan," 446-47.

<sup>413</sup> Ibid.

<sup>414</sup> *Sheikh Ibrahim Vs. Nazma Begum*.

case of *Hefzur Rahman vs. Shamsun Nahar Begum* in 1999 that struck down a longer term interpretation of post-divorce maintenance beyond the traditional three months.

## **b. Judicial Activism**

As is evident from the cases cited in the previous section, variations in interpretation cannot be accommodated in every area of family law with the same level of ease. Outside of a notable level of activism with regard to conjugal rights and child custody, my findings here suggest a distinct lack of any radical precedents in family law for Muslims either towards or away from equalising rights across the sexes, particularly in areas pertinent to financial or economic status. Certain other landmark judgments related to women's rights indicate that the judiciary is more inclined to challenge existing notions of women's status in legal areas outside of family laws. These are evident in the cases of the fatwa ban, forcing women to wear full Islamic headdresses or 'burqa' and restricting them from sports, and sexual harassment.

The fatwa ban and subsequent regulation was discussed in detail in Chapter III. In 2010 a series of cases was met with significantly less controversy than the fatwa ban, all addressing the wearing of religious attire. In March 2010, the High Court responded to a case where police in northern Bangladesh arrested nine teenage couples in a public park, ordering the girls to wear a burqa or full-body veils.<sup>415</sup> The Court banned the police from

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<sup>415</sup> Cat Barton, "'Veiling' Debate Divides Bangladeshi Women," *The Sunday Times Newspaper (in Sri Lanka; online)*, 19 September 2010.

“hassling women” on the pretext of forcing them to veil.<sup>416</sup> On 8 April 2010, the High Court ruled on a case in which a school headmistress claimed that a government official had called her a prostitute “for not covering her hair during a staff meeting,” holding that “bullying female employees into wearing headscarves or veils” at schools and colleges was illegal.<sup>417</sup> “The Court observed ‘It is the personal choice of a woman to wear a veil. If any person tries to compel a woman to wear a veil against her consent or will that amounts to a violation of her fundamental rights as enshrined in the Constitution.’”<sup>418</sup>

This was followed again by a case in 22 August 2010, when a principal of an all-women’s college in the north of Bangladesh banned “cultural activities” such as music, dance, and theatre, and sports at the college, and prohibited women from entering campus unless they were wearing burqas.<sup>419</sup> This time the High Court went a step further by banning such discrimination against women and men in academic institutions,<sup>420</sup> while also ensuring that women could not be banned from sports and cultural activities. Finally, on 4 October 2010, a High Court bench responded to a *suo motu* rule issued during the 22 August case, “asking the government to explain why compelling women to wear religious attires should not be declared illegal.”<sup>421</sup> Their verdict was that in a constitutionally secular state such as Bangladesh, no-one could be forced to wear religious attire,<sup>422</sup> extending beyond the arena of academic institutions as a general rule.<sup>423</sup> The bench also stressed that constitutionally

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<sup>416</sup> Ibid.

<sup>417</sup> "Burka Bullying Banned by Bangladesh Court," *The Telegraph (online)*, 9 April 2010.

<sup>418</sup> WLUML Networkers, "Bangladesh: High Court Directs Government to Ensure Women Not Forced to Veil," Women Living Under Muslim Laws, <http://www.wluml.org/node/6156>.

<sup>419</sup> "Secularism Back," *The Daily Star (online)*, 5 October 2010.

<sup>420</sup> Anbarasan Ethirajan, "Bangladesh Bans Enforced Islamic Dress Code," *BBC News (online)*, 22 August 2010.

<sup>421</sup> "Secularism Back."

<sup>422</sup> Ibid.

<sup>423</sup> "Bangladesh High Court Passes Key Burka court Ruling," *BBC News (online)*, 4 October 2010.

prescribed freedom of religion meant that, likewise, no-one could be banned from wearing religious attire.

It could be argued that the rapid and increasingly broad rulings on religious clothing were not especially remarkable judgments in that veiling or the wearing of burqa remains an inconsistent practice in Bangladesh, despite the greater numbers of young women donning such attire in recent years. However, the Quran's directive that women remain modest has traditionally been interpreted by orthodox Islamic scholars to mean that women should, at the very least, cover their hair as their appearance would otherwise arouse the sexual desires of men.<sup>424</sup> The Bangladeshi High Court, however, chose to leave this interpretation up to individual choice.<sup>425</sup>

A landmark sexual harassment case provides more details of judicial activism towards women, although unrelated to religious practice. A 2009 case where the High Court first applied Sexual Harassment Guidelines came about when four female students from the prominent Jahangirnagar University, located just outside of the country's capital, claimed in May 2008 that they had experienced "serial sexual harassment" from the head of the Drama Department there.<sup>426</sup> Calls for Sexual Harassment guidelines had emerged from students and staff at the University for over a decade prior to that, in response to multiple incidents of harassment by both students and professors.<sup>427</sup> Three University-appointed committees found the Drama Department head guilty of harassment and yet, in September 2008, the

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<sup>424</sup> Men are also instructed to look away from women in order to avoid arousing their own desires.

<sup>425</sup> The covering of hair by women in the public eye and the extent of this coverage, however, has received much speculation in the context of whether and to what extent Prime Ministers Begum Khaleda Zia (former) and Sheikh Hasina Wajed (current) cover their hair and what that might mean in terms of their respective levels of religiosity.

<sup>426</sup> Sara Hossain and Ruhul Quddus, "Bangladesh: University Students' Victory in Sexual Harassment Case," WLUMN Networkers, <http://www.wlumn.org/node/5274>.

<sup>427</sup> "Leading Lawyer Activist 2, Interview by Tahrat Naushaba Shahid."

University declared that Sunny had been cleared of all accusations, “beyond all reasonable doubt.”<sup>428</sup>

The University then attempted to temporarily expel the four female students, along with two other male students who provided evidence on their behalf. At this point, a Professor Sirajul Islam Chowdhury and others filed a Public Interest petition, Writ Petition 9414 of 2008, against the University as the six students were too afraid to initiate a case themselves.<sup>429</sup> Eventually, the six students also joined the suit, and on 14 May 2009 the High Court Division not only held that the University’s actions had been unlawful but also that the High Court’s own guidelines, drawn up by a committee of prominent women’s organisations including the Bangladesh Mahila Parishad and the Bangladesh National Women Lawyers’ Association prior to the hearing, was to be applied to all universities across the country. This was particularly significant since the Ministry of Education had failed to universalise guidelines after considering this step in 2008, suggesting instead that each university should adopt their own guidelines. “The Court also noted that Jahangirnagar University authorities had failed ‘for reasons best known to themselves’ to adopt their own guidelines on sexual harassment, and therefore in the absence of any applicable law, the High Court’s new guidelines should be applied to any fresh inquiry.”<sup>430</sup>

There has been one notable area of legislation on women’s rights where the Supreme Court has not commented at all: the proposal for a Uniform Family Code or UFC. The UFC, as mentioned in Chapter III, is a legal code for family laws across all religious groups, which also incorporates a reinterpretation of fiqh according women greater rights. The

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<sup>428</sup> Hossain and Quddus, "Bangladesh: University Students' Victory in Sexual Harassment Case."

<sup>429</sup> Ibid.

<sup>430</sup> Ibid.

Bangladesh Mahila Parishad and Ain O Shalish Kendra, two of the country's most prominent women's rights organisations, proposed this comprehensive new family code in 1996.<sup>431</sup> Its aim was "to address the inequities and incongruities within the [sic] different personal laws."<sup>432</sup> Crucially, the UFC proposes the equalisation of inheritance rights between men and women.<sup>433</sup> The proposal for a UFC mirrors a similar push in India for a Uniform Civil Code that would also take primacy over the laws of individual religious groups.

Although the occasional court judgment has suggested that a thorough review of family laws take place and that the universalisation of family laws across religious groups be considered, there has otherwise been little discussion of the UFC beyond publicity by the organisations supporting the Code. The proposal has largely been treated as overly ambitious even among groups and individuals pushing for the reform of family laws.<sup>434</sup> Supreme Court documentation on this issue may also be sparse for one other reason, as Nowrin Tamanna points out that:

"... in *Eva Sunanda Chowdhury v Subir Sardar/Sarker*, [2000 5 BLC 660–661] the High Court recommended that Parliament should enact a "unified Marriage and Divorce Act for all citizens to keep in pace with the modern time".[sic] After the judgment, various fundamentalist Islamic organs organised violent protests, even declaring a price on the head of the presiding judge. Eventually, the Appellate Division of the Supreme Court expunged

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<sup>431</sup> Taslima Monsoor, *From Patriarchy to Gender Equity: Family Law and Its Impact on Women in Bangladesh* (Dhaka: University Press Limited, 1999).

<sup>432</sup> Kapur, "Challenging the Liberal Subject: Law and Gender Justice in South Asia," 160-61.

<sup>433</sup> Hoque, Islam, and Kamal, "Opinion on the Study Report for Marriage, Inheritance And family Laws in Bangladesh Towards a Common Family Code," 102.

<sup>434</sup> "Professor 2, Interview by Tahrat Naushaba Shahid."; "Professor 5, Interview by Tahrat Naushaba Shahid."; "Professor 4, Interview by Tahrat Naushaba Shahid."; "Head of Government Department 3, Interview by Tahrat Naushaba Shahid."; "Head of Government Department 2, Interview by Tahrat Naushaba Shahid," Dhaka (January 2013); "Professor 1, Interview by Tahrat Naushaba Shahid."; "Leading Ngo Activist 2, Interview by Tahrat Naushaba Shahid."

the recommendation from the judgment upon the filing of a petition by an organisation called Islamic Law Research and Legal Aid Bangladesh.”<sup>435</sup>

The Appellate Division judgment *Tamanna* refers to here points out that *Eva Sunanda Chowdhury vs. Subir Sardar/Sarker* was a divorce case between two Christians. And yet, the Court does not find the fact that the petitioner is a group concerned primarily with the practice of Islam especially notable. Instead, the ruling repeatedly emphasises that the High Court judgment overstepped its boundaries:

“7. The unfortunate part of the matter is that the learned Judges of the High Court Division being totally unmindful of their legal limit while exercising the power of confirmation of the decree of dissolution of marriage passed by the District Court upon being sought by the respondent No. 1 against respondent No. 2, both professing Christianity, made impertinent recommendation [*sic*] which is totally unconnected with and irrelevant to the matter before the learned Judges for decision in either way. The learned Judges certainly went beyond the scope of the subject matter of the Divorce Suit in making uncalled for recommendation [*sic*] to which the leave petitioner has taken exception contending that the said recommendation has violated fundamental right of the community, to advocate whose grievance it has moved this Division, to profess the personal religion of the said community in all respects and the freedom of choice of regulating their personal institutions concerning different aspects of life in accordance with the direction of the Holy Quran and the highly adored Hadith as guaranteed by the Article 41 of the Constitution.”<sup>436</sup>

Despite fears of violent reprisal, however, judicial activism has had a key part to play in protecting women’s welfare at times when the strictest interpretation of existing laws have not allowed for this, rendering conjugal rights, for example, practically obsolete.<sup>437</sup> Alamgir Serajuddin points out that judicial activism in interpreting shari’a-guided laws has

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<sup>435</sup> Tamanna, "Personal Status Laws in Morocco and Tunisia: A Comparative Exploration of the Possibilities for Equality-Enhancing Reform in Bangladesh," 335-36.

<sup>436</sup> *Islamic Law Research Centre and Legal Aid Bangladesh Vs. Eva Sunanda Chowdhury & Others*, 54 Dhaka Law Report 168(2002).

<sup>437</sup> "Professor 2, Interview by Tahrat Naushaba Shahid."

significantly enhanced women's rights in Bangladesh, although it should not be seen as a substitute for systematic legislative change.<sup>438</sup> A dependence on individual judicial interpretation to secure favourable judgments for women is problematic in its inconsistency. One lawyer suggested that, "Some judges give good judgments but some are very stubborn - they don't want to interpret or read between the lines, everything's very black and white."<sup>439</sup>

The appointment of judges, furthermore, seems to reflect the political tide. Judges are administered under the Ministry of Law, an arm of the government, and their independence is limited or at best, again, inconsistent. Securing an appointment of High Court Justice from lower court levels, furthermore, remains great incentive to fall in line with the views of current administration.<sup>440</sup>

There may well be other influences on judges' decision-making processes. The language of judgments, some of it quoted here, and my interview data suggest that judges at the Supreme Court level frequently perceive their role as one of nation-building in a relatively young country.<sup>441</sup> However, this concern with the nation-building often overlaps too easily with politicised rulings, based as they can be on views representative of certain points on the political spectrum between left and right and associated conceptions of current and future national values. One professor pointed out, very likely in reference to Justice Rabbani, although the professor failed to explicitly use his name, that:

"Between '95 and '96, Bangladesh had a single activist judge – he made four decisions, on polygamy, fatwa, conjugal rights, and divorce maintenance. He really showed judicial activism, but in all of these things he showed haste, a tendency to make more popular decisions than legally sound ones, which

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<sup>438</sup> Alamgir M. Serajuddin, *Muslim Family Law, Secular Courts and Muslim Women of South Asia: A Study in Judicial Activism* (Oxford: Oxford University Press, 2011).

<sup>439</sup> "Leading Lawyer Activist 3, Interview by Tahrat Naushaba Shahid."

<sup>440</sup> Ibid.

<sup>441</sup> "Judge 5, Interview by Tahrat Naushaba Shahid ", Dhaka (June 2014).

gave the Supreme Court an opportunity to turn down his decisions at the next level.”<sup>442</sup>

Another professor added that:

“For judges indulging the development of Islamic law, the best question is how they interpret Islamic law with reference to society – and how do they reference it to developments elsewhere, say Turkey or Pakistan. When you analyse judgments during Awami League regimes, judges are very afraid to refer to Pakistan, because they don’t want to be dubbed pro-Pakistani. Even lawyers don’t make any such references in their arguments – it’s as if nothing good can happen in Pakistan! But when you look at decisions made during BNP regimes, you see, at least in terms of Islamic law, there are fewer references to India. Even though referring to Pakistan should really come first as interpretation is actually quite slow in India.”<sup>443</sup>

My analysis of landmark judgments cited here does not support these views, but it is interesting to note that these perceptions exist. In general, it seems that women’s rights lawyers perceive a higher degree of politicisation in rulings than I identify in my study. This confirms that judicial activism is not perceived to be a reliable means to secure desirable rulings in favour of women. Despite my conclusions, furthermore, the views of such lawyers on judicial bias were supported by academics and legal scholars, pointing to the fact that judicial independence and activism in Bangladesh provides fertile ground for further research. The next section builds on the curious trend of rulings enhancing women’s rights in terms of conjugal and custody issues and other areas associated with religious practices even beyond family law, but less so on areas such as inheritance or post-divorce maintenance.

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<sup>442</sup> "Professor 1, Interview by Tahrat Naushaba Shahid."

<sup>443</sup> "Professor 4, Interview by Tahrat Naushaba Shahid."

## 4. Legislative Changes

The previous section discussed how the judiciary are not hampered by electoral concerns and yet, with some notable exceptions, still fail to show a significant degree of activism either towards or away from establishing any change in personal status laws. I have also discussed the associated trend for new legislation on family laws to be established only during times of dictatorship or highly centralised government, even in the purely procedural context of the Muslim Marriages and Divorce (Registration) Act of 1974 and the Family Courts Ordinance of 1985. Even further back, in discussing the passing of the MFLO, Matthew Nelson pointed out the “value of a certain immunity from the exigencies of cross-party ‘bargaining.’ When change occurs— and of course it has— it has occurred in a context defined by (or akin to) ‘dictatorship.’”<sup>444</sup> Discussing India and Pakistan, he also points out that, “The key to success for those with an interest in ‘substantive’ patterns of personal law reform, in other words, still flows from an ability to construct a political environment that is, for all intents and purposes, ‘immune’ to the inconveniences associated with cross-party legislative bargaining.”<sup>445</sup> The Bangladeshi parliament’s lack of initiative in this area, then, is hardly surprising.

Earlier in this chapter, a comparison between changes in laws on violence against women and on personal status revealed that violence appears to be a less controversial area for change. One might argue that this is due to family laws’ association with religious practices. Two pieces of legislation on violence against women, however, are similarly associated: the Child Marriage and Domestic Violence Acts. Both of these laws required the

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<sup>444</sup> Matthew J. Nelson, "Islamic Law in an Islamic Republic: What Role for Parliament?," (2012), 12.

<sup>445</sup> Nelson, "Inheritance Unbound: the Politics of Personal Law Reform in Pakistan and India." 15.

dismissal of existing interpretations of Hanafi fiqh. Interestingly, the age of consent to marriage was changed without any reference to the age of marriage permitted in Islam.<sup>446</sup> Likewise, the publicity and legislative discussion around domestic violence legislation failed to mention the relevance of Islamic principles.

Any analysis of the steps leading up to legislation against domestic violence requires taking into consideration that the Quran, the most significant source of Islamic jurisprudence across all four maddhahib, suggests that punishing one's wife for being 'disobedient' is permissible. Whether the scale of that punishment and the permissibility itself are in fact symbolic or not may be under question, particularly if one is to employ the argument that classical Arabic, written in verse, can be interpreted in a number of different ways. The fact is, however, that no theological or linguistic exercise can deny the existence of this directive in this primary source.

Rights activists involved in the decade-long campaign pushing for domestic violence legislation reported supporting their publicity through a variety of arguments, notably excluding that of religious reinterpretation.<sup>447</sup> Instead, they cited Bangladesh's signing of international treaties on the equality and protection of women and the cost of domestic violence to the national economy in terms of percentages of GDP as well as human rights concerns.<sup>448</sup> The issue came to the notice of the Bangladesh Law Commission and, unlike its report challenging a Uniform Family Code published that same year, the Commission supported the proposal for a Domestic Violence Act. The Commission cited the fact that

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<sup>446</sup> Martin Lau, "Law and Society in South Asia (Ma/Llm Course)," (London: School of Oriental and Asian Studies, University of London, 2012). As shown in Table 2, although punishable, a child marriage is not considered void.

<sup>447</sup> "Leading Ngo Activist 2, Interview by Tahrat Naushaba Shahid."

<sup>448</sup> Ibid.

several other Commonwealth countries had already passed such acts in recent years, including New Zealand in 1995 and Malaysia in 1994.<sup>449</sup> The repeated reference to the Malaysian Domestic Violence Act of 1994 in their main report on the proposal<sup>450</sup> would have been especially significant since, like Bangladesh, it is also a Muslim majority country and its Muslims are subject to laws guided by shari'a. Although sexual abuse is included under the categories of domestic violence that is banned, however, spousal rape is not, with the report suggesting that sexual abuse includes: "(i) compelling the wife to cohabit with any body [*sic*] other than the husband."<sup>451</sup> The report makes no mention of evaluating the permissibility of such violence within a religious framework.

The Domestic Violence Act was passed during the Sixth Session of the Ninth Parliament of Bangladesh, headed by AL. Parliamentary records of the Session reveal that the main opposition party of BNP were absent as they were boycotting parliament at the time.<sup>452</sup> This is not uncommon, however, in that opposition parties frequently boycott parliamentary sessions in Bangladesh, and proposals such as the Domestic Violence Act are rarely challenged by the time they reach the stage where they are under discussion in parliament. The ability to pass such legislation is, therefore, a highly centralised one in that once a piece of legislation is pushed forward by the ruling party it is as good as passed. As an arm of the Ministry of Law, moreover, the opinion of the Law Commission tends to be a strong signal of the government's inclination towards any such proposals.

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<sup>449</sup> M. Enamul Hoque, Md. Sirajul Islam, and Mustafa Kamal, "A Final Report on the Proposed Law of Domestic Violence Along with a Draft Bill Namely, the Domestic Violence Act, 200..." (Dhaka: The Law Commission, Government of the People's Republic of Bangladesh, 2005), 2.

<sup>450</sup> *Ibid.*, 7.

<sup>451</sup> *Ibid.*, 5, 10.

<sup>452</sup> Irfath A. Iva, "Parliament Watch - Bangladesh (September - December 2010: A Report on the Proceedings of the Ninth Parliament of Bangladesh," (Dhaka: South Asians for Human Rights, 2010), 3.

The Repression of Women and Children or ‘Nari O Shishu Nirjaton Daman Ain’ Act of 2000 was similarly passed with limited opposition. In the year prior to the passing of the Act, “the number of incidents of violence against women reached alarming proportions,” when “2198 cases of violence of various types were reported among which there were 1238 cases of rape, 253 dowry related cases of violence, and 153 acid attacks.”<sup>453</sup> The law was intended to increase the severity of penalties for violence against women, while also introducing the “provision of compensation of victims of violence” and “provision of maintenance for children born out of rape” for the first time.<sup>454 455</sup> At the time of this Act, passed ten years before the Domestic Violence Act, however, domestic violence continued to be ignored.<sup>456 457</sup>

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<sup>453</sup> Shahnaz Huda, "The New Millennium: Legislation and Precedents Relating to Women in Bangladesh," *The Dhaka University Studies, Part F* 123, no. 1 (2002): 95-96.

<sup>454</sup> *Ibid.*, 97.

<sup>455</sup> Since its passing, the Nari O Shishu Nirjaton Daman Ain Act has had its Sections 6(2) and 6(4), which prescribe the death penalty for rape and murder, deemed unconstitutional. Taken up as an issue of child rights, juvenile offender Sukur Ali was to be executed for a rape and murder case filed against him in 1999 when he was 12 years old. On 2 March 2010, the Bangladesh High Court stayed his execution, while also declaring mandatory death penalties as unconstitutional. On 5 May 2015, the Appellate Division upheld the High Court’s decision. The Court argued that it “must always have the discretion to determine what punishment a transgressor deserves and to fix the appropriate sentence for the crime he is alleged to have committed. The Court may not be degraded to the position of simply rubberstamping the only punishment which the legislature prescribed. There is such finality and irreversibility in the death penalty. If the discretion of the Court is taken away then the right of the citizen is denied.” (Najrana Imaan, *From Justice for Children in Bangladesh: An Analysis of Recent Cases*, 2 vols., vol. 2 (Dhaka: Save the Children in Bangladesh, 2012), 123; *Bangladesh Legal Aid and Services Trust (Blast) and Another Vs. Bangladesh (Represented by the Secretary, Ministry of Home Affairs, and Others)*, 63 Dhaka Law Report 10(2010); "Bangladesh Supreme Court Scraps death Penalty Provision of a Law for Murder after Rape," *The Daily Star (online)*, 6 May 2015.)

<sup>456</sup> Huda, "The New Millennium: Legislation and Precedents Relating to Women in Bangladesh," 104-06.

<sup>457</sup> Rape by one’s husband, however, remains without penalty unless the wife in question is under the age of 14 years, which is considered the age of consent according to the Penal Code of 1860. If marital rape of a wife over the age of 14 years leads to her death, the offence would also be tried under the same Penal Code (*Ibid.*, 101-2.). It is worth noting the inconsistency inherent to this legislation in that the legal age of marriage is now 18 years but the legal age of consent is 14 years – although, as pointed out before, marrying a girl under 18 years of age does not render the marriage void ("The New Millennium: Legislation and Precedents Relating to Women in Bangladesh," 101-2.).

By contrast, the proposal for changes to family laws was met with a dramatically different response. The Bangladesh Law Commission expressed its views in 2005 in reaction to a joint study submitted to the Commission by UNESCO and Women for Women, a local NGO that produces and collects research on women's rights in Bangladesh, in support of the proposal for a Uniform Family Code. The Commission specifically rejected the proposal on the basis of religion, saying that:

“A large part of [the] Qur'an contains laws and codes of conduct and are, therefore, immutable and beyond the jurisdiction of any human being to amend or alter... Muslim family law affairs covering marriage, divorce, maintenance, dower, guardianship, inheritance etc. are all included in the huge mass of Muslim law developed over a period of fifteen hundred years. To take up a position that these laws should be suitably changed so as to fit in with a Common Family Code of all faiths and denominations is not merely an intellectual decision, but basically a decision as to whether the Muslims of Bangladesh should give up Qur'an as a revealed Book or not. The Law Commission [sic] 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.”<sup>458 459</sup>

This is significantly different from the statements of M. Shah Alam, later Chairman of the same Law Commission who suggested that there are avenues within Islamic jurisprudence to interpret shari'a in ways that would allow the expansion of women's rights within family law. The terms of each Chairman of the Law Commission in recent years reveal that the Chairman of the Commission at the time of the report responding to the UFC proposal, Mustafa Kamal, was appointed during BNP's term in power, and his tenure ended during a time when Bangladesh was under the military-backed caretaker government

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<sup>458</sup> Hoque, Islam, and Kamal, "Opinion on the Study Report for Marriage, Inheritance And family Laws in Bangladesh Towards a Common Family Code," 1.

<sup>459</sup> Interestingly, the Law Commission viewed the laws of other religious groups quite differently at this time: "Hindu and Christian personal laws are not static but empiric and progressive, but even then it will be very difficult in our country to make substantial changes or modifications in those laws."(Ibid., 3.)

following BNP's term. It is worth remembering that he had also been a judge on the Appellate Court case that overturned the High Court ruling expanding post-divorce maintenance in the aforementioned case *Hefzur Rahman vs. Shamsun Nahar Begum*.<sup>460</sup>

Shah Alam, on the other hand, was appointed as Chairman during AL's subsequent term as ruling party, and A. B. M. Khairul Haque, the Chief Justice presiding over the annulment of the Fifth Amendment and the adjustment of the ban on fatwa, was appointed Chairman during the AL's term in July 2013.<sup>461</sup> The appointment of the Law Commission Chairman and the Commission's inclinations towards greater sexual equality in family laws may well be reflective of the views of the ruling party. It remains to be seen how Haque may respond to future such proposals in favour of reinterpreting fiqh or expanding women's rights in family laws even outside of going through the exercise of that reinterpretation.

The position of the Law Commission on the UFC has evolved under changing leadership from outright rejection to a belief that there is a need for legal reform but it must be a process of incremental change. A recent report issued with limited, if any, publicity by the Law Commission under the leadership of Shah Alam reflects this new direction. He recommends allowing women to inherit their parents' estate if they are the sole offspring. As discussed in Chapter II, Hanafi fiqh requires that the estate of a man who had only daughters should have a portion of his estate distributed to his brothers upon his passing. This is not the case if that man had a son. The Law Commission report explicitly recommends adopting Shi'a Ja'fari law in this area, where the concept of the family is a

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<sup>460</sup> *Hefzur Rahman (Md) Vs. Shamsun Nahar Begum and Another*.

<sup>461</sup> "About Law Commission," The Law Commission, Government of the People's Republic of Bangladesh, <http://www.lawcommissionbangladesh.org/about.htm>.

nuclear one and that man's brothers do not inherit any portion of his estate, regardless of the sex of his children.<sup>462</sup> That is, daughters can be sole inheritors.

Shah Alam points out that the Pakistani introduction of the MFLO of 1961, which allowed for orphaned grandchildren to inherit from their grandparents for the first time, poses an inconsistency in that it is now possible for a granddaughter to inherit more (through her father) than a daughter.<sup>463</sup> He employs the language of *ijtihad* in much of the report rather than emphasising a call for modernisation or sexual equality as an element of that, as judges were shown to have done in certain cases earlier in this chapter. Shah Alam proposes adaptation of inheritance laws "from the Shia school [which] has taken a different and more progressive view of the issue," to resolve this inconsistency, also citing a number of cases across the Muslim world, including the case of the MFLO itself, where reinterpretation of *fiqh* was employed to enhance the rights of women.<sup>464</sup> This form of *takkhayur* is generally reserved for the adaptation of laws from other Sunni *maddhahib*. If this recommendation were taken on by legislators, although seemingly a minor adjustment, precedent would be set for further change. If the trend of past Commission reports reflecting government positions continues, this may well be an indication of future change, albeit very gradual.

Additionally, occasional public declarations on reforming Muslim personal law amongst policymakers suggest both an inclination towards change and a willingness, or perhaps desire, to provoke the ire of the religious right. Attorney General Mahbubey Alam,

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<sup>462</sup> M. Shah Alam, "Recommendation of the Law Commission for Possible Increase of Daughter's Share in the Succession of Parents' Property in Absence of Son," (Dhaka: The Law Commission, Government of the People's Republic of Bangladesh, 2012).

<sup>463</sup> *Ibid.*, 1.

<sup>464</sup> *Ibid.*, 4-5.

for example, in a meeting of the Ministry of Law organised by the UNDP, suggested that the law should be reformed to provide “complete succession rights to daughters...” and ban polygamy altogether.<sup>465</sup> These statements are made from time to time by government representatives despite the fact that such announcements tend to spark public protests and even violent riots rather than parliamentary discussions.

In light of the changes to legislation and lack thereof discussed here, it is clear that, while the judiciary may be open to reinterpreting religious practices, legislators are significantly less so due to the costs of passing such legislation. These costs reflect an ongoing struggle in terms of establishing to what degree Bangladesh is governed by ‘Muslim values’ and, as has been discussed throughout, women tend to bear the brunt of representing those values. Why does this struggle stymie the reform of family laws more than any other women-related laws, even when violence against women legislation may warrant a discussion of religious practices?

Although the Repression of Women and Children Act of 2000 legislating harsher penalties for acts of violence against women can be viewed “as a radical piece of reform that expanded the definition of rape considerably,”<sup>466</sup> violence-related legislation is easier to pass than family laws precisely because they do not challenge a society where the justification for limiting women’s equality is often made in terms of their own protection. The Act provided for custody of women in protected shelters during the course of their cases even if it was to be forced upon them against their will, suggesting a troubling perspective on women’s capacity to determine their own wellbeing. The wording of both the Repression of Women

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<sup>465</sup> "Attorney General wants Full Successor Rights for Daughters," *Bdnews24.com (online)*, 23 June 2013.

<sup>466</sup> Kapur, "Challenging the Liberal Subject: Law and Gender Justice in South Asia," 153.

and Children Act of 2000 and the Law Commission's report on the Domestic Violence Act, is telling in much the same way. "Section 10(2) of the Women and Children Act states: 'Any man who, in order to satisfy his lust in an improper manner, outrages the modesty of a woman, or makes obscene gestures, will have engaged in sexual harassment...'" As Ratna Kapur points out, sexual harassment here is defined in terms of a woman's modesty, "presumably sexual modesty. Such traditional notions about women's sexual conduct and behaviour can have adverse effects on women's rights, as interpretations as to what constitutes modesty and 'appropriate' female behaviour are highly subjective."<sup>467</sup>

Meanwhile, the Law Commission's report on domestic violence suggests the following: "In view of the ... wounded sentiments of our women who are hardening from tolerance to resistance, Law Commission thinks it justifiable to work out a legal remedy for dealing with the problems of domestic violence."<sup>468</sup> While the text here does make a case for women's resistance and even empowerment, all of the legislation that has been passed is concurrent with a view of women as victims. To give them a status where they have equality in marital contracts or inheritance shares, on the other hand, challenges the notion that women are best protected by men rather than themselves – and much of the justifications for leaving family laws as they are have been phrased in terms of best protecting women's interests.

This paternalistic trend in legislation is evident even beyond family matters and violence against women. For example, the Payment of Wages Act of 1937 ensures that "no deduction should be made from the wages of a person under fifteen years or of a woman for

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<sup>467</sup> Ibid.

<sup>468</sup> Hoque, Islam, and Kamal, "A Final Report on the Proposed Law of Domestic Violence Along with a Draft Bill Namely, the Domestic Violence Act, 200...", 2.

breach of contract.”<sup>469</sup> Similarly, the Workmen's Compensation Act of 1923 provides that “where compensation has to be distributed, no payment of sum as compensation to a woman or a person under legal inability [*sic*] shall be made otherwise than by deposit with the Commissioner.”<sup>470</sup> Women, as a group, are repeatedly categorised with minors and with those with some form of legal disability throughout the legal system in Bangladesh.

Besides legislative trends, legal case history at the Supreme Court level discussed earlier in this chapter also suggests a desire to protect women from violence as well as revering their traditional roles as mothers. And yet where financial compensation is concerned, judicial interpretations are less clearly in favour of women. Even the Constitution groups women with children and other vulnerable groups. The document’s Article 28, the same Article that calls for women’s “equal rights with men in all spheres of the State and public life,”<sup>471</sup> adds that, “Nothing in this article shall prevent the state from making special provisions in favour of women or children or for the advancement of any backward section of citizens.” It would seem, then, that the legal empowerment of women in Bangladesh has tended to reach its limits in the discursive space beyond victimhood.

Another, far more mundane, reason has been suggested for the stagnant nature of family laws relative to violence against women laws in Bangladesh: it is simply easier to pass legislation that does not depart dramatically from earlier legislation. Most new laws on violence against women are so similar to earlier laws that they might even be said to be redundant. The 2000 Repression Act, for example, is “an almost identical version of its predecessor of 1995, which in turn was an almost identical version of the Cruelty to Women

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<sup>469</sup> Monsoor, *From Patriarchy to Gender Equity: Family Law and Its Impact on Women in Bangladesh*, 145-46.

<sup>470</sup> *Ibid.*

<sup>471</sup> *The Constitution of the People's Republic of Bangladesh*.

(Deterrent Punishment) Ordinance, 1983.”<sup>472</sup> Similarly, the Penal Code of 1860 provides the same protections that were later repackaged into legislation specifically targeted at protecting women from violence in the form of the Cruelty to Women (Deterrent Punishment) Ordinance.<sup>473</sup> “Such special laws point to a tendency of governments to enact merely cost free legislation ... [they] can and do earn governments national praise and short-term gains within localized constituencies, but as far as realistically improving women's and children's access to justice,” they produce relatively low impact.<sup>474</sup>

While this may all be true, it is also the case that new legislation is a public statement of either contemporary or aspirational values. Laws that are specifically targeted at protecting women acknowledge that violence against women is worthy of special, legislative attention and that it is deemed unacceptable. The merits of categorising violence against women as separate from other forms of violence is worthy of further debate, but seemingly minor changes in legislation certainly make a difference in application. Despite its flaws, the Repression Act of 2000 “expanded the definition of rape and for the first time, [and] made sexual harassment and sexual assault punishable offences,” as well as addressing issues such as identity protection and safe custody for victims.<sup>475</sup> So in spite of continuing room for improvement, each new act has offered enhancements that provide, at least on paper, further protections for women.

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<sup>472</sup> Pereira, *The Fractured scales: The Search for a Uniform Personal Code*, 194-95.

<sup>473</sup> Monsoor, *From Patriarchy to Gender Equity: Family Law and Its Impact on Women in Bangladesh*, 239-41.

<sup>474</sup> Pereira, *The Fractured scales: The Search for a Uniform Personal Code*, 194-95.

<sup>475</sup> Ibid.

## 5. Conclusion: Protection versus Agency

This chapter has shown that certain legislation concerning women has seen more movement than others. Despite proposals for reform, substantive changes in family law have not come about. On the other hand, violence against women legislation has seen much further change, expanding and enhancing protections for women. Although challenging to analyse a lack of change rather than change itself, reports and case judgments reveal attitudes towards personal status matters relative to violence against women, as well as landmark judgments concerning religious practices outside of personal status.

Chapter III revealed that religious freedom as a constitutional right has tended to be interpreted in favour of maintaining existing interpretations of fiqh. This is perhaps in large part why so many activists working on women's equality tend to avoid discussions of religion in pushing for reforms if at all possible. Nevertheless, the landmark *Hefzur Rahman vs. Shamsun Nahar Begum* case at the High Court level demonstrated that religious freedom can and has been interpreted as the freedom to reinterpret fiqh, while the Appellate level ruling of that case suggested that secularism can be used as a tool to suppress reinterpretation of personal laws. Ultimately, the conflicts stymieing change in family laws appears to be one of interpretations, not just of fiqh and secularism as Chapter III demonstrated, but also of rights terminology such as freedom of religion and equality between men and women. Certain areas of personal status are more open to varied interpretations, such as child custody, and as a result have seen more judicial activism in favour of women while others, such as inheritance, have seen less.

In this chapter, I also present cases that are outliers to the trend of interpreting freedom of religion as a group right, as with the case of religious attire. This is especially important to family law since family law is the only significant body of laws within the Bangladeshi legal system on which religious practices have consistent bearing. Justice Rabbani's especially reformist judgments notwithstanding, as with *Hefzur Rahman vs. Shamsun Nabar Begum*, freedom of religion has not only been claimed as a group right in family law cases but also has largely been used to maintain a status quo away from equalising women's rights. The language of custody and conjugal rights cases, that have moved closer towards equality, on the other hand, have tended to emphasise the discourse of modernisation or, if couched within a religious framework, of *ijtihad*.

Religious practice in the Bangladeshi legal system, then, is very rarely viewed as the right of individuals to practice religion as they see fit, and the very foundation for family laws across South Asia is accepted group practices of religion. If, as Charrad suggests, women tend to be seen as representative of groups and of group values, then it follows that such laws are especially resistant to change, predicated as they are on the maintenance of group values. Indeed, challenging pre-existing legislation on violence against women is not as problematic as with family laws precisely because enhancing violence legislation in favour of women can be much more easily framed within the narrative of women as representatives of group honour.

While there may be "a mass public demand for redressal" on issues of violence against women, the same cannot yet be said on areas concerning the "redistribution of male

power and privilege,”<sup>476</sup> such as post-divorce maintenance, equal inheritance rights, and equal right of divorce.<sup>477</sup> Social norms are ever-evolving, however, and media appearances of the former Minister of Women’s Affairs, now Speaker of the House, on the 2011 National Women Development Policy and its clauses on women’s equal access to property,<sup>478</sup> suggest that legislation will come to pass when there is a perception by legislators that equality in family laws is a reachable and implementable goal rather than a mere aspiration.

Concerns with implementation, meanwhile, have found their place in strategies of incremental change where family laws are concerned. Attempts to modify family laws in a substantive way have left a number of activists with the impression that radical change is unrealistic, while also providing a marker for the level of change that is considered radical in the context of Bangladesh. Shifting social norms and legislative implementation go hand in hand, but there can be an issue of what comes first. The signalling mechanism that the Bangladesh Law Commission appears to provide in terms of a future parliamentary agenda provides clues towards the possibility of future changes among family laws. The Bangladesh Law Commission (under Alam) recently issued a report discussing mechanisms through which family laws may be reviewed, and the justifications that could be made within an Islamic framework.<sup>479</sup> However, this and similar such reports have largely been issued with

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<sup>476</sup> Sohela Nazneen and Maheen Sultan, "Mobilizing Support and Negotiating Change: Women's Organizations Building Constituencies in Bangladesh," (Dhaka: Pathways of Women's Empowerment, BRAC Development Institute, BRAC University, 2011).

<sup>477</sup> The second most common complaint received by the National Human Rights Commission, a supposedly autonomous body that reports directly to the President of Bangladesh, is that of domestic violence ("Stakeholder Report to Un Human Rights Council on Universal Periodic Review - 2nd Cycle," (Dhaka: National Human Rights Commission, Bangladesh, 2012), 3.).

<sup>478</sup> "National Women's Development Policy - 2011: Bangladesh," in *Grameenphone Lead News* (Ministry of Women and Children Affairs (Bangladesh) via [www.YouTube.com](http://www.YouTube.com), 2011).

<sup>479</sup> M. Shah Alam, "Discussion on Bangladesh's Muslim Family Laws and Some Recommendations of The the Law Commission (Translated by Tahrat Naushaba Shahid)," (Dhaka: The Law Commission, Government of the People's Republic of Bangladesh, 2013). Discussion of Islamic laws within the English language media and Bengali language media offer, at times, stark contrasts. Analysis of these

little, if any, publicity beyond being sent on to the Ministry of Law and eventually published on the Law Commission website among the Commission's many other studies.

Like Chapter III, this chapter provides further evidence of the significance of interpretation. Furthermore, the role of religion and women's status as a reflection of religious values has been treated as a bargaining tool between a range of political actors and their varied conceptions of modernity in Bangladesh. The greatest challenge in ensuring equal rights for women in Bangladesh is for state apparatus to shift from a symbolic model of women's rights that provides them with protections to one that facilitates their exercise of agency and equality as individual citizens. This mirrors transformations that women's rights have gone through in economic development policies in Bangladesh and elsewhere, and this is the focus of the next chapter.

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differences would offer an interesting insight on to the campaigning process from the perspectives of policymakers, women's rights activists, and groups that aspire towards the transformation of Bangladesh into a state run exclusively according to Islamic principles. Each of these three types of actors chooses to disseminate information through specific and sometimes exclusive news outlets and other forms of audiovisual publicity. At first glance, they all appear to be disseminating information to those who are already convinced of the arguments these presentations are providing. A closer look, however, suggests the possibility of systematic maneuvering to drum up active participation amongst those at the fringes of their support groups.

## CHAPTER V

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# The National Women Development Policy: Protesting a Non-Existent Clause

Many analyses of policies and legislation determining women's status tend to focus on their role in constructing and supporting national and state identities, with Mounira Charrad's *States and Women's Rights* on personal status laws being a particularly notable example of this trend. In South Asia, a range of authors have focused on the history of women's movements in this light, especially in the context of the independence movement and Partition of Pakistan and India in 1947<sup>480</sup> and, in the case of Bangladesh, in the context of its liberation movement and immediate aftermath.<sup>481</sup> As Amrita Chachhi points out for India, "Women have figured as crucial markers of identity—of the nation, community, caste group and religious group," and they have been "objects as well as agents of various discourses."<sup>482</sup>

Women as markers of identity and, in this study, of religious identity in particular has been an important factor in the evolution of family laws, whether seen through the lens of the Constitution or of legislation on women more broadly. This chapter delves more deeply into the theme of women's rights as symbols and how this may pose obstacles to changes in

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<sup>480</sup> Chhachhi, "Forced Identities: The State, Communalism and Women in India."; Jalal, "The Convenience of Subservience: Women and the State of Pakistan."; Agnes, *Law and Gender Equality: The Politics of Women's Rights in India*.

<sup>481</sup> Kabeer, "The Quest for National Identity: Women, Islam and the State in Bangladesh."; Kamal, "Law for Muslim Women in Bangladesh."; Nazneen and Sultan, "Mobilizing Support and Negotiating Change: Women's Organizations Building Constituencies in Bangladesh."

<sup>482</sup> Amrita Chachhi, "Identity Politics, Secularism and Women: A South Asian Perspective," in *Forging Identities: Gender, Communities, and the State*, ed. Zoya Hasan (New Delhi: Kali for Women, 1994), 75.

family laws through the lens of the National Women Development Policy or NWDP of Bangladesh, known in its earlier incarnations as the National Women's Advancement Policy. The policy includes a clause perceived by many as promoting equal inheritance rights between men and women, and religious right wing opposition to this clause has long stifled the policy from effective implementation, despite having no binding legal authority to begin with. In particular, while Chapter IV discussed the factors behind the greater degree of change in violence against women laws relative to the lack of movement in family laws, Chapter V discusses the reasons why this one area of the NWDP has posed such a challenge relative to, for example, many other of its clauses on women's participation in the formal economy. This chapter shifts gears from analysing largely protection-oriented laws on women, presented most often in the discourse of rights, to increasingly empowerment-oriented policies on women – presented in the language of development theory but intimately tied with legal discourse on women.

Section 1 introduces the four drafts of the NWDP so far and explains differences between them, starting with a history of government policies on women in Bangladesh more broadly. The following Section 2 describes opposition to the policy, particularly in response to the last two drafts. Section 3 brings this background together to discuss the evolution of women as symbols in development policies relative to women as symbols in legislation in Bangladesh. Section 4 goes on to discuss individual party positions on women's rights and how these reflect a particular understanding of women's rights, while Section 5 concludes this chapter.

This chapter adds to the evidence provided by Chapters III and IV that changes in family laws in favour of women's equality have been slowed by the interpretation of such

laws in a group rights framework. A particularly interesting feature of this chapter is to add development policies to the mix of variables under analysis, in which women's individual rights and economic empowerment have become increasingly central. The ways in which major political parties and civil society actors interpret these variations in viewing women's equality, and how they have implemented these interpretations once in positions of power, are also significant in determining expectations of change in family laws moving forward.

As with the Constitution, changes in the NWDP have had minimal impact on family laws. And, as with the legislative changes discussed in Chapter IV, the policy has had little impact on access to justice and effective implementation of rights on the ground but, similarly, it has acted primarily as a statement of aspiration. In the case of the NWDP, the statement has been of the ruling party's vision of women's roles in modern Bangladeshi society. The policy has also tended to be framed by secular women's rights activists on the left and by the religious right as a form of opposition to the religious right in Bangladesh, and the history of this opposition will be described in detail here.

The first NWDP was proposed in 1997, and in all the landmark cases analysed here, the NWDP has received no mention. Although this means that Supreme Court cases cannot be used as observations as they have been in Chapter III and Chapter IV, the absence of any mention of this policy is a notable one and can be treated as an observation in and of itself. The primary outcome to analyse, meanwhile, remains the same: the way in which shari'a is spoken of in the political discourse around family laws. Regardless of the party in power, the Bangladeshi government has repeatedly emphasised that the policy does not clash with shari'a. Meanwhile, protests and media reports suggest that such statements are accepted by neither mainstream media nor members of the religious right.

A significant body of literature on the relationship between women's status and their roles as representatives of national, cultural, and communal identity in Bangladesh already exists, and this chapter builds on that literature with the National Women Development Policy as its focus. There has been very little academic analysis of the policy so far, and most of the analysis and detail on the policy here has been drawn from newspaper articles, primary documentation, and interview data rather than secondary literature. It is also worth noting that this analysis does not address the nature of politics in Bangladesh beyond the end of 2012. In February 2013, the popular Shahbag movement emerged, protesting life terms in favour of death sentences for Jamaat-e-Islami leaders charged with war crimes. This movement led to a resurgence in what was deemed to be 'secularist' activism, with claims that the religious right had hijacked interpretations of Islam in Bangladesh.<sup>483</sup> Twenty-four hour rallies were held across the country, most prominently at a central intersection of Dhaka called Shahbag,<sup>484</sup> and with a striking level of participation among young women. In response, religious right groups increased the scale and visibility of their protests, leading to violent clashes with police.

The state of affairs by now is a complex one, rife with a tit-for-tat style of politically motivated assassinations and at least five high profile machete killings of 'secularist' or 'atheist' bloggers during the past two years, four of them since February of 2015 and the

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<sup>483</sup> Representatives of the Jamaat-e-Islami and its allies at the time described those involved in the movement as atheists and apostates, while English language media gradually adopted the term secularist.

<sup>484</sup> This location has particular significance as it is close to the campuses of several prominent state universities in what is generally considered the city's main university area, representing the geographic heart of student politics in the city and even in the country. It is the same area where the Language Movement against Pakistan emerged in 1952, when unarmed students protesting against the imposition of Urdu as the one and only state language of Pakistan were shot to death, and where barefoot processions commemorating the Movement are held every year on the date of the shootings. Much of the subsequent student protests against West Pakistani rule prior to independence were also held in and around this intersection.

fifth as recently as August 2015.<sup>485</sup> Meanwhile, the ruling party of AL has held on to power through elections in 2015 that were boycotted by the main opposition party. The AL appears to be increasingly pursuing opposition leaders, with charges of corruption for the BNP and terrorism and war crimes for Jamaat-e-Islami and its allies. There has also been a marked increase in government censorship of journalists and civil society critique. It remains to be seen where this will all lead in the future, and whether the highly centralised level of power that the current ruling party holds may lead to legislative changes for women that have been more difficult to push through in the past.

As mentioned in Chapter I, due to the current state of violence and concerns over discretion that have been characteristic of much of the period of my data collection, I have speculated here as to the reliability of individual items of primary source data discussed here, that sometimes clash with secondary sources discussing the same items. I speculate, in particular, as to whether these secondary analyses reflect the personal biases and agendas of the analysts or whether some of these items may have been edited in the years that followed, especially in their later translations to English. Where available, I compare the Bengali versions of policy documents to their English versions in an attempt to identify inconsistencies that may have bearing on my analysis.

## **1. The Development of the National Women Development Policy**

The most recent World Bank Gender Assessment report for Bangladesh points out that “The enhancement of women’s status in Bangladesh has been as much a product of the

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<sup>485</sup> "Fourth Secular Bangladesh Blogger Hacked to Death," *AlJazeera (online)*, 7 August.

vision of a new state as the unintended consequences of development policies.”<sup>486</sup> As part of this vision, a Ministry dedicated to women’s issues and intended to advance their equal rights was created as early as 1978.<sup>487</sup> This was created under the administration of Ziaur Rahman as the Ministry of Women’s Affairs and later changed to the Ministry of Women and Children’s Affairs or MWCA in 1994 under BNP administration. A complex and multi-layered structure was built to promote the Ministry’s agenda.

The highest level of the Ministry is the National Council for Women’s Development or NCWD, headed by the Prime Minister, below which sits an agency overseeing and implementing the National Action Plan for Women’s Advancement or NAP and the National Policy for the Advancement of Women or the National Women Development Policy<sup>488</sup> and a Parliamentary Standing Committee. They interact with the Women in Development or WID Focal Points in all of the line and service ministries and, most importantly, the MWCA itself. The MWCA, meanwhile, implements its initiatives via the Department of Women Affairs or DWA, which oversees District-level activities through a ‘Sub-WID Focal Point’ and the Jatiyo Mahila Sangstha or National Women’s Organisation.<sup>489</sup>

Academics, international development practitioners, and especially legal professionals, frequently involved in NGO activities in addition to their own private

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<sup>486</sup> Das (Lead Author), "Whispers to Voices: Gender and Social Transformation in Bangladesh," 8.

<sup>487</sup> Ibid., 14-15.

<sup>488</sup> The National Action Plan (NAP) is a plan for implementation and monitoring of policies. Initially based on the lead-up to the 1995 UN World Conference on Women in Beijing, the first NAP began to be drafted in 1992 with the co-operation of a number of prominent women’s organisations such as Women for Women; once the NWDP was formulated, the NAP came to represent an action plan for implementing the NWDP.

<sup>489</sup> Das (Lead Author), "Whispers to Voices: Gender and Social Transformation in Bangladesh," 8, 15.

practices, have a particularly significant presence in the women's rights movement in Bangladesh. In terms of NGOs that focus on legal issues and advocacy for women, the aforementioned Bangladesh Mahila Parishad or BMP, Naripokkho, Ain-o-Shalish Kendra or ASK, the Bangladesh National Women Lawyers' Association or BNWLA, and Bangladesh Legal Aid and Support Trust or BLAST are especially prominent. Founded in 1970,<sup>490</sup> the Bangladesh Mahila Parishad or Bangladesh Women's Association was active in the movement for independence from Pakistan and, since independence, has campaigned for changes to inheritance law and the Uniform Family Code among its other major initiatives. Naripokkho was founded in 1983 and focuses on advocacy concerning violence against women and human rights,<sup>491</sup> while ASK, BNWLA, and BLAST provide legal aid throughout the country to women while also advocating for legal reforms equalising the status of women.<sup>492</sup>

Initially, the primary emphasis of national policies regarding women was on providing welfare to those who had been affected by war, with a Bangladesh Women's Rehabilitation Board, later known as the Women's Rehabilitation and Welfare Foundation, established in February 1972.<sup>493</sup> This starting point for policies on women is discussed in greater detail in Section 3 of this chapter. With the inception of the country's first Five-Year Plan in 1973-78,<sup>494</sup> the government's efforts shifted towards a model where enhancing women's economic participation was seen as key to the country's economic development and modernisation. Government programmes that were focused on women during this first

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<sup>490</sup> Nazneen and Sultan, "Mobilizing Support and Negotiating Change: Women's Organizations Building Constituencies in Bangladesh," 10.

<sup>491</sup> Das (Lead Author), "Whispers to Voices: Gender and Social Transformation in Bangladesh," 8.

<sup>492</sup> *Ibid.*, 16.

<sup>493</sup> *Ibid.*, 11-13.

<sup>494</sup> Five Year Plans are the national development plans that the government formulates as a plan of action for economic growth and development.

plan, namely family planning and supplementary wage earning, very much reflect the development priorities of donor agencies and global economic development policy more broadly, and this trend has continued to this day. As donors' priorities and the relative contributions of individual donor countries and organisations have shifted, so too have those of the government - and indeed those of aid-dependent NGOs as well.

The interim Two-Year Plan of 1978-80 emphasised the incorporation of women in agricultural development and cottage industries. Once again reflecting broader, global trends in economic growth theories, the Second Five-Year Plan in 1980-85 suggests that government policies were moving away from women as subjects to women as agents of development. Coinciding with the Second World Conference on Women in 1985, the Second Five-Year Plan specifically mentioned "increasing women's participation in development," with references to their potential for economic productivity and credit users. It was not until the Third Five-Year Plan in 1985-90 that equality, particularly equal access to resources, however, comes to be mentioned. Even then, the Plan failed to include strategies for implementing its new approach.<sup>495</sup>

At this stage, it may be helpful to refer to a timeline of the major legislation and policy events discussed in this study to put developments of the NWDP in their proper context. The following table offers just that, detailing their timing in light of the first few Five-Year Plans described here.

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<sup>495</sup> Das (Lead Author), "Whispers to Voices: Gender and Social Transformation in Bangladesh," 8, 11-13.

**Table 3. Timeline of Legal and Policy Developments and Five-Year Plans**

Change in Legislation or Policy	Year	Party in Power	Five-Year Plans <sup>496</sup>
<i>Bangladesh Abandoned Children (Special Provisions) Order and Inter-Country Adoption Law</i> passed, facilitating international adoption of babies born of rape by Pakistani soldiers and collaborators, despite Muslim personal status law forbidding adoption	1972	Awami League	
<i>Muslim Marriages and Divorce (Registration) Act</i> passed to enforce civil registration of Muslim marriages, although failure to register was to be punished with a prison sentence and/or fine rather than invalidating the marriage	1974	Awami League	<b>1973 -1978 First Five-Year Plan:</b> incorporates women's economic participation through family planning and supplementary wage earning programmes
<i>Ministry of Women's Affairs</i> created	1978	Military dictatorship (of President Ziaur Rahman, later head of the Bangladesh Nationalist Party)	
<i>Fifth Constitutional Amendment</i> passed, which legitimised the addition of the Muslim start to prayer or blessing 'Bismillahir Rahmani Rahim' to the beginning of the Preamble, the removal of secularism as a fundamental principle, and its replacement with 'absolute trust and faith in the Almighty Allah.'	1979	Bangladesh Nationalist Party	<b>1978-1980 Interim Two-Year Plan:</b> includes focus on women in agricultural development and cottage industries

<sup>496</sup> Ibid., 11-16.

<i>Bangladesh Abandoned Children (Special Provisions) Order and Inter-Country Adoption Law</i> repealed amid concerns of child-trafficking and forced religious conversions to Christianity	1982	Bangladesh Nationalist Party	<b>1980-1985 Second Five-Year Plan:</b> specifically mentions expanding the participation of women in development activities, with references to their potential for economic productivity and credit users
<i>Cruelty to Women (Deterrent Punishment) Ordinance</i> passed, outlawing the abduction of women and acid attacks on women, mandating death or life imprisonment for killing a rape victim, and providing the first piece of legislation explicitly outlawing women-trafficking	1983	Military dictatorship (of President Ershad, later head of the Jatiyo Party)	
<i>Convention on the Elimination of Discrimination Against Women or CEDAW</i> ratified, with reservations concerning ending discrimination against women, the right of women to family benefits, and the equality of men and women in marriage and female relations	1984	Military dictatorship (of President Ershad)	
<i>Family Courts Ordinance</i> passed, laying out the jurisdiction and functions of Family Courts as courts of first instance for personal status cases and limiting them to civil suits	1985	Military dictatorship (of President Ershad)	
<i>Eighth Constitutional Amendment</i> passed, which declared Islam as the state religion	1988	Jatiya Party	<b>1985-1990 Third Five-Year Plan:</b> calls for equality between men and women, particularly equal access to resources, for the first time in such Plans - but fails to include strategies for implementation
<i>Convention on the Rights of the Child or CRC</i> ratified, with reservations on children's religion and adoption	1990	Jatiya Party	
<i>Tenth Constitutional Amendment</i> passed, which increased the 15-seat reservation for women in parliament to 30 for the next 10 years	1990	Jatiya Party	

Ministry of Women's Affairs renamed <i>Ministry of Women and Children's Affairs</i>	1994	Bangladesh Nationalist Party	<b>1990-1995 Fourth Five Year Plan:</b> incorporates gender mainstreaming, focusing on poor women in all of its development interventions
<i>Oppression of Women and Children (Special Provision) Act</i> passed, repealing the 1983 Ordinance so that this new act with more severe penalties was to take precedence, specifying death and life imprisonment for acid attacks leading to death, rape leading to death, gang rape, and attempts to cause death while committing rape, as well as life imprisonment for women-trafficking and holding children for ransom	1995	Bangladesh Nationalist Party	
<i>Beijing Platform for Action</i> signed without reservation at the Fourth World Conference on Women	1995	Bangladesh Nationalist Party	
<i>Proposal for Uniform Family Code or UFC</i> by group of activists led by the Bangladesh Mahila Parishad and Ain O Shalish Kendra	1996	Awami League	<b>1995-1997 Three Year Rolling Plan:</b> in which the Government of Bangladesh aligns itself with Millennium Development Goals, including those incorporating women and girls

<i>First National Women's Advancement Policy</i> announced	1997	Awami League	<b>1997-2002 Fifth Five-Year Plan:</b> combines gender mainstreaming efforts with programmes focusing on the empowerment of women
Reservation made to <i>CEDAW's</i> Article 13 on equal access to family benefits, and 16(1)(f) on equality between men and women on custody of children withdrawn	1998	Awami League	
<i>International Covenant on Economic, Social, and Cultural Rights</i> or <i>ICESCR</i> was ratified, with declarations pertaining to equality and discrimination on the basis of, among other characteristics, sex, and the extent to which the equality of economic rights could be made possible in developing countries	1998	Awami League	
<i>Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages</i> ratified, with reservations to Article 1 on the full consent of both parties in a marriage	1998	Awami League	
<i>Repression against Women and Children Act</i> passed, enhancing earlier laws on violence against women, including recognition of sexual assault and sexual harassment as crimes and the provision of protective custody for women	2000	Awami League	
<i>Second National Women Development Policy</i> announced	2004	Bangladesh Nationalist Party	<b>2003-2008 Sixth Five-Year Plan</b> (under BNP)
<i>Fourteenth Constitutional Amendment</i> , increasing the number of reserved women seats in parliament from 30 to 45	2004	Bangladesh Nationalist Party	
<i>Third National Women Development Policy</i> announced and then withdrawn due to violent opposition	2008	Caretaker government	
<i>Domestic Violence (Protection and Prevention) Act</i> passed, criminalising physical, emotional, and sexual domestic abuse, although spousal rape was not prohibited	2010	Awami League	

<i>Fifteenth Constitutional Amendment</i> passed, with secularism reinserted into the Constitution but Islam remaining a state religion, and the number of reserved seats for women in parliament raised from 45 to 50	2011	Awami League	<b>2011-2015 Sixth Five-Year Plan</b> (under Awami League)
<i>Fourth National Women Development Policy</i> announced	2011	Awami League	

It is worth noting both from Table 3 and Chapter IV's timeline of laws passed that 'non-development' initiatives such as the setting up of family courts, and a number of legislative acts concerning violence against women in the form of dowry, rape, acid attacks, and trafficking were passed during the period of the third plan. The Convention on the Elimination of Discrimination Against Women or CEDAW was ratified in 1984 under the military dictatorship of President Ershad, with the government making reservations relating to Article 2, Article 13(a), Article 16(1)(c), and Article 16(1)(f) on the basis of a perceived clash with shari'a.<sup>497</sup> Article 2 pertains to the equality of men and women and ending all discrimination against women and Article 13 (a) refers to the right of women to family benefits. Articles 16(1)(c) and 16(1)(f) promote the equality of men and women in marriage and family relations, such as in entering into marriage and its dissolution, and refer to equal rights and responsibilities between the sexes on guardianship and custody of children.<sup>498</sup> The Convention on the Rights of the Child or CRC was also ratified under Ershad, in 1990, and

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<sup>497</sup> "Convention on the Elimination of All Forms of Discrimination against Women: Text of the Convention," UN Women, <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>.

<sup>498</sup> "Convention on the Elimination of All Forms of Discrimination against Women: Declarations, Reservations and Objections to Cedaw," UN Women, <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>; "Bangladesh Announces Withdrawal of Some Reservations to Anti-Discrimination Convention, Delegations Tells Committee," (New York: United Nations, 1997). Resistance to these articles, and Article 16, in particular, are common to a number of other Muslim majority countries, with only around 30, or over half, of the countries who are part of the Organisation of Islamic Cooperation having ratified CEDAW, and reservations "entered by a dozen [of these] states in the name of Islamic principles." Although having reservations to CEDAW is not specific to Muslim majority countries, their reasoning that CEDAW clashes with Muslim personal status laws sets them apart from other countries with reservations (Siraj Sait and Hilary Lim, *Land, Law and Islam: Property and Human Rights in the Muslim World* (London: Zed Books, 2006), 94; Lisa Hajjar, "Domestic Violence and Shari'a: A Comparative Study of Muslim Societies in the Middle East, Africa and Asia," in *Women's Rights and Islamic Family Law: Perspectives on Reform*, ed. Lynn Welchman (London: Zed Books, 2004).). It is worth noting from cases discussed in Chapter IV that, while Article 16(1)(f) on child custody was one of the reservations held to CEDAW in 1984 on the basis of contradicting existing Islamic jurisprudence, the case *Muhammad Abu Bakar Siddique v. S. M. A. Bakar and others* in 1985 already revealed an increasing inclination towards according mothers child custody through re-interpretations of existing laws (*Md. Abu Bakar Siddique Vs. S. M. A. Bakar and Others*). As this reservation was removed in 1997, so too did a new landmark case arise, *Nargis Sultana v. Md. Amirul Bor Chowdbury*, again giving child custody to a mother and this time with fewer references to Islamic jurisprudence (*Nargis Sultana Vs. Aminul Bor Chowdbury*).

the government made reservations relating to Article 14(1) on a child's freedom of religion and Article 21 on child adoption, particularly inter-country adoption. The latter Article was to be applied subject to the country's existing laws, which had been constructed to protect children from trafficking, a long-standing significant problem across South Asia, particularly among girls.

Feminist groups allied with other opposition groups in calling for elections as resistance grew towards President Ershad's rule during the 1980s. After his fall, the support of women's rights groups in opposition to Ershad was rewarded by having them work closely with the government in preparing for the United Nation's Beijing Conference on Women in 1995.<sup>499</sup> The Fourth Five-Year Plan, for 1990-95, is the first that considers "gender differences in all development interventions,"<sup>500</sup> otherwise known commonly in international development policy jargon as 'gender mainstreaming.' It was not, however, until the time of the Three-Year Rolling Plan (1995-97) that a National Women Development Policy was underway.

There are four drafts of the NWDP to consider in this chapter. In 1995, Bangladesh signed up to the Beijing Plan of Action at the UN Conference for Women and the NWDP of 1997 was born shortly afterwards. It explicitly promoted working toward equal inheritance rights for women and, due to resistance, was never put into operation<sup>501</sup> as it was never formally approved by Cabinet.<sup>502</sup> The second, 2004 draft of the NWDP presented a

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<sup>499</sup> Sohela Nazneen, "Men Aboard? Movement for a Uniform Family Code in Bangladesh," (Dhaka: Pathways of Women's Empowerment, BRAC Development Institute, BRAC University, 2011), 2.

<sup>500</sup> Das (Lead Author), "Whispers to Voices: Gender and Social Transformation in Bangladesh," 11-13.

<sup>501</sup> Gayan, "Equal Property Right: Much Ado About Nothing."

<sup>502</sup> Hameeda Hossain, "Where Is the Promised change for Women in Bangladesh?," Ibid., 13 May 2009.

greatly watered down version of the first draft and was passed in Cabinet. The 2008 policy, announced under a caretaker government, while somewhat closer to the earlier, 1997 version, was withdrawn in the face of heated opposition from the religious right. Finally, the 2011 policy was approved at the Cabinet level and bears the closest similarity to the original 1997 version of all three later drafts.

Policy-making in Bangladesh starts with the Cabinet, which chooses to pursue a policy and assigns the relevant ministry to draft it. In the case of the NWDP, its relevant ministry is the MWCA. A draft policy is then sent off to other ministries for review, after which it is sent back to the Cabinet and relevant Parliamentary Committee, followed by the Parliamentary Standing Committee, back to Cabinet, and finally passed through Parliament. The Parliament, as mentioned briefly in the context of the Domestic Violence Act of 2010, has a largely “peripheral role” in the making of policy.<sup>503</sup>

In 1997, after the announcement of the NWDP, the reservation made to CEDAW’s Article 13 on equal access to family benefits, and 16(1)(f) on equality of custody was withdrawn.<sup>504</sup> It is important to note the reservations made on treaties ratified shortly after the 1997 NWDP announcement as well. The International Covenant on Economic, Social, and Cultural Rights or ICESCR was ratified in 1998 under an Awami League government.

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<sup>503</sup> Salahuddin M. Aminuzzaman, "Public Policy Processes and Citizen Participation in Bangladesh," in *Public Administration in South Asia: India, Bangladesh, and Pakistan*, ed. Meghna Sabharwal and Evan M. Berman (Boca Raton, FL: CRC Press/Taylor & Francis Group, 2013), 222.

<sup>504</sup> "Bangladesh Announces Withdrawal of Some Reservations to Anti-Discrimination Convention, Delegations Tells Committee." The withdrawn reservations are incorrectly reported as including Article(16)(1)(c) in "Convention on the Elimination of All Forms of Discrimination against Women: Declarations, Reservations and Objections to Cedaw." During the landmark sexual harassment case concerning university students discussed in Chapter IV, CEDAW was raised as a reference point encouraging the passing of anti-harassment guidelines ("Dear Mom, Want a Treaty for Mother's Day?," *Bangor Daily News (online)*, 24 May 2012.). There is no mention of international treaties in any of the landmark personal status cases discussed in this study, however, as personal status laws have tended to be held as the primary exception to falling in line with international treaties such as CEDAW.

The government at that time made declarations on Articles 2 and 3 pertaining to equality and discrimination on the basis of, among other characteristics, sex, and the extent to which the equality of economic rights could be made possible in developing countries: “The Government of the People's Republic of Bangladesh will implement Articles 2 and 3 in so far as they relate to equality between man and woman, in accordance with the relevant provisions of its Constitution and in particular, in respect to certain aspects of economic rights viz. law of inheritance.”<sup>505</sup>

The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages was similarly ratified in 1998 under the Awami League. Its ratification came with reservations to Article 1 on the full consent of both parties in a marriage which was to be attainable even in one’s absence according to the Convention, and to Article 2, which allows for a dispensation “as to age, for serious reasons, in the interest of the intending spouses” if a “competent authority” allows such dispensation.<sup>506</sup> The treaty was to be applied only to the extent these articles could be accommodated “with the Personal Laws of different religious communities of the country.”<sup>507</sup>

Revisions were introduced to the 1997 NWDP and appeared in a 2004 draft published by the Ministry of Women and Children’s Affairs while a Four Party Alliance between the BNP, Jamaat-e-Islami, Islami Oikkyo Jote or IOJ,<sup>508</sup> and Jatiya Party were in

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<sup>505</sup> "Chapter Iv. Human Rights: 3. International Covenant on Economic, Social and Cultural Rights," United Nations, [https://treaties.un.org/pages/viewdetails.aspx?chapter=4&en&mtdsg\\_no=iv-3&src=treaty#EndDec](https://treaties.un.org/pages/viewdetails.aspx?chapter=4&en&mtdsg_no=iv-3&src=treaty#EndDec).

<sup>506</sup> "Chapter Xvi. Status of Women: 3. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages," United Nations, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XVI-3&chapter=16&en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVI-3&chapter=16&en).

<sup>507</sup> Ibid.

<sup>508</sup> The Deobandi group Islami Oikyo Jote or Islamic Unity Front has increasingly been a major spokesman for religious right wing politics, with a platform that is further to the right than the

power. Notably, there were no discussions with civil society groups or any other public input leading up to its publication and all references to property, land, and inheritance rights were removed. The government is described by Elora Chowdhury as having “secretly introduced changes to the National Women's Advancement Policy (NWAP) without discussing it in Parliament or with women’s groups.”<sup>509</sup> The dilution of the earlier 1997 draft was widely perceived as acquiescence to the religious right.<sup>510</sup>

Ayesha Khanam, long-time head of the Bangladesh Mahila Parishad, commented that, “By contrast [to the 2004 policy] the 1997 policy had a reflection of all major international conventions on women like Rio Earth Summit 1992, Vienna Human Rights Conference and Plan of Action 1993, the International Conference on Population and Development Cairo 1994, and the Fourth World Conference on Women 1995.”<sup>511</sup> Confusingly, the same Ministry that watered down the NWDP in 2004 also submitted Bangladesh’s Fifth Report to the United Nations’ Committee on Elimination of all forms of Discrimination against Women or CEDAW in the same year, committing to reducing inequalities in marriage, property, citizenship, and political participation.<sup>512</sup> Furthermore, the

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modern-day Jamaat-e-Islami. As of 2013, Islami Oikyo Jote and a number of similar groups developed a new joint platform titled ‘Iman and Desh Rokkha Andolon’ or Faith and Country Preservation Movement. This movement excludes the Jamaat-e-Islami altogether by now (“Justice, Finally,” *The Daily Star (online)*, 1 March 2013.), likely in an effort to focus on transforming Bangladesh into an Islamic state rather than protesting the ongoing War Crimes Tribunal, which is currently the primary concern of the Jamaat-e-Islami.

<sup>509</sup> Chowdhury, “Transnationalism reversed’: Engaging Religion, Development and Women's Organizing in Bangladesh,” 416-17.

<sup>510</sup> Hameeda Hossain, “Women Development Policy: Pushing the Boundaries?,” *The Daily Star 20th Anniversary Supplements Archive (online)*, 4 April 2011.

<sup>511</sup> Haq, “Women Defy Islamic Clergy.”

<sup>512</sup> Hossain, “Women Development Policy: Pushing the Boundaries?.”

subsequent Bangladesh's Poverty Reduction Strategy Paper<sup>513</sup> reflected the earlier 1997 policy.<sup>514</sup>

The 2008 NWDP incorporated considerably more public dialogue, with the country's largest women's organisations brought together in workshops to formulate a proposed policy.<sup>515</sup> The policy was submitted to the Ministry of Women and Children's Affairs and announced by the head of the caretaker government at that time, Chief Adviser Fakhruddin, but never implemented. My text of the 1997, 2004, 2008, and 2011 NWDP and related documents shows that its fourth and last version is a slightly revised version of the 2008 policy, but nevertheless a watered down version of the very first, 1997 policy. Importantly, both the 2008 and 2011 policies make no reference to equal inheritance rights, though they do refer to equal access to property which, as the next section will demonstrate, has been understood by various non-state actors to be equivalent.

## 2. Protests Against the NWDP

Conflicts over each draft of the NWDP suggest that the issue of equal inheritance rights is merely one, especially vocalised, point of contention for rallying around a larger cause. By the time the 1997 draft policy "was finalised, the government's tenure had expired, and implementation of the policy remained incomplete. Even in 1997, however, religious right wing groups sensing groundwork on the policy document threatened to oppose clauses

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<sup>513</sup> The Poverty Reduction Strategy Paper or PRSP is the economic plan document required by the International Monetary Fund and World Bank before they consider providing assistance to a country.

<sup>514</sup> Chowdhury, "'Transnationalism reversed': Engaging Religion, Development and Women's Organizing in Bangladesh," 416-17.

<sup>515</sup> "Ngo Activist 2, Interview by Tahrat Naushaba Shahid."

that gave women enhanced rights and power.”<sup>516</sup> In response to the 2004 policy, on the other hand, a group of 35 organisations working on women’s rights formed the Shamajik Protirodh or Social Protest Committee to protest the way in which the NWDP had been passed, without any public dialogue or engagement with civil society groups.<sup>517</sup>

### **a. The National Women Development Policy of 2008**

When the next NWDP policy was announced on 8 March 2008, the Chief Justice at that time, Mohammad Ruhul Amin, declared his support for the policy.<sup>518</sup> Former Chief Justice Muhammad Habibur Rahman added his support as well, saying “If implemented properly, it will usher in a new era in freeing our women folk out of the shackles of the past,” at an event organised by the Bangladesh Mahila Parishad.<sup>519</sup> However, protests organised primarily by Islami Oikyo Jote followed the announcement, too. They feared that the policy aimed to equalise inheritance rights and was therefore in direct contradiction of widely accepted interpretations of Quranic injunctions. IOJ’s leader, Fazlul Haq Amini, argued that, “The new government policy has mentioned there would be equal property rights for women which is directly against Islam and the Holy Quran. We will not tolerate anything that goes against the Sharia.”<sup>520</sup> Meanwhile, women’s rights activists appeared to stoke the fire while the government continued to insist that there was no equal inheritance clause in the latest NWDP. “Shirin Akhter, head of one of the largest women’s groups in the

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<sup>516</sup> Haq, "Women Defy Islamic Clergy."

<sup>517</sup> Chowdhury, "'Transnationalism reversed': Engaging Religion, Development and Women's Organizing in Bangladesh," 416-17.

<sup>518</sup> "Bangladesh: Divisions over Women's Development Policy," *IRIN Asia (online)*, 28 May 2008.

<sup>519</sup> Ibid.

<sup>520</sup> Shafiq Alam, "Bangladesh: Government Retreats on Women’s Rights after Clerics Protest (Afp Via Dawn)," *Women Living Under Muslim Laws*, <http://www.wluml.org/node/4478>.

country, said she hoped the government would ignore the criticism. “The policy spells out clearly that women should have equal rights to property, which includes inheritance.”<sup>521</sup>

In response, the caretaker government of that time attempted to calm resistance by setting up a review committee of Muslim clerics. The committee was formed with 20 members of the ulema on 27 March 2008 to identify problems in the NWDP, followed by their report on 17 April saying that they were unable to find any contradictions of the Quran or Sunnah in the policy.<sup>522</sup> At least one of the groups making this assertion was the Bangladesh Sammilito Islamic Jote or Bangladesh United Islamic Alliance,<sup>523</sup> followers of liberal Sufi traditions and insistent on their belief “in the spirit of the 1971 liberation war.”<sup>524</sup> The committee nevertheless advised in favour of tweaking certain recommendations of the policy, such as “[watering] down a deterrent law on early marriage.”<sup>525</sup>

Women’s rights activists who had been involved in the drafting of the 2008 policy perceived the formulation of this review committee as a sign of the government’s weakness in the face of opposition. The Shamajik Protirodh Committee that had formed in response to the 2004 policy had by 2008 expanded to 40 women’s rights organisations and, headed by the Bangladesh Mahila Parishad, they submitted a memorandum to the Chief Advisor of the caretaker government “demanding immediate dissolution of the review committee of the Women Development Policy and scrapping of the committee's recommendations. ... [They also] urged the caretaker government to clarify its position regarding the Women Development Policy by issuing a press note.” On the protests organised by the IOJ, they

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<sup>521</sup> Ibid.

<sup>522</sup> "Bangladesh: Divisions over Women's Development Policy."

<sup>523</sup> Ibid.

<sup>524</sup> Riaz, "Unpacking the Islamist Agenda."

<sup>525</sup> Hameeda Hossain, "Where Is the Promised change for Women in Bangladesh?," *Forum, magazine of The Daily Star newspaper (online)*, 13 May 2009.

added that, “During the past few decades, this specific group has opposed and created obstacles to not only women's human rights but also to women's social development programmes,” and that “the April 11 violent demonstrations of the organisations prove that their objective is something else, not opposing the women development policy.” The Shamajik Protirodh Committee also argued that the review committee should have included representatives of the Ministry of Women and Children’s Affairs and women’s right organisations rather than being led up by the head cleric of the National Mosque of Baitul Mokarram. The Shamajik Protirodh Committee framed the issue thus: “Members of the [ulema] committee are trying to establish fundamentalist politics that go against the spirit of the Liberation War of Bangladesh and its constitution.”<sup>526</sup>

In the end, the government’s attempt to mollify both the Shamajik Protirodh Committee and the IOJ appeased neither. The IOJ questioned the membership of the ulema committee as being overly liberal or biased towards the government and continued with their violent protests, while women’s rights activists maintained their position that the government was backing down. Fear of continued violence convinced the government to withdraw the 2008 policy from public dialogue and, for all intents and purposes, retracted it altogether.

## **b. The Current 2011 National Women Development Policy**

The 2011 NWDP was approved by Cabinet and announced by Prime Minister Sheikh Hasina Wajed on 7 March 2011 and, although it referred to women’s equal access to

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<sup>526</sup> "Women, Hr Bodies Demand Scrapping of Review body," *The Daily Star (online)* 22 April 2008.

earned income, credit, land, and markets and proposed legal reforms based on human rights, made no call for moving towards equality in marriage, divorce, inheritance, and custody rights.<sup>527</sup> With the announcement of the 2011 policy, it was clear that the Awami League government was keen to communicate and clarify its principles widely in the media in an attempt to pre-empt opposition. Both the Minister of Women's and Children's Affairs at that time, Shirin Sharmin Chaudhury, and the Prime Minister stressed in public forums that the new policy had incorporated discussions with the ulema.<sup>528</sup> The ulema they spoke of were associated with the aforementioned Islamic Foundation, and its president announced that, "Generally there is nothing contradictory to Islam in the policy ... [warning also that] street agitation like hartal [or strike action that involves the shutting down of all workplaces and places of business, including schools, offices, shops, and others] in protest against the policy may create among women adverse attitude [*siz*] to Islam."<sup>529</sup> The IOJ responded by suggesting that the president was "a puppet in the hands of secularists."<sup>530</sup>

The Islami Oikyo Jote again protested on a national scale, and soon gave birth to right wing group Hefazat-e-Islam, since then a highly visible force demanding that the Bangladeshi government fall in line with their interpretation of Islamic principles. Hefazat was formed in direct response to a perception that this 2011 policy planned to equalise inheritance rights between men and women.<sup>531</sup> On 4 April 2011, they formed a blockade along a main highway in the country's capital and claimed that they had attracted

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<sup>527</sup> Hossain, "Women Development Policy: Pushing the Boundaries?."

<sup>528</sup> Haq, "Women Defy Islamic Clergy." Unfortunately neither the former Minister, now Speaker of the House, nor any members of her staff responded to my multiple requests for interviews to discuss this 2011 announcement.

<sup>529</sup> "Rights Chief roots for Women Policy," *The Daily Star (online)*, 15 May 2011.

<sup>530</sup> Bangladeshi Government 'Tries to Push Women's Equality for a Third Time, but Islamists Object to, 25 March, 2011, <http://www.equality-law.co.uk/news/989/66/Bangladeshi-Government-tries-to-push-women-s-equality-for-a-third-time-but-Islamists-object/>.

<sup>531</sup> "Who Owns Bangladesh?," *The Economist*, 20 August 2013.

spontaneous, grassroots support.<sup>532</sup> Despite repeated government clarifications, meanwhile, media reports claimed that the policy was promoting equal inheritance rights as well. International newspapers such as the *New York Times* reported on the protests with the same interpretation of the policy.<sup>533</sup> The editor of the most widely distributed English language daily newspaper in the country, the *Daily Star*, wrote a deeply emotive description of the protests shortly afterwards, revealing a common perception among those in support of the NWDP:

“Islami Ain Bastabayan [or Islamic Law Implementation] Committee headed by the leader of a faction of Islami Oikya Jote ... came out on to the streets ... armed with newly cut tree branches, and freshly carved wooden sticks clearly indicating they wanted a showdown with the law enforcers. They also wore the symbolic white outer garments (indicating that they were ready to die for what they were agitating) ... Some activists in the processions ... wore the Holy Quran around their necks or under their loosely fitted outer garments. Given their demeanor [*sic*] and body language they clearly intended to engage in scuffles with the police, and if chance should come, physically fight with them. Knowing full well what happens when there is a street fight with the police, bringing the holy book on to the streets is a clear indication that these people wanted the Holy Quran to be exposed to situations when it might be unwittingly and unintentionally desecrated. The aim appears to have been to show on TV screen and in newspaper photographs that our holy book was desecrated by police. This then could be used to fan anti-government sentiment. Such blatant, shameless, and cynical use of religion and of our Quran had never been seen in the past, and must be condemned by all.”<sup>534</sup>

IOJ’s nationwide strikes led to dozens of injuries in Dhaka as protesters fought with police, and the National Mosque was cordoned off for safety.<sup>535</sup> Meanwhile, 25 protestors were injured and one was killed during similar strikes in western Bangladesh, and protestors

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<sup>532</sup> "Police Disperse Bangladesh Protests against Women's Rights," *BBC News (online)*, 4 April 2011; "True' Women's Right Policy Demanded," *Bdnews24.com (online)*, 24 May 2011.

<sup>533</sup> "Bangladesh: Islamist Strike Shuts Cities," *The New York Times (online)*, April 4 2011.

<sup>534</sup> Mahfuz Anam, "In Fighting Extremism, Pm Needs All Our Support," *The Daily Star (online)*, 6 April 2011.

<sup>535</sup> "Dozens Injured as Bangladeshi Islamists Protest Women's Equality Laws," *The Telegraph (online)*, 4 April 2011.

insisted that this was a result of unwarranted police violence.<sup>536</sup> Fazlul Haq Amini, head of both the Islami Oikyo Jote and Islamic Law Implementation Committee, and the Prime Minister continued to argue through media reports and public announcements on the potential clash, or lack thereof, between Islamic principles and the NWDP.<sup>537</sup> Meanwhile, the BNP reportedly supported the IOJ's protests, although they neither organised any protests of their own nor volunteered supporters to join IOJ protests.<sup>538</sup>

A few weeks later, the Jatiyo Mahila Sangstha held their own protests across the country, forming human chains and holding rallies to express their support for the policy and demand that the government immediately enforce the policy.<sup>539</sup> The day prior to these pro-policy rallies, the Prime Minister addressed the Bangladesh Jamiatul Mudarresin, a group of religious school teachers, on clashes over the NWDP and insisted that "the confusion had been ironed out after a thorough review of chapters in the Holy Quran."<sup>540</sup> As with the 2008 policy, some women's rights activists demanded more, with one well-known academic and rights activist, Professor Emeritus Serajul Islam Chowdhury of Dhaka University, addressing the pro-policy rally to say that the government had not gone far enough and arguing for equalising amendments to inheritance rights.<sup>541</sup>

Meanwhile, a number of high-profile ulema made their support of the policy clear, in some cases with detailed analyses of the policy and verses of the Quran. Maulana Abdullah Al-Maruf told reporters that Amini had "deliberately twisted the meanings of words in the Quran," adding that "Nothing in the women policy clashes with the Quran or Sunnah. A

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<sup>536</sup> Ibid.

<sup>537</sup> Ibid.

<sup>538</sup> Haq, "Women Defy Islamic Clergy."

<sup>539</sup> Ibid.

<sup>540</sup> Ibid.

<sup>541</sup> "True' Women's Right Policy Demanded."

section of Alems, like Mufti Amini, are making wrong interpretation [sic] of the policy only for political gains.” Maulana Ziaul Hasan of the Islamic Foundation said “Any literate person will understand that the word ‘wealth’ in section-23.5 [of the Policy] does not mean inherited wealth. Similarly, the word ‘inherit’ in section 25.2 does not imply equal share of property to women.” They argued, too that Amini’s claim that women were not to have any economic responsibility in Islam was baseless.<sup>542</sup>

Unlike the NWDP 2008, the NWDP 2011 was not quietly retracted in the face of opposition, and the government continued to move forward with an action plan for monitoring and implementation. As has been observed from the outset of this study, the protests are against a clause that does not exist, suggesting that the policy holds more symbolic than real value. The key issue being protested is a clause that existed in the original, 1997 draft, but is not present in the 2011 version. Article 7 in 1997 states that the policy intends to: “Provide Equal opportunities and partnership to women in matters of property, employment, market and business,” with Article 7.2 specifying that the policy will: “Ensure women’s equal access to and equal control over the matters which are important to women’s empowerment, such as health, education, training, ... opportunity to earn, inheritance, property, credit and rights to property acquired through market-management including rights to land etc. and enacting necessary new Laws for achieving these goals.”<sup>543</sup>

The 2004 version, however, says the following in Article 7: “Ensure women’s Constitutional rights in formulating and implementing economic policies (commercial policy, monetary policy, fiscal policy etc.); Provide Equal opportunities to women in matters of

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<sup>542</sup> Rashidul Hasan, "Amini Versions Skewed," *The Daily Star (online)*, 11 April 2011.

<sup>543</sup> "Jatiyo Nari Unnoyon Neethi (National Women Development Policy) (Translated by Tahrat Naushaba Shahid)," ed. Government of the Republic of Bangladesh Ministry of Women and Children's Affairs (Dhaka 1997), 14-15.

access to employment, market and business.”<sup>544</sup> Article 7.2 of this version says that the policy will: “Ensure women’s equal access to and equal control over the matters which are important for women’s economic empowerment, such as health, education, training, ... opportunity to earn, credit and rights to property acquired through market-management etc. and enacting necessary new Laws for achieving these goals.”<sup>545</sup> All mention of property and inheritance were deleted here from the earlier, 1997 policy. In the 2008 NWDP, on the other hand, Article 9.5 was to have called for equal access to property.<sup>546</sup> The equivalent section of Article 7.2 where inheritance was previously discussed in the 1997 policy, Article 9.13, was to have made no reference to either inheritance or right to land but still refer to equal access and control with regard to property.<sup>547</sup>

My assessment of the 2011 policy, drawn from the English version currently available on the Ministry of Women and Children’s Affairs website and a Bengali print version issued by the Ministry and made available to me in 2013, produced slightly different readings than those drawn from activists and their statements in the media from the year during which the NWDP 2011 was first announced. As with previous versions, the most recent policy describes the situation of women in Bangladesh and its general objectives in broad terms and goes on from there to describe specific initiatives in a number of Articles or Sections.

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<sup>544</sup> "Jatiyo Nari Unnoyon Neethi (National Women Development Policy) (Translated by Tahrat Naushaba Shahid)," ed. Government of the Republic of Bangladesh Ministry of Women and Children's Affairs (Dhaka2004), 10-11.

<sup>545</sup> Ibid., 11.

<sup>546</sup> "Steps Towards Development: A. Analysis of the National Policy for Women's Advancement (Npwa) 2008 in Light of the Previous Ones," ed. Naripokkho (Dhaka). As the 2008 policy was withdrawn, the only documentation on this policy was made available to me by Naripokkho, which produced a leaflet comparing the 1997, 2004, and 2008 drafts.

<sup>547</sup> Ibid.

Long-time women's rights activist Hameeda Hossain's editorial analysis points out that the policy mentions women's "access and control over property, credit, land, market, food security, agricultural work, health care throughout her life cycle, shelter..."<sup>548</sup> However, I found no explicit reference to property in either the English or Bengali version of the document, though references to land and property may be treated as interchangeable in alternative translations. Hossain says also, that in "Sec. 25.2, the Policy refers to women's access to or control over earned income, credit, land and market only. The document has shied away from equal rights to inheritance."<sup>549</sup> The documents that I have access to from 2013 (Bangla, print) and 2015 (English, online), however, both mention succession in the same Section, that is, "25.2. To give women the rights to wealth and resources earned through income, succession, loan/credit, land and market management."<sup>550</sup> I agree with Hossain that there is no mention of equal access in such rights as they merely state that women should have 'rights' rather than 'equal rights.' Inexplicably, however, she appears to misquote the document and leave the word 'succession' out in her description of the Section altogether.

Hossain also points out that "Section 16.1 aims to ensure constitutional right in matters of the state and public life only,"<sup>551</sup> and that the private sphere is ignored altogether. She does not mention that, in Section 16.2, the document says that the policy will: "ensure

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<sup>548</sup> Hossain, "Women Development Policy: Pushing the Boundaries?."

<sup>549</sup> Ibid.

<sup>550</sup> "National Women Development Policy," Ministry of Women and Children's Affairs, Government of the Republic of Bangladesh,

[http://mowca.portal.gov.bd/sites/default/files/files/mowca.portal.gov.bd/policies/64238d39\\_0ecd\\_4a56\\_b00c\\_b834cc54f88d/National-Women-Policy-2011English.pdf](http://mowca.portal.gov.bd/sites/default/files/files/mowca.portal.gov.bd/policies/64238d39_0ecd_4a56_b00c_b834cc54f88d/National-Women-Policy-2011English.pdf); "Jatiyo nari Unnoyon Neethi (National Women Development Policy) (Translated by Tahrat Naushaba Shahid)," ed. Government of the Republic of Bangladesh Ministry of Women and Children's Affairs (Dhaka2011), 18.

<sup>551</sup> Hossain, "Women Development Policy: Pushing the Boundaries?."

security and safety of women in all areas of state, social and family life.”<sup>552</sup> This could at first glance be deemed to only refer to issues of abuse and violence but is then followed in Section 16.12 with, “To establish gender equality in politics, administration, other areas of activity, socio-economic activity, education, culture, sports and in **all areas of family life** [emphasis added].”<sup>553</sup>

The main thrust of Hossain’s critique of the NWDP 2011 holds – crucially, that it does not provide for equality in inheritance. Misrepresentations of the original document by a high profile women’s rights activist such as Hameeda Hossain, however, are curious, particularly as they reflect many of the generalisations prevalent among other women’s rights activists who contributed to the 2011 draft.<sup>554</sup> This raises the question of whether the document might have been changed after the protests of 2011 to include the words ‘succession’ and ‘family life’ without any further public announcements regarding the policy; or whether there has been some effort on the part of pro-policy activists to gloss over details justifying protests against the policy. (Further questioning on this point during my interviews of those activists, however, yielded inconclusive results.)

What emerges most importantly from the evidence presented here is that references to inheritance and personal status laws carry great value and remain a significant area of contention across Bangladeshi political discourse on the role of religion. While those who push for the policy to be implemented de-emphasise the inclusion of words such as

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<sup>552</sup> "National Women Development Policy."; "Jatiyo nari Unnoyon Neethi (National Women Development Policy) (Translated by Tahrat Naushaba Shahid)," 14.

<sup>553</sup> "National Women Development Policy."; "Jatiyo nari Unnoyon Neethi (National Women Development Policy) (Translated by Tahrat Naushaba Shahid)," 14.

<sup>554</sup> "Professor 5, Interview by Tahrat Naushaba Shahid."; "Ngo Activist 2, Interview by Tahrat Naushaba Shahid."; "Leading Ngo Activist 5, Interview by Tahrat Naushaba Shahid."; "Leading Ngo Activist 1, Interview by Tahrat Naushaba Shahid."; "Leading Lawyer Activist 3, Interview by Tahrat Naushaba Shahid."; "Leading Lawyer Activist 2, Interview by Tahrat Naushaba Shahid."

succession or family life, activists resisting the NWDP simultaneously invent clauses of the policy that simply do not exist. It would seem that the true details of the policy themselves are, in a sense, irrelevant. Nevertheless, the NWDP is a powerful symbol of the struggle over the role of Islam in governance, and is used to perpetuate the dichotomy of 'Muslim' versus 'secular' by women's rights and religious activists alike.<sup>555</sup>

Levels of publicity around different drafts and clauses of the NWDP are also significant indicators of different ruling parties' attitudes towards the policy. Changes have been made to policies on women with little public discussion in the past, in terms of both expanding and constraining existing rights. Elora Chowdhury cites Najma Chowdhury in pointing out that:

“... as the time for submission of the Bangladesh report to the CEDAW drew closer in 1995, the government surreptitiously withdrew some of the reservations to Article 2 having to do with equal enjoyment of family benefits and guardianship and custody of children. By not publicizing the withdrawal of reservations and keeping it out of a public debate, the government chose to maintain a 'politics of silence' presumably to protect itself from appearing inconsistent in revising yet supporting gender discriminatory policy.”<sup>556</sup>

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<sup>555</sup> The distinction I make here between women's rights activists and religious activists, suggesting that there is no overlap between the two groups, is a deliberate one discussed in greater detail in Section 3. The dichotomy may not exist in theory – that is, it is certainly possible to accommodate the enhancement of women's rights from the perspective of Islamic jurisprudence, and a number of scholars have written on ways in which women's religious discussion groups are informing and empowering themselves through the discussion of such jurisprudence in their private spheres e.g. Huq, "Reading the Qur'an in Bangladesh: The Politics of 'Belief' among Islamist Women."; Samia Huq and Sahida Islam Khondaker, "Religion and Muslim Women: Trajectories of Empowerment," (Dhaka: Pathways of Women's Empowerment, BRAC Development Institute, BRAC University, June 2011). Section 3, however, demonstrates that this dichotomy has become a self-perpetuating representation of the more public politics of gender in Bangladesh.

<sup>556</sup> Najma Chowdhury, "The Politics of Implementing Women's Rights in Bangladesh," in *Globalization, Gender and Religion: The Politics of Women's Rights in Catholic and Muslim Contexts*, ed. Jane H. Bayes and Nayerreh E. Tohidi (New York: Palgrave, 2001), 226. quoted in Chowdhury, "'Transnationalism reversed': Engaging Religion, Development and Women's Organizing in Bangladesh," 415.

Policies have been quietly reversed at other times as well, as demonstrated in the lack of dialogue preceding the 2004 draft of the NWDP that introduced significant changes from the 1997 version. How and when do governments choose to encourage dialogue and publicity and when do they make policy decisions with less fanfare? It is worth noting that the 1997, 2008, and 2011 NWDPs were all announced on the eve of International Women's Day, suggesting an attempt to create associations with international gender norms and the level of modernisation they represent. These announcements also led to very public confrontations with the religious right, however, in that there were both protests and counter-protests shortly afterwards.

In 2011, it appears that the government had planned ahead in addressing religious opposition to the policy. Section 17 of the English translation of the policy calls for eliminating all forms of discrimination against women, including misinterpreting religion "against the interest of women at the local or state levels," but also adds a footnote on the same page, "Notwithstanding anything contained in this policy, during enactment of the law, anything contrary to the Holy Quran and Sunnah shall be void."<sup>557</sup> Interestingly, the original, Bengali version of this policy does not include any sign of this footnote.

At the time of the strikes held by Islami Oikyo Jote in 2011, and uncharacteristic of earlier NWDP announcements, the Minister of Women and Children's Affairs Shirin Sharmin Chaudhury stressed in the media that the policy is not a legally binding document.<sup>558</sup> Confusingly, the Ministry of Women and Children's Affairs also publicly suggested that inheritance laws were a notable issue of gender disparity, even while stressing that they were not mentioned in the NWDP. She pointed out as recently as 2012 (and before she became

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<sup>557</sup> "National Women Development Policy."

<sup>558</sup> "National Women's Development Policy - 2011: Bangladesh."

Speaker of the House) that, “Despite concerted efforts and significant progress, gender disparities still exist, marginalizing women and constraining them from accessing equal rights and opportunities, specifically in inheritance law and access to resources like land.”<sup>559</sup> Other ministers joined suit in public forums. The Minister of Finance at that time, A. M. A. Muhith, pointed out that laws should offer protections for women’s rights, even if they are not fully implemented.<sup>560</sup> He also suggested that inheritance laws posed a “‘big problem’ in tackling gender equality,” going as far as to say that he hoped “that the inheritance law would be changed giving women the rights to land and other resources.”<sup>561</sup>

### **c. The NWDP, the Awami League, and the Religious Right**

The 2011 NWDP was to symbolise, in part, a return to a larger vision for Bangladesh that Awami League leaders felt required completion from its earlier term starting in 1996, a vision that reflected, even further back, Sheikh Mujib’s aspirations of independence. Its announcement could be interpreted at least in part as a deliberate attempt to provoke the religious right and bring greater public attention to their weakness. Instead, however, the 2011 policy kicked off a larger confrontation than had been anticipated. The policy became both a symbol and a catalyst for a complex and deepening rift and increasingly violent confrontation between the religious right and the secular left.

The clash between the religious right and the current ruling party of Awami League has a history that goes far back into Bangladesh’s earliest years of independence. Leaders of

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<sup>559</sup> "Inter-Ministerial coordination for Maximum Use of Gender Responsive Budget Stressed."

<sup>560</sup> "Bangladeshi Women Lag Behind in Labour Force: Wb," *The Daily Star (online)*, 16 October 2011.

<sup>561</sup> Ibid.

the Jamaat-e-Islami were widely known as collaborators of the Pakistani Army during the 1971 Liberation War, complicit in committing brutal atrocities of mass rape and systematic, targeted torture and killings of known intellectuals and academics, among others. There remained a level of support, nonetheless, for the idea of the newly formed country to be country constructed on Islamic principles, even within Sheikh Mujibur Rahman's ruling Awami League party. As discussed in Chapter III in the context of the Constitution, Mujibur Rahman managed in part to quell religious opposition during the earlier part of his rule, with memories of the Pakistan Army's attempts to 'purify' the Bengali population into being better Muslims still fresh. Nevertheless, when he was assassinated on 15 August 1975 along with the majority of his immediate family, the military officers responsible for his assassination were reported to have had a desire for an Islamic Republic. "The day after the killings, Major Dalim, one of the assassins, declared on the radio, 'Sheikh Mujib has been killed. Praise God, Bangladesh is now an Islamic Republic.'"<sup>562</sup> Elora Shehabuddin describes the killings thus:

"The army, for its part, had become divided between those who had participated in the 1971 war and those who had been interned in West Pakistan until after the war ended. As part of the Pakistani army until 1971, they had all been trained to regard India as their nation's foremost enemy; the friendly relations between the new Bangladeshi state and India disturbed many. ... Although it was apparent to many even then that the killings were prompted by a desire for personal vengeance... it is significant that the killers declared the need to establish an Islamic state as their primary motive... Whatever their real reason, Mujib's death marked the beginning of the growing prominence of Islam in Bangladeshi politics that persists over three decades later. Pakistan was the first country to recognize the new government (under Khandakar Mushtaq Ahmed) that replaced Mujib's regime. On receiving news of Mujib's assassination, Saudi Arabia was also very prompt to recognize the state of Bangladesh, four years after independence."<sup>563</sup>

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<sup>562</sup> Shehabuddin, *Reshaping the Holy : Democracy, Development, and Muslim Women in Bangladesh*, 69.

<sup>563</sup> Ibid.

More recently, various leaders of the AL have been attacked by Islamic extremists over the years, including the current Prime Minister. On 17 August 2005, 459 explosions occurred across 63 of the country's 64 districts within a period of 40 minutes, and "leaflets left at many of the sites promoted the Islamic extremist group Jamaat-ul-Mujahadeen Bangladesh (JMB)."<sup>564</sup> The JMB were reported by the media at that time to have been a splinter group of the Jamaat-e-Islami and still be maintaining links to senior Jamaat leaders.<sup>565</sup> Earlier, in August 2004, "a grenade attack at an Awami League rally claimed twenty lives and narrowly missed Sheikh Hasina. In January 2005, another grenade attack killed Shah A.M.S. Kibria, a former Bangladeshi finance minister, and four others at an Awami rally."<sup>566</sup> Similar, BNP-organised events have not been subject to such violence, suggesting that the AL is seen as a primary target.<sup>567</sup>

The majority of women's rights activists interviewed for this study, even those claiming to have no political inclinations, perceive the ruling terms of the Awami League as the best opportunities for women's rights causes on the post-independence and post-military rule timeline. In their public rhetoric, such activists and leading members of the AL often fail to distinguish between groups such as Jamaat-e-Islami and openly terrorist groups such as Hizb-ut Tahrir, using the informal, umbrella term 'Jamaatis' to describe all groups on the

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<sup>564</sup> Eben Kaplan, "Bangladesh: Nationwide Attacks Raise Fears of Growing Islamist Presence," (Council on Foreign Relations, 2005).

<sup>565</sup> Sreeradha Datta, "Islamic Militancy in Bangladesh: The Threat from Within," *South Asia: Journal of South Asian Studies* 30, no. 1 (2007): 154.

<sup>566</sup> Kaplan, "Bangladesh: Nationwide Attacks Raise Fears of Growing Islamist Presence."

<sup>567</sup> Indeed, BNP appears to have a history of exploiting this conflict between the religious right and the Awami League. In 1978, General Zia allowed Golam Azam, then head of the Bangladesh Jamaat-e-Islami, to return from exile to Bangladesh (Murshid, "State, Nation, Identity: The Quest for Legitimacy in Bangladesh," 23-24.). Later, with BNP's coming to power in alliance with both the Jamaat-e-Islami and the IOJ in 2001, they continued to be associated with the right. Indeed, recent investigations since AL returned to power suggest that the BNP-Jamaat government of that time may even have been complicit in the August 2004 bombings targeting Awami League members (Julfikar A. Manik, "Three Terrorists Spilled the Beans," *Dhaka Tribune (online)*, 21 August 2014.).

religious right. The current AL Prime Minister also holds that the Jamaat-e-Islami “has been supervising activities of various terrorist groups in the country for a long time.”<sup>568</sup>

The history of the NWDP suggests that it has largely been an Awami League project. It has become both a symbol of a certain interpretation of modern Bangladeshi society and a means of antagonising the religious right. Religious right groups in Bangladesh have long portrayed themselves as antithetical to modern – and by association, Western – views. As discussed earlier in this chapter, the Hefazat-e-Islam, the group that in 2013 most visibly protested what they perceived as the infiltration of traditional values, was an offshoot of the Islami Oikyo Jote who organised opposition to the 2008 and 2011 NWDP in Bangladesh. The interpretation of modernisation represented by the NWDP is seen by such groups as a Western construct and corrupting of traditional values, although the extent of these views varies between them. This is a common phenomenon in which, “In a post-colonial context, feminist movements have been perceived as betrayals of the ideal woman implied in the national construct and even ‘tools of western imperialism.’”<sup>569</sup> As Peter Awn points out in his discussion of the aforementioned landmark Shah Bano case in India:

“The more successful way to control the infiltrated social values is to identify them as weapons used by Americans and Europe to corrupt traditional societies. If the traditional society is sapped of its strength, the foreign power is able to maintain economic and political control. To reject foreign values is to reject foreign hegemony. To embrace traditional sexual roles proudly is to embrace independence, to stand up in militant opposition to the aggressor.”<sup>570</sup>

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<sup>568</sup> Kaplan, "Bangladesh: Nationwide Attacks Raise Fears of Growing Islamist Presence."

<sup>569</sup> Rai, *Gender and the Political Economy of Development: From Nationalism to Globalization*, 38-39.

<sup>570</sup> Peter J. Awn, "Indian Islam: The Shah Bano Affair," in *Fundamentalism and Gender*, ed. John Stratton Hawley (New York: Oxford University Press, 1994), 76.

Another feature of the views purported by the Deobandi Hefazat and IOJ are that the desire for modernisation, as reflected by enhancing women's rights outside of the formers' interpretation of Islam, represents a purely elite concern. This is a phenomenon that is neither new nor exclusively Bangladeshi or Muslim. In 1949, Indian National Congress legislator Pandit Laxmi Kanta Maitra spoke at the Constituent Assembly of India against those who supported the Hindu Code proposal, a proposal that was to considerably enhance Hindu women's rights in personal status laws, and "characterised those supporting the bill as 'a few ultra modern persons who are vocal, but who have no real support in the country' and argued that only women of 'the lavender, lipstick and vanity bag variety' were interested in the Bill."<sup>571</sup> In pushing for legislative changes that enhance women's rights in Bangladesh, then, government actors and activists who support them must make a twofold argument. The first is that these changes do not clash with a set of authentic, traditional values and norms through which individual women symbolise their larger national and cultural group identity. The second is that the proposed changes represent the desire of the majority and benefit women at large rather than an elite and Westernised few who are otherwise out of touch with the most immediate concerns of the overwhelming majority of women in Bangladesh.

### **3. Women as Markers of Community and Development**

The creation and evolution of the NWDP and the conflict over its non-existent clause on inheritance reflect an earlier evolution in perceptions of women as symbols.

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<sup>571</sup> Bina Agarwal, *"Bargaining" And Legal Change : Toward Gender Equality in India's Inheritance Laws* (Brighton: Institute of Development Studies, 2002), 15.

Echoing Mounira Charrad's work in the context of Bangladesh, Shirin Rai points out that: "[a] significant aspect in the narrative of legal reform in Bangladesh as it relates to gender is the incorporation of women's roles into the construction of Bangladesh as a nation. Theories of nationalism suggest that women are frequently considered markers of a nation in that they are considered carriers of tradition as the center of the family, especially in rapidly shifting social and political environments."<sup>572</sup> Mentioned at the conclusion of Chapter II in this study, women emerged as symbols of Bangladesh's independence movement long before 1971. Although the struggle and its aftermath in present-day Bangladesh is often simplified to one "between defining the 'Bengali' woman as opposed to the 'Muslim' woman,"<sup>573</sup> this section delves into the larger recovery and development discourse that weaves its way into these definitions.

During the course of the Liberation War, roughly 30,000 Bengali women were raped by Pakistani soldiers and their collaborators, "in an effort to purify the next generation of Muslims in East Pakistan."<sup>574</sup> Sexual violence of this scale in ethnic conflict is not unique to Bangladesh. "Gender plays a role in ethnonationalism. The nation is often gendered female, and the state male. ... The process of redrawing territorial borders to unite some people and exclude others sometimes uses women's bodies as symbols of the nation, markers of the in-group, and national 'property' to be defended and protected by men."<sup>575 576</sup> The purpose of sexual violence in this context is always two-fold. The first is the aforementioned ethnic and religious purification, and the second is the emasculation of men, unable as they are to

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<sup>572</sup> Rai, *Gender and the Political Economy of Development: From Nationalism to Globalization*, 28.

<sup>573</sup> Azim, Menon, and Siddiqi, "Negotiating New Terrains: South Asian Feminisms," 2.

<sup>574</sup> Kabeer, "The Quest for National Identity: Women, Islam and the State in Bangladesh," 122.

<sup>575</sup> Joshua S. Goldstein, *War and Gender: How Gender Shapes the War System and Vice Versa* (Cambridge: Cambridge University Press, 2001), 369.

<sup>576</sup> The Bangladeshi national anthem repeatedly emphasises physical descriptions of the landscape of Bengal, referring to the land as 'Ma' or Mother.

protect the honour of the victims as is their traditional role,<sup>577</sup> symbolising the failure of the male state to uphold the honour of the female nation.

Rehabilitation efforts for the victims in newly created Bangladesh, however, were remarkably public in their acknowledgement of sexual violence. Mujibur Rahman declared the rape victims to be 'birangona' or heroines of the war and, among a number of initiatives, reserved a five percent quota of government sector jobs for them.<sup>578</sup> Rehabilitation centres across the country, furthermore, also allowed women easy access to safe abortions should they so have wished, attempted to facilitate victims' marriages in an effort to salvage their honour, and provided them with vocational training so that they might be able to secure employment.<sup>579</sup> Additionally, a Bangladesh Abandoned Children (Special Provisions) Order and Inter-Country Adoption Law were passed in 1972 to facilitate the international adoption of babies born of rape by Pakistani soldiers and collaborators.<sup>580</sup> These laws were passed even despite the fact that Muslim personal status law forbids adoption.<sup>581</sup> The adoption-related acts, however, were repealed in 1982 amid concerns of child-trafficking and forced religious conversions to Christianity and replaced with the older Guardians and Wards Act of 1890, which "is more consistent with Muslim family law in that it provides for

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<sup>577</sup> Nayanika Mookherjee, "Gendered Embodiments: Mapping the Body-Politic of the Raped Woman and the Nation In bangladesh," *Feminist Review* 88, no. War (2008): 44.

<sup>578</sup> Kabeer, "The Quest for National Identity: Women, Islam and the State in Bangladesh," 125. It is notable, however, that amidst the need to recognise and implement coping mechanisms for the scale of sexual violence perpetrated during the war, the role of women guerrilla fighters who took up arms just as men did has largely gone missing in its larger narrative, with women's place in that narrative having emerged primarily, although not exclusively, as one of rape and torture.

<sup>579</sup> Nayanika Mookherjee, "Available Motherhood: Legal Technologies, 'State of Exception' and the Dekinning of 'War-Babies' in Bangladesh," *Childhood: A Global Journal of Child Research* 14, no. 3 (2007): 341.

<sup>580</sup> *Ibid.*, 347-48.

<sup>581</sup> *Ibid.*, 341-42.

guardianship, rather than adoption, of orphaned or abandoned children,” and “prohibits foreigners from being appointed guardians of minors who are citizens of Bangladesh.”<sup>582</sup>

Regardless of the repealed laws, “The way the government of independent Bangladesh dealt with the history of rape during the war ... was unprecedented. Instead of shrouding the issue of rape in silence ... the newly formed Bangladeshi government eulogized the raped women as *birangonas* (‘war-heroines’) in their attempt to rehabilitate them and reduce social ostracism.”<sup>583</sup> Indeed, the word *birangona* still carries connotations of a noble sacrifice, framing the women as a kind of freedom fighter in their own right. The government’s rehabilitation and integration efforts, however, largely failed, perhaps flawed as it was by the inherent othering of rape victims. Where identified, *birangona* were not accepted back into their families and eventually “disappeared from public discourse,”<sup>584</sup> although re-merging in the 1990s during the course of a movement demanding the trial of war criminals. The government jobs quota set aside for *birangona*, meanwhile, was never filled due to women’s fears of self-identification as rape victims.<sup>585</sup>

It is tempting to see these attempts at coping with post-war trauma as setting the tone for much of the Constitution and other pertinent legislation, with their continued references to women as under-privileged or vulnerable. However, it is also important to recognise the seeds of a development policy that encouraged women as potential members of the formal economy, with one of the major rehabilitation efforts of rape victims having been employment assistance. As discussed earlier in this chapter, development initiatives

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<sup>582</sup> Ibid., 347-48.

<sup>583</sup> Ibid., 341-42.

<sup>584</sup> Mookherjee, "Gendered Embodiments: Mapping the Body-Politic of the Raped Woman and the Nation In bangladesh," 40.

<sup>585</sup> Kabeer, "The Quest for National Identity: Women, Islam and the State in Bangladesh," 125.

since independence – both in government and non-government, non-profit sectors - have incorporated women in increasingly powerful roles, initially as a group contributing to economic growth and more recently as emblematic of the successes of economic development in Bangladesh. The discourse of economic growth and development, furthermore, has been far less controversial to the religious right, with relatively minor resistance in their public rhetoric, for example, to a highly successful family planning programme and the increasing visibility of young women migrating from rural areas to urban spaces as garment factory workers.

The transition towards greater roles in the formal economy, however, was a gradual one. General Zia's turn in power produced an Integrated Rural Development Programme across the country, but the programme provided credit to women only for rural activities that essentially "extended and reorganized domestic work," such as raising cattle or small-scale gardening.<sup>586</sup> Even these activities, still limited as they were to the domestic sphere but nevertheless increasing the visibility of women within village boundaries, clashed with the principles of the Jamaat-e-Islami, who supported an even deeper female seclusion at that time.<sup>587</sup> With the draw of garment factory work beginning in the 1980s, thousands of poor rural women drifted even further from seclusion and away from their traditional domestic sphere altogether, migrating to Dhaka and living in hostels by themselves, shopping in markets, going to the cinema, using public transport, and being more mobile and visible to the public eye than ever before.<sup>588</sup>

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<sup>586</sup> Feldman, "(Re)Presenting Islam: Manipulating Gender, Shifting State Practices, and Class Frustrations in Bangladesh," 43-44.

<sup>587</sup> Ibid.

<sup>588</sup> Ibid., 46.

In terms of government projects aimed directly at women's empowerment, successive governments in Bangladesh have incorporated such projects as a crucial element of economic growth as well as an indicator of the country's modernisation to the outside world. Meanwhile, the state has tended to drag its feet on certain legislative changes in fear of rocking the boat of Bangladeshi Muslim identity. This tendency to focus on women as markers of development has in part been deeply influenced by donor frameworks. Dina Siddiqi points out that although women are "hypervisible," proposals for policies enhancing their status are often "located within a narrow WID [Women in Development] framework, thereby reproducing a depoliticized and ahistorical understanding of women's lives."<sup>589</sup> This suggests some basis, then, for the perception that women's rights activism is an elite pursuit, with priorities determined by Western donors.

The growing availability of gender-driven donor funding through the 1970s and 1980s led to civil society organisations working on women's issues having their agendas increasingly determined by such donors. As donors shifted their own emphasis from 'Women in Development' or WID to 'Gender And Development' or GAD programmes,<sup>590</sup> Bangladeshi NGOs also moved away from focusing on general awareness-raising to advocacy and service delivery on specific policy issues.<sup>591</sup> Street-level activism in the form of protests and rallies was increasingly transformed to a more formal and professionalised engagement with the media and roundtable discussions including government and donor

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<sup>589</sup> Dina Siddiqi, "Religion, Rights and the Politics of Transnational Feminism in Bangladesh," in *CENISEAS Papers*, ed. Sanjib Baruah (Guwahati, India: Center for Northeast India, South and Southeast Asia Studies (CENISEAS), OKD Institute of Social Change and Development, 2003), 14.

<sup>590</sup> Shahrashoub Razavi and Carol Miller, "From Wid to Gad: Conceptual Shifts in the Women and Development Discourse," (Geneva: United Nations Research Institute for Social Development, 1995).

<sup>591</sup> Nazneen and Sultan, "Mobilizing Support and Negotiating Change: Women's Organizations Building Constituencies in Bangladesh," 15-16; 30.

representatives,<sup>592</sup> and donors demanded tangible measures for impact evaluation. As this trend has continued, women's rights organisations have become less visible at the street level, couching many of their initiatives in the language of international development jargon and measurable indicators rather than of human rights aspirations.

Analysing women's rights activism strategies as either incorporating the discourse of development or that of human rights may be argued to be an overly simplistic way to perceive how movements for reform have been approached. Based on comparative studies of feminist movements in Bangladesh, Sohela Nazneen points out that:

“Despite the overwhelming emphasis in the official discourse on women's economic empowerment, the feminists have successfully managed to advocate for issues that do not fit this economic development agenda ... In the post liberation period the feminists have mobilized around issues such as women's political participation, economic equality, legal reform of gender biased laws, violence against women etc.”<sup>593</sup>

Levels of mobilisation, however, are not accurate indicators for achievement. Framing women's equality in terms of human rights has been far less successful than incorporating initiatives enhancing equality into a larger growth and development discourse. The Uniform Family Code or UFC, discussed at some length in Chapter IV, is an example of a feminist movement that has so far failed. It was presented by pro-UFC activists as “a social justice issue ... drawing on the [sic] constitutional duties and the [sic] international conventions on women's rights.”<sup>594</sup> Nazneen argues that the Bangladesh Mahila Parishad

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<sup>592</sup> Ibid., 27-28.

<sup>593</sup> Nazneen, "Men Aboard? Movement for a Uniform Family Code in Bangladesh," 106.

<sup>594</sup> Ibid., 113. Admittedly, references to international conventions were relatively limited, and “the reports that contained summaries of speeches and discussions of the 147 workshops organised by Bangladesh Mahila Parishad from the period of 1994 to 2000 made only three explicit references to CEDAW and feminist movement in the West,” and “very few references to the family law reforms in

deliberately emphasised the UFC as a fulfilment of secular Bangladeshi nationalist principles but by doing so excluded the engagement of religious organisations and parties.<sup>595</sup> Unsurprisingly, as discussed in Chapter IV, the UFC was deemed to be anti-Islamic by such parties. Nazneen's primary critique, too, is that the UFC movement failed to engender support at the grassroots level or "tackle male fear and incorporate men."<sup>596</sup>

In addition to the way the proposal was communicated, there was great resistance to the content of the proposal. Among both legislators and even activists themselves, opposition to the UFC appears to be based on a reluctance to institute such dramatic change, rather than incremental, implementable reforms.<sup>597</sup> Nazneen's analysis suggests that "Some recent state policy documents and actions on the part of some of its institutions show a partial espousal of some of the proposals in the draft Uniform Family Code," referring to the National Women Development Policy's inclusion of "a clause which states that women have full control over assets they acquire. This left the option open to apply this to inherited property, which is in line with the code."<sup>598</sup> This suggests recognition on the part of women's rights activists that while there are clauses in the draft UFC that may be put in place in the near term others may require a longer wait.

Another point of resistance was that the draft Uniform Family Code ultimately looked to a number of analysts to be a tweaking of laws for Muslims, and that the proposed

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other Muslim majority countries," except for an occasional mention of the Tunisian family law code ("Men Aboard? Movement for a Uniform Family Code in Bangladesh," 114).

<sup>595</sup> Nazneen, "Men Aboard? Movement for a Uniform Family Code in Bangladesh," 114.

<sup>596</sup> *Ibid.*, 117-19.

<sup>597</sup> "Professor 2, Interview by Tahrat Naushaba Shahid."; "Leading Lawyer Activist 3, Interview by Tahrat Naushaba Shahid."; "Head of Government Department 3, Interview by Tahrat Naushaba Shahid."; "Head of Government Department 2, Interview by Tahrat Naushaba Shahid."; "Professor 4, Interview by Tahrat Naushaba Shahid."; "Professor 1, Interview by Tahrat Naushaba Shahid."

<sup>598</sup> Nazneen, "Men Aboard? Movement for a Uniform Family Code in Bangladesh," 122.

changes would have been even more dramatic for Christians and Hindus on certain fronts.<sup>599</sup> For example, Hindus are not permitted to divorce at all but Hindu men are allowed to remarry as they please without any restrictions, regulations that are even more unequal than their Islamic equivalent. Leading representatives of the Christian and Hindu communities, including the Catholic Archbishop of the archdiocese of Dhaka, were particularly vocal in their resistance to such changes.<sup>600</sup>

The argument of some women's activists in supporting the UFC, drawing on human rights discourse and on the Constitution to emphasise that Bangladeshi identity is a secular one, ultimately fell flat in an environment where secularism is defined as religious neutrality rather than a rejection of religion altogether. In doing so, furthermore, these activists also set themselves up in opposition to members of the religious right, who were opposed to a secular Bangladeshi identity to begin with, let alone an interpretation of secularism that rejected religion as a guide to personal matters altogether. A number of women's right activists engaged in the movement for the UFC point out that their organisations would absolutely not engage with the Jamaat-e-Islami on policy issues, let alone with those groups who are even further right on the political spectrum such as the IOJ.<sup>601</sup>

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<sup>599</sup> "Professor 5, Interview by Tahrat Naushaba Shahid."

<sup>600</sup> Ibid.

<sup>601</sup> "Ngo Activist 2, Interview by Tahrat Naushaba Shahid."; "Leading Ngo Activist 5, Interview by Tahrat Naushaba Shahid."; "Ngo Activist 1, Interview by Tahrat Naushaba Shahid," Dhaka (January 2013).

## 4. Elite versus Majority Concerns

While a number of women's rights organisations refuse to engage with groups associated with religious platforms, Jamaat-e-Islami and its allies on the religious right insist that women's rights activists and the leaders that respond to their calls for change have thus far represented a largely Westernised elite, having publicly slung the word 'heretic' at the Bangladesh Mahila Parishad<sup>602</sup> and others. The religious right are not alone in their perception that, following from the influence of Western donors, women rights activists are primarily made up of members of an educated and Westernised elite whose concerns do not represent those of the majority of Bangladeshi women. Historian Taj Hashmi critiques rights activism challenging religious practices, pointing out that "one should not lose sight of the exploitative nature of some NGOs and micro-credit organizations, especially in the countryside. Contrary to the observations made by some Western scholars, donor agencies and their local clients, the bulk of Bangladeshi women who are subject to some sort of exploitation and persecution, are victims of patriarchy and secular institutions rather than those of Islam-oriented politics," adding that women's rights activism in Bangladesh has tended to condemn Islam and leave aside men and that it is "futile and disruptive."<sup>603</sup>

During the course of my expert interviews, too, it emerged that a number of seemingly non-partisan professors, while supportive of women's equality as a whole, believed that the causes that have been pursued in the name of this equality are unrealistic and naïve. One suggested that women's activists were mostly "upper-class" and "donor

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<sup>602</sup>Nazneen and Sultan, "Mobilizing Support and Negotiating Change: Women's Organizations Building Constituencies in Bangladesh," 30.

<sup>603</sup> Taj ul-Islam Hashmi, *Women and Islam in Bangladesh: Beyond Subjection and Tyranny* (Basingstoke: Macmillan Press, 2000), 206-07.

agents,” arguing at length that they are tools of a Western agenda that is either out of touch with or uncaring of needs on the ground.<sup>604</sup> Another argued that women’s activists are working on the wrong initiatives, and that they should focus on labour and employment rights for women instead.<sup>605</sup> Similarly, yet another said that such activists were deeply unrealistic in their support for the fatwa ban.<sup>606</sup>

As discussed in Chapter III, said activists specifically pointed out to me that they did not support the High Court’s hasty judgment, that they believed the ban was unrealistic as well, and that they had looked forward to the appeals process when the ban could be reconsidered. Additionally, many of them also work on labour and employment initiatives but with considerably less consistent media coverage due to their lack of controversy relative to other equality-driven projects. There is a considerable divide, then, between perceptions of women’s rights activism across the political spectrum from left to right.

How does this mix of views on women’s equality-driven initiatives manifest itself in parties’ attempts to reach out on women’s rights? In Sub-Section 2.c of this chapter, I point out that a number of women’s activists have tended to perceive AL ruling terms as the most positive for women’s rights since military rule. One activist, however, added that engaging with the religious right on women’s issues is more challenging when the Awami League is in power because “politics is more polarised, the ulema listen to the Islamic Foundation more when it’s run by the Jamaat-e-Islami [as with BNP’s last term in power].”<sup>607</sup> Another suggested that the view that AL is “more secular is merely a perception, there’s conservatives

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<sup>604</sup> "Professor 2, Interview by Tahrat Naushaba Shahid."

<sup>605</sup> "Professor 1, Interview by Tahrat Naushaba Shahid."

<sup>606</sup> "Professor 4, Interview by Tahrat Naushaba Shahid."

<sup>607</sup> "Ngo Activist 1, Interview by Tahrat Naushaba Shahid." This comment was made prior to IOJ and a number of other similar but smaller groups distancing themselves from Jamaat-e-Islami.

among them as well.”<sup>608</sup> Indeed, the Awami League, too, has allied with the religious right in the past. In running against the BNP during elections initially scheduled for 2007, the AL even signed an agreement with the Bangladesh Khelafat Majlish, a radical group known to be associated with the aforementioned militant group JMB that was held responsible for nationwide attacks in August 2005.<sup>609</sup> Their agreement included the clause that the AL would not pass any laws against Islam, although this is already included in both AL’s public rhetoric and its manifesto. Elections never came to pass in 2007, delayed as they were until 2008, and by then AL’s agreement with the Khelafat Majlish had been dismantled.

Of the three major parties under analysis here, AL, BNP, and Jamaat-e-Islami, only the documents of BNP (currently the most significant opposition party) was unavailable for this research project. However, Nazneen et al’s analysis of the BNP Constitution in 2011 argues that the BNP Constitution discusses women only in the context of human capital.<sup>610</sup> AL and BNP 2001 and 2008 manifestos discuss women largely in reference to their role in economic development and with regard to violence against women. Jamaat-e-Islami’s 2008 election manifesto does the same, but its discussion of women is far more comprehensive, with both a section devoted exclusively to women and raising the issue of women in a number of other policy areas as well.<sup>611</sup> By 2014,<sup>612</sup> the Awami League also includes a small

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<sup>608</sup> "Leading Lawyer Activist 3, Interview by Tahrat Naushaba Shahid."

<sup>609</sup> Riaz, "The Politics of Islamization in Bangladesh," 59.

<sup>610</sup> Nazneen, Hossain, and Sultan, "National Discourses on Women's Empowerment in Bangladesh: Continuities and Change," 23.

<sup>611</sup> "Election Manifesto 2008: Bangladesh Jamaat-E-Islami (English)," Bangladesh Jamaat-e-Islami, [http://www.jamaat-e-islami.org/en/articlepdf/110\\_manifesto%20in%20english.pdf](http://www.jamaat-e-islami.org/en/articlepdf/110_manifesto%20in%20english.pdf).

<sup>612</sup> Neither BNP nor Jamaat ran for election in 2014, with Jamaat banned from running and BNP boycotting the process altogether. In August of 2013, the High Court of Bangladesh declared the Jamaat to be illegal and banned it from elections held in January of 2014 ("Bangladesh Court Declares Jamaat Illegal."). The judgment responded to a writ petition filed in January 2009 by a group of petitioners led by the Secretary General of the Tariqat Foundation, "a group that preaches Sufi philosophy and promotes secularism" ("Bangladesh Sc Rejects Jamaat’s Plea against Disqualification," *The Hindu (online)*, 5 August 2013.).

section focused exclusively on women and refers to the NWDP 2011 at the very start of this section.<sup>613</sup> The remainder of the section focuses largely on women in “national and social life,” women in government and in the formal labour force, and violence against women, while also warning against “anti-women propaganda misinterpreting religious tenets to confine women within the household.”<sup>614</sup>

In a later section on freedom of religion, the AL manifesto of 2014 emphasises both the upholding of “secular and democratic traditions” and that “no tradition contradicting Quran and Sunnah will be passed.” It also adds that “politics based on religion will be prohibited and liberal humanitarian society will be developed.”<sup>615</sup> However, both the manifesto’s English and Bengali versions’ cover pages includes Bengali words translating to “God the Almighty” at their very top, centred between “Joy Bangla,” which translates to ‘Hail Bangla,’ and “Joy Bongobondhu,” which translates to ‘Hail Bongobondhu,’ an affectionate, tribute-like term for Sheikh Mujibur Rahman meaning Friend of Bengal.<sup>616</sup>

All three parties’ manifestos, throughout all their years of publication, tend to lump women and children’s affairs together in a sequence reflective of the country’s Constitution. None of them refer explicitly to women’s rights in their personal and family lives and all of them, with the exception of references to violence against women, speak of women largely in the context of nation-building and economic growth. The primary argument of the Jamaat-e-Islami for maintaining the status quo or implementing a more orthodox interpretation of family laws for Muslims is derived from the reasoning that only shari’a-

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<sup>613</sup> "Nirbachoni Ishthehaar (Election Manifesto) of Bangladesh Awami League (English)," Bangladesh Awami League, <http://albd.org/ebooks/manifesto2014en/>.

<sup>614</sup> Ibid., 37-38.

<sup>615</sup> Ibid., 43.

<sup>616</sup> Ibid.

guided law provides women with true protections. This view is also reflected in Nazneen et al's assessment of Jamaat-e-Islami's manifesto, although they refer to a manifesto publication from 2007 when they suggest that "For Jamaat, it wants to ensure the 'highest' rights and dignity accorded to women under Islam."<sup>617</sup>

My reading of a 2008 copy of the same manifesto, however, does not reveal any mention of the phrase 'under Islam,' simply that "every man and woman will enjoy complete human rights and dignity" under the Jamaat-e-Islami.<sup>618</sup> It is worth noting that even the most updated version of the Women and Children's Section on the Jamaat-e-Islami website, from 2012, does not mention religion in protecting women.<sup>619</sup> This may well reflect a response to the ruling party's current crackdown on religion in politics, referred to in AL's own 2014 manifesto. Nevertheless, this most recent Jamaat manifesto continues to mention the upholding of an "Islamic welfare state," suggesting in the same sentence that this is the first step to a "modern welfare state."<sup>620</sup> Regardless of whether shari'a is pointed to as a guiding reference or not, however, all three parties reflect the Constitution's framing of women's rights as a matter of protection and ultimately avoid any discussion of such controversial issues as women's status with regard to managing property or marital relations, outside of AL's indirect reference through mention of the 2011 NWDP.

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<sup>617</sup> Nazneen, Hossain, and Sultan, "National Discourses on Women's Empowerment in Bangladesh: Continuities and Change," 26.

<sup>618</sup> "Election Manifesto 2008: Bangladesh Jamaat-E-Islami (English)."

<sup>619</sup> "Policies: Women's and Children's Rights," Bangladesh Jamaat-e-Islami, <http://www.jamaat-e-islami.org/en/details.php?artid=MTM1>.

<sup>620</sup> "Election Manifesto 2008: Bangladesh Jamaat-E-Islami (English)."

## 5. Conclusion: Potential for Implementation

Tracking the evolution of the NWDP reveals a very vocal resistance to the idea of allowing women equal inheritance and property rights and indeed to equality more broadly. Not only has the policy led to the formation of parties and alliances on the religious right created specifically to oppose women's rights, but they have also caused much disruption on both the left and right sides of the political spectrum in terms of support for strategies to oppose and support its principles. The position of women's rights activists on the NWDP 2011 is that it does not clash with shari'a – with the caveat that there are loopholes through which to use the policy to influence changes in family laws. The government, on the other hand, has stressed unequivocally that the policy does not clash with shari'a. In contrast, parties on the religious right, particularly the forces of Islami Oikyo Jote and the related Hefazat-e-Islam, hold that the policy is wholly un-Islamic, focusing especially on the non-existent inheritance clause while pro-policy activists lament its lack of existence.

This chapter has sought to answer the question of why this non-existent clause is of such symbolic value, despite characterising a document that is neither legally binding nor, evidently, directly influential in the application of family laws. The clash over this clause, initiated by the opposition of the religious right with the first 1997 draft with a genuine clause on inheritance, is shown here to be reflective of broader trends in Bangladeshi politics, especially between the Awami League and the religious far right. The Awami League may not have revived the original 1997 in its entirety but has certainly accorded the policy a great deal of publicity when passed in its 2011 form, and has even included a reference to the policy in its latest election manifesto. While the NWDP is a statement on women's rights and their place in a modern vision of Bangladeshi society rather than having a direct impact

on legislation, it seems the mere mention of succession has been played down by pro-policy activists while being deeply problematic for anti-policy religious groups.

Equal inheritance rights is, as discussed in Chapter II, the most difficult of rights within family law matters to justify within a shari'a-guided framework. By highlighting this as an area of contention, religious groups are able to perpetuate a depiction of the policy as representative of Westernised, elite encroachment on traditional Bangladeshi society. Meanwhile, women's rights activists appear to largely see these groups as a fringe, far right element that misrepresent the Bangladeshi majority's practice of Islam and focus on women's rights in the private sphere as a significant feature of this misrepresentation. Frequent references to the atrocities of the 1971 war in the rhetoric of women's activists, too, serve as a reminder of the systematic violence against women perpetrated in the name of religion at the country's start. Mir-Hosseini describes this characteristic clash across Muslim countries:

“Islamists continue to portray ‘feminism’ as an extension of colonial politics, as a Western plot to undermine the Muslim way of life, that had to be rejected in the name of Islam. Many women's rights activists, on the other hand, have attacked regressive Islamist policies using older Orientalist and essentialist narratives of Islam as a monolith inherently incompatible with modernity and gender equality.”<sup>621</sup>

As Chapter IV revealed, legislation pertaining to violence against women has tended to attract more sympathy than legislation on family laws. Similarly, in terms of policies, framing issues of women's status as a matter of development has been far more successful than framing them as a matter of rights or dignity. Again, this may be due to the fact that the

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<sup>621</sup> Ziba Mir-Hosseini, "Beyond 'Islam' Vs 'Feminism'," *Ids Bulletin-Institute of Development Studies* 42, no. 1 (2011): 69.

former speaks of women's equality in the context of the betterment of the group, that is, the nation, whereas the latter focus on women's rights as individuals.

Women's status in family laws has been shown in earlier chapters to be a particularly significant tool in negotiating multiple identities and contention between different political groups in Bangladesh. The NWDP and its vague references to property and succession and imaginary clauses on equal inheritance rights play much the same role in arousing and publicising conflict. With publicity for UFC already on the decline by the end of 1990s, the NWDP raised the issues of family laws once again. And, while the UFC suggested dramatic changes, the NWDP has attempted to bury references to succession and inheritance in broad, vague language, providing government actors with a ready response to detractors. These broad references also suggest openings to implement the sort of incremental changes supported by the Law Commission in its 2012 report on adapting Shi'a Jafari Law so that daughters can be sole inheritors.<sup>622</sup>

It has been argued that "politicians don't want to take a position on the NWDP unless they have to."<sup>623</sup> While previous versions have tended to disappear from public discourse, however, the NWDP 2011 has continued to be pushed beyond the time period that is the focus of this study. On International Women's Day in 2015, the Prime Minister raised the issue of the NWDP again, tying it to resistance against a "BNP-Jamaat alliance," saying that "Very often a section of people want to keep women confined to houses through anti-women propaganda and by giving wrong explanation [*sic*] of Islam. They want to keep women away from enjoying the rights of education and livelihoods... We need to

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<sup>622</sup> Alam, "Recommendation of the Law Commission for Possible Increase of Daughter's Share in the Succession of Parents' Property in Absence of Son."

<sup>623</sup> "Professor 1, Interview by Tahrat Naushaba Shahid."

come forward to create social awareness against anti-women propaganda,” and that “ Islam gave women the right for working with dignity in all sectors, including education, business-trade, industry, agriculture, healthcare and service of family, social and national lives.”<sup>624</sup> She tied it to the larger issue of national security, as well, “[urging] the country’s women to be vocal and put up a united resistance against the killing of people through arson attacks.”<sup>625</sup>

Meanwhile, in an interview in 2014, the current Minister of Women’s and Children’s Affairs pointed out that, with regard to men and women’s equal rights to property and inheritance, “There’s no point in saying something just for the sake of saying it. Besides, there is a certain class of people who will stir up a storm in the name of religion; then who’ll stand by us? That’s why we can’t make a decision rashly,” and, “It’s true that our constitution talks about equal rights, but we have to consider the aspect of religion. If religion dictates that a son will get a certain percentage, we cannot change it overnight. Our constitution does not contradict our religion. We are trying to ensure that a girl gets whatever she is entitled to under the Sharia law. Given our context, this is what we are terming as equal right to property. But even ensuring this is a considerable challenge. We hope that time itself would bring in the desired changes. These days, people have only two children. When people realise that they have to pass on their hard-earned money not to their own daughters but to their nephews, they themselves will seek changes in the law. But now is not the time.”<sup>626</sup>

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<sup>624</sup> "Stop Propaganda against Women: Pm," *The Daily Star (online)*, 8 March 2015.

<sup>625</sup> Ibid.

<sup>626</sup> "Our Government Is Focusing on Empowering Women," *The Daily Star (online)*, 20 October 2014.

## CHAPTER VI

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### Conclusion

Léon Buskens points out in the context of Moroccan family law reforms that, “These debates are not only about the contents of Moroccan family law but also about fundamental political issues. The family law debate should be understood as part of larger political developments taking place in Moroccan society. Family law has become a symbol of the place of Islam in society and of the right to participate in politics.”<sup>627</sup> As this study has shown, this is the case for Bangladeshi family laws as well, and I identify patterns of change for Muslim women in shari‘a-guided family laws as a means of reflecting larger political developments in Bangladesh. I compare family laws over time and with other types of legislation and policies to determine the most effective strategies for enhancing women’s rights and choices among the laws that fall within the remit of family matters. A number of common themes and results emerge from my analysis.

Chapter II discusses the history of personal status law for Muslims in Bangladesh. In this chapter, I explain the diversity of fiqh across the Muslim world and across what is now Bangladesh prior to the country’s independence. I discuss the origins of legislation on areas such as inheritance, marriage, divorce, and guardianship and custody of children for Muslims, particularly as they developed into a distinct and standardised body of law during the British Raj. Legislation on women’s rights increasingly symbolised a marker of communal identity and Muslim unity as the Raj came to an end, and 1961 saw the last

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<sup>627</sup> Léon Buskens, "Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere," *Islamic Law and Society* 10, no. 1 (2003): 122.

substantive reform in family laws with the Muslim Family Laws Ordinance passed by Ayub Khan. Despite protests from ulema that eventually contributed to Ayub Khan's fall, and intermittent review in Pakistan of clauses in the Ordinance in the years that followed, the Ordinance has not come into question within the Bangladeshi judicial or legislative system since the country's independence. Members of the Jamaat-e-Islami in Bangladesh, however, have continued to express their reservations at least as recently as the mid-1990s.<sup>628</sup>

In the years leading up to the breaking away of East Pakistan, women's dress became another form of resistance. Entwined with secularism, the Bengali nationalist movement emphasised features of Bengali-ness that had little to do with Muslim identity, such as celebrating Bengali New Year, in an effort to move away from the conception of a Pakistan united by religion. This was followed by a brutal war, and the 1972 Constitution of the newly independent Bangladesh continued to emphasise secularism as a fundamental principle of state and nation.

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<sup>628</sup> In a Bangladesh television programme just prior to national elections in 1996, journalists asked prominent members of Jamaat to explain their position on several issues, such as polygamy. Matiur Rahman Nizami, the party's Secretary General, responded by comparing the MFLO and his understanding of Islamic law, saying "There was a great deal of opposition to this law during Ayub Khan's rule. Islam permits multiple marriages, but there are also certain restrictions. To completely prohibit it is wrong. What is important is to ensure that it is not misused. What the ordinance does is add to and take away from a God given rule." He also argued that polygamy was intended to ensure that men do not stray from their marriages and "minimize social disorder." (Shehabuddin, *Reshaping the Holy : Democracy, Development, and Muslim Women in Bangladesh*, 93.)

Afterwards, the 1996 election in Bangladesh had a voter turnout of 73 percent, with turnout among women at 76 percent. Jamaat-e-Islami "trailed far behind three other parties, winning only 3 seats," and polling most poorly among women (Stepan, "Religion, Democracy, and The "Twin Tolerations"," 14.). Almost two decades later, during the course of the recent War Crimes Tribunal in Bangladesh, Nizami was charged with murder, rape, incitement and leading armed Al Badr forces against supporters of the Liberation War, and received a death sentence shortly after national elections in January 2014, the first such decision after a year without any other sentencing of Jamaat leaders, but the sentence has so far been stayed (Shamim Chowdhury, "The Politics at Play in Bangladesh War Trials," *Dhaka Tribune (online)*, 24 October 2014.).

With these initial conditions in mind, Chapters III, IV, and V analyse the impact of three key variables on the outcomes of landmark family law cases: the Constitution, existing legislation, and the National Women Development Policy. I attempt to identify in all of these variables their impact on the ways proposals for reform in personal status are framed and current legislation is practised. I determine whether the principles of shari'a are referred to but rejected as a guide, whether they are referred to and accepted as a guide, or whether they are ignored altogether. Once their impact is identified, I employ systematic process analysis to determine how their impact has been made or, alternatively, why they have had limited or no impact.

Chapter III describes the Bangladeshi Constitution and its amendments concerning the status of religion. I show that shifting references to Islam in the Constitution have had little impact on family laws and demonstrate how the labels of secularism, religion, and in particular freedom of religion have been employed both in favour of and against changing the status quo in favour of women's rights. Although there are few family law cases to study as observations with regard to constitutional amendments, the Constitution has on occasion been cited in landmark judgments on conjugal rights. Notably, judicial activism has rendered conjugal activism essentially obsolete,<sup>629</sup> at least in cases where it is claimed as a means to force women to return to their marital homes.

In this chapter, I also begin my analysis of the ways in which women's rights and religion have been presented in the rhetoric of individual political parties, continued in Chapters IV and V. Constitutional Amendments since Awami League has returned to power suggest a desire to return to the original 1972 Constitution, particularly in that they have so

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<sup>629</sup> "Professor 2, Interview by Tahrat Naushaba Shahid."

far been aimed at rejecting earlier Amendments made during Ziaur Rahman and BNP's terms in power. The one significant Amendment that remains in the context of religion is the declaration of Islam as the country's state religion, put in place by the Jatiya Party under President Ershad. Additionally, women's reserved seats in parliament have been consistently increased by Constitutional Amendment regardless of which party is in power, once by Jatiya Party from 15 to 30, by BNP from 30 to 45, and by Awami League from 45 to 50. So, in addition to policies and manifestos described in Chapters IV and V, the Constitution emerges as another arena for individual parties to assert their position on certain issues rather than reflecting a broader consensus on those issues. The Fifteenth Amendment under the Awami League, for example, changed a Constitutional clause on sexual equality to promote equality in all spheres of 'national' life rather than the earlier clause on equality in 'public' life. This clause was previously untouched, and the change suggests a desire to provide further judicial legal room for enhancing women's rights in the traditionally private spheres of family law, as 'national' life is even more vague and open to interpretation than 'public.'

References to shari'a or fiqh receive no mention in the Constitution. Islam as a state religion, too, has no concrete meaning, despite concerns that it can be used to restrict progress in equalising women's rights. Constitutionally mandated freedom of religion has, furthermore, been interpreted in multiple ways to both promote and challenge existing jurisprudential understandings of shari'a principles. It seems, then, that just as fiqh can be interpreted in multiple ways, so can the Constitution's application of fiqh.

Chapter IV comes to much the same conclusion as Chapter III, in that while there is no clear pattern that emerges in terms of religious practice being ignored or rejected as a

guide to family law cases, its application produces inconsistent results in enhancing women's rights. Child custody, conjugal rights, polygamy, and the right to initiate divorce has seen the most discussion in this light, while inheritance has seen very little movement beyond the allocation of succession rights to orphaned grandchildren. I show that, by comparison, violence against women laws have tended to increase in severity while attempts at changing family laws have been largely unsuccessful. Even where religious practices are concerned, reforms have allowed women more legal power in areas such as discrimination against certain types of dress and domestic violence, and with little or no reference to reinterpretation of those practices. However, family laws are one area where reforms are repeatedly framed as reinterpretation, falling into the only area of the Bangladeshi legal system that is categorically determined in terms of religion.

As with violence against women, policies on empowering women as vehicles of economic growth have been considerably more successful and less provocative than legislative proposals on issues such as inheritance. This is the focus of Chapter V, which analyses the National Women Development Policy. Clashes over the policy have brought the issue of inheritance to the forefront of the conflict between the secular left and religious right, fueling the emergence of the Deobandi group Hefazat-e-Islam which has since competed with Jamaat-e-Islami for prominence among groups on the religious right. As markers of identity, women's rights continue to be central to the discourse around religion in law and governance between state and non-state actors.

The NWDP has had little impact on family laws, but provide another example of an area where shari'a has been raised as a challenge to enhancing women's status in these laws. The policy demonstrates an aspiration towards greater sexual equality, and both the current

Prime Minister and Minister of Women and Children's Affairs have stressed that Islam is not inherently opposed to such equality but that members of the opposition have appropriated the language of religion to argue otherwise. Chapter V continues this study's contribution to existing literature on regulations around women's status as markers of identity and argues that development policies since the country's independence that encourage women's participation in the labour force suggest a gradual move away from framing women's rights purely in terms of protection. For example, the ulema in Bangladesh did not oppose "family planning and sterilization to the same extent as in India."<sup>630</sup> Indeed, their support for the government's family planning programme "was crucial in the unprecedented and dramatic decline (by 44%) in the Total Fertility Rate (TFR) between 1980-1985 and 1995-2000."<sup>631</sup>

The response to reform proposals for family laws, however, in which women's status continues to be spoken of in terms of protection rather than empowerment, has been considerably more negative. Ziba Mir-Hosseini offers an explanation for why this view of women in need of protection may be so persistent: "at the heart of the unequal construction of gender rights in Muslim legal tradition lies the idea that men have guardianship or *qiwama* over women. Verse 4:34 [of the Quran] (from which the idea is derived) is commonly understood as mandating men's authority over women, and is frequently invoked as the main textual evidence in its support."<sup>632</sup> As I point out in Chapter IV, the Constitutional perspective on women's rights perpetuates this conception, while the Ministry formed to

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<sup>630</sup> Patricia Jeffery, Roger Jeffery, and Craig Jeffrey, "Disputing contraception: Muslim Reform, Secular Change and Fertility," *Modern Asian Studies* 42, no. 2-3 (2008): 542.

<sup>631</sup> Ibid.

<sup>632</sup> Ziba Mir-Hosseini, "Justice, Equality and Muslim Family Laws: New Ideas, New Prospects," in *Gender and Equality in Muslim Family Law: Justice and Ethics in the Islamic Legal Tradition*, ed. Ziba Mir-Hosseini, et al. (London: I.B. Tauris, 2013), 9.

promote such rights continues to share space with “marginalized public concerns such as children.”<sup>633</sup>

In showing that Muslim legal tradition is especially significant in appropriating alternative unifying factors such as kinship networks, Mounira Charrad argues that feminist movements have had little or no influence in Algeria, Tunisia, and Morocco. Charrad points out that, although Tunisia experienced perhaps the most extensive reform to shari‘a-guided family laws after independence, its revised code was not a response to a mass movement in favour of women’s rights.<sup>634</sup> Meanwhile, despite the participation of women as guerrillas in Algeria’s independence movement and the expectation that this would have positive outcomes for women in revisions of family laws, women’s rights were not a priority once independence had been achieved.<sup>635</sup> Chapter V of my study suggests that this was not the case for Bangladesh at independence, but strategies framed in terms of economic growth and development have certainly been more powerful than those framed in rights language.

Chapter V also affirms the fact that inheritance is the most difficult of areas of family law to tackle in terms of the reinterpreted route that reform proposals have so far taken. Very little flexibility exists within the four maddahib of Sunni law on succession rights for women, and Charrad points out that:

“No other area of Islamic law sanctions the rights of paternal male kin as much as does the law of inheritance and succession. Whatever the specific regulations in particular cases, the basic thrust of the law is twofold. First, the law favors men over woman. A woman always receives half as much inheritance as would a man in a similar situation. Second, the law grants

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<sup>633</sup> Anne Marie Goetz, "National Women's Machinery: State Based Institutions to Advocate for Gender Equality," in *Mainstreaming Gender, Democratizing the State? Institutional Mechanisms for the Advancement of Women*, ed. Shirin Rai (Manchester: Manchester University Press, 2003), 74.

<sup>634</sup> Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco*, 219.

<sup>635</sup> *Ibid.*, 186.

inheritance privileges to agnatic relatives or male relatives on the paternal side.”<sup>636</sup>

Siraj Sait and Hilary Lim, on the other hand, suggest that this law should be seen in a “holistic” way, and that compensatory mechanisms exist in other areas of the law, such as mehr, maintenance, and partial bequests, to balance the discrimination inherent to inheritance law, while the primary purpose of the larger corpus of fiqh is to maintain transmission of wealth and stability within the family and community.<sup>637</sup> Problematically, of course, this view suggests that ‘the family’ is defined only through the tracing of male kin. The justification for such unequal inheritance, even without the goal of retaining the bulk of property within a community defined by male kin, is wholly dependent on a multitude of mechanisms that may or may not ultimately balance out the inequality of inheritance for individual women. (And it certainly does not take inflation into account as it is currently practised.) Their logic also assumes the inevitability of certain choices. What if, for example, a woman does not marry and therefore receives no mehr or maintenance? There is no ‘backup plan’ built into fiqh for that woman. It would seem considerably simpler to allow women to inherit equally rather than counting on a multitude of compensatory mechanisms that all require monitoring and enforcement. They also argue that the fact that women often give up even their existing inheritance rights deserves further scrutiny<sup>638</sup> which may well be the case but does not take away from the formal, legislative inequality inherent to existing succession rights.

Tariq Ramadan argues against current Islamic jurisprudence on inheritance as well:

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<sup>636</sup> (Charrad, 2001, p. 41)

<sup>637</sup> Sait and Lim, *Land, Law and Islam: Property and Human Rights in the Muslim World*, 135.

<sup>638</sup> *Ibid.*, 119.

‘The most emblematic case [in Islamic family law] is that of inheritance. In many cases, a woman may receive as much as a man, or more. In direct filiation (parents—children), however, a daughter receives half the son's share. [This has been justified] through the goals and the Islamic philosophy of the respective responsibilities of men and women: women keep their money for themselves while men spend theirs to provide for the whole family's needs as well as their own. This sharing of wealth should therefore be understood in the light of a broader framework determining the different responsibilities and roles within the family and society; the case is logical and well supported. But what should be done when, in contemporary families and societies, this logic of solidarity no longer works, when men have (willingly or not) abdicated their financial responsibilities and women find themselves alone, sometimes without an extended family, with several dependent children? Is it enough to repeat the “final, incontrovertible norm,” without paying attention to context, and thus support obvious injustice? Or should we, on the contrary, revise the implementation of the texts or suspend their application, or ask for clear compensation from the community—whether the State or local authorities—as I have been suggesting for years?’<sup>639</sup>

Ramadan's reasoning here is aligned with donor agency development theory that emerged in the 1980s to influence the Five-Year Plans during this decade discussed in Chapter V. Rather than perceiving women as spending money primarily on their own, seemingly frivolous desires, economic development and labour studies increasingly showed that women contribute greatly to household resources such as sanitation, food, and children's health and schooling.<sup>640</sup> Proven development theories of intra-household resource distribution since then show that it is in fact women that tend to contribute the highest percentage of their wealth and earnings in poor communities and countries such as

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<sup>639</sup> Tariq Ramadan, *Radical reform: Islamic Ethics and Liberation*, (New York: Oxford University Press, 2008),

<http://ezproxy.ouls.ox.ac.uk:2274/oso/public/content/religion/9780195331714/toc.html>. 228.

<sup>640</sup> The perception that women spend their earnings only on themselves is certainly not exclusive to Islamic philosophy - known as the ‘pin-money hypothesis’ and prevalent in non-Muslim, donor countries such as the United Kingdom as well, it has also been demonstrated that the hypothesis does not hold using British survey data from the late 1970s to the early 1990s. (Susan Harkness, Stephen Machin, and Jane Waldfogel, "Evaluating the Pin Money Hypothesis: The Relationship between Women's Labour Market Activity, Family Income and Poverty in Britain " *Journal of Population Economics* 10, no. 2 (1997).)

Bangladesh, despite often being the lesser beneficiaries of such resource distribution as both children and adults, particularly in South Asia.

While Chapter IV analyses the lack of change in family laws in light of the evolution of violence against women laws, then, Chapter V discusses family laws in relation to the National Women Development Policy and other policies on women's rights. The two tracks of domestic and international influences on women's rights are thus analysed in turn, with Chapter V revealing the degree to which donor agency discourse on women's policies have determined the more rapid change in certain areas of policy that fall under the category of economic development rather than the category of human rights. Interestingly, inheritance laws can easily be categorised as both, concerned as it is very directly with the distribution of wealth. These dual ways in which inheritance has been framed – as both a feature of development and as a matter of rights expressed through law – perhaps best reflect, within areas of family law, the conflict between reconciling evidence provided by contemporary development theory and promoted through policy and the evolving views of the supposedly intrinsically different roles and responsibilities of men and women that is promoted through law.

Despite the reality of women's contributions to their households, the most recent NWDP of 2011 has aroused the greatest opposition regarding inheritance rights. During protests against the 2008 NWDP, the Jamaat supported the IOJ in their public rhetoric but offered "very little presence on the street," in an effort not to seem confrontational with the caretaker government of that time.<sup>641</sup> However, once the 2011 NWDP was announced, Jamaat, IOJ, and BNP all united in their very visible opposition. Again, at least on the part of

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<sup>641</sup> Riaz, "Unpacking the Islamist Agenda."

the BNP and the Jamaat, much of this may have been a tactical decision directed at the Awami League rather than representing a genuine ideological position against women's equality.<sup>642</sup>

What do my conclusions from these chapters suggest for future strategies at reform? They show that discussions of Islamic jurisprudence and shari'a as part of the legislative, judicial, and civil discourse around reforming family laws are inevitable, and even those opposed to the religious right have acknowledged as much. The current ruling party has not faltered in its support of the NWDP, but it has also acknowledged constraints in negotiating with their opposition in this area. A recent statement exemplifies the most immediate concerns of the Awami League at this time, made in response to the murder of a blogger who was known for criticising the religious right:

“We are walking a fine line here,” said [Sajeeb] Wazed, [the Prime Minister's son and] an informal consultant for the ruling party, the Awami League. “We don't want to be seen as atheists. It doesn't change our core beliefs. We believe in secularism,” he said. “But given that our opposition party plays that religion card against us relentlessly, we can't come out strongly for [the murdered blogger]. It's about perception, not about reality.”<sup>643</sup>

As Jamaat has changed in its own position towards women's equality while simultaneously weakened by the dominance of the Awami League and the loss of allies during the course of the War Crimes Tribunal, the IOJ and Hefazat have emerged as the

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<sup>642</sup> Ibid. The BNP does not always ally with Jamaat against the AL while AL is in power. BNP leaders have been notably quiet in their support of Jamaat leaders under trial for war crimes. ‘Although BNP chief Khaleda Zia has described the war crimes trials as a “sheer farce,” it is unwilling to support the Jamaat's demand for repeal of the tribunals. “The BNP has many freedom fighters in their ranks who detest the Jamaat's brand of religious politics. So they want their leadership to distance themselves from the Jamaat on the war crimes issue”’ (Subir Bhaumik, "War Trials Re-Open Old Wounds in Bangladesh," *AlJazeera (online)*, 5 February 2013.).

<sup>643</sup> John Shiffman, "Exclusive: Widow of Slain U.S.-Bangladeshi Blogger Lashes out at Dhaka," *Reuters (online)*, 11 May 2015.

latest, self-styled custodians of female seclusion and orthodox Islam in recent years. Nevertheless, despite Hefazat's threats to "shut down" Dhaka if the government did not meet its demands within 30 days, one of which was to ban the "free mixing of men and women,"<sup>644</sup> Shirin Sharmin Chowdhury, former Minister of Women's Affairs, was voted in as Speaker of Parliament just before the 30-day deadline was reached.<sup>644</sup> Shortly afterwards, the BNP supported Hefazat's blockade of the city, "which led to considerable violence in the capital and the town of Narayanganj." In making his demands, the head of the Hefazat had previously addressed the Prime Minister, saying "You must leave the company of atheists."<sup>645</sup> Unlike Jamaat, Hefazat has yet to participate in elections. The Jamaat, on the other hand, has adapted its position over the time to the increasing participation of women voters,<sup>646</sup> who do not believe that their interpretation of Islam serves their best interests.

Indeed, leading members of the Jamaat continue to suggest reforms to put women in more powerful positions in the party,<sup>647</sup> though it is difficult to assess how much of this move is motivated by the desire to be able to participate in elections,<sup>648</sup> given the current restrictions placed on parties who run for office on a religious platform and who restrict female members from leading positions. Their strategy has generally been one of adaptation, with its senior official, Abdur Razzak, having been quoted to say about Deobandi Qwami madrassah, which are the schools from which members of the Hefazat and IOJ hail, "Qomi madrasa education is not total Islam. The student coming out of the madrasa is a misfit in

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<sup>644</sup> Kamran R. Chowdhury, "Bangladesh Defies Hardliners, Elects First Female Speaker," *Khabar South Asia (online)*, 11 May 2013.

<sup>645</sup> Toufique I. Khalidi, "Behind the Rise of Bangladesh's Hifazat," *AlJazeera (online)*, 9 May 2013.

<sup>646</sup> Ahmed, "Jihad and Lower-Middle-Class Women: Secularism in Rural Bangladesh," 126.

<sup>647</sup> Muhammad Kamaruzzaman to Khichuri, 26 November, 2010, <http://www.khichuri.org/wp-content/uploads/2015/03/StrategyforChange.pdf>.

<sup>648</sup> Shehabuddin, "Jamaat-I-Islami in Bangladesh: Women, Democracy and the Transformation of Islamist Politics," 600-01.

society. He is not a person who can compete in society. The person who comes out of the madrasa should be able to go to Oxford. The question is that Islam does not forbid you from learning English, mathematics, etc. Islam is a modern religion.”<sup>649</sup>

To what extent this modernity extends to the possibility of reform for family laws in favour of women is questionable. Indeed, framing public dialogue around family laws as secular versus religious law, entwined as this dichotomy is with competing versions of national identity and the history of independence in Bangladesh, has not thus far been successful. Abdullahi An-Nai'm argues that:

“Islamic Law cannot be enforced as state law and remain Islamic Law in the sense that Muslims believe it to be religiously binding. Since the enforcement of Islamic Law through state institutions negates its religious nature, the outcome will always be secular, not religious. ... This view does not dispute the religious authority of Islamic Law, which exists only outside the framework of the state. ... For any act to be religiously valid, the individual believer must comply voluntarily ... Whatever selection is made among competing views of Islamic Law cannot be challenged politically when they are presented as mandated by the ‘divine will of God.’ To avoid this risk, religious rationale itself cannot be sufficient basis for legislation, and that deficiency cannot be remedied by majority vote, even if unanimous. ... Thus, for example, a Muslim majority, however strong, should never override constitutional objections to any legislation that violates the fundamental requirements of equality and non-discrimination against women or non-Muslim citizens.”<sup>650</sup>

Martha Nussbaum too, suggests that “loyal members of a religious group should remain at liberty to follow its teachings in such matters, but this does not justify imposing such teachings on people who do not so choose, especially when imposition is unequal and when it violates a fundamental right of choice.”<sup>651</sup> John Bowen, meanwhile, argues in the

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<sup>649</sup> Bano, "Allowing for Diversity: State-Madrasa Relations in Bangladesh," 24.

<sup>650</sup> An-Na'im, "The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law," 3, 19.

<sup>651</sup> Nussbaum, *Sex and Social Justice*, 100.

context of Indonesia that a failure of secular reforms earlier in the 20<sup>th</sup> century in other Muslim countries demonstrates that it is important to engage with the discourse of religion, and promote change from within an Islamic jurisprudential or fiqh framework, in order to succeed in implementing reforms.<sup>652</sup>

The results of my study suggest that this is the approach increasingly taken among representative bodies of the state such as the Bangladesh Law Commission. The most recent Gender Budgeting Report for the Ministry of Religious Affairs, meanwhile, says that:

“The number of female teachers should be increased in the programs of preprimary and religious education; Initiatives should be undertaken to disseminate the interpretations of different religious books relating to the issues of women rights; It should be raised in all forums that every religion accords special place to women; The real history of women empowerment will have to be depicted in different religious research and publications portraying women’s leadership in crusade/holy wars.”<sup>653</sup>

The Gender Budget is distributed across ministries, and the current MWCA’s budget also includes the aim of “establish[ing] gender equality in politics, administration, socio-economic activity, education, culture, sports and in all areas of family life,”<sup>654</sup> but does not include any mention of property, assets, inheritance, succession, or wealth. The Law Ministry’s budget, however, includes a statement of intent to “Ensure equality and equity in terms of distribution of property, working opportunity and business opportunity for women; ... Eradicating all discriminatory behavior towards female child [*sic*] and ensuring gender equality in every sphere including the family through administering justice.”<sup>655</sup> This suggests

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<sup>652</sup> Bowen, *Islam, Law, and Equality in Indonesia: An Anthropology of Public Reasoning*, 169.

<sup>653</sup> "Gender Budgeting Report 2015-16," ed. Finance Division (Dhaka: Ministry of Finance, Government of the People's Republic of Bangladesh), 246.

<sup>654</sup> *Ibid.*, 45.

<sup>655</sup> *Ibid.*, 201.

a desire to move forward with equalising family laws, even in the case of property allocation, albeit with a multi-pronged strategy.

A significant element of moving forward with this area of research, motivated as it is by the desire to see greater equality for women in Bangladesh, would be to assess their access to justice. Family courts, like a number of other public and administrative arms of government and commerce, are deeply inhospitable to women, and yet they were formed with the hope of encouraging greater access for women. Furthermore, “As feminist lawyer and activist Sultana Kamal points out, the expense of the [case] filing fee and the need to hire a lawyer, plus the hassle of gathering necessary documentation and travel to the court, discourage most poor women from turning to the family court.”<sup>656</sup> In many cases, women give up their rightful share and, even when they do not, “male relatives have been known to file court cases, forge wills or resort to threats and even physical violence. ... These constraints are compounded by the unhelpful approach of many government functionaries who typically share the prevalent social biases and often obstruct the implementation of laws in women’s favour.”<sup>657</sup>

The contribution that this analysis makes to the fields of sexual equality, law, and religion, however, is one that focuses largely on legislation. The state’s negotiations between actors on the religious right and women’s rights activists among the secular left is emblematic of contestations on the status of women in much of the world. My study has framed the discourse around these contestations in the context of a predominantly Muslim country in South Asia, but conflicts between similar categories of political actors and their

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<sup>656</sup> Shehabuddin, *Reshaping the Holy : Democracy, Development, and Muslim Women in Bangladesh*, 78.

<sup>657</sup> Bina Agarwal, ""Bargaining" And Gender Relations: Within and Beyond the Household," *Feminist Economics* 3, no. 1 (1997): 14.

expression in the law have arisen across the world - for example, in variations on women's legal rights to terminate pregnancy across individual states in the United States despite federal regulation. In the context of Bangladesh, further scrutiny of family laws and how they can be effectively changed is crucial to expanding women's rights. Recent events beyond the time period analysed in this study have yet to show their impact in changing dynamics among the religious right, and the degree to which the state will be able to negotiate with civil society actors in the process of reform. Nevertheless, the most recent indicators in terms of government documentation suggests not only a desire for reform, but the recognition that this study affirms, that religious and secular discourse will have to find a middle ground if change is to be implemented.

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## Appendix A. List of Interviewees

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This appendix includes a full list of my expert interviewees and the dates on which they were interviewed. As I described in Chapter I, they are identified here according to their professions and, where they are active in multiple professional capacities, I have referred to them according to the capacity or capacities in which I interviewed them, such as “Leading Lawyer Activist.” Depending on their areas of expertise, they were interviewed on the history of personal status law for Muslims in South Asia, the Bangladesh Constitution and its amendments, landmark legal cases on fatwa, sexual harassment, and post-divorce maintenance, the activism of the judiciary, women’s rights movement, and religious right, and the debates around legislative and policy proposals including the Uniform Family Code, laws on violence against women, and the National Women Development Policy.

Their responses were compiled in a database and organised according to individual variables, thus identifying their responses with relation to the variables discussed in each chapter and their outcomes. So, for example, for Chapter III, I referred to responses categorised under “Constitution” and sub-categorised under “Islam (Amendments)” and “Women,” the two features of the Constitution under analysis in terms of outcomes. Variables that are not analysed in terms of their direct outcomes in any of the chapters but bear correlations with each of the variables discussed in Chapters III-V were also categorised separately, for example, under “Activism,” and sub-categorised under “Judicial,” “Women’s Rights,” and “Religious” as all three have bearing on the main variables under discussion here in Chapters III-V in capturing the motivations of individual stakeholder groups.

The following is a list of my interviewees, their locations, and their dates. Appendix B offers a general Interview Schedule that was adapted when necessary to the nature of my interviewee and their expertise.

<b>List of Interviewees and Date of Interview</b>		
<b>Interviewee code</b>	<b>Location</b>	<b>Date</b>
Head of Government Department 1	Dhaka, Bangladesh	January 2013
Head of Government Department 2	Dhaka, Bangladesh	January 2013
Head of Government Department 3	Dhaka, Bangladesh	January 2013
Judge 1	Dhaka, Bangladesh	June 2014
Judge 2	Dhaka, Bangladesh	June 2014
Judge 3	Dhaka, Bangladesh	June 2014
Judge 4	Dhaka, Bangladesh	June 2014
Judge 5	Dhaka, Bangladesh	June 2014
Lawyer 1	Dhaka, Bangladesh	June 2014
Lawyer 2	Dhaka, Bangladesh	May 2014
Leading Lawyer Activist 1	Dhaka, Bangladesh	March 2013
Leading Lawyer Activist 2	Dhaka, Bangladesh	March 2013
Leading Lawyer Activist 3 (1st Round)	Dhaka, Bangladesh	January 2013
Leading Lawyer Activist 3 (2nd Round)	London, United Kingdom	May 2014
Leading NGO Activist 1	Dhaka, Bangladesh	February 2013
Leading NGO Activist 2	Dhaka, Bangladesh	January 2013
Leading NGO Activist 3	Dhaka, Bangladesh	January 2013
Leading NGO Activist 4	London, United Kingdom	February 2013
Leading NGO Activist 5	Dhaka, Bangladesh	February 2013
NGO Activist 1	Dhaka, Bangladesh	January 2013
NGO Activist 2	Dhaka, Bangladesh	February 2013
Professor 1	Chittagong, Bangladesh	February 2013
Professor 2	Dhaka, Bangladesh	February 2013
Professor 3	Dhaka, Bangladesh	January 2013
Professor 4	Dhaka, Bangladesh	February 2013
Professor 5	Dhaka, Bangladesh	January 2013
Professor 6	Dhaka, Bangladesh	January 2013
Professor 7	Dhaka, Bangladesh	January 2013

## Appendix B. Interview Schedule

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**My research explores patterns of legal change with regard to women in personal status laws and how they have or have not come about. I am particularly interested in the case of inheritance rights as it appears to raise such obstacles against implementing the National Women Development Policy.**

1. The only two significant changes in family law were a time of heightened centralisation (Registration Act 1974 and Family Courts Ordinance 1985) enacted during the time of Presidents Zia and Ershad. Is there a correlation between centralisation of power and the ability to initiate change in this regard?
2. Even during eras of democratic governance, women's rights activists have failed to engage directly in politics, unlike the religious right - has this been a hindrance to their ability to exert power or are their personal connections in some ways more effective in reaching policy-makers?
3. Do gender issues play a significant role in electoral politics in Bangladesh? Do political parties in Bangladesh have a distinct strategy or platform with regard to women's affairs? Or has change in women-relevant legislation really come from the initiative of the judiciary?
4. Has the judiciary shown independence with regard to landmark cases relevant to religion and governance in Bangladesh e.g. 5<sup>th</sup> Amendment, fatwa ban? Do individual cases concerning family law (that is, cases outside of high profile Supreme Court judgments) suggest a certain level of judicial independence? Do they suggest judicial activism?
5. In terms of landmark cases relevant to religion and governance in Bangladesh e.g. 5<sup>th</sup> Amendment, fatwa ban, are these cases advised upon in any way by clerics or an advisory council including religious scholars?
6. How do law-making bodies - be they the ruling party or the judicial system - decide when to challenge the religious right? Is there a tendency to choose certain struggles over others e.g. fatwa ban versus equalisation of rights in personal status laws?

7. How do women's rights activists, in turn, choose which battles they fight? For example, they have managed to push for a Domestic Violence Act as recently as 2010, but the movement for a uniform family law code appears to have petered out?
8. What happened to the movement for a uniform code for family law – did it represent the full spectrum of religious groups in Bangladesh?
9. Formal legal changes in terms of personal status appear to be limited – yet laws penalising physical violence against women have seen repeated change. How are such statutes passed – through parliament? Through the Supreme Court? Please explain the process.
10. Have personal status laws received less scrutiny or have they received the same level of scrutiny but not experienced change?
11. How much negotiation do you see between prominent members of the clergy and women's rights activists?
12. Are political divides reflected in some ways in the media - do English and Bengali language newspapers, for example, reflect different political priorities?
13. Why do the media and some political parties tend to distort contents of NWDP re: equal inheritance rights? Some of the same goals with regard to women's affairs are presented in the country's poverty reduction policies (PRSP) and yet it appears that it is this aspect of personal status that is the primary obstacle to implementing the policy? Is it unrealistic to speak of equal rights for women in inheritance in Bangladesh given limitations on access to justice more broadly?
14. How national is the National Women Development Policy? Is this a statement with regard to a party's political platform on women or is this intended as an implementable policy with a long-term horizon? Were you or your organisation engaged in the process of drafting the latest and past such policies?
15. What is the significance of the changes that have occurred in the NWDP between 1997 and 2011, and why was there such a long gap between the 1997 and 2004 drafts?
16. Who monitors the National Action Plan and what impact does a failure to comply with the plan have?
17. Is Islamic feminism a significant movement here in Bangladesh? My understanding is that urban, elite women are increasingly drawn to studying Islam amongst themselves –

could that come with greater authority to interpret Islam in the public sphere (or is this study largely limited to the private sphere)?

18. Some areas of women's affairs, particularly when relevant to economic development (family planning, microcredit, participation in the formal labour force, education) have seen so much change – have social norms with regard to women's roles in the family changed, too? Has the government pushed that agenda or has this been an organic, market-driven process?
19. With regard to legislative enhancements for women, the strategy that appears to be most common is to enhance women's access to justice rather than to make significant change to the law. Has this been a deliberate strategy or a matter of negotiating within the limitations inherent to women's affairs in Bangladesh?

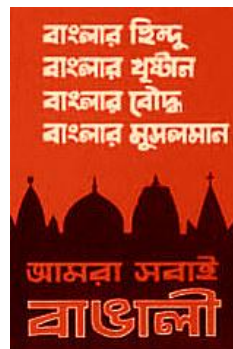
## Appendix C. Timeline of Landmark Legal Cases

Subject and/or Name of Case	High Court / Appellate Division	Year	Party in Power	Judges on the Bench	Description
Conjugal Relations: <i>Nelly Zaman vs. Giasuddin Khan</i>	High Court Division	1982	Martial law (under President Ershad)	Syed Muhammad Hussain	The principle of a husband's claim to forced conjugal rights over his wife was rejected, in part as it was not considered a reciprocal claim between wife and husband
Child Custody: <i>Muhammad Abu Bakar Siddique vs. S. M. A. Bakar</i>	Appellate Division	1985	Martial law (under President Ershad)	F. K. A. Munim; Badrul Haider Chowdhury; Shahabuddin Ahmed	Asserted that child is best cared for by a mother rather than a father despite traditional custody going to the father in Hanafi fiqh when child has passed certain age
Conjugal Relations: <i>Hosne Ara vs. Albaj Md Rezaul Karim</i>	High Court Division	1991	Caretaker government	Fazle Hussain; Mohammad Habibur Rahman; Kazi Ebadul Hoque	The principle of a husband's claim to forced conjugal rights over his wife was once again rejected, using <i>Nelly Zaman vs. Giasuddin Khan</i> as precedent
Inheritance: <i>Sheikh Ibrahim vs. Nazma Begum</i>	Appellate Division	1992	Bangladesh Nationalist Party	Mustafa Kamal; Latifur Rahman; A. T. M. Afzal; M. H. Rahman; Shahabuddin Ahmed	The Court recognised the right of an orphaned granddaughter's right to inherit all of her deceased mother's share of inheritance from the grandfather's estate, rather than distributing some of the mother's portion to the mother's brothers
Post-divorce maintenance: <i>Hefzur Rahman vs. Shamsun Nabar Begum</i>	High Court Division	1995	Bangladesh Nationalist Party	Gholam Rabbani; Syed Amirul Islam	Extended traditional period of post-divorce maintenance from three menstrual cycles to 'until remarriage'

Polygamy case: <i>Mohammad Ilias vs. Jesmin Sultana</i>	High Court Division	1997	Awami League	Gholam Rabbani; M. Bazlur Rhaman Talukder	Suggested that polygamy could be banned using the same reasoning through which it was banned in Tunisia
Child Custody: <i>Nargis Sultana vs. Md. Amirul Bor Chowdhury</i>	High Court Division	1997	Awami League	A. K. Badrul Haq	Asserted, again, that child is best cared for by a mother rather than a father despite traditional custody going to the father in Hanafi fiqh when child has passed certain age and despite pre-existing agreement in favour of father
Conjugal Relations: <i>Khodeja Begum vs. Sadaq Sarkar</i>	High Court Division	1998	Awami League	Muhammad Abdul Mannan	The principle of conjugal rights was abolished altogether, regardless of being conditional on force
Conjugal Relations: <i>Hosna Jaban (Munna) vs. Md. Shajahan (Shaju)</i>	High Court Division	1998	Awami League	[Unknown: Record could not be located]	Rejected all previous conjugal rights case precedents since the enactment of the Family Court Ordinance in 1985 enforced such rights as litigable; the restoration of such rights allowed the wife in this case to obtain maintenance from her husband
Polygamy case: <i>Mohammad Ilias vs. Jesmin Sultana</i>	Appellate Division	1999	Awami League	A. T. M. Afzal; Mustafa Kamal; Latifur Rahman; B. B. Roy Choudhury; Md Mahmudur Rahman	Rejected proposal for banning polygamy, suggesting that such a proposal was un-Islamic
Post-divorce maintenance: <i>Hefzur Rahman vs. Shamsun Nabar Begum</i>	Appellate Division	1999	Awami League	A. T. M. Afzal; Mustafa Kamal; Latifur Rahman; Mohammad Abdur Rouf; B. B. Roy Choudhury	Reinstated traditional period of post-divorce maintenance, suggesting earlier sentence was a matter of “judicial excess”
Conjugal Relations: <i>Md. Chan Miab vs. Rupnabar</i>	High Court Division	1999	Awami League	Kazi A. T. Manowaruddin	Conjugal rights were once again recognised - and considered to be reciprocal - and once again allowed the wife in this case to obtain maintenance from her husband

Conjugal Relations: <i>Sherin Akhter and another vs. Md Ismail</i>	High Court Division	1999	Awami League	Qazi Shafiuddin	<i>Nelly Zaman vs. Giasuddin Khan</i> was once again used as precedent to ensure that the wife was not forced to recognise the conjugal rights claimed by her husband
Eva Sunanda Chowdhury vs. Subir Sardar/Sarker	High Court Division	2000	Awami League	[Unknown: Record could not be located]	(In divorce case between two Christians) called for a unified marriage and divorce law
Fatwa Ban (in response to Writ Petition 5897)	High Court Division	2001	Awami League	Gholam Rabbani; Nazmun Ara Sultana	Fatwas were declared unconstitutional, but the decision was appealed and stayed
Islamic Law Research Centre and Legal Aid Bangladesh vs. Eva Sunanda Chowdhury	Appellate Division	2002	Bangladesh Nationalist Party	Mahmudul Amin Chowdhury; Mainur Reza Chowdhury; Md. Ruhul Amin; Md. Fazlul Karim; K. M. Hasan; J. R. Mudassir Hussain; Abu Sayeed Ahammed	Held that <i>Eva Sunanda Chowdhury vs. Subir Sardar/Sarker</i> ruling was impertinent and illegal in its call for a unified marriage and divorce law, expunging the call from the record of the case
Fifth Amendment (in response to Writ Petition 6016)	High Court Division	2005	Awami League	A.B.M. Khairul Haque; A.T.M. Fazle Kabir	Ruled in favour of repealing Fifth Amendment
Sexual Harassment (on Assault; in response to Writ Petition 4495)	High Court Division	2009	Awami League	Syed Mahmud Hossain; Syeda Afsar Jahan	After a sexual harassment case filed through public interest litigation against prominent Jahangirnagar University, the High Court eventually ensured that sexual harassment guidelines drawn up the Bangladesh Mahila Parishad and Bangladesh National Women Lawyers' Association were to be applied across all universities in the country

Fifth Amendment	Appellate Division	2010	Awami League	Md. Tafazzul Islam; Mohammad Fazlul Karim; Md. Abdul Matin; Bijan Kumar Das; Md. Muzammel Hossain; Surendra Kumar Sinha	Upheld High Court ruling repealing Fifth Amendment
Sexual Harassment (on Clothing/Attire; in response to Writ Petition 8769)	High Court Division	2010	Awami League	Imman Ali; Sheikh Hassan Arif	A series of four cases during the same year on forcing women to wear religious or modest attire led to the ruling that women and men cannot be forced to wear such attire in a constitutionally secular state, nor can they be banned from wearing such attire according to a Constitution that recognises freedom of religion
Fatwa Regulation	Appellate Division	2011	Awami League	A. B. M. Khairul Haque and others [Unknown: Record could not be located]	The issuance of fatwas was considered to be legal if made by sufficiently qualified legal scholars, but the implementation of fatwa decisions could not be made in contradiction to the formal legal system/state law (and the definition of qualified legal scholars remains open)



*1971 Liberation War posters with captions, from left to right:*

*“Bengal’s Mothers and Daughters, all are Freedom Fighters”*

*and*

*“Bengal’s Hindus, Bengal’s Christians, Bengal’s Buddhists, Bengal’s Muslims,  
We Are All Bengali”*