

GOVERNMENT OF THE PEOPLE'S REPUBLIC OF BANGLADESH

THE LAW COMMISSION

-SUBJECT-

**A FINAL REPORT ON THE PROPOSED AMENDMENT OF THE
DIVORCE ACT, 1869 (ACT 1V OF 1869) ALONG WITH A DRAFT
OF THE DIVORCE ACT, 1869 (AMENDMENT) BILL, 200--**

OFFICE OF THE LAW COMMISSION

OLD HIGH COURT BUILDING
DHAKA-1000

FEBRUARY 19, 2006

Report on the Proposed Amendment of the Divorce Act, 1869 (Act IV of 1869)

Introduction

The Divorce Act was passed in 1869 under the title the Indian Divorce Act, 1869 (4 of 1869) for the purpose of dealing with the divorce cases and related matters of the persons professing Christian religion in the then India. The object of the Indian Divorce Act was to place the Matrimonial Law administered by the High Courts in exercise of their original jurisdiction on the same footing as the Matrimonial Law administered by the Court for Divorce and Matrimonial causes in England. After partition of India in 1947, the word “Indian” was omitted from the Act by an amendment in 1949 (A-O 1949 sch) and the law stood as the Divorce Act, 1869(Act IV of 1869). After the independence of Bangladesh in 1971, the Divorce Act, 1869 continued to remain in force with necessary amendments by Act VIII of 1973 with effect from the 26th day of March 1971.

Before the passing of the Indian Divorce Act in 1869, the then Indian High Courts had the exclusive original jurisdiction to deal with and try the cases of divorce and related matters between the Christian spouses. The Christians seeking divorce at that time had to suffer much difficulty in coming to the seat of the High Courts from the far away Districts to get a decree for divorce of their marriage. For the purpose of relieving the poor Christians from the hardships which they had to suffer in coming to and getting a decree of divorce from the then High Courts, it was provided in section 4 of the Divorce Act, 1869 that the District Courts will have the concurrent jurisdiction with the High Courts in such matters. But a provision was made in section 17 of the Act that every decree for dissolution of marriage passed by a District Judge shall be subject to confirmation by the concerned High Court. The word “High Court” was later substituted by the word “High Court Division” by Act VIII of 1973 as mentioned above. The District judge is therefore under a legal obligation to refer the case under section 17 to the High Court Division for its confirmation. The reference is required by law to be heard by a Special Bench consisting of three judges with a further provision that a decree shall not be confirmed under this section until after the expiration of six months from the date of the decree.

From the above position, it will appear that a Christian spouse has to face a great hardship in getting a final decree for divorce of their marriage after passing through a lengthy procedure of the Divorce Act, 1869. Things have undergone many changes since after the passing of the Divorce Act in 1869. We, in Law Commission have, therefore taken up the matter of Divorce Act, 1869 to examine the Act with a view to finding out a way for a Christian spouse to get a decree for divorce easily, speedily and with lesser costs. In consideration of the above mentioned difficulties of a Christian spouse to get a decree for divorce, it will appear that there is a great need for an amendment of the Divorce Act, 1869 to enable a Christian spouse to get a decree for dissolution of their marriage easily and speedily without passing through this lengthy process.

Section 7 of the Act provides that the High Court Division and the District Courts shall act and give relief in all suits and proceedings under this Act on the basic principles applied by the English Divorce Courts in granting a decree for divorce. But after independence of Bangladesh, this provision, in our opinion, has become redundant. We, therefore, recommend that section 7 be omitted from the Act.

Under section 4 of the Act the High Court Division and District Courts have concurrent jurisdiction over the matter of Christian divorce and a decree passed by the District Court under section 14 is subject to confirmation by the High Court Division under section 17. To relieve the Christian women from the hardships of their getting a final decree for divorce, we think that the requirement of confirmation by the High Court Division of the decrees for dissolution of a Christian marriage passed by the District Judge should be done away with. We, therefore, recommend for omission of section 17 from the Act and for an amendment of section 4 to confer exclusive jurisdiction over the matters of this Act to the District Courts and consequently, we recommend for an amendment of the definition of “courts” in section 3.

Under section 10 of the Act a Christian husband can make a petition praying for the dissolution of his marriage on the ground of adultery, whereas a Christian wife must not only allege adultery but must necessarily prove adultery along with cruelty or desertion seeking divorce. Various organizations emphasized the need for bringing about gender equality in the matter on the grounds of divorce as available to Christian spouses. This inequality and discrimination between men and women needs to be

removed. With that end in view, we recommend for the substitution of section 10 by widening the grounds and making most of them common for both the husband and wife to make a petition for dissolution of their marriage. There also appears to be a need for inclusion of a provision enabling the Christian spouses to get a divorce by mutual consent. Accordingly, we recommend for insertion of a new section being section 10A providing for dissolution of marriage by mutual consent.

A provision is there in section 16 that a decree for a dissolution of marriage of a Christian spouse passed directly by the High Court Division will be a decree nisi to be made absolute not before the expiry of six months from the date of the decree. Section 18 of the Act has provided for a husband or wife to get a decree from the District Courts or from High Court Division declaring their marriage to be null and void. But it is provided in section 20 that every decree of nullity of marriage made by a District Judge shall be subject to confirmation by the High Court Division and that all the provisions of section 17 shall be applicable in the matters of such confirmation.

We have already recommended for omission of section 17 and for conferring exclusive jurisdiction over the matters of this Act to the District Courts. We therefore, recommend for the omission of section 16, 17A and 20 from the Act and for a consequent amendment in section 18 and 19.

Section 34 of the Act provides that the husband may claim damages for adultery in a petition for dissolution of marriage or for judicial separation or a petition limited to that object, on the ground of his wife having committed adultery. This provision appears to be a superfluous one and hence, we recommend that this provision of section 34 be deleted.

Section 35 provides that where in a petition by the husband, the alleged adulterer is made a co-respondent and the adultery is established, the Court may order on respondent-adulterer to pay him cost of the proceedings. In consequence of the omission of section 34 we are of the opinion that the provision of section 35 needs to be deleted. We, therefore, recommend that section 35 be omitted from the Act.

We recommend for amendments of section 36 of the Act making provisions that a petition for alimony pending final disposal of the suit shall be disposed of within 60 days from the date of service of such petition on the husband. We also recommend for amendments of sections 37,39,40,43, and 44. All these amendments will fulfill the expectations of the Christian families waiting for alimony or maintenance and education of their minor children. This is intended to bring a substantial and speedy relief to women who had to wait for years together to receive alimony or maintenance.

We recommend for the substitution of section 55 by a new section 55 making a specific provision for appeal to be filed by an aggrieved party to the High Court Division against a decree or order passed by the District Judge in a suit or proceeding under this Act specifying a time limit for filing such appeal.

In consequence upon the omission of section 16,17,17A and 20 and the amendment of section 18 and 19 of the Act as we have recommended above, there is a need for substitution of section 57 making a clear provision for either party to the marriage to marry again after a decree for dissolution or nullity of their marriage has been passed and time for appeal has expired or an appeal being presented has been dismissed.

Some other provisions of the Divorce Act, 1869 are also proposed to be amended in the enclosed draft Bill by way of making certain consequential changes. All these amendments and omissions are intended to bring substantial relief to the Christian women who wait for years to get a final decree for divorce or nullity of marriage or for judicial separation

In respect of the Schedule of Forms under this Act, we would like to say that in consequence upon our recommended amendments in the Act, the words “In the High Court Division of” and “To the Hon’ble Mr. Justice or To the judge of” shall become redundant in the Forms of the schedule under the Act and as such, we recommend for substitution of the words “In the High Court Division of” and omission of the words “To the Hon’ble Mr. Justice or To the Judge of.”

In the light of our discussions above, we are enclosing herewith a draft of the Divorce (Amendment) Bill 200... as Annexure 'A' for convenience and ready reference.

(Dr. M. Enamul Hoque)
Member-2

(Justice Md. Sirajul Islam)
Member-1

(Justice Mustafa Kamal)
Chairman

**A Draft Bill for Proposed Amendment of the Divorce Act, 1869
(Act IV of 1869)**

The Divorce (Amendment) Act, 200...

Bill No200...

Whereas it is necessary and expedient further to amend the Divorce Act, 1869 (Act IV of 1869) for the purposes hereinafter appearing;

It is hereby enacted as follows: -

1. Short Title and Commencement. - (1) This Act may be called the Divorce (Amendment) Act, 200...

(2) This Act shall come into force with effect from a date as the Government may by notification in the official Gazette appoint.

2. Amendment of section 3, Act IV of 1869. – In the Divorce Act, 1869 (Act IV of 1869), hereinafter referred to as the said Act, in section 3,-

(a) in clause (3), for the words “or of whose jurisdiction under this Act” the words “ or of whose jurisdiction under this Act, the marriage was solemnized or” shall be substituted;

(b) in clause (4), the words “The High Court Division or” and the words “as the case may be” shall be omitted; and

(c) clauses 6 and 7 shall be omitted.

3. Amendment of section 4, Act IV of 1869. - In the said Act, in section 4,-

(a) the words “by such Courts and” shall be omitted;

(b) in the marginal heading, after the word “exercised” the words “by the district court” shall be added.

4. Omission of section 7, Act IV of 1869. – In the said Act, section 7 shall be omitted.

5. Omission of section 8, Act IV of 1869. - In the said Act, section 8 shall be omitted.

6. Omission of section 9, Act IV of 1869. - In the said Act, section 9 shall be omitted

7. Substitution of section 10, Act IV of 1869. – In the said Act, for section 10, the following shall be substituted, namely: -

“10. Grounds for dissolution of marriage. - (1) Any husband or wife whose marriage has been solemnized before or after the commencement of the Divorce (Amendment) Act, 200--, may present a petition to the District Court praying for dissolution of his or her marriage on the ground that since the solemnization of the marriage, the respondent-

- (i) has committed adultery; or
- (ii) has ceased to be a Christian by conversion to another religion; or
- (iii) has been incurably of unsound mind for a continuous period of not less than two years immediately preceding the presentation of the petition; or
- (iv) has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of disease or from venereal disease in a communicable form ;or
- (v) has wilfully refused to or been unable to consummate the marriage and the marriage has not therefore been consummated; or
- (vi) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree against the respondent; or
- (vii) has deserted the petitioner for at least two years immediately preceding the presentation of the petition; or
- (viii) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent.

(2) A wife may also present a petition to the District Court praying that her marriage may be dissolved on the ground that her husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality or that he has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the husband if he had been alive”.

8. Insertion of a new section 10A, Act IV of 1869.– In the said Act, after section 10, the following new section 10A shall be inserted, namely:-

“10A. Dissolution of marriage by mutual consent. – (1) Subject to the provisions of this Act and the rules made thereunder a petition for dissolution of marriage may be presented to the District Court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Divorce (Amendment) Act, 200-, on the ground that they have been living separately for a period of two years or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of presentation of the petition referred to in sub-section (I) and not later than twelve months after the said date, if the petition is not withdrawn by both the parties in the meantime, the court shall, on being satisfied, after hearing the parties and making such inquiry, as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree declaring the marriage to be dissolved with effect from the date of decree”.

9. Substitution of section 11, Act IV of 1869. –In the said Act, for section 11 the following shall be substituted, namely. –

“11. Adulterer or adulteress to be co-respondent. – On a petition for dissolution of marriage presented by a husband or wife on the ground of adultery, the petitioner shall make the alleged adulterer or adulteress a co-respondent, unless the Court from so doing on any of the following grounds, namely, excuses the petitioner. –

- (a) that the wife, being respondent is leading the life of a prostitute or the husband, being respondent is leading an immoral life and

that the petitioner knows of no person with whom the adultery has been committed;

- (b) that the name of the alleged adulterer or adulteress is unknown to the petitioner, although the petitioner has made due efforts to discover it;
- (c) that the alleged adulterer or adulteress is dead.”

10. Amendment of section 13, Act IV of 1869. –In the said Act, in section 13, the last paragraph shall be omitted.

11. Amendment of section 14, Act IV of 1869. - In the said Act, in section 14, in the fourth paragraph, the words “in the manner and subject to all the provisions and limitations in section 16 and 17 made and declared” shall be omitted.

12. Amendment of section 15, Act IV of 1869. – In the said Act, in section 15,-

- (a) the words “without reasonable excuse” shall be omitted;
- (b) for the words “her adultery and cruelty” the words “ her adultery, cruelty or desertion” shall be substituted;
- (c) for the words “such cruelty or desertion” the words “such adultery, cruelty or desertion” shall be substituted.

13. Omission of section 16, Act IV of 1869. – In the said Act, Section 16 shall be omitted.

14. Omission of section 17, Act IV of 1869. –In the said Act, section 17 shall be omitted.

15. Omission of section 17A, Act IV of 1869. –In the said Act, section 17A, shall be omitted.

16. Amendment of section 18, Act IV of 1869. – In the said Act, in section 18, the words “or to the High Court Division” shall be omitted.

17. Amendment of section 19, Act IV of 1869. – In the said Act, in section 19, in the last paragraph, for the words “jurisdiction of the High

Court Division” the words “jurisdiction of the District Court” shall be substituted.

18. Omission of section 20, Act IV of 1869. –In the said Act, Section 20 shall be omitted.

19. Amendment of section 22, Act IV of 1869. – In the said Act, in Section 22, the words “without reasonable excuse” shall be omitted.

20. Amendment of section 23, Act IV of 1869. –In the said Act, in section 23, the words “or the High Court Division” and the “semi-colon” shall be omitted.

21. Amendment of section 27, Act IV of 1869. – In the said Act, in section 27, the words “or the High Court Division” shall be omitted.

22. Amendment of section 28, Act IV of 1869. – In the said Act, in section 28, the words “and that the same was without reasonable excuse” shall be omitted.

23. Amendment of section 32, Act IV of 1869. –In the said Act, in section 32, the words “or to the High Court Division” shall be omitted.

24. Omission of section 34, Act IV of 1869. – In the said Act, Section 34 shall be omitted.

25. Omission of section 35, Act IV of 1869. – In the said Act, Section 35 shall be omitted.

26. Amendment of section 36, Act IV of 1869. - In the said Act, in section 36, the proviso shall be omitted and the following new proviso shall be inserted, namely: -

“Provided that the petition for the alimony pending the suit shall, as far as possible, be disposed of within sixty days of service of such petition on the husband.”

27. Amendment of section 37, Act IV of 1869. – In the said Act, in section 37, for the portion beginning with the words “ the High Court

Division may” and ending with the words “ order that the husband shall” the words “where a decree of dissolution of the marriage or a decree of judicial separation is obtained by the wife, the District Court may order that the husband shall” shall be substituted.

28. Amendment of section 39, Act IV of 1869. –In the said Act, in section 39, the last Paragraph shall be omitted.

29. Amendment of Section 40, Act IV of 1869. –In the said Act, in section 40, for the portion beginning with the words “ The High Court Division and ending with the words” may inquire into” the words “ the District Court may, before passing a decree for dissolution of the marriage or a decree of nullity of marriage inquire into “ shall be substituted.

30. Amendment of Section 43, Act IV of 1869. – In the said Act, in section 43, for the portion beginning with the words “In any suit” and ending with the words “deems proper” the words “In any suit for obtaining a dissolution of marriage or a decree of nullity of marriage instituted in a District Court, the Court may from time to time before making its decree make such interim orders as it may deem proper” shall be substituted.

31. Amendment of Section 44, Act IV of 1869. – In the said Act, in section 44, for the portion beginning with the words “The High Court Division” and ending with the words “ may, upon application” the words “Where a decree of dissolution or nullity of marriage has been passed, District Court may, upon application’ shall be substituted and the words in the last paragraph, “decree absolute or” and “ (as the case may be)” shall be omitted.

32. Amendment of Section 45, Act IV of 1869. – In the said Act, in section 45, for the words “ the Code of Civil Procedure” the words “ the Code of Civil Procedure, 1908 (5 of 1908)”shall be substituted.

33. Amendment of the marginal heading of section 47, Act IV of 1869. – In the said Act, in the marginal heading of Section 47, the words “stamp on petition” shall be omitted.

34. Amendment of Section 52, Act IV of 1869– In the said Act, in section 52, for the words “by a wife, praying that her marriage may be dissolved by reason of her husband having been guilty of adultery coupled

with cruelty, or of adultery coupled with desertion without reasonable excuse” the words “by a husband or a wife, praying that his or her marriage may be dissolved by reason of his wife or her husband as the case may be, having been guilty of adultery, cruelty or desertion ” shall be substituted.

35. Substitution of Section 55, Act IV of 1869. – In the said Act, for section 55, the following shall be substituted, namely. –

“55. Appeal from decrees and orders. – (1) Subject to the provisions of this Act, an appeal shall lie to the High Court Division from any decree or order passed by a District Judge in any suit or proceeding under this Act.

(2) An appeal under sub-section (1) must be filed within sixty days from the date of passing of the decree or order appealed against.

Provided that there shall be no appeal on the subject of costs only.

(3) Subject to appeal under sub-section (1), all decrees and orders made by the court in any suit or proceedings under this Act shall be enforced in the like manner as the decrees and orders of the court made in the exercise of its original civil jurisdiction are enforced under the laws, rules and orders for the time being in force.”

36. Omission of section 56, Act IV of 1869. - In the said Act, section 56 shall be omitted.

37. Substitution of section 57, Act IV of 1869. –In the said Act, for Section 57, the following shall be substituted, namely: -

“57. Liberty to parties to marry again. - Where a decree for dissolution or nullity of marriage has been passed and either the time for appeal has expired without an appeal having been presented to the High Court Division or an appeal being presented has been dismissed and the dismissal of appeal has become final, it shall be lawful for either party to the marriage to marry again”.

38. Amendment of section 62, Act IV of 1869. –In the said Act, in section 62, for the words “High Court Division” the word “Government”

and for the words “Code of Civil Procedure” the words “Code of Civil Procedure, 1908 (V of 1908)” shall be substituted.

SCHEDULE OF FORMS

Amendment of Schedule of Forms, -In the said Act, in the Schedule of Forms, -

- (a) for the words “In the High Court Division of” wherever appearing in the Forms of the Schedule, the words “In the Court of the District judge, --” shall be substituted.
- (b) the words “To the Hon’ble Mr. Justice or To the Judge of” shall be omitted.