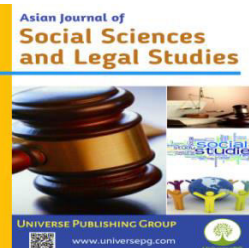




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# Equal Rights in Divorce Laws: A Comparative Analysis of Different Personal Laws of Bangladesh

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## Abstract

In the context of legal divergence existing in the family laws of Bangladesh, this research mainly focuses on the scope for ensuring equal rights in divorce under different personal laws of Bangladesh. The research argues that an equal and equitable treatment for both husband and wife should be ensured in the family context of Bangladesh. The concept of divorce and its impact on the children and the society as a whole has been discussed at first. The existing religious perception regarding divorce has been placed with legal reforms brought in Bangladesh. This research is a comparative study of different personal laws existing in Bangladesh. The modes and procedure of divorce under different personal laws are different. This research searches for the equality doctrine within these personal laws. Literature suggests that changes have been brought in the personal laws relating to divorce of Muslim and Christian law. But there is no codified law for Hindus in this regard. This study focuses on the urgency of recognition of Hindu divorce by the state. The state remains silent regarding the personal laws of minority people considering it as a sensitive issue. Some laws are obsolete, discriminatory and insufficient to face the problems arising out of social changes. This research argues that laws should be time befitting, in harmony with constitution and international human rights treaties and hence there should be no discrimination. Finally, this study argues that family stability primarily depended on the equal rights of divorce for both husband and wife.

**Keywords:** Equal rights, Divorce laws, Personal laws, Legal divergence, Discriminations, and Comparison.

## 1. Introduction

Bangladesh's divorce law is a complicated and multi-dimensional system that reflects colonial heritage, religious diversity, and the constitutional guarantee of equality. Legal diversity still exists in the family law system of Bangladesh, despite the country's secular status and the Constitution's Article 28 ensuring equality. As a result, citizens' rights in family matters,

such as marriage and divorce, are mostly determined depending on their religious identity. Because of this arrangement, Muslims, Hindus, and Christians now have distinct legal systems with radically different divorce laws and practices (Chowdhury, 2022). Under Muslim law, divorce is legal for both men and women, although the procedure and terms are not the same. Hindu law allows women very minimal legal rights

and severely restricts the scope of divorce. The Divorce Act of 1869, which governs Christian law, on the other hand, is patriarchal, procedurally complicated, and outdated. This disparity in divorce rights among different religious communities raises fundamental questions about legal equality, gender neutrality, and the constitutional responsibilities of the state. In addition to causing ambiguity and confusion in the application of family law, an over-reliance on religiously based personal rules and a delay in legal reforms are sustaining structural inequities. In the absence of a uniform family code, there is inconsistency and heterogeneity in the judicial process of family cases. This article provides a comparative analysis of the divorce provisions under Muslim, Hindu, and Christian personal laws prevailing in Bangladesh. It assesses the extent to which equality of rights has been implemented in divorce-particularly from the perspective of gender equality, procedural

fairness, and access to justice. This analysis is presented in light of constitutional obligations and international human rights principles, in order to propose an inclusive, rights-based perspective to the ongoing debate on personal law reform in Bangladesh.

**Problem in a wider context**

The legal system of Bangladesh is characterised by the co-existence of a general national law, applicable to all citizens, and a system of concurrent personal laws for Muslims, Hindus, Christians and Buddhists (Menski, 1988: 111). Bangladesh is a Muslim majority country, but secular in nature. The other religious communities like Hindus, Christians, Buddhists and also some ethnic minorities live here in peace. From the Independence to till now the ratio of different communities are indicated according to different consensus and study as follows:

**Table 1:** Ratio of different communities is indicated according to different consensus and study.

Religious group	Population % 1975	Population % 1990	Population % 2012	Population % 2022	Population % 2024
Muslim	84%	87%	89.5%	91.4%	91.4%
Hindu	15.6%	12.4%	9.5%	7.95%	9.01%
Christian	0.1%	0.1%	0.3%	0.30%	0.60%
Buddhist	0.3%	0.5%	0.7%	0.61%	0.70%

Muslim and Hindu personal laws on marriage and divorce seem to be discriminatory to women. An attempt to find out women's equal rights within the traditional *Shari'a* is an extremely difficult task (Bhuiyan, 2010: 6). The personal laws applicable to Muslims in South Asia are almost totally uncodified (Carroll, 1994: 83) and are therefore open to judicial interpretation. A Muslim female does not have the right to divorce in the way a Muslim male has. She can divorce her husband if such right is delegated to her by her husband and also could seek judicial separation on grounds permitted by Muslim law (Ahmed and Chowdhury, 310-311). This is the worst flaw in the Islamic system that the total authority granted to the husband to divorce his wife without a valid reason (Fyzee, 1974: 147). There is a considerable divergence of opinion among the schools of Muslim law concerning the grounds which afford the court jurisdiction to dissolve the marriage (Carroll, 1996, p.91). The husband can pronounce a talaq at his will

and pleasure, but when the wife sought divorce in the absence of the husband's consent, she would have to get the dissolution through the court. The Islamic law of divorce has been bitterly assailed for making the family life unstable, perpetrating great injustice and tyranny against women and degrading their social status (Serajuddin, 1999: 186). In Bangladesh, a judicial urge to interpret Muslim law in the light of changing social circumstances figured out in divorce case of Hasina Ahmed v. Syed Abul Fazal.

The laws enacted during the colonial period are still applicable to Hindus of Bangladesh and were never revised in the post independent period (Akter and Abdullah, 2007: 61). In accordance with the ancient and Bangladeshi Hindu law, Hindu marriage is sacrosanct and not a contract. It creates an indissoluble tie between the husband and the wife. Hindu law does not allow dissolution of marriage however painful cohabitation may be. In some community divorce is

allowed by custom and the courts enforced such custom provided they fulfilled the requisites of a valid custom according to the Court in the case *Sankaralingam vs. Subban* (1894) as cited in Akter and Abdullah, (2007). In Bangladesh, divorce is only available in custom since *Shastric* law does not allow it (Menski, 1988). Many Bangladeshi women are in abject suffering in absence of divorce provisions for them. The existing civil laws governing Christians of Bangladesh are obsolete, discriminatory and insufficient (Pereira, 2011). It was found that because the existing Christian personal laws have not been updated for mainly 150 years, there have arisen many confusing, illogical and sometimes unlawful practices. So, there is an urgent need to reform and codify laws relating to divorce in Bangladesh. Equalisation of divorce rights can bring conformity with the constitutional spirit of equality and international human rights treaties.

### **Objectives of the study**

This study aims at ensuring equal rights of men and women in Bangladesh regarding divorce related laws. The main objectives of this study are to find out the following answers:

- Whether the different personal laws regarding divorce are discriminatory to the women;
- To what extent the equal rights of women in divorce are hampered in different personal laws of Bangladesh;
- Why the Statutory law enacted by reforming these family laws cannot fulfil this demand;
- How far the practice of judicial activism applied in ensuring equal rights;
- To what extent reforms in personal laws necessary to eliminate discrimination and guarantee equal rights;

### **Limitations**

This study is limited to doctrinal and desk-based analysis; it does not include any empirical data collection, such as interviews or field surveys. In addition, the focus of this study is divorce law; issues related to alimony, custody, or inheritance are not discussed, except where they are directly relevant to the principle of equality in divorce.

### **Concept of divorce**

Divorce is the ultimate dissolution of a marriage, removing the parties' matrimonial ties and the legal obligations and responsibilities of marriage. It is often termed as the legal breakup of a marriage. Muslim law allows judicial and extra judicial type of divorce while Hindu law permits customary divorce among its people through different Hindu majority countries like India made provisions for judicial divorce.

### **Effect of divorce**

Divorce has a great impact on the society as a whole. It hampers the natural bringing up of children of a family whose parents have been divorced. Studies suggest that children from divorced families are more likely to exhibit such negative behavioural issues which are absent in children from non-divorced families. Divorce has a long-term effect on the children. Children from a divorced family frequently have lower academic achievements and risk of behavioural problems.

### **Divorces from religious perception**

The legal system of Bangladesh is a pluralistic one with four major religious communities- Muslims, Hindus, Christians and Buddhists. There also exist some tribal and indigenous people who follow their own personal laws. In this chapter the religious practices of divorce under different religions have been discussed.

### **Divorce under Muslim law**

Islam has taken a fair and balanced view regarding divorce. While the pre-Islamic laws suggest an easy and frequent divorce system, Islam shows dislike to it. The Prophet (s) is reported to have said that with Allah, the most detestable of all things permitted is divorce' (Fyzee, 1974). Islamic revolutionary actions have created a new chapter in the history of Eastern law. It limited the husbands' ability to file for divorce and granted women the opportunity to request a separation on justifiable grounds (Ameer Ali, 1985: 471). The word 'Talaq' is identical to 'Divorce'. This word is rooted from talaqqa' which means to repudiate, to free. Different Muslim jurists classify divorce in the following way:

- By the Death of Spouse
- By the Act of Parties

- By Judicial Process

### **By the death of spouse**

The death of the husband or the wife operates as dissolution of marriage. This is also termed as the dissolution by act of God but not divorce.

### **By the act of parties**

#### ***By the husband***

Talaq, (repudiation): The word 'Talaq' comes from a root 'talaqqa' which means to release, to make free (Fyzee, 1974: 150). In Islamic terminology 'talaq' means to free the wife from the bondage of marriage and it signifies the absolute power possessed by the husband at all times (Fyzee, 1974: 148). A Muslim husband of sound mind may divorce his wife at any time without attributing any cause. The Muslim husband can talaq his wife whenever he desires so by simply pronouncing certain words indicating a clear and unambiguous intention to dissolve the marriage. The pronouncement of talaq may be either revocable or irrevocable. The forms of talaq may be classified as follows:

- *Talaq us-sunnah* (i.e., the form approved by the Prophet and in conformity with the dictates of the Prophet) which is also classified in another two: i) Ahsan (the most approved) ii) Hasan (approved)
- *Talaq al-bid'a* (i.e., innovation)
- *Talaq us-sunnah*: As has been mentioned earlier, the *ahsan* form consists of one single pronouncement in a period of *tuhr*, followed by abstinence from sexual intercourse during the period of *tuhr*. *Tuhr* means purity, when the woman is free from her menstrual courses. If any intercourse takes place during the periods, the divorce is void and of no effect. A pronouncement of talaq made in *ahsan* form is revocable during the period of *idda*. *Idda* means the period of three months from the date of pronouncement of talaq and if the woman is pregnant, until delivery. The husband may revoke the divorce at any time during the *idda'* and after the expiration of the *idda'* the divorce becomes irrevocable. But there is no restriction to remarry the same husband or wife after the *idda'*. In Hasan form, there exist three successive pronouncements

during three consecutive periods of *tuhr*. The husband shall refrain from sexual intercourse during the whole period of *tuhr*. The talaq is complete on the third pronouncement. It can be revoked after the first or second pronouncement but not after the third. In these two forms of *talaq* there is a chance for the parties to be reconciled.

- *Talaq al-bid'a*: In this form three pronouncements are made in a single *tuhr*, either in one sentence or in three sentences. Such a talaq is lawful although sinful in Hanafi law. This is also called talaq al-ba'in or irrevocable divorce.
- *I'la* or vow of continence: *I'la* means to swear. When a husband swears that he will not have sexual intercourse with his wife and he abstains from it for four months or more then the talaq becomes effective. The holy Quran states regarding *I'la* as follows: Those who abandon their spouses have to wait four months; if they decide to change their minds, Allah is kind and merciful (Al-Quran, 2:226). According to Hanafi law, due to *I'la*, a marriage is dissolved after four months without going through legal processes. But according to Shafi'i law, such a vow does not amount to divorce, but only gives the wife a ground to seek judicial divorce (Rashid 2004).
- *Zihar* or injurious comparison: The word '*Zihar*' is derived from the word '*zahr*' meaning 'back'. It signifies the act of a husband comparing his wife to any of his female relations with whom the marriage is prohibited on account of consanguinity or fosterage. *Zihar* by itself does not dissolve the marriage, but the wife becomes unlawful to the husband without compensation. The husband may revoke the declaration by keeping fast for two consecutive months or to feed sixty needy persons or to make a slave free (Al-Quran, 58:3-4, 33:4).

#### ***By act of the wife***

The wife can divorce her husband if the husband delegates the power to divorce on her and also by way of khul. Khul means 'untying the knot' and according to Islamic terminology it denotes to the submission of dower money or some other gifts to the husband for allowing herself to divorce him.

*Talaq-e-tafwid* (Delegated divorce): A Muslim husband has the power to delegate his own right of pronouncing divorce to the wife. Under certain specified conditions, which must be reasonable and not opposed to recognized law of Islam, the wife can pronounce the divorce upon herself (Fyzee 1974: 158-160). Delegation of power may be given at the time of marriage or any time after the marriage contract.

*Khul'*: The literal meaning of this term is to untie the knot. According to Islamic terminology, the parting of a wife from her husband by giving him certain compensation is called khul. When a wife offers a sum or amount or a property to the husband to make her free and the husband accepts those, it will be considered as Khul.

#### **By mutual consent**

Marriage may also be dissolved by mutual agreement of the parties:

*Mubarrat (Mubarra'a)*: It means freeing each other (from the marital tie), by mutual agreement. When both the spouses are not in peace and harmony and want to live in separation and make an agreement in respect of this it will be called *Mubarra't*.

#### **Dissolution by faskh**

*Faskh* means judicial annulment. It indicates to the Qazi's (judge's) authority to dissolve a marriage at the wife's request for specific reasons.

#### **Divorce under Hindu law**

The Hindus constitute about 10 percent of the total population of the country According to Bangladesh Population Census, (2012). In traditional Hindu law, divorce is not commonly recognized. Hindu law considers marriage as an irreversible bond between a husband and wife, which is one of the main causes of this. The idea is that husband and wife will remain forever together and perform all religious and worldly functions together; after marriage they become a perfect union, union both in body and soul, not to be separated (Alam, 2004: 45). The spouses can divorce one another in no way unless it is allowed by custom (Mulla, 1990: 485). Generally, customary divorce among the lower classes of Hindu people is a common phenomenon. In case of customary divorce, the following grounds are regarded as the key-bases:

- Ill-treatment;

- Impotency;
- Dissolute and depraved habits of the husband. (Siddiqua, 2003: 39)

In *Kalee Churn Shaw vs. Dukhy Bebee* (1986) case, it was held that: "the divorce is usually affected by mutual consent, on the payment of some compensation for marriage expenses incurred at the first marriage the Panchayat or the head of the caste could determine marriage and grant a divorce."

The philosophies and scriptures of the ancient Shastric laws occupy a crucial role in case of sources of Hindu law. The philosophy lies in it advocates that under Hindu law, marriage is a religious sacrament and not a contract. As it is not a contract, so there is no dissolution at all. For Hindus, marital tie is enduring because the sacramental marriage has three characteristics:

- is a permanent and indissoluble union;
- union;
- a holy union;

Although marriages were supposed to be indissoluble under the traditional Hindu law, under certain exceptional circumstances, the wife or the husband were permitted to break up the nuptial union. *Narada Muni* is a divine Sage, plays prominent role in a number of Puranic texts and relied upon earlier versions of *Manusmriti*. *Narada* laid down five situations in which a woman could take another husband:

- first husband has perished;
- died naturally;
- gone abroad;
- impotent lost caste;

*Kautilya's Arthushastra* also prescribed certain circumstances in which either the husband or the wife could divorce each other: Mutual enmity; Apprehension of danger; Desertion for justifiable reasons.

- Mutual enmity;
- Apprehension of danger;
- Desertion for justifiable reasons.

According to Scholars, the stipulations in *Manusmriti* against remarriage of wives and widows appear to be a later insertion. In Mayne's Treatise on Hindu Law & Linage nowhere explicitly mentioned the validity of

divorce or dissolution of marriage; but the common sense suggest that it is quite impractical to imagine a situation of remarriage without invoking dissolution (Parashar, 1992: 116) This implicit divorce is not generally practised under traditional law because it is little known to the community or there is some degree of confusion amongst the common people about its applicability (Alam, 2004: 46). There is also much evidence of the long-established existence of the various customary forms of divorce among Hindus. Hindu divorces have long been recognized and practiced in specific situations, especially among the lower castes. Some Brahmins (the highest caste) even follow this custom (Virdi 1972: 33). Diwan has rightly observed that a large section of Hindus (i.e., lower classes) did enjoy the right of divorce. This was a custom which prevailed over the sacred law (Diwan, 1978: 15-16).

#### **Divorce under Christian law**

In respect of Canon Law dissolution of marriage is not possible except on death. Dissolution of marriage under the catholic sects is possible if it happens before sexual intercourse. Christianity abhors divorce altogether. The New Testament unequivocally advocates the indissolubility of marriage. It is attributed to Jesus to have said, "But I tell you that anyone who divorces his wife, except for marital unfaithfulness, causes her to become adulteress, and anyone who marries the divorced woman commits adultery" (Matthew, 5:32).

#### **Divorces under statutory law of Bangladesh**

Bangladesh is a secular state where the citizens practise their religion and follow the religious norms in their personal life. The right to practise religion is a fundamental right enshrined in Art.41 of the Constitution. Laws affecting the personal affairs like marriage, divorce, guardianship are mainly uncodified. For the Muslims there are two statutory laws e.g., the Dissolution of Muslim Marriages Act, 1939 and the Muslim Family Laws Ordinance, 1961. For the Hindus, there exists no statutory law regarding the divorce and the laws relating to divorce by the Christians of Bangladesh are governed by the Divorce Act 1869. The main provisions of these Acts are discussed in this phase of study.

#### **Dissolution of Muslim Marriages Act, 1939:**

This Act was created in order to eliminate any uncertainty regarding the impact of a married Muslim woman's renunciation of Islam on her marriage bond, as well as to unify and clarify the rules of Muslim law pertaining to suits for dissolution of marriage by women married under Muslim law (DMMA, 1939). Section 2 of the Act specified the grounds under which a suit for dissolution can be filed. Section 2 of the Act reads as follows:

"Any one or more of the following grounds may be used by a woman married under Muslim law to obtain a decree for the dissolution of her marriage:

- (i) that the husband's whereabouts have been unknown for four years;
- (ii) that the husband has neglected or failed to provide for her maintenance for two years;
- (iia) that the husband has taken another wife in violation of the provisions of the Muslim Family Laws Ordinance, 1961;
- (iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;
- (iv) that the husband has neglected to fulfil his marital duties for three years without a valid reason;
- (v) that the husband was impotent at the time of the marriage and is still impotent;
- (vi) that the husband has been insane for two years or is afflicted with leprosy or a virulent venereal disease;
- (vii) that she was given in marriage by her father or other guardian before turning eighteen; provided that the marriage has not been consummated;
- (viii) that the husband treats her cruelly, that is to say,

- (a) regularly abuses her or makes her life miserable through cruel behaviour, even if it doesn't involve physical abuse;
- (b) associates with women of bad reputation or leads a notorious life;
- (c) tries to coerce her into leading an immoral life;
- (d) destroys her property or prevents her from exercising her legal rights over it;
- (e) prevents her from practicing her religion; or

- (f) if he has multiple wives, does not treat her fairly in accordance with the Quran;
- (ix) on any other ground which is recognized as valid for the dissolution of marriage under Muslim law:

With the following provisions:

- (a) no decree may be made on ground
  - (iii) until the sentence has been finalized;
- (b) a decree made on ground
  - (i) will not become effective for six months after the date of the decree; if the husband shows up in person or through an authorized agent during that time and proves to the court that he is ready to carry out his marital responsibilities, the court will set aside the decree.; and
- (c) Before granting a decree on ground (v), the Court will, upon the husband's request, issue an order requiring the husband to prove to the Court that he is no longer impotent within a year of the date of the order. If the husband does so within that time frame, the Court will not grant a decree on that ground.

#### **Muslim Family Laws Ordinance, 1961:**

Section 7 of the MFLO, 1961 deals with the provision of talaq, which is as follows:

Talaq –

- 1) If a man wants to divorce his wife, he must notify the Chairman [of the local government unit] in writing as soon as possible after the pronouncement of talaq in whatever form and provide a copy to the woman.
- 2) Anyone who violates the terms of subsection (1) faces a maximum sentence of one year in simple imprisonment, a maximum fine of five thousand taka, or both.
- 3) Unless otherwise specified in sub-section (5), a talaq will not take effect until ninety days have passed since the Chairman receives notification under sub-section (1).
- 4) After receiving notice under sub-section (1), the Chairman is required to establish an Arbitration Council within thirty days in order to facilitate reconciliation between the parties. The Arbitration Council will thereafter take all necessary actions to achieve this goal.
- 5) If the wife is pregnant when the talaq is declared, it won't take effect until the time

frame specified in sub-section (3) or the pregnancy, whichever comes first, has passed.

- 6) Unless the termination is for the third time, nothing will prevent a wife whose marriage has been terminated by talaq effective under this section from remarrying the same husband without first getting married to a third party."

Section 8 of the MFLO, 1961, deals specifically with divorce by *talaq-i-tafwid*. This section reads:

Divorce using a method other than talaq. The terms of section 7 must, mutatis mutandis and to the extent that it is applicable, apply where a wife has been properly granted the right to divorce and she desires to exercise that right, or when any of the parties to a marriage wishes to dissolve the marriage in a way other than via talaq. It is evident that after pronouncing talaq, the wife must notify both her husband and the relevant public official. The announcement will not become a formal divorce until ninety days have elapsed after the official receives the notification. In order to shield women against an immediate and unrecorded divorce, this legislation was introduced.

#### **The Divorce Act, 1869**

Section-10 of the Divorce Act, 1869 states the provisions of dissolution of Christian marriage. There are three ways of dissolution such as:

- (i) Dissolution of Marriage;
  - (ii) Nullity of Marriage;
  - (iii) Judicial Separation.
- (i) Dissolution of Marriage: The husband may divorce his wife on the allegation of illicit relationship. A wife may apply to the court for dissolution as mentioned later on.
  - (ii) Nullity of marriage: A marriage may be declared by the Court as null and void on some grounds:
    - (a) Impotence of the husband;
    - (b) Forbidden relationship either by blood or affinity;
    - (c) Insanity of husband or wife;
    - (d) Husband or wife alive in time of marriage
  - (iii) Judicial separation: A husband or wife may apply for judicial separation for cruelty, illicit relationship or torture etc. If the wife or husband abandons themselves from each other for more

than two years they may apply for judicial separation. In most of the western countries a wife is entitled to receive half of the total property in time of her divorce.

Section-10 of the Divorce Act, 1869 reads as follows  
Any husband may petition the District Court or the High Court Division to dissolve his marriage on the grounds that his wife has committed adultery since the marriage's solemnization.

When wife may petition for dissolution

Any wife may petition the District Court or the High Court Division to dissolve her marriage on the grounds that, since the marriage's solemnization, her husband has converted from Christianity to another religion and entered into a marriage with another woman; or that he has committed incestuous adultery, bigamy with adultery, marriage with another woman with adultery, rape, sodomy, or bestiality; adultery coupled with cruelty that would have entitled her to a divorce *mensa et toto*; or adultery coupled with desertion, without a valid reason, for a period of two years or more." These divorce-related law measures are frequently criticized for failing to meet the demands of social change. However, laws ought to be such that they cannot be used as a tool to discriminate in any form or to oppress the weaker. The methods of equalizing divorce rights have been examined using a comparative approach in the subsequent chapter.

## 2. Review of Literature

### Review on divorce laws for Bangladeshi Muslims

The objectives of this review are to find out solutions to the following queries:

- whether an equalisation of divorce right can be possible against the general concept of unilateral practice of divorce by the Muslim husband;
- To what extent the wife has the right to divorce husband extra-judicially with or without the consent of the husband;
- Whether extra judicial divorce by the wife can protect financial right of a Muslim wife;

The most common mode of divorce by men prevailing in Bangladesh is '*talaq-e-bid'at*' or *Bain talaq* which takes effect immediately without the condition of

communication to the wife for its validity. The husband pronounces three times that he is divorcing his wife and with the third pronouncement the *talaq* becomes irrevocable and takes effect after completing the period of *idda'*. There is a consensus among the Muslim scholars that the practice of an extremely abusive form of divorce by the Muslim husband like triple divorce at one time is a degradation of womanhood in Islam (Serajuddin, 1999). But section 7 of the MFLO 1961 has changed this scenario now. This legislation is intended to protect the women from an instant and unrecorded divorce. It provides that *talaq* given by the husband shall not take effect until the notice of the *talaq* is communicated to the chairman of the Union Parishad and ninety days have elapsed after the issuance of such notice. The husband is also to give a copy of such notice to the wife. Within the said period, the husband can revoke the *talaq*. The chairman on receipt of such notice would constitute an Arbitration Council for effecting the reconciliation which, if successful, would render the divorce ineffective (MFLO, 1961).

A large and influential body of jurist regard pronouncement of *talaq* as prohibited except for necessity, i.e., adultery of the wife. Though the *Hanafis*, *Malikis*, *Shafi'is* and the greater part of Shias consider divorce to be permitted, there is a consensus among the most jurists of these schools that a divorce without any cause is morally and religiously abominable (Serajuddin, 1999: 191). Abu Hanifa holds a view that if there is no urgent need for divorce, it is haram or forbidden (Serajuddin, 1999). The spirit underlying in the Quran and Sunnah never justify the arbitrary divorce by the husband. But the law as developed in the sub-continent often seems to overlook the basic Quranic norms and Sunnah and regards the divorces articulated without any necessity or just cause as good in law. The judicial interpretation of Quranic verses makes it more lucid. In *Jiauddin Ahmed vs Anwara Begum* (1982) case, a revolutionary judgement was given by Baharul Islam, J. of Gauhati High court regarding the arbitrary divorce right. In this case, it was held that- "*talaq* must be for reasonable cause and be preceded by attempts of reconciliation between the husband and the wife by two arbiters from both sides. If the attempts fail, *talaq* may be affected." A similar

case was also decided by the same High Court namely *Mst. Rukia Khatun v. Abdul Khaliq Laskar (ibid)*. it was held that "though divorce is permitted under Islamic law, yet the right could be exercised in exceptional circumstances. Quoting Quranic verse IV: 35 the Court held that there is a condition precedent which must be complied with before the talaq become effective. If the reconciliation as mentioned in the verse will not be fruitful, the husband will be entitled to give talaq. The talaq must be for good cause and obviously not be at the mere desire, sweet will and whim of the husband." By Tahir Mahmood titled "Another Unreported Indian Judgement on Muslim Divorce Law, Islamic CLQ" (1982). Divorce given in a whimsical way is often regarded as a 'great distortion' of Islamic law of divorce. The husband's right of divorce is subject to the limitations laid down in the Quranic verse IV: 35 which show that a husband cannot repudiate the marriage at will and the case must be referred to a judge whose decision is binding (Ali, 1950). But the husband's inalienable right to divorce unilaterally cannot be said to be invalid in the eye of law. If a similar mechanism in favour of the wife can be proved tenable at law, equalisation of divorce right can be possible under the law. It has been already mentioned that the husband has a legal and religious right to dissolve a marriage unilaterally by way of pronouncement of talaq. The same right can also be exercised by the wife if such is delegated to the wife by the husband. This type of divorce is termed as talaq-i-tafwid. This sort of talaq has got its authority from the holy Quran, 33:28; as it reads follow: O Prophet! Say to thy consorts: "If it be that ye desire the life of the world and its glitter- then come! I will provide for your Enjoyment and set you free in a handsome manner" It was narrated by Hazrat Aisha (R) that "Allah's Apostle (S) gave us the option (to be divorced)" (Sahih Al-Bukhari Vol. VII p.137).

It is deduced from the Quranic text and the tradition of the Prophet (S) that a husband can lawfully delegate the right of pronouncing talaq to his wife. This principle of divorce law can effectively equalise the access of the spouses to divorce rights. To a great extent, talaq-i-tafwid places the wife on an equal position with the husband because if the talaq is delegated unconditionally, the wife can exercise this

right without reference to the husband's wish. Before exercising this right, the wife is duty bound to follow the procedure stipulated in the Quranic verse IV: 35. This procedure is the same for the husband. Besides the MFLO, 1961 mentioned certain conditions necessary for the service of talaq which are equally applicable for both the spouses under section 7 and 8. Under the statutory law, *talaq-e-tafwid* is also recognized. The MFLO made registration of all Muslim marriage is compulsory. The form prescribed specifically asks, "Whether the husband has delegated the power of divorce to the wife, if so, under what conditions?" (Rule 18 of *Nikahnama*). But there is some confusion regarding this right i.e., whether this is a conditional or unconditional right. This right can be determined with the consent to the marriage. When the bride signs the *nikahnama*, as a common practice in Bangladesh, this context is avoided because of some prejudice. In *Suroj Mia v. Abdul Majid* (1953) case, it was held that questions concerning extra judicial divorces may come before the court in various ways. After pronouncing *talaq-e-tafwid* the husband may sue for restitution of conjugal rights in cases where he has to pay the deferred dower; in such cases the wife can claim a declaration that her marriage has been dissolved by a clear stipulation in the *nikahnama* about delegating the right to divorce which is valid in law. In *Aklima khatun v. Mahibur Rahman* (1963) it was held that there is no reason in Muslim law why the delegation to the wife of the right to pronounce talaq should not be unconditional." If the right of divorce is not delegated to the wife by the husband in the marriage contract, she can dissolve her marriage by applying for khul' from the family court which is known as judicial process of dissolution. The fact of the Hadith concerning Jamila and her husband Sabit is regarded as a precedent to the case of khula talaq. The facts were that one Jamila hated her husband with intense hate. She came to the Holy Prophet and urged to effect separation between her and her husband. She said: "I hate him. I saw him, from the side of my veil, coming amongst people. He was of the shortest stature, the ugliest in face and blackest in complexion. I do not prefer infidelity after having accepted Islam." The Holy Prophet asked Sabit: "What do you have to say?" Sabit addressed the prophet as follows: "O Prophet of Allah! Order that she should return the

garden I gave her." Jamila replied: "I agree and I will give more." The Prophet said: "No, only the garden." Then He said to Sabit: "Take from her what you gave and clear her way (Sahih Al-Bukhari, Vol.7, Hadith No. 197).

In *Sayeeda Khanum v. Muhammad Sami* (1952) case, it was contended that if the Prophet of Islam, functioning as a judicial capacity, had dissolved a marriage simply on the wife's plea that the wife hated her husband for no other reason than his physical unattractiveness, then a marriage could be dissolved by the Qazi at the instance of the wife on proof of a similar repugnance and that can be regarded as a ground under sec. 2(ix) of the DMMA 1939 which states: "any other ground which is recognized as valid for the dissolution under the Muslim law," The Quranic verse IV: 35 concerning the appointment of arbiters in the case of discord between the spouses conferred authority for dissolving a marriage on a third party. This verse reads:

"If you fear a breach between them (the husband and wife), appoint arbitrators, one from his family and the other from hers; if both wish for peace, Allah will cause their reconciliation. Indeed, Allah is Ever All-Knower, Well-Acquainted with all things."

The *Malikis* take this verse very literally. According to *Maliki* law, when the wife makes serious allegations and repeated complaints against her husband then the Qazi will appoint two arbiters to reconcile the parties; if they consider that the dissolution of marriage is the appropriate solution, then they can dissolve it. Here the consent of the husband is not necessary and the orders of the arbiters will be enforced by the Qazi (F.H. Ruxton: 1916).

According to Hanafi law, this verse does not empower the arbiters to dissolve the 30 marriages against the husband's will. In *Mst. Umar Bibi* (1944) case the court expressed doubt whether *Shiqaq* (discord) is recognized as a ground for divorce under sec.2 (ix) of the DMMA 1939. In this case the court also opined that in the absence of her husband's agreement and consent, a wife could not obtain an extra-judicial divorce. But *Mst. Balqis Fotima v. Najm-ul-Ikram Qureshi* (1959) case is regarded as an important milestone on the road toward the establishment of

women's right to judicial divorce. In this case it was argued on behalf of the appellant that a Muslim wife has the right to demand dissolution of her marriage on grounds no more substantial than that she disliked her husband's appearance if she were prepared to forgo her dower. The question was aroused in this case that under the Muslim law the wife is entitled to *khul'* as of, right? The Court in this case cited the Quranic text II: 229 and interpreted it in a cogent way. The verse reads as follows:

Divorce is only allowed twice, after which the parties must either remain together on fair terms or amicably part ways. Men are not allowed to return any presents from their wives unless both of them are afraid they won't be able to adhere to the boundaries set by Allah. There is no guilt on either of them if she offers something in exchange for her release if you (judges) genuinely worry that they won't be able to uphold the boundaries set by Allah. These are the boundaries that Allah has established. Therefore, abide by the boundaries set by Allah; those who do so are wrong (both themselves and others) (The Holy Quran, Translated by A. Yusuf Ali.)

In the *Balqis Fatima* case, Justice Kaikaus opined that the first part of this verse is obviously addressed to husbands. Then there is a provision legalising some sort of financial arrangements in favour of the husband when both of them are agreed that they cannot keep within the limits of Allah. This was termed in this case as extra-judicial *khul'* or traditional *khul'* by mutual consent and agreement. After this, the wording of the verse changes- "if you fear that they would be unable to keep the limits of Allah, there is no blame on them for what she gives to become free thereby". So, it is clear that, after addressing the husband, the spouses are now referred to a 'third person' and the question is who is 'you' to whom the words are addressed? It suggests that there is someone to whom the wife can appeal to dissolve the marriage by submitting her mahr when the husband refuses to release her from a marriage she finds intolerable. Justice *Kaikaus* held the view that the 'you' in the phrase 'if you fear' must be addressed to the state and the judicial officers of the state. Interpretation of A. Yusuf Ali suggests that this must be a properly constituted court'. In this instance, the entire bench came to the conclusion that the

judge's comment could only imply that, despite the husband's opposition to the divorce, he has the authority to issue an order ending the marriage (1959).

Therefore, the only case supporting the idea that a Muslim wife is entitled to dissolution upon the restoration of what she has received from her husband is the Balqis Fatima case. This was referred to as "Judicial Khul," which is independent of the husband's agreement and may be ordered by the court in the event that the husband declines to consent to an extra-judicial khul (Carroll, 1996:100). This right of judicial *khul'* was not absolute and obviously subject to the satisfaction of the conscience of the court. This case was a remarkable declaration of the right of *ijtihad* and also the right to exercise independent judgement in interpreting the original sources; the right to refuse to be bound by the conclusions reached by the sages of past eras (Carroll, 1996: 106). In *Mst. Khurshid Bibi v. Muhammad Amin* (1967) case, the Supreme Court of Pakistan affirmed the decision of Balqis Fatima case. This case was one step ahead of the former one, which sternly held that moral and legal aspects of divorce must be kept separate. Just as it was wrong for the husband to talaq his wife capriciously, it was wrong for the wife to renounce her marriage capriciously. As far as the law concerned, the husband had the right of talaq in the face of wife's opposition and in spite of her innocence; so also, the wife had the right of demanding divorce from the court in the face of the husband's opposition and in spite of his innocence.

In *Hasina Ahmed v. Abul Fazal's* (1980) case, the High Court Division held that the wife could obtain a khul' from the court even if the husband did not agree. Based on a landmark ruling by the Supreme Court of Pakistan, the HCD substituted the court's discretion for the husband's consent requirement (Haque & Khan 2007: 219). Similarly, in *Shafiqul Islam v State* (1994) K.M. Hasan J. indicated that divorce is no longer a unilateral act, since the procedure involves a public authority (Arbitration Council). In *Sheerin Alam v Captain Shamsul Alam* (1996) case the HCD held that for dissolution of khula, the question whether the husband treated her wife with cruelty was not the prime importance. The ability of the parties to coexist peacefully and amicably is the most crucial factor. In the wake of *Mst. Khurshid Bibi's* case, the court

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decided that it would have the authority to dissolve the marriage if the wife convinced the court that they could not live together while fulfilling their marital duties and obligations. So, the second query about a Muslim wife's right to dissolve the marriage without the consent of the husband is recognised by the judicial interpretation of the law. The last query was whether there is any way out to restrain the arbitrary exercise of divorce by the husband. It has already been proved that the arbitrary exercise of divorce by the husband is prohibited according to the religion. Religious morality suggests that this is sinful. But this cannot restrain the abusive exercise. A Muslim husband should be subject to limitation and restriction in case of divorcing wife capriciously. But he can be restrained to exercise his right under the law which will be answered in the fourth chapter.

#### **Review on divorce laws for Bangladeshi Hindus**

It has been stated earlier that there is no codified law governing the personal matters of Hindus in Bangladesh. The ancient *Shastric* Hindu law is still predominant in Bangladesh. Customary laws also allow divorce. But the need of divorce was not confined to lower castes alone. There are several judicial decisions on admitting the urgent need of divorce law among all classes of people. The traditional Hindu law's adherence to the doctrine of indissolubility of marriage could not prevent the recognition of the people's need of divorce (Bhuiyan 2010: 233). These decisions containing rules of divorce laws have been laid down as precedent to be followed. The neighbouring country India has already codified divorce related laws under the 'Hindu Marriage Act 1955'. In *Haripada Roy v Krishan Benode Roy and others* case, it was decided that-

"A suit for dissolution of a Hindu marriage is a suit of civil nature and a court has jurisdiction to try such a suit. But the Hindu law forbidding dissolution may be pleaded as bar to suit for dissolution of marriage but that itself is a matter which has got to be decided by a court and it is the authority to decide the point that really makes up the jurisdiction of the court though the actual decision might be erroneous. Even when both the parties are Hindus, the dissolution of Hindu marriage on the footing of custom has been recognized. Whether or not the prohibition laid down

in Hindu law is attracted to the facts of a particular case is a matter of investigation by the court itself, and if the decision was erroneous or wrong in law, it cannot be ignored as nullity."

This case shows how judicial activism can give a novel effect to the indissoluble nature of Hindu marriage (Siddiqua, 2003:40). Some writers are of the view that customary divorce was recognized both socially and judicially in India from early period (Bhuiyan, 2010). Customary divorces were easy. In some cases, marriage would be dissolved by mutual consent. Sometimes, it could also be purchased. In some communities a forum was necessary; it was either panchayat or family council. In Bangladesh, though judicial divorce of Hindus is not recognized, judicial separation is allowed. For husband's polygamy or cruelty, Hindu women can ask for separate residence and maintenance under the 'Hindu Women's Right to Separate Residence Act 1946. Section 13 of Indian Hindu Marriage Act deals with dissolution of marriage which provides for divorce both Hindu men and women on various fault basis. Many of the grounds are similar to the grounds of DMMA 1939. A survey has been conducted by the Bangladesh National Women Lawyers' Association (BNWLA) as to whether the Hindu community in Bangladesh is satisfied with the existing Hindu family law; 76.67% of the male and 84% female respondents articulated that they are disgruntled with the existing family law in the sense that it discriminates against them. Another survey by the BNWLA reveals the fact that in response to the question as to whether they want to enjoy the right to divorce, 60.67% Hindu female and 58.67% Hindu male respondents expressed their view in favour of the right to divorce (Arifuzzaman et al., 2021; Islam, 2007: 167).

### **Review on divorce laws for Bangladeshi Christians**

As has been mentioned earlier that the Christians of Bangladesh are governed by the Divorce Act, 1869 in case divorce. Christians do not have the right to divorce as the Muslim males have. Both male and female have to apply to the court for the dissolution of marriage. Section 10 of the said Act stipulates the grounds on which a Bangladeshi Christian can obtain dissolution. Apostasy on the part of the husband is regarded as a ground but on the wife's, part is no

ground for dissolution. It may be seen that a Christian male can obtain divorce on the ground of adultery of the wife. But a Christian female cannot get the divorce only on the proof of adultery of the husband; she has to prove some other faults, e.g., incestuous adultery, adultery and remarriage, or bigamy, cruelty etc. The Law Commission of Bangladesh proposed to abolish discriminatory law relating to Christian divorce and it also recommended inclusion of a new provisions relating to divorce by mutual consent in the Divorce Act, 1869.

### **Policy for Muslim Divorce Law**

Islamic law does not support the abrupt and whimsical act of divorce in any way. Islam emphasises on preserving the marital bond and that is why it has stipulated an elaborate and gradual process towards divorce, i.e., the three stage talaq (Serajuddin, 1999: 186). The Muslim Scholars are in consensus upon the view that if a person at the heat of moment exercises three talaq at one stroke, it must be legally ignored and regarded as only one talaq. Secondly, Islam stresses on an organised counselling or mediation before taking the decision on breaking up the marital tie. As divorce is the most detestable thing among the all permitted things, it is not effective at the instance of utterance of divorce. As like any other contract, divorce should be witnessed by two witnesses. The text of the holy Quran 65:2 reads as follows:

Then, either return them politely or part ways with them politely when their term appointment is about to begin. And use two just individuals from among you (Muslims) as witnesses.

According to Muslim law, a husband can delegate divorce right to the wife, which is known as *Talaq-e-tafwid* or delegated or conditional divorce. In case of this type of divorce, the wife includes a condition in her marriage contract that allows her to divorce on her own initiative under specific circumstances. These conditions can increase a woman's access to divorce. But how can it be possible? Under the Muslim Marriages and Divorce Registration Act, 1974 and Section 6 of the MFLO require that the pronouncement of divorce must be registered.

It might be a misconception that both men and women have 'equal' rights in divorce in every respect. The

mechanisms vary in kind and accessibility from case to case; some channels are open to the men only; some to the women only, with or without judicial intervention or some to both, with or without partner's consent. So, what is equal is the right to seek and obtain the dissolution of an unsuccessful marital tie. Talaq is exercised by the husband and the *talaq-i-tafwid* is exercised by the wife as delegated by husband in both forms of divorce, there is no need to approach the courts. Meaning that the marriage can be dissolved rapidly, cheaply and with avoiding procedural problems. Lucy Carroll points out two grounds which are mainly responsible for the discriminatory laws of divorce appeared to be seen e.g., lack of information concerning the rights which Muslim law confers upon the women and corruption of original messages by accretions derived from less sacred sources (Carroll 1996: 9). Muslim marriage is a contract and therefore it is possible to stipulate in the marriage form or *nikahnama* any condition which is not inconsistent with Muslim law. To make an equalisation of divorce right under Muslim law, certain steps can be measured as appropriate:

- The provisions for *talaq-i-tafwid* which are inserted in the *nikahnama* are quite often avoided by both parties of marriage. But it should be taken into consideration very carefully.
- The power delegated to the wife cannot be revoked by the husband. Because marriage is a contract which is also valid under the Contract Act, 1872 which stipulates that- terms of contract are unalterable by either party once the contract has been completed by receipt of consideration. Again Section 25 stipulates that the requirement of consideration is waived if it is made on account of natural love, affection between the parties standing in a near relation to each other.
- "The Report of the Law Commission on Marriage and Family Laws 1955 can be taken into consideration in this regard. In that report two questions were inserted which were as follow:

The Law Commission also recommended that the right to provide in marriage contracts that the wife have a right to pronounce talaq equivalent to that of husband

should be recognized by statute. Though this recommendation was not acceptable but still it has an application to think about this.

- Delegation can be made as a part of consent to marriage which indicates that it would be delegated automatically if the bride gives her consent to the marriage.
- The power delegated to the wife should be unconditional and unrestricted which denotes complete equalisation of divorce rights.

#### **Policy for Hindu Divorce Law**

Divorce is not allowed in traditional Hindu law as well as in Bangladesh. The first and foremost important step to be taken is to enact laws for the Hindus of Bangladesh. In this regard, the Indian Marriages Act, 1955 would be a glaring example which equates both male and female in case of obtaining judicial right of divorce. Compared to that law, customary law allows similar grounds, but that are not enforceable in any court of law. Though under the existing law, a Hindu woman can judicially claim separate residence and maintenance but that does not restrain the Hindu husband from taking more than one wife. So, laws should not be discriminatory to the weaker section. Enactment of new law regarding the protection of Hindu divorce is the urgent need of time.

#### **Policy for Christian Divorce Law**

Christian laws relating to divorce in Bangladesh are discriminatory in nature, which demands modification. Dr. *Pereira* urged that section 10 of the existing Divorce Act 1869 should be reformed and a new provision for divorce by mutual consent should be inserted (Pereira 2011: 28). The following steps can be regarded as a way ahead towards non- discriminatory divorce right to both the spouses:

- By amending section 10 of the Divorce Act, 1869 provisions for both husband and wife should be the same in case of divorce. Under the existing law, the husband can dissolve the marriage only on the grounds of wife's adultery. But on the contrary, the wife has to prove some other grounds with adultery. This is quite discriminatory and thus should be amended.
- A Separate provision should be inserted to make provisions for divorce on the ground of

mutual consent which is in denial under the existing laws.

The above-mentioned steps can equalise the women's access to divorce make the personal laws in conformity with the constitutional spirit of equality of men and women. The role of judicial activism is noteworthy in this context. The cases which have been mentioned in earlier chapters have a great impact on society. So, the changing needs of society should be examined very carefully.

### **Role of judicial activism**

When a court adopts a law to meet the challenges of social justice by giving a literal interpretation it is said to resort to judicial activism (Serajuddin, 2011). Some of the sacrosanct rules are heavily weighted in favour of men and against women who are a disadvantaged, underprivileged and weaker segment of the society. It is often noticed that the legislature is reluctant to intervene in these issues considering the sensitiveness of the issues. But it is the duty of a court of law, to address these social justice issues and to adjudicate in such a way that is to fulfil the demand of ensuring justice negating the discrimination. To take into consideration the social changes and transformations and to adjust the law to the changing social needs and requirements should be the prime concern of the judiciary. The cases mentioned in this study and also others, if looked upon thoroughly, then it will be very easy to come into a consensus that the courts of this subcontinent have played the crucial role of activist in liberalising and modernising the rules of family law and contributed to secure equality of rights and social justice to women in keeping with the underlying goals and spirit of the constitution. The role of the judiciary is crucial in the administration of justice in any legal system. If the judges are literalists and conservatives, beneficial and progressive legislation may be eroded by their narrow interpretations and social advancement will become frustrated. The judges are often termed as the engine of social change and progress. By reinstating constitutional goals and concepts, they can acknowledge and uphold individual and collective rights even in the absence of legislation. In order to fulfil the aspirations and hopes of the populace, the courts should interpret and implement the law in a way that advances the larger and more comprehensive

goals of justice. The discovery of new principles and the creative application of old principles is the only way for the judiciary to keep pace with the vast social changes which are taking place outside the courts and to contribute to these changes (Sarkar, 1983, 286).

### **3. Methodology**

This study follows a qualitative, doctrinal legal research methodology, with an emphasis on comparative analysis. It attempts to assess gender equality and procedural justice by analyzing the provisions on divorce under Muslim, Hindu, and Christian family laws in Bangladesh. Primary legal sources, laws, religious texts, and judicial decisions are analyzed using a black-letter law approach. The grounds for divorce, procedural access, and access to remedies across religious communities are assessed through a comparative framework. The study also includes an analysis of several secondary sources, such as academic literature, reports, and legal interpretative works, have assisted the study.

### **4. Results and Discussion**

The divergence of religious faith differs the personal laws of divorce in Bangladesh. Study of religious law with an aim to reform is a very sensitive and complex task. It is the responsibility of the state to implement and reform existing laws relating to divorce for Muslims and Christians. There is an urgent need to enact a new law relating to Hindu Divorce. India has made radical changes regarding Hindu Divorce, but unfortunately this issue is being totally avoided by the legislature as a sensitive issue of minority. The followings are the findings of this study:

- Equalisation of divorce right is possible under Muslim law as against the general concept of unilateral practice of husband.
- This equalisation under Muslim law can be possible if provisions are made to delegate the power of pronouncing talaq absolutely and without any conditions. *Talaq-i-tafwid* or delegated divorce is valid even under the Contract Act. 1872.
- In absence of divorce related laws, the people of Hindu community are in abject sufferings especially Hindu women who cannot remarry though her husband can desert her and marry more than one.

- The Christian laws relating to divorce are already being proposed to be amended by the Christian community. If the legislature takes the right view, discrimination rooted into this law due to antiquity can be wiped out.

### Ethical clearance statement

This research was conducted in accordance with the ethical standards of the institutional research committee. Ethical clearance for the study was obtained from the Institutional Review Board, Khwaja Yunus Ali University. All participants were informed about the objectives of the research, and their voluntary consent was obtained prior to participation. Confidentiality and anonymity of all participants were strictly maintained throughout the study.

### 5. Conclusion

Laws should be interpreted in a way without deviating from the main spirit, as to bring out the best result. Laws regarding divorce should be ensured as legal rights of both the husband and the wife. Ensuring equality is a constitutional mandate which must be guaranteed. The researcher may conclude this study in a way to urge the implementation of divorce rights of women with an equal footing that of the husband which curtailed the unrestricted power of the husband proportionately. The state has the duty to implement laws necessary for the weaker sections of the society. The insufficiency and lack of concentration on the minority laws is an alarming issue which must be dealt with in priority.

### 6. Author contributions

Author M.R.H.: conceived and designed the study. M.H.R.: collected and analyzed the data. N.G.: contributed to the interpretation of results and J.Y.: contributed to manuscript drafting. All authors reviewed, edited, and approved the final version of the manuscript.

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### 8. Conflicts of interest

The authors declare that there are no conflicts of interest regarding the publication of this research article. All authors have read and approved the final version of the manuscript and have no financial or personal relationships that could have influenced the work reported in this paper.

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