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Hindu Personal Laws in Bangladesh: Challenges and Prospects of Women's Rights

KANAK KANTI KARMAKAR¹

ABSTRACT

Inequality for women in Bangladesh is more of a social issue than a legal one. Inequalities in the application of the law, with the exception of private concerns, are hardly ever observed. Religious rules or conventions, however, govern personal concerns. Since Hindu Law is the most ancient Law in the world, it deviates, changes or modifies immensely. Different schools are explained it in different way except with basic instruments. It modifies through the commentaries and customs. Although these norms or traditions are classified separately under the heading of "Personal Law" in Bangladesh's legal system, they are not, in their totality, drawn from religious laws or customs. Laws and ordinances altered their application. These, however, have not been sufficient to create equality between men and women. Gender norms hinder compliance with present laws. For easy understanding of the common people, the concerned authority should codify new rules and regulations with proper reference to Shastra Law and keep in mind International Obligations. This paper examines some notable legal constraints on the way to ensure the fruitful implementation of Women's Rights and offers some observations on assuring justice for all Hindu Women in Bangladesh.

Keywords: Hindu Law, Women's Rights, Inequality, Shastra Law, Obligations.

I. INTRODUCTION

It is depressing how society has consistently denied women's rights from prehistoric times. Despite the fact that this religion honours a large number of Goddesses; the ancient Hindu laws are among the most demeaning to women. Even after 50 years of independence, the government of Bangladesh has failed to change or pass a single piece of law to address the suffering of Hindu women; hence these rights are still out of date. The ability to divorce and remarry is one of the most contentious freedoms denied to Hindu women in Bangladesh. The government has not yet acknowledged divorce since it still abides by the outdated Hindulaw, despite the fact that the Hindu rules on marriage and divorce are in

¹ Author is a LL.M. Student of Department of Law at Bangladesh University of Professionals, Dhaka, Bangladesh.

conflict with the basic rights guaranteed by the Constitution.²

Hindu laws of Bangladesh are not in a codified way rather it remains in scattered way. Hindu laws enacted, in the form of Statute, on the British era but those are not enacted with conformity with **Vedic Shastra**. Hindu law should be changed to let the Supreme Being realize its holy purpose. Giving everyone equal rights regardless of sex, caste, community, or religion is the only way. Hindu law should enhance human rights. Indian Hindu reforms reflect this. Vedic philosophy and gradual modifications to Hindu law favor gender equality in accordance with current expectations.³ But negative socio-political scenario hinders the inner growth of the Hindu society.

Hindu personal laws created during the British era, is still in effect in Bangladesh. However, after gaining their independence, India quickly passed and amended their own laws. The Hindu personal rules that were in place in India during the 1950s saw considerable modifications, despite the fact that Hindus make up the large majority of the country's population. It should not be expected that these modifications were made without receiving criticism from traditional Hindu religious people. After much debate and fierce resistance, the Hindu Code Bill was finally defeated in 1951 when the Indian Constitution was enacted. In the end, four different acts that addressed a range of issues were enacted into law over the middle of the 1950s on the other hand; it remains same as the British made laws in our country.

II. BANGLADESH CONSTITUTION AND INTERNATIONAL LAW REQUIRE THE STATE TO ENSURE GENDER JUSTICE

(A) Constitutional Obligation:

As in many other countries, formal equality is enshrined in the Bangladeshi Constitution, and numerous Articles emphasize non-discrimination based on sex, caste, color, or other factors. Article 7 says “any prior laws of the state that are unconstitutional because they are in contradiction with any provision of the Constitution are null and void.” This article asserts that the Constitution trumps all other legislation. The US Constitution also guarantees equality before and under the law.⁴

² The Constitution of the People's Republic of Bangladesh, Art. 28

³ Alam, Dr. M. Shah “Review of Hindu Personal Law in Bangladesh: Search for Reforms”, (2004) Bangladesh Law Journal at 15-52, available at: <https://www.biliabd.org/wp-content/uploads/2021/08/Dr.-M.-Shah-Alam.pdf> last visited on February 04, 2023

⁴ the Constitution of the People's Republic of Bangladesh, Art 27

Articles 28 and 29 of the Bangladeshi Constitution stipulate “the principles of non-discrimination on the basis of sex, caste, color, and other factors.” Article 28 states, "The State must not discriminate against any citizen on the sole basis of religion, race, caste, sex, or place of birth.”⁵, and that women shall have equal rights with men in all spheres of the State and of public life.⁶ The State also prohibits child labor. Article 28(4) allows the state to make special accommodations for women, children, or any backward group, even if it does not protect the personal domain.

(B) International Obligation:

Bangladesh is dedicated to establishing equality on the basis of gender, caste, and other factors as a signatory to a number of international agreements. In addition to the CEDAW⁷, unquestionably the most significant international treaty pertaining to women, Bangladesh is a party to a number of other agreements that uphold the ideal of gender equality, including the ICESCR⁸, ICCPR.⁹

Bangladesh has reserved some provisions in each of the above treaties. Bangladesh opposed CEDAW Articles 2 and 16(1) (c).¹⁰ If the preceding is interpreted grammatically, it is possible that it would not be inaccurate to suggest that even if the rules of other communities are taken into consideration, Article 2 will still be obligatory.

The caveat contradicts the Convention's overall objective. Bangladesh has a reservation to Article 16 (1) (c)¹¹, which requires the state to provide “the same rights and duties throughout marriage and at the moment of its dissolution.” Bangladesh hasn't adopted it. Bangladesh supports the rest of Article 16. Article 16 requires state parties to end all marital and family discrimination against women. These include Article 16 (1) (b), which addresses the issue of free and full consent to marriage; Article 16 (1) (d), which addresses the issue of having the same rights and responsibilities as parents; and Article 16 (1) (f),

⁵ *ibid*, Article 28 (1)

⁶ *ibid*, Article 28 (2)

⁷ The Convention on the Elimination of All Forms of Discrimination Against Women, 1979 Article: 2, 16 (1) (c) available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women> (last visited on February 04, 2023)

⁸ The International Covenant on Economic, Social and Cultural Rights of 1966; Article: 2, 3 available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights> (last visited on February 04, 2023)

⁹ The International Covenant on Civil and Political Rights of 1966; Article: 23 available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> (last visited on February 04, 2023)

¹⁰ Article 2 conflicts with Sharia law based on the Holy Koran and Sunna, hence Bangladesh does not regard it as binding.

¹¹ CEDAW *supra* note 07

regarding which Bangladesh had reservations in the past that it later removed. The Convention on the Rights of the Child has these provisions. Bangladesh must also take all appropriate measures under CEDAW Article 5(a). Bangladesh disputes ICESCR Articles 2 and 3. These articles concern implementing the accord. State parties must "ensure the equal right of men and women to the enjoyment of the economic, social, and cultural rights set forth in the present Covenant" under Article 3."¹² In the case of the **ICCPR**, **Bangladesh has not denied the provisions of Article 23**¹³, even though it has expressed reservations to a number of the articles which is as follows:

- Society and the state must defend the family, society's most natural and fundamental social unit.
- The ability of people of legal marriageable age to wed and have families should be recognized as a fundamental human right.
- There shall be no marriage entered into without the free and complete agreement of both of the individuals who desire to wed.
- States This Covenant requires the parties to ensure the equality of rights and duties of spouses during and after marriage. If the marriage ends, children will be protected.

III. COMPARISONS AS TO MARRIAGE

India's 1955 Hindu Marriage Act addressed several marriage concerns. One of these difficulties was divorce, which was historically frowned upon (expression of disapproval) in Hindu ceremonies. The Act is more authoritative than personal Hindu law on its issues. The most important marriage law modifications are listed below:

- the contrast between Hindu weddings that are sacramental and those that are legal,
- traditional Hindu marriage becomes monogamous and
- a provision that allows for the termination of a marriage¹⁴

First and foremost, the Act changed Hindu marriage from sacramental to transactional.

¹² The Bangladesh has made a reservation, which states as follows: According to the relevant provisions of its Constitution, and in particular with regard to certain aspects of economic rights, namely the law of inheritance, the Government of the People's Republic of Bangladesh will implement articles 2 and 3 insofar as they relate to equality between men and women

¹³ ICCPR supra note 09

¹⁴ Parashara, Archana "Women and Family Law Reform in India: Uniform Civil Code and Gender Equality" 1st edn, (1992) Sage Publications

This was the best change. The Act was based on a legal equality of rights and obligations between spouses. Equality was formalized from this principle. The law provided men and women equal marital remedies and auxiliary reliefs.¹⁵

In Section 5, Indian Hindu marriage laws are detailed. If the following conditions are satisfied, any two Hindus may marry:

- At the time of the marriage, neither party is currently married to another person.
- When they were married, neither one of them:
 - is unable to provide a genuine consent to it in the context of the result of having an unstable mental state; or
 - notwithstanding the fact that they are competent to provide a valid consent, has been experiencing symptoms of a mental condition that a kind or to such an extent as to be considered to be unacceptable for marriage and the bearing of children
 - has been the target of repeated assaults from mental illness or epilepsy;
- The bride was eighteen when she married the groom, who was twenty-one.
- The parties are not even close to the degrees of connection forbidden unless permitted by tradition or the use regulations that govern each of them allow for a relationship between them;
- Unless their customs or standards allow them to marry, the parties are not identical.

IV. CASTE CONSIDERATIONS

Most faiths forbid inter-caste marriages. Under Hindu personal law, both parties must be of the same caste to be married in Bangladesh. The Special Marriage Act of 1872 is the only statute in Bangladesh that enables marriages between persons of different castes. It is feasible to argue that caste-based discrimination contradicts the Bangladeshi Constitution, which commits to and reiterates the ideal of caste-free treatment.¹⁶ In actuality, priests or purohits officiate such marriages in compliance with the Special Marriage Act of 1872 and the individual faiths. Even the Geeta, the Sacred religious book of Hindu people, mentions that Caste system will be based on his/her ability and virtue

¹⁵ Agnes, Flavia "Law and Gender Inequality: The Politics of Women's Rights in India; in *Women and Law in India*" 1st edn, (2004) Oxford University Press

¹⁶ The Constitution of the People's Republic of Bangladesh, Art 28

not based on by birth.¹⁷

(A) Polygamy:

a. Bangladesh position as to Polygamy:

Bangladesh follows the traditional interpretation of religious law, which holds that Hindu law allows polygamy and unlimited polygamy for men, and that children born from such marriages are legitimate. Bangladesh's classical law agrees. Polygamy for men is legal in Bangladesh, but polyandry is illegal and can get Hindu women arrested.¹⁸

b. India's position:

Under India, the crime of polygamy is addressed in Section 5 I as well as Sections 11 and 17. In India, a bigamous marriage is automatically considered null and invalid without the need for a court to make such a statement; however, a court is able to make such a pronouncement if a party requests it.

(B) Age of Marriage and Guardianship:

a. Bangladesh view point:

The "Child Marriage Restraint Act of 1929" in Bangladesh, which applies to all groups, sets the same minimum ages, but it only punishes the parties while the marriage is lawful. The prevalent practice of underage marriage prompted this regulation. Despite being fined, Hindu and Muslim child marriages in Bangladesh are legal, even if the average age of marriage has increased for several reasons. Bangladesh's Dayabagha law allows guardians to marry their wards. The mother is way down the list of suitable guardians for this School. Bangladeshi Hindu law does not allow a kid who was married before a specific age to divorce after they become 18. Muslim law does not include this.

b. India's view point:

Section 5 of the Hindu Marriage Act requires the bride to be at least eighteen years old and the bridegroom to be twenty-one. This is one of the Hindu marriage requirements. Hindu Shastriya law encourages minor marriages, especially for young women. Thus, the 1955 Act specifies a minimum age and invalidates marriages before it.

¹⁷ **Sreemadvagabhadra Geeta, chapter 04, verse 13**

¹⁸ Huda, Shahnaz "Combating Gender Injustice Hindu Law in Bangladesh" (2011) South Asian Institute for Advance Legal Studies (SAILS) available at: https://www.academia.edu/1586976/Combating_Gender_Injustice_Hindu_Law_in_Bangladesh_Dhaka_SAILS_2011_ (last visited on February 04, 2023)

(C) Consent and Physical Capacity:

Section 5(1) (ii) states that neither party must be unable of providing legal agreement to the marriage at the time of the marriage owing to unsoundness of mind or insanity, even if it is recurring, or must suffer from a mental or physical illness that makes them unsuitable for marriage or reproduction. Marriage must meet these standards. Thus, being able to consent has become a need for marriage, and guardianship in marriage has become obsolete.

V. DISSOLUTION OF MARRIAGE AND JUDICIAL SEPARATION

Hindu marriages are sacraments because they unite couples for life. Instead of a supernaturally sanctioned, irrevocable union, India's Hindu law emphasizes marriage's contractual nature.¹⁹ Legal scholars believe old Hindu law forbade divorce. This is because divorce would contradict sacramental marriage, the foundation of Hindu family law. **Menski** adds that Hindus have several traditional divorce methods despite the latter.²⁰ The dissolution of marital connections is a natural part of life; in recognition of this, and in contrast to the Hindu legal system in Bangladesh, the Hindu legal system in India has integrated ideas of

- through Judicial Separation
- by Divorce
- by Nullity of Marriage
- through the Divorce by Mutual Consent

VI. JUDICIAL SEPARATION**a. India Perspective:**

Section 10 of the Act of 1955 allows the parties to request a judicial separation on specific circumstances. This separation frees the petitioner from living with the respondent.²¹

b. Bangladesh Perspective:

In Bangladesh, Hindu women may live separate from their husbands and obtain alimony or maintenance. The Hindu Married Women's Right to Separate Residence and

¹⁹ Menski, Werner "Modern Family Law" Volume 65, Issue 2, Curzon Press, 2001

²⁰ Menski, Werner "Hindu Law: Beyond Tradition and Modernity", 1st edn, Oxford University Press, 2003

²¹ Huda, supra note 18 p 33

Maintenance Act of 1946 outlines several reasons that are equivalent to the grounds mentioned in the Hindu Adoption and Maintenance Act of 1956 that is applicable in India. This legislation was enacted in the same year.

VII. DIVORCE

a. **Bangladesh standpoint:**

Bangladeshi Hindu law prohibits divorce. Hindu law in Bangladesh forbids divorce unless local tradition allows it, which might be difficult to prove. This document suggests the Hindu Widow Remarriage Act of 1856 was passed. Women who satisfy the qualifications in section 5 of the Family Court Ordinance, 1985 may petition the Family Court for the dissolution of their marriage under the scenarios above, even though there is no Hindu marriage dissolution statute in Bangladesh.²²

b. **India standpoint:**

There are a multitude of factors that now constitute as grounds for an Indian Hindu couple to break their marriage for good. The Hindu Marriage Act of 1955 provides a provision in Section 13 that says either party to the marriage may petition the court to obtain a judgment of divorce for the grounds that are listed in the Act. Adultery, violence, desertion, conversion to another religion, unsoundness of mind, mental state whether continuous or intermittent, certain illnesses such as leprosy and venereal disease, and so on are all instances of these sorts of offenses.²³

Section 13 also allows the wife to divorce the husband for polygamy, rape, sodomy, or bestiality. The Indian Act finally recognizes Muslim law's Option of Puberty. A woman who was married before a certain age may cancel her guardian-arranged marriage when she matures.

c. **Shastra Standpoint:**

In these particular circumstances, Shastra is not devoid of texts that are favorable to the Hindu practice of dissolving marriages. Because the Sastra allows Hindu women to marry a second or subsequent husband in certain circumstances, or even more than once. The first marriage of both parties is ended as a result of the second marriage. **The Parashara**

²² Haque, Md. Azizul "Hindu Law in Bangladesh: Theory and Practice", 1st edn, University Publications 2016 atp 50

²³ Prof. Dr. Shahnaz Huda, supra note 12 at p 33

Sanghita provides that

“Another husband is ordained for women in five troubles. Such as:

- If the husband be unheard of
- Be dead
- Adopts a religious order
- Impotent
- Becomes out-casted²⁴”

d. Divorce by Mutual Consent:

Section 13B of the Marriage Laws (Amendment) Act of 1976 adds “divorce by mutual consent” as a reason for divorce in India. The Marital Laws (Amendment) Bill of 2010 attempted to add a new divorce ground, irretrievable marriage breakdown. Despite cabinet approval, these measures failed for many reasons. Despite the belief that marriage is unbreakable, **Menski** provides a persuasive argument for Hindu divorces.²⁵

e. Through the Nullity of Marriage:

Section 11 of India's 1955 Act states that any marriage consummated after the Act's enactment is invalid and may be declared null by a declaration of nullity on a petition by either party if it violates Clauses I (iv) or (v) of Section 5. Section 11 of the Act of 1955 states that any marriage completed before its adoption includes bigamy, parties with degrees in the restricted range, and Sapindas. Madness or idiocy, duress or fraud, and third-party pregnancy may invalidate a marriage under Section 12. Adultery during a marriage might also nullify it.²⁶

VIII. COMPARISON REGARDING MAINTENANCE

a. Bangladesh position:

A Hindu woman in Bangladesh has the right to claim separate residence and maintenance if she satisfies certain criteria²⁷, many of which are similar to those outlined in the Act of 1946.²⁸

²⁴ Chapter IV of the Parashaa Sanghita

²⁵ Menski, supra note 23 at p 44

²⁶ Huda, supra note 18 at p 35

²⁷ ibid see at p 24

²⁸ ibid see at p 35

b. India's Position:

India's Hindu Adoption and Maintenance Act, 1956, addressed the issue. Section 18 requires Hindu husbands to support their wives for life. Under Section 18(2) of the 1956 Act, a Hindu woman in India may live away from her husband without giving up her entitlement to alimony or maintenance if she satisfies certain qualifications. The 1956 Act requires a father-in-law to help his widowed daughter-in-law if she cannot support herself. The Act also requires daughters to help old or infirm parents, unlike Bangladesh's customary legislation. Sons have this duty before. **Menski** makes the observation that contemporary²⁹

Proof of marriage is required not only to prove the right to spousal support after a divorce or during the marriage itself, but also to get maintenance payments and many other benefits associated with marriage.

IX. COMPARISONS CONCERNING ADOPTION

Adoption in India has become a secular institution owing to the Hindu Adoption and Maintenance Act of 1956, which was implemented in that nation and abolished all of the religious and sacramental components of the procedure, making it unnecessary to execute a religious ceremony as part of the adoption process. Any male Hindu who is of sound mind and isn't a juvenile has the right to adopt a son or a daughter, according to Section 7. But if his ex-wife is still alive and capable of giving her approval, he cannot adopt without it if he already has a son or daughter living with him. Any sane Hindu female who is at least 18 years old who is unmarried, widowed, or divorced, and who has not completely and irreversibly forsaken the world or ceased to be a Hindu, may adopt a child under the provisions of Section 8 of the Indian Act. In contrast to this, Bangladesh's conventional legal system is still in place. As opposed to the scenario in Bangladesh, boys and girls who have both physical and mental disabilities as well as orphans and illegitimate children are now eligible for adoption.³⁰ Even the sacred Veda does not discriminate as to adoption on both male and female person. It says that "the parents give birth to children; son & daughter. One for the filial rites and duties for themselves & family; the other as

²⁹ Menski, *supra* note 23 at p 485; "Hindu law in its gender-focused ardor (Sections 24 and 25 of the Hindu Marriage Act) even provides Hindu men the right to be maintained by the wife after a divorce."³⁶ Diwan, Paras "Modern Hindu Law", 1993, Allahbad Law Agency, at p 217

³⁰ Kumar, Vijendra "Emerging Trends in Sonship and Adoption under Hindu Law", 2003, NALSAR Law Review, at p 96-111

beneficiary of the sanctities and accomplishments.³¹

X. COMPARISONS AS TO SUCCESSION

a. Bangladesh Perspectives:

Contrarily, Bangladeshi law, which is largely un-codified, provides that women, regardless of whether they are daughters or widows (or widows when there are many surviving spouses), continue to have limited estate rights, sometimes known as restricted inheritance rights.

b. India Perspectives:

The Hindu Succession Act of 1956 codified the succession law that Hindus in India had historically followed and set a uniform norm of succession that applied regardless of the School. The new regulation is based on the Mitakshara premise of closeness of blood, consanguinity, or proximity of kinship rather than the Dayabagha idea of religious efficacy. Contrary to the Dayabagha concept, this The current Hindu succession law is thus actually simply another kind of secular legislation. Religious and spiritual topics get little attention. Following rights are granted to women by the Equal Rights Amendment of 1956. Such as:

- the right to possess property as absolute owners;
- the position of coheirs with their brothers in the father's property; and
- the provision that makes a daughter's inheritance portion equivalent to that of boys³²

It was said that the outcome of this would be the dissolution of the patrilineal-based joint family system that is characteristic of Hindu culture. **In Section 14**, All types of property, with the exception of those for which there is some kind of agreement establishing limited rights, are proclaimed to belong entirely to women. Due to the retroactive application of Section 14, an existing woman's estate may be turned into a stridhan, also known as an absolute estate, if it satisfies two conditions: possession and ownership.³³ Unlike in Bangladesh, a Hindu woman in India who inherits property has complete control over it and may sell, give, or otherwise dispose of it. Thus, she owns the land in full, and her heirs will receive it when she dies. Thus, if a male Hindu in India dies, his widow, daughter,

³¹ Rig Veda, Mandal 3, Sukta 31, Sankhya 2

³² Mukhopadhyay, Maitrayee "Legally disposed Gender Identity and the Process of Law" 1998 p 98

³³ Paras Diwan, supra note 36 p 361

mother, and son would inherit equally.

XI. POSITION OF HINDU WIDOW

a. In Bangladesh:

The Hindu Women's Right to Property Act of 1937 in Bangladesh, as was previously indicated, permits a widow (or if there are many widows, all of them together) to inherit the same portion as one son, but she or they do so as restricted owners. If there are many widows, they each get the same portion.

b. In India:

A Hindu widow in India now receives the assets of her deceased husband together with her son, her daughter, and any other members of Class I who may be alive and living at the time of the inheritance as a consequence of the 1956 Act. In contrast to a widow in Bangladesh, there is no such thing as a widow's estate in contemporary times, and a Hindu widow is free to inherit anything she wishes. The need that a widow remains chaste in order for her to inherit property has been abolished.

c. Shastra:

In the verse of the Yagnavalkya Smriti mentions that after the death of the husband, the widow will get the equal share as the son will get. For instance, if a died person have 3 sons then the property will be distributed into four parts. Sons will get 3 portion and mother/ widow will get the one portion.³⁴

XII. POSITION OF HINDU DAUGHTER

a. In Bangladesh:

In Bangladesh, a girl is not eligible for an inheritance if there is a male in the family. This is in contrast to the situation for a widow. Only in the event that there is no son or sons and only in the event that there is a widow or widows does the daughter inherit.³⁵

In India: In contrast, India's 1956 Inheritance Act states that Class I daughters inherit together. The widow and son are included. In contrast to the old legal system, girls and sons receive equal inheritance in India. They also have the right. All females acquire property regardless of whether they can bear sons, and there is no distinction between

³⁴ Yagnavalkya Smriti, chapter 2, verse 123; Bishnu Smriti, chapter 18, verse 34

³⁵ Paras Diwan, supra note 36

married and unmarried daughters.

b. Shastra:

If the daughter is unmarried and if she stays Ancestry (father's house) then she will not be deprived from getting property. According to Manu Sanghita, the brother will bound to give $\frac{1}{4}$ of the whole property.³⁶ If a died person left behind widow, brother and unmarried sister then everyone will get the equal share.³⁷

But Bangladesh still apply the British made law in their daily life activities withexcept few law namely; Hindu Marriage Registration Act, 2012. Narad Smriti mentions that if there is any conflict situation or dissimilarities between the verses of Smriti shastra then it can be sorted out through the conscience, logical arguments and discussion.³⁸

XIII. CHALLENGES AS TO HINDU LAW IN BRITISH INDIA

Following the split of India and Pakistan in 1947, there were no legislative shifts or new advancements made regarding Hindu family laws in either Pakistan or, subsequently, Bangladesh. Therefore, the Anglo-Hindu legal system is still in use in Bangladesh, and Bangladeshi Hindu law is still based on that system.³⁹

India, in contrast to Bangladesh, instituted far-reaching reformation and altered the religious laws of the majority of the people, that means the Hindus, within just a few years of gaining its independence, while the laws governing the country's minority groups were, for the most part, unaffected by these changes. In a similar manner, legislative efforts were made in Pakistan (of which Bangladesh was then a part) in the 1960s, although on a smaller scale, and Muslim law was modified to some degree. Bangladesh was a part of Pakistan at the time. Despite this, the Hindu personal rules have neither been modified nor codified over the centuries.

XIV. EXISTING CHALLENGES

(A) Challenges as to Marriage:

Major Shudhir Saha, who works for the Kalyani Foundation, discussed his personal interactions with Hindu customers as follows:

³⁶ Manu Sanghita, chapter 9, verse 118

³⁷ Bishnu Smriti, chapter 18, verse 34

³⁸ Narad Smriti, chapter 01, verse 40

³⁹ Huda, supra note 18 p 14

A Hindu girl from Bangladesh and a Canadian immigrant ended up becoming engaged and marrying one other via an arranged marriage. Three days after the wedding, the groom went back to Canada, and while he was there, he called his new bride to tell her that he would not be able to continue with the marriage. The young lady did all in her power to sway his decision, but to no avail. She was in a difficult situation, and while her husband was unwilling to take her with him, that lady did not have the legal option of divorcing him and beginning a new life apart from him. After a grueling period of four years, it took a lot of convincing to get him to change his mind. Imagine how humiliated the girl must have felt to be forced to go to a guy who did not want her when she had no other option. When we talk about changing things, we have to take all of these individual experiences into consideration.

According to Menski, the subject of the traditional wedding ceremony is in and of itself a vast ocean of many beliefs, rituals, and traditions.⁴⁰

(B) Proof of Marriage:

In everyday life, one of the most significant challenges that Hindu couples have to overcome is to the documentation of their marriage. As a result of the absence of a provision in Bangladeshi Hindu law requiring that marriages be registered, there can be confusion as to whether or not a marriage actually took place in a number of different scenarios, including those in which one of the parties, typically the husband, denies that the marriage took place.

For instance, in the case of “**Amulya Chandra vs. the State**”⁴¹; the woman's position became very important when it came to the issue of evidence.

Fact: The allegation made by Kalpana Rani, who was perhaps 17 or 18 years old at the time, was based on the fact that she was led to believe that Kalpana had married Amulya Chandra via the exchange of garlands in private. Amulya Chandra changed her mind about getting married after discovering she was pregnant. After being unable to get any kind of redress from the Shalish of the village, she filed a criminal complaint alleging that she had been deceived in accordance with the Penal Code of 1860.⁴²

Held: The lower court decided in favor of “Kalpana Rani” and handed down the following

⁴⁰ Menski, *supra* note 23

⁴¹ *Amulya Chandra Modak vs. The State* 35 [1983] DLR 160

⁴² The Penal Code 1860; Sec. 493

sentence to Chandra as punishment: five years in prison and a fine of one thousand Taka. Amulya Chandra's appeal was successful, and she was found not guilty by a higher court. The higher court refused to believe that a girl of 17 or 18 years old would be so naive as to believe that a valid marriage could be solemnized without ceremonies such as Saptapadi and Viva Homa. This resulted in Amulya Chandra's acquittal. The court went on to say that it is customary for Hindus in Bangladesh to have some relatives attend the wedding, and that the bride is required to wear new clothes, bangles, and have a vermilion mark placed on her forehead. In addition, the court stated that the bride is marked with vermilion on her forehead. When none of these things were present, it was impossible for Kalpana Rani to have believed that the accused had become Kalpana Rani's husband through the simple act of exchanging garlands. Questions concerning the need to provide evidence of a marriage will therefore continue to stump the judicial system so long as there is neither a document nor a registration system.⁴³

Another instance is that of Minati Karmakar⁴⁴, who, although being in her twenties, is subjected to physical and mental abuse at the hands of her husband because she is unable to provide dowry. Because she is unable to put up with the harassment, she has decided that she wants to get a divorce, but she has come to the shocking realization that Hindu law does not let her to do so. Moreover, a Hindu woman may ask for separate residence⁴⁵ before the Family Court. But to make that kind of demand her marital status needs to be established firstly.⁴⁶ Among these some general problems which is related as to the lacuna of provision for mandatory nature of policy of the Hindu Marriage Registration in Bangladesh. Such as:

Challenges to prove the marriage in case of:

- If husband denies the marriage
- In the matter of legitimacy of children
- To establish the rights to maintenance for wife and children
- In the case of criminal prosecution such as Dowry related issue
- Obtaining pension in regards of death of husband

⁴³ *ibid*

⁴⁴ Huda, *supra* note 12 p 19

⁴⁵ Under the Separate Residence and Maintenance Act, 1946

⁴⁶ Huda, *supra* note 18 p 20

- Achieving visa for spouses

(C) Challenges as to Provision for Divorce:

As per the traditional system there is no legal option for divorce among Hindus in Bangladesh because Hindus believe that marriage should be treated as a holy institution. Even under the most difficult of circumstances, either a woman or a man is unable to dissolve their marriage. On the other hand, in contrast to men, who are able to build a life with more than one woman, women are unable to do so. In spite of the fact that everyone in the world hopes for marriage to be a union that lasts forever, the fact of the matter is that there are certain circumstances that make it impossible to stay together in a marriage.

(D) Challenges concerning Guardianship of Children

In Bangladesh, a Hindu father in the form of “WILL” may appoint any person as the guardian of his minor children as well as property. And the person he (father) so appoints will have precedence over all other persons even including Mother. It means that the mother has to give up her rights of guardianship upon her children after the death of the father.⁴⁷ In this circumstance it can be said that a Hindu Male has the complete dominance to act as a guardian of the minor children.

(E) Challenges as to Maintenance

According to the existing law, a Hindu wife is bound live and co-habit with her husband in regard to entitle the maintenance. If the wife lives in a separate place then her right will be suspended without any justifiable causes.

If the husband dies without leaving behind any kind of property, in this circumstance if her father in law though has enough property of his own then he is not legally obliged to maintain the widow.⁴⁸

(F) Challenges as to Ensuring Women’s Right on Adoption

It is clear that women face prejudice at each and every level of the adoption process in Bangladesh due to the conservative Hindu adoption regulations that are implemented there. When it comes to adoption, the biological father has the main right to either take or give the child. It does not matter whether he is a widower or a bachelor; in fact, he does not even need to be a major as long as he has reached the age of discretion in order to adopt

⁴⁷ Huda, supra note 12 p 23

⁴⁸ *Satish Chandra Pal vs. Mst Majidan Begum* 10 [1958] DLR 271

a child. It makes no difference whether his wife, if he has one, is against the adoption or even if she is pregnant, as far as he knows, since none of those things affect his decision. There are no legal avenues open to a single Hindu lady in Bangladesh who want to bring a child into the world. Adoption is not permitted across castes since, similar to marriage, both people adopting a child must be from the same caste. The legislation of adoption does not allow for the adoption of boys who have any kind of mental or physical disability.⁴⁹

It was made clear in the case of “**Abdul Mannan alias Kazi vs. Sultan Kazi**”⁵⁰ that an orphan cannot be given or accepted in adoption unless it is established by tradition. This ruling was made in relation to the Kazi family. As a result, the Hindu law of adoption in Bangladesh is distinguished by the prohibition of adoption between members of other castes, the absence of a legal right to adopt a daughter or an orphan, and the predominance of the male to take in adoption regardless of his rank. In spite of the fact that Article 41, it protects the right to freedom of religion, the Hindu law of adoption may still be seen as gross discriminatory against girl children and on the basis of caste. This is the case even though the Constitution of Bangladesh guarantees the right to freedom of religion. It is important to point out that the FCO⁵¹ does not include adoption as one of the matters that come within the area of the Family Court.⁵²

(G) Challenges Concerning Ensuring Women’s Right on Succession

According to the existing legal framework, a Hindu woman may have two kinds of property. Such as:

- Inherited Property
- Stridhan Property

As per the Dayabagha School, there are five kinds of female heirs which are given as follows⁵³:

- Widow
- Daughter

⁴⁹ Huda, supra note 18 p 25

⁵⁰ *Abdul Mannan alias Kazi vs. Sultan Kazi* 34 [1982] DLR 236

⁵¹ Family Court Ordinance, 1985; Ordinance No XVIII of 1985

⁵² Huda, supra note 18 p 25

⁵³ *ibid* see p 26

- Mother
- Father's mother
- Father's father's mother

When a woman inherits property from a male, she is considered the owner of the property, although she may be subject to certain restrictions. The holder of a limited interest, as opposed to an absolute interest, has the right to enjoy the property for her lifetime but does not have the capacity to transfer or sell the property. A Hindu widow is granted an interest in the estate of her late husband that lasts for her whole life. She is prohibited from selling or otherwise transferring this property under any circumstances, with the exception of situations in which doing so would be required by the law. After the death of the woman, such property will revert to the next heir of the owner who has passed away; this person is referred to as the reversioner. If a Hindu widow transfers the property of her late husband without their being a legal obligation to do so, the transfer is invalid, and the property may be returned to the reversioner.⁷³

When there is also a boy in the family, a Hindu girl in Bangladesh is absolutely disqualified from inheriting anything. When a man passes away leaving just one or more daughters but no male offspring, the right of such daughters to inherit is totally reliant on their having a son or being capable of giving birth to a son. If such girls do not have a son, then they do not have the right to inherit.⁵⁴

XV. REFORMATIVE APPROACH

(A) Why Reformation is needed?

Reforming certain aspects of the Hindu personal laws in order to make them less discriminatory and more in accordance with the principles of human rights and justice will go a long way toward resolving some of the most pressing issues that women and other members of the Hindu community are confronted with today. It is important to emphasize that Hindu males, in addition to women, are in need of societal changes and reforms in this context. Men are also negatively impacted by issues such as a lack of registration, an inability to divorce, and a lack of inheritance rights for daughters.⁵⁵

⁵⁴ *ibid* see p 27

⁵⁵ Huda, *supra* note 18 p 14

(B) Initiative for Reformation of Hindu Law in Bangladesh Uniform Family Law

There are a few laws in Bangladesh that concern to personal affairs that are consistent throughout the country, such as the **Child Marriage Restraint Act of 1929**, the **Dowry Prohibition Act of 1980**, and the Family Court Ordinance of 1985 however the majority of these laws are not. **Uniform Family Codes (UFC)** are also known as Uniform Family Laws. These codes were produced by a variety of organizations, including Ain O Shalish Kendra and Mahila Parishad (BMP) or Uniform Family Codes (UFC).

It is now possible for Bangladeshi women who marry foreigners to pass on their citizenship to their children, which was not the case in the past. Additionally, in order to properly identify a kid, both the mother's name and the father's name must be included on the document.

The patriarchal and paternalistic context of Bangladeshi society, as well as the strong belief that personal laws are the epitome of religious identity, makes it appear as though any attempt by any political government to enact a uniform law at this time would be too risky to attempt, especially in light of the resurgence of religious fundamentalism.

Personal laws continue to be the primary legal framework for family-related issues in India, despite the fact that the country's Constitution expressly calls for the adoption of a unified legal system. According to the provisions of **Article 44 of the Constitution of India**, "*The State should endeavor to provide for the people a uniform civil code across the territory of India,*" This simply indicates that despite the fact that there is a constitutional obligation to adopt a civil uniform family law regardless of religion, it has not yet proven practicable to do so and will likely never be achievable.

(C) Bangladesh Law Commission:

The Bangladesh Law Commission, sometimes known as the BLC, is a statutory entity that was **founded in 1996**⁵⁶ with the passing of the **Law Commission Act**. In 2006, the Commission worked on drafting a comprehensive Hindu law bill that addressed the most pressing problems that needed to be fixed. In spite of the fact that the enactments are, for the most part, equivalent to those enacted in India, there are a few changes and additions. The following subjects are addressed by the Bill.

⁵⁶ See report of the "*Bangladesh Law Commission on Uniform Family Law*", 2005 available at <http://www.lawcommissionbangladesh.org/reports/69.pdf>

a. Marriage

In **Section 5 of the Hindu Bill of the BLC**, the conditions that must be met in order for a marriage to be considered valid are outlined. These conditions include monogamy, a mind that is capable of consenting, the absence of disease, and the absence of any prohibited or sapinda relationships between the parties, among other things. In addition, **Section 5(g)** of the proposed legislation in Bangladesh specifies that “a marriage may take place between a man of any caste and a female of any caste. This indicates that there are no restrictions on marriages between people of different castes.” On the other hand, Section 8 of the Bill provides Hindus with the opportunity to register their marriages in order to establish the fact that they have taken place. In each and every municipality, the government is going to appoint someone to serve as a Hindu Marriage Registrar. It is made clear in Section 8(4) that the absence of registration will not have any bearing on the legality of a marriage.⁵⁷

i. Gap:

In 2012 the Hindu Marriage Registration related Act has been enacted. But in section 03 of the afore mentioned Act, it states that “Hindu marriage may be registered”. That means it is not obligatory nature. That’s why difficulties which Hindu male and female are facing still exist even after adopting new law.

b. Judicial Separation:

The legal dissolution of marriage is the topic of discussion in **Section 10 of the Bill**. The reasons why a party may submit a petition for the parties to become legally separated. The grounds are as follows:

- The person who is petitioned is often assaulted.⁵⁸
- While under the influence of alcohol, the assailant breaks into the house and viciously attacks the petitioner.⁵⁹
- The person who submitted the petition is often cursed and subjected to mental torment for no apparent reason.⁶⁰

⁵⁷ Proposed Hindu Marriage, Adoption, Maintenance and Succession related Codified Act, 2006 or The Hindu Law Bill of 2006 drafted by the Bangladesh Law Commission.

⁵⁸ *ibid* section 10 (c)

⁵⁹ Section 10 (d)

⁶⁰ Section 10 (e)

- Gets into disputes with the petitioner about trivial matters, to the point that the petitioner claims that she or he fears for her or his life as a result of the discussions.⁶¹
- If the husband usually lives with another wife or concubine at another location, or if he retains another wife or concubine at the place of residency of the wife, then the marriage is considered invalid.⁶²

i. Gap:

The proposed Act of 2006 does not mention about the consequences of Judicial Separation. This Act only states regarding the grounds if it happens then the victim can petition for Judicial Separation. Since the Act of 1946⁶³ states about the maintenance after getting separate residence but this Act does not mention it.

c. Divorce:

Section 13 addresses the dissolution of marriage for reasons such as conversion, incurable mental condition, asceticism, absence, and polygamy on the part of the husband.

i. Gap:

According to the Parashara Sanghita⁶⁴, a Hindu Woman can marry second time and first marriage will be dissolved on the five grounds. But Law Commission did not codify those grounds in line with the Shashtra. Unlike the marriage registration process, the concerned authorities remain silent regarding Divorce registration process. In considering the present circumstances, it needs to adopt divorce registration policy.

d. Adoption:

The adoption process is very patriarchal, and men are given priority when it comes to giving and receiving children via this route of parenting. Without the permission of his wife or wives, a married man is unable to adopt a child. If a woman is single, divorced, or a widow, as well as if her husband has permanently withdrawn from all worldly affairs, she may be eligible to adopt a child. It is possible to adopt male and female children as long as they are under the age of 15 and have not married, unless the local tradition dictates

⁶¹ Section 10 (f)

⁶² Section 10 (h)

⁶³ The Hindu Married Women's Rights to Separate Residence and Maintenance Act of 1946

⁶⁴ Chapter IV of the Parashara Sanghita. The five grounds are: if the husband be unheard of, dead, adopts religious order, impotent and becomes out casted.

differently.⁶⁵

i. Gap:

In that proposed Law, it lacks of mentioning regarding the Caste Barriers of adopting children. Since in the proposed Law there is no bar to the inter caste marriage. So, it is relevant to no discrimination on adopting a child irrespective of his or her caste.

e. Succession:

The property of a male Hindu will first and foremost pass on to his heirs, who are listed in the First schedule of the Act, in accordance with the provisions of Section 46 of the draft Bill. These heirs will all inherit at the same time and will not share their inheritance with the heirs that are included in the second class or subsequent classes. The following guidelines will be used to determine how the property will be distributed among the first class of heirs.⁶⁶ It includes:

- Son
- Predeceased son's son
- Son of Predeceased son of a predeceased son
- Widow
- Widow of Predeceased son
- Widow of Predeceased son of Predeceased son

The proposed legislation places daughters in the second category of heirs, which means that they will only be eligible to inherit in the event that none of the aforementioned individuals are alive.⁶⁷

i. Gap:

In this proposed Law, it states that if the first class heirs are missing only then the second class heir like: daughter will be able to inherit her father's property. It is clear evident of gender discriminatory. Bangladesh Constitution also states that no discrimination on the basis of religion, sex, caste etc. on the other hand India Family states that male and female will get the equal share of the property.

⁶⁵ Huda, supra note 18 p 42

⁶⁶ The Hindu Law Bill 2006 supra note 161

⁶⁷ Huda, supra note 18 p 43

XVI. INITIATIVE FOR REFORM OF HINDU PERSONAL LAW IN INDIA

- Marriages between people of different castes are now legal.
- The practice of polygamy and bigamy has been outlawed, and monogamy has been legalized.
- Under the Indian Penal Code, violating the norm of monogamy is considered a criminal offense, and as such, it is subject to legal repercussions (section 51, 17).
- It is also conceivable for both spouses to agree to have a divorce, at which point the court would issue a decree of divorce after following specific formalities.
- Either party to a marriage may file for a judicial separation on their own will if they feel it is in their best interests.
- It is possible to register a marriage under these circumstances.
- The court is responsible for making a decision regarding custody of the children both while legal processes are still ongoing and after a decree has been issued, with the best interests of the children serving as the primary factor in making that determination.
- When a male Hindu passes away intestate, his son, daughter, widow, and mother are all given equal parts of the property that he leaves behind. There is no longer any differentiation made between male and female heirs; both are now regarded in the same manner.⁶⁸
- Any property that a woman has, regardless of how she came into possession of it or how it was acquired, is to be held in her total ownership. She has complete control over the property and may dispose of it in any way that she sees fit.
- Privilege of adoption, which is a significant part of Hindu law and which was previously only accessible to males, is now open to females as well. This right was formerly only available to males.
- A husband who is prepared to adopt a child but does not have the approval of his

⁶⁸ <https://www.thedailystar.net/law-our-rights/news/hindu-womens-right-inheritance-2159216>

On the other hand, as a result of the historic case of “*Danamma vs. Amar*” in 2018, India has revised its Hindu Inheritance Act, which was passed in 1956. In this particular instance, the Supreme Court of India decided that a daughter had equal property rights with their male counterparts in accordance with the modified Hindu Succession Act, which was passed in 2005.

surviving wife is unable to do so. This applies to either a son or a daughter.

- The natural or testamentary guardian of a minor is required to get authorization from the court before transferring any portion of the minor's immovable property in any manner, including but not limited to sale, mortgage, gift, or exchange.

Legislation in India's first decade following independence changed the Hindu legal system. These acts' changes emphasize women's legal standing. The Indian reforms' real readings are believed to affirm Hindu law's divine essence. This contradicts the belief that the changes violate Hindu law's divine essence.⁶⁹

XVII. FINDINGS AS TO EXISTING LAW

As earlier mentioned that most of the existing laws of Hindu Personal Law in Bangladesh are taken from British era and they did not enact laws in line with the Shastra. That's why it remains discriminatory in nature. Though the Constitution of Bangladesh already mentions that States shall not discriminate against any citizens on some grounds and Women shall have equal rights with men, but in practice there is no Statute in which there is a clear description of rules in line with Shastra. Moreover, Bangladesh is a Dualist Country has to maintain International rules and regulations. Such as: CEDAW, ICESCR, ICCPR etc. Because of the international obligations that Bangladesh has made, it is obligated to guarantee that all weddings are registered, that all parties to a marriage provide their informed permission to the marriage, and that all parties are treated equally with respect to the marriage and its dissolution. Besides that, wherever there is no clear instruction from Shastra Law then the Court can govern that issue considering the Good Conscience, Equity and Justice.⁷⁰

(A) Regarding Challenges

Whereas the Marriage system of Hindu Law is Sacramental in nature, unlike Civil Contract under the Muslim Law. That is why people think that Marriage registration, divorce, adoption, guardianship etc are not possible under the Shastra Law. Moreover, except with the basic part, the detailed part of the Hindu Law has been developed, changed and modified to a great extent irrespective of Dayabhaga and Mitakshara School. Say for example, if anyone asks, through the reference of the Hindu Marriage Act, 1955 (Amendment in 1976), that Hindu Personal Law (as to Divorce) needs to reform in accordance with that

⁶⁹ Alam, *supra* note 03 at p 08

⁷⁰ The Civil Court Act, 1887 Sec 37(2)

law. Then would it be violation of Shastra law? In replying that question **Prof. Menski**⁷¹ already mentions that Shastra Law has mentioned the Divorce policy. But as it's a patriarchal dominant society, they hide that actual truth for their own interest. Moreover, in case of Adoption, many individuals were ignorant of the fact that ladies and orphans are ineligible for adoption. Those who were knowledgeable on the subject indicated that according to Hindu Shastras, sons are required to take part in the fundamental Shraddha rite, and as a result, it is of the utmost significance to have a son. But there is no bar to adopt both male and female children.

(B) Concerning Reformation

Bangladeshi Hindu personal laws need immediate reform. It's obvious. However, how to proceed is a thing, and whether one should be pleased with little improvements like marriage registration or wait until all Hindu family regulations are addressed is debatable. Following the British, the government is unwilling to interfere with minority religious practices. Change would violate Shastra-based law and the Hindu faith, according to opponents. For that reason Mahila Parishad recommends "Uniform Family Code".⁷² Though it is not possible because "every citizen has the right to profess, practice or propagate any religion. Afterwards, though Bangladesh Law Commission⁷³ proposed new rules but it remains with problematic. Only registration of Hindu Marriage Act was passed in 2012 but it remains non obligatory nature.⁷⁴

XVIII. RECOMMENDATIONS

- Existing Laws that are followed or governed in Bangladesh carried from British era fully obsolete and not made in line with the Shastra Law. It is high time to reform the existing laws as to Marriage, Divorce, Adoption, Guardianship, Succession etc immediately.
- To creating awareness among the Hindu religious people that though the Hindu laws are sacramental but progressive realization in relevancy with Shastra and Constitutional direction is also crying need to eradicate gender discrimination from society. As Hindu Laws are the oldest religious law in the World, it develops through the several commentaries, customs irrespective of different schools. It

⁷¹ Menski, supra note 23

⁷² Huda, supra note 18 at p 38

⁷³ The Hindu Law Bill of 2006 drafted by the Bangladesh Law Commission supra note 161

⁷⁴ Huda, supra note 18 at p 38-43

spreads or exists in a scattered way. For easy understanding, Codification of the Shastra law is a crying need to the society.

- Though the Bangladesh Law Commission already proposed few laws but it remains with lots of difficulties and not mentions the reference of Shastra Law. That's why proper reference and eradicate the loopholes of proposed law is needed to be reformed.
- The concerned authority should take the proper steps so that those rules can be implemented immediately.
- If there is any violation of maintain proper Shastra law then there should be enacted punishment system.
- If there is any conflict situation or dissimilarities, for codification laws from shastra, between the verses of Smriti shastra then it can be sorted out through the conscience, logical arguments and discussion.

XIX. CONCLUSION

To the end of the chapter, from the above discussion it can be summed up in a way that since Hindu Law is the most ancient Law in the world, it deviates, changes or modifies immensely. Different schools are explained it in a different way except with basic instruments. It modifies through the commentaries and customs. In our society there are few people especially big guns who interpret the rules and regulation in regard to their own interest. In these circumstances, Law Commission proposed new rules and regulations in 2006 but cannot able to implement. Though it remains few problematic but not in engaged with gender biasness. As Bangladesh is a dualist country so whenever they enact any law should concern with International obligations. For easy understanding of the common people the concerned authority should codify new rules and regulations with proper reference with Shastra Law and keep in mind with International Obligations.
