A COMPARATIVE STUDY ON HINDU LAW BETWEEN BANGLADESH AND INDIA

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Abstract: Concern for Hindus in Bangladesh is a relatively recent phenomenon, though not widely discussed. The Hindu laws in Bangladesh, where most of the people are Muslims, are not reformed because of the politicization of religion while radical changes have been brought in India in response to the changing trends of society, where the majority of the population is Hindus. In fact, it is difficult to bring reforms to laws affecting the majority of the population of a country, it is impossible to do so in case of minorities. This happens in Bangladesh. This article demonstrates the laws that apply in Bangladesh and at the same time shows the reforms that made in India. This article also emphasizes on the laws that affect Hindu women and that safeguard and sustain the patriarchal system of the society.

Introduction
This article presents a brief discussion on particular personal law relating to Hindu women in Bangladesh. Comparative reference is made to the law applicable to Indian Hindu women. The article shows that the laws enacted during the colonial period are still applicable to the Hindus of Bangladesh and were never revised in the post independence period while at the same time comparing the reforms made in India. It also tells that in Bangladesh matters such as, divorce, marriage, maintenance, custody, adoption and so forth are governed by Muslim law for Muslims and by Hindu law for Hindus. The same rule applies in the case of other religions because there is no uniform family or personal law. Because of the lack of “uniform family code” there is a chance of discrimination between Muslims and Hindus in Bangladesh and in reality we observe this discrimination affects Hindu women in their socio-economic life. The CEDAW Committee raises concern on this issue and always urges the Govt. to take appropriate measures to amend the religion based laws. It is necessary to mention here that Bangladesh ratified the “United Nations Convention of the Elimination of All Forms of Discrimination Against Women (UNCEDAW)” in 1984 with reservation to four important articles and in September 2000 Bangladesh became the first country to ratify the Optional Protocol to CEDAW which ensures the implementation of the tools to eradicate discrimination. But maintaining such reservation to the very pledge to eradicate such discrimination is therefore, contradictory and makes the sincerity of the state to remove gender discrimination questionable.

In fact, Hindu Women in Bangladesh suffer due to the presence of ancient shastric law and the absence of “uniform family code”. Practically there is a long time demand for the introduction of a “uniform family code” which may be applicable to all communities of Bangladesh irrespective of religion. The reasons behind the non-introduction of such a Code may be the probable negative impact on Muslim religious sentiment, the possibility of loosing the vote bank and strong opposition from the religion based political parties and have restrained any Govt. to pursue the adoption of such a law. In this regard it has to be mentioned that the situation of Muslim women in Bangladesh is widely discussed while at the same time the circumstances of Hindu women in Bangladesh are not subjected to the same amount of scrutiny. This article tries to critique the Hindu law as it is applied in Bangladesh while at the same time comparing the reforms effected in India.

According to the modern definition, Hinduism is the predominant religious, philosophical and cultural system of the Indian subcontinent and the island of Bali (Indonesia) and a Hindu is one who is an adherent of philosophies and scriptures of Hinduism. It is necessary to mention here that these philosophies and scriptures play a guideline in the case of sources of Hindu law. We know that the primary sources of Hindu law are the
Dharma and the Srutis (that is, that which was heard) or the Veda, the Smriti (that is, that which was recollected or remembered by the rishis), commentaries and custom. These sources remain mainly uncodified. Besides the uncodified sources, there are codified sources which include legislative enactments and precedents.

Codification of Hindu law, which is applicable to Bangladeshi Hindus, was done during the British period. These include:
- the "Racial Inability Remission Act, 1850",
- the "Hindu Widow's Remarriage Act, 1856",
- the "Sati Regulation, 1829",
- the "Child Marriage Restraint Act, 1929",
- the "Earned Property Affairs Act, 1930",
- the "Inheritance Act, 1925",
- the "Hindu Women's Right to Property Act, 1937",
- the "Hindu Women's Right to Separate Residence and Maintenance Act, 1946".

The mentioned laws remained in force after partition in 1947 and no legislative changes had been made in the then Pakistan and the same trend still continues after the independence of Bangladesh. Except the above enactments in all other cases the ancient Shastric law, which is based on scriptures and philosophies and which arises out of the ancient and primary sources of Hindu law, applies in Bangladesh.

On the other hand, our neighboring country has come out from these ancient Shastric scripture based laws and passed several enactments for the protection and promotion of Hindus. These enactments are:
- the "Hindu Marriage Act, 1955",
- the "Immature Children's Property Act, 1956",
- the "Hindu Minority and Guardianship Act, 1956",
- the "Hindu Adoptions and Maintenance Act, 1956",
- the "Hindu Succession Act, 1956",
- the "Special Marriage Act, 1960".

Now I like to refer and analyze some key factors such as, marriage, adoption, maintenance, divorce etc. as are applied in Bangladesh and afterwards compare it with the reforms that made in India in the following:

**Hindu marriage-Sacrament or a contract:** In accordance with the ancient and Bangladeshi Hindu law, Hindu marriage is a sacrament and it is the last of the ten sacraments for men and perhaps the only sacrament for females. It is not a contract. We know that the important element of a contract is that the parties must have attained the age of majority and make agreement between themselves. But this is not the case in a Shastric Hindu marriage. Marriage of Hindu children was brought about by their parents and the minority of a child was not a bar to his or her marriage. So a Hindu marriage can't be regarded as a contract, as there is no dissolution of such marriage. But in some cases it may be likened to a contract such as, though Hindu marriage in respect of Bangladesh is treated as a sacrament but it does not approve any marriage with any lunatic person or any marriage conducted with force or fraud. In this point it is similar to a contract (14Mad.316; 22 Bom.312).

On the other hand, in India after the passing of the "Hindu Marriage Act, 1955", Hindu marriage is now like a civil contract. Because it is now a condition of marriage that the bridegroom must have completed the age of 18 years and the bride 16 years. Besides that, Hindu marriage is now a civil contract in the sense that after the passing of the Act either the husband or the wife has the opportunity to get the marriage dissolved.

So, radical changes have been brought in India as regards Hindu marriage. But the eternal tradition regarding the one has still been kept in Bangladesh.

**Requirements for the validity of Hindu marriage:** Before beginning the discussion on the requirements which are necessary for the validity of Hindu marriage in Bangladesh, I
want to refer the requirements of Hindu marriage in India at first and then I will go to the former (Bangladesh) and afterwards I will compare between the two.

The “Hindu Marriage Act, 1955” provides certain conditions of a Hindu marriage. According to the Act, a marriage to be valid has to fulfill the following conditions:

Neither party should have a spouse living at the time of marriage. The spouse does not include a divorced husband or wife.

At the time of marriage, the parties should be capable of giving a valid consent to the marriage. A person who is of a sound mind shall be considered to be a person capable to give a valid consent. Neither party, though capable of giving a valid consent should be suffering from mental disorder of such kind or to such an extent as to be unfit for marriage and procreation of children. Neither party should be suffering from recurrent attacks of insanity or epilepsy.

The bridegroom should have attained the age of 21 years and the bride 18 years at the time of marriage.

The parties should not be within the degrees of prohibited relationships unless the customs or usage permits such a marriage.

The following persons are said to be within the degrees of prohibited relationships:

If one is a lineal ascendant of the other. For example, a daughter can’t marry her father or grandfather. Similarly a mother can’t marry her son or grandson.

If one was the wife or husband of a lineal ascendant or descendant of the other. For example, a son can’t marry his stepmother. Similarly a person can’t marry his daughter-in-law or son-in-law.

If one was the wife of the brother or of the father’s or mother’s brother or the grandfather’s or grandmother’s brother of the other.

If the two are brother and sister, uncle and niece, aunt and nephew or children of brother and sister of two brothers or two sisters.

The parties are not sapindas of each other, unless the customs or usage governing each of them permits of a marriage between the two. A sapindas relationship with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother and the fifth (inclusive) in the line of ascent through the father.

In plain words, a person can’t marry up to his second cousin from the mother’s side and up to his fourth cousin from the side of the father. It is also necessary to say that the parties should not be sapindas of each other from either side.

In case, either party has a spouse living at the time of marriage, within the degree of prohibited relationship and are sapindas of each other, the marriage between the parties shall be null and void.

So the above conditions are necessary to prove the eligibility of an Indian Hindu marriage. Now I will discuss the requirements through some points that are necessary for the validity of a Bangladeshi Hindu marriage and afterwards compare them with the above reforms that made in India.

Age of Marriage

There is no minimum age of marriage according to the Shastric Hindu law. A marriage during the minority of either party is not invalid. It is mentionable that in Bangladesh the “Majority Act, 1875” does not apply to Hindu marriage. Again the “Child Marriage Restraint Act, 1929” restraints the solemnization of marriages between children male under 18 years and female under 15 years. But This Act does not affect the validity of such
Hindu marriage. In Bangladesh the “Child Marriage Restraint Act, 1929” has been amended by Ordinance in 1989. So minimum ages of marriage are 21 for men and 18 for women. The legislation provides penal sanctions for those who knowingly participate in the contracting of an under age marriage but does not invalidate such marriages. This Ordinance applies Hindus as well as Muslims. But in India under the “Hindu Marriage Act, 1955” it is now a condition of marriage that the bridegroom must have completed the age of 21 years and the bride 16 years and in this way this Act has removed the ancient concept regarding marriage and given an opportunity to achieve the status of a civil contract.

Capacity and Consent

Mayne, John D. in his “Treatise on Hindu Law and Usage” has told as regards the capacity and consent of an ancient Hindu marriage. According to him, “the primary purpose of a Hindu marriage is the begetting of a son who has the capacity to confer spiritual benefit upon the deceased father at the sraddha or funeral ceremony. Therefore physical capacity is essential. As regards mental capacity since the Hindu marriage is a sacrament and not a contract a consenting mind is unnecessary and its absence whether from infancy or incapacity is immaterial”.

Though Mayne, John D. in his Treatise considered mental capacity unnecessary but in several decisions mental capacity has got preference. In “38 Cal. 700” it was held that marriage of a lunatic is not valid. That means, a lunatic is incapable to get married but his incapacity depends upon his degree of lunacy. But if the bridegroom is capable to understand and perform the necessary formalities of a marriage, then in such a case he will be able to get married and his marriage will be valid. Again a marriage won’t be invalid due to idiocy. But if the bridegroom losses his complete reason, then he can’t take the bride and his marriage will be illegal. It is astonishing that under the ancient Hindu law, an impotent person is qualified to get married but at present it is considered that a marriage with impotent person is a nullity.

These rules as regards capacity prevail in Bangladesh and no change has been taken. In fact, the ancient Hindu law does not give much importance on the physical or mental capacity of the bridegroom or the bride. The ancient Hindu law permits child marriages even when the parties are not physically or mentally fit to get married.

On the other hand, radical changes have been taken in India after the passing of the “Hindu Marriage Act, 1955” as regards the physical or mental capacity of the parties to the marriage. I have already mentioned that it is now a condition of Indian Hindu marriage that the bridegroom must have completed the age of 21 years and the bride 18 years. This ensures the physical capacity of both the parties and stops early marriage. The Act fixes the age of marriage and in this way it prepares the bridegroom and the bride mentally, psychologically, emotionally or physically for their conjugal life. So the necessity of physical capacity in the question of Indian Hindu marriage is strongly emphasized and in order to understand how far physical capacity is needed in case of marriage, I want to tell something about the devastating effects of an early marriage. We know that in most cases girls are married at an early age in comparison with the boys and for this reason I will mention here the strongly bad effects of an early marriage upon a girl child.

Underage married girls usually suffer from much health related problems because of the sexual intercourse in their conjugal life. Apart from this they give birth to weak and underdeveloped offspring because the bodies of girls under 18 are not fully developed. The amniotic fluid needed for the survival and growth of the fetus might not be mature enough and the underdeveloped uterus can’t provide a full protection shield. Similarly because of the cervical dilation (lack of elasticity in the cervix), the child may suffocate to death at the time of birth. In fact, pregnancy related complications are the main cause of death in 15-19 year old girls world wide. According to an article titled “Gender Discrimination Across the Life Cycle” of the State of World’s Children 2007, UNICEF published in the Daily Star.
dated 6th January, 2007, “an estimated 14 million girls between 15-19 years old give birth every year. If a mother is under 18 her baby’s chances of dying in the first year of life is 60 percent greater that that of a baby born to a mother over 19. Babies born to mothers under 18 are more likely to suffer from low birth weight, under nutrition and delayed physical and cognitive development.”

Again if we keep our mind on the mental capacity of the parties, then we see that the “Hindu Marriage Act, 1955” requires the sound mind of both the parties who must give valid consent. The parties who have sound mind can only give valid consent. Besides that, any person may be capable of giving a valid consent but if he or she is suffering from mental disorder of such kind or to such an extent as to be unfit for marriage and procreation of children, then he or she can’t be a party of the marriage. Again a person can’t be a party of the marriage if he is suffering from recurrent attacks of insanity or epilepsy.

So we see that the Act considers a person suffering from any kind of mental disorder (in most which is severe) as unfit for marriage. That’s why mental capacity is needed for marriage. We know that a person attains his mental capacity at a certain age and before that age if he gets married, that will effect on the attainment of his mental capacity. Now I will mention here how the early marriage affects a girl in case of attainment of mental capacity. I have already mentioned that girls are married at an early age in comparison with the boys and for this reason I want to discuss here the consequences of an underage marriage upon a girl as regards mental capacity.

An early marriage robs an opportunity of starting or continuing her education and deprives her of any possibility to develop her own personality and potentiality. Once married, she is expected to get into the multiple roles of a good wife, perfect daughter-in-law, diligent house-keeper and responsible mother. This transition can be psychologically and emotionally stressful for an underage girl.

Now we may come to the consenting mind of the parties to the marriage. Though the Shastric Hindu law which prevails in Bangladesh considers the consenting mind of the parties to the marriage unnecessary, but the “Hindu Marriage Act, 1955” requires the valid consent of both the parties. That means, it is now a condition of Indian Hindu marriage that the parties must have consent to the marriage.

Though we find a difference between Bangladeshi and Indian law as regards the necessity of consent to the marriage, both the countries are agreed in one point. That is, if the consent is obtained by fraud or force, then the marriage is invalid. In (14Mad.316;22Bom.312) it was held that just as a contract is vitiated by fraud or force, so marriage brought about by fraud or force is altogether invalid. In the absence of Bangladeshi case laws in this regard, I will refer and discuss 2 Indian cases in brief in the following:

Tapan Ranjan Das vs. Smt. Jolly Das (1990 AIR Calcutta 353)

In this case the plaintiff respondent, Jolly Das made an application under section-25 of the “Special Marriage Act, 1954” to the Additional District Judge for a declaration of nullity of marriage to the appellant, Tapan Ranjan Das, who had been her music instructor. The Additional District Judge declared the marriage between jolly Das and the appellant, Tapan Ranjan Das null and void upholding her claims that Tapan Ranjan Das had exercised fraud and through coercion and inducement, had made her sign blank forms, which he had told her were required to obtain an audition for a radio programme, although in fact they were marriage registration forms.

The Calcutta High Court allowed Mr. Tapan’s appeal on the following ground:

Incidental music assistance or instruction provided by the appellant to the respondent, who was usually taught by another teacher, did not amount to the establishment of a fiduciary
relationship between the two. Furthermore, there was no cogent and convincing evidence to establish that the appellant in his role as the respondent's teacher exerted any undue influence on her in effecting registration of the marriage.

With respect to the ground of alleged fraud and misrepresentation exercised by the appellant on the respondent in getting her to sign the marriage forms, the contradictory pleadings and evidence demonstrated to the contrary. It was proved that the parties had known each other for a long time, that they decided to marry voluntarily and that the marriage was registered at their instance and arranged between them. Such a marriage could not be declared to be a nullity on the ground of fraud.

In another case, namely, Babui Panmato vs. Ram Agya Singh (1968 AIR Patna 190)

the appellant, Babui Panmato, claimed that upon her becoming sui juris, her father represented to her mother, who acted as agent to her marriage, that a proposed bridegroom was a Youngman, although in fact he was over 60 years old. Babui Panmato, believing her parents representation, consented to the marriage. She later sought the annulment of her marriage under section 12(1)(c) of the "Hindu Marriage Act, 1955".

In allowing the appeal, the court held that:

Although no direct misrepresentation was made to the appellant, the purpose of the talk between her parents was to secure her consent to marriage. By making false statements about the bridegroom's age to her mother, who in the circumstances was acting as her daughter's agent, the appellant's father had suppressed the true facts and made a false representation.

Moreover, the appellant's father actively concealed a fact without his knowledge and acted contrary to the duty he owed to his daughter in view of their relationship. Believing the representation to be true, the appellant raised no objection and hence her consent was obtained by fraudulent misrepresentation.

For section 12(1) of the Hindu Marriage Act to apply, it is not necessary to prove that the consent was obtained by fraud or force at the time of marriage, that is, the ceremony itself. Rather the section only requires that the consent has been obtained by force or fraud before the marriage was solemnized. Thus the present case falls within the ambit of section 12(1) as the fraud occurred prior to the solemnization.

So we see that if the consent is obtained by fraud or force or by fraudulent misrepresentation, then the marriage is invalid and the party affected can avoid it. Otherwise not.

Identity of Caste

Another requirement for the validity of a Bangladeshi Hindu marriage is that the parties must be within the same caste. In Bangladesh there is a bar to marriage between persons belonging to different castes. That means, inter-caste marriage (that is, marriage between persons of different castes) is invalid in Bangladesh and Hindus are barred from marrying out of the particular caste which they belong to. Thus it has been held that a marriage between a Brahmin bridegroom and a Kayastha bride is invalid. But in some parts of Bangladesh inter-caste marriage is allowed. Thus in the district of Chittagong and Comilla a marriage between Vaidiya and Kayastha is valid by custom. Though inter-caste is invalid, but marriage between the same sub-groups of the same caste is not invalid. The "Hindu Marriage Disabilities Removal Act, 1946" provides that a marriage otherwise valid shan't be invalid due to the fact that the parties belonged to the same sub-groups of the same caste. This Act, which applies in Bangladesh, validated sagotra and sapravera marriages.

On the other hand, in India after the passing of the Hindu Marriage Act, the division of Hindus into four castes has been
obsolete. Now in India identity of caste or sub caste for marriage is not necessary and inter caste marriage is allowed. Section 29(2) of the Act declares that marriage solemnized before the commencement of the said Act, shan’t be deemed to be invalid by reason only of the fact that the parties thereto belonged to different castes or divisions of the same caste.

Prohibited Degrees in Marriage and Sapinda Relationship
Another important requirement is that the parties must not be within the prohibited degrees and must not be sapindas of each other. It is regarded by some that the rule of prohibited degrees is based on physiological grounds. That means, if marriage is entered into between near relatives, then that would lead to physical degeneracy of the race. For the prevention of such kind of physical degeneracy of the race and in order to secure healthy offspring Hindu law imposes restrictions by referring prohibited degrees in marriage and sapinda relationship.

It is also thought by some that marriage under Hindu law is restricted to a large number of near relatives for the purpose of retention of joint family system which is usually the normal condition of Hindu society. Under the joint family system a considerable number of people live together in the same household. If marriage is allowed between the near relatives, that will destroy the structure of joint family system. So this is probably the stronger reason for the rule.

Under Hindu law there are two rules as regards the prohibited degrees which are as follows:

A) A man can’t marry a girl of same gotra or pravar (58 ALL1053). This rule does not apply to Sudra as the Sudras have got no gotra of their own. It is necessary to mention here that two persons are sagotra, that is, of the same gotra or family, if both of them are descendants in the male line from the Rishi or sage after whose name he is called, however distant either of them may be from the common ancestor and two persons are samana pravara, that is, of the same pravara, if they are descendants in the male line from the 3 paternal ancestors of the founder of a gotra.

We know that there are two main Schools of Hindu law, namely, the Dayabagha and the Mitakshara School. Dayabagha School prevails in Bangladesh and in the Bengal province of India. Except these two, Mitakshara School prevails in other parts of India. So all the matters of Hindu law such as, marriage, divorce, adoption, maintenance etc. under Dayabagha School remain in force in Bangladesh and this is also applicable in case of prohibited degrees. According to Dayabagha School, a man can’t marry a girl if she is within seventh degree in descent from his father or from one of his father’s six ancestors in the male line.

if she is within the fifth degree in descent from his maternal grandfather or from one of his maternal grandfather’s four ancestors in the male line.

if she is within seventh degree in descent from his father’s Bandus or from one of their six ancestors through whom the girl is related to him.

if she is within fifth degree in descent from his mother’s three technical Bandus or from one of their four ancestors through whom the girl is related to him.

Like all other cases prohibited degrees under Mitakshara School are not applicable in Bangladesh. Even then I will mention that here for the purpose of discussion and in order to understand that Bangladesh follows the distinction between the Schools in all the cases.

According to Mitakshara School, a man can’t marry a girl if their common ancestor being traced through his or her father, is not beyond the seventh in the line of ascent from him or her and
if their common ancestor being traced through their mother, is not beyond the fifth in the line of ascent from her.

B) A man can’t marry a girl who is sapinda and two schools are agreed with this. But there is a difference between two schools as to who are sapindas for marriage:

1) According to Dayabagha or Bengal School, a man can’t marry a girl-

a) if she is within seventh degree in descent from his father or from one of his father’s six ancestors in the male line.

b) if she is within fifth degree in descent from his maternal grandfather or from one of his maternal grandfather’s four ancestors in the male line.

c) if she is within seventh degree in descent from his father’s three technical Bandus or from one of their six ancestors through whom the girl is related to him.

d) if she is within fifth degree in descent from his mother’s three technical Bandus or from one of their four ancestors through whom the girl is related to him.

A girl though related within the degrees mentioned above may be taken in marriage if she is removed by three gotras from him.

2) According to Mitakshara School, a man can’t marry a girl-if their common ancestor, being traced through his or her father is not beyond the seventh in the line of ascent from him or her, or if their common ancestor being traced through their mothers, is not beyond the fifth in the line of ascent from him or her.

So we see that Bangladesh follows the distinction between the Dayabagha and Mitakshara School as regards the prohibited degrees of relationship like all other cases. But in India after the passing of the “Hindu Marriage Act, 1955” the difference between these two schools as regards the prohibited degrees of relationship for the purpose of marriage is abolished. This Act curtails the ancient degrees of prohibited relationship and sapinda relationship and prescribes the aforesaid four types of prohibited degrees of relationship and also enacts (aforesaid) sapinda relationship.

**Divorce**

For the Hindus the marital bond is unbreakable. The sacramental marriage amongst Hindus has three characteristics:

- It is a permanent and indissoluble union,
- it is an eternal union,
- it is a holy union.

Ancient Hindu law does not allow dissolution of marriage however painful cohabitation may be. However, in some communities divorce is allowed by custom and the courts enforced such custom provided they fulfilled the requisites of a valid custom (Sankaralingam Vs Subban 1894ILR17Mad.479).

So practically divorce is unknown to Hindu law. Change of religion or loss of caste or the adultery of either party or the fact of wife deserting her husband and becoming a prostitute does not operate as dissolution of marriage. It is to be noted that there are cases in which Hindu law allows separation or desertion. But it can’t have the effect like divorce or dissolution of marriage tie completely. Besides, unsoundness of mind of either party for a number of years or suffering from any virulent or incurable form of disease or renouncement of the world would not be a ground for divorce. But divorce can’t be claimed only on the ground of custom.

Since Bangladesh predominantly follows Shastric Hindu law, divorce is also not permitted here and in reality many Hindu women in Bangladesh lead lives of abject misery in case of
abandonment by the husband who can marry as many times as he wishes.

An article titled “Suffering for Absence of Marriage Registration”- was published on June 27 2004 in the Daily Star by Shanchita Sharma. In that article Shanchita Sharma presented a fact of a Hindu woman of Bangladesh who suffered for absence of divorce provision. The fact was about Minati Karmakar. She suffered at her husband’s house for inability to bring dowry. Minati’s husband tortured her, as she could not bring dowry money for him. Being Fed up, one day she left her husband’s house and returned to her parents. But even after this her husband did not give her the scope to be free from his torture and the harassment was too much for her to bear. In this situation Minati wanted to terminate the marriage. She went to court and found herself surprised when she came to know that the existing Hindu law of Bangladesh could not help her through divorce.

This is no exception. It happens to thousands of Hindu women in Bangladesh. As per “Hindu Women’s Right to Separate Residence and Maintenance Act, 1946” Hindu women can file cases with courts to only regain the rights to conjugal life. But they can’t ask for divorce. They have limited scopes to ask for separation. But they can neither divorce nor remarry. Besides, Hindu women can file cases under the “Family Courts Ordinance, 1985”, “Dowry Act, 1980” and “Women and Children Repression Act, 2003”. But these laws are too inadequate to protect the Hindu women’s rights in this regard. While arguing on the necessity of inserting divorce provision President of “Bangladesh Metropolitan City Universal Puja Committee” Swapan Shaha says: “There should be laws to guide Hindu marriage, including rights to divorce because Hindu women are sometimes forced to leave their husbands houses. In such a case, a woman should be able to obtain legal divorce and take another husband”. So like the Shastric Hindu law, divorce is not allowed in Bangladesh. But as per a 1946 law, a Hindu woman may institute a suit for restitution of conjugal rights and Hindu couples can become separated when marital adjustment is not possible.

Though Bangladesh has not yet come out of ancient Hindu law which does not permit divorce, but in India after the passing of the “Hindu Marriage Act, 1955” the changes which have come give both parties to the marriage the right to go to court for dissolution of marriage. This Act also grants the wife additional grounds for dissolution of marriage. Under section-13 of the Indian Act of 1955, either husband or wife may seek divorce on grounds of cruelty, adultery, desertion, insanity or incurable disease and so forth. Besides, section-12 of the Act provides that marriages may be voidable and may be annulled by a decree of nullity on grounds of impotency of the respondent. Like the traditional concept of option of puberty for the Muslims recognized by section-2(7) of the “Dissolution of Muslim Marriage Act, 1939”, the Indian Act of 1955 by Section-13(2)(4) provides that Hindu wife may petition for dissolution of her marriage on the ground that her marriage (whether consummated or not) was solemnized before she attained the age of 15 years and she has repudiated the marriage after attaining that age but before attaining the age of 18 years.

So in India divorce is allowed under the “Hindu Marriage Act, 1955”. The Act specifies several grounds for divorce but it is not mentioned whether “irretrievable breakdown of marriage” is a ground for divorce or not and the question arose in a case between Kanpur Industrialist Naveen Kohli and Neelu.

While awarding Rs.25 lakh as permanent maintenance to Mrs. Neelu, including Rs.5 lakh awarded to her by the trial court, with interest, a three judge Bench of Mr. Justice Dalveer Bhandari said, “because of the change of circumstances and for covering a large number of cases where the marriages are virtually dead and unless this concept is pressed into service, divorce can’t be granted”. The Bench also said, “ultimately it is for the legislature whether to include irretrievable breakdown of marriage as a ground for divorce or not but in our considered
opinion the legislature must consider irretrievable breakdown as a ground for grant of divorce under the “Hindu Marriage Act”. The Bench also referred to the law Commission’s 1978 report, recommending inclusion of this as a valid reason for the dissolution of marriages, saying “we deem it appropriate to recapitulate the recommendation extensively”. After this case “irretrievable breakdown of marriage” is regarded as a ground for divorce, though it is not mentioned in the Act of 1955.

In fine we can say that the reforms that have come in India as regards divorce able to fulfill the demands of a modern democratic society but Bangladesh on the other hand fails to do so.

6. Polygamy: In Bangladesh a Hindu male may marry any number of wives though he has a wife or wives living. But only one husband at a time is allowed under the Bangladeshi Hindu law for Hindu women. So polygamy is permitted for Hindu men while polyandry is prohibited.

A Hindu man in Bangladesh wishing to marry during the subsistence of his marriage faces no restrictions. This means that a woman can’t in most cases restrict her husband who wants another wife and this is also almost impossible when the woman is always financially dependent on the husband and in such cases must acquiesce to his demands, however unreasonable.

In fact, the situation of Bangladeshi Hindu women is very depriving because on the one hand a woman has little recourse in case of her husband wanting another wife and on the other hand divorce is not allowed. If the husband marries again, the previous wife can’t ask for divorce. She can ask for separation if the marital adjustment is not possible. If she is forced to leave her husband’s house, she can sue for the restitution of conjugal rights. But in most cases a wife does not seek the above methods rather she lives with her husband within abject misery.

But in India after the passing of the “Hindu Marriage Act, 1955”, it is now a condition of marriage that the bridegroom must not have another wife living at the time of marriage. So by virtue of this Act monogamy has been established and bigamy is punishable both for the male and female. Section-5 (1) of the Indian Hindu Marriage Act thus prohibits not only polyandry but also polygamy. Section-11 of the Act makes a bigamous marriage null and void and section-17 makes it a penal offence for both Hindu males and females under sections-494 and 495 of the Indian Penal Code.

Ceremonies

Another essential of a Hindu marriage in Bangladesh is that the prescribed ceremonies have to be performed. The main ceremonies are:

Viva homa, that is, invocation before the sacred fire and

Saptapadi, that is, the taking of the seven steps before the sacred fire by the bride and the bridegroom.

There are two important cases as regards ceremonies and rites of a Hindu marriage. If we discuss these two cases we can clear our idea.

In Utpal Kanti Das Vs Monju Rani Das (50DLR AD 1998 47) both parties belonged to the Shusdra caste of the Hindu community. Monju claimed they married at a Hindu temple according to the Hindu Shastra in the presence of several persons and then later swore an affidavit together before a First class Magistrate confirming the marriage. However, Utpal later abandoned her and remarried, after she refused to accede to dowry demands. Monju claimed maintenance in the Family Court.

The Court Held

It has been contested that the marriage is bad in law because the two essential ceremonies of Hindu marriage, namely, a)
saptapadi and b) invocation before the sacred fire had not been performed. The findings in the lower courts neither denied that these rites had been performed nor positively affirmed the contrary. But what the final court of fact, the lower Appellate Court and the High Court Division found was that there was a marriage ceremony between the parties in the temple of the deity Kali in presence of many persons and that garlands had been exchanged.

There are a number of various and complicated nuptial rites in Hindu Shastra in addition to the two mentioned above. An exact observance of their details is not easy and is beyond the comprehension of the ordinary participants of the ceremony. But once the celebration of a marriage in fact is established, there shall be a presumption of there being a marriage in law and observance of the essential ceremonies.

In the present case there was evidence on record to show that the marriage between the parties had taken place and that they lived together as husband and wife. This evidence was the testimony of the witnesses, the affidavit and even the married appearance of the woman.

As marriage in fact has been proved, marriage in law must be presumed. In the absence of any evidence to the contrary, it is amply proved that the plaintiff and the defendant were married according to the Hindu Shastra.

So the rulings given by the court consider a marriage as bad in law because of the absence of the two essential ceremonies namely, viva homa and saptapadi, but this case also gives importance on other ceremonies of the marriage. This case also thinks that a Hindu marriage has various and complicated nuptial rituals and an exact observance and comprehension of their details is not easy by the ordinary participants. For this reason in the absence of two essential ceremonies the Court recognized the marriage as valid on the presence of other ceremonies. The Court found that there was a marriage ceremony between the parties in the temple of the deity Kali in presence of many persons and that garlands had been exchanged. In this case the Court did not only rely on this ceremony. The Court also relied on other evidence. The evidence was the testimony of the witnesses, the affidavit and even the married appearance of the woman. It was held by this case that once the fact of marriage is established, there is the presumption of valid marriage. Minor variations don’t render the marriage invalid.

In Amulya Chandra Modak Vs State (35 DLR 1983 160) the appellant, Amulya Chandra Modak, asked a young female neighbor to live at his house to look after his ailing mother. Without his parent’s knowledge, he promised to marry her ceremonially at a later stage and started co-habiting with her. When she became pregnant and his parents refused to approve of their marriage, he refused to marry her. The woman’s father filed a complaint with the Magistrate and Amulya was convicted under section-493 Penal Code. He appealed denying the marriage.

In allowing the appeal and acquitting the appellant, the Court held that:

Even if the story of garland exchange was true, the two essential ceremonies of Hindu marriage, namely, a) invocation before the sacred fire and b) saptapadi had not been performed. It is also customary among Bangladeshi Hindus that some relations on both sides are present and the bride anoints and dresses herself for the occasion. A young woman of 17-18 years was expected to know these and that there could not be a valid Hindu marriage without the invocation before fire and saptapadi and therefore the accused can’t be held to have led her to believe that she was lawfully married to him.

In the circumstances it is likely that the couple had voluntary sexual intercourse in their youthful exuberance and that the woman realizing the serious consequences of her folly, introduced the story of exchange of garlands and started the case against the appellant to put pressure on him to marry her. The prosecution had not been able to prove that by practicing deception
the accused appellant created a belief in the mind of the woman that she was lawfully married to him and that in pursuance of that belief she had allowed him to co-habit with her.

A mere promise of marriage made by the accused does not warrant a conclusion that a false belief was caused in the mind of woman that she was lawfully married to the promisor.

This case has very specifically established that viva homa and saptapadi must be performed for the validity of a Hindu marriage. Otherwise the marriage is void. It is necessary to mention here that in the former case these two ceremonies were not performed but even then the court recognized the marriage on the presence of other marriage ceremonies. Besides the ceremonies, the court also relied on the other evidence on record and this has helped the court to presume the existence of marriage. But in the later case the two ceremonies were not performed, there was also no evidence of performance of other ceremonies and there was no other evidence on record on which the Court could presume the existence of marriage. For this reason the Court in the later case said that there was no marriage at all.

There are various shortcomings in the Bangladeshi Hindu law. But as regards ceremonies and rites the Bangladeshi Hindu law goes one step further by fixing the two essential ceremonies for the validity of marriage and these cures the confusion as regards ceremonies. On the other hand, in India the “Hindu Marriage Act, 1955” prescribes no particular form of ceremonies for the validity of marriage.

**Proof of marriage:** In Bangladesh Hindu marriages are solemnized merely through some religious rituals. There is no marriage registration system for Hindu people in Bangladesh. It is surprising that there is also no Hindu marriage law or Hindu marriage register in the country. So when the Hindu women want to come out of bad marriages they are in trouble because there is no marriage registration system in the Hindu society in Bangladesh.

In an article titled “Suffering for Absence of Marriage Registration” (June 27, 2004, the Daily Star) Shanchita Sharma, studied the case of Kazali Rani Das. Kazali Rani Das works as a day laborer at her village. Her neighbor Sanjoy Madhu lured Kazali with a marriage proposal and convicted her. Then they got married and began their conjugal life at the house of Kazali’s parents. Before long, Kazali became pregnant and Sanjoy was asked to take Kazali to his own house. Her trouble begins here. It did take long for Kazali to understand that she had fallen into a trap. Sanjoy delayed to take Kazali to his house by making false excuses and later disclaimed this marriage with her. Kazali is now too helpless to express her plight. Society does not want to believe what she says. She has no official document, as her marriage was not registered.

Such kind of incident happens to Hindu women in Bangladesh very frequently and the only remedy of this is the inclusion of marriage registration. Various persons comment on the necessity of marriage registration and if we observe those, then we can understand how much marriage registration is needed for Hindu women in Bangladesh.

Hindu Religionist and Professor of Culture and Pali Department of Dhaka University Dr. Niranjan Odhikari say, “Marriage registration is as necessary as the baby’s birth registration. It will be helpful if Parliament makes laws in this regard” (Suffering for Absence of Marriage Registration, Shanchita Sharma, the Daily Star, June 27, 2004).

Organizing Secretary of Bangladesh Mohila Parisad Rakhi Das Purkaistha says, “Marriage registration is a legal right of women. Marriage registration needs to be obligatory to all people irrespective of religion, caste and creed because marriage registration does not disregard religion”
A Hindu woman social worker, preferring anonymity, regrets, “People in our country only think of the society. They forget that marriage registration is a right of women”.

While telling about marriage registration Advocate Nina Goswami says, “In fact, Hindu women have no right in our country. But we have nothing to do”.

But leaders of Hindu, Buddhist, Christian Oikya Parisad have different views. They think marriage registration is unnecessary for Hindu people. They think Hindu boys believe in single marriage and the number of those who go for polygamy is very few. The leaders say Hindu women will be repressed more if marriage registration and divorce laws are enacted.

I think the comment is illogical, very harsh for women and undemocratic in the modern society.

In India the “Hindu Marriage Act, 1955” provides for registration of marriages. But lack of registration does not affect the validity of the marriage.

**Widow remarriage:** In Bangladesh remarriage of widow is permitted by the “Hindu Widow’s Remarriage Act, 1856”. According to this Act, no religious ceremonies are necessary in the case of marriage of widow. Again if a widow marries for the second time, she can’t retain the property of her previous husband (Nurunnabi Vs Joynal Abedin 1977 29 DLR SC 137). Even if custom allows, a Hindu widow by such remarriage forfeits her right to her deceased husband’s property (Sowdamini Ray Malakar Vs Narendra Ch. Barmau 1952 4 DLR 492).

The same situation prevails in India. The Act of 1856 also applies there and under this Act there is no necessity of observing religious ceremonies in the case of marriage of widow. Besides, the provisions relating to property of a widow who marries again are also same.

Though the provisions relating to widow remarriage are the same in the two countries, but India goes one step ahead than Bangladesh because by the passing of the “Hindu Marriage Act, 1955” India makes no distinction between marriage of a maiden and that of a widow. As a result marriage of a widow has given preference like marriage of a maiden.

**Maintenance:** A Hindu husband has the personal obligation to maintain his wife, minor children and aged parents. This obligation does not depend on the possession of property, ancestral or otherwise. I have already mentioned that divorce is unknown to Hindu law in Bangladesh. So the question of post divorce maintenance does not arise. However, a Hindu wife in Bangladesh under some specific grounds can live separate from her husband and be entitled to maintenance. Under the “Hindu Women’s Right to Separate Residence and Maintenance Act, 1946” as applied in Bangladesh a married Hindu woman may seek separation and the husband is under responsibility to maintain her if she can prove that her husband is suffering from some loathsome disease not contracted from her or is guilty of cruelty which renders it unsafe or undesirable for her to live with him or deserts or abandons her or marries again or converts to another religion or keeps a concubine or for any other justifiable cause.

So under the Act a Hindu wife can institute a suit in the Family Court for maintenance against the husband (Nirmal Kanti Das Vs Sreemati Biva Rani 47 DLR HCD 514). In this regard I like to refer a case here in brief for the convenience of discussion as regards maintenance.

In “Ponchon Rikssi Das Vs Khuku Rani Das” (50 DLR 1998 47) the petitioner, Ponchon Rikssi Das, married the respondent, Khuku Rani Das under Hindu law, was given dowry by Rani’s father. Ponchon sent Rani to her father’s house and failed to maintain her or the child and married again. Rani filed a suit in the Family Court for maintenance.
In discharging the Rule without any order as to costs, the Court held:

The Hindu Women’s Right to Separate Residence and Maintenance Act of 1946 gave a right to Hindu wives to live in separate houses and to have maintenance. But neither the Hindu Personal law nor the Act provided the forum. The “Family Courts Ordinance, 1985” has now provided the forum. Section-3 of the Ordinance made it available to all citizens irrespective of their faith. The Ordinance is a self contained Code which provides a forum to litigants for enforcing their rights in respect of the five subjects enumerated in section-5.

The “Family Courts Ordinance, 1985” has not in any way curtailed or superseded the personal laws of the subjects. The Ordinance provides only a special forum for speedy and effective disposal of the cases which may be filed before the Family Courts as is evident from section-4 thereof which provides that there shall be as many Family Courts as there are Courts of Asst. Judge and the latter Courts shall be the Family Courts for the purpose of the Ordinance.

Also, after the Ordinance of 1985, the forum for disputes under the “Guardian and Wards Act, 1890” is now the Family Court, while the District Court is the appellate court for such disputes. If section-24 is read along with section-5, it will be very clear that not only Muslims but non Muslims can avail of the forum of the Family Court for settling any dispute arising out of the guardianship and custody of children as that Court has been given exclusive jurisdiction in the matter. This shows clearly that the Ordinance of 1985 is not meant only for Muslims, but applies to all citizens irrespective of religion.

In the light of sections-3, 4, 5 and 27 of the Ordinance of 1985, the Criminal Courts jurisdiction including that of Magistrate’s Courts with respect to awarding maintenance has been ousted except in pending proceedings. After the Ordinance came into force, all matters relating to subjects enumerated in section-5 shall have to be brought before the Family Courts. Therefore the ordinary Criminal Courts have lost jurisdiction to entertain and decide cases that may be filed under section-488 of the Criminal Procedure Code relating to maintenance after the coming into force of the “Family Courts Ordinance, 1985”.

So we see that the Hindu Women’s Right to Separate Residence and Maintenance Act of 1946 as applied in Bangladesh provides for some specific grounds under which a Hindu wife may seek separation and be entitled to maintenance and the Ordinance of 1985 (applicable in Bangladesh) provides for a forum for enforcing such rights. It is necessary to mention here that only a Hindu wife may seek separation and is entitled to maintenance under the Act of 1946.

Now if we keep our mind in India, then we find that under the Hindu Marriage Act of 1955 as applied in India, both parties to the marriage may seek maintenance pendente lite as well as permanent maintenance and alimony. This Act does not define maintenance and it is defined under the Indian Hindu Adoption and Maintenance Act of 1956. Under this Act maintenance is meant as food, clothing, residence, education, medical attendance and treatment (Section-13 (b)(1)). The Act also inserts provisions for civil proceedings to obtain maintenance while section-125 of the Indian Criminal Procedure Code, 1973 makes provisions for summary proceedings to recover maintenance. The above mentioned section of the Act also clarifies that “wife includes a woman who has been divorced by or has obtained a divorce from her husband and has not remarried”. So a destitute divorced wife may be entitled to maintenance until remarriage under the Act.

Now if we compare between the two countries, then we find that in India both parties to the marriage can make an application for maintenance but in Bangladesh only a wife may seek maintenance. Besides in India maintenance and wife are clearly defined and as such there is no chance of confusing but in Bangladesh these are not defined. These are the lacking of the
passing laws. Again in India there are both civil and criminal proceedings for cases regarding maintenance. On the other hand a good change has been brought in Bangladesh and that is the enactment of the Family Courts Ordinance, 1985. This Ordinance provides a special forum for speedy and effective disposal of the cases that may be filed before the Family Courts.

**Property rights:** We know that in ancient society there was no question of inheritance. Then the society was divided into several small gotras. The members of the gotra enjoyed the property equally. In course of time the idea of inheritance has been established and like other religions Hinduism also recognizes the idea. From the viewpoint of morality ancient gotra system is better than that of the latter because in the former society all the humans enjoyed the goods, property equally irrespective of sex. But in Hinduism as applicable in Bangladesh a large number of women are excluded from inheritance. It is argued that Hinduism makes this in the interest of joint Hindu family system or in order to prevent the breakdown of the joint Hindu family system. But in fact the conservative male counterparts of the society have done this for their own interest considering the females as the worst class of society.

Theoretically only five classes of women inherit according to Dayabhaga School of Hindu law. They are according to preference: wife, daughter, mother, father’s mother, and father’s father’s mother. I have already mentioned that women are excluded from inheritance and here I am presenting that they are also entitled to inheritance. The former is correct in the sense that they have only limited rights to the property. Here for the purpose of discussion I want to refer two kinds of property that a Hindu woman may possess:

Stridhan property upon which she has absolute control and she has power to give, sell or use independently and which passes on her death to her heirs.

The property inherited by her and to which she has limited rights. In such a case when a female inherits property whether from a male or a female she only takes a limited estate and on her death the property reverts back to the reversioner, that is, the next heir of the person she had inherited the property from.

So we see that a woman has absolute rights over her stridhan property (Which is acquired by her) and this is her actual property. But when she inherits the property, she takes the property only in life interest. She can sell the property only for limited legal necessity. So in true sense Hindu women that is, wife, daughter, mother, father’s mother and father’s father’s mother are excluded from inheritance and the five are limited heirs of the property.

The estate inherited by a widow from her dead husband is called widow’s estate. Her position is similar to that of a limited heir. Although by law Hindu widows have the right to enjoy their dead husband’s property, but in most cases they are deprived of that. As soon as their husbands died, they are turned into slaves of the family or are driven away from the husband’s houses. An article titled -the “Socio Economic Condition of Disinherited Hindu Widows” written by Ruma Halder was published on 26 March 2005 in the Daily Star. In that article in order to understand the socio economic status of Hindu widows, information has been collected from a number of selected areas inhabited by Hindus. One hundred case studies have been conducted from Shashikor and Lakhsmipur village of Madaripur, Arichaghati and Onmoypur village of Manikganj and Barisal zila sadar. Key findings from the research are regrettable and shameful for the modern society. It has been found that the condition of Hindu women in society is extremely vulnerable. Out of the 100 respondents only 4 were found capable of taking independent decisions on household matters and holding a valued position within the family. The rest of the 96 women were found to be vulnerable, their life uncertain and dependent. Most of them had no property. As soon as their husbands died, they were turned into slaves of the family while others became separated.

Now we can keep our mind on daughter, another limited heir of her father’s property. It is surprising that the daughter is fifth in line to her father’s property. In the absence of a son, son’s
son, son’s son’s son, widows the daughter inherits. Maiden daughters are preferred at first, then preference has been given to a daughter who has a son. Barren widowed daughters or daughters having no son or probability to have no son are excluded from inheritance to their father. So it is astonishing that the importance is placed upon a male offspring.

The above pre-1947 laws regarding succession are still prevailing in Bangladesh. But in India in this regard laws have been framed and amended that have established women’s rights on the property of father and husband and this was seen as a threat to the system of joint Hindu family and thus vehemently opposed. The main enactment as regards succession in India is the “Hindu Succession Act, 1956” and this Act abolished the limited estate of the female Hindu. Now a female Hindu has the right to deal freely with and dispose of in any manner any kinds of property acquired by her. She is now a full owner and not a limited owner of the property acquired by her.

By the 1956 Indian Act the property of a male Hindu devolves in equal shares between his son, daughter, widow and mother. Male and female heirs are now treated as equal without any distinction.

**Adoption:** Adoption is permitted under the Hindu law in Bangladesh. An adopted son is considered to occupy for all purposes the same position as a natural son (Anath Bandhu Guha vs. Sudhangsu Sekhar Dey 31 DLR 1979 312). The aim of adoption under the Shastric Hindu law that applies in Bangladesh is two-fold. The first is religious, that is, to obtain a son able to take part in the funeral ceremonies of the father and the second is secular, that is, to carry on the family name. Under the Shastric Hindu law as applied in Bangladesh, only a male can be adopted and he must belong to the same caste as his adoptive parents and his mother must not be within the prohibited degrees to his adoptive father, that is, he must not be a boy whose mother his adoptive father could not have married. Besides, he should not suffer from any physical infirmity or be an orphan. Under the law only a man can adopt unilaterally. A wife can’t adopt without the consent of her husband if he is alive and able to give such consent. A widow under the Dayabagha School may adopt if her husband gives implied or express consent before he died. Besides that, under this law a maiden can’t adopt.

Though the above Shastric uncodified Hindu law relating to adoption still remains in force in Bangladesh, but in India several changes to the law regarding adoption have been made. Under the “Hindu Adoption and Maintenance Act, 1956” (applicable only in India) the aim of adoption only is secular and this Act gives a woman rights almost equal to that of a man. A married Hindu male can’t adopt without the consent of his wife. A Hindu woman, unmarried, widow or divorcée can adopt but a married woman can’t adopt even with her husband’s permission. The husband must adopt with her consent. The Act reduces the male’s exclusive right of adoption and now under this Act both boys and girls may be adopted. Identity of caste of adoptive parents and children, which was under the Shastric Hindu law, has also been abolished by the Act.

**Conclusion**

So in India radical changes as regards Hindu laws have been made but in Bangladesh the ancient pre-1947 laws have remained in force. The reason behind the changes in India is that the majority of the population in India is Hindus, they themselves demanded changes, the leaders of this community came forward and consequently changes had been made through enacting laws by legislature. But in Bangladesh the issue is avoided as a sensitive minority issue. Even the leaders of this community don’t take any major attempt to address the problem. As there is no attempt to reform Hindu personal law, so one question may arise and that is whether there is any constitutional bar to reform Hindu family law. If we read Articles 10, 19, 27, 28 and 29, we see that there is no such bar in our constitution rather it encourages the Govt. to remove social and economic disparities among the citizens. In fact, free democratic environment is needed for the reforms of Hindu laws. Awami League Presidium
Surajit Sen Gupta says, “Hindu laws need to be reformed in our country. But the free democratic environment that is needed for the reforms has not properly developed yet”. Truly for the creation of a free democratic environment the Govt. and NGOs have to work together. They have to build awareness among the Hindus about the limitations of their personal laws. They have to make them understand that for their own interest reforms in Hindu laws are needed. In our country various matters, such as, sanitary problem, female health etc. are telecasted through media for building awareness. But the problems of Hindu women are not shown. For creating awareness their problems may be brought before them through short film, music etc. When the Hindus themselves were aware, the leaders of this community would come forward, then the reforms would have been made through enactment and only then we will be able to claim our country as a modern democratic society.

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