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"DOUBLE TROUBLE": HINDU WOMEN IN BANGLADESH—A COMPARATIVE STUDY.....

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Introduction

The following article deals with particular personal laws relating to Hindu women in Bangladesh. Comparative reference is made to the law applicable to Bangladeshi Muslim women. Although the focus of the article is on Bangladeshi Hindu women, attempts have been made to analyse the disadvantages faced by women of both religions. The purpose is to present a comparative view of the situation of women belonging to these very different religions in the Bangladeshi context. The article also touches upon legislative reforms affecting Hindu and Muslim Women in Bangladesh while at the same time comparing the reforms made in India.

The situation of Muslim women in Bangladesh and their status under the law is a subject which continues to be widely discussed since the majority of Bangladeshis are Muslim. However, the circumstances of women who belong to the minority religions are not subjected to the same amount of scrutiny. Efforts are made in this article to critique the Hindu law as it is applied in Bangladesh today in view of the wide ranging reforms effected in India.

Protection of minority rights and non-discrimination based on religion is one of the tenets upheld, at least theoretically by all civilised systems of law, as it in Bangladesh. The irony is that this has been construed to mean non-interference with the personal laws of different religions and this has in its turn effectively ensured discrimination of the minority amongst the minority i.e. women belonging to minority religions, specifically in this article, Hindu religion. This discrimination is supported by the patriarchal system of the Hindus as it is in the case of the Muslims. Bhasin

writes that most religions consider women to be inferior, impure and sinful:

> .....inequitous relationships are sanctioned and legitimised by recourse to "religious creeds and fundamental tenets".[1]

Women in Bangladesh, both Muslim and Hindu, suffer due to disparate religious laws which because of politicisation of religion have not been reformed as they ought to have been. Again, while it is difficult to bring reforms to laws affecting the majority of the population of a country, it is close to impossible to do so in the case of minorities and withstand allegations of interference with religion.[2] When it comes to safeguarding the patriarchal system through the use of religion, depriving women becomes the common rallying ground for most religions.

Personal laws: sources and Nature:

There is no uniform law applicable in Bangladesh so far as family or personal matters are concerned. Matters such as divorce, marriage, maintenance, custody, adoption and so forth are determined for Muslims by Muslim law and for Hindus by Hindu law. The same rule applies in the case of other religions.

In the case of Muslims, Bangladeshis belong to the Sunni Hanafi

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1. Bhasin. Kamla (1993) What is Patriarchy; Kali for women; New Delhi. at p.10.

2. In 1985 in the Indian case of Mohammad Ahmed Khan v. Shah Banu [1985 (1) SCALE, p. 767 ; Air 1985 SC 945] the Supreme Court decided in favour of a Muslim womans' right to get maintenance beyond the period of *iddat* based on the Courts interpretation of Islamic law as well as on the basis of Sec. 125 of the Criminal Procedure Code, 1973 applicable in India. In the end the Government had to bow down to the pressure of the orthodox portion of the Indian Muslim community. Muslims women, by virtue of the Muslim Women's (Protection of Rights on Divorce) Act, 1986 were declared to be exempt from Sec. 125 of the Indian Cr. P.C. and her right to maintenance during the period of *iddat* was reiterated. For more on the Shah Banu case see Latifi, Danial (1993). "Women's Rights" ---Paper presented at the International Conference of Lawyers on Changing Scenarios of Human Rights, February 20-21, 1993. New Delhi.

school. Apart from the religious or Shariah law, the main pillars of which are the Quran and the Sunna, sources of Muslim law include several legislative enactments aiming to introduce certain reforms, and judicial precedents.[3]

Hindus in Bangladesh belong to the *Dayabagha* school.[4] Hindu law is considered to be part of the *Dharma* and the *Srutis* (i.e. that which was heard) or the *Veda* are considered to be the original source of Hindu law i.e. the *Dharmashastras*. *Sruti* or the Vedas are of divine origin and the words of God which were passed on to their disciples until such time that they were compiled and put into writing. Since they are superhuman works, they are eternal, faultless and self evident.[5] In significant contrast to Islamic law. this process of revelation is not from one identified God to his Prophet, but from an unknown God or Great Power.[6] The Code of Manu is considered to be the most authoritative.

After the *Smruti* comes the Smriti i.e. that which was remembered

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3. For more on the sources of Muslim Law see, among many others, the following

   Ali, Syed Ameer (1929). *Mahommedan Law;* Thacker, Spink and Co., Calcutta;

   Baillie, Neil B.E. (1875). *A Digest of Moohummudan Law,* part I the Doctrines of the Hanifeea Code of jurisprudence, 2nd edition; Smith, Elder and Co., London.

   Fyzee, Asaf A.A. (1964). *Outlines of Muhammadan Law;* Oxford University Press, London.

   Macnaghten, W.H. (1825). *Principles and Precedents of Moohummudan Law;* Calcutta.

4. There are two main schools of Hindu law -- the Dayabagha and the Mitakshara. The Dayabagha school, also known as the Bengal school, prevails in Bangladesh. The major difference between the two schools are as regards principles of inheritance and the joint family.

5. Nagpal, Ramesh Chandra (1983). *Modern Hindu Law;* Eastern Book Company, Lucknow at p.23

6. Rakshit, Mridulkanti Sree (1985) *The Principles of Hindu Law-- the personal laws of Hindus in Pakistan and Bangladesh;* Sree, Mrinalkanti Rakshit, Chittagong at p.8.

by the *rishis*. Thus the basis of *Smriti* is the *Sruti* but they are human works.[7]

> The Smritis (what is recollected or remembered) are of human origin and refer to what is supposed to have been in the memory of the sages who were the repositories of the revelation.[8]

During the post *Smriti* period, when the composition of the *Smritis* came to a halt, discussion on *Dharma* took the form of commentaries on the *Dharmashastras* which included assimilation of the customs and usages prevailing during that time.[9]

Another vital source of Hindu law is custom. A custom, if proved, can outweigh any written text of law.[10] The word custom as used in Hindu law is derived from the Sanskrit word *sadachar* or *shistachar* i.e. the customs of good men.

Thus, Hindu law is the law of the *Smritis* as expounded in the Sankrit Commentaries and Digests which, as modified and supplemented by custom, is administered by the courts.[11] As in the case of Anglo-Muhammadan law:

> Hindu law as administered by the British-Indian Courts was a mixture of Shastric Law, custom, and case law, with a hardy dose of English legal concepts and notions, simplified and standardised for ease of application and administrative convenience.[12]

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7. Ibid at p. 24.
8. *Mayne's Treatise on Hindu Law ;* 13 th Edition; revised by Kuppuswami, Justice Alladi; Bharat Law House, New Delhi at p.14-15.
9. For more on the schools, sources and development of Hindu law see Mullah's principles of Hindu Law, 13 th Edition, by Desai, Sunderlal T.; N.M. Tripathi Private Ltd, 1966; Mayne's Hindu Law (Ibid)
10. Madura v. Mootoo Ramlinga (1868) 12 MIA 397 (463).
11. Supra note 8 at p.1.
12. Carroll. Lucy (1986). "Law, custom, and statutory social reform: the Hindu Widow's Remarriage Act of 1856" in *The Indian Economic and Social History Review,* 20,4 (1986); pp.363-388 at p. 369.

After the initial sources, there are more modern sources e.g. legislative enactments and precedents which play, as in the case of Muslim law, an immensely important role in determining what the law is for the Hindus in Bangladesh. The Colonial Government of India had the legislative authority to change the personal laws of the Indians and they used this power in several cases. This applied especially in the case of practices they could justify as being particularly abhorrent e.g widow remarriage, child marriage, *sati* and so forth.[13] After partition in 1947 while there were major legislative changes in India as regards Hindu law there were close to none in the then Pakistan. After the independence of Bangladesh, this trend continues and significant legislative reforms to Hindu laws are negligible. The Hindu law of Bangladesh thus, generally remains at the position the British left it in 1947.[14] As far as judicial activism is concerned, although in many cases interpretation of Hindu laws have been given by the courts, there is the danger of the ignorance and lack of codified guidelines of the above law translating itself into faulty interpretations of the law.

In India, demands for a codified Hindu law, which would reform the family laws in favour of women and remove legal disabilities in their favour was raised from the 1930's . However, vehement opposition from the orthodox community to such a Code defeated attempts to legislate on such a Code time and time again. Ultimately the proposed code was split up into four enactments and passed in the 1950's. These enactments are:

The Hindu Marriage Act, 1955; The Hindu Minority and Guardianship Act, 1956; The Hindu Adoptions and Maintenance

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13. For a discussion and critique of the reforms made by the British Raj see Ibid and Chowdhry, Prem (1993). "Conjugality, Law and State: Inheritance Rights as Pivot of Control in Northern India" in *National Law School Journal:* Special Issue 1993 on *Feminism and Law;* 95-116.

14. Menski, Werner F. and Rahman, Tahmina (1988) . "Hindus and the Law in Bangladesh" in South Asia Research Vol. 8, No. 2 November 1988 pp. 111-131 at p.1.

Act, 1956; The Hindu Succession Act, 1956.

The above Acts are not applicable in Bangladesh.

Marriage:

For both Hindus and Muslims, the institution of marriage is regarded as extremely important. Socio-cultural as well as religious considerations augment the importance of marriage for women of both religions. Irrespective of religion, single women are not socially acceptable.

Muslim marriages are contracts of a relatively simple nature which only requires offer and acceptance in front of two witnesses. Apart from socio cultural practices, Muslim marriages require little ceremony or ritual to give the marriage legality. In effect it is a civil contract with religious overtones.

For the Bangladeshi Hindus, uncodified marriage laws continue to govern the institution of Hindu marriages. Whatever statutory innovations exist are the gift of the British colonisers. Unlike a Muslim marriage, a Hindu marriage is a religious sacrament and certain ceremonies are essential to the legality of the marriage. In the case of AMULYA CHANDRA v. THE STATE it was held that the two essentials for a valid marriage under Hindu law are:

i) Invocation before the sacred fire and

ii) The taking of the seven steps before the sacred fire by the bride and the bridegroom, i.e. *Saptapadi.* The marriage becomes complete when the seventh step is taken ---until then the marriage is incomplete and not binding.[15]

Age of marriage: As far as the age of marriage is concerned, both the religions permit child marriages.[16] Banerjee writes that Hindu

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15. (1983) 35 DLR. 160.

16. For more on the age of marriage under Muslim law see Huda, Shahnaz (1997). "Child Marriage: Social Marginalisation of Statutory law" in *Bangladesh Journal of Law,* Vol. 1 No. 2, December 1997; Bangladesh Institute of Law and International Affairs; pp. 138-181.

minors are not only eligible for marriage, but are the fittest to be taken in marriage:

> ....marriage of a woman after she has attained puberty, though declared sinful, is not absolutely void, though some degree of blame is always attached to it.[17]

Under Muslim law, persons under a certain age have the power to repudiate marriages contracted during minority exercising what is known as the option of puberty, which under traditional Hindu law a Hindu does not have.

The Child Marriage Restraint Act, enacted by the British in 1929 (amended in Bangladesh in 1961 and 1984) however attempted to stop underage marriages and this act applies equally to all citizens of Bangladesh. In reality the ineffectiveness of the Child Marriage Act is obvious with the absence of proper birth registration and so forth. The Child Marriage Restraint Act in the case of both Hindus and Muslims fail to invalidate a marriage where the party/parties are below the legal age of marriage, it only makes it a punishable offence.[18]

Consent:

In the case of a Hindu woman, the consent of the bride is unnecessary---under Muslim law, the girl must consent (at least theoretically) if she is above the age of puberty. In both religions the father is always the preferred guardian.

Polygamy:

Polygamy amongst the Muslims is permitted and polyandry is prohibited and punishable by criminal law. However by virtue of the Muslim Family Laws Ordinance 1961, restrictions have been introduced to the right of polygamy amongst the Muslims and a man wanting to marry again during the subsistence of a marriage

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17. Banerjee Gooroodass (1879). *The Hindu Law of Marriage and Stridhan;* Tagore Law Lectures; Thacker, Spink, and Co., Calcutta at p.46-47.
18. For more on child marriages and the Act see supra note 16.

must take permission from the appropriate authorities.[19]

As in the case of Muslim men, polygamy is also permitted for Hindu men while polyandry is prohibited. Unlike the 1961 Act. restricting the Muslim mans' right of polygamy to a certain extent, a Hindu man in Bangladesh wishing to marry during the subsistence of his marriage (s), faces no restrictions whatsoever. This practice effectively means that a woman is left with little recourse in case of her husband wanting another wife. Even in the case of Muslims, the statutory requirement of obtaining the requisite permission in reality becomes largely ineffectual when the woman is almost always financially dependent on the husband and must acquiesce to his demands, however unreasonable. In case of Bangladeshi Hindu law the situation becomes especially hard since divorce is not allowed (see later). In India however, by virtue of the Indian Marriage Act of 1955 monogamy has been established and bigamy is punishable both for the male and the female. Section 5 (i) 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 Ss. 494 and 495 of the Indian Penal Code.[20]

Other changes made to the laws on Hindu marriage in India include the legalisation of intercaste marriages which continues to be forbidden in Bangladesh.

Registration of marriage:

As far as registration is concerned although Bangladeshi law provides for registration of Muslim marriages[21] through legal

19. Section 6 (1) of the Muslim Family Laws Ordinance, 1961 states:
No man, during the subsistence of an existing marriage, shall, except with the pervious permission in writing of the Arbitration Council, contract, another marriage, nor shall any such marriage be registered under the Muslim Marriage and Divorces Registration Act 1974 (LII of 1974).

20. Diwan, Paras (1993) *Modern Hindu Law;* Allahabad Law Agency, Allahabad, at pp. 106-108.

21. Muslim Marriages and Divorces Registration Act 1974.

mechanisms, albeit faulty, as far as Hindu marriages are concerned there are no provisions at all for the registration of Hindu marriages. The Muslim Family Laws Ordinance of 1961, covered the question of registration until 1974, when the first Parliament of Bangladesh enacted the Muslim Marriages and Divorces (Registration) Act, 1974. By virtue of this Act, provisions were made for the registration of divorces as well as marriages.

As mentioned above, there is no requirement for registration of Hindu marriages in Bangladesh.[22] Since registration is not a requirement, the court's technical approach, in particular the failure to recognise customary forms of marriage, may cause considerable difficulty to women who seek to validate their rights.[23] The Indian Marriage Act, 1955 provides for registration of marriages. However lack of registration does not effect the validity of the marriage in the Indian Context.

Dissolution of Marriage

For the Hindus the marital bond is eternal and unbreakable. The sacramental marriage amongst Hindus have three characteristics :

> it is a permanent and indissoluble union, it is an eternal union, it is a holy union.[24]

Shastric Hindu law does not allow dissolution of the marital tie, however painful cohabitation may be. However in some communities the custom of divorce obtained and the courts enforced such custom provided they fulfilled the requisites of a valid custom.[25]

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22. Huda, Shahnaz (1999). *Registration of Marriage and Divorce in Bangladesh, A Study on Law and Practice;* Bangladesh Legal Aid and Services Trust, (BLAST), Dhaka.
23. Hossain, Sara (1994). "Equality in the Home : Women's Right's and Personal Laws in South Asia" in *Human Rights of Women;* Cook, Rebecca (Editor); The University of Pennsylvania Press, Philadelphia; pp. 465-494 at p. 477.
24. Supra note 20 at p. 68.
25. Sankaralingam v. Subban 1894 ILR 17 Mad 479.

As far as Muslim women are concerned, it is true that they have the right of divorce but in a much more limited manner than the unfettered right possessed by the Muslim male.[26] The Muslim wife may divorce with her husbands consent, on mutual agreement or if she has been delegated the right by her husband. She may also involve herself in messy judicial divorce proceedings under the Dissolution of Muslim Marriages Act 1939.

It is interesting to compare the statutory innovation regarding dissolution of marriages enacted in 1939, (applicable to both Indian and Bangladeshi Muslims) and the provisions for dissolution made available to Indian Hindus by the Marriage Act of 1955. The Act applicable to Muslims grants the power to women to seek dissolution of marriage by judicial decree on certain grounds. The Hindu Marriage Act of 1955 applicable in India, gives both parties to the marriage the right to go to court for dissolution and furthermore grants the wife additional grounds.[27] Under the Indian Act of 1955 (Section 13) either husband or wife may seek divorce on grounds of cruelty, adultery, desertion, insanity or incurable disease and so forth. Cruelty, desertion, insanity, impotency, incurable disease are also grounds for Muslim women to go to Court under the Dissolution of Muslim Marriages Act, 1939 although adultery is not. Under the Hindu Marriage Act, 1955 marriages may be voidable and may be annulled by a decree of nullity on grounds of impotency of the respondent (Sec.12). Like the traditional concept of option of puberty for the Muslims recognised by Section 2 (vii) of the Dissolution of Muslim Marriage Act of 1939, the Indian Act of 1955 by Sec. 13 (2) (iv) provides that the Hindu wife may petition for dissolution of her marriage on the ground :

> that her marriage (whether consummated or not) was solemninized before she attained the age of fifteen years and

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26. For more on Muslim laws on divorce see Huda, Shahnaz (1993). "Untying the knot-Muslim Women's Right of Divorce in Bangladesh"; in *The Dhaka University Studies*, Part F, Vol.V, No.1. June, 1994.

27. See Section 13 (2) of the Hindu Marriage Act 1955.

> she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Widow Remarriage :

There are and were no bars against widows remarrying under Muslim law. Traditional Hindu law prohibited widow remarriage amongst higher caste Hindus. Under orthodox Hindu law :

> ... a woman, on the death of her husband, might either immolate herself on his funeral pile, or lead a life of perpetual widowhood.[28]

The practice of *sati* was abolished by the British in 1829.[29]

By the Hindu Widow's Remarriage Act of 1856, which owes its origin to Pundit Ishwar Chandra Bidyasagar, remarriage of widow's was legally sanctioned.[30] However if a widow remarries she cannot retain the property of her previous husband.

> Widow's right to inherit her late husband's property is conditioned on her capacity to confer spirtitual benefits on her dead husband-Loss of such right is a characteristic of the Hindw Law following her remarriage founded on texts as well as on the underiying principles regarding law of inheritance.[31]

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28. See supra note 17 at p. 199.
29. Interesting to note how even practices which are obviously illegal and likely to bring upon criminal punishments continue in spite of age old laws. In 1987 the celebrated Indian case of Roop Kanwar from Rajasthan who burned on her husband's funeral pyre shocked India and brought home the fact that these practices continue to exist and may be more widespread than is acknowledged. Dowry deaths, child marriages and so forth continue unabated in all the countries where legislation prohibiting such practices have been in force for years.

    Also for more on the background of the colonial legislation to abolish the practice of sati see Mani, Lata (1987). "Contentious Traditions : The DEBATE on SATI in Colonial India" in *Culture and Critique*, 1987 Fall, pp. 119-156.
30. Supra note 12.
31. Nurunnabi v. Joynal Abedin (1977) 29 DLR (SC) 137.

Even if custom allows re-marriage, a Hindu widow by such marriage forfeits her right to her deceased husband's property.[32]

Section 2 of the Hindu Widow's Remarriage Act States :

> All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to remarry, only a limited interest in such property with no power of alienating the same shall upon her remarriage cease and determine as if she had then died; and the next heirs of her deceased husband or other persons entitled to the property on her death, shall thereupon succeed to the same...

Adoption

Adoption is recognised under Hindu law but not under Muslim law. Although many childless Muslim couples in reality do adopt, the child does not inherit property as a natural child. This means that adoptive parents usually have to go through complicated procedures to gift their property to the child. Unlike Muslim law, adoption is permitted amongst the Hindus. The aim of adoption under Hindu law is two-fold. The first is religious i.e. to secure spiritual benefit to the ancestors and to the adopter by having a son for the purpose of offering funeral cakes and libations of water to the manes of the adopter and his ancestors. The second is secular i.e. to secure an heir and perpetuate the adopter's name. In Bangladesh the Shastric uncodified law relating to adoption continues to exist. Under this law only a male can be adopted. 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 i.e, he must not be a boy whose mother his adoptive father could not have married. Under Shastric law only a man can adopt unilaterally. A wife or a widow, in most places, may adopt only with the husbands express consent.

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32. Sowdamini Ray Malakar v. Narendra Ch. Barmau (1952) 4 DLR 492.

The Hindu Adoptions and Maintenance Act of 1956 has in India changed, amended and codified the law relating to adoption. All adoption in India after 1956 are secular, and to be valid must conform to the requirements of the Act.[33] In the case of adoption changes have been made in India which gives a woman rights almost equal to that of a man. A married Hindu male cannot adopt without the consent of his wife [Section 5 (1)]. A Hindu woman, unmarried, widow or divorcee can adopt but a married woman cannot adopt even with her husband's permission. The husband must adopt with her permission. (Section 8).

Property Rights

In Bangladesh the kinds of property that a Hindu woman may possess continues to be divided into a) *Stridhan* and b) Property inherited by her and to which she has limited rights. *Stridhan* property is property over which a woman generally has absolute control. Loosely defined, *Stridhan* means property which a woman has power to give, sell or use independently and which passes on her death to her heirs.

When a Hindu man inherits property, whether from a man or a woman, he takes absolutely and becomes the fresh stock of descent i.e. after his death the property passes to his heirs. When however, a female inherits property whether from a male or a female she only takes a limited estate and upon her death the property reverts back to the reversioner, i.e. the next heir of the person she had inherited the property from. The estate inherited by a widow from her dead husband is called widow's estate. The estate taken by every other limited heir is similar in its incidents to a widow's estate. Although the woman is entitled to enjoy the estate inherited by her she cannot dispose of such property by gift, sale and so forth.

A daughter's right to her fathers property depends, astonishingly enough, upon whether she has or can have a son. Little wonder

33. Supra note 20 at p. 217.

therefore the importance placed upon a male offspring! The daughter is fifth in line to her fathers property. In the absence of a son, son's son, son's sons son, widow (s) the daughter inherits. Preference is given to the maiden daughter who may possibly have a son in the future, then to a daughter who has a son. Barren daughters, widowed daughters who have no children or who have daughters are excluded.[34]

In India however, after independence, the State, through direct and positive intervention brought about 'fundamental and radical changes in the law of succession in breaking violently with the past.[35] In 1956, the Hindu Succession Act was enacted. Granting equal property rights to women was seen as a threat to the system of joint Hindu family, an intrinsic part of the Hindu social system and thus vehemently opposed.

Of the most broad changes made by the Hindu Succession Act, 1956 is the abolition of the limited estate of the female Hindu. A Hindu female had now the right to deal freely with and dispose of in any manner any kinds of property acquired by her. Section 15 of the Act prescribes a list of heirs entitled to succeed to the property of the woman upon her death.

(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

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.[36]

As far as Muslim women are concerned, except for a few

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34. For more see Supra notes 6 at p. 172 and Supra note 8 at p. 850.
35. Chowdhry, Prem (1993). "Conjugality, Law and State : Inheritance Rights as Pivot of Control in Northern India" in *(1993) I NLSJ,* Special Issue 1993 on Feminism and Law, pp. 95-116 at p. 106.
36. Hindu Family Law : An action Study on proposed reforms of Hindu family law; BNWLA, NY at p.13.

exceptional cases, most women inherit half of their male counterparts e.g. the daughter inherits half of what the son interits. She nevertheless inherits absolutely with full powers of disposal. The demand has been for equal inheritance rights for Muslim women.[37]

Maintenance

Under Muslim law a man must maintain his wife and children. The husband is under a duty to maintain his divorced wife during the period of *iddat*. The question of past divorce maintenance was settled in the case of Jamila Khatun v. Rustom Ali[38] where it was decided that the wife is entitled to past divorce maintenance even in the absence of any specific agreement. In Hefzur Rahman v. Shamsun Nahar Begum,[39] the High Court Division of the Supreme Court of Bangladesh, held in favour of the divorced wife's right to maintenance until remarriage. However, this decision was reversed by the Appellate Division. Now a Muslim wife is entitled to file a civil suit under the Family Courts Ordinance or under Section 9 of the Muslim Family Laws Ordinance, 1961. The jurisdiction of the Criminal court to entertain suits under Section 488 of the Cr.P.C. was ousted in the case of Pochon Rissi Das v Khuku Rani Das.[40]

Under traditional Hindu Law, the husband has the duty to maintain his wife and minor children. A father is bound to maintain his daughter until marriage. The responsibility to maintain his wife is a personal obligation arising out of the fact that she is his wife and independant of the possession of any property by him.

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37. For more see Huda, Shahnaz (1998). "Women's Property Rights in Bangladesh : Effect of Religion and Custom" in *Development Issues Across Regions : Women, Land and Forestry;* Wickramasinghe, Anoja (editor); CORRENSA, Peradiniya, Sri Lanka; pp. 294-308.
38. 16 BLD (AD) (1996) 61.
39. 47 DLR (1995) 54.
40. 1998 to DLR 47.

After the Hindu Women's Right to Separate Residence and Maintenance Act of 1947, a woman may be entitled to maintenance even if she is living separately, based on several grounds.

Under the Hindu Marriage Act of 1955, *applicable to India,* both parties to the marriage can make an application for maintenance *pendente lite* as well as for permanent maintenance and alimony (under sections 24-25 of the Hindu Marriage Act of 1955). Under the Hindu Adoption and Maintenance Act of 1956 maintenance is defined as including, "...provisions for food, clothing, residence, education and medical attendance and treatment..." Section 3 (b) (i). The Act makes provisions for civil proceedings to obtain maintenance while under Section 125 of the Indian Criminal Procedure Code, 1973 maintenance is made recoverable by summary proceedings. The above mentioned section also clarifies that "wife includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried". Thus, under the Act a destitute divorced wife may be entitled to maintenance until remarriage.

Conclusion :

The lives of women in Bangladesh, both Muslim and Hindu, continue to be symbolized by unequal treatment and unequal laws. Only few laws relating to certain family matters apply to all communities e.g. The Child Marriage Restraint Act, 1929; The Dowry Prohibition Act, 1980; The Family Courts Ordinance, 1985.

As shown above, the far-reaching legislative enactments of independent India have revolutionised the Hindu woman's rights in regard to succession and inheritance :

> Many of the prescriptions of the Shastric Law have been superseded by an emphasis on modernity, social emancipation, equality of the sexes, and by the social exigencies of the new era.[41]

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41. Supra note 12 at p. 388.

Intervention by the state in the case of Hindu personal law has thus resulted in Indian Hindu women gaining increased legal rights, although they have not gained complete legal equality.[42] The same may be said of Bangladeshi Muslim women, although statutory interventions reforming the Shariah law have in no comparative manner played as major a part as in the case of India.

Reminiscent of the struggle to pass the Hindu Code in India, in 1961 the Pakistani move to introduce reforms to several Muslim laws evoked strong response from the fundamentalist Muslim Community.

The Muslim Family Laws Ordinance of 1961 may be said to be the most important statutory innovation of the last four odd decades. It has restricted the right of polygamy, made the registration of marriages compulsory, introduced a period of three months and requirement of notice before divorce and so forth. However, reform of Shariah law through legislative encatments have not been as wide as those that have amended Hindu law in India.

In Bangladesh the situation of women is made more complicated due to the fact that the women of the minority communities face discriminations resulting from the failure to follow a more modern version accepted in India while on the other hand the reforms are much less far ranging as regards the women belonging the majority religion i.e. the Muslim women. Indian Hindu women have greater rights but Indian Muslim women due to the fact that they belong to a minority religion continue to be governed by archaic personal laws. It is alleged that :

> Setback to Muslim women arises from the fact that Indian Muslims now live in a state which can legislate for Hindu women without arousing suspicions and insecurities, but which cannot do the same for Muslim women.[43]

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42. Parashar, Archana (1992). *Women and Family Law Reform in India;* Sage Publications; New Delhi et al at p. 201.

43. Saiyed, A.R. (1992). "Muslim Women in India : An overview" in *Muslim Women in India;* Anjum, Mohini (Editor). Sangam Books Ltd., Dhaka at p.5.

The cry of religion in danger is used in case of majority communities also. Parashar cites an Indian case where the petitoner contended that an Act prohibiting polygamy amongst the Hindus while leaving Muslim men to freely practice it denied Hindu men equality before the law and discriminated against Hindus on grounds of religion only.[44]

The case is somewhat different in the Bangladeshi context where changes to laws especially which give greater rights to women are opposed both in the case of Muslim and Hindu law. Similarities in the two countries exist however in the use of religion, in both countries, as a political pawn.

Equality is demanded in two ways-that men and women should have equal rights and that all women, irrespective of religion should have the same rights. The dichotomy between two of the fundamental rights guaranteed by the constitution i.e. that is equality irrespective of gender and freedom to practice religion is difficult to reconcile.

The demand that all women should be treated equally means a demand for a uniform civil code. However fears have been voiced that this may mean Hindulisation or Muslimisation of laws depending on which religion forms the majority in the same manner that the British are accused of having Brahmanised Hindu law in their attempt to reform certain laws. Questions remain regarding the substantive success of such code as well as its acceptance. The argument whether it is more useful to have a uniform civil code to ensure equality or whether it would serve women's purposes the same way by amending each communities personal laws to guarantee equality is a debate which seems to be unending. The question of practicality however compromising, may have to be debated.

> It is only by understanding the contradictions inherent in women's locations within various structures that effective

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44. Supra not 42 at p. 208.

> political action and challenges can be devised.[45]

The pressing need of the moment is wide ranging codification and legislative reforms to alleviate the situation of Hindu women in Bangladesh. There is not much evidence of judicial activism and/ or a desire by the Bangladeshi judiciary to 'make' laws.[46] Some of the widely accepted advantages of having a code are the achievement of uniformity, completeness and clarity in the expression of law.[47] It is also suggested that the codification of law makes further development of law much easier *inter alia* as the legislator's job also made simpler because he/she has to deal with the provisions of a code rather than with judge made law.[48] Rochi commenting on Pakistani Hindus comments :

> Given the sensitivity attached to religion and the force of customs and traditions, such laws which depend purely on interpretations of religion and tradition leave those governed under this law vulnerable to unexpected interpretations.[49]

Codification of such laws is essential so that sudden religious pressures can be avoided and the application of the law is uniform and less flexible.[50]

The other option is to have what may be called an empowering law. These kinds of laws would allow a person to choose what law (s) he chooses to be governed under. It would reconcile the contradictions between enforcing an uniform code upon people

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45. Mohanti, Chandra Talpade (1997). "Under Western Eyes : Feminist Scholarship and Colonial Discourses" in *The Women, Gender and Development Reader;* Visvanathan, N. (Co-ordinator) and Duggan, L. et al; The University Press Limited, Dhaka; pp. 79-86 at p. 85.
46. Supra note 14 at p. 131.
47. Supra note 42 at p. 243.
48. Ibid.
49. Ram, Rochi (NY). "Family Laws as applicable to Hindus in Pakistan" in *Family Laws and the Rights of Women;* AGHS legal Aid Cell, Lahore; pp. 9-11 at p.11
50. Ibid at p.11.

who vehemently object to such; on the other hand it is equally repressive forcing persons to choose religious laws which they do not wish to be bound by, especially as regards personal matters such as disposition of property and so forth; i.e. issues over which a persons freedom of choice is essential. However as Parashar[51] points out having an optional uniform law would mean that the majority of the women in India would not have privilege of making choices about their rights. She goes on to say that if the intention of the code is to give legal equality to women then an optional uniform code will be merely a cosmetic measure.[52] In India the Special Marriage Act of 1954 enables two persons to be married irrespective of what religion or religious beliefs they hold. Under Section 4 of the Act 'a marriage between any two persons may be solemnised under this Act' provided they fulfil certain conditions regarding prohibited degrees, valid consent, insanity. The parties under the Special Marriage act applicable in India, must be above the age of 18 and 21 and must not have a spouse living at the time. The Act also makes provisions for registration of the marriage, divorce by both husband and wife, permanent alimony and maintenance of the wife (Section 37). In Bangladesh the Special Act of 1872, enacted by the British, applies. This Act provides that persons belonging to different religions may marry but expressly excludes Muslims from marrying under the Act. Sec. 2 of the 1872 Act states that marriages may be celebrated under the above Act between parties neither of whom professes the Christian, Muslim, Hindu, Jewish, Parsi, Buddhist, Sikh or the Jaina Religion.

> or between persons each of whom professes one or other of the following religions that is to say, the Hindu, Buddhist, Sikh or Jaina religion...

The Special Marriage Act of 1872 is rarely used since it requires

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51. Supra the note 42 at 261-262.
52. ibid.

the parties to renounce their religion and personal laws and also limits rights to divorce, succession and adoption.[53]

One of the objections put forward by conservative Indian Muslims before the enactment of the Special Marriage of 1954 was that it would encourage people to circumvent their religious laws and obligations.[54] They had demanded that Muslims should be exempt from the purview of the Act. Unlike India, Bangladesh no longest explicitly commits to secularism—neither does the Constitution of Bangladesh, as in the case of India, make a pledge towards an uniform civil code.[55] Political considerations undoubtedly play a big role in determining what laws are going to be enacted. The enactment of an uniform code is viewed as a potentially disastrous election strategy. Coupled with that is the fact that a large portion of the community genuinely oppose the move to establish an uniform code. One must also keep in mind that those who oppose include a large number of women of that particular community. However every modern State is pledged towards the protection of the rights of its citizens. As Pereira points out, there is the choice of having a distinct, separate and overriding personal Code on the one hand and on the other having a parallel system whereby religious as well as a secular set of laws should have a fair life.[56] In this manner the State need not disturb the already existing

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53. Supra note 23 at p.476.

54. Supra note 42 at p.161.

55. The constitution of the People's Republic of Bangladesh of 1972 originally contained the guarantee of secularism in both its preamble and Article 8 (1). This was reposed by proclamation Order No. 1, 1977 with 'principles of absolute trust and faith in almighty Allanh.' The Indian constitution guarantees secularism and in Article 44 contains a directive principle that: the state shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.

56. Pereira, Faustina (1998). Draft key Note Paper. Round Table Consultation on Personal Law Reform in Relation to women in Bangladesh and Assessing the Feasibility of a Uniform Personal Code: Organised by law Review and The British Council, October 27,1998, Dhaka. pp.1-7 on p.3.

personal, customary norms within each religion while at the same time, fulfilling its duty to:

> provide a uniform parallel system for its citizens who find themselves adversely affected by the customs and rules of their specific religious community.[57]

The rituals, customs and ceremonies which are so important need not be left out and can be incorporated with the parties deciding to opt for a secular outcome of their marriage if they so wish.

After several decades since the adoption of the Constitution, the Indian State has not made any progress towards realising the goal of an uniform civil code.[58] Thus despite formal guarantees of equality,

> Indian women's lives continue to be characterised by pervasive discrimination and substantive inequality.[59] Legal reform cannot in reality change womens lives.

For reasons common to the application of Muslim law in Bangladesh, ignorance of law, attitudinal inhibition like fear of public opinion and incapacity to reach and use the legal mechanism prevent women from realising the claims available under law. With increase in poverty levels women's lack of personal safety increases because poverty disempowers women even more than it does men. Although the realisation that empowerment of women is essential for the development of the country, has brought about many positive changes to women's lives:

> For every woman who sits in parliament, or has done a Ph.D. or goes to the Supreme Court to argue a case, you have

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57. Ibid at p.6
58. Supra note 42 at p.201.
59. Kapur, Ratna and Crossman, Brenda (1993). "On Women, Equality and the Constitution: Through the Looking Glass of Feminism" in *(1993) 1 NLSJ*; pp.1-61 at p.p

> thousands in a village who don't even know their basic rights and that they are equal citizens.[60]

The gradual development of religious personal law demonstrates the dynamic nature of religion and also that religious law continuously adapts itself in response to the changing trends of society which is denied by the orthodox, conservative community.[61] The increase in incidents of crimes against women is conveniently blamed upon the increased participation of women in activities outside the house thereby justifying seclusion and segregation of women. The legal system in most countries is both patriarchal and bourgeois, i.e., it favours men and the economically powerful classes.[62] Statutory innovations will fail until the whole underlying structural concepts of gender inequality is shaken.

Although the Hindu Community must play the crucial role in the demands for codification and modernisation of Hindu family laws in Bangladesh, the State must fulfills its constitutional obligations of ensuring justice to all its citizens. In the new millenium, the expectation of Bangladeshi women, of all religions, is justice, equality and equity. The Constitution of Bangladesh promises equality of treatment, equal protection of law and non-discrimination. These commitments must be translated into reality so that all Bangladeshis, irrespective of gender or religious belief, economic, political or social position are protected.

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60. Bumiller, Elisabeth (1990). *May you be the mother of a Hundred Sons;* Penguin Books, Calcutta at p.129.
61. Supra note 42 at 47.
62. Supra note 1 at p. 10.