

Gender Equality by International Norms: An Analysis on Hindu Marriage and Divorce Laws in South Asia with Special Attention to Bangladesh

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Abstract

Personal laws govern the social phenomenon of marriage and the dissolution of marriage, in Bangladesh. A great deal of debate surrounds the issue of Hindu marriage and the right to divorce, under the orthodox Hindu legal regime. It is observed that no significant legal changes have addressed or rectified the age-old provisions of discrimination. Hindus, being a minor community in Bangladesh has been deprived of the benefits that come with expected changes. This paper examines the laws relating to Hindu marriage and divorce in the South Asian context, focusing on India, Nepal and Pakistan with special concern to Bangladesh. It aims to illuminate the constitutional validity of un-unified personal laws and analyses the existing laws which create a safeguard for sustaining the longstanding patriarchal system within the Bangladeshi society. It also observes a flagrant non-compliance with the twin principles of equality and non-discrimination found within the normative framework of universal human rights. The article questions the practical reason behind this non-compliance and suggests some initiatives that could be adopted to ensure justice for the Hindu women of Bangladesh. In spite of the numerous limitations, every effort adds to a robust voice for Hindu women's rights in the country.

Keywords: Hindu Marriage and Divorce, Gender Equality, Discrimination in Hindu Law.

I. INTRODUCTION

Marriage is a social phenomenon that unites two people in a sacred union. Hindu marriage is a sacred union involving various ceremonies that unite not only the two people, but the extended families as well. In *Shastriya*, an ancient Hindu law, Hindu marriages are treated as a sacrament or *Sanskara*.¹ *Shastriya* law enjoins all men to marry for the purpose of procreating sons necessary for carrying on the progenitor's lineage and for the spiritual benefit that saves them from the fires of hell. On the other hand, the dissolution of a marriage is a procedure to break all the vows taken during the sacred ceremony of

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¹ Sree Mridulkanti Rakhshit, *The Principles of Hindu Law*, 6th ed., Kamrul Book House, 2008, p. 98.

marriage.² In Bangladesh, Hindu women would endure enormous hardships; rather than a separation from their spouse or a divorce. Bangladeshi Hindus follow the *Shastriya* law in this regard, where no right to divorce exists. While polygamy is allowed for men, (they can remarry after a separation) women have the choice of either staying in the marriage or living alone. Though they have a right to live separately (from their husband) they cannot seek a divorce; this has been a debatable issue. In contrast, other South Asian countries, namely, India, Pakistan and Nepal have ensured the right to dissolve marriage. However, no measure has been taken in Bangladesh. This not only weakens the social structure; it also violates the provisions of the Constitution and is inconsistent with international instruments.

This article analyses Hindu personal laws in South Asia regarding marriage and divorce; and the responsibility of the state to both its Constitution as well as international human rights obligations. The next part of the paper discusses Hindu marriage laws concerning prohibitory decrees, ceremonies, polygamy and registration of marriage applicable in Bangladesh as well as other South Asian countries. The following part then focuses on the dissolution of marriage under this law and addresses the issue of discrimination which is prevalent in Bangladesh with comparisons drawn from other South Asian countries. The article attempts to address the question: why are Hindu women in Bangladesh prejudiced? Bound to live a woeful existence in various circumstances. A premeditated approach has been taken to identify the practical reasons for the non-implementation of initiatives that have been proposed by different organs. Lastly, recommendations have been made for the adoption of necessary measures to eliminate the inequitable system that has been in practice for far too long.

II. LEGAL SYSTEM OF BANGLADESH AS REGARD TO HINDU MARRIAGE AND DIVORCE LAWS AND ITS CONCERN TO MAJOR HUMAN RIGHTS JURISPRUDENCE

The legal system of Bangladesh has its roots in the laws of British India. The country adopted laws that were prevalent during the colonial rule in the sub-continent and is a common law jurisdiction. Even after independence, the laws inconsistent with the spirit of the new independent country continued. In the sphere of Hindu personal laws, Bangladesh continues to follow the *Shastriya* law. Having a Muslim majority, Hindu's make up only 8.5% of the total population of the country.³ Although people of different beliefs enjoy the freedom to exercise their religious rights without any interference, the age old discriminatory Hindu laws prevail. According to the Constitution, secularism is recognised as one of the fundamental principles of state policy in Bangladesh. In accordance with this spirit of secularism, the country keeps its public affairs free from any religious interference. Reforms have been made to Muslim personal laws to eradicate

² Md. Ashabur Rahman, Protection of Right to Divorce for Hindu Woman, Law Journal Bangladesh, <http://www.lawjournalbd.com/2017/03/protection-of-right-to-divorce-for-hindu-woman/>, site accessed on 10 April 2018.

³ Official Census Results, 2011, p. xiii, Bangladesh Government.

prejudicial provisions; no such initiatives however have been made to Hindu personal laws. Hindu women are primarily affected by this; under *Shastriya* law they cannot inherit property and they do not have the right to dissolve their own marriages even if it is detrimental to life.

Several international human rights conventions contain the principles of equality and non-discrimination. Bangladesh has ratified several international human rights conventions with reservations to a few provisions. The domestic application of international human rights law has been the subject of much debate (from its inception) due to the directory nature of international law which generates a conflicting view regarding compliance to international norms and the state law. From international law's perspective, national courts as the state organs are required to conform to international norms due to the universal nature of human rights standards. The universality of human rights norms is disputed by a number of states upholding the idea of cultural relativism. While debates and dissent over the 'universality' of human rights continue (as they have by no means reached a consensus) courts across the world have generally acquiesce to the less contentious international human rights provisions, such as the right to life and liberty, freedom from torture, and so on.⁴ The common practice of all states is that the Higher Judiciary has the jurisdiction to deal with issues pertinent to international instruments.⁵ Bangladesh has a similar practice and have acquiesced to some human rights instruments.

The Universal Declaration of Human Rights⁶ (UDHR) has served as the foundation for two binding United Nations (UN) human rights covenants, the International Covenant on Civil and Political Rights⁷ (ICCPR) and the International Covenant on Economic, Social and Cultural Rights⁸ (ICESCR). The principles of the UDHR are also elaborated in other international treaties, such as the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The UDHR continues to be widely cited by governments, academics, advocates, constitutional courts, and by individuals who appeal to its principles for the protection and recognition of their human rights. The UDHR recognises the inherent dignity, the equal, and inalienable rights for all human beings as a foundation of freedom, justice and peace in the world.⁹ It assures people that they are entitled to all human rights without distinction of any kind; like, race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁰ Equal rights to marriage and its dissolution for both men and women can be found in these different international instruments. The UDHR has

⁴ Sumaiya Khair, *Bringing International Human Rights Law Home: Trends and Practices of Bangladeshi Courts*, 2011, 17 Asian Yearbook of International Law, p. 49.

⁵ An advisory report on "Universality of Human Rights and Cultural Diversity", by the Advisory Councils of International Affairs, Netherlands, No. 4, June 1998.

⁶ Adopted in the United Nations General Assembly at its 3rd session on 10 December in 1948 as resolution 217 at the Palais D Chaillot in Paris, France.

⁷ The International Covenant on Civil and Political Rights was adopted by the United Nations General Assembly on 19 December 1966.

⁸ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966; entry into force 3 January 1976.

⁹ Preamble of the UDHR.

¹⁰ Article 2, UDHR.

given both men and women equal rights to marriage and to its dissolution irrespective of race, nationality and religion. Article 16(1) of the Declaration provides that-

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.¹¹

CEDAW is an international treaty adopted by the General Assembly of the United Nations (UN) in 1979 to eliminate discrimination against women so that they can enjoy full human rights including equal access to opportunities in areas such as political and public life, health, education and employment.¹² Article 16(1) of CEDAW stipulates that, the states parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations on the basis on equality between men and women.¹³ It ensures the same rights and responsibilities to both the husband and wife during the marriage and dissolution.¹⁴ Bangladesh is one of the first few countries that ratified CEDAW in 1984 with reservations to two articles, namely, Article 2 and Article 16(1c). Article 2 provides that state parties ratifying CEDAW declare their intent to enshrine gender equality into their domestic legislation, repeal all discriminatory provisions in their laws, and enact new provisions to guard against discrimination against women. Article 16 (1c) mandates that state parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and, in particular, shall ensure a basis of equality of men and women. Despite the state having adopted many laws and policies over the last few decades with regards to the violence against women in accordance with the principles under CEDAW, it has retained its reservations. The issue of reservation in consideration with *Shariah* principles, has been criticised by different state actors as it is contrary to some of the articles found in the Constitution of Bangladesh.

A. The Constitution of the People's Republic of Bangladesh 1972

The Constitution is the supreme law of the country and has supremacy over all other laws. The Constitution states that all citizens are equal before the law and are entitled to equal protection of law.¹⁵ The Constitution also provides that the state will ensure equal rights to all citizens and remove social and economic disparities.¹⁶ The principle of non-

¹¹ Right to marriage.

¹² Overview of CEDAW, See Cedaw Aware, <http://cedaw.aware.org.sg/what-is-cedaw/> site accessed on 15 April 2018

¹³ Article 16 (Right to property marriage and dissolution), CEDAW.

¹⁴ *Ibid.* at Article 16(1) (c)

¹⁵ Article 27, The Constitution of the People's Republic of Bangladesh

¹⁶ *Ibid.* at Article 19.

discrimination is declared in Articles 28¹⁷ and 29. Although Article 28(2) excludes personal laws and practices from protection, clause 4 also empowers the state to enact special provisions for the development of women or children. Even though the state claims to be a secular one, its reservations to CEDAW have not been withdrawn and there have been no state initiatives to eliminate the discriminatory provisions of Hindu laws. These initiatives are necessary if changes to discriminatory laws are sought.

ICCPR ensures equality before the law and equal protection of law without any discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁸ The ICCPR specifically provides for equal rights of spouses, and the right to marriage and divorce. Article 23(d) of ICCPR says that –

States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Similarly, ICESCR provides the principle of non-discrimination and ensures equality between men and women¹⁹ upon which Bangladesh has reservations.²⁰ Article 3 reads-

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Bangladesh has acceded to both of the covenants of ICCPR and ICESCR in the years 2000 and 1998 respectively.

¹⁷ Article 28 enunciates that-

- (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.
- (2) Women shall have equal rights with men in all spheres of the State and of public life.
- (3) No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution.
- (4) Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens.

¹⁸ Article 26 (Law to prohibit discrimination), ICCPR.

¹⁹ Article 2(2) provides that, “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

²⁰ It reserves the right to interpret the labour rights in Articles 7 and 8 and the non-discrimination clauses of Articles 2 and 3 within the context of its constitution and domestic law.

B. The Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages 1962

The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages 1962 (the Convention on Consent to Marriage) was a treaty agreed upon in the UN on the standards of marriage.²¹ Bangladesh acceded to the treaty in 1998 with reservations to Articles 1 and 2. These two articles deal with the free consent of parties and the minimum age of marriage.²² Article 3 of the treaty also provides for the compulsory registration of marriage to a competent authority. Registration of Muslim marriages are compulsory,²³ whereas, the registration of Hindu marriages is still optional.²⁴ This is clearly a non-compliance with the Convention on Consent to Marriage.

It is generally accepted that principles of international law, whether customary or treaty-based, are normative by character and are binding on states, still, controversies persist over the degree and extent to which these norms may be invoked and enforced.²⁵ While the rights in question must already be a part of domestic law, their nature and scope may be affected by customary international law.²⁶ Unavoidably, Bangladesh is under an obligation to abide by the principles of equality and non-discrimination as it is the moral duty upon the state to ordain domestic law in a manner that does not breach international law.

III. HINDU MARRIAGE LAWS IN SOUTH ASIAN COUNTRIES: ADDRESSING DISCRIMINATION IN BANGLADESH'S LEGAL REGIME

Hindu personal laws are based on Hindu *Dharma* which has its origins in India.²⁷ Hindu Law is divine in nature which can be observed from the words of Manu,²⁸ (the prominent *Smriti*²⁹ writer) and *The Veda*.³⁰ The *Smriti* is the approved usage and what is agreeable to one's soul (good conscience), which the wise have declared to be the quadruple direct

²¹ The treaty was opened for signature and ratification by General Assembly resolution 1763 A (XVII) on 7 November 1962 and entered into force 9 December 1964 by exchange of letters, in accordance with Article 6.

²² Shahnaz Huda, *Combating Gender Injustice Hindu Law in Bangladesh*, The South Asian Institute of Advanced legal and Human Rights Studies (SAILS), 2011, p.12.

²³ Section 3, The Muslim Marriages and Divorces (Registration) Act, 1974, Act no. LII.

²⁴ Section 3, The Hindu Marriages Registration Act, 2012, Act no. XL.

²⁵ *Supra* n 4, at p. 49.

²⁶ *Supra* n 4, at p. 53.

²⁷ Dr. Rabia Bhuiyan, *Gender and Tradition in Marriage and Divorce*, 1st ed., United Nations Educational, Scientific and Cultural Organization, 2010, p. 31.

²⁸ The code of Manu was compiled between 2000 BC to 200 AD.

²⁹ *Smriti* means 'what is remembered'. It refers to the utterance and precepts of the Almighty which have been remembered and handed down by the sages from generation to generation.

(D F Mulla, *Principles of Hindu Law* 15thEd., N M Tripathi Private Limited, Bombay 1982, p. 20.

³⁰ *Veda* is the compilation of *Sruti* meaning 'what is heard and is believed to contain the very word of God.' Norshivan H Jhaval, *Principles of Hindu Law* 20thed., C. Jamnadas and Co. Educational and Law Publishers, Mumbai 2009, p. 3.

evidence of *Dharma*.³¹ While marriage among the Muslims is a civil contract, among the Hindus it is a sacred ceremony. According to John D Mayne,³² the purpose of a Hindu marriage is to acquire a male heir who has the capacity to confer spiritual benefit upon the deceased at the funeral ceremony. In the absence of any legislative enactments, Bangladesh continue to follow the ancient principles of Hindu Law. A Hindu marriage is conducted following multiple ceremonies and registration is not necessary. Most astoundingly, the marriage cannot be dissolved as divorce is not available under the ancient Hindu law provisions.

The application of this law discriminates against women and is against the principles of equality and non-discrimination. The neighbouring countries of Bangladesh namely, India, Pakistan and Nepal, have amended the ancient *Shastriya* Hindu law which are discriminatory towards women. India and Nepal, being Hindu majority countries addressed the orthodox law by enacting the Hindu Marriage Act in 1955 and the *Muluki Ain* in 1963, Nepal followed suit in 2019. Pakistan, being a country with a Muslim majority, has also brought landmark changes in Hindu personal laws by enacting the Hindu Marriage Act of 2015. The cultural pattern and socio-economic infrastructure of Bangladesh is fairly similar to its neighbouring countries, yet it has noticeably been reluctant to change this orthodox law. Hereafter, the article will discuss the relevant laws and will attempt to identify the practical reasons behind the disinclination to reform the Hindu laws in Bangladesh.

A. *Requirements for a Hindu Marriage*

In Bangladesh, the orthodox Hindu law imposes restraint on inter-caste marriages, disapproving the marriages conducted within prohibited degrees. Parties to the marriage have to be beyond the prohibited degrees of relationship, i.e. not of the same *gotra*³³ or *pravara*³⁴ and not the *sapinda*³⁵ of each other.³⁶ The marriage is only completed when all the ceremonies are performed. Moreover, an infant's marriage is deemed complete and legal in Hindu law.³⁷ Even though the *Shastriya* law imposes restriction on inter-caste

³¹ Norshivan H Jhaval, *Principles of Hindu Law*, 20th Ed., C. Jamnadas and Co. Educational and Law Publishers, Mumbai 2009, p. 3.

³² John Dawson Mayne, *The Treatise on Hindu Law and Usage*, 7th Ed., 1906, Madras: Higgingbotham.

³³ Two persons are 'sagotra' if both of them descend in the male line from rishi or sage after whose name the gotra is called, however distant either of them may be from the common ancestor (D F Mulla, *Principles of Hindu Law*, 15th Ed., N M Tripathi Private Limited, Bombay 1981, p. 436).

³⁴ Two persons are said to belong to the same *pravara*, if they are descendants in the male line from three paternal ancestor of the founder of a gotra (D F Mulla, *Principles of Hindu Law*, 15th Ed., N M Tripathi Private Limited, Bombay 1981, p. 561).

³⁵ *Sapindas*, according to the *Dayabagha* school of law, are the persons who are connected by the offerings of the funeral cake or 'pinda' (R K Agarwala, *Hindu Law*, 20th ed., Central Law Academy Allahabad, 2000, p. 35).

³⁶ Mahua Zahur, "The Hindu Marriage System in Bangladesh: Addressing Discrimination", *Commonwealth Law Bulletin*, 2014.

³⁷ Gooroodass Banarjee, *The Hindu Law of Marriage and Stridhan*, Thacker, Spink and Co., Calcutta, 1879, p. 111.

marriages, this has increased. According to Human Rights Watch,³⁸ inter-caste marriages are occurring more frequently now-a-days with the change in the collective mindset of Hindus from all castes. Depending on the educational qualification, professional diversity and financial status, inter-caste marriages are being solemnised and accepted by the society. The Hindu Marriage Disabilities Removal Act 1946 has paved the way for marriages between the Hindus belonging to the same *gotra* or *pravara*.³⁹

If we pay attention to the Hindu law in India, it can be observed that the Hindu Marriage Act of 1955 has rectified the prevalent orthodox practices of *Shastriya* law. This Act has an overriding effect on all other laws and traditional practices. It is undoubtedly a reflection of the modern thought of the people at that time. The conditions and requirements to conduct a Hindu marriage provided by this Act have considerably been simplified.⁴⁰ With regards to the prohibited degree of relationship, it has specifically mentioned the lineage of progenitors between whom solemnisation of marriage is prohibited. Now marriage can be solemnised beyond these degrees.⁴¹ The Act of 1955 has rendered the restrictions on inter-caste marriage as obsolete. As such, the division and discrimination as to caste is no longer as prevalent. If the marriage fulfills the conditions provided by the Act, it will not be nullified just because it has been solemnised between parties belonging to a different caste or sub-caste.⁴²

B. Hindu Marriage Ceremonies

In Bangladesh, a Hindu marriage is ceremonious. The marriage is not complete without observing these preceding and following these wedding rituals. But the question of what formalities create the valid status of a marriage cannot be answered precisely and requires the social consideration of a particular community.⁴³ In the *Amulya Chandra Modak* case⁴⁴ two ceremonious requirements for a valid marriage were established, one is *viva homa* or invocation before the holy fire and another is *saptapadi* or the taking of seven steps around the holy fire. In this case, Kalpana Rani (who was 18 years old) was induced into believing that she was married to the appellant on the ground that they had

³⁸ "Will I Get My Dues...Before I Die?": Harm to Women from Bangladesh's Discriminatory Laws on Marriage, Separation and Divorce; Human Rights Watch 2012.

³⁹ *Supra* n10, at Article 2.

⁴⁰ Section 5, The Hindu Marriage Act, 1955, Act XXV.

⁴¹ According to section 3(g) of the Act, "degrees of prohibited relationship" means two persons- (i) if one is a lineal ascendant of the other; or (ii) if one was the wife or husband of a lineal ascendant or descendant of the other; or (iii) if one was the wife of the brother or of the father's or mother's brother or of the grandfather's or grandmother's brother or the other; or (iv) if the two are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers or of two sisters. "Explanation- for the purposes of clauses (f) and (g) relationship includes- (i) relationship by half or uterine blood as well as by full blood; (ii) illegitimate blood relationship as well as legitimate; (iii) relationship by adoption as well as by blood; and all terms of relationship in those clauses shall be construed accordingly.

⁴² According to section 29(1)- A marriage solemnised between Hindus before the commencement of this Act, which is otherwise valid, shall not be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to the same *gotra* or *pravara* or belonged to different religion, castes or sub-divisions of the same caste.

⁴³ Werner Menski, *Hindu Law, Beyond Tradition and Modernity*, 1st ed., Oxford University Press, 2003, p. 278.

⁴⁴ *Amulya Chandra Modak v the State* [1986] 35 DLR 35.

secretly exchanged garlands. She had consented to cohabiting with the appellant and subsequently became pregnant. The learned judges opined that Kalpana Rani was matured enough to understand that various compulsory rites like *viva homa* and *saptapadi* were not performed. Kalpana could not have believed that by the mere exchange of garlands with the accused, he had become her lawful husband.

The court acquitted the appellant from the charge of deceit. Due to the non-performance of the aforementioned two important ceremonies the marriage was invalidated. Due to the divergence of ceremonies the presumption of marriage is often at the discretion of the court. In another case of *Ramesh Chandra Adhikari v Bulbuli*,⁴⁵ a dispute arose about the presumption of marriage. In this case, even though the ceremonies were not properly held, circumstances suggested that there was a presumption of an existing marriage even though the defendant-appellant denied the fact. This is due to the absence of any statutory provision as to the mandatory ceremonies that had to be completed before a marriage is valid. Identifying the existence of marriage can be quite complicated thus giving rise to disputes.

As regards to the ceremonies to be followed in India, the Hindu Marriage Act of 1955 has upheld the customary rites and ceremonies of the parties. It states that, where ‘*saptapadi*’ is included, marriage becomes complete and binding when the seventh step is taken.⁴⁶ By dint of this Act, the rituals of marriage have been simplified which eradicates the complications that arise as to the presumption of marriage.

The Marriage Registration Act of 1971 in Nepal is more progressive in nature. It has stipulated that no particular ceremonies are to be performed by the parties. If any party wants to follow any religious, ethnic or dynastic custom, tradition, usage or practice, it has to be addressed in front of the Marriage Registration Officer and witnesses.⁴⁷ Due to these provisions in India and Nepal, the solemnisation of a Hindu marriage has become much easier. Even though, Bangladesh shares a similar Hindu culture, it is left out of the positive transformations in Hindu law.

C. The Polygamous Nature of Hindu Marriage

The practice of polygamy in Hindu law evolved from necessity rather than from the desire of men. There are circumstances when a Hindu man may engage himself to more than one marriage, for example, for the procreation of a male issue.⁴⁸ The law prevalent for the Hindus in Bangladesh allows polygamy, though it is not an ideal practice in society. Hindu men may take as many wives as they want. They are not required by law to seek permission from the existing wife or any authority, and they do not have to fulfill any conditions before remarrying. However, polyandry is not permitted by law. As dissolution of marriage is not legally possible, a Hindu men may marry innumerable times even after deserting his wife. But a Hindu woman cannot even dissolve a marital tie

⁴⁵ 3 LNJ (AD) (2014) 49.

⁴⁶ Section 7 (1), (2), the Hindu Marriage Act, 1955, Act XXV.

⁴⁷ Section 8(2), The Marriage Registration Act, 2028 (1971).

⁴⁸ *Supra* n 27, at p. 154.

that is unhealthy and unsatisfying and cannot remarry. She may however ask for judicial separation and maintenance.⁴⁹

By the application of the Hindu Marriage Act of 1955, polygamy is now prohibited in India. Section 5 of the Act stipulates that neither party can have a living spouse at the time of marriage. Further, section 11 of the Act has declared that any such polygamous marriage as null and void. So now, in India, a Hindu man cannot have more than one wife. Section 17 of the Act provides for the punishment of such acts. Due to this express provision, bigamy is also removed from Hindu marriages. If such a marriage is solemnised between two Hindus while an existing spouse is alive, the marriage is considered void. The provisions of Sections 494⁵⁰ and 495⁵¹ of the Indian Penal Code (45 of 1860) shall consequently apply. It makes polygamy a punishable offence and says that such marriage will be void; the husband or wife will be fined or punished for a term that may extend to seven years. In the case of concealment of the fact of a previous marriage, the husband or wife will be punished with a fine or imprisonment for a period that may extend to ten years. Previously, a Hindu man could marry without being accountable to his partner with little recourse available to the Hindu woman. These provisions have undeniably safeguarded the rights of Hindu women in the country.

Similarly, Nepal (who has a majority Hindu population) has brought dramatic changes by liberalising the ancient Hindu law principles. It has prohibited polygamy through the Marriage Registration Act of 1971. The provisions of this Act stipulates that marriage may be entered into if the male or female has no other husband or wife.⁵² However, the Civil Code of the State (The *Muluki Ain*) mentions some grounds when a male may keep an additional wife, namely, if the wife has any contagious venereal disease which has become incurable, if she has become incurably insane, if no offspring has been born because of the wife, if she becomes crippled, if the wife becomes blind of both eyes and if she takes partition share from him pursuant to No. 10502 of the Chapter on Partition and lives apart.⁵³

By dint of the Hindu Marriage Act 2017 Pakistan has prohibited bigamy for both male and female. The only exception says that, a man may remarry if his spouse cannot

⁴⁹ Section 2(4), The Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, Act XIX.

⁵⁰ Marrying again during the lifetime of husband or wife: Whoever, having a husband or wife living, marries in any case in which, such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. Exception: This Section does not extend to any person, whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.

⁵¹ Same offence with concealment of former marriage from person with whom subsequent marriage is contracted: Whoever commits the offence defined in the last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

⁵² *Supra* n 47, at. Section 4(a).

⁵³ Number 9, Chapter 17, *Muluki Ain* of Nepal, 2019 (1963), Act LXVII.

conceive a child and is medically declared to be so.⁵⁴ Any Hindu marriage solemnised while parties have a spouse living at the date of such marriage will be void. Similar to the Indian Act, this Act also declares polygamy as a punishable offence; applying Sections 494 and 495 of the Pakistan Penal Code 1860 accordingly.⁵⁵ Besides rendering the marriage as void, it has also provides for punishment of a fine or imprisonment for a term that may extend to seven years. The concealment of the fact of former marriage will give rise to a fine or imprisonment that may extend to ten years. Hindus are a minority in Pakistan as they are in Bangladesh. It is noticeable that even though it is an Islamic state, the rigorous modifications that have been brought by the Act of Pakistan is very appreciable.

D. Optional Registration of Marriage

Prior to 2012, there were no provisions for the registration of Hindu marriages in Bangladesh. As such, when a Hindu woman's marriage was challenged, she would face tremendous difficulty in proving her marriage.⁵⁶ Different potential problems arose due to the absence of any legal rule for registration of Hindu marriage, such as, proving the fact of marriage when the husband denies it, proving the legitimacy of children, maintenance of the wife, remedy in criminal cases arising due to family violence.⁵⁷ Post 2012, the enactment of the Hindu Marriage Registration Act 2012 has brought some changes to the primordial rule of Hindu marriage. It provides for the registration of Hindu marriage, though this is optional.⁵⁸ Theoretically, it has paved the way for the discriminatory law to change, however, reality suggests that this has not been the case.

In India, Section 8 of the Hindu Marriage Act of 1955 provides for the registration of Hindu marriages. It has declared the registration of marriage compulsory and anyone contravening the provision would be fined an amount which may extend to twenty five rupees.⁵⁹ However, the validity of any marriage will not be affected if it is not registered.⁶⁰ The mandatory registration of marriage may have had the effect of remarkably lessening the rate of denial of marriage. In Bangladesh, due to lack of compulsory registration the presumption of marriage depends on the contemplation of the performance of different ceremonies.

The Marriage Registration Act 1971 of Nepal provides that marriage is to be concluded through registration. The marriage concluded must be registered by the Marriage Registration Officer pursuant to Section 8 in the marriage register. Before concluding a marriage pursuant to this Act, the parties to the marriage and at least three witnesses shall sign a deed of declaration (affidavit) in a prescribed format and submit it to the Marriage Registration Officer.⁶¹ By evaluating the laws prevalent in Nepal, it is

⁵⁴ Proviso Section 4(d), The Hindu Marriage Act, 2017, Act VII.

⁵⁵ *Ibid* at Section 20.

⁵⁶ *Swapon Kumar Gain v Amita Goldar* [2006] 58 DLR 26.

⁵⁷ *Supra* n 22, at p. 19.

⁵⁸ *Supra* n 24, at Section 3(2).

⁵⁹ *Supra* n 46, at Section 8(2).

⁶⁰ *Supra* n 46, at Section 8(5).

⁶¹ *Supra* n 47, at Section 8(1).

evident that a marriage may be concluded in the simplest way where no complication arises. Discriminatory provisions that are contrary to the spirit of the Constitution are no longer in practice.

Pakistan has also made a radical change in their Hindu marriage laws by enacting the Hindu Marriage Act of 2017. Hindus may solemnise their marriage following all the rituals and ceremonies⁶² but it must be registered. Section 6(1) of the Act provides for a time period of fifteen days for registration after the solemnisation of such marriage. Anyone violating the provision relating to registration will be punishable under Section 23 of the Act with imprisonment for a term which may extend to three months or with fine which may extend to one thousand rupees or both.

The provision of optional registration of Hindu marriage in Bangladesh does not only trigger an oppressive situation but also creates legal complications. The Registration document is proof of a valid marriage which cannot be presented where the official document is asked for, like in the case of a visa application. Whereas the abovementioned countries have made it compulsory, the optional registration in Bangladesh has rendered it an ineffective one.

IV. DISSOLUTION OF HINDU MARRIAGE IN SOUTH ASIAN COUNTRIES: IS BANGLADESH'S PROVISION AN OPPRESSIVE ONE?

For the Hindus, as *Shashtra* the marital bond is unbreakable. It is an eternal and indissoluble holy union. *Shastriya* law does not allow for the dissolution of marriage under any circumstances, even after the death of the husband. Manu observes, “*Let mutual fidelity continue until death. This is the summary of the highest law for husband and wife*”. There are divergence of opinions as to whether divorce is permitted by *Shastriya* law or not. The dominant view is that divorce is not permissible at all as the eternal bond is irrevocable. However, there is also much evidence in the long-established existence of various ancient customary forms of divorce among Hindus.⁶³ As per the ancient Hindu law divorce was observed in exceptional circumstances. According to Narada,⁶⁴ women were allowed another husband in certain situations, such as, where there is no trace of the husband, or that he is dead, or had converted into another religion, or was impotent, or had become an outcaste. Under almost similar circumstances, the dissolution of a marriage was supported by Parasara.⁶⁵ As a male child is an essential progeny in Hindu marriage, its absence affected dominantly while considering divorce. In some communities, divorce is allowed by custom and the courts enforced such custom provided they fulfilled the

⁶² *Supra* n 54, at Section 5.

⁶³ R K Agarwala, *Hindu Law*, 20th Ed., Central Law Academy Allahabad, 2000, p. 437.

⁶⁴ Narada is an ancient *Smriti* writer and has notably progressive views on law. He has addressed age of majority and recognized separation and remarriage by a woman in certain circumstances. D F Mulla, *Principles of Hindu Law*, 15thed., N M Tripathi Private Limited, Bombay 1981, p. 28.

⁶⁵ Parasara is also an ancient *Smriti* writer. He has recognised the usages and customs of the people as transcendent law.

D F Mulla, *Principles of Hindu Law*, 15th Ed., N M Tripathi Private Limited, Bombay 1981, p. 31.

requisites of a valid custom.⁶⁶ The practice of divorce is prevalent among the lower castes. However, it does occur among *Bramins* as well, although this fact is still highly controversial. Werner Menski pronounces, “Many texts point to certain circumstances in which separation may be necessary in view of higher concerns. Where there are no children, or if the wife (and sometimes the husband) seriously misbehaves, then this may be a ground for changing the marriage partner. Whether this is called to be a divorce, or something else, has become a controversial topic.”⁶⁷ Till today Bangladesh follows the *Shastra*.⁶⁸ Hindu women have no right to seek a divorce. By dint of the Special Marriage Act of 1872, Hindus may marry outside of their religion or outside their caste. The Divorce Act of 1869 is applicable for the parties who contract marriages under the Special Marriage Act of 1872,⁶⁹ but to solemnise such marriages, the parties must declare that they do not profess any religion.⁷⁰

Bangladesh, albeit being a secular country, does not embrace any measures to reform the prejudiced *Shastriya* law unlike India, Pakistan and Nepal. The principle of non-discrimination is professed in Articles 28 and 29 of the Constitution of People’s Republic of Bangladesh. But Article 28(2) excludes personal laws and practices from protection and thus personal laws of different religions prevail unsorted. Even though there is no provision for Hindu divorce, Hindu women can seek a court decree for a separate residence and maintenance on few grounds⁷¹ under the Hindu Married Women’s Right to Separate Residence and Maintenance Act of 1946. She can – (1) ask for a judicial separation in case her husband suffers from a loathsome disease; (2) if he remarries or keeps a concubine; (3) if he abandons her or does any act of cruelty to her; or (4) if he converts to a different religion. Even this right to separate residence and maintenance is not an exhaustive one. A Hindu married woman shall not be entitled to such right from her husband if she is unchaste or ceases to be a Hindu. Moreover, she also loses the right if she fails to comply with a court decree for the restitution of conjugal rights. Judicial separation does not serve the purpose of separating one from the oppressed life. As polygamy is allowed in Hindu law, the husband may remarry. But the wife cannot remarry and start a new life.

A. The Constitution of the Republic of India 1950

The Constitution declares that India is a sovereign, socialist, secular, and democratic republic. It assures its citizens, justice, equality and liberty.⁷² Article 14 of Part 3 of the Constitution provides for equality of every citizen before the law like that of Bangladesh.

⁶⁶ *Sankaralingam v Subban* [1894] ILR 17 Mad. 479.

⁶⁷ *Supra* n 43, at p. 433.

⁶⁸ Work of sacred scripture in Hindu *Dharma*.

⁶⁹ Section 17, the Special Marriage Act, 1872, Act III.

⁷⁰ *Ibid.* at Section 2.

⁷¹ *Supra* n 49, at Section 2 -(a) He is suffering from any loathsome disease; (b) he is guilty of cruelty towards his wife; (c) he is guilty of abandoning her against her wish; (d) he remarries; (e) he converts to another religion; (f) he keeps a concubine; and (g) any other justifiable cause.

⁷² Preamble, The Constitution of Republic of India.

Article 16 further provides that the state shall not discriminate against any citizen on the grounds of religion, race, caste, sex, place of birth or any of them. Aligned with the constitutional provisions of the country, the Hindu Marriage Act was enacted in 1955. It has since brought about drastic changes in the law. The primeval law has been substituted with new laws ensuring the concept of equality. The concerns regarding marriage and its dissolution are now dealt with without discriminating between a Hindu husband and wife. The Act of 1955 offers the equal right to divorce to Hindu husband and wife. Section 13 of the Act provides for dissolution of marriage to both Hindu man and woman on a number of modern fault grounds.⁷³ Adultery, unsound mind, incurable disease of leprosy, venereal diseases, polygamy and cruelty are grounds under the Hindu Marriage Act of 1955⁷⁴ to apply for a divorce. Besides, the Act provides special provision for the Hindu wife for the dissolution of the marriage in certain circumstances such as, if a Hindu male remarries, the wife may ask for divorce. She can also seek divorce due to rape, sodomy or bestiality of the husband.⁷⁵ These provisions are unquestionably a cutting-edge in eliminating the discrimination that has long been in existence.

B. The Constitution of Nepal 2015

The preamble of the Constitution of Nepal 2015, states that the State of Nepal upholds the essence of the principle of non-discrimination by eliminating discrimination based on class, caste, region, language, religion and gender and all forms of caste-based untouchability. Part 3 of their Constitution provides for the fundamental rights of the citizen where right to equality⁷⁶ is listed as one of such rights. It ensures that no discrimination shall be made among people on the grounds of origin, religion, race, caste, tribe, sex, economic condition, language, region, ideology or any other similar grounds. Furthermore, Article 38 of the Constitution ensures equal rights of women in every sector. Spouses shall have equal rights to property as well as in family affairs.⁷⁷

With regards to the dissolution of marriage, Nepal established landmark reforms. Its Civil Code has provided for the right to dissolve a marriage by a wife. Chapter 12, No. 1 of the *Muluki Ain* provides the grounds of dissolution of marriage by the husband as well as by the wife.⁷⁸ If a wife has left her husband and lived separately for a continuous period of three years or more without his consent, or she has carried out any such act or intrigue or conspiracy as is designed to put an end to the husband's life, lead to his physical disability or result in any other severe physical or mental⁷⁹ suffering to him, or the wife suffers from any incurable venereal disease⁸⁰ or the wife is held to have sexual intercourse with any other man, the husband may dissolve his relation with

⁷³ *Supra* n 27, at p. 238.

⁷⁴ *Supra* n 46, at Section 13.

⁷⁵ *Supra* n 46, at Section 13(2).

⁷⁶ Article 18, The Constitution of Nepal 2015.

⁷⁷ *Ibid.* at Article 38(6).

⁷⁸ Part 3.

⁷⁹ Inserted by the Eleventh Amendment.

⁸⁰ *Supra* n 53, at Chapter 12.

such a wife. Accordingly, it also says, if a husband has brought or kept another wife or banished her from the house, or not provided her with food and clothes or left the wife and lived separately without seeking any news of her and without taking care of her for a continuous period of three years or more or carried out any such act or intrigue or conspiracy designed to put an end to her life, lead to her physical disability or result in any other severe physical or mental⁸¹ suffering to her or has become impotent, or the husband suffers from any incurable venereal disease⁸² or the husband is held to have sexual intercourse with any other woman or the husband is held to have raped the wife as mentioned in Section 6 of Number 3 of the chapter on rape,⁸³ the wife may dissolve her relation with such a husband. The laws in Nepal do not provide unfettered right to a husband to divorce his wife and it also provides equal opportunity to the wives to dissolve any detrimental relation of marriage, unlike Bangladesh.

C. *The Constitution of the Islamic Republic of Pakistan 1973*

This Constitution also enshrines the principle of equality. Article 25A of part 2, Chapter 1 of the Constitution provides that everyone is equal before the law and no one shall be discriminated on the basis of sex. Being an Islamic State, Pakistan preserves the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam.⁸⁴ It ensures adequate provisions for the minorities to freely profess and practice their religion and culture.⁸⁵ A momentous change related to issues under Hindu divorce was made when Pakistan enacting the Act of 2015. It was a much-awaited Act which obtained approval by Pakistan's Senate in 2017. The Act makes provision for the annulment of a Hindu marriage for both husband and wife on the grounds of adultery, cruelty, deserting the spouse for a period of not less than 2 years, conversion to another religion, spouse being incurably of unsound mind or mental disorder, incurable form of leprosy, venereal disease or HIV and if the spouse renounce the world by entering any religious order.⁸⁶ Moreover, the Act provides special grounds for the wife for the termination of her marriage.⁸⁷ Remarriage of the husband, rape or cruelty towards the wife, if the marriage was solemnised before the attainment of eighteen years by the wife; no matter if the marriage is consummated or not, these are considered as valid grounds for the annulment of the marriage by the wife.

D. *The Position in Bangladesh*

By discussing the Hindu Divorce laws in India, Nepal and Pakistan, it can be identified that these countries have developed their laws illuminating the principles of human rights jurisprudence and Constitutional provisions. Revolutionary laws have been enacted,

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Inserted by Some Nepal Acts to Maintain Gender Equality Amendment Act, 2063 (2006).

⁸⁴ Preamble, The Constitution of the Islamic Republic of Pakistan 1973.

⁸⁵ *Ibid.*

⁸⁶ *Supra* n 54, at Section 12(1)(a).

⁸⁷ *Supra* n 54, at Section 12(2).

with Bangladesh being the only exception. Even if we consider the fact that Hindus are a minority community in the country, Pakistan has a similar background; and despite being an Islamic state they have adopted crucial changes to eliminating the discriminatory provisions of the *Shastriya* law. It is a matter of great regret that even after being a secular state Bangladesh has not been able to make any such changes. Bangladesh stands alone when it follows the *Shastriya* prejudicing the lives of Hindu women. Even though some reforms have been introduced in case of Mohammedan law, Hindu laws remain unchanged. Recently in 2012, the Hindu Marriage Registration Act was enacted but the law does not render the registration of Hindu marriage compulsory.⁸⁸ Section 3 of the Act provides for the registration of a Hindu marriage, but if it is not registered the validity of the marriage will not be affected. As it is optional the court cannot confer any legally binding order, rather it depends upon the parties.

Hindu women in Bangladesh can go to the court to ask for remedies in certain cases such as dowry, non-maintenance, suppression and violence. Under section 3 of the Family Court Ordinance 1985, a Hindu wife can institute a suit against her husband for maintenance. The Dowry Prohibition Act 1980 and the *Nari-o-Shishu Nirjatan Daman Ain* of 2000 provides remedies for women and children in case of dowry and oppression. These Acts could not guarantee apposite fairness to them because even if they can ask for punishments and compensation for certain offences, they cannot divorce their husband. Hence, no matter how oppressed she is, she has to endure the conjugal life anyway or stay separately, but cannot dissolve the marriage as it is irrevocable. As there is no divorce for Hindu wives in Bangladesh, no opportunity for post-divorce maintenance is present unlike the Mohammedan law. The principles of equality and non-discrimination are enshrined in every Constitution. The states' initiative should be in compliance with these constitutional frameworks. The other South Asian countries mentioned in this paper have adopted more secular and non-discriminative provisions, leaving Bangladesh unaccompanied within the spectrum of Hindu personal laws.

V. REFORM AGENDA ON HINDU PERSONAL LAWS IN BANGLADESH: PRACTICAL REASON BEHIND RELUCTANCE IN MODIFYING THE EXISTING LAW

It is really disheartening that after a long time Bangladesh is still following the age-old orthodox laws even after the constitutional framework towards non-discriminatory and secular approach were put in place. Several proposals were made like, the Hindu Marriage, Adoption, Maintenance and Succession Related Codified Act 2006 by the Bangladesh Law Commission;⁸⁹ the Hindu Personal and Family Laws Ordinance 2008 by the Human Rights Congress of Bangladesh Minorities (HRCBM)⁹⁰ and the Hindu Marriage Act 2010

⁸⁸ Section 3.

⁸⁹ Bangladesh Law Commission (BLC) is a statutory body established by the Law Commission Act of 1996.

⁹⁰ HRCBM is an international campaigning movement dedicated to protecting the human rights of people in Bangladesh, in particular religious minorities.

by the Coalition for the preparation of a Draft Hindu Marriage Law.⁹¹ However, till today, the initiative to reform the present law by the parliamentarians remains unattended. Why are discriminatory Hindu laws still unattended to? This paper poses the question with a great surprise which needs to be resolved.

The United Nations Educational, Scientific and Cultural Organization (UNESCO) along with the non-governmental organisations for women prepared a report in 2005 entitled 'Marriage, inheritance and family laws in Bangladesh: towards a common family code' and submitted it to the government of Bangladesh.⁹² After reviewing the proposal it concluded that a Uniform Family Code (UFC) would be impossible to achieve in Bangladesh's reality because the religious beliefs of different communities differ in terms of its origins, basis and faith.⁹³ Setting aside the concept of UFC, the idea of enacting a new law for the Hindus in Bangladesh has not been successful till now. Given the existing patriarchal rule and orthodox religious belief, the Hindu community does not seem encouraged to take any such initiative to reform the law. In 2011, the much debated Women's Policy announced by the Government reiterated the State's desire to ensure gender equality.⁹⁴ The policy also has implications for the rights of Hindu women but it was opposed vehemently by fundamentalist groups. Till today, the existing structure of society does not want to offer equal opportunities to the women. Though the mindset of modern Hindus are changing, a major section of society still believes in *Shastriya*. The spur of the religion is so resilient that many Hindu women themselves do not want to change the customary law, where any contradiction to it is considered a sinful deed.

VI. SUGGESTIONS FOR FUTURE INITIATIVES AND CONCLUDING REMARKS

As the idea of a UFC is not possible to implement in the current social arrangement, the legislators should take the initiative to consider enacting a new law by addressing the discrimination of prevailing Hindu laws. For example, the provision of registration of Hindu marriage should be made mandatory (rather than keeping it optional) to avoid various legal complication. Conducting a marriage should be kept as simple as possible, preserving the ceremonies to be followed should be decided by the parties. Polygamy should be prohibited except in extraordinary circumstances. Most importantly, the provision of divorce by both the Hindu husband and wife needs to be introduced. If the purpose of marriage is not served and a sacred bond turns out to be prejudicial to their lives, it is better to dissolve the relationship.

A radical change cannot be made at once to reform the personal laws in Bangladesh, but initiatives should be taken to reform the separate provisions which are discriminatory, and which violate the egalitarian principles of human rights. At present time, the Hindu

⁹¹ Under the initiative of 'Manuser jonno Foundation' (MJF) and 'Bachte Shekha', a coalition of 17 NGO's was formed to propose reforms to the laws relating to Hindu Marriages in Bangladesh.

⁹² *Supra* n36.

⁹³ *Supra* n36.

⁹⁴ *Supra* n22, at p. 11.

community is gradually accepting the principle of equality. It is hoped that the government of Bangladesh would continue to address and reform the laws to comply with the constitutional provisions and existing international covenants.