

Anglo-Mohammedan and Anglo-Hindu Law- Revisiting Colonial Codification

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Introduction:

Their respective personal religious laws govern family or private matters of Muslims, Hindus and of other communities in Bangladesh. Most of these laws continue to remain uncodified, although legislative enactment have, to a certain extent through the decades, reformed, amended or supplemented the personal laws of different communities. A great majority of such statutory codification relating to family matters was accomplished during the British rule of the sub-continent. These laws continue to dominate the personal legal regime of Bangladeshi Muslims, Hindus, and Buddhists who are also governed by Hindu Law in many respects.

The present article discusses and critiques the legal initiatives, which the colonizers undertook by way of legislation. Although some of such laws have been repealed, most continue to remain important pieces of law. This is especially true in the case of Bangladesh but also applies to a greater or lesser extent to Pakistan and India.

Brief History of colonial law making:

Before the advent of the British i.e. under the Moguls, Mahomedan law and not Hindu law was the law of the land. The East India Company was granted restricted legislative powers first by Queen Elizabeth through the Charter of 1600, which set up the Company. The Company's powers remained confined to employees of the company in furtherance of their primary objective i.e. to carry on trade and business in India. Successive charters granted similar powers. In 1726 the Crown recognized the Company as a ruling power in respect of several towns, places and factories that were already within its control.¹ The Charter of 1726 for the first time created a subordinate legislative authority in the three Presidency towns of Calcutta, Bombay and Madras. This Charter was unique in several respects. Legislative powers were granted to Governors in Council and were applicable to the inhabitants, including Indians, of the places concerned and not confined to the Company and

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¹ Khan, B. U. and Supan, G.M.H., *Encyclopedic Compendium of the Laws of Bangladesh*, BLAST, Dhaka, 2002, at p. 4.

its servants as under previous Charters.² The legislative powers to make by-laws, rules, ordinances to regulate the working of the Corporations and also for the better administration of the inhabitants of the settlements was given to the Governor-in-Council.³

Warren Hastings Plan of 1772:

Warren Hastings took over the Governorship of Bengal in 1772 and under him the famous judicial plan, which came to be known as the Warren Hastings Plan was prepared. Hastings, explaining the plan for better governance of Bengal to the Court of Directors of the Company, stated that it would establish the Company's system of governance on 'a most equitable, solid and permanent footing'.⁴ The plan was based, in Hastings' own words, on:

principles of experience and common observation, without the advantages which an intimate knowledge of the theory of law might have afforded us: We have endeavored to adapt our Regulations to the Manners and Understandings of the People, and the Exigencies of the Country, adhering as closely as we are able to their ancient uses and Institutions.⁵

Under the plan prepared by Hastings, the whole of Bengal, Bihar and Orissa were divided into districts, which were under the administrative and judicial control of an English officer called Collector. The Plan set up civil and criminal Courts for Bengal, Bihar and Orissa, pursuant to the East India Company's determination to stand forth as *dewan*.⁶ For the administration of civil justice in the district level a Mofussil Diwani Adalat presided over by the Collector was established.⁷ Following current practice in Bengal, which was a Muslim-ruled state, the British accepted Muslim criminal law as the law of the land, but civil law was

² Ibid.

³ Kulshreshtha V. D., *Landmarks in Indian Legal and Constitutional History*; 5th ed., Eastern Book Company, Lucknow, 1984, at p. 63.

⁴ Letter from Governor-General and Council to Court of Directors, Fort William, 3 November 1772, printed in Great Britain: Parliament, *Reports from Committees of the House of Commons*, vol. 4, (East Indies, 1772-3; reprinted London 1804), at pp. 345-6 cited in Cohn, Bernard S. (1985). "The Command of Language and the Language of Command" in *Subaltern Studies*, Vol. IV, 1985, at p. 289.

⁵ Ibid.

⁶ Rankin, G.C., "Civil Law in British India before the Codes" in *Law Quarterly Review*, Vol. 58, 1942, at p.469.

⁷ Supra note 3, at p. 89.

to be Hindu for Hindus and Muslim for Muslims.⁸ The courts established under the Plan of 1772 therefore were charged with the task of applying indigenous legal norms `in all suits regarding inheritance, marriage, caste, and other religious usages or institutions.'⁹ Indigenous norms comprised `the laws of the Koran with respect to

Muhammadans, and the laws of the Brahminic `Shasters' with respect to Hindus with *maulavis* and *pandits* respectively advising the relevant courts.¹⁰

The Regulating Act of 1773 permitted the Company to retain its Indian possessions, but its management was brought under the definite, if only partial control of the Crown and parliament.¹¹ This Act granted legislative power to the Company's executive authority in Bengal. The Governor-General and Council were authorized to make and issue rules, ordinances and regulations for the good order of civil government in the Company's settlements, factories and places.¹²

After the Hastings Plan of 1772 and the Regulating Act of 1773 i.e. between 1774 and 1858 several changes were made to the judicial and legislative system of Bengal but the overall control remained in the hands of Company. The Charter Act of 1833 is referred as one of the most important Charters, which played a crucial role in shaping the future course of the legislative and judicial development of this sub-continent.¹³ The Charter allowed the Company to retain its territorial possessions in India for the next twenty years and established an All India Legislature with general and wide powers to legislate.¹⁴

In 1858, by the Government of India Act, the governing powers of the East India Company was transferred to the Crown and was to be exercised on behalf of the Crown. The rule of the Company effectively came to an end through the Proclamation of Queen Victoria and the administration of the Company's Indian possessions was taken over by

⁸ Cohn, Bernard S., "The Command of Language and the Language of Command" in *Subaltern Studies*, Vol. IV, 1985, at p. 290.

⁹ Anderson, Michael R., "Islamic Law and the Colonial Encounter in British India" in *Islamic Family Law*, Mallat, Chibli & Connors, Jane (editors); Graham & Trotman, London et al., 1990, at p.207.

¹⁰ Ibid.

¹¹ Supra note 3, at p. 115

¹² Ibid.

¹³ Supra note 3, at p.186.

¹⁴ Ibid.

the British Government.¹⁵ The Governor General in Council was empowered as the Indian Legislative Council to make laws by passing Acts instead of regulations. Considering the necessity of law reform and based on recommendations of successive Law Commissions, the Council enacted several laws. Slavery was abolished in 1843; Islamic criminal law and procedure were replaced entirely by colonial codes in the early 1860s, and Islamic canons of evidence were supplanted by British based rules.¹⁶ The Code of Civil Procedure 1859, Penal Code of 1860, the Criminal Procedure Code of 1861 and the Evidence Act 1872 were enacted. By 1875, new colonial codes had displaced the Anglo-Muhammadan law in all subjects except family law and certain property transactions.¹⁷ The rest, as they say is history.

Legislative enactment therefore stepped in to change certain aspects of prevailing law whether Islamic criminal law, laws related to evidence or Muslim and Hindu personal law. With regard to the first and second, uniform secular laws applicable to all communities replaced Islamic law. In the case of personal law, legislation on such matters related to practices, which the rulers found particularly abhorrent such as child marriages, the practice of *sati* (widow immolation) and so forth. According to Washbrook:

the elements of continuity in the first century of colonial rule frequently have been seen to derive from either fear that, by disturbing the bases of religious and traditional authority, they would unleash revolt against their rule.¹⁸

Although hesitant to interfere in the practices which were considered within the private sphere of those they colonized, they found it easier to deal with those practices which particularly offended them and which they, backed by Indian social reformers as well as those back in Britain, found it easier to address. As the apparatus of the colonial state became more refined, and administrators more capable of policing various forms of resistance, large portions of the Anglo-Muhammadan law was

¹⁵ Hoque, K. Ebadul, *Administration of Justice in Bangladesh*, Asiatic Society of Bangladesh, Dhaka, 2003, at p.16.

¹⁶ *Supra* note 9, at p. 209.

¹⁷ *Ibid.*

¹⁸ Washbrook, D. A. "Law, State and Agrarian Society in Colonial India" in *Modern Asian Studies*, 15, 3 (1981), at p. 665.

supplanted by laws of British origin¹⁹ as indeed was the Anglo-Hindu law.

The British therefore chose to administer separate systems of personal law and the trend was never reversed in any of the three countries. Whilst preserving this separation of systems, they legislated on various aspects of these personal matters. The British in India saw themselves as a force of enlightenment, especially for women. Between 1772 and 1947 several major legislative changes were made affecting the personal laws and customs of Hindus and Muslims. This article discusses the major legislative initiatives undertaken by the colonizers affecting Muslim and Hindu law. It focuses on those laws, which continue to be in force in Bangladesh.

ANGLO –MOHAMMEDAN LAW:

British legislation concerning Muslim personal law were fewer in number compared to laws related to Hindu law. One reason could be that the British hesitated, after having effectively replaced Muslim criminal and other laws, to interfere also in their personal laws. Several of the legislative changes relating to personal matters which were introduced applied not to any specific community but to all communities such as the laws relating to child marriages, guardianship and the age of majority. Only two major legislative enactments were undertaken which dealt exclusively with Muslim law and these are discussed below in some detail.

The Muslim Personal (Shariat) Application Act, 1937²⁰:

In large portions of India, customary practices were in vogue which either directly contradicted the Sharia law or differed substantially from classical law. In many cases these practices were alleged to deprive women of rights granted by religious law. For example, in many places in British India, customary law was enforced which favored the exclusion of daughters from inheritance in favour of sons. The former was deprived of any share of their father's property, which contravened the Sharia law under which a daughter is a Koranic heir and entitled to a share of her father's property.

One of the justifications behind the enactment of laws was therefore the amelioration of women's situation in India. Both Hindu and Muslim

¹⁹ Supra note 9, at p.208.

²⁰ Act No. XXVI of 1937; Bangladesh Code (BC), Vol. 11, at pp.387-388.

social reformers saw the roots of decline in a subsoil of rituals and customs that they regarded as unnecessary accretions, corruption of a pure standard embodied in a reinterpreted past.²¹

The British colonial power attempting to clarify or codify personal laws was encouraged by one portion of the Muslim populace who advocated the closer adherence to classical Shariah law and saw in this a route to ameliorating the backward status of women in India. Muslim reformers denigrated useless custom and advocated a return to stricter adherence to the laws of the Shariat. In the early part of the twentieth century, therefore, an unlikely coalition of *ulema*, Muslim middle-class reformers, and Westernized politicians with nationalistic leanings came together-for very diverse reasons to enact a series of legal reforms one of which was the Shariat Act of 1937.²²

The Shariat Act applies to all Muslims regardless of the school he belongs to but as Fyzee mentions, a peculiar feature of the law is that the word Muslim is not defined. Section 2 of the Act states:

Notwithstanding any custom to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq ila, zihar, lian, khula and mubaraat, maintenance, dower guardianship, gifts trusts and trust properties, and waqfs (other than charities and charitable institutions and endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

In two separate sections the Act specified i) those subjects in regard to which all Muslims of India would be compulsorily be governed by Islamic law, and ii) those in respect of which a Muslim would have the option to adopt Muslim law in preference to a contrary custom, if any for himself, his minor children and their descendants.²³ Section 2 of the Act describes in details the matters in which Shariat law and not customary law was to be followed and as can be seen, they encompass

²¹ Minault, G., "Women, Legal Reforms and Muslim Identity" in *Islam--Communities and the Nation--Muslim Identities in South Asia and Beyond*; Hasan, M., (editor), The University Press Limited, Dhaka, , 1998, at p. 138.

²² Ibid, at p. 149.

²³ Mahmood, Tahir., "Indian Legislation on Muslim Marriage and Divorce" in *Social Legislation in India*, Vol. 3, Gangrade, K.D. (editor); Concept Publishing Co.: Delhi, 1978, at pp.16-27.

almost all aspects of family laws. By making Islamic Law applicable in matrimonial matters and inheritance, regardless of any contrary usage the Act indirectly enabled Muslim women to enjoy fully their rights relating to property and divorce as sanctioned by Islamic law.²⁴

The Shariat Act had the effect of establishing Sharia law over customary law practiced in many parts of India.

The Dissolution of Muslim Marriages Act, 1939²⁵:

In 1939 the Dissolution of Muslim Marriages Act was enacted, as stated in the Preamble, 'to consolidate and clarify the Muslim Law regarding suits for dissolution of marriage of women married under Muslim law' and 'to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie'.

Under Muslim law, the husband has extensive powers of pronouncing divorce (*talaq*) extra judicially. A Muslim women, on the other hand, has no such corresponding right unless her husband has delegated the right to her or has consented, in lieu of some consideration to a dissolution sought by her (*khula*), or they have mutually agreed to end the marriage (*mubaraat*). The lack of rights of Muslim women regarding dissolution of an unhappy marriage became a concern in British India because Muslim women opted to convert to another religion or chose apostasy, which automatically dissolved the marital tie. Classical Muslim jurists differed as to the grounds upon which a Muslim wife could obtain dissolution of marriage. A comparison of the different schools shows that the *Hanafi* School is least favorable to the woman's right to dissolve the marital tie while the *Maliki*, the most favorable. The Islamic law of India was the *Hanafi* law since the Muslim rulers by and large belonged to the *Hanafi* school. Prior to the passing of the Act of 1939, following the *Hanafi* interpretation of law, the courts had denied to Muslim women the rights to dissolve their marriages.²⁶ It became necessary to utilize the principle or doctrine of *takhayyur* to introduce *Maliki* concepts in order to enable Muslim *Hanafi* women to go to Court on certain specified grounds to seek dissolution of marriage. *Takhayyur* or selection is a process whereby doctrines of another school are incorporated into and accepted by another school. The Act of 1939 is

²⁴ Ibid, at p. 19.

²⁵ Act No. VIII of 1939; *Pakistan Code*, Vol.9, at pp. 716-718.

²⁶ Fyzee, Asaf A.A., *Outlines of Muhammadan Law*; Oxford University Press: Bombay et al, 1974, at p.169.

said to be the most important piece of legislation relating to Muslim women, promulgated in the sub-continent²⁷ during the British rule.

Under Section 2 of the Act, the wife may obtain a judicial decree for dissolution of marriage from the Court on any one of the grounds mentioned therein. Several grounds are mentioned in the Act based upon which a woman may go to Court to obtain divorce and even a single ground is sufficient for a married woman to obtain a dissolution of her marriage. **There are nine grounds- the occurrence of any one or more of which would provide cause of action for a Muslim wife to seek divorce through court.** These grounds include the husband's failure to provide maintenance for two years, [Sec.2 (ii)], his imprisonment for a period of seven years [Sec.2 (iii)], impotency [Sec.2 (v)], his insanity for two years, or if he is suffering from leprosy or **virulent venereal** disease [Sec.2 (vi)] and his cruelty [Sec.2 (viii)]. Cruelty need not only be physical; mental cruelty can be a ground for divorce. Sec.2 (viii) gives certain examples of what would constitute cruelty which includes inequitable treatment in the event of his having more than one wife, habitual cruelty of conduct, forcing the wife to lead an immoral life, disposing of her property or preventing her from exercising her legal rights over it, obstructing her in the observance of her religious profession or practice and any other justifiable cause 'recognized as valid under Muslim law'. The DMMA of 1939 also deals with the option of puberty. Under classical law when any guardian other than the father or grandfather contracts a marriage, the minor has the option to repudiate the marriage on attaining puberty. This is known as the "option of puberty" or *khyar-ul-bulugh*. Section 2(vii) of the Act also extends the option of puberty available to a Muslim girl to repudiate her marriage if brought about while she was a minor; to include a marriage contracted on her behalf by her father or grandfather.²⁸ The Act further clarified the confusion regarding the idea that abandonment of Islam automatically dissolved the marital tie and declared that it did not do so.

The Mussalman Wakf Validating Act, 1913²⁹ and The Mussalman Wakf Validating Act, 1930³⁰:

²⁷ Ali, S. Sardar, *Gender and Human Rights in Islam and International Law*, Kluwer Law International, The Hague et al., 2000, at p.147.

²⁸ Ibid.

²⁹ Act No. VI of 1913, BC, Vol. 8, at pp.118-119.

³⁰ Act No. XXXII of 1930, BC, Vol. 11, at p.127.

The word *Wakf* means detention and in the sub-continent signifies an inalienable pious endowment.³¹ In order to do away with doubts regarding the validity of *wakfs* created by persons professing the Mussalman faith in favour of themselves, their families, children and descendants and ultimately for the benefic of the poor or other religious, pious or charitable purposes the Mussalman Wakf Validating Act, 1913 was enacted. Section 2(1) of the Act defines *wakf* as:

the permanent dedication by a person professing the Mussulman faith of any property for any purpose recognized by the Mussalman Law as religious, pious or charitable.

The Act of 1913 was not retrospective and did not apply to *wakfs* created before its enactment. By the Mussalman Wakf Validating Act of 1930, which came into force on 25 July 1930, the Act of 1913 was made retrospective and made applicable to *wakfs* created before 7 March 1913.³²

ANGLO-HINDU LAW:

An examination of British statutory innovations makes it obvious that a large number of laws were enacted which significantly effected the application of Hindu personal law.

Initially, the courts looked to the scriptures for guidance on domestic and social norms and rested heavily on the interpretations of pandits for the Hindu law.³³ Under British influence other sources of Hindu law such as legislation and judicial decisions concretized large quite a portion of Hindu law.

The Sati Regulation Act, 1829³⁴

The British took credit for ending the practice of *sati* or widow immolation practiced amongst some classes of Indian Hindus. Prohibiting such act marked the first Government intervention in the Hindu religion, and was claimed by the British as their first initiative towards the liberation of Indian Women.³⁵ The abolition of *sati* by the

³¹ Supra note 26, at p.278.

³² See *Mulla's Principles of Mahomedan Law*, 1977. By Hidayatullah M.; N.M. Tripathi Private Ltd., Bombay at p. 223 and supra note 25 at p.311.

³³ Supra note 18, at p.653.

³⁴ Bengal Regulation XVII of 1829.

³⁵ Liddle, J. and Joshi, R., "Gender and Colonisation: Women's Organization under the Raj" in *Women's Studies Forum*, 1985, at p.523.

British is called the founding moment in the history of women in modern India.³⁶ The practice of *sati*, it was argued by those opposed to its prohibition, was based on religious texts while those for its abolition argued that the prevalent practice bore little resemblance to its orthodox model which foresaw it as an voluntary act of the widow. The abolition of *sati* was made difficult by official claim that it had a scriptural basis and was based on immemorial customary practices considered to be an important source of Hindu law. However Raja Rammohan Rai argued that *Vedic* support was in favour of ascetic widowhood much more than *sati*.³⁷ The British thus began their history of law making by the Act which put an end, at least on paper, to the practice of *sati*.

The Hindu Widows Remarriage Act 1856³⁸:

Remarriage of Hindu widows was prohibited and children born of such subsequent marriage deemed to be illegitimate and unable to inherit. The life of a Hindu widow was one of misery and anguish. As Carroll³⁹ very movingly portrays:

Irrevocably, eternally married as a mere child, the death of the husband she had perhaps never known left the wife a widow, an inauspicious being whose sins in a previous life had deprived her of her husband, and her parents-in-law of their son, in this one. Doomed to a life of prayer, fasting, and drudgery, unwelcome at the celebrations and auspicious occasions that are so much a part of Hindu family and community life, her lot was scarcely to be envied.

Hindu widows, by law administered in the civil courts with certain exceptions, were by reason of the fact that they had been married once, incapable of contracting a second valid marriage, and the offspring of such widows by any second marriage were held to be illegitimate and incapable of inheriting property.⁴⁰ The Act legalized the re-marriage of Hindu widows and removed any legal incapacity they faced.

Section 1 of the Act states:

³⁶ Mani, L., "Contentious Traditions: The Debate on SATI in Colonial India" in *Culture and Critique*, Fall 1987, at p.1.

³⁷ For a detailed discussion of debate surrounding the abolition of *sati* in British India see *ibid*.

³⁸ Act No. XV of 1856, BC, at p. 17-18.

³⁹ Carroll, L., "Law, custom, and statutory social reform: The Hindu Widow's Remarriage Act of 1956" in *The Indian Economic and Social History Review*, 204 (1983) at p. 364.

⁴⁰ See preamble to the Act.

No marriage contracted between Hindus shall be invalid, and the issue of no such marriage shall be illegitimate by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and interpretation of Hindu law to the contrary notwithstanding.

Enlightened Indians such as Pandit Vidyasagar and others spearheaded agitation demanding legislative reform to ameliorate the deplorable condition of the widows. The enactment of the law legalizing widow remarriage by the British Indian government therefore obviously brought relief to many thousands of widows, many of whom were children married to much older men. However the law has been criticized, as has many other legislation undertaken by the British, for Brahminizing Hindu law which in several instances caused hardship instead of relieving it. Critics point out that it was only the higher caste Hindus that favored early marriage of their daughters and prohibited widow remarriage.

The lower, particularly Sudra, castes and the (so-called) 'Untouchables' -- who represented approximately 80 per cent of the Hindu population -- neither practiced child marriage nor prohibited remarriage of widows⁴¹

After the enactment of the Act, the Courts were called upon several times to solve the contentious question as to whether Act had primacy over prevalent customs practiced amongst castes, which allowed widow remarriage before the Act. The Act effectively deprived widows, who remarried, from property inherited from their deceased husband, even though permitted by custom. By virtue of Section 2 of the Act, the rights and interests which a widow may have in her husband's property shall upon her re-marriage cease and determine as if she had then died. In addition, Section 6 declares that all ceremonies shall have the same effect if spoken, performed or made on the marriage of a Hindu widow, and no marriage shall be declared invalid on the ground that such words, ceremonies or engagements are inapplicable to the case of a widow.

The Hindu Disposition of Property Act, 1916⁴²:

The Act is to remove certain disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition. The Act states that subject to certain limitations, the disposition of property by a Hindu, whether by

⁴¹ Supra note 39, at p.364.

⁴² Act No. XV of 1916.

transfer *inter vivos* or by will, shall not be invalid by reason only that any person for whose benefit it was made was not in existence at the date of such disposition. This Act altered the rule of Hindu Law as laid down by the Privy Council in the famous case of Tagore versus Tagore⁴³ where it was held that a gift or will in favour of an unborn person is invalid.⁴⁴ The Act of 1916 (along with similar other Acts) altered the rule that the person capable of taking must, either in fact or in contemplation of law, be in existence at the death of the testator.

The Hindu Inheritance (Removal of Disabilities) Act 1928⁴⁵:

Heirs, under Hindu law, may be excluded from inheriting property due to certain mental, physical or religious disabilities. The Act of 1928 was enacted to "amend the Hindu Law relating to exclusion from inheritance of certain classes of heirs and to remove certain doubts." It applies only to Mitakshara school and not to the Dayabagha school and states that only a person who has been from birth a lunatic or idiot shall be excluded from inheritance or from any right or share in joint family property. Thus under the Dayabagha school, persons suffering from other defects, deformities and diseases are still excluded from inheriting a share of property.

The Hindu Law of Inheritance (Amendment) Act 1929⁴⁶:

Also applies only to the Mitakshara school and alters the order of intestate succession with a view to give preferential rights of inheritance to certain female heirs. Section 2 states: A son's daughter, daughter's daughter, sister, and sister's son shall, in the order so specified, be entitled to rank in the order of succession next after a father's father and before a father's brother. Cognates are given preference over distant agnates to the estate of a Hindu male dying without male issue.⁴⁷

The above Act now stands repealed in India by the Hindu Succession Act of 1956.

⁴³ 9 Beng LR 377, PC.

⁴⁴ Chadha, P. Nath (NY), *Hindu Law*, Eastern Book Company, Lucknow, at p. 201.

⁴⁵ Act No. XII of 1928, BC Vol. 11, at p.76.

⁴⁶ Act No.II of 1929, BC, Vol. 11, at p.77.

⁴⁷ *Mayne's Treatise on Hindu Law & Usage*, Bharat law House: New Delhi, 1995, at p. 59.

The Hindu Gains of Learning Act 1930⁴⁸:

The above Act was intended to remove doubts as to the rights of a member of Hindu undivided family in property acquired by him by means of his learning. The Act declares that notwithstanding any custom, rule or interpretation of Hindu law, gains of learning, i.e. all acquisitions of property made through any trade, industry, profession or a vocation in life which the person was able to pursue because of different kinds of education, will be the acquirers of exclusive and separate property.

The Hindu Women's Right to Property Act, 1937⁴⁹:

Under orthodox law a Hindu widow was entitled to succeed to her deceased husband's property only in the absence of son, grandson, great grandson. In the case of the Dayabagha School prevalent in Bengal (also known as the Bengal school) a widow would, in the absence of those mentioned earlier, succeed to her husband's separate property as well as to his share in the coparcenary or joint family property. In the case of the Mitakshara school, the widow in such case was entitled to her husband's separate property but not to his share in the coparcenary property. The Hindu Women's Right to Property Act, 1937 gave the Hindu widow, who had previously been excluded from inheritance by the son, agnatic grandson or agnatic great-grandson of her husband a right to intestate succession equal to a son's share in regard to her husband's property liable to devolution by succession (i.e., separate and joint property under Dayabagha and separate property under Mitakshara) and to the whole of her husband's interest in property liable to devolution by survivorship (i.e., Mitakshara joint family property).⁵⁰

According to section 3(1) of the Act even when a man dies leaving male issue his widow inherits along with his male issue his separate property if he is governed by the Mitakshara law or all his property along with the male issue, if he is governed by the Dayabagha law.⁵¹

The Arya Marriage Validation Act 1937⁵²:

⁴⁸ Act No. XXX of 1930; BC, at pp.125-126.

⁴⁹ Act No. XVIII of 1937; BC, Vol. 11, at pp.384-385.

⁵⁰ Supra note 39, at p. 387.

⁵¹ Supra note 47 at p. 858-9.

⁵² Act No. XIX, 1937; BC, Vol. 11, at p. 386.

The above Act declares that marriage between Arya Samajists shall be valid. Section 2 of the Act states:

Notwithstanding any provision of Hindu Law, usage or custom to the contrary no marriage contracted whether before or after the commencement of this Act between two persons being at the time of the marriage Arya Samajists shall be invalid or shall be deemed ever to have been invalid by reason only of the fact that the parties at the time belonged to different castes or different sub-castes of Hindus or that either or both of the parties at any time before the marriage belonged to a religion other than Hinduism.

The Hindu Women's Right to Separate Residence and Maintenance, 1946⁵³:

A Hindu husband is under a personal liability to adequately maintain his wife irrespective of the fact of his being in possession of any property. On the other hand a Hindu wife is duty bound to live under the same roof as her husband. Since divorce is not permissible under orthodox Hindu law, a wife is unable to escape an unhappy union. Again Hindu law permits polygamy but prohibits polyandry. Neither is a Hindu man obliged to treat his concurrent wives equally, unlike a Muslim husband. In order to provide relief in such cases, in 1946 provisions were made for a Hindu wife to leave her marital home and claim maintenance.

Section 2 of the Act states:

Notwithstanding any custom or law to the contrary a Hindu married woman shall be entitled to separate residence and maintenance for her husband on one or more of the following grounds:

1. If he is suffering from any loathsome disease not contracted from her;
2. If he is guilty of such cruelty towards her as renders it unsafe or undesirable for her to live with him.
3. If he is guilty of desertion, that is to say, of abandoning her without her consent or against her wish;
4. If he marries again;
5. If he ceases to be a Hindu by conversion to another religion;
6. If he keeps in the house or habitually resides with a concubine ;
7. For any other justifiable cause.

⁵³ Act No. XIX of 1946, *Pakistan Code* (PC), Vol.10, at pp. 304-305.

A Hindu wife's right to live separately and demand maintenance is made dependant on several factors such as her chastity, her continuing to be a practicing Hindu and her compliance with a court's decree for restitution of conjugal rights. This law continues to be in force in Bangladesh while in India it has been repealed by the Hindu Adoption and Maintenance Act of 1956.

The Hindu Marriage Disabilities Removal Act, 1946⁵⁴:

The above Act provides that notwithstanding any text, rule of interpretation of the Hindu law or any custom or usage to the contrary, a marriage between parties which is otherwise valid shall not be invalid by reason only of the fact that the parties belong to the same *gotra* or *pravera*.

LEGISLATION APPLICABLE TO ALL COMMUNITIES:

The British enacted several general laws expressly or impliedly superceding the contrary rules of all the personal laws of all communities.⁵⁵ Some of such relevant laws are discussed below.

The Special Marriage Act, 1872⁵⁶:

It applies to marriages between persons neither of whom professes the Hindu, Sikh, Christian, Parsi, Buddhist, Jain or Muslim religion, or between persons each of whom professes any of the following religions namely Hindu, Buddhist, Sikh or Jain. In simpler words it deals with mixed marriages i.e. where the parties belong to different religions. When a Muslim, of either gender, wishes to marry a person of another religion under this Act, he or she [as well as the person(s) he wishes to marry] must declare that they do not profess any religion. Two persons, unless they are both members of the Hindu or associated religion, who wish to marry under this Act, are forced to renounce their religion.⁵⁷ This Act continues to apply to Bangladesh. In India, in 1954 the Special Marriage Act was enacted which allows persons of any religion to marry and register their marriages under the Act.

⁵⁴ Act No. XXVII of 1946, PC, Vol. 10, at pp.309-310.

⁵⁵ Supra note 23, at p. 17.

⁵⁶ Act No. III of 1872, BC, Vol. 2, at pp. 66-75.

⁵⁷ Pearl, D. and Menski, W., *Muslim Family Law*, 3rd ed., Sweet and Maxwell: London, 1998, at p.165.

The Majority Act, 1875⁵⁸:

This Act fixed the age of majority at 18 years and applies to Hindus and Muslims except in matters of marriage, dower, divorce and adoption. The purpose of the Act as enunciated in the Preamble is to 'prolong the period of nonage, and to attain more uniformity and certainty respecting the age of majority...'

The Guardians and Wards Act, 1890:⁵⁹

The Guardians and Wards Act, 1890 was enacted as a law 'to consolidate and amend the law relating to guardian and ward'. Under the Act, guardian means a person having the care of the person of a minor or of his property, or of both his person and property [Section 4(2)]. Pearl and Menski notes that the Act appears to preserve the personal law despite being a family law enactment which applies to all religious communities in South Asia⁶⁰.

Under Sunni *Hanafi* law, a mother may have custody or *hizanat* of her daughter until she attains puberty and a son until he is seven years old. Failing the mother, the custody passes on to the mother's mother then the father's mother and so forth. After that period, custody reverts to the father who is generally known as the 'natural guardian' of his children.⁶¹ Thus father is always the legal guardian of a minor even when in the custody of the mother whose custody is said to be 'subordinate custody' and is subject to the supervision of the father which he is entitled to exercise by virtue of his guardianship.⁶² Failing the father his executor and after that the paternal grandfather can be the guardian. If there are no such persons, it is for the Court to appoint a guardian of the person of the minor under the terms of the Guardian and Wards Act, 1890. Under *Hindu law* also the father is the natural guardian of the person and the separate property of his minor children.⁶³ The mother comes next to him unless the father has by will appointed some other person as guardian. Mother cannot act as lawful guardian

⁵⁸ Act No. IX of 1875; BC, Vol. 2, at pp. 218-220.

⁵⁹ Act No. VIII of 1890, BC, at pp. 292-314.

⁶⁰ Supra note 57, at p.413.

⁶¹ Supra note 27, at p. 63.

⁶² Supra note 32, at p. 368.

⁶³ *Mulla's Principles of Hindu Law* (1966). By Desai, Sunderlal T., N.M.Tripathi Private Ltd., Bombay, at p. 523-524.

during the lifetime of the father.⁶⁴ However, where the welfare of the child requires, the Court may appoint a guardian under the provisions of the Guardians and Wards Act, 1890.

When the Court is satisfied that it is for the welfare of a minor that an order should be made-- (a) appointing a guardian of his person or property, or both, or (b) declaring a person to be such a guardian, the Court may make an order accordingly. (Section 7).

The Child Marriage Restraint Act, 1929⁶⁵:

The laws relating to the age of marriage represent one of the major interventions by the British in the personal affairs of the Indian and the political implications of these laws were manifold.⁶⁶ They also represent modern legislative intervention by the state in the personal lives of the people, which replaces the rules laid down by religious law. And as such is another example of direct legislative action aimed at the reform of certain social conditions.

The Child Marriage Restraint Act of 1929 set down minimum ages of marriage for girls and boys. It made the marriage of a female below the age of fourteen and that of a male below eighteen punishable. Such marriages however were not declared invalid, i.e. a marriage involving persons below the minimum age was still be a valid marriage with all the consequences of a valid marriage. The minimum age of marriage has been increased in all three countries of the sub-continent and in Bangladesh by the amendment of 1984 the age is respectively 18 and 21.

The Act represents one of the major legislative changes, which occurred during British reign, which substantially interfered with customary and religious practices of India.⁶⁷ Although the motivations and the intentions behind the Act were questioned, it is true that the Act could be enacted at that time probably only due to the fact that the country was under foreign rule.⁶⁸

⁶⁴ See Supra note 47, at p.482.

⁶⁵ Act No.XIX of 1929, BC, Vol. 11, at pp. 100-122.

⁶⁶ Huda, Shahnaz , " Child Marriage: Social Marginalisation of the Statutory Law" in *Bangladesh Journal of Law*; Vol.1, No.2, December 1997, at p.149.

⁶⁷ Ibid..

⁶⁸ Ibid.

On the 1st of February 1927, the Indian reformer Rai Sahib Harbilas Sarada introduced 'the Sarada' Bill to prohibit child marriages.⁶⁹ Although initially intended to confine its operations to Hindu marriages only, later, when a proposal was made to make child marriage a penal offence instead of merely a civil offence, the bill was made applicable to all, irrespective of religion.⁷⁰

Conclusion:

It has been close to sixty years since the British left the Indian sub-continent. Changes made through statutory innovations in the religious laws of the communities in all three countries of the region continue to affect familial relations and personal laws.

These countries, which were indelibly effected by colonization, are on their separate journeys regarding legislation concerning family laws. Those belonging to the majority religion of each country have mostly not been able to shake off a persistent hesitation in bringing about any change regarding not only their own religious personal laws but even more so when it comes to introducing reforms to the personal laws of the minority communities.

In the case of Bangladeshi Muslim law, only a handful of laws have been enacted after 1947. During the period that Bangladesh was part of Pakistan (first as East Bengal and later as East Pakistan) the Muslim Family Laws Ordinance of 1961 was enacted. This law can indubitably be referred to as the most important piece of legislation, which attempted to reform Muslim law. In the last several decades, after Bangladesh gained independence the sole statutory enactment which relates only to Muslims is the Muslim Marriages and Divorces Registration Act of 1974⁷¹. The Dowry Prohibition Act of 1980 and the Family Courts Ordinance 1985 applies to all communities. As regards Hindu personal law, after 1947 it has virtually remained untouched. The Hindu law followed in Bangladesh continues to be uncodified and orthodox law. It is still Anglo-Hindu law, as far as its official operation

⁶⁹ Ibid at p.155.

⁷⁰ Legislative Assembly Debates (Official Reports); Vol. 2, 2nd Session of the 3rd Legislative Assembly, 1928, at p. 1967.

⁷¹ Act No. LII of 1974, 26 *Dhaka Law Reports* (DLR), 1975 (BS), at pp.251-328.

is concerned, in real life it appears to be a largely localized, customary law.⁷²

In India as regards Hindu law the situation is very different. In the 1950s several legislative enactments reformed and modernized the Hindu Law applicable in India but the separation between the private and public as regards uniformity remained. The most important enactments, which have considerably modernized the Indian Hindu law, include The Hindu Marriage Act of 1955, The Hindu Minority and Guardianship Act, the Hindu Adoption and Maintenance Act and the Hindu Succession Act, all of 1956. Unlike the Constitutions of Bangladesh and Pakistan, the Indian Constitution imposes upon the State the responsibility to endeavor to secure for its citizens a uniform civil code throughout the territory of India.⁷³ This seems however unlikely to happen in the near future and irrespective of the wide reforms brought about in the Hindu law of the country, they are violative of the above mentioned Directive Principle requiring the introduction of uniformity in all laws. As regards Muslim Law, in India the only legislative innovation applicable to Muslims is the Muslim Women (Protection of Rights on Divorce) Act, 1986. This Act is the first codification of Muslim Law in India after the Dissolution of Muslim Marriages Act 1939 and the only Indian Act on Muslim Law after independence.⁷⁴ In India,

The Hindu majority is largely indifferent and the Muslim minority almost unanimously opposed to any such uniform code behind which they fear that a Hindu-inspired code would be imposed upon them or failing that a code which ignored the religious and cultural demands of Islam.⁷⁵

The same can be said to apply to the Muslim majority and Hindu minority in Bangladesh and Pakistan. While Muslim law has been changed somewhat, the Hindu law of Bangladesh and Pakistan has remained almost entirely the same. In Pakistan an increasing trend towards Islamization of the legal system especially from 1979 has effected women's status within the legal system although the primary aim of the new legislation is to make the laws of crime and evidence

⁷² Menski, Werner F. and Rahman, Tehmina, "Hindus and the Law in Bangladesh" in *South Asia Research*, vol.8.No.2, November 1988, at p.111.

⁷³ Art. 44 of the Indian Constitution, 1950.

⁷⁴ *Supra* note 57, at p.213.

⁷⁵ Hodkinson, Keith, *Muslim Family Law--a sourcebook* ; Croom Helm London and Canberra, 1984, at p.22.

more consistent with the Shariah. Chief examples of such laws are the Offence of Zina (Enforcement of Hudood) Ordinance 1979 (VII of 1979) and the Qisas and Diyat Ordinance of 1991. Although such laws are criminal and not personal they have had effect on women's rights.⁷⁶

If a query is made as to the overall effect of colonial law making, the reply would be anything but simplistic. On the one hand it is undeniable that many beneficial laws were enacted which might not have been possible under a less autocratic authority. Changes to law, especially if they are not seen to be uniformly beneficial or consistent with particular ideologies are difficult to enforce or even legislate upon. The Muslim Family Laws Ordinance of 1961 is another example of a good, though not perfect law, being passed during the absence of a democratic government.

The purported reasoning behind colonial law making was obviously to replace applicable laws with better and more equitable laws, ensure justice to the citizens of India and to make the lives of Indian women better. One cannot find fault with such reasoning and cannot also claim that these objectives were completely thwarted. However the success of colonial codification has been the subject of much controversy and debate. Many authors contend that the purpose of the British was not to liberate women but to introduce their own concept of morality and justice in accordance with the Victorian concepts of the 'ideal woman'. They wanted, it is alleged, to introduce their own concept of reason and their own religion respectively.⁷⁷ The British obviously perceived themselves as civilized and knowledgeable and their colonial subjects as uncivilized and in some cases degraded and therefore needing to be rescued. They however hesitated to introduce large-scale law reform or attempt to codify the personal laws; which they believed were so

⁷⁶ Under the Qisas and Diyat Ordinance, for example, the blood money given and accepted in lieu of punishment by the State for a murdered woman is only half the amount for a murdered man. Again, the Zina Ordinance makes the proof of rape extremely strict and consequently many rape victims, instead of finding redress, find themselves accused of adultery and in conflict with the law. For more see: a) Mazari, Shireen, "Islamisation And The Status of Women In Pakistan: A Note" in *South Asia Bulletin* Vol. 3, No.1, Spring, 1983, at pp. 79-82 and b) Quraishi, Asifa, "Her Honour: An Islamic Critique of Rape Provisions in Pakistan's Ordinance on ZINA" in *Islamic Studies*, Occasional Papers 38, 19991, Islamic Research Institute, Islamabad.

⁷⁷ Ibid.

interconnected with religious feelings that such attempts would cause injury to religious susceptibilities.⁷⁸ As essentially outsiders, they shied away from offending their colonial subjects for fear of initiating mass protest and revolt. It was mainly due to such reason that legal reform was invoked only after considerable pressure from the communities themselves.⁷⁹

In the case of Muslim law, the British mainly reiterated and established orthodox and traditional laws. By applying narrow common law rules to family matters it further contributed to the petrification of personal law and of women's rights, and in certain cases, such as the Muslim law of inheritance, in fact effected further retrogressions.⁸⁰

For instance, the Shariat Application Act of 1937 for all the sympathetic rhetoric of the debate had an extremely limited effect on Muslim Women's rights.⁸¹

In the case of Hindu law, British knowledge of such law came primarily from the Hindu pundits. The interpretations given by these pundits, in many cases, reflected a Brahminical view of society and in many instances validated the caste system.⁸² The effects of Hindu law seems to have been considerable on those sections of society, closest to the regulating authority of the colonial power i.e., mainly the upper echelons involved in one way or another, with the higher institutions of state.⁸³ The British came into contact with the elite or upper classes of Hindu society whose belief system was very different, and in some instances quite alien from the lower classes. For the majority of Hindus, Hindu law was based on unwritten custom:

flexibly interpreted in line with prevailing opinion, and embodying a vast diversity of approaches according to cultural, regional and caste differences.⁸⁴

⁷⁸ Supra note 57, at p. 38.

⁷⁹ Ibid.

⁸⁰ Hossain, Sara, "Equality in the Home: Women's Rights and Personal Laws in South Asia" in *Human Rights of Women*, Cook, Rebecca (editor); University of Pennsylvania Press, Philadelphia, 1994, at p. 475-476.

⁸¹ Supra note 21, at p. 153.

⁸² Supra note 18, at p. 653.

⁸³ Ibid.

⁸⁴ Supra note 35, at p. 522.

Colonial law in many instances imposed Shastric texts of the Brahmins upon all Hindus as the basis of uniform Hindu law, when in reality uniformity did not exist. They attempted to make Hindu custom fit in with British law....⁸⁵ As a consequence many Hindus of the lower classes were deprived of rights afforded to them under customary practices. A case in point is the laws regarding widow remarriage.

Thus contrary to British claims of being liberalizing and non-interfering, the fact is that they were highly selective in their non-interference and in their liberalizing so that they liberalized the law for some groups of women but imposed constraints on others.⁸⁶

One cannot help but wonder what the consequence would have been if the British had decided to codify and bring uniformity to personal laws and decide not to interfere with the criminal law if the sub-continent. It is easier to imagine that instead of continuing with the separation between the private and public sphere they could have introduced uniform systems in all spheres of life. However it is also debatable as to whether they could have in doing so avoided imposing Westernized values and customs considered by them to be 'civilized'. As it is, the personal religious law of each community with their decidedly patriarchal leanings has been chosen to be the vanguard of the religious identity of both the Hindu and Muslim religion. Women rights activists, when advocating uniform family law, are faced with the justification that it is adherence to personal laws which significantly determine one's religiosity like no other portion of life and therefore must remain untouched. Colonialism continues to impact upon the legal worldview of all formerly colonized countries and will continue to do so for decades to come.

⁸⁵ Ibid.

⁸⁶ Ibid at p. 524.