

REVIEW OF HINDU PERSONAL LAW IN BANGLADESH: SEARCH FOR REFORMS

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1. Divine Nature of Hindu Law

It appears from historical study that progressive changes are essential features of the development of Hindu law. While there were regressive turns and obstructions caused by various facts of history, it is not difficult to identify these changes which indicate a general movement forward.¹ Hindu law as it presents itself today in Bangladesh or in India or in any other country, is the result of such changes. Divine in nature, Hindu law is organic part of Hindu religion which has traversed a long path clothing the humanity with rich spiritual ideas and urging every individual to good actions in order that the individual being could shine in divinity reflecting the Supreme Being.

To better understand Hindu law, one has to enter the deeper domain of Hindu philosophy which provided a complete code of life in which law plays an important role in carrying the mission of God.² Hindu philosophy believes in the ultimate unity of everything conceivable; it believes in the unity of the creator and created. The Supreme Being *Brahmno*, unfolding itself in nature takes various forms in which it develops for its own self-realisation.³ This philosophy reminds one of Hegelian concept of Absolute Idea (Will) which is at the root of all creations. Absolute Idea of Hegel unfolding itself into nature passes through various stages of development by the law of dialectics i.e. contradictions of phenomenon until human

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¹ See generally, Mulla, *Principles of Hindu Law*, Vol. I, 17th edition by Satyajeet A. Desai, Butterworths, New Delhi, 1998, pp. 1-68 (Introduction); Derrett, J.D.M. *A Critique of Modern Hindu Law*, Bombay, N.M. Tripathi, 1970, pp. 13-14; Menski, Werner F. *Hindu Law – Beyond Tradition and Modernity*, Oxford University Press, 2003, pp. 1-3, pp. 547-48; Raghavachariar, N.R. *Hindu Law*, ed. by S. Venkataraman, Madras, 1987, p. I; আনন্দ কুমার বিশ্বাস, “হিন্দু আইন সংস্কার জরুরী কেন?”, *ভারের কাগজ*, এপ্রিল ১, ২০০০, c.,: 4.

² See generally, Nehru, J. *The Discovery of India*, Jawaharlal Nehru Memorial Fund, Oxford University Press, New Delhi, 1982, pp. 69-135; Paras Diwan, *Modern Hindu Law*, Allahabad Law Agency, Allahabad, 1993, pp. 11-26; Agarwala, R.K. *Hindu Law*, ed. by R.K. Sinha, Central Law Agency, Allahabad, 1996, pp. 1-8.

³ দেবেশ চন্দ্র ভট্টাচার্য, “বাংলাদেশের নারী সমাজের স্থিতিসত্তা ও আইনগত অধিকার,” *বাংলাদেশ এশিয়াটিক সোসাইটিক পত্রিকা*, দশম খন্ড, প্রথম ও দ্বিতীয় সংখ্যা, জুন ও ডিসেম্বর, ১৯৯২, পৃ: ৯৪-৯৫.

beings in the society reach material, intellectual, cultural and spiritual perfection by which only Absolute Idea achieves self-realisation.⁴ According to Hindu philosophy also, human life develops by constant contradiction i.e. struggle between 'good' and 'evil', 'truth' and 'falsehood', 'good' or 'truth' not only always winning at the end but also elevating itself to higher pedestal which we call spiral movement forward.

The nature into which Supreme Being *Brahmno* unfolds itself is the sum-total of material conditions where human beings as creations of Lord Himself individually and collectively seek to perfect themselves by actions. Divine messages become comprehensible by actions. *karma* is *dharmna*. Good actions are the roads to perfection; good actions bring out enormous divine power that is already in human person. Divinity in man manifests itself in the concrete forms of love, reason, devotion, sense of justice and common good. The Supreme Being from an abstract idea of goodness proceeds to manifest Itself in concrete forms in individual beings. Individual beings flourish in their innumerable qualities for the ultimate goal of the Supreme Being for self-realisation and self-cognition. This is spiritual movement from abstract truth to concrete truth. In this progressive movement forward, Will of the Supreme Lord, *Brahmno*, prevails. It is in the nature of things that human thought and actions tend to conform to the Supreme Will.⁵ Yet, the process is not automatic. Divine guidance is always present. To facilitate man's access to this guidance, Hindu religion through centuries has made great contributions.

Hindu *dharmna* teaches that guidance to mankind came from God in the form of divine revelations.⁶ Divine revelations which came to the people through saints, sages and *rishis* during vedic period (3000 B.C.-1000 B.C.)⁷ form the foundation of Hindu way of life. These revelations also form the foundation of Hindu law. They have formed Hindu beliefs, practices, usages and customs later developing into written texts of law. Essence of these revelations consists in the answers to the questions of what is 'good' or 'evil', what is *shat karma*, what path to follow and what to despise. These revelations aimed at bringing out the best in human person — to protect

⁴ See, Shah Alam, "Hegel's Concept of International Law" *The Rajshahi University Studies Part-A*, Vol. XII, 1984, pp. 145-162.

⁶ Menski, Werner F. *op.cit.*, pp. 88-89; Mulla, *op.cit.*, pp. 1-7; Raghavachariar, *op.cit.*, pp. 3-4; Jahabvalla N.H. *Principles of Hindu Law*, C. Jamnadas & Co., 1979, pp. 1-3.

⁷ There are divergent opinions as to the extent of vedic period, some authors tracing its origin as back as 6000 B.C.; See Menski *op.cit.*, pp. 86-87; Gandhi, B.M. *Hindu Law*, Eastern Book company, Lucknow, 1999, p. 1.

him, to strengthen him and to make him worthy of the mission of the Supreme Lord. Revelations were truly appealing to the people, became their songs and were manifest in popular practices and usages. Long practices and usages have a very high position in Hindu law, and they reflect justice, equity and good conscience.

Material conditions of nature in which Supreme Being unfolded Itself change and develop. This is what is divine order. Human person must adapt and adjust to these changes. Divine revelations help human person to adapt and adjust, adaptations and adjustments leading to further changes of material conditions and vice versa. Institutions (state and other social organizations) and values (law, justice, morals, ethics) which are the vehicles of adjustment to changes of objective material conditions are the manifestations of divine revelations. Revelations are divine guidelines. They do not change. But their comprehension must conform to suit the changes in the material world. Revelations are divine lights showing the right path in any difficult situation of adaptations and adjustments.

Hindu laws and precepts are deductions from divine revelations through the Hindu sages as reflected first in usages, then in written texts.⁸ Changing customs and usages and written laws bore testimony to newer comprehension of revelations that better served the purpose of supreme 'good'. One of the great qualities of Hindu religion is that it discovered divinity in its changing forms, content remaining the same which is self-realisation in human goodness. Customs and laws are the forms of habitation of human goodness. This led the scholars to conclude that "Hindu law was not static or staid, but was empiric and progressive."⁹

Goal of divine revelation being as it is to elevate every human person on to higher and higher pedestal that the Supreme Being could Itself be realised in the totality of individual beings, it is only logical and natural that every person ought to get equal rights and opportunities to develop, that no discriminatory norms are raised between communities and groups, that individuals, groups and communities flourish in full freedom, dignity and harmony. All-embracing and progressive march of the Supreme Being in its pursuit for self-realisation would be retarded, should there be any such discrimination and degradation.

Divine revelations have also been characterised as natural laws, which as reason, good conscience and justice guide people to ultimate goal of

⁸ Jhabvalla, N.H. op. cit. pp. 1-2.

⁹ Ibid, at p. 2.

perfection and goodness. Justice and reason emanates from nature, says Cicero.¹⁰ Sense of justice and reason sustains the life, nature and the universe moving them forward. Modern norms of human rights are the dictates of nature. Natural laws as reflecting the sense of human justice and reason are true comprehensions of divine revelations.

2. Glorious Vedic Past of Hindu Law

As mentioned above, divine revelations during Vedic period formed the foundations of Hindu religion and law. These revelations as formal source of Hindu law had been concretised down the ages in various material sources, namely, *smritis*, commentaries, customs, judicial decisions, legislations etc., their understandings or interpretations being greatly modified by *rishis* and scholars under changing objective material conditions of life, nature and society.

In the present age of rationalism, conscientious humanity and recognition of human rights and human dignity, some of the norms of Hindu personal law as existing in Bangladesh to-day seem puzzling and lead one to wonder and look for the original revelations, to examine what they actually revealed, how were they interpreted, whether they were interpreted in accordance with the changing material and socio-economic conditions, whether their interpretation and comprehension truly responded to the change of time and place, reflecting reason and justice, which is eternal.

Some of the existing provisions of Hindu marriage, more specifically legal status of a married woman, differential treatment of man and woman in respect of inheritance, guardianship, adoption and the restrictions imposed by the caste system are not in tune with the broader outlook of Hindu philosophy which is one of the richest spiritual and cultural heritages of mankind. Hindu philosophy presupposes fullest growth of human person for the fullest bloom of divine qualities latent in her/him, irrespective of sex, caste, creed, colour, time and place. This is not possible without according equal rights and opportunities to all. Existing provisions of Hindu law, therefore, would naturally lead one to investigate the Vedic age, which is considered the age of enlightenment, peace and happiness.

There exists substantial authority of opinion that women during the period of *Rig-ved* enjoyed a very high position and honour in the society. There was no considerable difference between man and woman in the

¹⁰ Mulla, op. cit. p. 59.

exercise of family and social rights. Woman is called *shabodharmini*. In rig-vedic time, woman had real opportunity to conduct herself as genuine *shabodharmini*. Man and woman would perform *jaggo* together and both had rights to lead the *jaggo*. Equal treatment was apparently accorded to son and daughter. *Upanayan* was also applicable to girl as well as to boy. That woman acquired high position of honour and prestige is evident from many *suktas* of *Rig-ved*, whose authors were distinguished women, namely, Lopamudra, Biswabara, Apala, Ghosha, Surja, Bak and Indrani. And the Hindus hold the *rishis* in high esteem as they are considered the messengers of divine will i.e. divine revelations. It amply testifies that given appropriate opportunities, women in ancient India also made great contributions in the development of human civilisation and culture.¹¹ This conforms to the principle of *sanatan dharma* holding woman in high esteem. Vedic position of Hindu woman reminds many of the provisions of modern human rights law relating to women, which for any other civilisation or culture or system of law took centuries to reach.

At a later time in the post-vedic and *Upanishad* period, rights and positions of the women declined. In many *smritis* covering several hundred years one could observe ups and downs of women's rights. In *Manusmriti* women became totally incompetent to inherit and to own property.¹² Amongst earlier *smritikars* who did not recognise the women's right to inheritance were Goutama, Budhayana, Apastambha and Vasistha. But situations improved and many *smritikars* recognised the right of the women to receive gifts and to become owners of *stridhana* acquired by various other ways.¹³ Slow but positive change could be marked in religious practices and social conduct in relation to women's rights. In performing prayers of deities and *jaggos*, company of wife became recognised. Widows acquired rights to perform various religious rituals for the peace and salvation of deceased husband's soul and, as a result, their right to inherit husband's property was recognised.¹⁴

While degradation of women in post-vedic period is difficult to comprehend and appreciate, it was not the same with all *smritikars*, and no other personality than Rishi Narad demonstrated great sympathy towards

¹¹ দেবেশ চন্দ্র ভট্টাচার্য, *op.cit.*, p. 93.

¹² *Ibid*, at p. 94

¹³ Archana Parashar, *Women and Family Law Reform in India*, Sage Publications, New Delhi, 1992, pp. 92- 93.

¹⁴ দেবেশ চন্দ্র ভট্টাচার্য, *op. cit.* p. 94.

women's rights and position. The great sages of antiquity at a particular time might have interpreted changing material and social conditions in a particular way which perhaps had predetermined women's position. That might have been the social demand and need. But the situations certainly were not static as subsequent developments so proved. Women's rights came to be gradually recognised. But it took several centuries to realise.

It required the genius, struggle and sacrifice of Raja Ram Mohan Roy and Iswar Chandra Bidwasagar in the 19th century to do away with *satidab* and to introduce remarriage of Hindu widow. There was no *satidab* in vedic time and Bidwasagar found sufficiently strong arguments in some *smritis* to justify remarriage of widows.¹⁵ Then it became imperative law, appreciated by the people, completely in harmony with modern norms of human dignity reflecting true comprehension of divine revelations.

There is no definite proof that caste system which is now prevalent in Hindu society and which is one of the basics of Hinduism, was any established rule in Vedic period. Rather there is a strong shade of opinion that caste system as it has been understood and practised in the last two thousand years was non-existent in the Vedic period. Justice Debesh Bhattacharya holds firm opinion that during early period of *rig-ved* there is no evidence of caste based society. Subsequently classes developed on the basis of particular activity and profession. *Brahmins* (religious leaders), *shatrya* (kings and warriors) and *bashya* (farmers and businessmen) as three distinct classes were identified. It is so stated in *Satapath Brahmin* and *Tattoya Brahmin*. But these three classes did not acquire any permanent and unchangeable form. Some scholars have testified to the existence of four classes (*sudra* being added to former three) at the later period of *Rig-ved*. But many modern scholars and researchers have altogether denied the existence of rigid classes on the basis of hereditary professions.¹⁶

In 112th *Sukta* of 9th *Mandol* of *Rig-ved* Rishi Shishu says: See, I am sutrakar, my son is a physician and daughter is a sculptor. We are engaged in different professions." It aptly proves that classes did not yet become hereditary. Different persons in the same family pursued different professions. At a later stage, perhaps out of social need, classes emerged on the basis of merits and deeds. But they were in no way closed classes,

¹⁵ পূর্ণেন্দু বিকাশ চৌধুরী, "বিদ্যমান হিন্দু আইনের সংস্কার চিন্তা", দৈনিক মাতৃ ভূমি, ঢাকা, সেপ্টেম্বর ২০, ১৯৯৯।

¹⁶ Ibid.; Hari Singh Gour, *The Hindu Code*, 6th ed. by Justice K.B. Asthana & others, Law Publishers (India) Pvt. Ltd. Vol. I, Allahabad, 1998, p-xcv, para-41.

bereft of mutual social or family relationships. It does not appear that inter-class or inter-caste marriage was prohibited during this time. Only later, these social classes acquired religious sanction to become rigid and stereotyped. At the early Vedic society, vanquished locals had no place amongst victorious Aryan, but were later incorporated in the society as *sudras*. Marriage, dining and profession became affairs confined within respective classes or castes. This social stratification with its inherent immobility had far reaching impact on the history of Hindu civilisation.

It took the genius of many saints and social reformers including Swami Vivekananda and Mahatma Gandhi to hit hard the walls of these rigid social structures. Mahatma Gandhi waged holy war to elevate the untouchables - the lowest classes, and he named them 'harijans'- children of God.¹⁷ Both Gandhi and Vivekananda for their rationalist and humanist views on Hinduism always referred to vedic period of enlightenment, and they both fought for the reforms of traditional Hindu law and religion.

3. Srutis and Smritis as Sources of Hindu Law

A correct understanding of divine revelations as they were characteristic of the vedic period allows to take an objective view of the sources of Hindu law as they developed down the ages, always referring to vedic verses, discovering and rediscovering them with rational interpretation, as ultimate authority of law. A chronological study of the sources from the Vedic period up to modern time gives a picture of progressive development of Hindu law. This development was conditioned by the changing needs of the people for the growth of their physical, mental, intellectual and spiritual faculties. This explains why at every stage of the development of Hindu law, emphasis has always been on long practices, usages and customs of the people as evidence of the law, and on equity, justice and good conscience as the test of the law. General acceptance of any norm by the people at large or by any particular community has been looked upon as evidentiary of the mark of divinity. Keeping pace with time, such acceptance has been conditioned by the developing sense of equity, justice and reason. In the ultimate analysis, it was human reason which underscored all legal developments of Hindu life to truly reflect divine revelations. Human reason is nothing but voice of God in human soul. Development of human reasons is a process of

¹⁷ *The message of Mahatma Gandhi*, comp. & ed. by. U.S. Mohan Rao, Publications Division, Ministry of Information and Broadcasting, Government of India, 1970, pp. 90-95.

unveiling of the divine potentials of human person to truly reflect original divine revelations.

Srutis as the divine revelations are the original sources of Hindu law. All others are derivatives from *srutis*. In this sense *srutis* are formal sources of Hindu law, from where law derives validity. All other sources are material sources of law, showing in exactly what material forms laws do exist, and hence have more practical importance.

Literally, *srutis* mean that what were heard from above. They are the divine utterances or voices comprehensible by sages and saints, which over several hundred years had been composed in verses in four vedas, namely, *rig-ved*, *yajur-ved*, *atharva-ved* and *sam-ved*, six vedangas as appendages to the vedas and eighteen *Upanishads*. *Srutis* are religious teachings, precepts, commands and directives from where *smritikars* extracted positive law.

Smritis are primary material source of law. Literally *smriti* means that which was remembered. In fact, *smritis* are also divine utterances and instructions which have been heard and remembered long afterwards and handed down by the *rishis* from generation to generation and compiled in book forms by many eminent sages over several hundred years which came to be known as *smritisbastra* or *dharmashastra*. While *smritis* are high authorities on religious teachings, morals and ethics, they also contained substantial body of positive laws. In fact, commentaries by juristtheologians on the *smritis* at a much later stage of legal development formed more practical sources of Hindu law for day to day application.

Extending over a period of about 1500 years, the era of *smritisbastras* or *dharmashastras* was keenly searching and productive in nature. It was synchronous with the age of some of the leading *Upanishads* which are instinct with a spirit of inquiry and a passion for the search of truth about the hidden meaning of things. 'Truth wins, not falsehood' was the favourite axiom, and the famous invocation was: Lead me from the unreal to the real; lead me from darkness to light; lead me from death to immortality.¹⁸ This is a prayer of the learned for progressive development of mankind to be manifest in the time honoured formation and growth of values, laws, customs and institutions to cater to the needs of human enlightenment, which only would serve divine purposes. During this period one could find very dynamic, extensive and multi-dimensional intellectual exercises accomplished by innumerable learned *smritikars*. While Manu (200 B.C), Yaznavalka (400 A.D) and Narad (500 A.D.) are considered to be the

¹⁸ Mulla, op.cit., p.8.

principal *smritikars* on whose teachings Hindu law made further strides, several other *smritikars* also substantially contributed to the development of Hindu law.

In territories as vast as ancient India, while *smritikars* gave their varied interpretations of divine revelations depending on time, place and naturally emerging habits and customs of the people, they also shared general unity of thoughts and perceptions which experienced progressive movement forward. This intellectual growth which was characterised by broader and objective comprehension of divine revelations always put human welfare at the centre. If in early *smritis* (Rishi Manu) property right was observed to be only men's monopoly, later *smritis* made some provisions, conditional though, for women's property right as well; if earlier *smritis* did not approve remarriage of widow or otherwise separated or distressed married women, later *smritis* (Narod and Parashar) more humanly sought to resolve this issue. Later *smritis* made more references to equity, justice and good conscience (*yukti*). But it must be admitted, and this may be attributable to their greater proximity to vedic period, some of the rules relating to the higher status and rights of women also found favour with the earlier *smritis*. Remarriage of widows and divorce were recognised in some of the older texts (Vasistha XVII, 72-74-SBE vol. XIV). In *vishnusutra*, it is stated that on partition between brothers after the father's death, not only are the mothers entitled to share equally with their sons but unmarried sisters also are entitled to their aliquot shares.¹⁹

The *rishis* who compiled the *smritis* did not exercise temporal power, nor did they owe their authority to any sovereign power. The authority or imperative character of their legal injunctions was partly derived from the reverence in which they were held and from the generally accepted principle that what they laid down was agreeable to good conscience. The *smritikars* did not arrogate to themselves the position of law-makers but only claimed to be exponents of the divine precepts of law and compilers of traditions handed down to them and clung to that position even when introducing changes and reforms.²⁰

Yajnavalkyasmriti, while in general continued the conservative tradition of *Manusmriti*, was more liberal than Manu on many questions particularly on status of *sudras*, women's right to inherit and to hold property and criminal penalty. But it was Rishi Narod who actually laid the foundation of more progressive development of Hindu law. In this the influences of

¹⁹ Ibid., p. 16

²⁰ Ibid. pp. 10-11.

the teachings of Buddhism — universal compassion, love and equality — on Yaznavalkaya and more particularly on Narod cannot be ignored.

While Narod purports to compile the traditional laws paying great respect to his illustrious predecessors specially Rishi Manu, he differs from the great master on a number of interesting and important points. Narod is categorical and emphatic in his statement that custom is powerful and overrides the texts of the sacred laws. His work is systematic and more legal or normative in nature. He is exhaustive in treatment and extensively covers various branches of law, both substantive and procedural. He does not shrink from declaring rules in conformity with changes that had taken place in social, economic and political conditions.²¹

It is natural that *Narodasmriti* being in point of time the last of the three leading codes after Manu and Yaznavalkaya, more accurately reflected the changing demands of time in a long intellectual evolution which was to continue further on a progressive track. Remarkable political, economic and social progress preceded the compilation of the code of Narod.

The most glorious chapter in the history of ancient India had commenced with the reign of the Maurya dynasty founded by Chandragupta Maurya in 321 B.C. Ashoka was a Maurya emperor who ruled a vast empire. Emperors and kings, while theoretically subscribing to the tradition that law (*dharmā*) was mightier than the king, promulgated many laws and edicts which from the nature of the things were bound to be enforced. A striking feature of *Narodasmriti* is that it is the first of the *dharmashastras* to accept and record the principle that king-made laws could override any rule of law laid down in the *smritis*. In fact, the edicts and ordinances of the powerful Mauryan emperors and the kings, by their very nature and by reason of the sanction behind them, were bound to be accepted and enforced without any challenge even when they did not accord with the *smriti* law. But the edicts and ordinances of the Mauryan kings who wielded great popular and moral authority were assumed to be in accord, rather than in contradiction, with the shastric laws.²² The great Mauryan scholar and author of *Arthashastra* Kautilya who was secular in outlook subscribed to the view that the kings and the laws were created by the people. According to him, the king at the time of his coronation affirmed that his powers and prerogatives emanated from the people and his oath was really oath of service to the people: May I be deprived of

²¹ Ibid. p. 25.

²² Ibid. p. 26; Menski, op.cit. p. 115.

heaven, of life and of progeny, if I oppress you'.²³ Circumstances indicate that as far as possible the edicts and ordinances of the kings so operated as not to disturb any fundamental concepts or rules of law embodied in *dharmashastras*, and Kautilya believed that they operated within the matrix and frame-work of the traditional law. The time, which preceded *Narodasmritis* also, saw, besides great kings and emperors, the great doctrine of *karmayoga*, based on the philosophy of Upanishads, to flourish. This then was the political, cultural and intellectual background in which *Narodasmritis* were composed.

Rishi Parashara and Brihashpati continued and further developed the progressive trends set by Narod. Brihashpati in one of his verses propounded the doctrine of equity and justice and enjoined that a decision must not be made solely by having recourse to the letter of the written codes. Trends set by Narod and Brihashpati were characterised by overriding importance accorded to proven customs and kingly edicts as the manifestations of justice, equity and good conscience.

4. Commentaries

Commentaries on *smritis* are the next important source of Hindu law. *Smritis* often differ on many important questions of law. Commentaries are interpretations of these conflicting provisions of *smritis* to find out what the true law is. In fact, they are more than mere interpretations and have to a great extent modified *smritis* to suit long usages and customs of the people. *Smritis* are now practically replaced by commentaries which have actually come to be accepted as authoritative exposition of Hindu law in the different parts of Indian subcontinent. Authors of the commentaries modified and supplemented the rules of *smritis*, in part by means of their own reasoning and in part in the light of usages and customs that were in vogue in a particular time at a particular place. In fact, they frequently created new rules of conduct to meet the changing ideas of the people,²⁴ and the commentaries following the progressive traits of the later *smritis* (Narod, Brihashpati) made rational use of the doctrine of long usages and the principle of equity to meet the practical needs of the people.²⁵ *Smritis*

²³ Mulla, *Ibid.* p. 34.

²⁴ শ্রী দীনেশ চন্দ্র দেবনাথ, *হিন্দু আইন*, ১৯৮২, পৃ: ৩

²⁵ Mridul Kanti rakshit, *The Principles of Hindu Law*, 5th ed. 2005, Kamrul Book House, Chittagong, p. 25, pp. 56-57.

and *smritis* now find rational expression in the commentaries as more direct and easily accessible source of Hindu law having great practical importance for application by the courts. Several commentaries sprouted in the post-smriti period. The commentators, although they rested their opinions on the *smritis*, explained, modified, enlarged and even at times departed from the letter of the written texts in order to keep the law in harmony with their environments and the prevailing notions of justice and to suit the felt necessities of the times, contributing thereby to the process of self-development of the law.²⁶

In course of time the law came to be ascertained and accepted mainly from the commentaries and digests of which the leading ones acquired almost *ex cathedra* character. Composed in different parts of India, several of them gained ascendancy in those parts of the country where the authors were accepted as pre-eminent authority. Facts of geography were massive and in different parts of the country different commentaries came to be referred to as the chief guides on law. The result was that the two principal schools of Hindu law, the *Mitakshara* and the *Dayabhaga* sprang into existence, and furthermore where the *Mitakshara* prevailed, there came to be recognised a number of sub-schools of the parental authority.²⁷

Mitakshara (11th century) is a running commentary on *Yajnavalkyasmriti* by Vijananeswara and with its sub-schools (Benares, Mithila, Maharashtra or Bombay, Dravida or Madras) is applicable throughout whole of India except Bengal (West Bengal and Bangladesh). *Dayabhaga* (12-13 century) by Jimutabhahan is not a commentary on any particular code, but a critical digest of all the codes. Dayabhaga School, which is prevalent in Bengal, is considered more progressive of the two.²⁸

These schools born of diversity of doctrines mark a new stage in the evolution of Hindu law. Main differences between the two principal schools of Hindu law relate to the law of inheritance²⁹ and joint family. Jimutabhahan's doctrines on the law of inheritance and the joint family

²⁶ Mulla, p. 43.

²⁷ Ibid.

²⁸ শ্রী দীনেশ চন্দ্র দেবনাথ, *op.cit.*

²⁹ Mulla, *op.cit.* p. 44.

³⁰ Jhabvalla, N.H. *op.cit.* p. 10.

³¹ Collector Madura v. Moottoo Ramalinga (1868) 12 M.I.A. 379.

system were totally opposed to some basic rules of the *Mitakshara* School. In introducing certain radical innovations in a number of incidents of the joint family and right of the members of such a family, Jimutabahan purported to base his theories on certain precepts of Manu, which he felt were not properly comprehended by previous commentators. His theories show that his appeal is more to reason and stern logic than to precepts or precedents, and his approach to most of the controversial questions is direct and forthright.³⁰

5. Customs

Customs have a special place in the system of sources of Hindu law. It is not only one of the most important sources as under Hindu law clear proof of usage will outweigh the written text of law,³¹ it has also played a great role in the very composition of written texts i.e. smritis, commentaries. *Smritikars* in composing the legal scripts and the commentators in modifying or interpreting these scripts have always relied on the practices of the people whose long adherence to a particular practice was evidentiary of the established rules of law, and which then found abode amongst *smritis* or commentaries.

During the earliest stages of the development of Hindu law, custom was acknowledged and accepted as being the embodiment of principles and rules prescribed by sacred tradition.³² The expressions generally used by the *smritikars* for custom are *achara*, *sadachara* and *shishtachara*. Broadly interpreted, they mean practices of good men. In the context of civil law *sadachar*, which is the most commonly used of these three expressions, requires that there must be no element of moral turpitude or anything opposed to public policy about the customs.³³ It must also be ancient, reasonable, uninterrupted in observance and not contradictory to statutes.

Emphasis on custom as source of Hindu law indicates its popular, democratic and progressive nature. Customs are nothing but habits and life styles of the people which are conditioned by the felt necessities of life which arise out of the changing material and socio-economic conditions.

³² Mulla, *op.cit.* p. 59.

³³ *Ibid.* 60

³⁴ Jhabvalla N.H. *op.cit.*, p. 6; Mridul Kanti Rakshit, *op.cit.*, pp. 1009-1010.

³⁵ Mulla, *op.cit.*, p. 61.

Changing material, socio-economic and historical conditions determine what is good or bad for the people. The sense of what people should do and what they should refrain from doing for their well-being and safety and for spiritual and material development at a given point of time, gradually but definitely comes to them by the laws of nature and takes abode in their habits and customs. This is natural law and is divine in nature. People's general acceptance and practice of any rule is the mark of divinity and this renders any custom or usage stronger than any other source of law. In fact, proven custom or usage which has not been incorporated in *sruti*, *smriti* or commentaries is rightly considered to be forgotten or lost *smriti* and by the force of long popular practice is equated with or placed above written texts.

6. Justice, Equity and Good Conscience

The principle of justice, equity and good conscience played a very important role in the development of Hindu law. This is not merely a source of law, but it is also a test of good law. *Smritikars* and commentators have always resorted to this principle to bring out the spirit of law, to interpret law and fill up its lacunae according to prevailing sense of equity and justice.³⁴ *Rishi* Brihashpati gave a rule of fundamental importance when he recommended *yukti* (justice) in the well-known *versus memorialis* that decision must not be made solely by having recourse to the letter of written codes: since if no decisions were made according to the reason of law, or according to immemorial usage, there might be a failure of justice.³⁵ Sense of equity, justice and good conscience which we may together call reason is the highest form of social value and is conditioned by social reality at a given point of time. As social reality changes, so changes social value. Social value as collective popular value ought to be divine in nature. Reason, individual or collective, is voice of God in human person. As human society expands and moves forward, voice of God becomes clearer and diversified. The voice of God is justice which blooms in the body of law. The concepts of justice and law are dialectically related, one complementing the other. The *smritikars* have always underscored this dialectic relationship between justice and law by emphasizing the

³⁶ Hoque, Azizul, *The Legal System of Bangladesh*, Bangladesh Institute of Law and International Affairs, Dhaka, 1980, pp. 9-11; Jain, M.P. *Outlines of Indian Legal History*, Wadhwa & Company Law Publishers, 1993, pp. 61-66; *Legal Systems of the World - A Political, Social and Cultural Encyclopedia*, ed. Herbert M. Kritzer, Vol. I, ABC-CLIO, Santa Barbara, 2002, p. 118.

importance of right reason, good sense and equitable justice by which alone any law can justify its existence. Based on justice, law as habitation of the sense of justice elevates justice at a higher level for further growth. Emphasis on the principle of justice, equity and good conscience for understanding and making of law has rendered Hindu jurisprudence dynamic and progressive.

Smritikars and specially commentators made extensive use of established customs and the principles of justice, equity and good conscience giving the law newer dimensions. It was not merely development of the norms of positive law, their quantitative volume constantly increasing to cover more and more areas and issues of human life, it was and it is also movement of the will of the Supreme Being, a vigorous cognitive process by which the divine revelations were transmitted down the ages and were manifest in innumerable ways and forms to illuminate human persons.

7. Hindu Law in British India

The upward movement of Hindu family law suffered its first setbacks by the establishment of British rule in India in the middle of 18th century. India was no more free. Absence of freedom deprived India of its creative energy and natural growth. Shackles of colonialism fell heavily on the mind and spirit of the Indian people; its economy and polity became sterile; its pride gone, slave psychology seized the entire Indian humanity, and it lost the power of independent thinking which is the primary condition of progressive development of any human society. This was also reflected in the development of Hindu law.

After the acquisition of *Diwani* of Bengal, Bihar and Orissa, the British East India Company introduced court system in 1772 which was supposed to administer *inter alia* Hindu law. According to the needs of their colonial administration, the British in India amended or enacted anew criminal, commercial and civil laws other than Hindu or Muslim personal laws. Non-interference with the personal laws was their broad colonial policy. British Indian courts in administering personal laws of the Hindus and Muslims would employ *paundits* and *moulvis* to advise the court to pick up the relevant law.³⁶ The age of commentators by whom Hindu law experienced

³⁶ Hoque, Azizul, *The Legal System of Bangladesh*, Bangladesh Institute of Law and International Affairs, Dhaka, 1980, pp. 9-11; Jain, M.P. *Outlines of Indian Legal History*, Wadhwa & Company Law Publishers, 1993, pp. 61-66; *Legal Systems of the World - A Political, Social and Cultural Encyclopedia*, ed. Herbert M. Kritzer, Vol. I, ABC-CLIO, Santa Barbara, 2002, p. 118.

creative development came to an end. Hindu *paundits* in the courts could at the best explain the literal meaning of the *smritis* or commentaries on which the courts mainly depended. Under the emerging colonial circumstances, since initiatives had shifted to courts, *paundits* performed mere formal functions of interpreting, stereotyped and traditional, non-innovative in character. Their intellectuality became captive in a foreign cultural milieu. In an atmosphere of foreign domination and subjugation, no fresh idea could be expected to come out of the minds of the *paundits*. The courts became heavily dependent on the ancient texts and the commentaries and their interpretations by the *paundits*. Describing this situation Mayne wrote “no voices were heard unless they came from the tombs”. Some ancient texts and injunctions favoured by the commentators which had not been accepted as part of current law and virtually abandoned in practice were in cases received as binding law and given inflexible interpretation. All this led to unprecedented rigidity and to the creation of judge-made law, which from the inherent limitations on its scope could not be expected to respond adequately to all changing needs and circumstances. The only remedy was comprehensive legislation.³⁷

However, beginning of British rule in India marked a somewhat new phase in the development of Hindu law. Deprived of natural and progressive growth due to non-appearance of new generations of commentators or *nibandbankars* under colonial clouds, Hindu law looked towards social reformers educated in European ideas. Need for codification and legislation was greatly felt, the cause of which was steered by the enlightened section of the Hindu community which subsequently produced men like Raja Ram Mohan Roy, Swami Vivekananda, Iswar Chandra Bidwasagar and others. Codification and legislation entailed a process of transforming customary laws into statutory resolving thereby anomalies and contradictions existing in the customs, doing away with outdated or archaic norms, and enacting at the same time new laws to suit newer circumstances.

While codification and legislation is the most sophisticated and modern device of law reform, British India could little take its advantage as regards Hindu law due to colonial reality; nor could judicial decisions under *stare decisis* of common law make any substantial contribution to the progressive development of this law. Combined effect of the legislations accomplished

³⁷ Mulla, *op.cit.* p. 66.

during two centuries of British rule, therefore, was rather meager to have any major impact on the traditional Hindu law. Yet many progressive changes specially those relating to women's rights brought about during this period cannot be denied to have taken place. Dynamics of changes in Hindu law during the period of commentaries, Bijjananeswara and Jimutabahan and after, give reasons to believe that had Hindu law developed as it had developed during this period, it would have achieved a higher level of reforms by the time the British quitted India.

Modern education, enhanced social and national consciousness, political awakening combined with the enlightened and progressive school of Hindu philosophy created necessary conditions for great legislative reforms of Hindu law which were to come soon and which actually took place after the British rule had ended. It was as if long suppressed forces of reforms had been in the waiting in impatient silence and found the right moment to proclaim themselves, not long after the independence.

8. Dual Fate of Hindu Law in Partitioned India

The Hindu Law Committee was formed in 1941 to examine various aspects of Hindu law. The Committee headed by Sir Benegal Narsing Rau recommended wide ranging reforms and prepared a single uniform code of Hindu law by blending the most progressive elements in the various schools of the law prevailing in the country, to be applied to all Hindus. The Hindu Law Bill prepared on the basis of the Committee's draft code was not moved for a long time. It was first placed before the Federal Legislative Assembly on April 11, 1947 and then stalled and again placed in the Indian Parliament after independence, but not as a single code. It was split into parts depending on the respective subject matters.³⁸ The years of 1955 and 1956 saw placing before the Indian Parliament four separate bills on Hindu law which were duly passed ushering in radical changes of the law relating to marriage, inheritance, maintenance, adoption and guardianship. The changes were the reflections of the modern notions and norms of human rights, one of the fundamental elements of which is equality between man and woman.

India was divided in 1947 on religious principle into two independent states — India and Pakistan. While Pakistan became a Muslim state consisting of the Muslim majority territories, India supposedly consisting of Hindu majority territories was to become a secular state. In both the

³⁸ Archana Parashar, *op.cit.* p. 80.

states there were substantial minorities — Hindus in Pakistan and Muslims in India. Partition of India on religious principle witnessed history's one of the most painful inflow and outflow (cross-border movement) of the people accompanied by gruesome mass killings and abandonment of one's own land and households. While mass migration was more immediate, abrupt and cruel in the West (border with West Pakistan), it took slower and protracted character in the East, extending over few decades. Despite massive migration to India, more than 12 million Hindus still live in Bangladesh (former East Pakistan), formed as an independent state out of Pakistan in 1971, and the number now seem to have stabilised.

At the end of colonial rule, the development of Hindu law experienced dual fate. As it has been expected, removal of the shackles of colonialism paved the way for true reforms of Hindu law in India, and reforms were effected. Indian reforms depicted not only modern norms of human rights, but also the nature of changes inherent in Hindu law itself, by blending the progressive elements of various of its schools.

On the other hand, free from British colonial rule, Hindus in Pakistan fell in more colonial situation, which had definite negative impact on the development of Hindu law. In East Pakistan the situation was worse. For Hindus it was a situation of 'double colonialism'. Bengalees in Pakistan were subjected to general discrimination, which gave enough reasons to describe the situation as neo-colonial, which ultimately led to liberation war of Bangladesh. Position of Hindus was worse and vulnerable. They were in double jeopardy being both Bangalee and Hindu. Pakistani rulers pursued a policy, both covert and overt, of gradual expulsion of Hindus from East Pakistan. Emergency requisition laws, evacuees laws, enemy property laws — all were directed at this aim. These laws specially Enemy Property Act enacted in less than two decades after the partition of India, combined with social and political discrimination meted to Hindus and mingled with fear of communal riots, led to gradual mass migration of Hindus to India. Most enlightened section of the Hindu population in East Pakistan became almost non-existent. Unfortunately, social, cultural, economic and political position of the Hindus became worse than what it was in British India. Environment of freedom and creativity which is the prerequisite of any reform was totally absent in East Pakistan. Consequently, there was no community demand for reforms of Hindu law, nor the Pakistani rulers had any thought or concern for Hindu law reforms which were then effected in India. Creation of Bangladesh in 1971 did not lead to any substantial improvement of the conditions of the Hindus either. In fact, after military take over of politics in Bangladesh in 1975 situation deteriorated.

Recommendations for Hindu law reforms which were actually made during the end of British period and also placed before Federal Legislature in bill form on April 11, 1947, but further proceedings of which were delayed or stopped for multifarious reasons relating to India's independence and partition and which ultimately were placed in the Indian Parliament after the independence, would have become equally valid laws for Pakistan, had they been passed by British Indian Federal Legislature as it was originally planned. But the destiny decided otherwise. While in India Hindu law progressively flourished by new legislations and judicial decisions, in Bangladesh it remained where it was in August 1947. That Hindu law has not experienced any change in Bangladesh is contrary to the nature of historical development of this law.

9. Problems of Reforms of Hindu Law in Bangladesh

In post-partition East Pakistan, later Bangladesh, issues of Hindu law reforms were overshadowed by acute problems of more fundamental nature, which the Hindus faced in a Muslim state. The woes that the Hindus suffered in Pakistan were inherent in the very principle of partition of India. The position of the Muslims in India was perhaps not as bad and vulnerable as it was for the Hindus in Pakistan, for India was not created as a Hindu state. To abandon under compulsive or semi-compulsive circumstances one's own land, property and household and to migrate to look for shelter in another country, as were so compelled many Muslims in newly created India and many Hindus in Pakistan, is one of the most unfortunate human tragedies that may befall a person or a family. Enemy Property Act, 1965, in Pakistan expedited Hindu migration to India further aggravating the situation. Enemy property law continued to exist in Bangladesh under the name of Vested Property Act of 1974.³⁹ To make their position more vulnerable, secular character of our Constitution was tampered with first in 1975 and then again in 1988.⁴⁰ These are some of the major problems which Hindus in Bangladesh are groping with.

³⁹ While the Vested Property Act was formally repealed in 2000, it failed to obviate the effects already made under the Act; for a comprehensive and critical study of the enemy property turned vested property law, see Abul Barkat & others, *Political Economy of the Vested Property Act in Rural Bangladesh*, Association for Land Reform and Development (ALRD), 1997, 189p.

⁴⁰ Under 5th Amendment in 1975, secularism incorporated in Article 8 (1) of the Constitution as one of the fundamental principles of state policy was deleted, and Article 12 which provided for prohibition of all forms of communalism, state patronage of any particular religion, abuse of religion for political purposes and discrimination on the basis of religion, was deleted all together. Under 8th

It must, however, be admitted that despite fifth amendment (secularism deleted as a principle of state policy) and eighth amendment (Islam declared as the state religion), the Constitution of Bangladesh continued to remain democratic and secular in character where all communities would equally enjoy fundamental rights and civil amenities⁴¹. Socio-economic and political position of the Hindus in Bangladesh has also stabilized to certain extent. Out-migration to India has decreased. Attempts are being made to ease the conditions arising out of the operation of the Enemy Property Act turned Vested Property Act. But fears persist; Hindus still feel themselves strangers in their own land and are not sure of their future. More steps are required to restore their confidence.

Circumstances in which the Hindus have found themselves in Bangladesh tend, therefore, to complicate the issues of reforms of their personal laws. Hindus in Bangladesh which make more than 10% of the population are the single largest minority community. Captive to a sense of common suffering, they demonstrate a peculiar minority psychology — sensitive, suspicious and fearful. Reforms of their personal laws which otherwise would be natural and spontaneous as it has been the case with much larger Hindu community in India including West Bengal with whom the Hindus in Bangladesh experience greater affinity, could, therefore, be eyed with suspicion in Bangladesh and run the risk of being branded as an interference with traditional minority law and life style.⁴² However, *sanatan dharma* (Hinduism) is too rich and vibrant a religion, its philosophical foundation too strong, its positive laws too responsive with in-built trend of progressive changes to be prevented from being reformed by any condition of despair in which a particular Hindu community may temporarily find itself. Aversion to possible reforms, if found amongst Hindus in Bangladesh, is explained more by socio-political factors than by any theory of unamendability of the traditional laws whose origin is traced

Amendment in 1988, Art. 2A was inserted in the Constitution declaring Islam as the state religion of Bangladesh.

⁴¹ Alam, Shah, “State-Religion in Bangladesh: A Critique of the Eighth Amendment to the Constitution”, *South Asia Journal*, 4, 3 (1991) Sage Publications, New Delhi/Newbury Park/London, p. 328.

⁴² আশুতোষ টিকাদার, “হিন্দু আইন সংস্কার সম্পর্কে”, *ভোরের কাগজ*, জুলাই ৫, ১৯৯৯, পৃ: ৫; প্রেম রঞ্জন দেব, “হিন্দু আইন সংস্কার ও কিছু কথা”, *দৈনিক জনকণ্ঠ*, আগস্ট ৮, ১৯৯৯, পৃ: ৭

back to divine vedic past. It would be a historic injustice done to Hindu law not to encourage its reforms in order to facilitate march of the Supreme Being for self-realisation, which is the original divine goal of Hindu law. This can only be done by according equal rights to all irrespective of sex, caste, creed, community, religion etc. Progress in Hindu law is supposed to be reflective of the progress in human rights. Reforms in the larger Hindu community in India reflect this progress. Norms of human rights sing the melody of divinity which must also be the essence of Hindu law.

Peculiar socio-economic conditions in Bangladesh may legitimately compel the Hindu law reformers to be more cautious and undertake certain social security measures if any particular reform tends to lead to any adverse social consequences,⁴³ but reforms all together cannot be stalled, for they relate to realisation of more fundamental individual rights necessary for individual self-development which is the demand of Supreme Being. Anticipated reforms of Hindu family law as that of Muslim family law would first of all mean providing more rights and freedoms to women. Gender equality is one of the fundamental principles of the law of human rights. Vedic philosophy and nature of progressive changes of Hindu law would support gender equality to be in conformity with modern norms of humanity. Pretext of any external condition i.e. adverse socio-political situation, standing in the way of reforms of Hindu law and, therefore, not going for reforms which would recognise full gender equality, would actually deter the inner development of Hindu community.

10. Comparing Hindu Family Law with That of Muslim Family Law in the Context of the Need for Reforms

Muslim family law in Bangladesh also did not undergo any significant change over the past years. While Muslim Family Law Ordinance, 1961, was a progressive contribution to the development of Muslim law, it related more to the procedural aspect of the law. Based on progressive interpretations of some of the norms of Muslim law and on the assumed spirit of the entire law itself, the 1961 Ordinance undoubtedly put certain restrictions on the practice of polygamy which is otherwise permissible under Muslim law, and recognised the inheritance right of the children of a predeceased father. The Muslim Family Law Ordinance 1961 has been

⁴³ রানা দাশগুপ্ত, “হিন্দু আইন সংস্কাে প্রয়োজন জাতীয় সমীক্ষণ”, *দৈনিক সংবাদ*, আগস্ট ১০, ১৯৯৯, পৃ: ৫; সুবল চন্দ্র সাহা, “হিন্দু আইন সংশোধন সম্পর্কে কিছু প্রশ্ণ্ডুব”, *ভোরের কাগজ*, এপ্রিল ১১, ১৯৯৯ ও জুন ১৪, ১৯৯৯; রেহেনা পারভীন রক্ষমা, “হিন্দু নারীর আইনগত অধিকার”, *দৈনিক জনকণ্ঠ*, জুন ২২, ১৯৯৯।

explained in Muslim jurisprudence more as an act of liberal, rational, progressive and humanitarian interpretation of the law, rather than any change or amendment of the law itself, for amendment of shari'a law is allegedly not permissible. While further reforms by interpretation in the pattern of the Muslim Family Law Ordinance may be attempted with or without success, prospect of any substantive legislation which would supersede shari'a law as for example Penal Code has so superseded many norms of shari'a does not appear bright at the present stage of development of Muslim jurisprudence.

Early stage of Islam (7-10 centuries) did witness certain changes and creative development of Muslim law. However, subsequently scopes for liberal interpretations and changes became narrower. Muslim juristheologians in the 10-11 centuries closed the doors of *ijtihad*, and unchangeability of the law became article of faith.⁴⁴ Last one thousand years, therefore, did not experience any significant change of Muslim law. Islam being a revealed religion with a specific holy book, the Holy Qur'an with Hazrat Mohammad (sm.) as its prophet, norms of the law being clearly inscribed in the Holy Book and in the sayings and doings of the prophet and the scope for their interpretation being narrowed, change is not the essential characteristic of the nature of the development of the Muslim law. This distinguishes Muslim law from Hindu law and actually places the latter at an advantageous position. Muslim law and Hindu law represent two different schools of thought, two different philosophies. Any comparison between these two systems of law to justify or not to justify reforms of either law may be misleading. Reforms of Hindu law ought to follow its own historical pattern, progressive change to meet the requirements of time being its life force. On the other hand, some reforms of Muslim law may materialise within the rigid framework set by the Holy Qur'an and Sunnah. Greater scopes for reforms of Hindu law provide more opportunities to bring its norms closer to universal standards of human rights as agreed upon by the world community in various international instruments.

⁴⁴ Closing of the door of *ijtihad* (Bab-al-Ijtihad) i.e. end of progressive interpretations of sharia law to suit changing circumstances and the need of the hour, is associated with the name of great orthodox Muslim scholar Imam Al-Ghazzali in the 11th century.

11. The Indian Experience of Hindu Law Reforms

The above discussions on Hindu law allow to take a more critical look at the law as it exists to day in Bangladesh. This is pre-partition level of development of Hindu law where it has remained stationary for the last sixty years. Although during the British period, barring a few notable exceptions, there has not been any fundamental change of Hindu law by legislation, acts adopted during the whole length of British rule have gone a considerable way to mitigate the effects of the severity of some of the very conservative provisions of traditional Hindu law. Legislative journey of Hindu law in British India ended with two such acts adopted in 1946 — The Hindu Married Women's Rights to Separate Residence and Maintenance Act (No.19) and the Hindu Marriage Disabilities Removal Act (No.28). While further progress was stopped in Pakistan (including to-day's Bangladesh), Hindu law in India, as mentioned earlier, made great strides. Reforms of Hindu law in India not only reflected its fundamental character that it must change to represent the changes as manifest in various international instruments, but also sought to put into practical implementation constitutional norms, principles and goals of new India. For reasons discussed above, such reforms have not taken place - neither in Pakistan after 1947, nor in Bangladesh after 1971. While socio-political problems of the Hindus in Bangladesh undoubtedly need to be resolved, the state and the Hindu community need to seriously consider what reforms of their personal laws could be beneficial to the members of the community. Adverse socio-political situation, which ought to be a temporary phenomenon, is not to retard the inner development of Hindu community which to a great extent may come in the form of reforms of their personal law. Had such phenomenon been a genuine reason for non-reform and had British India waited until the Indian Independence, whatever had been achieved by way of legislative reform in British India would not have been achieved at all.

Investigation of existing Hindu family laws in Bangladesh and their possible reforms warrant a perusal of reforms of Hindu law in independent India where most of the Hindus live. A comparative look at the relevant family laws of the Muslims who form the overwhelming majority in Bangladesh and are the community neighbour of the Hindu minority is also necessary.

Major reforms of Hindu law enforced in India by legislation,⁴⁵ which relate to marriage, divorce, inheritance, minority, guardianship, maintenance and adoption can be presented in a nutshell as follows:

1. Reforms in India have introduced uniform system of family laws for all Hindus as the term so implies under the provisions of the relevant acts, irrespective of different schools to which they belong.
2. Inter-caste marriage is now permitted.
3. Polygamy/bigamy has been abolished and monogamy introduced.
4. Non-compliance with the rule of monogamy is a crime and hence punishable by law under IPC (sec. 51 ,17)
5. On fulfillment of the conditions as prescribed by law, divorce is allowed on the initiative of either parties to the marriage, husband or wife, and is to be decreed by the court.
6. Divorce is also possible by mutual consent of the parties, to be decreed by the court following certain procedures.
7. Judicial separation is also permissible on the initiative of either of the parties to the marriage.
8. There is provision for registration of marriage.
9. The new Indian law does not prescribe any particular ceremony for a valid marriage. It only provides that such a marriage can be solemnized in accordance with the customary rites and ceremonies of any one of the parties to the marriage.
10. There is provision for remarriage for either party after a valid divorce.
11. There is provision for permanent alimony and maintenance for either party.
12. The question of custody of the children during the pendency of legal proceedings as also after the passing of a decree is to be decided by the court, the interest of the children being the prime consideration.
13. The Hindu succession law provides for a uniform system of inheritance for the whole country and lays down same simple rules relating to succession of the property of a Hindu male and female, irrespective of whether he or she belongs to Mitakshara or Dayabhaga school.

⁴⁵ Legislation includes The Hindu Marriages Validity Act, 1949; The Special Marriage Act, 1954; The Hindu Marriage Act, 1955 (as amended in 1976); The Hindu Succession Act, 1956; The Hindu Adoptions and Maintenance Act, 1956; The Hindu Minority and Guardianship Act, 1956.

14. The property of a male Hindu dying intestate devolves in equal shares between his son, daughter, widow and mother. Male and female heirs are now treated as equal without any distinction.
15. Any property possessed by a woman, irrespective of the mode of acquisition, is to be held in her absolute ownership and she has full power to deal with it and can dispose of it as she likes.
16. Succession to *stridhan* under traditional law varied according as a woman was married or unmarried, and if married, according to the form of marriage. It also varied according to the sources of the *stridhana*. All these distinctions have now been abolished and the new law lays down a uniform scheme of succession to the property of a female Hindu who died intestate.
17. A Hindu coparcener in a joint family under Mitakshara school can now dispose of his undivided coparcenary interest by will, which under traditional law he was not entitled to so dispose of.
18. Traditional law under which certain physical or mental defects, deformities and diseases of a person and also unchastity of a woman excluded an heir from inheritance has been abolished and these grounds no more disqualify a person from inheritance.
19. Right of adoption which is an important branch of Hindu law and which right was exclusively reserved for male is now available also for female.
20. A Husband willing to adopt a son or a daughter cannot so adopt without the consent of his wife, living at the time.
21. A female Hindu of sound mind who is not a minor and is not married can also adopt.
22. A married woman who has become a widow or when the marriage has been dissolved or the husband has finally renounced the world or has ceased to be a Hindu or has been declared to be of unsound mind by a competent court, can adopt for herself.
23. Under the new law, not only son, but also a daughter can be taken in adoption.
24. It is no longer necessary that the adopted person has to belong to the same caste as of the adoptive father or mother. Caste barrier in adoption has been abolished.
25. Previously, a near relative had to be taken in adoption in preference to a stranger. Now a stranger may be adopted even if near relatives are available for adoption.

26. Under traditional law, the person to be adopted must not be a boy whose mother the adoptive father could not have legally married. This restriction has now been waived.
27. *Datta Homan* is no more the essential condition to the validity of an adoption.
28. Right of the adopted person as to succession and to his property acquired before adoption has been made absolute, free from any controversy or exceptions, which previously was shrouded by divergence of opinions on these two issues.
29. The new law of maintenance obliges a female Hindu alongside with the male to maintain to the best of her ability the minor children and the aged or infirm parents.
30. Formerly, there was no provision in Hindu law for the maintenance of illegitimate children. Under the new law such children can claim maintenance during their minority.
31. Greater discretion has been accorded to the court to determine the degree of responsibility of the persons who are under obligation to provide maintenance and also to fix any amount relating to such maintenance.
32. The long list of natural guardians existing under traditional Hindu law has been reduced under the new law to only three- (i) father (ii) mother and (iii) in case of a married girl - husband.
33. Court's permission has been made mandatory for the natural or testamentary guardian to transfer by way of sale, mortgage, gift, exchange or otherwise any part of minor's immovable property.
34. Power of the *de facto* guardian under existing law to alienate minor's property has been taken away.
35. An appointment of a guardian for the minor made by the father by will shall have no effect if the father pre-deceased the mother. It shall only revive if the mother dies without appointing by will any person as guardian, which means guardian appointed by mother's will would act in preference to a guardian appointed by the father.

The above changes of Hindu law are the results of legislative activities undertaken within the first ten years of the Indian Independence. A perusal of the changes brought about by these acts would indicate that they basically relate to improving the legal position of the women.⁴⁶ They are

⁴⁶ Archana Parashar, *op. cit.*, p. 78.

also more caring for other weaker sections of the society i.e. minors, disabled, illegitimate children, lower caste etc. More humanitarian and democratic character of the reforms is clearly evident. If more care and attention accorded to the weaker sections of the society including women and attempt to draw more people to the enjoyment of rights that society can offer are any measure of the upward movement of civilisation to appropriately reflect divine will, then above enactments are undoubted contributions to that upward movement.⁴⁷ The Indian reforms are not contrary to the divine nature of Hindu law, rather as its true interpretations are purported to be declaratory of the correct view of the divine law as it was so declared when the Hindu Widow's Remarriage Act was passed in 1856.

The amendments of the traditional Hindu law in India could not be expected to achieve immediate success in the society. Any change to materialise in practice is a long-term process. No change is free from transitional hazards or even temporary negative impacts. But changing social conditions are higher determinant factors to absorb the legal changes and to settle down at a higher and more humane level. Indian laws can be considered as great steps undertaken in the right direction, ushering in a new era of development of Hindu family law. In considering reforms of Hindu law in Bangladesh, whatever may be the difference in socio-political situation, Indian experiences cannot be overlooked, for Hindu law everywhere, except for the last sixty years, has undergone over several thousand years the same historical experiences of its development.

12. Comparative Position of Women in Reformed Hindu Law in India and in Muslim Law and Hindu Law in Bangladesh.

Women's legal position under Muslim family law appears to be better than that under Hindu law existing in Bangladesh, but is considered less favourable when compared with Hindu law now existing in India. Major provisions of Muslim family law which mainly concern women may be summed up for comparison as below.

1. A Muslim male can take up to four wives, this right of the male being subjected to various procedural constraints imposed by the Muslim Family Law Ordinance, 1961. But the procedural restrictions and true interpretation of the relevant Quranic verses clearly tend to support monogamy.⁴⁸

47 Mridul Kanti Rakshit, *op. cit.* 4th ed. 1985, p. 32.

48 In some Muslim countries including Tunisia and Malaysia, monogamy has been made part of positive law.

2. Husband's right to divorce his wife is unconditional and absolute, subject only to some delays effected by 1961 Ordinance.
3. Wife can also seek divorce by the Court, but this right of the wife is conditioned by (a) husband's consent given in the marriage contract and (b) the grounds given in the Muslim Dissolution of Marriage Act, 1939.
4. Either party to the marriage can seek court's assistance for the restitution of the conjugal rights.
5. In case of dissolution of marriage the husband's obligation to provide maintenance to the former wife extends only until the end of the period of *iddat* after such dissolution.
6. Under certain circumstances, the wife has right to separate living with a right to maintenance.
7. Woman enjoys full not limited ownership of the property which vests in her by way of inheritance, purchase, gift, exchange etc.
8. Woman in various capacities (daughter, wife, mother) is capable of inheriting along with male inheritors.
9. A Woman's share in any inheritance is half of what her male co-sharer gets.
10. Wife receives from the husband certain amount of *mahr* (value in cash or in kind) as part of marriage contract.
11. A mother cannot become the legal guardian of the child's person or property; she can only act as the custodian of the daughter upto puberty and of the son until he is seven years old.
12. There is no provision for adoption in Muslim law.
13. Marriage is compulsorily registered.

It is not difficult to notice that a comparison with the above provisions of Muslim law would indicate an improved position of the women in the reformed Hindu law in India. But the situation in the Hindu community in Bangladesh as it would be seen below is different. Although comparison between two completely different schools of thought may not be the best way to suggest reforms of any system, for reforms ought to follow their own paths, yet comparative delineation of the family laws of the two communities which have lived side by side for centuries may not be overlooked. Reforms of any system of law when they clearly appear to be more in conformity with reason and conscience set by general human development always have positive impact on any neighbouring system of law.

As it has been mentioned earlier, Muslim family law has undergone any substantial change over the past several hundred years, neither by legislation nor by judicial decisions. 1961 law has at best liberalised the

application of some of the provisions of the substantive law reducing thereby their severity. While there are great scopes for progressive interpretations of Muslim law by the courts, progressive in the sense of their being more in conformity with modern universally acceptable norms of human rights, prospects for such interpretations being in the nature of reforms and also reforms in the form of progressive codification changing the letters not the spirit, or in other words changing the forms not the contents of the law, seem at this stage, due to historical reasons that have befallen the nature of development of Muslim law, a distant possibility. On the other hand, both conceptually and historically, Hindu law has great advantage of being responsive to imperative of changes.

13. Critical Appraisal of the Existing Hindu Law in Bangladesh

After we have observed the historical development of Hindu law including radical reforms in modern India and also have a glance at neighbouring Muslim family law, it is, we believe, expedient to make a critical review of the existing Hindu family law in Bangladesh exploring the possibilities of any reform to move the law from where it had anchored in 1947.

1. Inter-caste marriage is prohibited under Hindu law in Bangladesh. This is shastric law followed since the days of *smritis*.

It has been observed above that during the earliest Vedic period the society was not divided into classes or castes. Castes developed later on the basis of different professional works done by different people. Even then there was no prohibition in their interrelationships. They experienced mutual social relationship. It was much later that classes or castes became rigidly stratified and self-contained, many social contacts and mutual relationships including inter-caste marriage being prohibited and the caste system with accompanying inter-caste prohibitions acquiring religious sanctions.

During British period in India some of the caste disabilities were removed by enacting separate laws (1850, 1946). But basically caste barriers subsisted until they were removed in independent India first by a special law in 1949, then by the Indian Constitution and finally by Hindu family law amendments in 1955-56. In Bangladesh it has remained where it was in August, 1947. It is strongly suggested that any barrier in inter-caste marriage be removed now. It would reflect not only the ideal Vedic State, but also the present reality.

It is not difficult to notice that as regards the professional activities, the Hindus in Bangladesh do not strictly follow the pattern set by their religion

i.e. the dictates of the caste system. Profession is now determined more by socio-economic conditions, needs, opportunities and merits. Therefore, the traditional caste differentiation is no more possible to maintain. Save the *Brahmins* who conduct various religious ceremonies, it is difficult to identify other castes on the basis of their professions. As Hindu law places great reliance on reality and practice, it is no more rational to hold fast to the old system of caste. Memories of the vedic past which would remind a fundamental spirit of Hindu philosophy, that is, to help flourish in a person all the latent qualities of a perfect being to reflect divinity of the Supreme Being, and the universally acceptable norms of human rights as well as the constitutional provisions of equality of the citizens warrant legislative measures to minimise inter-caste differentiations, first of all, to allow inter-caste marriage of the Hindus.

2. Polygamy is permitted under Hindu law in Bangladesh. This is degrading for women. There exists a strong view amongst Hindu scholars that during vedic period monogamy was the normal order.⁴⁹ This view is commensurate with the historically confirmed fact that women were then held in high position. That wives are called *shabodbarmini*, testifying to their equal status with husbands in conducting religious ceremonies, is traced back to Vedic past. If man and woman are considered equal, and undoubtedly they are so considered by Vedic law, present constitutional law as well as by the law of international human rights, it is difficult to reconcile with any system of marriage other than monogamy.

In practice also, monogamy is normally the order in Hindu community in Bangladesh. It is only very rarely that bigamy or polygamy is found amongst the Hindus to-day. Values and reasons have reached a point in the society where polygamy is viewed with disapproval and is condemned. Monogamy is the ideal. Introduction of monogamy would only mean giving legal coverage to what is already widely practiced in the Hindu community, enhancing at the same time woman's legal position and prestige, so necessary for the development of their over all personality. For comparison, it may again be noted that some rational interpretations of the relevant provisions of shari'a have been supportive of monogamy.⁵⁰

3. Dissolution of Hindu marriage in any form, divorce or otherwise, is not allowed in Bangladesh, for marriage under Hindu law is considered a sacrament. The idea is that husband and wife will remain forever together

⁴⁹ Menski, W. op. cit. pp. 377-380.

⁵⁰ Supra, fn. 48.

and perform together all religious and worldly functions. After marriage they become a perfect union, union both in body and soul, not to be separated. This bond unto death and even beyond is presumed to increase their mutual love, regards and care and provide greater sanctity, concentration and devotion to the performance of religious duties. Any scope for separation could destabilize this divine arrangement.

A careful study and objective understanding of the institution of Hindu marriage as a sacrament would reveal that its inner meaning is true accomplishment of religious and worldly functions by way of greater harmony and love between wife and husband. That indissolubility of marriage would increase such love and harmony perhaps contains some grains of truth. However, this was truer in the past than in the present, and the arguments for indissolubility will weaken further in the future. To-day's socio-economic conditions have grown so sensitive that they as determining objective factors often upstage many subjective considerations. Realities may engender circumstances in which indissolubility of marriage would breed disharmony and hatred rather than create harmony and love. Unfortunately under present day realities, this being so in many cases, marriage fails to accomplish its purposes. No doubt, in most cases in practice marriage is a life long happy union, serving divine and worldly purposes. But when exceptions occur and the wife and husband cannot live together anymore without doing harm to each other, dissolution of marriage would actually serve the purpose of indissolubility by paving the way for the parties to the marriage to seek harmony and love in divorce and remarriage. Divorce would only come as a panacea for any insurmountable hazard that unfortunately may befall the marriage bond. This would keep the institution of marriage as an abode of love and harmony, which is actually the divine, will.

The apprehension that validation of dissolution of marriage by way of divorce or otherwise would lead to frequent breach of Hindu family is not sustainable for the simple reasons that it is instinctual for man and woman as husband and wife to seek happiness in union rather than in disunion and find shelter in a strong family tie with loving children to strengthen that tie. Normally no one would break that tie. He or she would never seek divorce because he or she has the right to do so, as long as he or she is happy in the family. Reasons for seeking divorce are not to be looked for in the right of divorce, but elsewhere. This is one right, which a person would definitely want to avoid to exercise. Moreover, in order to correct any human error or to provide greater opportunities or time to wounded human emotions or reasons to heal, recapitulate and rectify, granting of

right to divorce would require that conditions, both procedural and substantive, be so worked out as to approve judicially only the most genuine divorce or dissolution of marriage cases.

Smritikars were also not unaware of the need for dissolution of marriages in extremes cases. Rishi Narod and Rishi Parashar approved of remarriage of women if the husband was dead, or unheard of for a long time, or impotent, or had taken to life of a *swannashi*, or had fallen as spoilt by ceasing to be a Hindu or otherwise.⁵¹ Although Narod and Parashor have nowhere specifically mentioned of the validity of divorce or dissolution of marriage, it is not possible to imagine of a situation of remarriage of the woman in four out of five above mentioned situations without invoking assumed dissolution of marriage. Valid dissolution of marriage in whatever form is implicit in their views.⁵² However this implicit divorce is not normally practiced under traditional law either because it is little known to the community or because there is some degree of confusion amongst the people about its applicability. There would, therefore, hardly be found any precedent of divorce and subsequent remarriage referring to Rishi Narod and Rishi Parashar. Legislation is necessary to confirm and clarify.

4. Registration of marriage or divorce is now recognised and required under all modern systems of law, Hindu law being the only exception. Registration may not be required, but certainly it does not undermine the sacramental nature of marriage. On the contrary, in the modern life of rapidly changing socio-economic conditions accompanied by cruel uncertainties, fulfillment of registration formalities is a record of immense importance. In any case, under the conditions of the proposed law i.e. introduction of monogamy prohibiting bigamy or polygamy, divorce by either party, remarriage etc., production of registration documents of marriage or of divorce by either party would be necessary to prove or to disprove the state of marriage or the fact of dissolution of marriage.

5. (a) Right of succession to property is one of the most important but delicate issues in any system of family law. Here again, focal point of all questions and controversies is woman's right. It is argued that women's position under Hindu law as regards right of succession to property is not in keeping with their interest. This position does not seem befitting of the

⁵¹ পূর্ণেন্দু বিকাশ চৌধুরী, *op.cit.* Hari Singh Gour, *op.cit.*, p-CV, para-104.

⁵² Archana Parashar, *op cit.* p. 116.

high esteem in which women were held during Vedic period and of the status, which they then enjoyed. By some accounts they also enjoyed full property rights. However, situations so developed that these rights came almost to nil in *Manusmritis*. Although women's right to property was not recognised during earlier *smritis*, later *smritis* did recognise it in a limited way as they were validly permitted to spend from deceased men's property in order to perform various religious ceremonies dedicated to the deceased.⁵³ Women were also seen to receive gifts from various sources which formed their *stridhan*. Women's limited right of succession to property and the institution of *stridhana* received detailed treatment in *Mitakshara* and *Dayabhaga*.

After Jimutabahan, women's right of succession to property of the husband or the father did not advance beyond what was given under Hindu Women's Right to Property Act, 1937 i.e. widow was elevated to inherit along with the sons, although her such right continued to be a limited right as before. In Bangladesh, even that limited right of ownership is further limited by the fact that it is applicable only to homestead and non-cultivable estate, and not applicable to cultivable or agricultural land.

It appears that women's position under traditional Hindu law in Bangladesh as regards succession is vulnerable. Other than *stridhana* which gives absolute property right to women and which it is possible only for very fortunate women to acquire in any substantial amount, any other property which a woman inherits is owned by her as limited estate, having no power to dispose or transfer the property as she likes, and reverts back to the nearest male inheritor (of the person from whom she inherited) after her death. Amongst the female, only the widows inherit along with the sons, the grand sons and the great grand sons. Only after them come daughters. Amongst the daughters, unmarried are given priority. Then come married daughters with sons or expected to have sons. Infertile daughters, sonless daughter-widows and daughters having only female offspring are deprived of inheritance.

Vulnerability of Hindu women's property position has increased manifold in the wake of instability and uncertainty of to day's socio-economic conditions and complex nature of societal development. Women's maintenance is based on the concept of man's charity which it would not be fully correct to say has failed in its mission. But this charity has also been subjected to harsh reality bringing miseries to womenfolk.

⁵³ *Supra*. fn. 14.

Dependence on the institution of charity, however it may be accompanied by love and compassion, retards a person's free development, which is the goal of any great religion.

Apart from the concept of equality between man and woman in inheriting father's property which is more in conformity with the concept of human rights and human dignity, woman's right to inherit, acquire and own property in absolute terms is warranted by the need of her material security which is more in danger under modern conditions. Introduction of the proposed reforms on marriage and divorce would also require sufficient safeguards for the women to maintain themselves, which is possible to ensure *inter alia* by acquiring property rights.

It is suggestible, therefore, whatever women inherit be made their absolute estate in distinction from the existing limited estate right. Second, daughters irrespective of whether they are married or unmarried, widow or not, with or without children, be equated with the sons to inherit from father. This would mean to place the widows and their children on equal footing to inherit. There may be some legitimate arguments against widow and married daughters inheriting on equal footing with the sons. Traditionally, grown up and earning sons take care of their mothers, while married daughters as wives in other families enjoy the maintenance of the husbands. Moreover, daughter as widow would also inherit from her husband. Actually under the conditions of validity of dissolution of marriage, such dissolution being justified and established by law, daughter's inheritance rights need to be strengthened. As for the properties of widows as mothers, these actually would be enjoyed and inherited by the sons and daughters. Property rights of a mother do not in fact undermine the property interests of the children.

It may be argued that giving succession right to women to inherit both from the husband and from the father on equal terms along with sons and brothers respectively would place the women on a far more advantageous position than the men. This may be true, but considering social and family reality, this may just be as necessary to bring their position closer to that of man's to provide for equality in practice. Notwithstanding this, here perhaps there is some scope for alternative thinking. In case of married daughter, where marriage has not been dissolved by divorce or otherwise, and widow, some deviation from the strict observance of the equality between man and woman principle to inherit from father may be allowed, giving the daughters less than the sons. This would also subscribe to the view that after marriage the daughter goes to another family in a separate

gotra where she will enjoy her own package of rights. But whatever the deviation, they must not be absolutely deprived of father's property.

(b) Providing enhanced property right to women in our society where social conditions are adverse to them may legitimately raise the question of how effectively they would be able to use and protect their property. This is more relevant in the situation of Bangladesh where the Hindus as members of the minority community find themselves immersed in so many social, political, legal as well as security hazards. Under the circumstances, Hindu women's position with property may be argued to be more hazardous than that without property. While this argument may contain grains of truth, this should not be so absolutised as to deny altogether property rights of women which are based on higher goal of justice. Law must be based on justice, the notion of which changes with changing socio-economic conditions. Implementation of any new law may encounter initial difficulties. They are to be overcome by undertaking concerted social and political measures.

For any law reforms measure to be successful which concern Hindus in Bangladesh specially to improve the position of women, what is important is to take into consideration the overall socio-political environment in which the said measures are to be implemented. Otherwise, it would lead to unnecessary speculation, suspicion and mistrust. Being by themselves significant for democracy and human rights, measures to repair the damage caused to the secular character of our original Constitution and to obviate the effects of the enemy property turned vested property law can also significantly contribute to the improvement of overall situation in which any reform concerning Hindu law, specially law of succession, increasing property right of women is more likely to succeed.

There are instances, although very insignificant in number, that Hindu women have been married to Muslim men in Bangladesh, accompanied by their conversion to Islam. These are exceptions in the society. There exists an apprehension amongst the Hindus that vesting property rights in Hindu women would increase such occurrences, not only posing further threat to already diminishing Hindu property, but also increasing the miseries of these women who would be enticed into such marriages with Muslims.⁵⁴

With due respect to above fears and apprehensions, it can be said with reasonable amount of empirical evidences that such marriages, if at all,

⁵⁴ শ্রেম রঞ্জন দেব, *op.cit.*

have taken place and perhaps would take place more due to human emotional factors than any consideration of property.⁵⁵ Yet, to overcome any practical compulsion on the part of Hindu women or to dispel any fear, social security legislative measures may be considered necessary. One such measure may be to adopt necessary law to exclude from succession those Hindu men or women who would convert themselves to other religions as well as those entering into marriage union with the members of other religions. While such measures would be subjected to criticism as being contrary to human rights and freedom of religion and conscience, they may be suggested as temporary and extraordinary measures to prevent apprehension of aforesaid conversion and marriage in order that community property interests can also be safeguarded. Such proposition would mean recommendation for repeal of the relevant provisions of two very progressive laws of 1850, namely, the Hindu Caste Disabilities Removal Act and Freedom of Religion Act⁵⁶, which does not entail forfeiture of property rights due to conversion, or inter-religion or inter-caste marriage. But again, this is recommended only as temporary measures. When overall socio-political and legal environment becomes congenial for the minorities, need for continued existence of the impugned law would wither.

(c) Physical or mental defects, deformities and certain diseases and also unchastity of the women exclude a Hindu from inheritance. It appears good physical and mental health and perfection and also chastity were considered essential attributes for rendering spiritual services. It was also thought that property could be well protected and made good use of for worldly as well as divine purposes only by the clean and healthy persons. Such reasoning do not hold good under modern conditions. Modern science and medicine has come with wonderful cure and remedy for mentally and physically handicapped in order that they could also live a reasonably good life and make their contributions to the progress of mankind. This is one of contemporary world's great virtues that people care for the handicapped and disabled. On the other hand, protection of their property would depend more on the social, political and legal conditions than on the physical or mental health of the owner. Chastity is

⁵⁵ ইলা চন্দ, “বষম্যমূলক হিন্দু আইনের পরিবর্তন আবশ্যিক”, *ভোরের কাগজ*, জুন ৮, ১৯৯৯, পৃ: ৫.

⁵⁶ Agarwala, R.D. *Hindu Law*, Allahabad Law Agency, ed. Arvind Pandeya, 1999, p. 7; সুবল চন্দ্র সাহা, *op.cit.*; ডুবনমোহন দাশগুপ্ত, “হিন্দু আইন সংশোধন প্রসঙ্গে”, *ভোরের কাগজ*, সেপ্টেম্বর ৫, ১৯৯৯.

now becoming increasingly difficult to define. Even when we greatly value this as a human virtue, to exclude one from inheritance on the ground of unchastity alone would be too unkind to be accepted. It is recommended that the traditional law, which excludes a person from inheritance on the above-mentioned grounds, be abolished.

6. Amendment of the law of inheritance would logically lead to amendment of the law of maintenance. Giving more property rights to the women would justify increasing their responsibility towards maintaining elderly persons as well as the minors in the family. There would be mutual responsibility of the wife and the husband to maintain each other and the individual responsibilities would be determined depending on their material positions and, in case of the dissolution of the marriage or separate living of the spouses, depending on the circumstances of each case or on whose initiative or fault the dissolution or the separate living has been caused,

7. Adoption is a very important institution in traditional Hindu law. Under existing law only a male Hind can adopt or be adopted. While it has been justified by the need of performing religious ceremonies i.e. son conducting funeral rites of the deceased father for the peace and salvation of his soul, its inner meaning is also to satisfy the craving of the childless for a child and the sonless for a son. It is suggested, therefore, that the sphere of the application of the institution of adoption be expanded to include a woman as adopter as well as adoptee. Such expansion is not to diminish or to discard the religious function of the institution of adoption. Other conditions remaining the same, adoption rights should, therefore, be accorded to woman, both married, widowed or when the husband is not in a position to adopt, and unmarried, as it should also be the stipulation of law that not only a boy but a girl can also be taken in adoption. Adopted boy or girl ought to be treated absolutely as the natural born for the purpose of the right of succession from the adopting parents, giving at the same time full protection to the ownership of his or her property acquired before adoption. In case of husband adopting, wife's consent to it is to be made a mandatory condition. Caste barrier for adoption is to be abolished.

14. Conclusion and Recommendations

It appears from the above investigation that proposed reforms of Hindu family law primarily and fundamentally concern women's rights. The reforms would considerably enhance women's rights and position in the family. This is a question of gender equality which for years has been a burning and searching issue under any system of law, public or private. This is also one of the principal problems of contemporary human rights

law, one of the imperative norms of which is gender equality in public and private life. The proposed reforms are in accord with this norm.

It is suggestible to amend and to codify Hindu law, but not as it has been done in India, splitting the law into several of its branches and enacting separate legislation for each branch. In Bangladesh it may be advisable to incorporate the major amendment proposals in one single legislation (act) leaving the rest to the continued regulation by the traditional law.

Salient features of a possible Hindu family law bill of reforms may be recommended to consist of the following:

1. Removal of caste barrier for the purpose of marriage and adoption.
2. Introduction of monogamy and the prohibition of bigamy or polygamy.
3. Dissolution of marriage union by way of divorce or otherwise on the initiative of either parties to the union and its enforcement by the decree of the court on the fulfillment of certain conditions prescribed by law.
4. Remarriage after dissolution of marriage.
5. Provision for registration of marriage and divorce.
6. Recognition of the equitable rights of the daughters, married or unmarried, to inherit parents' property along with sons.
7. Absolute ownership of the property of the women as against limited ownership as presently existing.
8. Abolition of the traditional law which excludes physically or mentally handicapped from inheritance.
9. Recognition of the right of inheritance for the illegitimate children.
10. Right of the women, married or unmarried, to adopt a boy or a girl.
11. Right of a female child to be adopted by an adoptive father or mother.
12. Necessity of the consent of the mother to the will made by the father.