Reform of laws on Hindu marriage and related areas in Bangladesh: A ‘legal’ take on a very ‘social’ issue

By Shah Ali Farhad

Bangladesh has generally been quite successful in formulating legal measures to combat social ills against women, for example, in areas like domestic violence¹, violence against women and children generally², acid crimes³, dowry⁴ etc. Unfortunately, the same cannot be said of family laws. This is one area of law where Bangladesh is significantly lagging behind in bringing the justice system in line with the demands of time.

In the absence of any ‘Uniform Family Code’ in Bangladesh, which lays down the relevant family laws for all citizens irrespective of their religions, recourse has to be had to the various religious laws which pertain in this extremely sensitive area of law. Thus, matters such as marriage, divorce, maintenance, custody/guardianship, adoption etc. are provided for by the various regimes which apply depending on whether one is a Muslim, Hindu (Buddhists have the same rules applicable for them as Hindus) or Christian.

Many⁵ feel that the existence and application of different legal regimes depending on one’s faith is unconstitutional⁶, unfair, discriminatory and contrary to Bangladesh’s international commitments⁷ and the recently adopted women’s policy⁸.

S Akhtar and ASM Abdullah⁹ write that when it comes to legislative reforms in Bangladesh, the position of Hindu women has received little attention when compared to the position of Muslim women. Such neglect on part of law has also greatly affected the socio-economic lives of Hindu women. Such a position fails to take into account that Hindus are the largest minority in Bangladesh. They constitute roughly around 9.2 per cent of the population¹⁰.

Thus, in this article, I will be looking at the various laws and principles applicable to Hindu marriage and related concepts such as custody/guardianship of children, maintenance,

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¹ Domestic Violence (Prevention and Protection) Act, 2010
² Nari-o-Shishu Nirjaton Daman Ain, 2000
³ Acid Crime Control Act, 2002
⁴ Dowry Prevention Act, 1980
⁵ Dr Shahnaz Huda, “Combatting Gender Injustice: Hindu Laws in Bangladesh” (Dhaka: SAILS, 2012)
⁶ By being repugnant to such provisions as Articles 27, 28 and 29
⁷ Dr. Shahnaz Huda, “Combatting Gender Injustice: Hindu Laws in Bangladesh” (Dhaka: SAILS, 2012)
⁸ Clauses 16, 17 and 25 of the Women’s Policy, 2011
⁹ United Nation’s Convention for Eliminating All Forms of Discrimination Against Women (CEDAW); International Covenant on Economic and Social Rights (ICESR); International Covenant on Civil and Political Rights (ICCPR); Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriage
separation and divorce, polygamy, etc. As we shall see, there are obvious disparities in the position of men and women in Hindu family laws. I will try to identify the areas of gender inequalities being perpetuated by the ancient rules still in force. I will also look at possible meaningful reforms in those areas as suggested by various stakeholders. I will be drawing heavy comparison on most aspects of discussion with the position as they prevail in India, as both jurisdictions have the same laws, at least up to the point of partition of the Indian sub-continent. I have however, deliberately left out the issue of succession, as I felt that deserves a separate paper of its own due to the complex socio-religious-political-economic angles involved.

Sources of Hindu Family Laws

John D Mayne\textsuperscript{11} defines Hindu law as “the law of the Smritis as expounded in the Sanskrit Commentaries and Digests which, as modified and supplemented by custom, is administered by the Courts”.

The primary sources of Hindu family laws are: i) Dharma and Srutis (that which was heard); ii) Vead or the Smriti (that which was recollected or remembered by the Rishis) iii) commentaries; iv) customs (In fact, custom, if proved, can outweigh the written text of the law\textsuperscript{12}); v) legislations; and vi) case laws.

It is to be noted that all legislations relevant to Hindu women were enacted in the British colonial period, namely: The Racial Inability Remission Act, 1850; The Hindu Widow's Remarriage Act; The Sati Regulation, 1829; The Child Marriage Restraint Act, 1929; The Earned Property Affairs Act, 1930; The Inheritance Act, 1925; The Hindu Women's Right to Property Act, 1937; The Hindu Women's Right to Separate Residence and Maintenance Act, 1946.

Unlike India, no further laws have been enacted in Bangladesh after the British left, both as part of Pakistan as well as an independent nation. It is as if the issue of social reforms for Hindu women has been forgotten by successive regimes and governments since 1947.

Marriage

There are two main schools of Hindu law: a) Mitakshara and b) Daya-bagha. The Hindu laws on marriage as applied in Bangladesh are principally based on the Daya-bagha school. Marriage is a very important concept in Hinduism. Unlike Muslim law, where marriage is considered to be a contract, marriage in Hindu law is a sacrament. Since it is not a contract,

\textsuperscript{11} John Dawson Mayne, "Treatise on Hindu Law and Usage" (1906), Seventh Edition, Madras: Higginbotham

\textsuperscript{12} Collector of Madura V Mootoo Ramlinga (1868) 12 MIA 397
ordinary legal principles regarding contracts are not relevant, such as the minimum age for marriage. In Hindu law, there is no bar to the marriage of minors. This is especially true of women, and it is not surprising to see brides who have barely crossed their childhood. However, there are case laws\textsuperscript{13} which show that Hindu marriages do resemble contracts in some respects, for example, the law does not recognize a marriage with a lunatic person or marriage induced by fraud or force.

Requirements of a Hindu marriage

India: In India, by virtue of the \textit{Marriage Act, 1955}, the following requirements have to be fulfilled for a marriage to be considered legally valid: first, neither party should have a spouse living at the time of marriage; second, there are certain age requirements, in that the groom has to be at least 21 years of age and the bride has to be at least 18; third, the parties should have the capacity to consent, in that they have to be of sound mind; and last, the parties should not be within the degrees of prohibited relationships.

Bangladesh: Unlike India, in Bangladesh, in the absence of any legislative enactment like the \textit{Marriage Act, 1955}, the prevalent rules are the ancient and orthodox Hindu principles. As regards age, there are no requirements as such and hence, even a marriage involving one or more minors is legally valid. However, there is one practical limitation. By virtue of \textit{Child Marriage Restraint Act, 1929} (as amended by the 1989 Ordinance), a marriage involving a groom of less than 21 years of age or a bride of less than 18 cannot be solemnized and the people involved in the contracting of an underage marriage can be subjected to penal sanctions. However, notwithstanding such sanctions, the validity of the marriage is not affected.

S Akhtar and ASM Abdullah\textsuperscript{14} criticize the application of the ancient Shastric Hindu laws in Bangladesh regarding the issue of age. They point out the following drawbacks resulting from permitting early marriages: a) the parties may not be mentally, psychologically, emotionally or physically prepared for conjugal life; b) underage girls in particular, face severe mental and physical trauma from having to engage in sexual relations at early ages; c) underage mothers give birth to weak and malnourished babies; d) infant mortality; e) an early marriage robs the girl of the opportunity of starting or continuing her education and deprives her of any possibility to develop her own personality and potentiality.

As regards capacity, John D Mayne\textsuperscript{15} wrote that according to ancient Hindu traditions, the purpose of marriage is considered to be the acquiring of a male heir who has the capacity to confer spiritual benefit upon the deceased at the funeral ceremony. This objective of marriage coupled with the fact that a Hindu marriage is a sacrament and not a contract, makes it apparent that although there is an element of physical capacity involved, infancy or

\textsuperscript{13} 14 Madras 316; 22 Bom 312
\textsuperscript{15} John Dawson Mayne, “Treatise on Hindu Law and Usage” (1906), Seventh Edition, Madras: Higginbotham
mental incapacity is however, irrelevant. However, subsequent case law\textsuperscript{16} has shown that mental capacity of the parties is a requirement of a valid Hindu marriage.

As regards consent, though we find a difference between Bangladeshi and Indian law as regards the necessity of consent to marriage, both jurisdictions are however, agreed in one respect. That is, if the consent is obtained by fraud or force, then the marriage is invalid.

**Ceremonies**

Adherence to the appropriate rituals and ceremonies can also have an effect on the validity of a Hindu marriage. There are a number of such rituals both preceding and following the actual wedding. However, according to the Supreme Court in *Amulya Chandra Modak vs. The State*\textsuperscript{17}, only two requirements are mandatory: a) Viva homa/joggo or the invocation before the holy fire; b) saptapadi or taking seven steps around the holy fire.

**Divorce**

The matrimonial bond, under Hindu family laws, is considered to be sacrosanct. They are eternal. As their religious sayings go, the bond is for this life and the next. The union is dissoluble. There is nothing wrong in holding the bond between man and woman in such a high esteem. However, the world is not an ideal place. We are imperfect. And so are our relationships. There are many reasons why any relationship can break down, sometimes irretrievably. That is why there is what we call divorce. Divorce allows men and women the opportunity to part their ways when their paths no longer lead to the same destination. In the 21\textsuperscript{st} century, it is hard for some of us to believe that the State, or the government or the legal system would have a say as to whether we want to stay in a marriage or not. However, surprising as it may sound to some, this is true for all Hindu marriages.

Hindu family laws do not permit divorce under any circumstance. There is no conceivable way a man and woman can part ways once they have taken their vows, even if the decision to divorce is mutual. However, in some communities divorce is allowed by custom and the courts enforce such customs provided they fulfill the requisites of a valid custom\textsuperscript{18}.

By contrast, in India, by virtue of the **Hindu Marriage Act, 1955** (the “1955 Act”), both the husband as well as the wife has the right to go to court and seek dissolution of the marriage. By virtue of **Section 13 of the 1955 Act**, the accepted grounds for seeking divorce include: cruelty, adultery, desertion, insanity or incurable disease and so forth. **Section 12** provides the additional ground available to a wife, that being impotency of the husband. **Section 13(2)(4)** provides that a Hindu wife can seek divorce on the ground that her marriage (whether consummated or not) was solemnized before she attained the age of 15 years and she has repudiated the marriage after attaining that age but before attaining the age of 18

\textsuperscript{16} 38 Cal 700

\textsuperscript{17} [35 DLR 1986 160]; see also Utpal Kanti Das vs. Monju Rani Das (50DLR AD 1998 47)]

\textsuperscript{18}Sankaralingam vs. Subban 1894ILR17Mad.479
years. By virtue of Section 13B of Marriage Laws (Amendment) Act, 1976, a further ground for divorce is now available, that being divorce by mutual consent.

Thus, it is quite clear that compared to India, the law regarding divorce for a Hindu woman in Bangladesh is rife with unfairness and is badly in need of modernization. There is widespread support for introducing the provision of divorce in Hindu marriages. A survey carried out by the South Asian Institute of Advanced Legal and Human Rights Studies (SAILS)\(^\text{19}\) shows that of a total of 175 Hindu people interviewed, 125 supported the right to divorce, 45 were against it and 5 had no responses.

**Position of widows**

In the not too distant past, the law used to be that women could not remarry even after the death of their husbands. Owing to social reforms in the mid-19th century, primarily at the behest of the British colonial administration, this rule was abrogated. Thanks to the Hindu Widow's Remarriage Act of 1856 Hindu widows got the permission to re-marry after the demise of their husbands. This law is applicable for all Hindus living in the sub-continent, including those in Bangladesh. However, there is one proviso, that being if a widow chooses to remarry then she loses her entitlement and any interest she might have in the properties or assets of her late husband\(^\text{20}\). This provision takes precedence over any contrary custom allowing the widow to retain any such property\(^\text{21}\).

**Polygamy**

Hindu men too, do not have the option to divorce. However, this relative disadvantage is far outweighed by the one sided prerogative bestowed only to the men folk under Hindu laws. Men are permitted to engage in polygamy. Simultaneously, they can take as many wives as their heart desires. There is no condition precedent, neither is there any cap on the highest number of wives they can take. There is however, no corresponding right to polyandry. Women are not given the chance to take more than one husband.

As stated earlier, men cannot divorce. However, they can desert their wives and remarry. The deserted wife does not have any grounds for seeking a divorce, as divorce is not permitted under any circumstances. A battered wife suffering physical or emotional abuse at the hands of her husband has no recourse but to tolerate all woes and continue with the matrimonial bond, notwithstanding her sufferings. Similarly, a deserted wife with no maintenance, or a wife stranded with a physically impotent husband is forced to continue with unsatisfying relationships. Hindu family laws lend no ears to their plight. If a husband remarries, however, the wife can petition the family court for a separate residence and maintenance.

\(^\text{19}\) Dr. Shahnaz Huda, “Combatting Gender Injustice: Hindu Laws in Bangladesh” (Dhaka: SAILS, 2012)

\(^\text{20}\) Nurunnabi vs. Joynal Abedin (1977 29 DLR SC 137)

\(^\text{21}\) Sowdamini Ray Malakar vs. Narendra Ch. Barmau (1952 4 DLR 492)
In India, as a result of the Hindu Marriage Act, 1955 [Section 5], it is now a condition of marriage that none of the parties can have a living spouse at the time of the marriage. A polygamous marriage is null and void [Section 11]. Further, Section 17 provides criminal sanctions for breach of the provision outlawing polygamy.

The fact that polygamy is no longer a desirable as well as popular entitlement is made abundantly clear by the field survey carried by SAILS, where among 56 questioned, 41 were against polygamy, 6 supported its continuation and 3 had no responses.  

Inter caste marriages

The ancient Hindu rules, as applied in Bangladesh, provide a barrier in marriage between members of different castes. Hindus are barred from marrying outside their caste and hence, inter-caste marriages are invalid in the eyes of law. However, S Akhtar and ASM Abdullah write that in some regions of Bangladesh, customs may permit inter caste marriages. For example, in Comilla and Chittagong, marriages between members of Vaidiya and Kayastha castes are considered valid by custom.

In India, with the passage of the Hindu Marriage Act, 1955, the caste system has been rendered obsolete in the context of marriages. It is no longer a requirement that the husband and wife have to belong to the same caste or sub-caste. Inter-caste marriages are permitted by Section 29 of the 1955 Act.

It is difficult to imagine that even in the 21st century concepts such as caste divide have managed to survive. It is widely accepted that this prohibition on inter caste marriage should be quashed by law. However, according to HRW, in practice, inter-caste marriages are frequently occurring nowadays with the change in the collective mindset of Hindus from all castes. A person’s education, employability and prospects of success in life are nowadays more potent indicators of courtship than caste. However, it is also conceded that a move towards abolishing the rule and making inter-caste marriages permissible by law is set to receive stiff resistance from the fundamentalist/orthodox sectors of the Hindu community. According to the survey carried out by SAILS, among a total number of 175 people, 104 voted for abolition of the rule prohibiting inter caste marriages, 65 voted for retaining the rule and 6 people gave no responses. Thus, in line with the general public opinion, it is this author’s view that the law should remove the bar on inter-caste Hindu marriages.

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22 Dr. Shahnaz Huda, “Combatting Gender Injustice: Hindu Laws in Bangladesh” (Dhaka: SAILS, 2012)
24 “Will I Get My Dues…Before I Die?” Harm to Women from Bangladesh’s Discriminatory Laws on Marriage, Separation and Divorce, Human Rights Watch 2012
25 Dr. Shahnaz Huda, “Combatting Gender Injustice: Hindu Laws in Bangladesh” (Dhaka: SAILS, 2012)
**Separation and Maintenance**

Although divorce is not available for Hindu women under *Shastra* rules as applied in Bangladesh, they can, however, seek a court decree for a separate residence and maintenance on limited grounds outlined in the *Hindu Married Women's Right to Separate Residence and Maintenance Act of 1946* (the “1946 Act”). The grounds are that the husband is suffering from a “loathsome disease not contracted from her,” treats her with “such cruelty” that it becomes “unsafe” or “undesirable” to live with him, the husband abandons her without her consent, remarries, converts to another religion, “keeps a concubine or habitually resides with a concubine,” or if there is some “other justifiable cause”.

Maintenance under the *1946 Act* is however, not an absolute entitlement. A Hindu woman is not entitled to maintenance or loses her entitlement if she is unchaste, converts to another religion, or fails to comply with a court decree for restitution of conjugal rights *[Sections 2 and 3 of Hindu Married Women's Right to Separate Residence and Maintenance Act of 1946]*.

As for the forum via which to seek relief, recourse has to be had to *Section 3 of the Family Courts Ordinance, 1985*, which provides that a Hindu wife can institute a suit in the *Family Court* for maintenance against the husband *[Nirmal Kanti Das vs. Sreemati Biva Rani* (47 DLR HCD 514); *Ponchon Rikssi Das vs. Khuku Rani Das* (50 DLR 199847)].

However, there has been some controversy regarding the amount of such maintenance. The only guide for such determination being that the court should “have regard to the social standing of the parties and the extent of the husband’s means.” This lack of clear criteria for determining maintenance has received a lot of criticism.

**Human Rights Watch ("HRW")** suggests that the law regarding maintenance needs to be amended to ensure that in determining maintenance, courts take into consideration such factors as the duration of the relationship; the impact of childcare and household responsibilities on the education and earning capacity of the dependent spouse (typically the wife); current and likely future income of each spouse; the dependent spouse’s capacity to support herself; the health and age of the spouses; the dependent spouse’s needs and standard of living; other means of support; and contributions made by the dependent spouse to realize the other’s career potential. **HRW** has also suggested that a wife’s entitlement to maintenance should not be made subject to concepts as “obedience,” “chastity,” “marital duties,” or “good character.”

Since in Bangladesh, Hindu women cannot seek divorce, the question of post-divorce maintenance does not even arise.

In India, by virtue of the *Hindu Marriage Act of 1955*, both parties to the marriage may seek maintenance *pendente lite* as well as permanent maintenance and alimony. However, the definition of maintenance is found in the *Indian Hindu Adoption and Maintenance Act of 1956*.

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26 “Will I Get My Dues…Before I Die?” Harm to Women from Bangladesh’s Discriminatory Laws on Marriage, Separation and Divorce, Human Rights Watch 2012

27 Ibid.
1956. Under Section 13(b)(1) of the Act maintenance refers to food, clothing, residence, education, medical attendance and treatment. The 1956 also makes it clear that “wife includes a woman who has been divorced by or has obtained a divorce from her husband and has not remarried”. Thus, the contentious issue of post-divorce maintenance is suitably provided for in India.

**Issue of marriage registration**

Another bone of contention regarding Hindu marriages is the issue of marriage registration. The Hindu law as it applies in Bangladesh does not impose any requirement for registration of Hindu marriages.

Such an absence of registration can give rise to many problems. S Sharma\(^{28}\) writes that from analyzing the case law\(^{29}\) we can see the following potential problems arising from the lack of proper marriage registration system: a) difficulty in proving marriage where husband denies the fact of marriage; b) proving legitimacy of children born out the union; c) establishing rights to maintenance for the wife and/or children; d) in criminal prosecutions such as dowry cases; e) wife obtaining pension upon husband's death; f) immigration purposes etc.

There is overwhelming public support favouring a compulsory registration mechanism. The survey carried out by SAILS\(^ {30}\) shows that of a total of 175 questioned, 118 were supporting a compulsory move towards registration, whereas 29 were against and 28 gave no responses.

**Guardianship of Children**

There is significant gender imbalance when it comes to guardianship of children under Hindu family laws. The father is the natural guardian of the person and property of his minor children. In order of priority, the mother comes next, but the father has been given the authority to appoint, by will, some other person who supersedes the mother. Thus, it is abundantly clear that the father has an absolute dominance on the issue of guardianship of children.

It is this author’s view that the law in this regard should also be modified. Nowhere in the world can we see such an imbalance of authority when it comes to issues of guardianship. At least, when it concerns children, one would have thought that women should have an upper hand. But that is not the case. Surprisingly, this particular point regarding guardianship has not received much academic interest too, as was revealed by the author’s own research carried out before embarking on the task of writing this article. The importance of this issue

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\(^{29}\) Amulya Chandra vs. The State; Onita Golder vs. Bikash Golder; Family Court, Rupsha, Khulna; Family Case No. 456/04.7. Bikash Chandra Goldar vs. Onita Goldar; Family Appeal No. 47/09 26 May 2010

\(^{30}\) Dr. Shahnaz Huda “Combatting Gender Injustice: Hindu Laws in Bangladesh” (Dhaka: SAILS, 2012)
is underscored by the lack of interest shown by the stakeholders. More needs to be done here and the starting point would be undertaking exclusive research in this area.

Attitude of the Hindu Community on the Question of Reforms

There is a significant division among the Bangladeshi Hindu community when it comes to the question of amending personal family law systems. There are those who actively support personal law codification and reform, but there are also those who are putting up substantial resistance. From 2011, an initiative has been taken by some stakeholders, including activists and religious leaders to develop a draft law on family matters. The pressure group, “Women’s Coalition For The Preparation Of A Hindu Marriage Law” (“Hindu Bibaho Ain Pronoyone Naree Jot”) has collected 3,000 case studies documenting how Hindu women suffered because of the discriminatory treatment they receive under existing family laws. The Coalition has asked for reforms in the line of: compulsory marriage registration, equal rights in marriage and divorce.

The opposition to reforms mainly derive from the religiously conservative quarters. Additionally, a large part of the Hindu community feels marginalised by the Bangladeshi legal order and look at any move towards reform with suspicion. This is hardly surprising given the history between them and the State; for example, the abrogation of secularism from the constitution and insertion of Islam as the official religion of the Republic (and its recent retention in the 2011 constitutional amendment), and not so fond memories of ‘vested property’ laws (which enabled government to take over properties of minority).

Proposals for Reforms

There have been several set of proposals for reforming Hindu family laws made by the various stakeholders over the recent years, principal among which has been those made by the Law Commission. The impetus for reform started in 2006 when the Law Commission undertook an exhaustive study on the viability of reforming Hindu family laws. The culmination of such research was the Hindu Marriage, Adoption, Maintenance and Succession Related Codified Act 2006 (proposed). In this proposed Act, they recommended, *inter alia*:

a) Ensuring monogamy and prohibiting bigamy/polygamy;

b) Making consent an essential requirement for a valid Hindu marriage;

c) Abolishing the prohibition on inter-caste Hindu marriages;

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31 Dr. Shahnaz Huda, “Combatting Gender Injustice: Hindu Laws in Bangladesh” (Dhaka: SAILS, 2012)
d) Giving the mother preferential rights over the guardianship of children and abolishing the current state of father’s absolute dominance;

e) Introducing registration processes for Hindu marriages (optional);

f) Making provisions for judicial separation of couples on various grounds (which more or less correspond with other jurisdictions) including the wide discretionary ground of “any justifiable cause”;

g) Introducing the right to divorce for Hindu couples, including divorce by “mutual consent”;

h) Making provisions for mutual duty of maintenance, including post-divorce maintenance.

By the same token, recommendations in more or less the same line have been made by the “Human Rights Congress of Bangladesh Minorities (HRCBM)”\(^{33}\) (an international campaigning movement dedicated to protecting human rights in Bangladesh, especially those of minorities) and “Coalition for the preparation of a Draft Hindu Marriage Law”\(^{34}\) (initiative taken by Manusher Jonno Foundation, Bachte Shekha and 17 NGOs).

In August 2012, the Law Commission reiterated its support for reform of Hindu family laws\(^{35}\). In particular, it has recommended, \textit{inter alia}, that the government prohibit polygamy, make marriage registration compulsory, and allow Hindu couples the right to divorce.

The government recently enacted the \textbf{Hindu Marriage Registration Act, 2012}. This provides for registration of Hindu marriages on an optional basis. Many felt that the registration process should be made mandatory and hence this law has been subject to sustained and cogent criticisms from women’s and human rights organisations\(^{36}\).

The author supports the view that reforms have to be introduced in the sphere of Hindu family laws on a priority basis. Hindu women should be given the right to divorce; registration of marriage should be made compulsory; principles regarding maintenance should be clarified and the issue of post-divorce maintenance provided for; bigamy or polygamy should be outlawed; women should have preferential rights regarding guardianship of children; and there should be strict legal requirements for a valid marriage, regarding, age, consent, capacity and form.

It is 2012. The discussed areas have to be reformed. It is a demand of the time. It is not a question of if, but when. And in my opinion, the when is now. Even if some resistance is met,

\(^{33}\)The Hindu Personal and Family Laws Ordinance, 2008

\(^{34}\)The Hindu Marriage Act, 2010 (proposed)


\(^{36}\)“Law making Hindu marriage registration optional condemned” Daily Star, Friday September 21, 2012
those will have to be faced. Major social overhauls inevitably encounter many obstacles, they always have. But barriers and impediments cannot and should not deter us from denying law to perform one of its principal functions: being the tool of implementing social change.


