

## The Right of Pre-emption in Personal and Statutory Laws: A Comparative Legal Analysis of Bangladesh and India

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**ABSTRACT:** The right of pre-emption represents an important yet controversial legal doctrine that allows a person to acquire property in preference to others upon the occurrence of a sale. Rooted in Islamic jurisprudence and later incorporated into statutory regimes, this right occupies a unique position in the property law framework of South Asia. In both Bangladesh and India, the doctrine survives through a complex interaction between personal laws and statutory enactments. This paper undertakes a comparative legal analysis of the right of pre-emption under personal and statutory laws in Bangladesh and India. It examines the historical foundations, conceptual justifications, procedural requirements, judicial interpretations, and contemporary relevance of pre-emption in both jurisdictions. The study finds that while Bangladesh continues to recognize pre-emption primarily through Islamic personal law and limited statutory support, India has moved largely toward statutory regulation with diminishing reliance on personal law. The

paper also highlights constitutional challenges, policy debates, and reform needs surrounding this doctrine in modern property transactions.

**Keywords:** *Right of Pre-emption, Property Law, Muslim Personal Law, Statutory Law, Bangladesh, India, Comparative Legal Analysis.*

## 1. Introduction

The right of pre-emption is one of the oldest proprietary rights known to legal systems influenced by Islamic law. It operates as a preferential right allowing a person, under specific circumstances, to step into the shoes of a purchaser and acquire immovable property before it passes to a stranger. Traditionally justified on grounds of preventing inconvenience and preserving neighbourhood harmony, the right has been both defended as socially beneficial and criticized as an unreasonable restraint on free alienation of property.

In South Asia, particularly in Bangladesh and India, the right of pre-emption has evolved through a complex interaction between Islamic personal law principles and colonial-era statutory enactments. While its roots lie in Muslim jurisprudence, British administrators introduced statutory reforms that reshaped its application. Post-independence constitutional frameworks and land reforms further transformed its legal character in both countries.

This paper aims to conduct a **comparative legal analysis of the right of pre-emption in Bangladesh and India**, focusing on:

1. Its nature under **personal law** (especially Muslim law),
2. Its treatment under **statutory law**, and
3. Its **judicial interpretation and constitutional position**.

By comparing these two jurisdictions, the study seeks to identify similarities, divergences, practical challenges, and potential reforms.

## 2. Materials and methods

### 2.1 Concept and Nature of the Right of Pre-emption

#### 2.1.1 Definition

The right of pre-emption is a legal right that enables a person to acquire property in preference to others when the owner intends to sell it. It is not a right of repurchase but a **right of substitution**, whereby the pre-emptor replaces the buyer under the same terms and conditions.

Under classical Muslim law, it is known as “**Shufa**”, defined as the right of a co-sharer or neighbor to acquire property sold to a stranger in order to prevent potential inconvenience.

### 2.1.2 Legal Character

The right of pre-emption does not confer title by itself. It is:

- A **weak right** until exercised,
- A **contingent right**, dependent on the actual sale of property,
- A **personal right**, not an interest in property until completed through legal procedures.

Courts in both Bangladesh and India have consistently held that pre-emption restricts the freedom of contract and therefore must be **strictly construed**.

### 2.1.3 Objectives of Pre-emption

Traditionally, the doctrine aims to:

- Prevent **intrusion of strangers** into close-knit co-ownership or neighborhood property arrangements,
- Avoid **disputes and inconvenience** among co-sharers,
- Maintain **peace and social harmony**.

In modern times, however, critics argue that these justifications no longer hold strong relevance in rapidly urbanizing and commercial societies.

## 2.2 Historical Development of Pre-emption in South Asia

### 2.2.1 Origin in Islamic Law

The doctrine originated in Islamic jurisprudence and was recognized by classical jurists based on Hadith traditions. It was primarily intended to protect co-sharers and immediate neighbors from harm arising from the entry of strangers.

### 2.2.2 Colonial Legislation

During British rule, the doctrine was selectively codified through various provincial laws such as:

- The Bengal Tenancy Act, 1885,
- The Punjab Pre-emption Acts,
- Agra Pre-emption Laws.

The colonial judiciary also played a major role in shaping the procedural and evidentiary aspects of pre-emption.

### 2.2.3 Post-Independence Developments

After 1947:

- **Bangladesh** retained the doctrine mainly through Islamic personal law and limited statutory recognition under land laws.
- **India** progressively restricted and repealed many pre-emption statutes through land reform legislation and constitutional scrutiny.

This divergence has led to substantially different legal landscapes in the two countries.

## 2.3 The Right of Pre-emption under Personal Law in Bangladesh

### 2.3.1 Basis in Muslim Personal Law

In Bangladesh, the right of pre-emption is primarily governed by **Muslim personal law**. It is applicable only to Muslims and is not recognized under Hindu or Christian personal laws.

### 2.3.2 Categories of Pre-emptors

Under classical Muslim law, pre-emptors are categorized as:

1. **Shafi-i-Sharik (co-sharer in property)**
2. **Shafi-i-Khalit (participator in rights or easements)**
3. **Shafi-i-Jar (neighbor)**

Priority is given in the above order.

### 2.3.3 Conditions for Valid Pre-emption

To validly exercise pre-emption:

- There must be a **completed sale**,
- The claimant must make **immediate demands (Talabs)**:
  - *Talab-i-Muwasibat* (prompt demand),
  - *Talab-i-Ishhad* (confirmation in presence of witnesses),
  - *Talab-i-Tamlik* (*third and final formal demand*)
- The claimant must be **legally competent**.

Failure to comply strictly with these formalities defeats the claim.

### 2.3.4 Judicial Approach in Bangladesh

Bangladeshi courts follow established principles of Muslim law. They consistently hold that:

- Pre-emption is a **weak right**,
- It must be exercised **without delay**,
- Any **negligence or waiver** extinguishes the right.

“The Appellate Division in *Abdul Jabbar v. Md. Kasem* (20 DLR (SC) 1968) authoritatively held that the right of pre-emption under Muslim law is a weak right which must be exercised with utmost promptness and in strict conformity with prescribed formalities.”

Also in *Nur Mohammad v. Abdul Gafur* (38 DLR (AD) 1986), the court reaffirmed that any delay or negligence in making the required demands operates as a waiver of the right of pre-emption, regardless of the claimant’s underlying entitlement.

## 2.4 Statutory Pre-emption in Bangladesh

### 2.4.1 *The State Acquisition and Tenancy Act, 1950*

Section 96 of the **State Acquisition and Tenancy Act (SAT Act), 1950** provides statutory pre-emption in respect of agricultural land. It allows:

- Co-sharer tenants to pre-empt transfer of land sold to strangers,

- Applications to be made within a prescribed time,
- Deposit of consideration money in court.

#### **2.4.2 Pre-emption under the Non-Agricultural Tenancy Act, 1949 and the Land Reform Act, 2023**

In addition to the State Acquisition and Tenancy Act, 1950, statutory recognition of the right of pre-emption in Bangladesh is also found in other land-related enactments.

Section 24 of the Non-Agricultural Tenancy Act, 1949 allows a co-sharer non-agricultural tenant to claim pre-emption when a share of non-agricultural land is transferred to a person who is not a co-sharer. The section permits the eligible co-sharer to apply for substitution as purchaser upon deposit of the consideration money and compliance with the prescribed procedural requirements.

Section 13 of the Land Reform Act, 2023 allows pre-emption in cases where a transfer of land would result in a person exceeding the ceiling limits fixed by law. The provision enables eligible persons, as specified under the Ordinance, to assert a preferential right in accordance with the statutory scheme governing land reform and redistribution.

#### **2.4.3 Key Features**

- The right of pre-emption arises only after a completed and registered transfer of land to a person who is not otherwise entitled under the relevant statute.
- Statutory pre-emption is available only to persons expressly specified by law, such as co-sharer tenants or other eligible persons under land reform legislation.
- The exercise of the right is subject to strict limitation periods prescribed by the relevant enactments.
- The claimant is required to deposit the full consideration money, along with any additional amount or compensation mandated by statute.
- The right operates within clearly defined categories of land, including agricultural holdings, non-agricultural tenancies, or land subject to ceiling restrictions.
- Statutory pre-emption is procedural in nature and does not depend on traditional personal law requirements such as oral demands or ceremonial formalities.

- Courts interpret statutory pre-emption strictly and literally, and any non-compliance with statutory conditions defeats the claim.

#### **2.4.4 Relationship with Personal Law**

Statutory pre-emption in Bangladesh operates independently of personal law. Where a statutory provision applies, the right of pre-emption must be exercised strictly in accordance with the requirements of the relevant statute, and principles of Muslim personal law do not govern such cases. Personal law-based pre-emption, including the doctrine of Shufa under Muslim law, continues to apply only in areas not expressly covered by statutory enactments. Accordingly, statutory provisions prevail within their respective fields, and personal law principles do not override or modify legislative mandates relating to pre-emption.

### **2.5 The Right of Pre-emption under Personal Law in India**

#### ***2.5.1 Application of Muslim Law***

In India, Muslim personal law is recognized under the Muslim Personal Law (Shariat) Application Act, 1937. The right of pre-emption continues to exist for Muslims where it has not been abrogated by statute.

#### **2.5.2 Judicial Attitude**

Indian courts have adopted a **restrictive approach** toward pre-emption. In several landmark cases, the judiciary has emphasized that:

- Pre-emption is an exception to the general rule of free alienation,
- It must be strictly proved,
- It cannot override statutory reforms.

#### **2.5.3 Declining Practical Relevance**

With the introduction of modern land laws, urban planning statutes, and housing regulations, personal law pre-emption has largely lost practical importance in India, surviving only in a limited number of rural or traditional contexts.

### **2.6 Statutory Pre-emption in India**

### 2.6.1 Pre-Independence Legislation

Several provinces enacted Pre-emption Acts during British rule, notably:

- The Punjab Pre-emption Act,
- The Agra Pre-emption Act.

These laws governed pre-emption irrespective of religion.

### 2.6.2 Post-Independence Reforms

After independence, many of these laws were:

- **Repealed**, or
- **Substantially amended** due to land reform legislation aimed at:
  - Abolishing intermediaries,
  - Promoting free land markets,
  - Ensuring economic efficiency.

### 2.6.3 Constitutional Challenges

Indian courts increasingly held that statutory pre-emption laws:

- Violated **Article 19(1)(f)** (right to property before its repeal),
- Were inconsistent with **modern market principles**.

Though the right to property is now a constitutional legal right under Article 300A, courts continue to scrutinize pre-emption laws strictly.

## 2.7 Constitutional and Policy Dimensions

### 2.7.1 Bangladesh

The Constitution of Bangladesh guarantees the right to property subject to reasonable restrictions. Pre-emption is considered a **statutory and personal law limitation** but remains constitutionally valid due to:

- Social justice concerns,
- Agricultural land protection policies.

## 2.7.2 India

In India, pre-emption has faced strong constitutional resistance. Courts have characterized it as:

- A **feudal relic**,
- An interference with **economic liberty**.

The dominant policy trend favours **free transferability of property** in line with economic liberalization.

## 3. Results and Discussions

### 3.1 Comparative Analysis of Bangladesh and India

#### 3.1.1 Source of Law

In Bangladesh, the right of pre-emption derives from a dual legal foundation consisting of both personal law and statutory enactments. Muslim personal law continues to play a significant role, particularly in cases involving urban and non-agricultural property where no comprehensive statutory framework exists. The principles of Shufa are frequently applied by Bangladeshi courts, subject to strict procedural requirements. Alongside personal law, statutory recognition is primarily found in the State Acquisition and Tenancy Act, 1950, which provides a structured mechanism for pre-emption in respect of agricultural and tenancy lands. As a result, the doctrine of pre-emption in Bangladesh remains comparatively robust and operational across different categories of property.

In contrast, the legal foundation of pre-emption in India has undergone substantial transformation. While Muslim personal law formally recognizes the right of pre-emption, its practical application has been significantly curtailed by legislative reforms and judicial interpretation. Historically, several statutory pre-emption laws operated across different provinces during the colonial period. However, following independence, many of these statutes were repealed or rendered ineffective through land reform measures and constitutional scrutiny. Consequently, statutory pre-emption in India has largely diminished, and personal law-based pre-emption survives only in limited and exceptional circumstances.

This divergence highlights a fundamental difference in legal orientation between the two jurisdictions. Bangladesh continues to maintain pre-emption as an operative legal doctrine grounded in both personal and statutory sources, whereas India has moved toward restricting and marginalizing the doctrine in favour of free alienability of property and market efficiency.

### 3.1.2 Scope of Application

- Bangladesh retains pre-emption in both **personal and statutory spheres**.
- India largely confines pre-emption, with statutory recognition rapidly declining.

### 3.1.3 Judicial Attitude

- Bangladeshi courts maintain a **conservative but consistent** approach.
- Indian courts display **increasing scepticism** toward pre-emption.

### 3.1.4 Policy Orientation

- Bangladesh emphasizes **land redistribution and rural stability**.
- India prioritizes **market efficiency and free alienability**.

## 3.2 Practical Challenges in the Application of Pre-emption

### 3.2.1 Procedural Complexity

The strict procedural requirements often lead to:

- Technical dismissals,
- Prolonged litigation.

### 3.2.2 Abuse of the Doctrine

Pre-emption is sometimes misused for:

- Harassment of buyers,
- Delaying development projects,

- Speculative litigation.

### 3.2.3 Conflict with Modern Real Estate Practices

In urban contexts:

- Rapid property transactions,
- Multi-storied buildings,
- Commercial developments make traditional pre-emption practically unworkable.

## 3.3 Judicial Landmarks

### 3.3.1 Bangladesh

The Appellate Division in *Abdul Aziz v. Shamsuddin* (41 DLR (AD) 1989) emphasized that the right of pre-emption cannot arise in the absence of a completed and valid sale, nor can it be founded upon mere intention or negotiation.

Also in *Md. Shamsul Alam v. Md. Abdur Rashid* (55 DLR (AD) 2003), the court clarified that statutory pre-emption under the State Acquisition and Tenancy Act operates independently of personal law principles and must be strictly governed by statutory conditions.

Courts consistently hold that:

- The right arises **only after a valid sale**,
- Delay in exercising demands defeats the claim,
- Equity has no role in enlarging this right.

### 3.3.2 India

The Supreme Court of India has consistently characterized the right of pre-emption as a weak and restrictive doctrine that operates as an exception to the general principle of free alienability of property. In *Bishan Singh v. Khazan Singh* (AIR 1958 SC 838), the Court held that pre-emption is a very weak right which may be defeated by any legitimate means and must therefore be strictly construed.

This restrictive approach was reaffirmed in *Bhau Ram v. Baij Nath Singh* (AIR 1962 SC 1476), where the Court observed that pre-emption imposes an unreasonable restraint on property transactions unless narrowly confined within statutory limits.

The judicial skepticism toward pre-emption became more pronounced in *Sant Ram v. Labh Singh* (AIR 1965 SC 314), in which the Supreme Court upheld the power of the legislature to amend or abolish pre-emption rights as part of land reform policies aimed at social and economic restructuring.

A decisive shift in judicial policy is evident in *Atam Prakash v. State of Haryana* (AIR 1986 SC 859), where the Supreme Court described statutory pre-emption as a feudal and outdated concept incompatible with contemporary constitutional values and modern economic conditions.

In a later reaffirmation of this position, the Supreme Court in *Shyam Sunder v. Ram Kumar* ((2001) 8 SCC 24) emphasized that modern property law in India favors unrestricted transferability and market efficiency, thereby leaving little scope for the expansive application of pre-emption rights.

The Supreme Court has repeatedly observed that:

- Pre-emption is a **very weak right**,
- Modern property law favours **unrestricted transferability**.

These judicial positions reflect the gradual decline of the doctrine in India.

### 3.4 Critical Evaluation

While pre-emption served important social purposes in traditional societies, its relevance in modern economies is increasingly questioned. The doctrine may:

- Hinder investment,
- Discourage free property markets,
- Increase transaction costs.

However, in agrarian contexts like rural Bangladesh, pre-emption still plays a role in:

- Preventing land fragmentation,
- Protecting small farmers,
- Preserving family holdings.

The challenge lies in striking a balance between **social protection and economic efficiency**.

### 3.5 Recommendations for Legal Reform

1. **Codification in Bangladesh:** A unified statute governing all forms of pre-emption would reduce uncertainty.
2. **Strict Time Limits:** Shorter limitation periods can prevent unnecessary litigation.
3. **Urban Exclusion:** Pre-emption should be expressly excluded from commercial and urban residential developments.
4. **Digital Land Records:** Transparent land registration can minimize fraudulent pre-emption claims.
5. **Judicial Training:** Specialized training can ensure uniform application of principles.

## 4. Conclusion

The right of pre-emption continues to represent a fascinating intersection between tradition and modernity in the property law of Bangladesh and India. While both jurisdictions share a common historical foundation rooted in Islamic jurisprudence and colonial legislation, their contemporary legal trajectories differ significantly. Bangladesh retains a relatively strong framework of both personal and statutory pre-emption, reflecting its agrarian socio-economic realities. India, on the other hand, has progressively diluted and repealed pre-emption laws in favor of market-oriented property regimes.

This comparative study demonstrates that pre-emption is no longer a uniform doctrine across South Asia. Its survival depends largely on socio-economic policy choices rather than purely religious or historical justifications. A careful and contextual reform approach is therefore essential to ensure that the doctrine serves justice without becoming an impediment to development.

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