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(The Dhaka University Studies Part-F)
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Submission

Dhaka University Law Journal is interested in original contributions on contemporary or jurisprudentially important legal issues from scholars and professionals. This is a peer-reviewed journal, and papers and critical essays are published only after the author(s) has/have resubmitted the paper in compliance with reviewers' suggestions and recommendations, if there be any.

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Standard articles written on one side of good quality A4-sized papers, double spaced with wide margins, should be of 8,000-10,000 words including footnotes. The contributions must be in journal style outlined below.

References, Footnotes and Layout

The text must contain appropriate headings, subheadings and authoritative footnotes. The footnotes should be numbered consecutively and typed single spaced at the bottom of each relevant page. Citations conform generally to a Uniform System of Citation. Thus the style should be as follows:

Journal Articles: Single Author

Antonio Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in the Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *European Journal of International Law* 649, 651. [Here, the pinpoint reference is to page 651 which is preceded by the starting page 649 and a comma and space.]

Journal Articles: Multiple Authors

Taslima Monsoor and Raihanah Abdullah, 'Maintenance to Muslim Women in Bangladesh and Malaysia: Is the Judiciary Doing Enough?' (2010) 21(2) *Dhaka University Law Journal* 39, 47. [Note: honorific titles (and initials) are omitted. However, M, Md, Mohd and any other abbreviated form of Mohammad which are part of author's name should not be removed. 21 is the volume and 2 is the issue no of the journal. 2010 is the publishing year. Year should be placed in square brackets [for journals that do not have volume number.]

Books: Single Author

Shahnaz Huda, *A Child of One's Own: Study on Withdrawal of Reservation to Article 21 of the Child Rights Convention and Reviewing the Issues of Adoption/fosterage/ kafalah in the Context of Bangladesh* (Bangladesh Shishu Adhikar Forum, 2008) 187. [Note: here 187 is the pinpoint reference. This reference is from the first edition of the book. In the case of editions later than the first, the edition number should be included after the publisher's name. It should appear as: 3rd ed]

John Finnis, *Natural Law and Natural Rights,* (Oxford University Press, 2nd ed, 2011) ch 4. [Here, a broad reference is made to chapter 4 of the book.]

Books: Multiple Authors

Richard Nobles and David Schiff, *A Sociology of Jurisprudence* (Hart Publishing, 2006) 49.
Paul Rishworth et al, *The New Zealand Bill of Rights* (Oxford University Press, 2003). [Note: when there are more than three authors, only first author's name should appear and 'et al' should be used instead of remaining authors' names.]

Books: Edited

Tom Ginsburg (ed), *Comparative Constitutional Design* (Cambridge University Press, 2012). [Note: where there are more than one editor, '(eds)' should be used instead of '(ed)'.]

Chapters in Edited Books

Jon Elster,'Clearing and Strengthening the Channels of Constitution Making' in Tom Ginsburg (ed),*Comparative Constitutional Design* (Cambridge University Press,2012)15, 18.

Books: Corporate Author

McGill Law Journal, *Canadian Guide to Uniform Legal Citation* (Carswell, 7th ed, 2010).

American Psychological Association, *Publication Manual of the American Psychological Association* (6th ed, 2010) 176. [Note: a publisher's name should *not* be included where the publisher's and the author's names are the same.]

World Bank, *Gender and development in the Middle East and North Africa: women in the public sphere* (2004).

Theses

Naim Ahmed, *Litigating in the Name of the People: Stresses and Strains of the Development of Public Interest Litigation in Bangladesh* (PhD thesis, SOAS, 1998).

Working Paper, Conference Paper, and Similar Documents

Jens Tapking and Jing Yang, 'Horizontal and Vertical Integration in Securities Trading and Settlement' (Working Paper No 245, Bank of England, 2004) 11–12.

James E Fleming, 'Successful Failures of the American Constitution' (Paper presented at Conference on The Limits of Constitutional Democracy, Princeton University, 14-16 February 2007) 13.

Newspaper

Stephen Howard and Billy Briggs, 'Law Lords Back School's Ban on Islamic Dress', *The Herald* (Glasgow), 23 March 2006, 7. Imtiaz Omar and Zakir Hossain, 'Coup d' etat, constitution and legal continuity', *The Daily Star* (online), 24 September 2005 <http://archive.thedailystar.net/ law/2005/09/04/alter.htm> accessed 9 March 2014.

Internet Materials

International Whaling Commission, *Extending the Global Whale Entanglement Response Network* (28 January 2014) <http://iwc.int/extending-the-global-whale-entanglement-response-n> accessed 9 March 2014. [Note: here the date within parentheses is the last date of update of the web page, and the date after the URL is the date of last access.]

Cases

A (FC) v Secretary of State for the Home Department [2004] UKHL 56.

Additional District Magistrate, Jabalpur v Shivakant Shukla AIR 1976 SC 11207.

A T Mridha v State (1973) 25 DLR (HCD) 335, 339. [Here, the case is reported on page 335, and the pinpoint is to page 339. Full stops should not be used in abbreviations.]

Bangladesh Environmental Lawyers Association (BELA) v Bangladesh [1999] Writ Petition No 4098 of 1999 (pending). [Note: '& others,' '& another' should be omitted.]

Shahida Mohiuddin v Bangladesh [2001] Writ Petition No 530 of 2001 (unreported).

Parallel citations should not be used in citations of Bangladeshi cases. But in citations of United Kingdom Nominate Reports and early US Supreme Court decisions, parallel citations are used.

Statutes (Acts of Parliament)

Evidence Act 1872, s 2. [Note: 'The' should not precede the name of the statute, and comma (,) should not be used before the year]

Evidence Act 2006, s 15 (New Zealand). [Note: when necessary, give jurisdiction in parentheses to avoid confusion.]

Delegated Legislation

Family Courts Rules 1985, r 5.
Financial Institutions Regulations 1994, reg 3.
Abbreviations should be written out in full when they appear first in the text or form the first word in a sentence. Leave out full stops in abbreviations made up of capitals as, for example, SEC, HCD, and JATI.

The abbreviation 'Ibid' should be used to repeat a citation in the immediately preceding footnote. Standing alone, 'Ibid' means strictly 'in the very same place' while 'Ibid, 231' means 'in the same work, but this time at page 231.' Avoid the use of 'Latin gadgets' such as *supra*, *infra*, *ante*, *Id*, *op cit*, *loc cit*, and *contra*, which are not widely understood. For cross reference and other purposes, following introductory signals can be used: See; See, eg,; See also; See especially; See generally; Cf; But see; See above/below n.

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Flying Kites: *Banglar Ghuri – Iccher Ghuri:* Managing Family Laws and Gender Issues in Bangladesh

Werner Menski*

I Introduction

Researching how the global phenomenon of law works out in culture-specific scenarios across the world, my starting point for this article is that Bangladesh seems to need quite radical rethinking about how law and jurisprudence are taught and how students are led to think about the potential roles of law and lawyers and the management of conflicts of law. Current domination of legal minds by legal positivism systematically cuts out other forms of law, though they clearly retain immense importance today and cannot be cast aside. There will be little disagreement about this in Muslim-dominated Bangladesh in terms of religion, and thus the influence of natural laws, as in reflected in muddled debates about the extent of 'secularisation' and its perceived dangers. But what about socio-cultural norms as law, local customs and traditions that people follow and that may be more in line with local *dharma* or *shari'a* than state law? Traditional natural law concepts and socio-legal understandings of law were not simply eradicated when positivism made its star appearance in colonial Bengal centuries ago.

Today a new key question for Bangladesh is how to handle the recent external pressures of international human rights law and other forms of new natural law. In this kind of scenario of interlegality, a pluralist methodology is required to make sense of what Moore incisively called the ubiquitous analytical problem of the 'semi-autonomous social field'.[1]

Dreams of better conditions and a bright future for the country as a whole can be expressed through *Banglar ghuri, iccher ghuri*. A wish kite is not only about some romantic moments in a *filmi* song. Let us make it a long-lasting quest for a better life for all Bangladeshis. To achieve such dreams, however, one needs the right skills. The key challenge for lawyers is not just to study 'law' as a technical subject, but to learn skilful management of the many conflicts that constantly arise around us,

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1 Sally Falk Moore, *Law as Process. An Anthropological Approach* (London: Routledge & Kegan Paul, 1978) 55-6.

helping to solve problems in an altruistic spirit of consciousness about competing expectations in scenarios of interlinkedness.

II Moving Away From Eurocentrism

Globally, in the current postmodern age, jurisprudence as theoretical study of law is presently moving away from traditional Eurocentric modes of thinking. Traditional Austinian positivism has been compared to a sinking ship, but the strength of legal positivist determination, particularly in common law and civil law traditions, ensures that this ship will continue to float. We cannot do without the state, so much is clear. Global legal theory, though, is finally waking up – still with considerable reluctance and birthpain – to the confusing reality of an immense plurality of legal orders that include not only state-centric Common Law and Civil Laws, and whatever remains of socialist legal systems, but also Muslim Law, Chinese Law, Hindu Law, African Laws, and many others forms of law that all co-exist on this globe.[2] On a global level, the old taxonomy of 'families of law' was really rather too simplistic.

It is also becoming evident now that it does not make sense to argue for one world legal system, though the Taliban and secular human rights fundamentalists may each in their own way push for a particular uniformising solution. It would be terrible abuse of law - and of human rights - to impose one law for all on this globe. Law in itself is such an outrageously plural phenomenon that it cannot be constrained in the straightjacket of any one particular model that lawyers used to study. Law is everywhere culture-specific and will remain so, since we already see that globalisation actually turns into glocalisation of many shapes.

So lawyers today have to become pluralists if they want to make sense of this glocalising world, even at the local level. They have to learn to be plurality-conscious and need to balance conflicting perspectives all the time. Learning rules is one thing, applying them for the benefit of society and the nation as a whole in situation-specific scenarios is a huge challenge. In Bangladesh, colonial barrister-focused mindsets and outmoded ways of thinking about law as a simple tool of governance remain strong, but are becoming increasingly unrealistic. Studying abroad may be a great experience, but learning about English law and procedure as they stand today often just avoids covering the basic tools needed for successful legal practice in Bangladesh. The sooner law students realise such underlying problems, the better for them and their educational progress. So I welcome the emergence of further opportunities for legal education in Bangladesh itself – but the challenge to prepare students for the plural realities of the glocalising world all around us is enormous.

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[2] For an enormously rich source of information on legal histories and current legal developments see, Stanley N Katz (ed), *Oxford International Encyclopedia of Legal History*, Vols. I-VI, (New York: Oxford University Press, 2009).

Properly qualified versatile lawyers that can do business in a global context and remain at the same time sensitive to local needs are needed now at the top range of legal education. Otherwise you end up with huge development projects that violate human rights in the name of the law. More modestly, preparing oneself for local legal practice does not normally require knowledge of foreign legal systems, but awareness of legal pluralism and sensitivity to legal pluralism still remain crucial. It also does not make sense to digitalise one part of your brain, while retaining traditional legal thinking in the other. Bangladeshi lawyers need to realise that as glocal citizens, they form part of today's postmodern world. This confusing reality includes big mansions and massive traffic jams in congested cities, but also illiterate children playing in sand or water all day, or perhaps already working to survive. It is no coincidence that there are heated ongoing debates in countries such as Bangladesh about 'child labour' and 'child work'.[3]

III The Challenge of Understanding 'Law'

The story of how to understand 'law' as an internally plural entity is actually quite simple, but it involves giving up on dreams about the absolute and absolutist power of positive law. In 2008 I sought to familiarise teachers and students at Stamford University with the presently evolving global models of pluralist legal analysis. This year we are trying to dig deeper. My critical analysis of comparative law[4] emphasised the uncomfortable truth that people teaching and studying law are still everywhere struggling with the most basic question: What is law? There is no globally agreed definition of 'law'.[5] Since 'law' can mean so many different things in many different contexts, to make sense of it as a global phenomenon and to devise a globally valid model turns out, on closer inspection, to be a huge challenge. Law is not just Austin's famous 'command of the sovereign' or some Napoleonic strokes of the pen by candlelight. My pluralist model of law, represented in 2006 as a simple triangle[6] (see figure 1), turned out to be a productive development of seminal discussions about the nature of law by the Japanese jurist Masaji Chiba.[7] Chiba distinguished 'official law', 'unofficial law' and 'legal postulates' and emphasised the continuous interaction of these three types of law. Actually, this basic volatile structure matches the three major theories of law commonly studied by lawyers, namely legal positivism (state law, the political and legal aspects of life), natural law

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[3] Mostafa Haider, 'Recognising Complexity, Embracing Diversity: Working Children in Bangladesh'(2008) 28(1) *South Asia Research* 49-72.

[4] Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa,* (2nd edn, Cambridge: Cambridge University Press, 2006).

[5] Ibid, 32.

[6] Ibid, 185-9.

[7] Masaji Chiba (ed), *Asian Indigenous Law in Interaction with Received Law*, (London and New York: KPI, 1986), cited in Menski, ibid, 119-28.

(with inputs from religion, philosophy, psychology and potentially an emphasis on the individual), and finally socio-legal approaches and historical studies of law, which emphasise development of rules in societies (figure 2).

This image also illustrates the important distinction between colonially imposed or more voluntary legal transplants (point A in figure 3) as 'official laws (so that the A actually ought to be within the triangle rather than outside it) and "ethnic implants"[8] (as new unofficial legal consequences of global migration (point B in figure 3). A computer-generated structure of three overlapping circles rather than a triangle (figure 4) reinforced the realisation that legal pluralism as a form of legal hybridity could take many different forms.

Chiba (1986) had theorised a basic, but quite sophisticated three-level structure of law, distinguishing 'official law', 'unofficial law' and 'legal postulates'.[9] He explicitly noticed, however, that official law did not have to be made by the state, but was often recognised by a particular state from among pre-existing traditions or cultural norms. There are thus different types of 'official law'; much of 'customary law' and 'religious law' could in fact be official law. Unofficial law for Chiba is "the legal system not officially sanctioned by any legitimate authority, but sanctioned in practice by the general consensus of a certain circle of people, whether within or beyond the bounds of a country".[10] The third element in Chiba's model, a legal postulate, is "a value principle or value system specifically connected with a particular official or unofficial law, which acts to found, justify and orient the latter".[11]

Since Chiba had emphasised so strongly the dynamic nature of this tripartite structure, I began to present this graphically as a structure with three corners, creating a semi-autonomous legal field marked by intense pluralism in the centre and porous boundaries everywhere (see figure 5). It was only a small step from there to adding numbers for different types of law (see figure 6), combining them in different forms.[12] So 1-1 is pure 'chthonic' custom[13], but 1-3 is something like an Islamised local custom, while 1-2 would be a 'living law'[14] type of custom emerging as a result of the presence of a particular state law. The same can be played through

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8 Menski, above n 5, 58-65.

9 Chiba, above 8.

10 Ibid, 6.

11 Ibid.

12 Menski, above n 5, 612.

13 H Patrick Glenn, *Legal Traditions of the World. Sustainable Diversity in Law,* (3rd edn, Oxford: Oxford University Press, 2006).

14 Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, (Cambridge, MA: Harvard University Press, 1936).

for 2-2 as 'pure' Austinian positivism, 2-1 as official law that actually is taken from local custom, and 1-3 as state law that may be based on certain religions or ethical principles. Similarly for 3-3, 3-1 and 3-2.

What all of this numbers salad was trying to convey was simply that law is everywhere not simply state law, but state law AND religious norms, values and morality, AND the customs of local people. I emphasised that regardless of what John Austin in 1832 had really said, law is never just the 'command of the sovereign' (type 2-2), but derives authority from potentially three sources at the same time, the three corners of the triangle. This means that, at all times, we humans have to learn to navigate laws and the resulting legal pluralisms of various kinds. As lawyers, and especially as analysts of law, we therefore have to accept, whether we like it or not, a global phenomenon that should without reservations be called 'legal pluralism' and that itself appears in many different manifestations. Lawyers, however, do not like legal pluralism for all kinds of reasons. It is still a 'dirty word' for many of my positivism-infected colleagues, while I see the triangle as an appropriate, progressive image to represent the plural realities of life and to help us understand the global phenomenon of law in more depth. Some people are now writing PhDs on this model – it works also in practical application.

Apart from being focused on rules, law is also concerned with processes, particularly the management and negotiation of such rules. The main aim in real life is often avoidance of conflict, maintenance of a kind of equilibrium, so that it is not necessary to call upon lawyers to settle a dispute in a formal court. Now, in a dispute-free society, would we say there is no law? Or would we rather agree that there seems to be a successful law, or even, as the nineteenth century German jurist Rudolf Stammler called it, something like 'the right law'. This 'right law' could be located anywhere near the centre of the pluralist triangle, but not necessarily in the centre, because this 'right law' might involve very little state law. For example, the *Qur'an* is certainly not state law. In Bangladesh, where the majority of people are Muslims, living by God's law (portrayed as *Qur'an* and *Sunna* in the first place) is largely seen as the correct thing to do. It does not need to involve much state law at all and rather links to local Bengali Islamised customs, which turn into Bengali *shari'a*, for which the local Bengali term is actually *dharma*. This is of course a classic example of hybridisation of a local legal culture over time and a wonderful reflection of legal history in today's plural world.

So if law must everywhere be more than just state law, it is dynamically interlinked with other phenomena. To call these phenomena 'extra-legal' is of course just a reflection of a positivism-infected mindset, a myopic perspective. If for positivists anything that is not state law is simply 'extra-legal', that kind of thinking is today far

too simplistic as a basis for legal education in the twenty-first century. Rather than just teaching basic positivist legal doctrine, associated with the big names of Austin, Hart, Kelsen and others, we should empower law students today to become skilful legal navigators. Devising a new globally valid methodology to understand the interaction of the various elements and components of law, we must highlight that there will be no instant change in society just because a new law is made. Developments have to be negotiated and take time to become effective. Violence will not vanish instantly, though I was impressed that the acid throwing problems in Bangladesh a few years ago were skilfully tackled by new laws and stricter monitoring. Empowerment, though, does not happen automatically. In addition, though we now live in the so-called human rights age, and international law and values somehow also need to be added to this picture, dreams about implementation of international norms by itself also rely far too much on simplistic positivist mindsets.

IV Flying Kites Of Law

Menski still kept globalisation and international law outside the picture and portrayed it in the introduction as a potential and somewhat threatening impact on the triangle from a global perspective.[15] Given my reservations about the superiority claims of international law as a unifying force, my analysis even went as far as depicting human rights arguments as "monsters" [16]. I was often told that this somewhat hostile approach to human rights argumentations would not be maintainable and that, in turn, my references to 'culture' and 'religion' as forms of law were monstrous threats to individual human rights. Whether one takes a human rights approach or not is actually quite immaterial. The basic principle, namely that all voices of law in the semi-autonomous social or legal field should be heard and recorded in some form, and that no one type of legal theory can totally exclude all the other types of legal theory, is the key to understanding global legal pluralism. This realisation helped me to add a fourth corner to the structure of the original triangle. International law, then, is clearly also a form of law that needs to be built into this pluralistic model, and cannot be left outside it.

So my model of the triangle of law changed last year into a structure with four corners, which can now be represented like a kite, *ghuri* in Bangla (see figure 7). The challenge is now to test whether this new model can help us make progress in understanding the complex phenomenon of the internal plurality of law. Lawyers, I am now saying, are really just like kite flyers. Whether as individuals, as societies, nations or as the international community, we are all navigating the competing

[15] Menski, above n 5, 3-24.
[16] Ibid, 3-24.

expectations of different kinds of law. Judges are kite flyers, too legislators are kite flyers. All legal activity can be brought under this image of flying a kite, which in the Japanese language, as I found recently, has the same sign as 'octopus', so a kite may also be floating gracefully in water! People using law have to manage, like a skilled kite flyer, competing pushes and pulls, different expectations at the individual, social, national and international level. They have to harmonise different visions and concepts of law, crossing boundaries of state law and other types of law in the process, as and when necessary.

While restructuring this image, it also occurred to me that if we look carefully at legal history around the world, without becoming evolutionists (another 'dirty word' these days), like Sir Henry Maine, a re-numbering exercise would be essential. Thus the kite structure starts now with corner 1 for natural law (as *themis* in ancient Greece, or Hindu *rita*, Chinese *tao* and divine revelation in Islamic law), then we move to corner 2 for society (with concepts such as *dharma* in Hindu law, *shari'a* in Islamic law, or *li* in Chinese law). Corner 3 then is allotted to the state, represented in terms like *qānūn*, maybe *danda* (threat of punishment) in Hindu law and the concepts of *fa* (positive law) and *hsing* (deterrent punishment) in Chinese law, an obvious conceptual parallel to *hadd* in Islamic laws. The fourth corner, the most recent legal development, not replacing all the others but forming a new layer of law in the global cake,[17] is then occupied by international law as a new form of natural law. Law in the twenty-first century has not just turned into international law as a new dominant paradigm, seeking to displace state-centric positivism. States are not redundant just because international law wants to assert itself. All types of law are still present and compete with each other. Other global images of law that we have been experimenting with this academic year, such as a tasty soup with many ingredients, South African 'pot food', or even the now increasingly familiar American 'salad bowl' model or the Canadian 'mosaic' image, do not convey that the four-level structure of a *ghuri* is a more adequate reflection of the various pushes and pulls that the kites of law are bound to experience.

V The Practice Of Flying Kites

Obviously, there will be many politics around this constant legal boundary crossing, and people will never completely agree on everything, in the same way as we do not agree on a basic global definition of law. I always revert back to that basic argument when the clouds get too dark and storms of protest threaten to pull the kite of law down. Can there not be many kites in the sky? Is pluralism really a threat? Or is it,

[17] Indeed, one of my young students recently came up with a computer-generated model of a wedding cake, with international law as the icing on that cake.

as a social reality, an uncomfortable reminder to those seeking simple naked power that there will always be limits to that power?

If we ask what kite flying is about, we seem to find very different perceptions. In Khaled Hosseini's *The Kiterunner*, which focuses on Kabul in troubled Afghanistan, kite flying is portrayed as a deadly contest involving much pride and *izzat*.[18] The aim appears to be that at the end of a day of kite flying, there should be only one kite left in the air over a city. This is hardly a reflection or celebration of pluralist co-existence, but a rather brutal image of a violent contest, cutting the strings of all the other kites to gain power, esteem and status. Cutting all the other kites in a macho show of strength breeds new violence, as the novel shows, when the 'wrong' person wins the contest. This is all very unlike the peaceful sailing of many *iccher ghuri* structures in the sky. So much is sure, there is no one way of flying kites. If we imagine every individual as a mini-kite, having to make sense of the competing expectations of the four types of law in one's brain, we can also imagine the larger kites of societies and of nations floating in the sky. And then there is maybe a huge global kite, which also will not fly successfully if one does not navigate the competing expectations properly.

Bangladesh as a still fairly young country, but with an ancient civilisation, knows a lot about such disagreements. It seems your country has recently learnt some lessons about skilful kite flying. Very significantly, you now have an elected government again, which was absent for so many years. There are many lessons from that. How will this new scenario impact on the understanding of law and its role in governance? Conscious of the fact that law can mean a number of things at the same time, and is therefore also always its own 'other', we should realise that there is always an in-built opposition, which is as necessary as the government itself. Similarly, a man and a woman will only have a good marriage if there is give and take on both sides, a sense of dynamic interaction. Only then will the wish kite of happy married life become a reality. A nation that still struggles to get used to the idea that there is a legitimate space for an opposition in Parliament is making a big mistake in constructing its national image and creating an appropriate national identity if naked positivism is taken as the ground rule. Democracy and properly conceived rule of law need the input of different perspectives. Any nation's kite will crash if important lessons about respect for plurality and diversity are not learnt.

Fortunately, things look a little more positive now in Bangladesh. A few days after your celebrations of the 38th Independence Day, Bangladesh is still a very young nation, but people seem to have learnt some lessons now. You have learnt, like the

[18] Khaled Hosseini, *The Kiterunner* (London: Bloomsbury, 2003).

Americans seem to have accepted when they elected Barack Obama as President, that there is a need for different people to work together. Obama said that the Republicans and the Democrats needed to co-operate for the benefit of the nation and the public interest. He talked a lot about 'interlinkedness' as a kind of new *Grundnorm* for the nation. He said there were Whites and Blacks and Latinos and others, and they were all Americans. And to the surprise of many sceptics, the first non-white President of the USA was elected with a huge mandate.

Quite unnoticed by the world, at roughly the same time, your current Prime Minister gave a very similar message to the people of Bangladesh: Let us work together. Overcome bipolar politics, realise why Bangladesh was created. Since I now know that *Joy Bangla* is a party political slogan, and there is also the slogan of *Bangladesh Zindabad*, I thought it was much better here to raise the wish kite of a *Banglar ghuri,* representing hope for a bright and prosperous future that you have already entered, many of you just do not realise this. You are no longer living in a desperately poor country, you are slowly becoming a major Asian player. Of course you are overshadowed by India, China and Japan, but you already have more people than Japan, and people are clearly an asset – provided they are educated and have skills. One of the most basic elements of education needs to be a respect for 'the other', whether in law or in life. Forgetting the very basic message that 'law' is actually an internally plural entity leads to disaster for individuals, societies, whole nations, and ultimately the whole globe. The claim that only state law represents 'empowerment' is itself a form of violence, while accepting legal pluralist methodology can be understood as a form of promoting empowerment.

If law is clearly a complex field that displays constant immense dynamism and agility and we now imagine a kite flying in the sky, the kite flyer needs considerable skills to make sure that the kite does not crash. One wrong movement, and there is a crisis. One bad gust of wind, and there is disaster. This sounds like the story of Bangladesh. So, yes, one needs to address how, in light of such theoretical approaches to understanding law, Bangladesh should tackle the deeply contested legal issues that plague your country. Especially the position of Islamic law within the country's legal system of personal laws and the development and modernisation of the minority personal laws seem important concerns. One quickly realises that such age-old issues have become so heavily politicised in Bangladesh that open discussion about some topics seems almost impossible.

VI The Need To Respect Legal Pluralism

Using the new image of the pluralist kite, it is obvious from looking around the world (which is what comparative lawyers also do) that refusing to accept pluralism in its various manifestations makes many kites crash and leads to disaster. So the

first requirement is that Bangladesh needs to do some serious introspection and examine its own identity, in ethnic, religious, legal and other terms. Chiba talked about the need to develop a country's 'identity postulate', a method to devise a culture-specific compromise between the competing forces of legal pluralism.[19]

Open discussions will need to be held. There is clearly no sense in stealthily bombing each other and killing those who disagree, because where will this end? Since we humans anywhere will never all agree about everything, it seems we have to learn to respect difference and should not even attempt to dictate sameness. We have to learn to talk and to listen to each other. We must learn to discuss and navigate competing perspectives.

We should thus dream about ideals and think of *iccher ghuri* harmony, but lawyers have to remain realistic and alert. There are many Muslims, but God created also many people of other faiths. There are men and women. Law by itself does not make them the same; it can create rules that people should be treated the same, but people themselves remain different entities. Law, this means, has many limits, provided by nature, society, and beliefs, and these differences have to be respected by anyone who wants to make laws. We should not become dictators, abusers of power, but need to become skilful legal navigators. The simplistic British model of Parliamentary Sovereignty, which many post-colonial rulers in states including Bangladesh still cherish, only works for certain situations and leads too easily to abuses of power by those who should be accountable to the public. South Asians should free themselves from colonial mindsets in this field, too. Clearly, not all law is made by Parliament. Especially at the local level, many laws are already in existence and in operation; there has never really been a total void.

Lawyers need to respect such existing diversities. They should learn to think as pluralists rather than rushing to draft new laws all the time. Only then can we succeed, as individuals, societies, states and as a whole interconnected world, to handle the many differences that are never going to go away. The route to success is basically through constructive acceptance of difference and of pluralism, not through imposition of sameness. If there are problems, they should be tackled, but not just through making new laws, rather through negotiation and skilful navigation. People are everywhere different, but ideally they need to work together to make life successful. We can of course say that men and women 'shall' or *should* be the same because we are all human, or they 'shall' or *should* be treated equally because of human rights and all kinds of other concepts of equality, also before God in Islamic law. But we cannot make existing gender differences non-existent by decrees of law

[19] Masaji Chiba, *Legal Pluralism: Towards a General Theory Through Japanese Legal Culture* (Tokyo: Tokai University Press, 1989).

and simple top-down declarations. The lived experience everywhere brings us back to the need to recognise many kinds of differences.

The growing presence of diversity and pluralism all around us, especially in the context of international migration, all over the world, has led to what Steven Vertovec calls 'super-diversity'.[20] We live today in increasingly super-diverse environments in which ever more hybrid combinations and new phenomena may appear, like a mixed-race President of the USA. President Obama's key message seems to be the *Grundnorm* of interlinkedness, the message of the need to work together. Without saying this clearly, it is a pluralist message. Specifically applied to America, this seems to mean overcoming the gulf between Republicans and Democrats, between whites and blacks and others, absolutely essential for the welfare of the nation. President Obama, as a 'skilful cultural navigator' since early childhood, has now become a highly skilful legal and political operator, whose biggest challenge presently is to match ideas with reality and to keep the American kite high up in the sky.[21] He has to practise plurality-conscious management now, like the new Prime Minister of Bangladesh, and that is never going to be an easy task.

I called Obama's election the second declaration of independence of the USA from Europe. The basic message of Americans for Europe was that we are today no longer a colony or an adjunct of Europe. We no longer subscribe to white eurocentric domination. America is a very plural nation, and proud of it. In fact, the message is thereby also that America has moved closer to Asia and Africa now in many ways than to Europe. Having elected a black president is something that Europe simply cannot imagine for itself. So for the second time in history, rejection of the eurocentric domination of America became a reality.

Nobody seems to have realised and discussed that rather similar developments occurred in Bangladesh. While everybody focused on America, at roughly the same time Bangladesh, it seems that Bangladesh made a second declaration of independence on 29th December 2008 as well and said again that we are not the same as Pakistan. Finally electing a new government on 29 December 2008, Bangladeshis showed the world not only that they can respect democratic traditions, but indicated a deeper understanding of the importance of accepting difference, not sameness, as a basic value around which the country was created in 1971.

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[20] Steven Vertovec, 'Super-Diversity and its Implications'(2007) 30 (6) *Ethnic and Racial Studies* 1024-54.

[21] Roger Ballard (ed), *Desh Pardesh. The South Asian Presence in Britain,* (London: Hurst & Co, 2007).

We found in hotly debated seminars in London that after declaring independence as Bangladesh, people realised suddenly that all Bangladeshis were not actually the same. Getting rid of the dominating 'other' had worked, but now there were manifestly other different 'others'. As a nation and a people you understood this, but did not fully accept the unique, religiously and ethnically plural nature of the new country. The *Banglar ghuri* was in danger of crashing, and different brands of *iccher ghuri* began to compete. The realisation that this is potentially fatal in an internally plural nation evidently took a long time to sink in; of course this key issue is still not fully understood or accepted.

The hopeful message that I took from the recent election was that Bangladesh realised again that it is unique, made up not only of Muslim men, but home to many different kinds of Bangladeshis who all have formally equal legal rights. The challenge is now whether in 2009 and in future years this awareness and latent tolerance for difference and pluralism will grow, whether gender-related violence will decrease and the killing of religious minorities will be curbed and become seen as unacceptable. These key issues will affect every aspect of the nation's development. These challenges are certainly not unique to Bangladesh, but they are crucial for the development of your country.

Both in theory and practice then, we all will need to become still more plurality-conscious during the twenty-first century. We have to develop increasing sensitivity towards legal pluralism, socio-cultural diversity and many other forms of difference, which we must learn to respect, otherwise we will end up killing each other in the name of some civilising mission, some superior nationalist ideology, or even in the name of law, a term that can so easily be abused. Lawyers have a key role in guiding better understanding of such complex processes and they have a responsibility to the nation which many law students are only vaguely aware of.

Legal theory to me is not just theory. It links to our lived experience and what the great Austrian jurist Ehrlich called 'living law'.[22] In real life, there is all the time much need to navigate, to find solutions to problems and answers to questions, visible and invisible. The constant private and public manipulations of legal, socio-economic, ideological and political systems suggest now that an image of kite flying, of subtle navigation of a quite vulnerable structure in a potentially turbulent atmosphere, can help us illustrate and understand better what we are doing while using law and legal processes as individual people, members of social groups, citizens of a state or foreigners, or as office bearers in official positions. The global skies are full of kites of different shapes and sizes, with many colours and culture-

[22] Menski, above n 15.

specific ornaments. Assuming that there are no invisible boundaries in the sky,[23] to avoid massive collisions and crashes of kites we have to be hyper-sensitive about pluralism and extremely skilled in handling competing pulls from different corners of the kite.

I suggest that a major task for comparative legal studies today is to find the right balance between competing pulls of different types of law. It is like trying to keep a kite flying in the air even in wind or rain. If we do not manage this well, the kite will crash. Or individuals may fail to handle specific problems and may kill themselves, or may turn violently against other people. A state may not function properly and become a failed or deeply troubled state. Unfortunately we have many examples of such maldevelopments around the globe. Finding the right balance of individual self-regulation, social control or governance at the level of states and even international law is clearly a constant challenge.

As a grandchild of Nazi Germany, I know only too well that exclusive claims of law to authority and power can easily lead to questionable aberrations. Chiba's pluralist methodology has been helpful for understanding the interdisciplinary nature and various roles of law. However, all over the world, most legal scholars continue to be narrow-minded technical experts of so-called 'black-letter' law, preferring to see law as a separate and often totally exclusionary and superior entity, making exaggerated claims that a particular type of official law is the only kind of law we should be concerned about. Today, in the age of globalisation, we see more and more pressure from international lawyers and fashionable topics like human rights to pull the kite of law mainly or only in their direction, disregarding culture-specific elements and area-specific concerns. Competing fundamentalisms and globalisations are in existence.[24] These trends are dangerous turbulences in the global skies of law, sometimes even new forms of state-sponsored terrorism that plurality-conscious scholarship must learn to unmask and oppose.

A country like Bangladesh could never ignore Islam and its expectations, but the country is not only composed of Muslims, and that will need to be reflected in national construction efforts. If law is at the same time natural law AND positivism, AND socio-legal norms AND international norms as a new kind of mainly secular natural law, then these four competing entities and perspectives need to be constantly balanced. None of the four elements in pure form is 'the right law'. This

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[23] Some Italian scholars wondered recently, contemplating the kite image, whether there might be invisible boundaries in the sky between Rome and the Vatican; of course various types of borders do exist on the ground and all over the planet. In an Islamic context, questions would arise about invisible limits in the sky between the Middle East and South Asia, between Mecca and Dhaka for example, or between India and Bangladesh.

[24] Glenn, above n 14.

illustrates that one does not manage diversity by denying it; one needs to address the problems that it may generate. The laws of Gods and gods, of Nature and of humans, whether as customs or state-made rules, are everywhere in need of sophisticated application, today increasingly tested against expectations of international norms. The kite symbol with its four corners makes increasing sense, not only in plurality-conscious South Asia. In the post-modern legal world, then, many different legal systems fly as colourful kites in the sky of law. And as the world becomes more crowded, so does the sky of law, which over Bangladesh alone would have more than 150 million individual kites as well.

Presently, the fourth corner of the kite of postmodern legal theory, international law in its various manifestations, exerts strong pulls on the various domestic laws to follow international norms, but constant subtle balancing has to continue. Familiar debates arise in Bangladesh, often concerning the politics of NGOs. There is a grave risk that those new pulls into one particular direction will lead to new imbalances and potential kite crashing of the kite. Going too far in following international expectations and globalising demands, ignoring the other corners of the kite, would clearly violate basic principle that every state needs to develop its own specific method of legal navigation, cultivating and fine-tuning its particular legal identity.[25] Globalisation, this confirms, is not moving us in the direction of one uniform world legal system, leading us instead to an ever more intense pluralisation of culture-specific legal systems and different patterns of regulation, ending up as multiple glocalisations. It needs to be studied in depth in future years how this works out for Bangladesh.

VII Conclusions

As a legal theorist with a realist's eye for practical implications, I see that the boundaries between official and unofficial law anywhere in the world will never be fully erased. Legal border-crossing will remain ever-present and will, of course, remain contested. We may attempt to shift boundaries, but cannot totally erase them. Particularly the interaction of ethnic minority individuals of various descriptions with states and different value systems will never be exclusively determined by state agenda or by the principles of the respective majority religions and cultures.

As argued above in terms of theory, and as we can see in practice, law everywhere needs to be negotiated between competing perspectives. Every individual has not only the right, but a human obligation, to make sense of socio-legal normative pluralism to construct his or her own way of life. Lawyers need to get off their high horses of dictatorial tendencies and should cultivate a sense of obligation to allow

[25] Chiba, above n 20.

others a voice in deciding how they wish to lead their lives. Imposing our own values on others becomes far too easily a form of dictatorship. This certainly does not mean that everything goes, but the most appropriate solution in a legally plural scenario can in most scenarios not be that one imposes the same law for all.

Obviously, such conclusions have enormous implications for debates in Bangladesh, particularly about the role and place of Muslim law, the position of minority personal laws and the Uniform Civil Code debate, which clearly is not focusing on a realistic option if one envisages one set of laws for all Bangladeshis. The recent Indian developments, to the effect that by 2001 there are clear signs of a harmonised system of personal laws, rather than the mergence of a Uniform Civil Code as originally envisaged[26], need to be studied carefully in Bangladesh with a view to drawing lessons for the future of Bangladeshi law.

In Europe today, we foolishly tend to treat personal laws as medieval institutions, forgetting that the majority of the world's population today actually lives under personal law systems. Most members of our so-called ethnic minorities, including Bangladeshis, arrive in Europe and North America with historical and social memories and skills in applying different laws to different sets of people according to religion and social status. These minorities have not assimilated into our legal systems, like salt into water. Rather, they have developed unofficial laws, which have been called *angrezi shariat*[27] and now even *Amrikan shari'a.*[28] There remains much to study about such new legal hybrids.

In Britain, we now face a deep crisis of constitutionalism because we have failed to become sufficiently plurality-conscious while our resident population has changed into a multicultural entity. Various methods of assimilation have been tried, but Muslims in Britain (and other minorities, too) are growing increasingly disillusioned with a state that fails to develop adequate and fair criteria for handling pluralist scenarios. Victimisation of ethnic minorities continues to be an observable pattern. A growing sense of injustice exists among Afro-Asian people in Britain, emerging long before the current anti-terrorist troubles that embroil and criminalise so many individuals, including some of my students. All of this indicates serious deficiencies in plurality-conscious management of multiple diversities in supposedly advanced legal systems.

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[26] Werner Menski, 'The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda'(2008) 9(3) *German Law Journal* <http://www.germanlawjournal.com/submissions.php>.

[27] David Pearl and Werner Menski, *Muslim Family Law* (3rd edn, London: Sweet & Maxwell, 1998).

[28] Saminaz Zaman, 'Amrikan Shari'a: The Reconstruction of Islamic Family Law in the United States'(2008) 28(2) *South Asia Research* 185-202.

The growing realisation that substantial numbers of marriages and divorces in Britain are no longer formally regulated by English law remains uncomfortable for the official legal system. In such cases, the many Sharia Councils in Britain may now assist a Muslim wife and may pronounce, if necessary, a *talaq* on behalf of the Muslim husband.[29] A more recent development, the skilful re-branding of bodies called 'Muslim Arbitration Tribunal', indicates that the ongoing struggles over multicultural governance are far from over. Evidently, such legal processes at the fuzzy boundaries of formal English law have created new nervousness in official quarters.

The current legal situation in the UK, which basically continues the familiar piecemeal process of making exceptions for certain scenarios or communities, could be seen as skilful kite flying, but is actually perceived as discriminatory treatment, which ruins trust in the official law, which is often not perceived as a friend. Emerging stronger evidence of deliberate Muslim refusal to obey European local laws tells us that the supposedly superior bargaining position of modern state law faces definite limits. If states refuse to recognise a Muslim *nikah* in Europe as legally valid, and Muslims refuse to register their *nikah* marriages in the new states of residence, we find a political and legal stalemate of a mutual refusal to engage in constructive debates. This leads to very dodgy weather forecasts for kite flying in the multicultural skies of Europe. If there is no willingness to accommodate, but rather a growing sense of misunderstanding, there will be more conflicts and crashing of kites.

From a pluralist perspective, I find that some of the new unofficial ethnic minority laws in Europe will eventually need to be accommodated by state laws. Sooner or later, the demands of basic justice and equity will force official laws to address the negative implications of non-recognition of Muslim and other personal laws, religions and cultures. Conversely, in countries like Bangladesh, where personal laws systems are an ancient reality, a refusal to legally recognise the culture-specific needs of religious and other minorities cannot be a sustainable way forward. Whether we analyse legal developments in Asia or in Europe, everywhere in the world the realities of legal pluralism demand plurality-conscious solutions, and old-established, positivist modernist ideologies will need to be re-examined for theirusefulness in today's globalising, but by no means just uniformising world.

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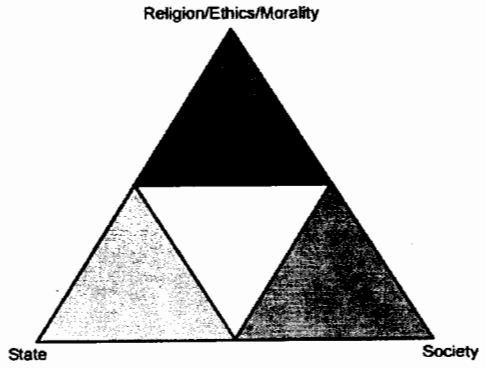
[29] Sonia Nûrîn Shah-Kazemi, *Untying the Knot. Muslim Women, Divorce and theShariah,* (London: Nuffield Foundation, 2001).

Figure 1



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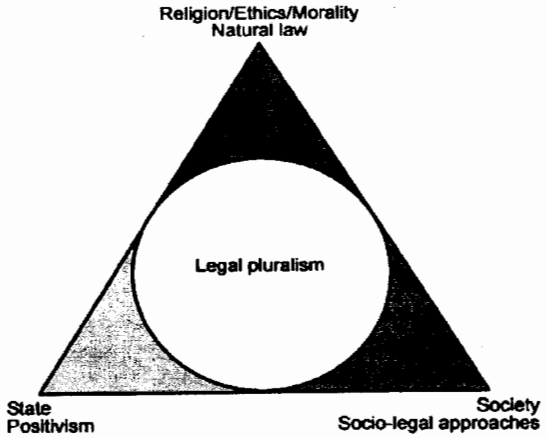

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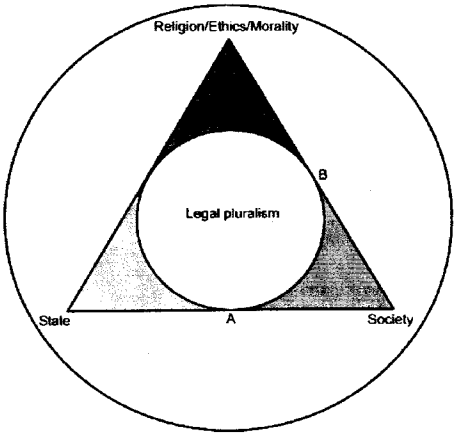

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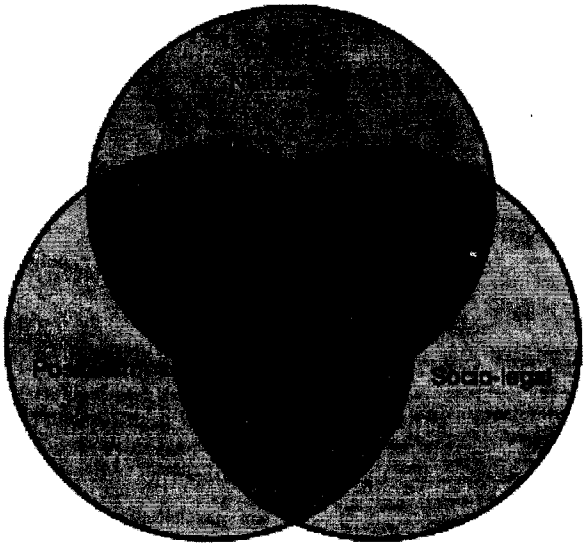

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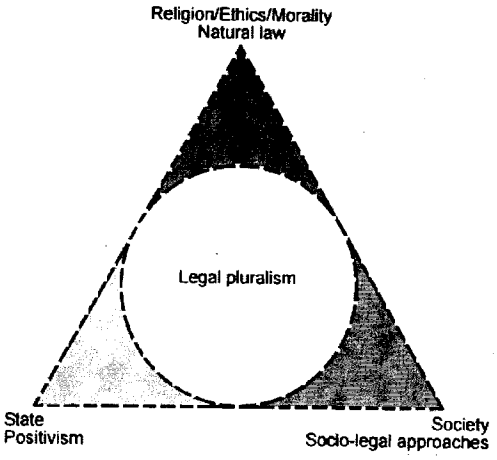

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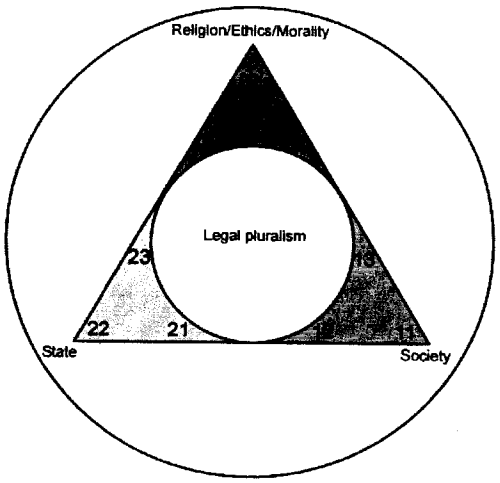

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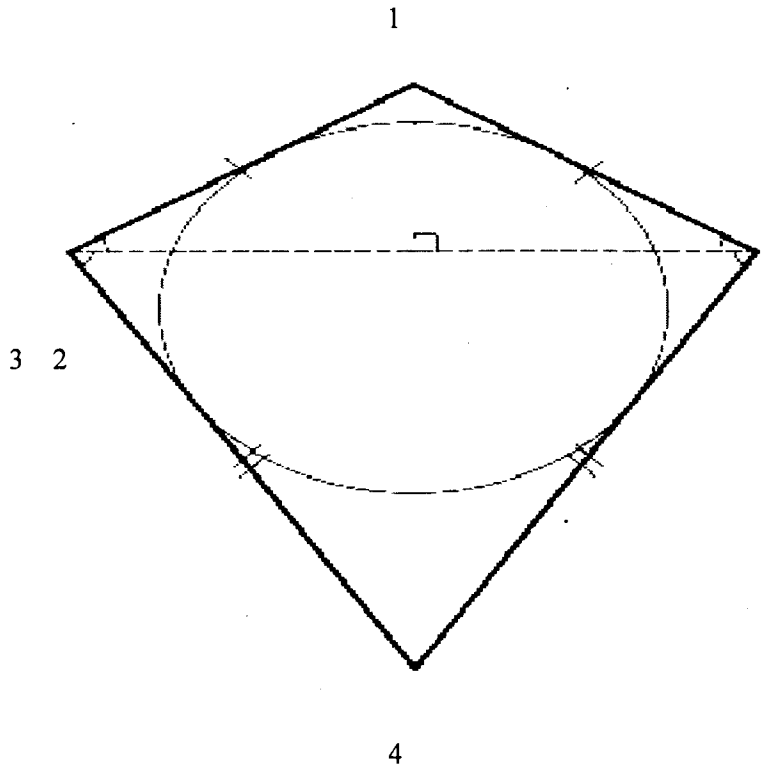

The Prevention Of Oppression Against Women And Children Act And Special Tribunal: Revisiting The Law And Its Implementation

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K M Ashbarul Bari**

Abstract

To prevent the crimes of violence against women and children, the Prevention of Oppression against Women and Children Act was enacted in Bangladesh. The law notonly incorporates very stringent provisions to combat violence against women (VAW) and children, it alsoprovides provisions for the creation of special courts, referred to as Nari o Shishu Nirjatan Domon Tribunals. However, although 16 years have elapsed, different data,information and reports show that the Act has failed to achieve the expected results interms of punishing actual criminals for committing crimes of VAW and children.The reasons for the lack of expected success of the Act are manifolds: vague definitions of crime, providing harshest punishment for several crimes, makingall offences non-bailable, delays in trial processes and so forth. It is even contendedthat the Act has gone against all the canons of criminal jurisprudence of the last twohundred or so years. This paper aims to assess the effectiveness of the said Act and thetribunals formed thereunder in order to address the crimes of VAWand children. The assessment is made from a variety of perspectives. Firstly, discuss the definition and nature of VAW and children. Secondly, point out the legal framework to combat VAW and children from national and international legal perspectives. Thirdly, make a critical analysis of the said Act of 2000. And fourthly, discuss the gap between the text and implementation of the said Act.

Key Words: Violence, Women, Children, Nari O Shishu Nirjatan Domon Tribunal

"But why does it matter what we call it, as long as there is concerted action to respond to and prevent such crimes? It matters because if we really want to fix something that is broken, if we want to heal these fractures in our society, then we need to understand their causes...As long as this violence continues, it is obviously the case that we do have to address the symptoms, but my argument is that we must also address the causes if we want a long-term reduction or even, perhaps, the eventual eradication of violence against women."

—Finn Mackay

Introduction

Violence against women (VAW) and children continues to be one of the most prevalent human rights abuses in Bangladesh, and around the world. It disdains the

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very root of human dignity on which the whole human rights paradigm is erected. Indeed, VAW and children impedes the efficiency of development initiatives and it is an obstacle to the full and equal participation of women in social, economic and political activities and the proper psycho-social development of children.

To prevent the pervasive actsof VAW and children, Bangladesh like many other countries has enacted and formulated several special legislations apart from its general penal law.[1]However, the Prevention of Oppression against Women and Children Act of 2000 (hereinafter POWCA)[2] is regarded as the primary and most prominent legislation in this regard. This Act is enacted to fill the gaps existed in earlier legislations which werein force before the enactment of the POWCA.This law not only incorporates very stringent provisions to combat VAW and children, it also provides provisions for the creation of special courts, referred to as Nari o Shishu Nirjatan Domon Tribunals.

However, although 16 years have elapsed since this Act has been enacted, different data, information and reports show that it has failed to achieve the expected results in terms of punishing actual criminals for committing crimes of VAW and children.The reasons for the lack of expected success of the Act are manifolds, for example, vague definitions of crime, providing harshest punishment for several crimes, making all offences non-bailable, delays in trial processes and so forth. It is even contended that the Act has gone against all the canons of criminal jurisprudence of the last two hundred or so years.

This paper aims to assess the effectiveness of the said Act and the tribunals formed thereunder in order to address the crimes of VAW and children. The assessment will be from a variety of perspectives. Firstly, discuss the definition and nature of VAWand children. Secondly, point out the legal framework to combat VAWand children from national and international legal perspective. Thirdly, make a critical analysis of the said Act of 2000. And fourthly, discuss the gap between the text and implementation of the said Act. To be mentioned, in order to crystalise the argument of the study, some leading cases decided by the Supreme Court (SC) of Bangladesh are consulted and examples from other similar jurisdictions[3] have been cited where necessary.

Conceptual Framework of VAWand Children

a. Defining the term 'Woman' and 'Child'

The preamble of the POWCA clarifies that the Act is enacted to make necessary provisions for the prevention of crime against women and children'.[4] Regarding to

1 The Penal Code, 1860 (Act No. of XLV of 1860).
2 Act No VIII of 2000, also known as the *Nari o Shishu Nirjatan Domon Ain.*
3 For example, the cases decided by the Indian Judiciary relating to the VAW and Children.
4 POWCA, above n. 2, preamble.

the construction of the term 'woman'[5] the Act[6] clarifies that woman means 'woman of any age'. The tribunal established under this Act held that the term 'woman' means women of any age and there is no obligation to determine the age of the women who are victims of offences under the said Act of 2000.[7] In this regard it can be mentioned that the Council of Europe through its convention[8] defines the term 'women' and includes girls under the age of 18 years.[9] The Maputo Protocol on the Rights of Women in Africa[10] states that 'women' means person of female gender, including girls.

In Bangladesh, on the other hand there is a discrepancy as to the exact age of Child. The authoritative legislation for this purpose is the Children Act[11] which defines child as any person under the age of 18 years.[12] Whereas the Child Marriage Restraint Act[13] states that 'child' means any person under the age of 21 years if such person is a male, and a person under the age of 18 years if such person is a female. The Labour Act[14] defines child as a person under the age of 14 years.[15] The Penal Code[16] provides a standard of between 9 to 12 years of age for determining whether a person is a child or not.[17] The POWCA states that any person under the age of 16 years will be regarded as a child.[18]

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5 Scientifically the term 'woman' denotes to sex that can bear offspring or, produce eggs ; they have two 'x'chromosomes; it also denotes the gender identity attributable to the women folks, For details see, Deana F. Morrow and Lori Messinger (eds.), *Sexual Orientation and Gender Expression in Social Work Practice: Working with Gay, Lesbian, Bisexual, and Transgender People* (Columbia University Press, 2006), 8.

6 POWCA, above n 2, s 2(g); See also; *TheDomestic Violence (Prevention and Protection) Act, 2010* (Act No LVIII of 2010 of Bangladesh), s 2(9).

7 *Alam (Md.) and Others v. State* 54 DLR (HCD) (2002) 298.

8 Council of Europe, *Convention on Preventing and Combating Violence against Women and Domestic Violence*, 11 May 2011.

9 Ibid, art 3(f).

10 African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003.

11Act No XXIV of 2013 of Bangladesh.

12 Ibid, s 4; See also; *The Prevention and Suppression ofHuman Trafficking Act, 2012* (Act No III of 2012 of Bangladesh), s 2(14); *ThePornography Control Act, 2012* (Act No IX of 2012 of Bangladesh), s 2(e); *The Domestic Violence (Prevention and Protection) Act, 2010* (Act No LVIII of 2010 of Bangladesh), s 2(4); *TheMajority Act, 1875* (Act No IX of 1875 of Bangladesh), s 3 (Age will be 21 if the guardian of his or her property is under a court of wards).

13 Act No XIX of 1929 of Bangladesh, s 2(a).

14 Act No XLII of 2006 of Bangladesh.

15 Ibid, s 2(LXIII).

16 Act No XLV of 1860 of Bangladesh.

17 Ibid, ss. 82 and 83.

18 POWCA, above n 2, s 2(k).

Turning to the international law it is found that 'Child' has been defined in the Convention on the Rights of the Child [19] as a person below the age of 18,[20] unless the laws of a particular country set the legal age for adulthood younger. The committee on the rights of the children, the monitoring body for the convention, has encouraged states to review the age of majority if that is set below 18 and to increase the protection for all children under 18. In the light of the mandate of this Convention in Bangladesh the age of child was set forth as 18 in the Children Act of 2013.[21]

b. Concept of Violence vs. VAW and Children

Defining the term Violence

There is no universally recognized jargon, either legal or non-legal, for referring to violence. The different forms and nature of violence is the reason behind such non-existence of an agreed-upon definition. Many scholars have tried to define violence from their own notions but those cannot be called uniform for their inclusive or restrictive nature. Violence can be connoted simply as 'physical attack' which itself stands for a broad range of incident.[22]

Apart from physical harm, violence has also psychological and social impacts and no simple relationship can be established between the categories of violence and its impact upon the stake holders. This extended notion of violence raises the moral ground of inclusion of all types of harms or use of forces either physical or non-physical within the purview of violence. Again, violence can be described from the perspectives of different actors (perpetrators, victims and third party) related with it.[23] Thus having multifaceted, socially constructed and extremely indecisive characteristics, violence though cannot be defined uniformly but a brief appraisal from non-legal and legal point of view can be made to explore the concept of violence.

From inclusive point of view, violence can be defined as "any action or structural arrangement that results in physical or non-physical harm to one or more persons",[24]

19United Nations, *Convention on the Rights of the Child* as adopted by the General Assembly Resolution 44/25 of 20 November 1989.

20 Ibid, art 1.

21 In India the Juvenile Justice (Care and Protection of Children) Act has also adopted similar definition.
(Act No. 2 of 2016), s 2(12).

22 PAJ Waddington, D. Badger & R. Bull, 'Appraising the inclusive definition of workplace 'violence'' (2005) 45(2) *British Journal of Criminology* 141-163.

23 Vittorio Bufacchi, 'Two Concepts of Violence' (2005) 3 *Political Studies Review* 193-204.

24 Gregg Barak, *Violence and Nonviolence Pathways to Understanding*, (Thousand Oaks, CA: Sage Publications, 2003) 26.

or can focus on injuriousness of actions standing apart from their social, moral or legal grounds.[25] *Stuart Henry* defines violence as "the use of power to harm another, whatever form it takes."[26] Therefore, from the perspective of inclusive approach violence is a more comprehensive, extended and multidimensional phenomenon, which includes all types of harms or attacks, either physical or non-physical. However, inclusive notion of violence have some drawbacks too, for example, a simple disagreement between two persons can be termed as violence, if there remains no recognized terminology and periphery of violence. Moreover, a broad definition may blur the entire concept and may become more complex to combat against violence.

The restrictive definitions of violence on the other hand, introduce a more conclusive approach by limiting its ambit to physical attack. Though restrictive notion has been regarded as feasible and appropriate by some scholars,[27] it cannot give adequate solution regarding the definition of violence in different contexts. The major criticism against restrictive notion is that it neglects the different forms of violence and its impact.[28] The question of legitimacy of violence also seems to be arbitral as it only regards physical harms as illegitimate violence, whereas other kinds of harm may turn into more injurious in a given social context.[29] Now concerning the legal definition of violence, it can be noted that most of the legal definitions on violence take a more or less restrictive approach. For example, US Code on Crimes and Criminal Procedure defines the crimes of violence in a restrictive way as follows:

'The term "crime of violence" means—

a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.'[30]

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25 Mary R. Jackman, 'Violence in Social Life' (2002) 28 *Annual Review of Sociology* 387.
26 Stuart Henry, 'What is school violence? An integrated definition' (2000) 567 *Annals of the AmericanAcademy of Political and Social Science* 16.
27 David Riches (ed), *The Anthropology of Violence*, (Oxford: Basil Blackwell, 1986); See also; AJ Reiss & JA Roth (eds.) *Understanding and Preventing Violence,* (Washington DC: National Academy Press, 1994).
28 Willem Schinkel, *Aspects of Violence* (Doctoral Dissertation, Rotterdam: Erasmus University, 2005).
29 Bufacchi, above n 23.
30 18 *United States Code*, s 16 <https://www.law.cornell.edu/uscode/text/18/16> accessed 8 August 2016.

Both the inclusive and restrictive notions of defining violence have theoretical basis and which approach should be feasible to define violence in a social structure depends upon the context upon which such violence occurs. Any permanent definition of violence cannot be given on a particular situation. Therefore, a hybrid definition including both inclusive and restrictive notion is feasible to explore violence. For example, World Health Organization's Report on Violence and Health (WRVH) has defined violence restrictively with inclusive notion as follows:

> "the intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, mal-development, or deprivation."[31]

Defining Violence against Women

The first internationally agreed-upon definition of VAW was propounded by the United Nations in the UN General Assembly in 1993 through the Declaration on the Elimination of VAW[32] in the following words:

> 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.'[33]

In this definition VAW has been recognized as gender-based violence. Article 2 of the said declaration has provided a non-exhaustive list of VAW as follows:

'VAW shall be understood to encompass, but not be limited to, the following:

a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.'

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31 World Health Organization, *World Report on Violence and Health* (2002) 5.
32 UN *Declaration on the Elimination of Violence against Women* adopted by the General Assembly Resolution 48/104 of 20 December 1993.
33 Ibid, art 1.

Before that the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[34] includes 'violence against women' in its General Recommendations 12 and 19 in 1989 and 1992 respectively.

After 1993 UN Declaration, regional instruments have started to define violence against women. On this process, the Inter-American Convention on the Prevention, Punishment and Eradication of VAW of 1994[35] defines VAW in the following words:

> 'any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.'[36]

Article 2 of the same convention has mentioned a non-exhaustive list of violence as follows:

'VAWshall be understood to include physical, sexual and psychological violence:

a) that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse;
b) that occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place; and
c) that is perpetrated or condoned by the state or its agents regardless of where it occurs.'

In 2002 the Council of Europe through its Recommendation of the Committee of Ministers to Member States on the Protection of Women against Violence[37] connoted the term 'violence against women' in following the words:

> 'For the purposes of this recommendation, the term "violence against women" is to be understood as any act of gender-based violence, which results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of

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34 UN *Convention on the Elimination of All Forms of Discrimination against Women* adopted by the General Assembly Resolution 34/180 of 18 December 1979.

35 Organization of American States (OAS), *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Para)*, 9 June 1994.

36 Ibid, art 1.

37 Council of Europe, *Recommendation Rec(2002)5 of the Committee of Ministers to member States on the Protection of Women against Violence* as adopted on 30 April 2002.

liberty, whether occurring in public or private life. This includes, but is not limited to, the following:

a) violence occurring in the family or domestic unit, including, *inter alia*, physical and mental aggression, emotional and psychological abuse, rape and sexual abuse, incest, rape between spouses, regular or occasional partners and cohabitants, crimes committed in the name of honour, female genital and sexual mutilation and other traditional practices harmful to women, such as forced marriages;
b) violence occurring within the general community, including, inter alia, rape, sexual abuse, sexual harassment and intimidation at work, in institutions or elsewhere trafficking in women for the purposes of sexual exploitation and economic exploitation and sex tourism;
c) violence perpetrated or condoned by the state or its officials;
d) violation of the human rights of women in situations of armed conflict, in particular the taking of hostages, forced displacement, systematic rape, sexual slavery, forced pregnancy, and trafficking for the purposes of sexual exploitation and economic exploitation.'[38]

In 2003 through Maputo Protocol on the Rights of Women,[39] African Union Commission stipulated VAW in the following terms:

> ''Violence against women' means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war;'[40]

Article 2 of the same Protocol has also put a non-exhaustive list of VAWas follows:

> ''Violence against women' shall be understood to include physical, sexual and psychological violence:

a) that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse;
b) that occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced

38 Ibid, appendix.
39 Maputo Protocol, above n 8.
40 Ibid, art 1(j).

prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place; and

c) that is perpetrated or condoned by the state or its agents regardless of where it occurs.'

Again in 2011 the Council of Europe defined VAW through the Convention on Preventing and Combating VAW and Domestic Violence[41] in following words:

> ''violence against women' is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life;'[42]

Defining Violence against Children

Violence against Child was first defined through the Convention on the Rights of the Child (CRC) as mentioned by the UN Study on Violence against Children of 2006 which includes all forms of physical or mental violence, injury and abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.[43]

In 2002 World Report on Violence and Health of World Health Organization (WHO) connoted violence or abuse against children in following terms:

> 'the intentional use of physical force or power, threatened or actual, against a child, by an individual or group, that either results in or has a high likelihood of resulting in actual or potential harm to the child's health, survival, development or dignity.'[44]

Turning to the laws of Bangladesh, it can be noted that no Act of Parliament has yet defined VAW and children in specific terms but a significant numbers of Act deal with the legal provisions to combat violence and repression against women and children.

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41 Council of Europe Convention, above n 9.

42 Ibid, art 3(a).

43 CRC, above n 19, art 19.

44 WRVH, above n 31; See also; Report of the independent expert for the United Nations *Study on Violence against Children* (A/61/299) of 29 August 2006; Committee on the Rights of the Child, *The Right of the Child to freedom from all forms of violence,* General Comment No. 13 (CRC/C/GC/13) of 18 April 2011.

Legal Frameworks for Combating VAW and Children

Combating is a continuous process and a relative term usually annexed to 'VAW and children' through which the roadmap for prevention can be drawn in the way of taking appropriate steps to end violence. These appropriate steps can be connoted as legal framework to combat violence in a more constructive way. International legal framework tries to develop some common good practices, whereas the national legal framework aims to formulate the methods of implementing those practices to eliminate violence in its national context.

a. International Legal Framework on Combating VAW and Children

The international human rights paradigm, from the Universal Declaration of Human Rights, 1948[45] to the Covenant of Civil and Political Rights,1966[46] and the Covenant on Economic, Social and Cultural Rights, 1966[47] states about gender neutrality but is silent on VAW and children, and also on its prevention.

There is no specific UN Convention on the prevention of VAW and children till date. However, after 1975 globally and regionally significant legal developments started to grow in two areas: (i) in the arena of prevention of discrimination against women and children; and (ii) gender equality which directly or indirectly mentions about VAW and children, and its elimination. A brief assessment on the frameworks contained in these legal instruments is given below.

UN Convention on Elimination of All Forms of Discrimination against Women, 1979

This convention provides gender specific human rights for women that protect them from all forms of discriminations including violence. As to the framework of the Convention, there shall be a specialized committee on the elimination of all forms of discrimination against women of 23 experts (CEDAW Committee)[48] assigned to monitor the implementation of theConvention. To be mentioned thisconvention does not enclose an express article on violence against women,but it mentions about VAW impliedly. The CEDAW Committee used its mandate under Article 21 toformulate general recommendations and has thereby provided a rational and specific explanationof VAW as falling under the CEDAW Convention.

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45 United Nations, *Universal Declaration of Human Rights* as adopted by the General Assembly Resolution 217A(III) of 10 December 1948.

46 United Nations, *InternationalCovenant on Civil and Political Rights* as adopted by the General Assembly Resolution 2200A(XXI) of 16 December 1966.

47 United Nations, *International Covenant on Economic, Social and Cultural Rights* as adopted by the General Assembly Resolution 2200A(XXI) of 16 December 1966.

48 CEDAW, above n 34, art 17.

The CEDAW Committee in 1989 adopted its General Recommendation No. 12[49] on VAW based on the mandate under Article 21 tomake general recommendation.Later on, in 1992 CEDAW adopted its vital recommendation on the matter, GeneralRecommendation No. 19[50] on VAW and provided a comprehensible explanation of genderbased VAW as a form of discrimination against women falling under theCEDAW definition. In this regard the General Recommendation No. 19 states that 'gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of Article 1 of the convention.'[51]The Committee also explained the responsibility of state parties regarding such violence.[52]Further it explained that discrimination under the convention is not restricted to actions by or on behalf of Governments and recalled that under Article 2 (e) of the convention.[53]Moreover, the General Recommendation No 19 stipulates 22 points specific recommendations to combat violence against women.[54]However, this international women's rights protection framework against violence under the CEDAW has not accepted by many states let alone its universal acceptance.[55]

UN Declaration on the Elimination of VAW, 1993

Though this declaration is not binding but it has significant influence on setting out common good practices to combat violence against women. This declaration specifies two fold responsibilities: First, article 4 of this declaration stipulates 17 points responsibility upon state parties to not only refrain itself from committing violence but also take affirmative measures to prevent violence committed by public and private actors; second, article 5 of the same declaration connotes the responsibilities of UN and its organs and specialized agencies.

The Beijing Declaration and Platform for Action, 1995

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49 United Nations, *CEDAW General Recommendations No 12* as adopted by theCommittee on the Elimination of Discrimination Against Women (CEDAW)at the Eleventh Session, 1992(U.N. Doc. A/44/38).

50 United Nations, *CEDAW General Recommendations No 19* as adopted by theCommittee on the Elimination of Discrimination Against Women (CEDAW)at the Eleventh Session, 1992(U.N. Doc. A/47/38).

51 Ibid, paragraph 7.

52 Ibid, paragraph 8.

53 Ibid, paragraph 9.

54 Ibid, paragraph 24.

55 United Nations, *Declarations, Reservations and Objections to CEDAW,* <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> accessed 15 August 2016.

This declaration[56] for the first time stipulates responsibilities not only for Government and State entities but also for non-government and non-state entities in itsparagraphs 112-130. These paragraphs mainly discuss the actions to be taken by the entities of different sectors related to preventing VAW depending specifically on three objectives: (i) taking integrated measures to prevent and eliminate violence against women;[57] (ii) studying the causes and consequences of VAW and the effectiveness of preventive measures;[58] and (iii) eliminating trafficking in women and assisting victims of violence due to prostitution and trafficking.[59]

Optional Protocol to the Convention on the Elimination of all forms of Discrimination against Women, 1999

This protocol[60] sets out two procedures to monitor compliance with CEDAW: first, it created a communications procedure for individual woman, or groups of women, to submit any claim of violations of CEDAW after exhausting domestic remedies;[61] second, it established an inquiry procedure[62] enabling the CEDAW Committee to investigate situations of 'grave or systematic violation' of women's rights which includes violence against women.

Moreover, there are also a significant number of 'UN Resolutions' adopted by the UN Commission on Human Rights (until 2006) and UN Human Rights Council (2006-present), and 'Report of UN Special Rapporteurs', which urge to the state Governments and UN Bodies to make preventive measures more effectively by setting out guiding principles to eliminate violence against women. Furthermore, following the UN framework, regional initiatives and instruments have also set out procedures to prevent VAW more efficiently.

Convention on the Rights of Child, 1989 (CRC)

This convention does not mention the term 'violence against children' directly. It states about state responsibility to protect children from different types of violence, neglect, exploitation and abuse.[63]A committee on the Rights of the Child was established comprising 18 expert members for the purpose of examining and

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56 United Nations, *Beijing Declaration and Platform for Action* adopted at the Fourth World Conference on Women, 27 October 1995.

57 Ibid, paragraphs 124-128.

58 Ibid, paragraphs 129.

59 Ibid, paragraphs 130.

60 UN *Protocol to theConvention on the Elimination of All Forms of Discrimination against Women* adopted by the General Assembly Resolution A/RES/54/4 of 15 October 1999.

61 Ibid, art 2.

62 Ibid, art 8.

63 CRC, above n 19, arts 19, 32, 34, 37, 39.

monitoring the progress made by the state parties.[64] The Committee also uses its mandate under Article 45 to make General Comments on different issues of rights of children including combating violence against children. In this regard, General Comment No. 13[65] can be mentioned whichprovides clear interpretation and elaborates supplementation of the legal language of Article 19 of the CRC.[66]

Advancing best practice approaches and technical resources for states parties and professionals on preventing violence against children, and on strengthening protection programs, systems, services, research, monitoring, evaluation and reporting; General Comment 13 further stipulates that 'implementation of article 19 requires cooperation within and between national, regional and international human rights bodies, mechanisms and United Nations agencies.'[67]

Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, 2000

Articles 34 and 35 of the Convention on the Rights of the Child say that governments should protect children from all forms of sexual exploitation and abuse and take all measures possible to ensure that they are not abducted, sold or trafficked. The Convention's Optional Protocol on the sale of children, child prostitution and child pornography[68] supplements the convention by providing states with detailed requirements to end the sexual exploitation and abuse of children. This protocol also provides protective measures for children from being sold for non-sexual purposes - such as other forms of forced labour, illegal adoption and organ donation. Moreover, the protocol provides definitions for the offences of 'sale of children', 'child prostitution' and 'child pornography'.[69] It also creates obligations on governments to criminalize and punish the activities related to these offences.

UN Declaration of the Rights of the Child, 1959

This declaration[70] does not mention the term 'violence against children' specifically but it states about protecting children from all types of discrimination[71] and

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64 Ibid, arts 43, 44.

65 United Nations, *CRC General Comment No 13* as adopted by theCommittee on the Rights of the Child (CRC)Resolution CRC/C/GC/13 of 18 April 2011.

66 Ibid, paragraph 7(a).

67 Ibid, paragraph 7(a).

68 UN *OptionalProtocol to theConvention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* asadopted by the General Assembly Resolution A/RES/54/263 of 25 May 2000.

69 Ibid, art 2.

70 UN *Declaration of the Rights of the Child*asproclaimed by the General Assembly Resolution 1386(XIV) of 20 November 1959.

71 Ibid, principle 10.

providing them social security[72] and special protection,[73] so that they do not becomethe victim of any type of violence.

Geneva Declaration of the Rights of the Child, 1924

This declaration[74] states that the child must be protected against every form of exploitation.[75] If the meaning of exploitation is taken in a sense of violence, it becomes clear that though this declaration does not mention the term violence but it strongly defines every form of violence committing against children.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

This convention[76] does not mention about VAW and children explicitly, but condemns every form of torture against any human being. Defining the term 'torture' under Article 1, it stipulates state parties' responsibilities regarding torture related offences in different Articles.[77] Further this convention requires the establishment of a Committee against Torture comprising of 10 expert members for the purpose of examining the incidents of torture and the proper implementation of the convention.[78] The Committee also used its mandate under Article 19 to make General Comments on different issues of torture. For example, clarifying the state parties responsibilities under article 14, General Comment No. 3[79] states that, 'states should ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.'[80]On the other hand, General Comment No. 2[81] addresses the vital points under Article 2 to remember state parties about their responsibilities against all forms of torture in the following words:

> 'Since the adoption of the Convention against Torture, the absolute and non-derogable character of this prohibition has become accepted as a matter of customary international law. The provisions of article 2 reinforce this

72 Ibid, principle 4.
73 Ibid, principle 2.
74 League of Nations, *Geneva Declaration of the Rights of the Child* as adopted of 26 September 1924.
75 Ibid, point 4.
76 UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* as adopted by the General Assembly Resolution 39/46 of 10 December 1984.
77 Ibid, part I, arts 2-16.
78 Ibid, art 17.
79 United Nations, *CAT General Comment No 3* as adopted by theCommittee against Torture (CAT)Resolution CAT/C/GC/3 of 13 December 2012.
80 Ibid, paragraph 1.
81 United Nations, *CAT General Comment No 2* as adopted by theCommittee against Torture (CAT)Resolution CAT/C/GC/2 of 13 December 2012.

peremptory *jus cogens* norm against torture and constitute the foundation of the Committee's authority to implement effective means of prevention, including but not limited to those measures contained in the subsequent articles 3 to 16, in response to evolving threats, issues, and practices.'[82]

Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 2002

This protocol[83] utters about establishing a Sub-committee on prevention of torture and other cruel, inhuman or degrading treatment or punishment of the Committee against Torture, for carrying out 'regular visits to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment'.[84] It further mentions about the formation and function of the Sub-committee in its subsequent Articles.

Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1975

This declaration[85] condemns any type of torture and other cruel, inhuman or degrading treatment or punishment and considers these acts as an offence towards human dignity.[86] Article 4 of this declaration mentions about the responsibility of states to take effective measures and in this regard training for law enforcement personnel and other public officials who may be responsible for state sponsored cruel treatment or punishment has been inserted to prevent such types of activities.[87] Moreover, Articles 8 and 9 require for conducting proper investigation by states, if any complaint is received regarding torture and cruel, inhuman or degrading treatment or punishment. State parties have the responsibility to incorporate the definition provided under Article 1 of this declaration in their respective criminal laws.[88]

b. National Legal Framework on Combating VAW and Children

In Bangladesh the legal framework on combating VAW and children has been developed through special legislations. The primary criminal legal instrument in this

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82 Ibid, paragraph 1.

83UN *Optional Protocol to theConvention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* as adopted by the General Assembly Resolution A/RES/57/199 of 18 December 2002.

84 Ibid, art 2.

85 UN *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* as adopted by the General Assembly Resolution 3452(XXX) of 9 December 1975.

86 Ibid, art. 2.

87 Ibid, art. 5.

88 Ibid, art. 7.

regard is the British enacted Penal Code of 1860.[89] However, after the independence of Bangladesh a number of other special legislations (deriving their due authority from the constitution of Bangladesh) enacted to combat violence.

Constitution of Bangladesh

The constitution of Bangladesh does not mention about VAW and children specifically. However, it urges for a society free from exploitation in following words:

> '...it shall be a fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens;'[90]

Article 10 of the constitution again endorses the words uttered in the preamble by saying that 'a socialist economic system shall be established with a view to ensuring the attainment of a just and egalitarian society, free from the exploitation of man by man.'The constitution further mentions about equal protection of law for all citizens in its third part on fundamental rights[91] and connotes about the responsibility of state regarding the discrimination against women in following words:

> '28. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.
>
> (2) Women shall have equal rights with men in all spheres of the State and of public life.
>
> (3) No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution.
>
> (4) Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens.'[92]

Moreover, the constitution mentions about right to protection of law, protection of right to life and personal liberty, safeguards as to arrest and detention, prohibition of

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89 above n 16.
90 Constitution of the People's Republic of Bangladesh, Preamble.
91 Ibid, art 27.
92 Ibid, art 28.

forced labour and protection in respect of trial and punishment in its different Articles.[93]

The Penal Code, 1860[94]

The Penal Code of 1860 contains several provisions regarding crimes of VAW and children without mentioning the term specifically, for example, first, offences relating to murder, culpable homicide, causing death by negligence, abetment of suicide, attempt to murder (Ss. 299-308); second, offences relating to hurt and grievous hurt (Ss. 319-338A); third, offences relating to wrongful restraint and wrongful confinement (Ss. 339-348); fourth, offences relating to criminal force and assault (Ss. 349-358). Again, amongst crimes which are committed against women and children and defined specifically in the Penal Code are: first, offences related to miscarriage (Ss. 312-317); second, offences relating to kidnapping, abduction, slavery and forced labour (Ss. 359-374); third, offences relating to rape and unnatural offence (Ss. 375-377); fourth, offences relating to criminal force and assault (Ss. 354, 355); and fifth, offences relating to marriage (Ss. 493-498)

The Child Marriage Restraint Act, 1929

This Act[95]is enacted to restrain the solemnization of child marriage[96] and provides punishment for such solemnization for parties related to such marriage.[97] Punishment for parent or guardian concerned in a child marriage has also been provided.[98] Offences under this Act shall be tried by any magistrate of first class.[99] Under this Act preventive measure has also been provided. Upon receiving information, the court may issue injunction prohibiting marriage in contravention of this Act and if any person disobeys such injunction will be punished with imprisonment for a term which may extend to three months and a fine which may extend to one thousand taka.[100]

The Dowry Prohibition Act of, 1980

This Act[101] penalizes the dowry taking or giving, which is one form of economic violence against women. This Act provides penalties of maximum five years or minimum one year including or excluding fine for dowry taking and giving and

93 Ibid, arts 31-35.
94 Act No XLV of 1860.
95 above n 13.
96 Ibid, preamble.
97 Ibid, ss. 3-5.
98 Ibid, s. 6.
99 Ibid, s. 8.
100 Ibid, s. 12.
101 Act No. XXXV of 1980 of Bangladesh.

dowry demanding for marriages under sections 3 and 4. Section 5 of the same Act provides that an agreement on dowry is illegal. Offences under this Act was made non cognizable, non-bailable and compoundable[102] and shall be tried in the Court of Magistrate of first class or superior Court.[103]

The Acid Crime Control Act, 2002

This Act[104] is enacted to strongly suppress and control the offences committed by acid, which are generally committed against women and children, which is one form of violence. The acts which has been made punishable as offences under this act are: first, offences of causing death by acid (section 4); second, offences of causing hurt by acid in such a way which totally or partially destroys eye-sight, hearing capacity, or destroys face, or breast, or reproductive organ [section 5(a)]; third, offences of causing hurt by acid in any part of body other than those mentioned in section 5(a) [section 5(b)]; fourth, offences of throwing acid or attempt to throw acid on anybody although no physical, mental or any other harm has been caused (section 6); and fifth, offences of abatement to throw acid (section 7). Indeed, this Act provides for the establishment of the Acid Crime Control Tribunal[105] and provides that provisions of Children Act will be followed for the trial of juvenile offenders.[106] The tribunal would be formed by Session Judge or Additional Sessions Judge.[107] Appeal can be filed against any decision of the tribunal before the High Court Division (HCD) of the SC of Bangladesh.[108]

The Labour Act, 2006

This Act[109] provides some rules and regulations regarding to the appointment of adolescence in any establishment and also prohibits the appointment of any child in any type of establishment[110]the contravention of which is punishable under this Act.[111] This Act also prohibits any type of activities, which is indecent orrepugnant to the modesty and honour of any female worker.[112]Chapter XIV of the Act states that Government may constitute Labour Court and Appellate Tribunal for trial of

102 Ibid, s. 8.
103 Ibid, s. 7.
104 Act No. II of 2002 of Bangladesh.
105 Ibid, ss. 2(c), 23.
106 Ibid, s. 17.
107 Ibid, s. 23.
108 Ibid, s. 26.
109 above n 14.
110 Ibid, chapter III.
111 Ibid, ss. 284 and 285.
112 Ibid, s. 332.

offences under this Act. At present there are 7 Labour Courts, 2 Circuit Labour Courts and 1 Labour Appellate Tribunal working in Bangladesh.[113]

The Domestic Violence (Prevention and Protection) Act, 2010

This Act[114] isenacted for the prevention of domestic violence and protection of women and children from domestic violence.[115] This Act defines domestic violence in four categories-[116] (i) physical abuse; (ii) psychological abuse; (iii) sexual abuse; and (iv)economic abuse. Cases under this Act are tried by the first class Magistrate or Metropolitan Magistrate, where applicable.[117] It also provides for the trial in absentia of the respondent.[118] Offences under this Act shall be cognizable, bailable and compoundable.[119] As to the decision of the case, the Court may give interim protection order, or protection order, or residence order, or compensation order, or custody order.[120] Appeal against the cases under this Act can be filed before the Chief Judicial Magistrate or Chief Metropolitan Magistrate, where applicable.[121]

The Prevention and Suppression of Human Trafficking Act, 2012

This Act[122] is enacted to prevent and suppress human trafficking, to ensure the protection of victims of the offence of human trafficking and their rights, and to ensure safe migration.[123] Section 11 of this Act deals with penalties for importing or transferring for prostitution or any other form of sexual exploitation or oppression, which is one form of VAW and children. It also describes penalties for keeping brothel and for soliciting for the purpose of prostitution, which are related with the prevention of violence against women.[124] For the implementation of the legal provisions the Anti-Human Trafficking Offence Tribunals have been established.[125]

The Pornography Control Act, 2012

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113 Ministry of Labour and Employment, <http://www.mole.gov.bd/> accessed 21 August 2016.
114 Act No. LVIII of 2010 of Bangladesh.
115 Ibid, Preamble.
116 Ibid, s. 3.
117 Ibid, s. 21.
118 Ibid, s. 26.
119 Ibid, s. 29.
120 Ibid, Ss. 13-17.
121 Ibid, s. 28.
122 Act No. III of 2012 of Bangladesh.
123 Ibid, Preamble.
124 Ibid, Ss. 12 and 13.
125 Ibid, chapter IV.

This Act[126] is enacted to control and suppress pornography.[127]It has provided punishment for child pornography and any pornography recording, pictures with a child being filmed up to 10 years imprisonment and five lac taka fine.[128] Indeed, it empowers the court to take expert opinion/help from IT experts and empowers the Investigation Officer to siege or search any device, book, CD as evidence.[129]Section 11 of the Act states that government may constitute tribunal, which is yet to be established for trial of offences under the Act. Any false and frivolous allegation under this Act carries a sentence of 2 years imprisonment and up to 1 lac taka fine.[130] Offences under this Act are cognizable and non-bailable.[131]

The Children Act, 2013

This Act[132] is enacted for the purpose of implementing the CRC of 1989.[133] Section 4 of this Act defined any person up to the age of 18 years as child. This Act further provides in details provisions for the protection of both types of children in conflict with law and in contact with law. Some of the important provisions are: first, probation officer's appointment (sec 5); second, establishment of national, district and upazila child welfare boards; third, child affairs desk at the police station (sec 13), fourth, establishment of Children's Court (section 16); fifth, participation of child in court proceeding (sec 22, 25); sixth, bail of the children in conflict with law; and, seventh, social inquiry report (section 31).

Repealed Legislations similar to the POWCA before 2000

Cruelty to Women (Deterrent Punishment) Ordinance, 1983

This Ordinance provided deterrent punishment for the offence of cruelty to women, such as, kidnapping, rape, trafficking, causing death for dowry, etc., most of which later covered by new special legislations. Offences under this Ordinance were triable by the Special Tribunals established under the Special Powers Act, 1974.[134]

Women and Children (Special Provisions) Act, 1995

126 Act No. IX of 2012 of Bangladesh.
127 Ibid, preamble.
128 Ibid, s. 8(6).
129 Ibid, s. 7.
130 Ibid, s. 13.
131 Ibid, s. 10.
132 above n 11.
133 Ibid, Preamble.
134 Act No. XIV of 1974 of Bangladesh.

This Act[135] was enacted to provide special provisions for certain heinous offences against women and children.[136] It has repealed the earlier Ordinance of 1983[137] and in turn was repealed by the POWCA.[138]

Emergence of the Prevention of Oppression against Women and Children Act, 2000

In the previous Act of 1995 in offences relating to rape causes death or followed by the murder of the victim,[139] the only punishment prescribed for was death penalty was contested in the case of *BLAST and Others v Bangladesh and Others.*[140] Moreover, this Act of 1995 provided mandatory death penalty provisions for other offences also, such as, murder of the victim after or by gang rape,[141] causing death by burning, corrosive and poisonous substances[142] and causing death for dowry.[143] Furthermore, the definition and extent of offences prescribed in the Act of 1995 were not exhaustive. In the case of *Younus Ali and Others v The State,*[144] it was held that 'mere attempt to kidnap' is not an offence under the Women and Children (Special Provision) Act of 1995. It also did not provide any provision regarding to the protection of victims. Therefore, to overcome these shortcomings and put flexibility on the harshness of punishment, the POWCA was enacted in 2000.

Critical Analysis of the POWCA, 2000

a. Dynamics of VAW and Children

The POWCA came into force on February 14 of 2000. Following the previous Act of 1995 this Act also provided for rigorous punishments but with flexibility in order to strictly prevent the oppression against women and children. This Act is applicable in matter of all women irrespective of age and children. The offences described under this Act can be categorized under three heads, *inter alia*, crimes; abetment to crimes, and attempt to commit crimes.

Crimes which are dealt under this Act can further be classified under five heads:first, crimes punishable with mandatory death sentence for causing death for dowry under section 11(a); second, crimes punishable with death sentence or life imprisonment for: causing death by burning, corrosive and poisonous substances under section

135 also known as *Nari o Shishu Nirjatan Domon (Bishesh Bidhan) Ain* of 2015.
136 Ibid, preamble.
137 Ibid, s. 29(1).
138 POWCA, above n 2, s. 34.
139 WCA, above n 135 s. 6(2).
140 Writ Petition No 8283 of 2005, 30 BLD (HCD) 2010.
141 WCA, above n 135, s. 6(4).
142 Ibid, s. 4.
143 Ibid, s. 10(1).
144 7 (1999) BLT (HCD) 46.

4(1); causing grievous hurt if eyesight or hearing capacity or face or breast or reproductive organs are damaged under section 4(2)(a); confinement of any woman or child for taking ransom under section 8; causing death of any woman or child due to rape or any activities of the offender after rape under section 9(2); causing death or hurt by gang rape under section 9(3); and causing mutilation of any limbs of child for the purpose of begging or selling limbs (section 12); third, crimes punishable with mandatory life imprisonment for rape of woman or child under section 9(1); fourth, crimes punishable with life imprisonment or lesser terms of rigorous punishment for: abduction of any woman or child under section 7; and causing grievous hurt for dowry under section 11(b); and fifth, crimes punishable with lesser terms of rigorous punishment for: causing grievous hurt by burning, corrosive and poisonous substances resulted in to damage to any part of the body under section 4(2)(b); failing to provide safety to any woman who has been raped in police custody under section 9(5); sexual harassment under section 10; and causing simple hurt for dowry under section 11(c).

*Attempt to Commit Crimes*are specified under five specific heads: first, attempt to cause death by burning, corrosive and poisonous substances for which punishment is death sentence or life imprisonment and fine [section 4(1)]; second, attempt to throw burning, corrosive and poisonous substances even though the concerned woman or child does not suffer from any physical or mental harm for which punishment is rigorous imprisonment with fine [section 4(3)]; third, attempt to cause death or hurt by rape for which punishment is life imprisonment and fine [section 9(4)(a)]; fourth, attempt to rape for which punishment is rigorous imprisonment [section 9(4)(b)]; and attempt to cause death for dowry for which punishment is life imprisonment and fine [section 11(a)]

Abetment to Crimes is specified under section 9A where punishment for abetting any woman to commit suicide is detailed. The Act also specified that'whoever abetted to commit an offence under this Act and the offence is committed or an attempt was made to commit the offence in consequence of the abetment, or, whoever abets another to commit an offence under this Act, shall be punished with the punishment provided for the commission of the offence or for the attempt to commit the offence.'[145]

b. Formation and Function of Special Tribunal

Section 26 of the Act prescribes for establishing special tribunal, termed as 'Nari o Shishu Nirjatan Daman Tribunal' for the trial of cases under this Act. Regarding to the formation of the tribunal, section 26 states as follows:

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145 The POWCA, above n 2, s. 30.

'1. There shall be a Tribunal in each District Sadar to try offences under this Act and the Government may, if it thinks necessary, establish more than one Tribunal in that district; such Tribunal shall be called as Nari o Shishu Nirjatan Daman Tribunal.

2. The Tribunal shall consist of one Judge and the Government shall appoint the Judge among the District or Session Judges.

3. The Government shall appoint the District or Session Judge as the Judge of the Tribunal in addition to his duty.

4. Under the section District Judge or Session Judge shall also include Additional District Judge and the Additional Session Judge respectively.'

Section 27 states about the jurisdiction of the tribunal. To take cognizance of any offence, written report from any police officer is required. If the tribunal is satisfied that the complainant has requested to take complaint of an offence to the police officer or any person empowered, but failed, the tribunal may order any magistrate or any empowered person to inquire about the complaint and submit a report within 7 days, and if the tribunal is not satisfied, the tribunal may reject the complaint. After receiving the report if the tribunal is satisfied that the complaint has requested to take complaint of an offence to the police officer or any person empowered, but failed and there is primary evidence of the offence, the tribunal shall take cognizance on the basis of the complaint and report otherwise, the tribunal may reject that complaint or take cognizance upon showing justification.

If any offence under this Act is related with another and if the offences are needed to be tried together for the ends of justice, the other offence shall be tried with the offence under this Act. Regarding the territorial jurisdiction of the tribunal Section 27(2) states as follows:

' When any offence or part thereof, if committed in the jurisdiction of a Tribunal or the place where the offender or where more than one offender, one of them is found, is under the jurisdiction of that Tribunal, the report on the complaint shall be taken for cognizance in that Tribunal and the Tribunal shall try the offence.'

Section 20 deals with the trial procedure of this tribunal. The adjudication of any case has to be completed within 180 days from the date of commencement and hearing of the case shall be held in every working day until such completion. If the adjudication is not completed within the mentioned period of time, the tribunal can release the accused on bail and if the accused is not release shall notify the causes for it. Moreover, the tribunal is required to submit a report to the HCD showing the

cause of not completing the adjudication of the case within 180 days.[146] Section 25 states that in different stages of trial,procedure incorporated in the CrPC shall be followed.

If the tribunal thinks appropriate or upon the application of the party trial in camera can be held in adjudicating the offences under section 9. If any of the accused or witness is children, the tribunal shall try to follow the procedure prescribed in the Children Act of 2013. Moreover, this Act provides the procedure of custody and maintenance of children born in consequence of rape[147] and also prohibits any publication in acquaintance of a woman and child oppressed in news media.[148] Furthermore, section 21 provides the procedure of trial in absence of the accused. According to section 19 all the offences under this Act are cognizable and non-bailable, but if the tribunal finds any of the ground mentioned in the proviso or subsequent clauses, bail can be granted. In any stage of the trial of an offence, if the tribunal thinks that, any woman or child is needed to be kept in safe custody, the tribunal can direct so.[149]This Act also provides for the medical test of a woman and a child being raped,[150] and also provides the evidential value of the report submitted by the chemist, pathologist, handwriting expert, finger-print expert, or armament expert.[151] Moreover, this Act provides the procedure for appearance of witness,[152] trial in absence of accused,[153] and the power of the magistrate to take statement in any place.[154]

Regarding to the appeal procedure of the cases tried in the tribunals, section 28 stipulates that any party aggrieved by the order, judgment or punishment imposed by the tribunal can appeal to the HCD within the period of 60 days against such order, judgment or punishment. Regarding to the procedure of the confirmation of death penalty this Act states that 'when any Tribunal under this Act passes the sentence of death, the proceeding shall immediately be sent to the HCD according to the provision of section 374 of the CrPC and the sentence shall not be executed unless it is confirmed by the HCD.'[155]

146 Ibid, s. 31A.
147 Ibid, s. 13.
148 Ibid, s. 14.
149 Ibid, s. 31.
150 Ibid, s. 32.
151 Ibid, s. 23.
152 Ibid, s. 24.
153 Ibid, s. 21.
154 Ibid, s. 22.
155 Ibid, s. 29.

c. Police Investigation Process

Section 18 deals with police investigation process. The details provision has been mentioned in the following table.

No	Condition	Time of Investigation	Process	Provision
01	If any accused was caught directly by police or any other person	15 Days	The Time shall start from the day, the accused was caught directly and report in this regard has to be submitted within time limit	s 18(1)(a)
02	If any accused was not caught directly	60 Days	The time limit shall start from the day police got information or order from the Tribunal to start investigation and submit report	s 18(1)(b)
03	If investigation not completed within the time limit prescribed in s 18(1)	30 Days	The cause of delay has to be submitted in written to controlling officer or to the Tribunal and investigation report has to be submitted	s 18(2)
04	If investigation not completed within the time limit prescribed in s 18(2)	24 hours	The Investigation Officer shall submit the cause of delay in written to the controlling officer or to the Tribunal	s 18(3)
05	If investigation not completed within the time limit prescribed in s 18(1)-(3)		The Tribunal after receiving the cause of delay in written may order another investigation officer to investigate in this regard	s 18(4)
06	If accused was caught directly by police or any other person	7 Days	The Time shall start from the day, the accused was caught directly and report in this regard has to be submitted by the new officer	s 18(4)(a)
07	If accused was not caught directly	30 Days	The time limit shall start from the day police got information or order from	s 18(4)(b)

No	Condition	Time of Investigation	Process	Provision
			the Tribunal to start investigation and submit report	
08	If investigation not completed within the time limit prescribed in s 18(4)	24 Hours	The Investigation Officer shall submit the cause of delay in written to the controlling officer or to the Tribunal	s 18(5)
09	If investigation not completed within the time limit prescribed in ss. 18(2) and 18(4)		After reviewing the report of delay in this regard if the Tribunal is satisfied that the Investigation Officer is liable for the delay, it will be considered as his or her inefficiency and misconduct. This inefficiency and misconduct will be inserted in his or her annual confidential report and action may be taken against him or her following the service rules in this regard.	s 18(6)
10	If accused is found innocent after reviewing corresponding facts		The Tribunal may order to consider that accused person as witness for ensuring justice	s 18(7)
11	If the Investigation officer is found guilty of acts like not inserting any accused in the investigation report or not examining any important witness		These types of act will be considered as inefficiency and in certain cases misconduct on part of the investigation officer and the Tribunal may initiate lawful against such officer	s 18(8)
12	The Tribunal may order to change the investigation officer		Application or proper information in this regard is needed	s 18(9)

d. Amendments, Repealed Provisions and Suggested Amendments

Prevention of Oppression against Women and Children (Amendment) Act, 2003[156]

This amendment has brought about several changes to the said Act, for example:

(i) Substitution of the definition of dowry:[157] previously the Act only provided for a simple definition of dowry. Now the definition includes along with the previous part the demand of goods, money or other property from the bride party by the bridegroom or father or mother of any such person as dowry.

(ii) Specification of the age of victim of offence of rape by way of substitution:[158] it states that the offence of rape will be committed if any person without marital bond has sexual intercourse, firstly, with any women aged more than 16 years without her consent or by fraudulently obtaining her consent; and secondly, with a women aged below 16 years with or without consent.

(iii) Insertion of new offence of abetment of suicide:[159] if any woman commits suicide for direct reason with her consent or against her will by the wilful activities or act of any person, he shall be accused and convicted for abetment in committing suicide of that woman.

(iv) Substitution of the provision as to sexual assault:[160]the section was substituted and instead of two portion one inclusive provision has been made and punishment for such offence has also been changed.

(v) Substitution of the provision as death for dowry:[161]the words grievous and simple hurt were substituted for the word only hurt, and three specific punishments have been provided for causation of three types of varying degree of offence relating to dowry respectively.[162]

(vi) Substitution of the provision relating to child born after rape:[163]the government is made responsible for providing maintenance of the child. The child will be placed in the custody of her mother or maternal relatives and will be known by the name of either the mother/father or both.

(vii) Substitution of the provision relating to investigation of a case:[164]the time limit for completion of investigation is made 15 days if the accused is caught red handed and it is 60 days otherwise.

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156 Act No. XXX of 2003 of Bangladesh.
157 The POWCA, above n. 2, s. 2.
158 Ibid, s. 3.
159 Ibid, s. 4.
160 Ibid, s. 5.
161 Ibid, s. 6.
162 Ibid, ss. 6(b), (c).
163 Ibid, s. 7.
164 Ibid, s. 8.

(viii) Substitution of section relating to cognizance of offence: [165]the tribunal can release any women/child or physically infirm person on being satisfied that doing such will not impede proper justice.

(ix) Substitution of provision as to procedure of trial:[166]now, the tribunal may conduct trial in camera for offences under section 9 on application or on its own motion for the purpose of protecting the best interest of the victim.

(x) Substitution of provision as to Jurisdiction of the tribunal:[167]the tribunal takes cognizance after following some procedures, like, the complainant needs to submit the decision of refusal from the authorized person and on being satisfied the tribunal will order for its inquiry within 7 days and if not satisfied the tribunal will dismiss it directly etc.

(xi) Insertion of provision as to accountability of the tribunal:[168]the tribunal is required to submit a report to the SC of Bangladesh if it fails to complete the trial within the time limit specified in section 20(3) of this Act and then the appropriate authority after reviewing the same can take action accordingly.

(xii) Insertion of provision as to medical examination of the victim:[169]the government authorized hospital can conduct medical examination of the victim and such hospital is required to issue a certificate of examination after completion of the medical examination. If such examination is not held timely then such act of the responsible doctor will be construed as misconduct and the same will be noted down in the annual confidential report.

To be further mentioned that sections 5 and 6 relating to trafficking of women and children respectively are now repealed by the Prevention and Suppression of Human Trafficking Act of 2012.[170] However, the Law Commission has put forwarded some important suggestions regarding to the amendment of the Act:[171]

i. Adding the word "any other inflammatory substance or thing which causes extreme burning" after the word "corrosive" in section 4 (1, 2, and 3) was recommended. As in case of torture to domestic workers the means used generally are hot water or oil etc. But the same do not fall under the criteria specified under section 4. Thus for bringing such acts within the purview of section 4 the amendment is suggested.

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165 Ibid, s. 9.
166 Ibid, s. 10.
167 Ibid, s. 11.
168 Ibid, s 12.
169 Ibid, s. 13.
170 Act No. III of 2012.
171 Bangladesh Law Commission, *Report as to the Proposed Amendment of Some Sections of the Prevention of Oppression against Women and Children Act of 2000*, 2010.

ii. Attempt to commit abduction should be included as an offence under section 7 of this Act and offences under the said section should be made compoundable. Because sometimes false complaints are made by the parents of the victim where the alleged accused and the victim go out of home for love and affection for each other.

iii. Adding the words "or rigorous imprisonment for life" after "for causing death, death sentence"' in section 11(a) as mandatory death penalty is declared *ultra vires* by the HCD in the case of *BLAST and Others v. Bangladesh.*[172]

e. Development through Case Laws

Offences Relating to Rape

In the matter of consensual relationship in the case of *Sohel Rana v. State,*[173] it was held that if the alleged victim mingles with the appellant sexually on her own accord, without no resistance or outcry from her part then the offence of rape would not be held as committed. Again in the case of *Kamal Hossain v. State,*[174] it was held that even the conscious misuse of free consent by a mature girl would not give rise to any legal action. In the case of rape the prosecution case must be corroborated in the evidence of independent witnesses or circumstantial evidence[175] and if the prosecution fails to prove its case beyond reasonable doubt, the defence gets the benefit of doubt as of right.[176]Unexplained delay in lodging FIR, non-examination of witness by the prosecution renders the prosecution case doubtful.[177] Regarding gang rape, in the case of *Rehana Begum v. State*,[178] The HCD took hard position and condemned the not imposing of death penalty upon the three accused for committing gang rape resulting in the death of the teenager without caring about the least sanction provided by the law and not considering the case as a rare one as the offence smashed her modesty, her person, her dream, her chastity, her dignity which are considered as her invaluable and inviolable asset of any women. Even offence of sodomizing even a male child of below 16 years of age is construed as rape.[179]

Offences Relating to Dowry

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172 (2010) MLR 145.
173 57 DLR(HCD) (2005) 591.
174 61 DLR (HCD) (2009) 505; See also; *Golam Ahmed v. State* 64 DLR (HCD) (2012) 93.
175 *Sree Pintoo Pal vs. The State*, 30 BLD (HCD) (2010) 220.
176 *Roni Ahmed Liton vs. The State,* 29 BLD (HCD)(2009) 386; *Monwar Malik vs. The State*, 17 BLT (2009) HCD 25.
177 *Kazi Nurunnabi Parag and others vs. The State,* 15 MLR (HCD) (2010) 84.
178 63 DLR (HCD) (2011) 548.
179 *Abdus Samad (Md.) alias Badsha vs. State,* 19 BLC (HCD) (2014) 171.

For holding a person guilty under this Act the attempt to cause death or death by dowry under Section 11(a) has to be against a 'Nari' only.[180] The term 'Nari' has been construed as a woman of any age. In the case of *Alam (Md.) and others v. State*it was held that there is no obligation to determine the age of women who are victims under this Act.[181] Torture cannot attract Section 11(a) of this Act. But causation of death as a result of dowry related torture will obviously come within the preview of Section 11(a).[182]

Taking Cognizance

Any cognizance taken by the tribunal without following the due process of law prescribed in the Act would be construed as an abuse of the process of the court.[183] Moreover, in the matter of lodging complaint of an offence, investigation, trial and disposal, the provisions of the CrPC shall apply.[184] The tribunal is not empowered to take cognizance of any frivolous or vexatious cases and in the absence of any written complaint made by any person the tribunal do not have any authority to direct the magistrate or any other person to file any such complaint to enable it to take such cognizance.[185] Moreover, in the case of *M Moinul Khan v. State,*[186]it was held that direction of inquiry for the second time to the Additional District Magistrate for holding "local inquiry" after rejecting the inquiry report submitted by the Magistrate, 1st class was indeed due to misconstruction of Section 27 of the Act as the said law does not provide for such inquiry for the second time. If Naraji Petition is filed the tribunal have to send the matter for further inquiry under Section 27(1Ka) and (ka) of the Act, because Naraji Petitions are fresh complaint.[187] The investigating officer empowered by the tribunal is accountable only to the tribunal regarding the issue of completing the investigation with due diligence.[188]

Bail

In the case of *State v. Arman,*[189] it was held that in granting bail the court needs to act judiciously with due care and caution because every erroneous decision is a miscarriage of justice and every miscarriage is in derogation to the common interest of the society. Thus, the discretionary power is to be exercised with some restraint.

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180 *Nurul Huda(Md.) vs. State,* 67 DLR (AD) (2015) 231.
181 above n 7.
182 *State vs. Md. Golam Sarwar @ Ripon* 67 DLR (HCD) (2015) 447.
183 *Abdul Hamid (Ujir) vs. State* 67 DLR (HCD) (2015) 154; See also; *Amin Uddin vs. State* 58 DLR (HCD) (2006) 294.
184 *Md. Shahid Malongi & Another* v. State 24 BLC (HCD) (2004) 236.
185 *Nurul Huq vs. State* 55 DLR(HCD) (2003) 588.
186 58 DLR (HCD) (2006) 253.
187 18 BLC (HCD) (2013) 598.
188 *Shahjahan (Md.) State*, 19 BLC (HCD) (2014) 372.
189 67 DLR (AD) (2015) 181.

In another case of *Md.Shahid Malongi and Another v. State*[190] it was held that application filed by the informant for considering the bail of the accused has no stance in law to effectuate bail or refusing the prayer of bail and despite having power to grant bail on appeal the tribunal and the HCD in exercising such power shall have to regard the conditions laid down in Section 19 of this Act.

Special Measure (Safe Custody under section 31)

It was held in the case of *Mostofa Kamal v. state*[191] that if the tribunal makes an order for safe custody of minor victim of an offence under this Act to her mother, no other organization or person can raise question as to the validity of such custody.

A Study on the Gap between the Text and Implementation

The POWCA is one of the major legislations regarding to the suppression of VAWand children in Bangladesh. However arguably there are some major limitations exist in this Act. For example, limitation exists in terms of multiplicity of laws and legislative inconsistency; articulation of offence; tribunals framed; punishments provided; police investigation process; and forensic analysis and medical report.

a. As regard to the Multiplicity of Laws and Legislative Inconsistency

This Act provides provisions for offences relating to the VAWand children which are covered by other legislations already exist. This Act is an expression of proliferation of statutes as well as the overlapping of avenues dealing with the same class of offences previously defined. Again, the new legislations in the field of VAW and children also deal with the same offences already described in the POWCA. Owing to such overlapping, sometimes confusion arises regarding to the forum where the victim has to proceed and to whom the law actually applies. Certain examples may be cited in this connection.

In matter of offences relating to causing death, hurt or grievous hurt by burning, corrosive, or poisonous substance or mere throwing of such substance, there exist three legislations as follows:

Name of the Legislation	Provisions	Forum	To Whom Applicable
The Penal Code, 1860	provisions for voluntarily causing hurt or grievous hurt by means of any poison or any corrosive substance under sections 326A and	Criminal Court designated by general	Any Person

190 above n. 184.
191 58 DLR (HCD) (2006) 453.

	328	law	
The Prevention of Oppression against Women and Children Act, 2000	provides punishment for causing death, grievous hurt, even for trying to throw any burning, corrosive or poisonous substance on any women or child under section 4	The Nari o Shishu Nirjaton Domon Tribunal	Women and Children
The Acid Crime Control Act, 2002	exclusively mentions the word 'Acid' and acid related offences including hurt, grievous hurt or death under sec. 2, 4 & 5	Acid Oporadh Domon Tribunal	Any Person

In matter of offences relating to rape, gang rape, causing death or hurt caused by rape or gang rape, etc., there exist two legislations as follows:

Name of the Legislation	Provisions	Forum	To Whom Applicable
The Penal Code, 1860	provides definition and punishment for rape under sections 375 and 376	Criminal Court designated by general law	Any Person
The Prevention of Oppression against Women and Children Act, 2000	provides punishment for rape, gang rape, causing death or hurt caused by rape or gang rape, etc. under section 9	The Nari o Shishu Nirjaton Domon Tribunal	Women and Children

In matter of offences relating to abetment of suicide there exist two legislations as follows:

Name of the Legislation	Provisions	Forum	To Whom Applicable
The Penal Code, 1860	provides punishment for abetment to suicide under sections 305 and 206	Criminal Court designated by general law	Any Person
The Prevention of Oppression against Women and Children Act, 2000	provides punishment for abetment of suicide of any woman under section 9A	The Nari o Shishu Nirjaton Domon Tribunal	Women and Children

In matter of offences relating to dowry there exist two legislations as follows:

Name of the Legislation	Provisions	Forum	To Whom Applicable
The Dowry Prohibition Act, 1980	provides definition for dowry under section 2	Criminal Court designated by general law	Women
The Prevention of Oppression against Women and Children Act, 2000	provides definition for dowry under section 2(j)	The Nari o Shishu Nirjaton Domon Tribunal	Women and Children

In matter of offences relating to abetment of suicide there exist two legislations as follows:

Name of the Legislation	Provisions	Forum	To Whom Applicable
The Penal Code, 1860	provides punishment for abduction and taking dishonestly any movable property under sections 359-363, 364A, 365, 368 and 369	Criminal Court designated by general law	Any Person
The Prevention of Oppression against Women and Children Act, 2000	provides punishment for kidnapping and taking ransom under sections 7 and 8	The Nari o Shishu Nirjaton Domon Tribunal	Women and Children

Moreover, there remains legislative inconsistency regarding the definition and age of 'child' or 'minor' as mentioned below:

No.	Name of the Legislation	Relevant Section	Age of Child (Years)
01	The Children Act (Act No XXIV of 2013)	4	18
02	The Prevention and Suppression of Human Trafficking Act (Act No III of 2012)	2(14)	18
03	The Pornography Control Act (Act No IX of 2012)	2(e)	18

04	The Domestic Violence (Prevention and Protection) Act (Act No LVIII of 2010)	2(4)	18
05	The Labour Act (Act No XLII of 2006)	2(63)	14
06	The Prevention of Oppression against Women and Children Act (Act No VIII of 2000)	2(k)	16
07	The Child Marriage Restraint Act(Act No XIX of 1929)	2(a)	21 (male), 18 (female)
08	The Guardian and Wards Act (Act No VIII of 1890)	4(1)	18, 21 (court of wards)
09	The Court of Wards Act (Act No IX of 1879)	3	18
10	The Majority Act (Act No IX of 1875)	3	18, 21 (court of wards)
11	The Christian Marriage Act (Act No XV of 1872)	3	21
12	The Special Marriage Act (Act No III of 1872)	2(2)	18 (male), 14 (female)
13	The Penal Code(Act No XLV of 1860)	82, 83	9-12

b. As regard to the Articulation of Offence

The Act of 2000 in some cases defines offences in a vague manner that a whole range of innocuous actions can be termed as crime and any person can be tried and punished. Moreover, there are confusions regarding the definition of some of the term used under this Act. For example, turning to the definition of 'woman', it says ''Woman' means a woman of any age'. Therefore, the Act fails to crystalize that the term 'child' is a stage of human life, whereas the term 'woman' is a genre of human species. Defining these two terms in same language is not convenient.

Moreover, section 30 prescribes a definition of 'abetment to offences' under this Act. But the process of abetmentis not specified. Again, the terms 'abetment' and 'attempt' are used in different sections but the way an attempt or abetment has really occurred is not clarified.

Furthermore, section 10 requires illegal touches to convict any person. But sexual assault can be done by indecent gesture, or posture, or exhibition of any indecent

object, or by making any indecent sound with the intent to be heard, or by intruding upon the privacy of a woman. These different ways of sexual assault have not been incorporated in the Act. Section 9A provides that the direct causation of outrage of modesty of a woman is required to convict anyone. But outrage of modesty of any woman can be occurred by any indirect activity of any person. This is one of the major gaps of the Act. Indeed, the Act fails to include all forms of oppression against women and children. Furthermore, the safeguard provided for the victims of violence under this Act is not sufficient.

c. As regard to the Tribunals Framed

The Act under section 20 states that the adjudication of each and every case filed against the offences shall be completed within 180 days; and again if not completed within such period, under section 31A the tribunal has to report to the SC with showing the cause. There has been little progress in this regard and remains huge case backlog in these Tribunals.

At present in Bangladesh there are 66 tribunals established under this Act. But the requirement to establish one tribunal per district has not yet materialized. Therefore, the parties suffer to run with their cases from one district to another. Moreover, the system of reporting to the HCD is not properly followed.

d. As regard to the Punishment

The POWCA provides rigorous punishment for offences in many provisions. 'Severity in punishment must be proportional to the gravity of offence' – is a cardinal principle of the retributive theory of punishment on which the POWCA is based. It can be a point of argument that whether it was right to formulate this Act solely based on the retributive theory of punishment. Indeed, in the matter of applying this theory the proportionality principle is not considered. Excessive harsh punishments have been incorporated in the matter of minor offences.

Moreover, treatment of different level of offences equally is one of the major flaws in matter of punishment, for example, (i) punishment for attempt to commit crime and successfully committing crime are equal; and (ii) punishment for abetment to commit crime and committing crime are equal.

Furthermore, there exists controversy regarding to the mandatory death penalty incorporated in section 11 of this Act. In different international instruments, the right to life has been incorporated,[192] and inhuman, degrading and cruel form of treatment

192 UDHR, above n 45, art 3; see also; ICCPR, above n 46, art 6; Council of Europe *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, art 2.

or punishment has been prohibited in different ways.[193] In the case of *Hussain Muhammad Ershad Vs. Bangladesh and others,*[194] it was observed by B.B. Roy Chowdhury, J. that the national Courts should not ignore the international obligations, which a country undertakes. In conformity with the international obligations, these provisions also have been incorporated in the Constitution of Bangladesh in part-III[195] and following the provisions of Article 26[196] it can be argued that death penalty is *ultra vires* to the Constitution.

In accordance with these provisions of the constitution, the HCD of the SC of Bangladesh declared mandatory death penalty *ultra vires* to the Constitution in the case of *BLAST and Another v. Bangladesh,*[197] which was later upheld by the Appellate Division (AD) in the case of *BLAST and Others v. Bangladesh and others.*[198] In this regard the AD observed that 'a law which is not consistent with notions of fairness and provides an irreversible penalty of death is repugnant to the concepts of human rights and values, and safety and security.'[199]The Appellate Division further observed that:

> 'A provision of law which deprives the court to use of its beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore without regard to the gravity of the offence cannot but be regarded as harsh, unfair and oppressive. The legislature cannot make relevant circumstances irrelevant, deprive the court of its legitimate jurisdiction to exercise its discretion not to impose death sentence in appropriate cases. Determination of appropriate measures of punishment is judicial and not executive functions. The court will enunciate the relevant facts to be considered and weight to be given to them having regard to the situation of the case. Therefore we have no hesitation in holding the view that these provisions are against the fundamental tenets of our Constitution, and therefore, *ultra vires* the Constitution and accordingly they are declared void.'[200]

Regarding to the mandatory death penalty provided in section 11 of the POWCA, the AD held that:

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193 UDHR, above n 45, art 5; see also; ICCPR, above n 46, art 7; CAT, above n 76, art 16.
194 21 BLD (AD) 69.
195 Constitution, above n 90, arts 32, 35.
196 Ibid.
197 BLAST (HCD), above n 140.
198 BLAST (AD), above n 3.
199 Ibid, paragraph 46.
200 Ibid, paragraph 50.

> 'In section 11(Ka) of the Ain of 2000, it is provided that if death is caused by husband or husband's, parents, guardians, relations or other persons to a woman for dowry, only one sentence of death has been provided leaving no discretionary power for the tribunal to award a lesser sentence on extraneous consideration. This provision is to the same extent *ultra vires* the Constitution.'[201]

e. As regard to the Police Investigation Process and Bail

Section 18 prescribes two types of time period for completing an investigation. If the accused gets arrested or caught by the police directly or by any other person, the total time for completing an investigation will be 54 days (including second investigation) and if the accused get caught otherwise, the total time for completing an investigation is 122 days (including second investigation). It has been provided that a trial has to be completed within 180 days after the day of commencement of adjudication.[202] And the offences under this Act are non-bailable except in certain cases.[203] Moreover, it was provided that the tribunal has the power to release any accused on bail after recording proper cause in excess of the period mentioned in s 19(2).[204]

Therefore, there remain two types of dilemmas. In case the accused got arrested directly he has to wait to avail bail after 234 days, which is almost after 8 months if any of the causes has not been fulfilled under section 19 and in case the accused did not get arrested directly he has to wait to get bail after 302 days, which is almost after 10 month if any of the causes has not been fulfilled under section 19. Moreover, the tribunal may release any person upon bail after grounding any cause mentioned in a false investigation. Therefore, the bail provision has to be flexible as well as the conditions have to be properly fixed upon which a person can be released on bail under this Act.

Furthermore, there remain procedural gaps in the provision related to investigation. If there exists proper cause of action and both of the first and second investigation officers fail to provide investigation report, what will be the step to be taken, is not mentioned in the Act. Again, if any investigation officer submits false or irrelevant investigation report, whether the complainant can submit a naraji petition or not, is not mentioned in the Act.

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201 Ibid, paragraph 51.
202 The POWCA, above n 2, s. 20.
203 Ibid, s. 19.
204 Ibid, s. 19(3).

Apart from the above, gap remains in the implementation process. For example in the case of *Jaban Ali v. State*,[205]the accused appellant Jaban Ali has been held in trial for about two years but no formal charge has been framed against him. The respondent submitted that the offence is serious in nature that is why the accused-appellant should not be enlarged on bail. Again in the case of *State v. Osena Begum*,[206] the accused and her son were charged for murder of her daughter-in-law for dowry. But later the HCD found that the entire conviction in the trial court was based upon a newspaper report and hence, the conviction was overturned.

f. As regardto the Forensic Analysis and Medical Report

The medical test of any person who is a victim of an offence under the POWCA is dealt by section 32 of this Act that states that a medical test can be carried out in any government hospital or in any government recognized private hospital. Moreover, it is also provided that if any victim is presented before any concerned doctor of a hospital for medical test, the doctor shall complete that test as early as possible and shall issue a certificate on such medical test. If it is appeared before the authority and the tribunal that the completion of medical test took more than normal or prudent time and for that the doctor in concern is responsible, that delay will be regarded as an inefficiency and misconduct on part of that doctor and action can be taken against him or her as per service rules.

To be mentioned in Bangladesh during a medico-legal examination on victim of rape, the physicians generally use 'two finger test' to determine whether the victim (female) is habituated to sexual intercourse or not. In this regard, Bangladesh Legal Aid and Services Trust (BLAST) filed a writ petition[207] before the HCD contending that this 'two finger test' is a grave violation of fundamental rights of the victims protected under Articles 28(1), 28(2), 31, 32 and 35(5) of the Constitution of Bangladesh. The HCD issued a Rule Nisi in this regard and called upon the respondent "to set up a committee including experts in forensic, criminal justice, public health and experience in providing support to women and girl survivors of violence to develop a comprehensive guideline for police, physicians and judges of Nari o Shishu Nirjaton Daman Tribunal for examination and treatment of women and girls subjected to rape and sexual violence and submit a detailed report."

In accordance with the order given by the HCD, the Ministry of Health and Family Welfare formed a committee of experts and prepared a detailed report to develop a comprehensive guideline in this regard and submitted it before the HCD where the committee provides details guidelines for victim, police, health department, hospital

205 56 DLR (HCD) 89 (2004).
206 23 BLD (HCD) 336 (2003).
207 *BLAST v. Bangladesh and Others*, Writ Petition No 10663 of 2013.

and for the tribunal in several points. At present the Writ Petition is pending before the HCD. After submission of this report, the members of the committee of experts gave their valuable opinion being presented before the Bench. To be mentioned, in India a similar type of case is now pending before the SC.[208]

Conclusion

The term 'violence' in diversified ways and manners is in existence in every sphere of our life. Starting from physical to psychological harms, it encompasses a broad range of activities which causes direct or indirect harm to a subject. The nature and innate trait of violence requires it to be against the person or group of persons which a particular society recognizes as less strong. Consequently in the context of Bangladesh VAW and children becomes relevant. To be specific the incident of VAW would include anything that has the implication of causing physical, sexual or psychological harm from within the family or community. On the other hand, violence against children includes physical/mental violence, negligent treatment which has the implication of causing actual or potential harm to children.

The drastic escalation of the incidents of VAW and children requires adoption of legislations and introduction of enforcement mechanism of such legislations to counteract such acts of violence effectively. Existence of these laws and mechanisms in a particular legal system would daunt the violent activities against women and children, as then the entire matter would be under a fixed authoritative boundary. It is only after that, in the sense of prevention, deterrence in case of adult offenders and reformation in case of children in contact with law, the avenue of criminal punishment system would work properly from the view point of victims.

The gigantic number of women and children violence in Bangladesh is largely attributable to the socio-economic, socio-cultural and most importantly to the existing socio-legal discrepancy. With the aim of mitigating and controlling the occurrence of violence in any form the POWCA, 2000 was promulgated. The minute description of some of the violent offences against women and children and others remedial provisions have made the law an important one for dealing with the issue of violence. Being the avenue of dealing matter of VAW and children, this law is of paramount importance.

Nevertheless no great thing in the universe is devoid of any flaws and when it come legislation if not the text, then the flaws of implementation makes the applicability and utility of the law questionable. This particular law has some loopholes both as regards to the textual formation as well as the procedural implementation.

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208 *Nipun Saxena and Anr vs. Union of India and Ors.*, WP (C) 565 of 2012.

Articulation of offences with narrow ambit and over harsh punishment is one of the major drawbacks of this Act. Apart from that procedural gap which includes huge number of filing of false cases and lengthy trial procedure resulting in inexplicable misery to the alleged offenders, is making the procedure of this act questionable. Moreover, the inclusion of mandatory death penalty creates severe controversy. Again not determining the guideline for forensic analysis and medico-legal test violates the rights of the victims as regard to their privacy, honour and reputation.

In order to attenuate these lacunas; firstly, provision of bail should be made flexible; secondly, the provision of mandatory death penalty should be interdicted; thirdly, offences should be articulated more accurately and the existing ambiguities should be resolved, so that the victims as well as the accused and offenders do not suffer unnecessarily; fourthly, provisions regarding forensic analysis and medico-legal test should be made keeping in mind the modern technologies, so that it becomes victim friendly; fifthly, capacity building of the tribunals is needed to deal with cases within shortest period of given time, otherwise, case backlog problems will not be resolved.

The amendment with the proposed changes will make this Act efficient and credible one and people would take resort to it with more reliance.

Wife's Property Rights: Dowry defeats Dower

Dr. Nahid Ferdousi*

1. Introduction

In Bangladesh majority of women are financially insolvent and thereby unable to support their needs. For a secured future there is a belief in the society that the daughter has to be married off from future uncertainties. So, the most important event in a woman's life is marriagewhich is surrounded by various financial transactions including dower and dowry.Dowry is not any part of Muslim legal tradition, while dower is an integral element of Muslim matrimonial law.[1]Dower is an exclusive right of a Muslim wife to receive a part of the husband's income or estate at any time after marriage. In fact, dower is the financial support of a wife in her rainy days and also a check on the impulsive act of her husband to divorce her. In majority of the cases, dowry-takers are reluctant to provide dower to their wives;ratherthey abuse and may go to the extent of killing her. Consequently, a woman loses her property rights which she is entitled to both under the Shariah and statutory laws as well as her family suffer a lot for this dowry system.Dowry has now become a prominent practice than dower in the Bangladesh.

Originally, premised on the welfare of a daughter, dowry was a Hindu legal concept[2] adopted to compensate woman for the prohibition on her right of inheritance in parental property. Conversely, the concept of dower has its origin in Islam and in addition to many other rights and protection under Islam this concept also offers protection to the wife in a marriage. Hence, dower is religiously permitted but dowry is not supported by any personal law and prohibited by statutory law though it exists strongly throughout the country. In recent times, the curse of dowry system affected both the Muslim and Hindu society that it has spread from the upper class down to the poor class. Though the parents provide dowry for the security of the daughter, in

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1 David Pearl and Werner Manski, *Muslim Family Law*, (Brite Books, Lahore, Pakistan, 1998) 179.

2 As under Hindu law, female issues do not inherit anything, they were given every possible valuable thing as marriage gifts to secure their future. Following the foot step of Hindu community, the Muslims as well started the practice of giving dowry to their daughter, sometimes as a token of affection or sometimes as a means of showing social status.

reality security may remain far off from her. Once dowry is being paid on demand of the husband, demanding dowry becomes a regular practice.[3]

The Dowry Prohibition Act 1980 deals with dowry and to outlaw dowry with a maximum penalty of 5 years imprisonment.[4] In practice dower comes in a written form in marriage contract, so wife can claim for the recovery of dower at any time. Unfortunately, there is no written document to recover the amount of dowry from husband. The anti-dowry law stated that property given as dowry belongs to the wife but later on amended the law.Additionally, the amendment of 1984 deleted section 6 of the Dowry Prohibition Act 1980 which has deprived woman of the possibility of claiming property which was given as dowry. Although dower and dowry both are the property of a wife as it comes from her paternal home,but in reality she is deprived form the both rights.

In reality, dower victim get some legal protection but a dowry victim does not receive justice from existing laws and social practices. There is no legal instrument to recover and return the dowry property from the husband to the wife. Thus, it is needed to add the provision concerning wirtten form of dowry and property as well as recovery of the dowry related things. Against this backdrop, the study assesses that how the Muslim woman's right of dower is curtailed by the social practice of dowry and thereby offers some suggestions to ponder the way-out for improving the family justice which is a great challenge in the 21st century in Bangladesh.

2. Concept of Dower

Dower (*mahr*) is mentioned in the Holy Qur'an and it is a sum of money receivable by the wife from the husband as a consideration for the marriage.The subject matter of dower is not only confined to a sum of money or property; it includes personal services and other things.[5] Under Muslim law, there cannot be any marriage without dower and anything of value may be settled as dower.Therefore, both under law and Islam dower rights of women are mandatory in any Muslim marriage. It is a right every woman acquires in a marriage under the marriage contract known as *nikahnama/kabinama* and the clauses 13-17, 20 of the *nikahnama* prescribe the right to dower. This is a responsibility of a husband that he will maintain and protect his wife for life. It is signed in a pre-nuptial ceremony by the elders of both sides and in

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3 Farah Deeba Chowdhury, 'Dowry, Women, and Law in Bangladesh' (2010) *International Journal of Law* (2010) 24(2) *Policy and the Family* 198–221.

4 The Dowry Prohibition Act 1980, s 4.

5 A handful of dates (Abu Daud), a pair of shoes (Tirmizi), if the husband is a slave, his services to his wife (Mohit Sarkhsee), the services of the husband's slaves to the wife (Fatawa-i Alamgir), Husband's services rendered to the guardian of a minor wife (Durrul Muktar) and teaching Koran to the wife (Tradition) were recognised as the subject of dower.

case of a literate bride and bridegroom, carrying their signatures.[6] The inherent idea behind dower is that it is an obligation imposed upon the husband as a sign of respect to the wife.[7] Thus, dower is an important and serious consideration of marriage.

Dower may be fixed before the marriage contract, at the time of the marriage, or even after completion of the marriage. It may be settled either orally or in a written agreement (*kabinnama* or *nikahnama*). But the amount of dower varies in different countries; there is no fixed rule as to the maximum. It depends on the social position of the parties and the conditions of society in which they live. Whatever amount exceeding the minimum the man agrees to pay he will be liable therefore. In *Atiqul Huque Chowdhuryvs.Shahana Rahim*[8] it was decided that the dower in a Muslim marriage forms an inseparated part of the terms of the *kabinnama* and thus, as the *Kabinnama* is intended to be registered under the Muslim Marriages and Divorces (Registraton)Act, 1974 so is the dower. The Act of 1974 is, in force, relating to the registration of Muslim marriages including dower.[9] Where no details about the mode of payment of dower is specified in the *Kabinamah*, or the marriage contract, the entire amount of the dower shall be presumed to be payable on demand.[10]

Hence, dower is usually classified either as specified or unspecified. The specified dower is further sub-classified which are prompt and deferred dower. Prompt dower becomes payable immediately after the marriage and must be paid on demand. The wife claiming the prompt dower stands as an unsecured creditor. If the prompt dower is not paid she could refuse to stay with her husband and also can take legal action. The wife is under the Muslim law entitled to refuse herself to her husband until and unless the prompt dower is paid. On the other hand deferred dower is payable on dissolution of the marriage by divorce or death. If by divorce than dower can be recovered by compromise or suing in the family court. If by death then dower can be recovered from her husband's estate/compromise/suing. In case of unspecified dower husband is not thereby released from his liability to pay a

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6 Marriage, *Inheritance and Family Laws in Bangladesh: Towards A Common Family Code*, collaborative work of UNICEF and women for women- A Research and Study Group, Bangladesh (2005) 65.

7 Sura Al Nisa, Verse 24, Surah Al-Baqarah, Verse 23 and Verse 237.

8 47 DLR (1995) (HCD) 310.

9 Taslima Monsoor, *Gender Equity and Economic Empowerment: Family Law and Women in Bnagladesh* (British Council, Dhaka 2008) 46.

10 Under the Nikahnama the dower may be prompt or deferred also it can be in form of any valuable thing like property, ornaments or anything else which is agreed between the Muslim marriage partners. As per Muslim Marriage and Divorce (Registration) Rules 1975, r 24 (1) where the *Nikahnama* is silent about the division of prompt and deferred part of the dower, the whole amount will be presumed as prompt i.e. payable on demand (s 10 of the Muslim Family Law Ordinance 1961).

dower.[11] Where the widow, therefore, is in possession of her husband's property under a claim for her dower, the other heirs of her husband are severally entitled to recover their respective shares upon payment of quota of the dower debt proportionate to those shares.

3. Practice of Dowry

The dowry refers to the money, goods, or estate from the bride's family to the groom's family before, at the time of and during the course of marriage. It is not recognised in the religion or the law of the Muslim societies but has spread into it.[12] The concept of dowry originated from an ancient Hindu custom, an approved marriage among Hindus has always been considered to be a *kanyadaan* that is gift of the daughter.[13] Now it has become a custom essential in all marriages. It is not only prevalent in a particular, illiterate marginal section of our society but unfortunately, the well-off educated section of the society contributes to the problem in the same way. The dowry looked upon as a financial security, gift and seed capital for the new couple so that a husband can invest the dowry amount for a business or facilitate maintenance of their new family. The original anti-dowry law stated that the property given as dowry belongs to the wife; this provision was later omitted which means that in law dowry does not belong to wife.[14]

4. Hindrance to Realise Dower

A family court has exclusive jurisdiction to entertain, try and dispose of any suit relating to dower.The suit for dower is a suit to enforce a simple money claim founded solely on a contract entered into by the husband and wife. For a suit for the recovery of dower, the Limitation Act 1908 will be applicable *i.e.* three years from the date when claim for prompt dower was first refused and for deferred dower on death or divorce.

It is difficult for the wife to recover the dower even after divorce as she has to go to the family court for realizing dower and maintenance through lengthy procedure. Some times it creates tedious and painful procedural lockheads not only in case of recovery of the prompt part of the dower, but also in case of delaying divorce by a husband who is unwilling to conclude the contractual terms of dower as stated in the *kabinnama*. Dower in practice seems to have the status of a grant depending on the

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[11] Pearl and Menski, above n 1, 180.

[12] Taslima Monsoor, *From Patriarchy to Gender Equity: Family Law and Its Impact on Women in Bangladesh,* (The University Press Limited, Dhaka 1999) 222.

[13] Nusrat Ameen, 'Dowry in Bangladesh: How Many More Deaths to Its End?' (1997) *Journal of Faculty of Law* (1997) 8(1) *The Dhaka University Studies, Part-F* 128.

[14] Taslima Monsoor, *Management of Gender Relations: Violence against Women and Criminal Justice System in Bangladesh,* (British Council, Dhaka 2008) 15.

will of the husband.[15] Consequently, a wife rarely gets any portion of her dower unless the husband is adamant to give divorce. Without intervention of court dower can hardly be realized in these cases. Divorce occurs frequently without the payment of dower.

Though there is legal instrument concerning dower and its recovery still it is noticeable that women are being deprived of their rights of dower due to various reasons. Such as:

a) Dower is controlled by husband and social custom;
b) Unregistered marriage;
c) Non specification of the mode of payment of dower in the *Kabinnama;*
d) Lack of awareness of laws on dower;
e) Fixation of a smaller amount of dower by the groom's party;
f) The traditional concept of *usool* (paid) by jewellery or other items at the time of marriage;
g) The customary practice to waive dower in the wedding night;
h) Hidden intention to deprive the bride from property rights;
i) Lack of husband's sense of responsibility towards the payment of dower;
j) dower is being curtailed by turning a *talaq* case into *khula*[16] where the woman has to sacrifice her right of dower in exchange for a divorce.

In this way, the cases of dower are influenced by social practice and the question of payment arises only at the time of divorce.[17]

5. Social Context of Dowry

Dowry exists in various forms in the society and varies across the country depending upon economic conditions, societal structures, institutions, and family characteristics. The most common motives behind the dowry system are the grooms' and their families' greed, growing consumerism, excessive materialism, the need for status seeking, and rising expectations of a better and luxurious life. Before 1981, dowry practice was not as popular as today. At that time the amount of dowry was very low but now the amount is very high, more than double, as the price of necessary objects is now much higher. Such payments usually go hand-in-hand with marriages arranged by the parents of the respective spouses.[18]There is a belief of

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15 Marriage, above n 6, 65.

16 There are instances when a woman can actually lose her right to deferred dower like in cases of "Khula" which means divorce by mutual consent. Where divorce is prayed on any grounds under section 2 of Dissolution of Muslim Marriages Act 1939 the divorce cannot affect a woman's right to dower.

17 Monsoor, above n 12, 199-205.

18 Siwan Anderson, 'The Economics of Dowry and Brideprice' (2007) 21(4) *Journal of Economic Perspectives* 170.

male that the wife is subject to her husband's marital power. By virtue of this power, he is a head of the family and controls all financial matters.[19] There are a number of socio-economic, cultural and religious factors which are responsible for such continuous persistence of dowry. In this connection, following factors play vital role in the society-

a) Greed and commercialization of marriage;
b) Tendency to show wealth and status and to honor the bridegroom's family;
c) Lack of ethical practice and social values;
d) Poverty and rising unemployment;
e) Lack of decision making power of woman in family;
f) Less economic power of woman to control the family;
g) Illiteracy and unawareness of the effect of dowry;
h) Narrow mentality of groom's family;
i) Negative male attitude towards the female.[20]

However, dowry system is one of the worst evil cultures in Bangladeshi society. In some cases, parents borrow money on exorbitant rate of interest to marry their daughters and sisters and spend rest of their life in great misery. The parents at times sale-out property to meet dowry demand. Moreover, as the groom has a psychological disposition that he deserves dowry and therefore, continues to demand additional dowry even when initial demand has been met. Often moderate poor households are to take loans from various NGOs and microfinance institutions to fulfill the dowry demand. If loans are unable to cover the entire cost of dowry, they normally move on to sell their assets to raise the outstanding balance. They are to lose many things and face many problems for this dowry system. In this way dowry pushes households into debts. Sometimes, husbands control their wives' income as a source of wealth accumulation.[21]

On the contrary, there are many severe consequences resulting from the payment of dowry and a common result of unmet dowry is sending the girl or woman back to her parent's house. For failure to meet dowry demands or the new demands often results in verbal and physical abuse[22] of the wife. Disputes over dowry payments

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19 H R Hahlo, 'Matrimonial Property Regimes: Yesterday, Today and Tomorrow' (1973) 11(3) *Osgoode Hall Law Journal* 458.

20 Fhameda Qudder, 'Dowry System in Bangladesh: A Socio- Legal Perspective'(2014) 3(7) *International Journal of Innovative Research and Development* 133.

21 <http://odhikar.org/are-you-a-silent-observer-of- dowry-and-related- violence/#sthash. 8Tdjp CGH. dpuf> published on August 22, 2014.

22 Physical abuse includes beating; burning with cigarettes, withholding foods, sleep deprivation and denial of medical treatment. The abuse may be meted out by the husband or members of his family, especially his mother. Verbal abuse may include starting rumors about the character or behavior of the wife and often the girls feel unable to disclose the

have led to numerous cases of dowry violence against brides, resulting in injuries and even death. Many women file divorce petitions to escape torture at the hands of in-laws for failing to meet the expectations of dowry.[23] Every year many young women commit suicide or face physical torture after marriage because their parents cannot afford to give dowry. Day by day, marriage has become a kind of business and exploitation of the parents of a woman and it is still practiced by most families living in rural areas. Woman has to live in a hostile environment where they become the victims of physical, social, mental and psychological torture.

According to Ain O Shalish Kendra (ASK) Documentation Unit the statistics of the duration of January- June 2014 the table shows different forms of violence against women for dowry demand.

Table 1: Violence against Women and Dowry Related Incidents (Reported Incidents Only)

Age / Nature of Violence	13-18	19-24	25-30	30+	Not mentioned	Total	Cases filed
Physical Torture		7	6	1	38	52	19
Absconded From Marital Home		1				1	
Death After Physical Torture	7	23	17	7	29	83	39
Suicide After Torture		2			2	4	
Total		33	23	8	69	140	58
Source: ASK Documentation Unit, January-June 2014							

In addition, the chart of Ministry of Home Affairs, Department of Women Affairs (DWA), 2013 shows the number of women abused for dowry:

Table: 2 Comparative Frequencies of Different Forms of Violence by Year

Types of Violence	2008	2009	2010	2011	2012	2013
Dowry	82	79	101	134	122	147
Source: Ministry of Home Affairs, Department of Women Affairs (DWA), 2013						

The effects of dowry problems involve both economic deprivation and violence against women. The struggle against dowry is part of the struggle for equal status for wife's life whether it relates to the property rights. Dowry was legally banned by theDowry Prohibition Act 1980. The Act has made dowry a criminal offence

situation to her parents. If the physical abuse continues and worsens, this may lead to the wife committing suicide.

23 Monsoor, above n 14, 37.

punishable with a maximum penalty of five years imprisonment, and is fundamentally concerned with a series of issues including punishment for demanding or taking and giving dowry and its investigation and trial proceedings.[24] There is no noticeable change in the dowry practice since the enactment of the law. In some cases, the law is effective and in some cases it is not.

Mainly for lack of cooperation from the family members, women do not get the required support from the law. Some victims do not want to continue the legal battle against their husbands for reprisal. As most victims come from poor families, losing the shelter of the husband's home can be a particularly frightening prospect. They cannot afford to fight legal cases. In a judicial system where cases move forward at rate slower than that of a snail the woman and/or her family cannot continue to fund the legal procedures over many, many years. The anti-dowry criminal statutes firstly enacted in 1980[25] and subsequently modified in 1982, 1984 and 1986 and adopted Nari O Shishu Nirjatan Daman Ain, 2000 with the support of women advocates have not provided a dramatic protective effect. Instead, they have been implemented narrowly. The result is to re-emphasize the systematic subordination of women that was at the root of the original attack on dowry violence.[26]

6. Dowry Defeats Dower

A dower is a woman's right to marital property. It is her right to receive a part of the husband's income or estate if he dies in the course of the marriage. Dowry however, is the woman's property that she brings into the marriage when she gets married. This custom now exists in all levels of society; the rich, poor, the educated and illiterate.Often the parents of the daughter are willing to provide large sum of money and expensive goods to make the future of their daughter a pleasant and secure one. In solvent families the family of the groom expects that the parents of the bride will willingly gift the new couple with expensive goods which they can show off as a symbol of prestige and wealth.The existing dowry practices, despite legal intervention, continue to compromise women's rights in Bangladesh. Women cannot exercise her property rights and she faces humiliation, mental torture, verbal and physical abuse, even murder by her husband and in laws if she is incapable to fulfill the payment of the demanded dowry.Consequently, dowry has now become so prevalent in the society that it often takes over the position of dower in Bangladesh.

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[24] Afroza Begum, 'Revisiting Domestic Violence as a Gross Violation of Womens Fundamental Rights to Freedom From Torture' (2007) 4 *Rajshahi University Journal of Law* 19.

[25] The Dowry Prohibition Act 1980 (Act No. 35).

[26] Mohammad Abu Taher and *et al*, 'Combating Dowry Violence against Women in Bangladesh: A Critical Study' (2014) 8(3) *International Journal of Innovation and Applied Studies* 1126.

Firstly, giving or taking dowry is illegal by the state law but dower is legal under *Shariah* and statutory law. Dowry comes in many forms not always with threat or abuse. It comes with love, affection and emotional blackmailing as well. In the same process dower is mitigated.

Secondly, dowry often exceeds dower amount. It is seen in many cases that the amount of dower agreed to be paid or paid to the wife is much less than the dowry demand or the amount accepted as dowry. If dowry is demanded, most of the times dower money is adjusted to it. Sometimes parents provide dowry willingly and most of the time husband's family demand and give pressure to provide dowry. If dowry is voluntarily given it may exceed or is equal to dower.

Thirdly, dowry has no document but dower has a document, so it is easier to claim dower not dowry. In practice dower comes in a written form in marriage contract and wife can claim for the recovery of dower at any time. But unfortunately, there is no written document to recover the amount of dowry from husband.

Finally, dowry property gets lost from bride or her parental family and is usually subsumed in groom's family property. Daughter's family provides dowry but in reality, husband use the dowry property as per needs. However, dowry property belongs to the wife as it comes from her paternal home. So, dower and dowry is a property of woman but they cannot easily access to enjoy and implement the property rights.

7. Legal Strategies to Prevent Dowry Practice

7.1 The Dowry Prohibition Act 1980

The Dowry Prohibition Act 1980 recognize dowry as a crime. The Act makes giving and taking or demanding dowry a punishable offence. According to section 2 of this Act, dowry means 'any property or valuable security given or agreed to be given either directly or indirectly (a) by one party to a marriage to the other party to the marriage or (b) by the parents of either party to a marriage or by any other person to either party to the marriage or to any other person. The Dowry Prohibition (Amendment) Ordinance 1984 extended the definition of dowry to 'any property or valuable security given at the time of marriage or at any time' that substituted the earlier words 'at, before or after the marriage'.

But the Act does not root-out the dowry practice as it was expected. Most important provisions and loopholes of the Act are as bellow:

a) Court discretion regarding penalties in case of penalty for taking dowry

Section 3 of the Dowry Prohibition Act provides that the penalty for any person giving or taking dowry shall be imprisonment from one to five years, or a fine or

both. Consequently, the court can reduce the sentence; and imprisonment is equated with a fine. However, a fine is not fixed or properly clarified. Thus, sanctions appear vulnerable to judicial bias and any higher socio-economic status of the husband. Given the alarming increase of dowry incidents, this discretionary power must be removed. In 2010 the government enacted the Domestic Violence Prevention Act, introducing punishment of one year's imprisonment and a fine of Tk 10,000 to a plaintiff for filing a false case accusing anybody of sexually harassing her. However, the penalty specified should be increased when the taking of dowry exceeds the financial capacity of the bride's father.

b) Similar liability for giving and taking dowry

In addition, the Act fails to recognise the gravity of the crime and the immorality involved in 'taking dowry' by placing dowry giver and dowry taker on an equal plane. It fails to take into account the unequal power balance in operation. Dowry-takers are more blameworthy as they are motivated by greed and utilise the groom's superior bargaining position. To make the Act of greater benefit and utility to women, section 3 should be amended to penalise only the takers or abettors of dowry.

c) Penalty for Demanding Dowry

Section 4 of the Act sets out the punishment for demanding dowry: If any person, after the commencement of this Act, demands, directly or indirectly, from the parents or guardian of a bride or bridegroom, as the case may be, any dowry, he shall be punishable with imprisonment which may extend to (five years and shall not be less than one year, or with fine, or with both). This section makes 'direct and indirect' demands for dowry an offence. Making merely a 'demand' an offence is appropriate recognition of the magnitude of dowry. 'Indirect demand', however, has not been defined by the Act; neither have any guidelines been developed in this regard. This omission may advance undue expectations of the in-laws under the pretext of 'voluntary gifts' (instead indirect demand) and perpetuate physical/emotional abuse of the bride which, oftentimes, remains invisible. Therefore, certain categories of actions and inactions especially linked with the treatment by and behaviour of inlaws towards a bride should be categorised under the 'indirect demand'.

d) Voluntary gifts to be for the benefit of the wife

The amendment of 1984 deleted section 6 of the Dowry Prohibition Act 1980 which had provided that any dowry given for the benefit of the wife or her heirs and recived by any person was to be transferred by such person to the women within a

specified period of time.[27] This section regards dowry as women's property but,' as we indicated above society counts it as the property of the bridegroom and his family. So, this section was rarely invoked, it did confer an important right on a woman whose family had provided a dowry. As a result of the deletion of section 6, there is now not only a lacuna in Bangladeshi law on the issue of dowry, but the amendment has also taken away an important right of women to accure property.The Dowry Prohibition Amendment Ordinance of 1986 did not fill the gap created by deletion section 6 of the Act. These amendments have also taken away an important right of the women to own property, thus depriving women economically. However, the primary need of women in Bangladesh is to be protected from economic deprivation and violence. Thus, Section 6 of the Dowry Prohibition Act of 1980 should be re-introduced to protect women from economic deprivation.

e) Voluntary transfer of property to the bride

Section 3 of India's Dowry Prohibition Act 1961considers all voluntary presents of a marriage the exclusive property of the bride, and requires those presents to be listed. To ensure women's exclusive control over the property, it is further recommended that the listed property not be able to be transferred to, or disposed of, within five years of marriage without the permission of the Family Court on an application of the bride. The Bangladesh legislation does not contain such a provision; instead, section 6 which dealt with the same issue was repealed. A provision concerning 'voluntary gifts' (paralleling India's legislation) should be inserted to provide greater economic security for women in the matrimonial home. Under this provision, all gifts given at marriage must be registered in the name of the bride and in the event of the dissolution of marriage revert to her.

7.2 The Nari O Shishu Nirjatan Daman Ain 2000

In acknowledgement of dowry-related violence against women in Bangladesh, the Cruelty to Women (Deterrent Punishment) Ordinance of 1983 was enacted, but was then repealed by the Women and Child Repression (Special Provision) Act of 1995. The 1995 Act provided severe penalties for crimes committed against women and children, including those related to dowry, stipulating the death penalty in section 10 (1) for causing death for dowry and life imprisonment for attempting to cause death. Section 11 (a) laid down the penalty for causing grievous hurt to a woman in connection with dowry as life imprisonment or 14 years of rigorous imprisonment (which would not be less than five years), and the perpetrator was also required to pay additional monetary compensation.

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[27] Taslima Monsoor, 'Dowry Problem in Bangladesh: Legal and Socio-Cultural Perspective' (2003) 14(1) *Journal of Faculty of Law* 11.

A still more stringent law to combat violence against women and children was enacted when the Nari O Shishu Nirjatan Daman Ain 2000 repealed the Act of 1995. Despite deterrent punishments, dowry related violence continues unabated. Section 11(a) of the said Act provides for death sentence for causing murder, imprisonment for life for attempting to murder, imprisonment from five to twelve years for grievous hurt and imprisonment of one to three years for simple hurt over the demand of dowry.

In the case of the *State Vs. Azaharul Islam and others*[28]the court held that in order to attract section 11(a) it is to be proved that death was caused in view of demand of dowry put forward from the side of husband or father, mother, guardian or relation of the husband or any person for and on behalf of husband. In the *State Vs. Oliar Rahman*[29]the High Court held that the trial court has rightly awarded the sentence of death for dowry death of the wife. Such a person, who caused death of his wife, has no right to live in this world. He has committed cold blooded murder of a simple village girl just because her parents and she had failed to meet his illegal demands. In such situation, the High Court Divaison is of the view that the tribunal has committed no illegality in passing the sentence of death.[30]

Critics of the law point out that instead of protecting women as intended, these laws are widely used to harass people, including women of the husband's family. In many cases, in order to bring an offence of domestic violence that is not related to dowry demands within the law of 2000; false allegations of such demands are made. Unfortunately these laws have not been beneficial to women and protect her property rights.[31]

7.3 The Domestic Violence (Prevention and Protection) Act 2010

The Domestic Violence (Prevention and Protection) Act, 2010, is another positive initiative by the government for addressing domestic violence against women. The Act in the beginning defines "domestic violence" in article 3 as "abuse in physical, psychological, economical and sexual nature against one person by any other person with whom that person is, or has been, in family relationship, irrespective of the physical location where that act takes place".The section is unique as it not only defines physical from of violence rather it includespsychological abuse but not limited to verbal abuse, harassment, and controlling behavior. So in case of physical or psychological abuse for dowry women can take resort to the Act.

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28 3 LNJ (HDC) 2014, 862.

29 4 Apex Law Report (ALR) (HCD) 2014, 16.

30 Md. Shahjahan (ed), *Yearly Law Digest 2014: Civil and Criminal* (Amin Book House, 2015) 328.

31 Taher, above n 26, 1130.

Most of the time filing a charge on dowry can be problematic for women since they have fear of expulsion from husband's residence, and also scared about her husband's unwillingness to continue matrimonial relation after she has taken legal action against him. Considering these facts, section 10 of the Act provides that the victim shall have every right to reside in the shared residence due to family relationship. The section 16 of the Act also does not provide any corrosive punishment rather it prescribes compensation. In practice, lack of effectiveness of relating laws and lack of professional ethics of concerned agencies laws are not bringing expected results.

8. Way of SearchforEqual Rights

Dowry system is against the law of equality of men and women. There are thousands of cases of dowry every year, few offenders are actually punished. Gaps remain between legal provision and social practice. Laws alone cannot purge society of the dowry system as well as enforce dower practice. Besides laws, we need more social awareness and effective social measures. In this context, the registration of marriage must be made compulsoryand monitoring cell relating marriage registration should be constructed for ensuring registration of marriage. At the same time, monitoring would be effective as to what portion of dower money has been really paid by the groom's part and what has been stated in the *Kabinnama*, both at the time of marriage and at the time of dissolution of marriage.

Whatever amount has been stated in the *kabinnama* as dower money will have to be paid by the husband and in no circumstances the court should reduce the amount. Similarly, legal aid services should be more accessible for the women so that they can bring their action within the proper time. In this regard similar liability for giving and taking dowry introduceunequal power balance in practice as per the section 3 must be amended to penalise only the taker or abettors of dowry not the giver. The term 'indirect demand' under section 4 needs to be specifically clarified so that no demand can escape punishment due to the vagueness of the term.Under section 6 the voluntary gifts for the benefit of the wife should be incorporatedto provide women with economic security in their matrimonial homes.

Conversely, mandatory arrest and pro-prosecution policies must be introduced to combat the dowryrelatedviolence. A provision for presumption of cruelty and beating to obtain dowry, or the suicide of a woman within seven years of her marriage should be incorporated in the anti-dowry Act. Also, similar provision of presumption as in India could be legislated in instances where there is evidence of cruelty or grievous hurt to women in connection with dowry.

In dowry prosecution, the burden of proof should be shifted onto the accused in some respects such as proving that he/she did not commit dowry offence. Compulsory training have to introduce which must focus on progressive, multifaceted strategies embodying international best practices and aiming to sensitise all officials, especially police, involved in dowry prosecution and to raise their consciousness of the law and core values of human life. Furthermore, the concept and the principle of responsibility should be promoted through national curriculum which impacts everyday life of citizen.Women and men all have to be more conscious and aware about the women's right of dower. The sense of responsibility should be practiced from family and society.

9. Concluding Remarks

In Bangladesh, the woman is usually deprived of their dower, maintenance and most common property rights. Dower an essential part of Muslim marriage is the lawful right of the wife to be provided from the husband's estate. The right of dower should not be reduced or curtailed by any customary tradition of dowry. In fact, nobody wants a humiliating and violent marital life and to see a violent society where marriage is a curse because of dowry.As the roots of the problem of dowry appear to be social, remedies can only be achieved by changes of attitude in society; this can be attempted by legislation, but will need to be supported by education and legal awareness. Similarly, social awareness regarding women's right of dower should be ensured by inserting basic concepts of dower in the syllabus of primary or secondary education. Thus, women's education and their employment, equal property rights and empowerment are vital for women to fight for implementation the dower provisionsand rise up against dowry practices. The most important thing in eliminating dowry is the proper implementation of law.Additionally, it is needed to rethink about social values, ethical principles and responsibilities andapproaches among family, community and the state.

Women's Political Representation: An Examination of the Local Government Laws of Bangladesh

Sayeeda Anju*

Abstract

Promotion of Local Government Institutions and representation of women related provisions were inserted in the Constitution and later on was replaced and omitted from the state policy. Direct election for the reserved seats in some local government institutions is definitely a breakthrough for women in Bangladesh, butthe gender imbalance in the ratio of men and women is still a common phenomenon. At present, since political symbols are being usedin local elections for the post of chairman in *UnionParishad*and Mayor in *Pourashova* therefore it is necessary that in accordance with the RPOs the political parties must ensure 33% participation of women for these posts in local politics. Women of Bangladesh, hadto visit the court on the point of equal treatment of male and female ward commissioners in local government. The court upheld their views on equal treatment of them. Roles and responsibilities of the women members should be clearly defined in the laws of local government. Work should be fairly distributed among both male and female members in such a way so that women members can meaningfully participate in all types of functions. In *UpazilaParishad,* the prevailing conflicts between the UNOs and the elected members must to be resolved if the system is meant to run properly.Due to the absence of any election in *ZilaParishads,*it is impossible to assess the participation of women in political representation. Implementation of CEDAW (Convention on Elimination of all forms of Discriminations Against Women) is invisible in political practices in both rural and urban areas. For a fruitful representation of women in local political sector laws, elections and political practices should be coherent with the Constitution and CEDAW provisions.

1. Introduction

It is favorable that the Constitution of Bangladesh supports women's right in the political arena.Several Acts and laws are enacted and amended to ensure women's participation in politics of Bangladesh. Specifically women's involvement in the local government sectors were established by enacting the laws of initiating reserved seats for them and later the Act was amended to start direct election on these reserve seats. This write up examines the laws on the different segments of local government and also makes a clear picture of the actual scenario of the position of women in various stages of local governance. Beside statutory laws, judgments pronounced by apex

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court are illustrated as well. Bangladesh is one of thesignatory parties to the CEDAW,[1] and is therefore, committed to implement CEDAW in its territory. This paper aims to investigate the scenario of enjoyment of political rights of women in the local government, which has been ensured by the CEDAW commitment. Local government sectors are numbered and renumbered frequently by all ruling governments' and the elections are held in different phases. Aside from that the election commission does not clearly update its website therefore it is quite difficult to find out the actual number of constituencies as well as the actual number of elections and the result of the election. The author has used the election commission's website reports and latest CEDAW reports submitted by the Government to the CEDAW Committee along with several scholars' writings as a source.

2. Constitutional guarantees of women to participate in the local government

Women's participation in the Government and in the local Government is separately ensured by different articles of the Constitution of Bangladesh. In addition to their right to conduct direct election, the Constitution guarantees reserved seats in favor of women for their advancement in the political sphere. Article 59 of the Constitution provides for elected local government institutions at all levels. Previously women's participation in local government was separately discussed in articles 9 and 10 in the Constitution, but at present the Constitution has amended and women's involvement in local government and related provisions is found in statutory laws.

The Constitution of Bangladesh made provisions regarding women's participation in local government bodies. Before Fifteenth amendment to the Constitution in 2014, article 9 expressed that the State shall encourage local government institutions which are composed of representatives of the areas concerned and in such institutions special representation shall be given, as much as possible, to peasants, workers and women. Ergo article 9 stated that State shall encourage special representations of women in local Government institutions. While article 10 stated that steps shall be taken to ensure participation of women in all spheres of national life. Articles 9 and 10 were inserted by the Proclamations Order No. 1 of 1977 in the Constitution but it was removed by the Fifteenth Amendment of the Constitution. At present article 10 is merged with article 19 and exists as 19 (3) whereas provision in article 9 was omitted. Article 9 of the 1972's Constitution is related to 'Nationalism". Fifth Amendment replaced the article as 'Promotion of Local Government Institution'. The Fifteen Amendment reinstated 1972's Constitution and at present article 9 deals with "Nationalism". Hence a question can be raised on the point that the promotion of Local Government Institution and representation of women related clauses which were inserted in the meantime, are totally omitted from the Constitution. The provisions special treatment of women in local government bodies are not merged

[1] On 18 December 1979, the United Nations General Assembly adopted CEDAW. It entered into force on 3 September 1981and Bangladesh ratified CEDAW on 6 November 1984.

with any article while article 10 is merged with article 19. At present article 10 is related with socialism and freedom from exploitation. In the original Constitution article 19 had sub-article 1 and 2 but the Fifteenth Amendment added 19(3) and set the provisions of participation of women in article 10 there. So, complete revival of the 1972's Constitution might not be possible under such circumstance. The reason behind deleting the provisions of representation of women in local government bodies in article 9 could either be that these provisions of positive discrimination have been fulfilled or there are no more need of these provision. Whatever the reasons may be, the actual scenario is that women are still being considered as backward and need special attention by local government politics.

At present articles 59 and 60 of the Constitution[2] only deal with the provisions related to local government. These articles are alike for both man and woman. On the other hand, Article 28 (4) of the Constitution states that nothing in this article shall prevent the State from making special provision in favor of women or children or for the advancement of any backward section of citizens. By incorporating the article, the Constitution gives special attention to women and puts no legislative barrier in the way of promoting special provisions for creating gender equity in the realm of social, political and economic activities. The Constitution confirms equal rights to women and also makes special provision for providing all necessary protections to backward sections of the society. In accordance with that article a number of statutory laws have included women's reserved seats in all local government bodies. Hence, currently women's status in local government is determined by statutory laws rather than Constitution.

3. Women's Representation in Municipal Laws

After the revisions of its structure by different governments at different times, the local government system of Bangladesh, at present can be classified as Urban and Rural group. The following table shows the hierarchy of local government institutions.

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[2] Article59 of the Constitution of The People's Republic of Bangladesh states,
(1) Local government in every administrative unit of the Republic shall be entrusted to bodies composed of persons elected in accordance with law.
(2) Everybody such as is referred to in clause (1) shall, subject to this Constitution and any other law, perform within the appropriate administrative unit such functions as shall be prescribed by Act of Parliament, which may include functions relating to –
(a) administration and the work of public officers;
(b) the maintenance of public order;
(c) the preparation and implementation of plans relating to public services and economic development.
Article 60 of the Constitution of The People's Republic of Bangladesh states, 'for the purpose of giving full effect to the provisions of article 59 Parliament shall, by law, confer powers on the local government bodies referred to in that article, including power to impose taxes for local purposes, to prepare their budgets and to maintain funds'.

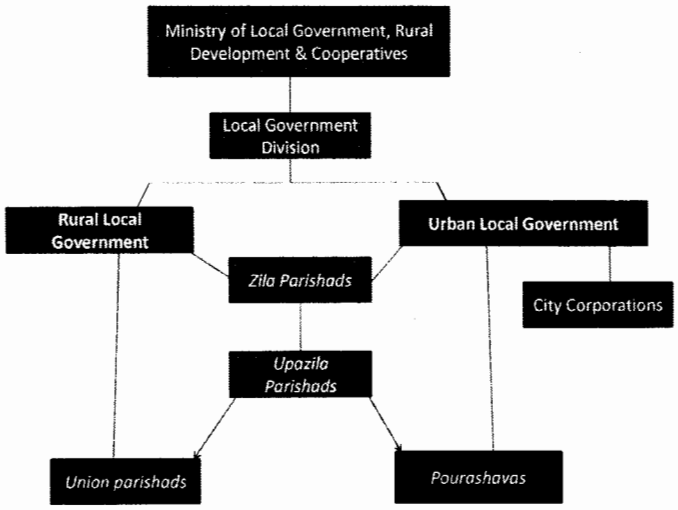

Table - 1

The table[3] shows that the local government in rural areas comprises of three tiers, i.e., *Union Parishad*, *UpazilaParishad* and *ZilaParishad*.[4] Local Government in the urban areas consists of *Pourashavas* (Municipal Corporations), *UpazilaParishad* and *ZilaParishad* and City Corporations are distinct arrangements for cities only.The local government institutions are controlled by Ministry of Local Government, Rural Development & Cooperatives. The municipal laws concerning those institutions are discussed from the root level.

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3 The diagram has been prepared by the author. See, PranabKumar Panday, *Women's Political Participation in Bangladesh Institutional Reforms, Actors and Outcomes* Springer, India 2013 page no.58 for other kind of table.

4 It is mentionable that another tier was in rural areas as*Gram Sarkar*.The *Gram Sarkar* Act 2003 has been passed in as an associate unit of the *Union Parishad*which was judicially challenged that it had been made without lawful authority, and the High Court declared it illegal, it was repealed in 2009. Two cases are relevant here- *BLAST vs Bangladesh* Writ Petition No. 4502 of 2003,*Kudrat-e-ElahiPanir v Bangladesh,* 44 DLR (AD) 319.
Since the present study deals with women's political representation it is mentionable that one criticism of the *Gram Sarkar* system is that it was discriminatory to women in violation of the equal rights guaranteed under the Constitution. Because women members elected in reserved seats were to serve as advisors to each of the three *Gram Sarkars* in their constituencies. Designating women members as advisors to *Gram Sarkar* bodies women are excludes from mainstream activities. See, Dr. BadiulAlamMajumdar, 'Gram Sarkar: A problematic initiative', *The Daily Star* May 10, 2005 http:// archive. thedailystar.net/2005/05/10/d50510020326.htm.accessed on 5.8.2015

3.1. *Union Parishad*

Union Parishad is the lowest tier of administrative unit in Bangladesh applicable to 4562[5] unions each consisting of 9 wards.*From 1971 to 1975, no efforts were made by the Government to incorporate woman in the political process of local governing bodies.*[6] In 1976, the government passed the Local Government Ordinance for a three-tier local government system. It was the first ever ordinance regarding the local government system in the history of independent Bangladesh. In this ordinance the structure of the local government system underwent changes and a provision was made to nominate 2 women members in the *Union Parishad*. That makes the first significant inclusion of women in the local Government. In 1983 a new lawwas enacted. It replaced the earlier Act of 1976.[7] Changes were brought in structure and composition of *Union Parishad* by promulgating the Local Government (*Union Parishad*) Ordinance. This ordinance increased the number of nominated women members to 3 and theoretically each of them represented 1 ward, in fact each ward for each woman was the combination of 3 wards for 3 men members. [8]The system is presented by the following table.[9]

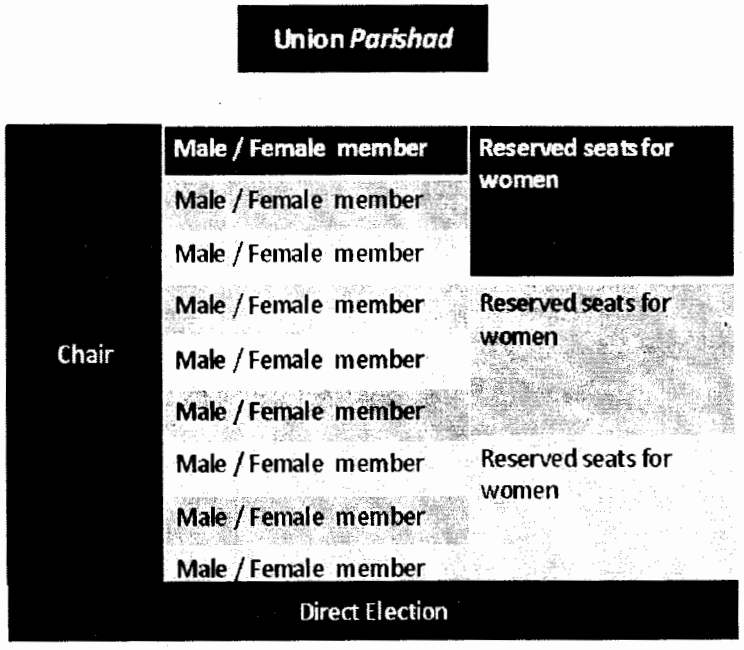

Table - 2

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[5] The Eighth Periodic Report of the Government of the People's Republic of Bangladesh, Submitted under Article 18 to the Committee on Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)May 2015 p.4.

[6] Pranab Kumar Panday, *Op. Cit.*, at page no.62

[7] See section 88 of the Local Government (*Union Parishad*) Ordinance,1983.

[8] See section 3(1.2.) Local Government(*Union Parishad*) Law 2009.

[9] The table has been prepared by the author.

In 1993, a Local Government (*Union Parishad*) (Amendment) Act was passed in the Parliament to secure the representation of women in the local government. This was the first amendment of the Local Government (*Union Parishad*) Ordinance, 1983. The new order omitted the system of nomination and a provision for indirect election was created by the *Parishad*. The number of the women member was fixed at 3 as it was earlier. The Local Government (*Union Parishad*) Second Amendment Act, 1997 to the Local Government (*Union Parishad*) Ordinance, 1983 is a milestone in the history of political empowerment of women in Bangladesh.[10] The government of Bangladesh enacted these laws for direct elections to reserve seats for women in local elections. In this Act the government reserved three seats for women out of twelve members in the *Union Parishad*where women members are directly elected from each of the three wards. [11] Previously the law did not contain any clause for the role, power and responsibility of the women members. After the amendment in 1997, the government increased the number of standing committees set up by the *Union Parishad* from seven to twelve with a direction that women members should be presidents of at least one forth of these standing committees.[12] Even after this amendment, the terms of reference of these committees and their *modus operandi* were not clearly specified.[13] At the same time, the government by a notification directed each *Union Parishad* to form Social Development Committees in each of the three female wards to be led by the female member.[14]Finally the Local Government (*Union Parishad*) Act 2009 was enacted. The voters of the *Union Parishad*can directly elect all members including female members. The present Government has conducted almost all the elections after amending the existing laws.

3.2.*UpazilaParishads*[15]

UpazilaParishad is another important sector of the local government. The districts are divided into *Upazilas*[16] headed by an *Upazila* Chairman. Currently, there are

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[10] MD. MostafejurRahman Khan, FardausAra, *Women, Participation and Empowerment in Local Government: Bangladesh Union Parishad Perspective*, Asian Affairs, Vol. 29, No. 1 :73-00, January-March, 2006 available at, http://www.cdrb.org/journal/current/1/3.pdf accessed on 3.3. 2015

[11] See, section 5 of the Local Government (*Union Parishad*) Ordinance 1983 amended in 1997.M M Ali, *Union Parishad Manual*, Dhaka 2nd edition 1997 at p. 8.

[12] Md. MostafejurRahman Khan, FardausAra,*Op.Cit.* at page no 83

[13] *Ibid*

[14] *Ibid*

[15] In 1982, General HM Ershad introduced *UpazilaParishads* by promulgated an ordinance. The BNP-led government abolished the *Upazila* system in 1991. Things did not improve even after reintroduction of the constitutional provisions on local government in 1991. Each *thana* was upgraded to *Upazila*and designated as focal point of administration with responsibility for all local development activities. Ershad regime held two *Upazila* elections--one in 1985 and the other in 1990. In 1998, the AL-led government reinstated the *Upazila* system. But over 12 more years were needed to hold elections.

489[17] *Upazilas*in Bangladesh. In 1982, the law for *Upazila*[18] was first enacted but was repealed in 1992.[19] This local government body remained inactive due to political reasons for some time and revived in 1998 by enactment of a law named *UpazilaParishad* Act, 1998(Act no. XXIV, 1998). This Act was amended in 2011. In 2013, *UpazilaParishad* rules were made and they were amended in 2015. At present, each *UpazilaParishad* has one chairman and two vice chairmen, one male and one female. All three are elected through a direct election. *Union Parishad* chairmen within the *Upazila* are considered as the members of the *Parishad*. If it is in urban area chairman of every *Pouroshava* under the *Upazila* is also a member of the *UpazilaParishad.Upazila* polls elect people's representatives but the elected representatives have not yet been able to do much due to opposition from local administration and interference from the lawmakers who are advisers to the *parishads.UpazilaNirbahi Officer* (UNO), or *Upazila* Executive Officer is a non-elected Administrator in *Upazila*. Senior Assistant Secretary of Bangladesh Civil Service (BCS) acts as executive officer of the *Upazila*under the elected posts.

UpazilaParishad law 1988 states that out of the total number of *Union Parishad* and *pouroshava* (if any) members/commissioners, there will be one third reserved seats exclusively for women members who will be elected by *Union Parishad* women members and *pauroshava* women commissioners from amongst themselves.[20] This is in fact an indirect election of *UpazilaParishad* women representatives.

Earlier in the*Upazila Parishad* Ordinance 1982 amended in 1983 had the provision of nominating three women members by the Government among the members resident in that *Upazila*.

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[16] *Upazilas* were formerly known as *thana* which literally means police station. In 1982 *thanas* were re-termed to as *Upazilas* with provisions for semi-autonomous local governance. This system was reverted to the *thana* system in 1992. Later in 1999 geographic regions under administrations of *thanas* were converted into *Upazilas*. All administrative terms in this level were renamed from *thana* to *Upazila*. For instance, *Thana Nirbahi Officer (lit. Thana Executive Officer)* was renamed to *UpazilaNirbahi Officer (lit. Upazila Executive Officer)*. The word *thana* is now used to solely refer to *police stations*. Generally, there is one police station for each *Upazila*; but larger administrative units may have more than one police station covering different regions.

[17] The Eighth Periodic Report of Bangladesh, *Op.Cit.*, p.4

[18] The Local Government (*UpazilaParishad* and *Upazila* Administration Reorganisation) Ordinance, 1982, Act no.LIX of 1982.

[19] The Local Government (*UpazilaParishad* and *Upazila* Administration Reorganization) Repeal Act, 1992. For repealing *Upazila* of 1982 at first Ordinance was proclaimed in 1991 then Act in 1992.

[20] See in detail Kamal Siddiqui*Local Government in Bangladesh* (revised third edition), University Press Limited, Dhaka p. 122.

To sum up it can be said that, in every *Upazila*there must be a post of women vice chairman who shall be elected through direct election. Whereas, women members of reserve seats will be elected through indirect election.

3. 3. *ZilaParishad*

District Council or *ZilaParishad,* [21] is a local government body at the district level by the Local Government Ordinance 1976. The Act was made inoperative and in1988 another *ZilaParishad A*ct was enacted, finally the fresh new law[22] for *ZilaParishad* was made in 2000.[23]A *ZilaParishad* comprising twenty-one members which would include one chairman and twenty members, of which five would be female members against the five reserved seats for women.[24] All of them are elected by the public representatives of the other local governments of the relevant district. Chairman, members and women members in the reserve seats will be elected by the members of an electoral college consisting of the City Corporation Mayor and Commissioners (if any), *UpazilaParishad* chairman, *Pauroshova* chairman and Commissioners and *Union Parishad* Chairman and members within the jurisdiction of a district.[25] The tenure of a *ZilaParishad* would be five years. The criteria for the eligibility and non – eligibility for becoming a member of the *ZilaParishad*are alike for both male and female. *ZilaParishad* is applicable for all the districts of the country except 3 hill tracts namely Rangamati, Khagrachhari and Bandarban.[26]

3. 4. Municipal Corporations (*Pouroshava*)

Municipal Corporations (*Pourashava*) Act was first enacted in 1977. The most recent Municipal Corporations (*Pourashava*) Act was enacted in 2009 and further amended of the Local Government (Municipality) (Amendment) Ordinance in 2010

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[21] In 1976, General ZiaurRahman promulgated a local government ordinance providing for *ZilaParishad* in each district. General HM Ershad introduced *UpazilaParishads*. During his rule, he promulgated an ordinance and five Acts including the *ZilaParishad A*ct of 1988. *ZilaParishads*constituted under the Act of 1988 worked up to 1990. With the downfall of Ershad, the *ZilaParishad* chairmen, most of whom were MPs from Ershad'sJatiya Party, were removed and DCs returned as ex-officio chairmen. The *ZilaParishads* continued functioning under the Act of 1988 during the BNP rule between 1991 and 1996. In 2000, the AL-led government repealed the *ZilaParishad* Act of 1988 and framed a new law providing for direct election to the *Parishads*. But up till now, no election has been held, allowing the bureaucrats to run the *Parishads*.

[22] *ZilaParishads*Act 2000 section 83 repealed the earlier*ZilaParishads*Act 1988.

[23] For more see, M Abdul LatifMondal, Non-elected *ZilaParishad*? *The Daily Star***Monday,** August 24, 2015

[24] Section-4.1.c of the *ZilaParishad*Act 2000.

[25] See, Kamal Siddiqui*Op. Cit.,* p.122

[26] Three Separate Acts created the three hill district Local Government *Parishad.* See, Hill District Local Government *Parishads*, in Kamal Siddiqui, *Op. Cit*., p.82

is applicable to 316 towns in the country.[27] According to section 6.2(c) a *Pouro* Mayor, a commissioner for each ward and one third of total number of commissioners as women will constitute *Pouroshava*. The designation of Chairman of the *Pouroshava* will be Mayor. The women members of reserved seats will be elected by the vote of the citizens directly on the basis of adult franchise like the *Union Parishad*. The term of an elected body of the *Pouroshava*is five years. Qualifications and disqualifications of general commissioner and reserved commissioners are alike.[28] The Act does not describe or clarify their job as a member and their working assignment is not fixed. However according to the circulars of the local government division duties and responsibilities are developed. Commissioners of reserved seats will play an active role in preventing abuse of women and children. They will be the chairman of committees related to these aspects. [29]

3. 5. City Corporation

Local Government City Corporation Act 2009 is a consolidated law, for all the existing City Corporations which repealed the previous single Acts for each City Corporations. Again this law was amended in 2011 and the Dhaka City Corporation has been divided as into Dhaka South City Corporation (DSCC) and Dhaka North City Corporation (DNCC). As per section 5 .1(c) of the Local Government (City Corporation) Act 2009, one third of the councilors' seats are reserved for women. A Mayor, a councilor in every single general ward and a woman member for a reserved seat consisting of three wards are elected by direct voting.

After the establishment of the new format the councilors will elect a mayor panel from among the councilors within one month of the first meeting. The major condition is that one of the councilors must be a woman from the reserved seat.[30] This provision reflected another step regarding positive discrimination in favor of women in the City Corporation Act.Although the provision prescribed for only one female member from the reserved seats in the panel, it can be filled by more women from general seat if they are competent.

The main functions of the City Corporation include public welfare, maintenance of law and order, revenue collection, development and adjudication. Women members come to power through proper political participation and commitment, but their work and responsibilities are not ascertained by any gazette notification. They

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[27] DrAmanur mentioned in his book *A Quest for Credence Women at Local Governance in Bangladesh* Dhaka which was published in 2015 at p. 32, the number is 307.

[28] For detail about qualifications and disqualifications see Kamal Siddique,*Op.Cit.*, p. 135

[29] For detail see Kamal Siddiqui,*Op.Cit.*, p. 182

[30] See, section 20 of Local Government (City Corporation) Act 2009 Act no.60 of 2009

cannot take any development initiatives as well as actions without the permission or the support from the pertinent ward commissioner who was elected in general seat.

4. Direct Election of Women in Reserved Seats

The several Acts and regulations made for local government to allocate reserved seats for women which are equivalent to one third of the general seats in all local government bodies. Hence the Constitution has ensured inclusion of women in every sector. Albeit positive discriminations in local government sectors have been initiated by the government in1976, yet women have not been empowered in this sector. Before the direct election mere selection was simply a symbolic inclusion. After decades, in 1997 the government introduced direct election in the root level. In addition there may be several reasons working as hindrance in the way of women empowerment such as,[31] illiteracy, insufficiency of money, lack of assistance from family and obviously negative attitude of the male counterpart.[32] Only a few of the female representatives have come forward -- possibly with the strong support of male member. In such cases, service has turned into business, in fact their husband or brother or son looks into the business and the women appear as dolls.[33] The violence and the black money in politics stop the actual candidates from becoming the representatives. Moreover most of the representatives in the local government sectors are not well-educated.[34] It is quite hard for illiterate women to understand the rights and responsibilities assigned to them and it is also quite easy for the male counterparts to harass them in different ways. The political parties should start to formulate strategies in such a way which encourages literate women to come forward in politics and provide essential training to acquaint elected members with their responsibilities and accountability towards the State.

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[31] NomitaHalder identified numerous factors for influencing women's political participation See NomitaHalder for factors affecting Parliamentary Representation, p 30 'Female Representation in Parliament: A Case Study From Bangladesh', New Zealand *Journal of Asian Studies* 6, 1 (June, 2004): 27-63 http://www.nzasia.org.nz/downloads/NZJAS-June04/6_1_3.pdf accessed on 1.4.2016

[32] The project, "Aparajita--political empowerment of women", funded by the Swiss Agency for Development and Cooperation, started in 2011 in 40 *Upazilas* to increase women's share in local government. Women's Political Empowerment in Bangladesh Prospects and Challenges, Experience from Aparajita Program Swiss Agency for Development and Cooperation SDC p. 6 available at, http://204.93.159.78/~grotspser/last/images/Aparajita/29.09.14/brochure-aparajita-29.09.14.pdf accessed on 5.3.2016

[33] For more discussion see, Md. MizanurRahman&FauziaNasreen Sultana, *Women in Local Government in Bangladesh and West Bengal : A Comparative Perspective,* Women's Security Paper, Bangladesh Freedom Foundation October 2005

[34] *The Daily ProthomAlo* 2o April 2016 p. 1

In 2015 *Pauroshova* and in 2016 *Union Parishad* elections for the post of Mayor and Chairman respectively are running on the basis of political parties' symbol.[35] The local government election has been occurring in Bangladesh since 1973, it is a unique example of the application of political parties' symbol in local government election. Even the election held at the time of Bangabandhu in 1973 was on the basis of separate symbols. Political parties' symbols were not used there. At present local elections are not neutral but are influenced by political parties. The nomination of both man and woman candidates are selected by political parties. Here it is mentionable that the Representation of People's Order (RPO) includes provision of increasing women nominees and leadership in political parties to up 33%.[36] Electionbased on political parties' nomination need to ensure that the internal memorandum consist of 33% women. However all local government related laws contain 1:3 proportion of women representative. Both of those provisions have consistency. It is admitted in the CEDAW report submitted by the government[37] that although the two biggest political parties are led by women, yet women's participation in general is low in the political leadership and the parties often do not nominate women for general seats. Lack of political support is one of the main barriers for women's participation in local government elections [38] hence political parties need to ensure 33% women in their constitution. In recent times the *Union Parishad* elections have very low women representatives, in order to ensure sufficient participation Election Commission can fix the total number of nominations that must be given to women.[39] The status of women representatives in different elections held in Bangladesh is discussed later on. At a glance all local government elections held in Bangladesh is as followings:

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[35] Local Election on Partisan Basis: Only Mayor Chairman candidates to contest on party symbol, The New Age 16 November 2015, http://newagebd.net/175789/local-elections-on-partisan-basis-only-mayor-chairman-candidates-to-contest-with-party-symbols/ accessed on 4.4.2016

[36] According to the amendment brought in section 90B (1) (b) by the Representation of People's Ordinance (RPO) 2013 (Third Amendment) a registered political party must incorporate in its constitution specific provisions to fix the goal of reserving at least 33% of all committee positions for women including the central committee and progressively achieving this goal by the year 2020.

[37] CEDAW Report *Op. Cit.*, p.30

[38] 'Lack of political support curbs women's inclusion', *The Daily Star* May 13 2014http://www.thedailystar.net/lack-of-political-support-curbs-womens-inclusion-23867 accessed on 3.3.2016

[39] SohrabHossain, NiranobboishotanshopurushtantrikNirbachon !(99 % Patriarchal Election!) *The Daily ProthomAlo* 23 April 2016 p. 10

Table - 3

The table-3 discusses only the number of local body elections and years on which those were held. The table is clarified below in different heads along with the discussion on participation of women.

4.1 *Union Parishads*

The first Union Parishad election was held in 1973, a couple of years after independence. Women have been seen to contest directly in the Union Parishad election of 1973 with men for the post of the chairman and the member. Only one woman was elected in the post of chairman. The formal entrance of women into the Union Parishad occurred in 1976 where the government in a circular nominated two women for each Union Parishad. The Sub-Divisional Officer nominated them.[40] *Later the Local Government (Union Parishad) Ordinance, 1983 raised the number of women from 2 to 3. Then UpazilaParishad made this nomination. In 1993 this provision was amended and the power to nominate women members was authorized to the Union Parishad.*

Two Union Parishad elections were held in accordance with the Act of 1997, one in 1997 and another is 2003. In the Union Parishad election held in 1997, 12,828 women were elected out of 44134 women contestants.[41] *In that election 102 women fought directly for the post of chairman and 20 were elected.* [42] *In general seats 456*

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[40] Dr. AmanurAman, *Women Leadership in Decentralised Governance and Rural Development* Dhaka 2015 p. 14

[41] Dr. AmanurAman, *A Quest for Credence Women at Local Governance in BangladeshOp.Cit.*, p.13

[42] *Ibid*

women also contested, of whom 110 were elected.[43] *In the Union Parishad election held in 2003, 12,684 women had been elected to the reserved seats and 85*[44] *women in the general seats.*[45]

After enacting the new Act in 2009 two elections were held, one in 2011 and the one being the present election of 2016. In 2011 around 12844 women in the post of member and 32 women in the post of chairman were elected as local level leaders.[46]

The *Union Parishad* election of 2016 is continuing. According to daily newspaper the election is being held at different phases. In first phase 732 UP election was held on 22 March 2016 whereas another 672 UP election was held on 31 March, 2016. Among 1251 *Union Parishad* chairman only 12 members got elected which reflects crises of women leadership in grassroot level.[47]

The Union Parishad election in 1997 encouraged women's participation in decision-making and empowerment process in Bangladesh. Provisions of direct election in reserved seats for the women at local level were a major initiative by the government for ensuring women's participation in politics. But the women councilors were facing enormous problems to perform their roles in the *Parishad.* Male counterparts have severely criticized and dishonored, and physically harassed[48] them. The law prescribed provisions for formation of several general and special standing committees and in some cases women member's duties are affixed by the Government.[49] Most of the women members are not aware of their duties. It is a clear reflection of the women situation and position in the society that manifests inequality and gender disparity. [50]

4.2 *UpazilaParishad*

The post of a woman vice chairman was created to ensure at least one-third woman representation in all the elected posts of the local government. Women are elected in

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[43] Dr. AmanurAman, *Women Leadership in Decentralised Governance and Rural DevelopmentOp.Cit* p. 15

[44] Md. MostafijurRahman Khan FardausAra states it was 79. They referredAhmed, Tofailet. al. (2003), Gender Dimensions in Local Government Institutions, Dhaka: NariUddug Kendra, 20

[45] Kamal Siddiqui,*Op. Cit.,* p.312

[46] Dr. AmanurAman, *A Quest for Credence Women at Local Governance in BangladeshOp. Cit.,* at page 13

[47] *The Daily ProthomAlo*April 20 page1 & 3.

[48] Md. MostafijurRahman Khan FardausAra, *Op. Cit.,* p. 86

[49] ShajedaAktar, 'BangladeshesthaniosorkerbabosthaiNarirKhomotayon : Union porishader Nirbachito MohilaSodossoderuporektisomikha (Women Empowerment in the Local Government System in Bangladesh: A Study on elected women members of Union Parishads)', *Social Science Journal,* Vol 11, July 2005, Faculty of Social Science, Rajshahi University pp.8-9

[50] Dr. Md. MoksudurRahman, *BangladesherSthanioSaottoshason* (Local Government in Bangladesh), Rajshahi, 4th edition 2005 p. 527

reserved seats the number of which is equal to one third of the regular seats. On 22 January 2010 the first election in 18 years of *UpazilaParishad* of general seats was held but no election of women's reserved seats was held. In 2014 *UpazilaParishad* election was held in four phases, starting from 19th February to 31th March in 2014. It is mentionable that at present almost all the local government elections are held in different phases. The reason stated behind is that since the term will end at different times so the election should be held at different phases. It may be for assessing the environment as well as the flow of result. In the past, for example, 1973 local government election was held at a time. However in June 2015 for the first time *UpazilaParishad* women's reserved seat election was held. The election was indirect, only women reserved seat holders in the *Union Parishads* and municipalities were eligible to vote.[51] The UNOs, being the government officers posted in the local bodies works with the help of the MPs. So a tension and internal disturbance persists from the initial level. To avoid disturbance local bodies should be administered by local people without the interference of government officers.[52]

According to Aparajita Program,[53] during 2009, 481 women vice chairpersons were elected in reserved seats and only 3 women were elected directly as chairman. Some 167 women were also elected as councilors through direct election. Up to May 2014, out of 487 *Upazilas*, elections were held in 458 in which a total of 1507 women took part. In 2009 elections, on average 7-9 women competed per seat, which has decreased to 3-4 women per seat in 2014 elections. [54]In another study it is found that women's participation in the 2014 *Upazila* elections went down by 48 percent compared to that of the 2009 *Upazila* elections.[55]

According to CEDAW report submitted by government in 2015 in the *Upazila* elections in 2014, in 458 *Upazilas* 1,509 women candidates participated which amounted to 3.4 candidates per *Upazila*. [56]Women were elected in all *Upazilas* as Vice chairpersons.

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[51] Fact Sheet: Women's Reserved Seats Elections – *UpazilaParishad* prepared by USAID, IFES and UK aid available at-www.http://ekbangladesh.com.bd/wp-content/uploads/2015/06/IFES-BD-UZ-Reserved-Seats-Fact-Sheet-English.pdf accessed on 1.4.2016

[52] Dr. AmanurAman, *A Quest for Credence Women at Local Governance in BangladeshOp, Cit.,* at page 131

[53] The project, "Aparajita--*Op. Cit.*, p. 5

[54] SohrabHossain*Op.,Cit.*

[55] A paper, presented by RanjanKarmaker, the executive director of Steps Towards Development (STD), said Lack of political support curbs women's inclusion, 8.3.2015 *The Daily Star*, http://www.thedailystar.net/lack-of-political-support-curbs-womens-inclusion-23867 accessed on 26.4.2016

[56] CEDAW Report *Op. Cit.*,p. 30

4.3*ZilaParishads*

ZilaParishad could not be fruitful because although electoral process is supposed to be followed to appoint members of the *ZilaParishad*, it is still made of nominated members by the ruling Government. It has been 16 years, since *ZilaParishad* Act 2000 has passed but no election was held yet. It has not gotten its proper shape yet thus it is difficult to comment on women's participation in *ZilaParishad.*[57]However the election procedure prescribed in the Act indirect. Five women members along with other fifteen members and Chairman are supposed to be elected indirectly.

4.4 *Pourashava*

Women ward commissioners are deprived of their responsibilities and financial allocations for development of their constituencies by the general male members. In cases where women have larger constituencies than their male counterparts' they face difficulties of meeting the expectancies of such a large peer group. The management of time and transport cost is another factor for them.[58] Moreover they have little access to the funds for development schemes. Women ward commissioners cannot be the chairperson of any school/madrassa/college committee.[59] (They however will act as a chairperson to the committees related to women affairs e.g. dowry, acid crime etc.)They can at best be members whereas directly elected commissioners are chairpersons of these committees.[60] Often they are not notified about the times of meetings and sometimes pressured by the chair to sign the minutes of meeting even if the female member were not present in that meeting. They are often verbally abused by the male counterpart. [61]

Most of them are elected for the first time having no previous experience on politics with minimal education and till elected so far serving as housewives. Thus it is better to impose a minimum educational qualification to be eligible to conduct

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[57] DrAmanurAman, *A Quest for Credence Women at Local Governance in BangladeshOp Cit.* p. 31stated that TIB study identified a number of other challenges in making *ZilaParishad*effective, these includes; lack of capacity, dependency on government grant, corruption in recruitment, use of *ZilaParishad*as party office, non-existence of both short and long term development plans etc,

[58] Dr. HamidaAkhtar Begum, 'About the Role of Elected Representatives of the Local Government', Salma Khan (ed), *Role of NGO in Effective Implementation of PFA and CEDAW in Bangladesh,* NCBP 2003 p.111.

[59] Md. MahbubHossain, Women Ward Commissioner of Reserved Seat in Urban Local Government (Municipality) of Bangladesh: Problem and Prospect, MPhill Thesis Center for Governance Studies, BRAC University Dhaka at p.21vailable atdspace.bracu.ac.bd/.../Women% /Women%20ward%20commissioner%20(1).PDF accessed on 3.3.2015

[60] *Ibid*

[61] Dr. Md. MoksudurRahman,*Op. Cit.*

election. Extensive training to improve their effective participation in social activities is also necessary. The quality of performance of women members need to be improved by making proper policies by the Government.

Some women members of *Pourashavas*are found cautious about the steps of Government and found to seek judicial remedy. In *Sultana Begum*vs*Government of the Secretary, of Government, Rural Development and Co-operatives and others,*[62] female Member of a Ward of *KushtiaPourashava* has objected to the Declaration and Alterations of Municipalities area. However, the Rule was discharged.

In fact, it is stated that although quota system is a major step towards the empowerment to assert their participation, the discriminatory attitudes on the ground of general seats and reserved seats have virtually made the appreciable strategy baseless.

4.5 City Corporation

Mayor is the administrative head in the City Corporations. For the first time, one female City Mayor in Narayanganj was elected in 2011.[63] In Dhaka, Rajshahi, and Khulna City Corporation elections, held in 2002, only one female candidate contested for the post of Mayor in Dhaka City Corporation but she was not elected. In Sylhet and Barisal City Corporation election held in 2003, no female contested for the post of Mayor. [64] Although women are equally eligible for being elected in general seats for the post of ward coumcillor a few of women are found to contest for general seats. For example - In Rajshahi City Corporation the number of female contestants in the general ward was only 2, none of them were elected, whereas for the 10 reserved seats, 103 female contested.[65] To date no women from Panel Mayor has been seen to act as a Mayor.

In every City Corporation female councilors are elected in reserved seats through a direct election. Although no distinction is prescribed between the ward councilors whether elected in the general seats or in the reserved seats, while running the affairs of the Corporation, women members face discrimination by the Government as well as by the Corporation. A writ petition was filed by the elected Ward Commissioners in the reserved seats of *Khulna* City Corporation. The High Court Division of the Supreme Court of Bangladesh has established women's right to equality in political arena in the case, of *Shamima Sultana Seema and othersv.Bangladesh and others*[66]In this casethe court observed that once a person is elected as a ward commissioner,

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[62] 55 DLR HD (2003), Writ Petition No. 2905 of 2000 p. 190

[63] Aparajita,*Op. Cit.*, p.4

[64] Kamal Siddiqui*Op. Cit.*, p. 312

[65] *Ibid*

[66] *Shamima Sultana Seema and othersv.Bangladesh and others* 57 DLR (2005) Writ Petition No.3304 of 2003

whether being from a general seat or from a reserved seat, she has to be treated in the same way as other commissioners and there should be no discrimination in the allocation of power and functions among the commissioners. The case enlightened the application of gender equality by the judges. In short the facts of the case are that the petitioners were the elected ward commissioners in the reserved seats which are reserved for the female members of *Khulna* City Corporation. The female ward commissioners (ten) were aggrieved by a circular issued under the signature of the Joint Secretary, Ministry of Local Government, Rural Development and Co-operative. The circular specified the duties and functions of the commissioners, allowing the certain functions only to those elected in the general seats but not to the commissioners elected in the reserved seats. Although our Constitution established gender equality but the practice was different. The petition of the case shows that the Commissioners who were elected in general seats enjoyed the facilities of a ward secretary, an MLSS and a guard but such facilities were not allowed to the female commissioners elected in the reserved seats. The women ward commissioners were also discriminated in the matter of sharing the slaughtered cattle from Saudi Arabia during *Eid-ulAzha*. The petition shows that several times they were discriminated and ignored by the Mayor in different matters including remuneration. Originally this is a discrimination of male and female commissioners under the shadow of general seats and reserved seats. The female ward commissioners of reserved seats are not entitled to a monthly remuneration, instead they get an allowance of taka 400 per meeting with the maximum amount of taka 1600 while the male commissioners elected in the general seats get a monthly honorarium of taka 3000. Although Constitution repeatedly ensures women's equality in all spheres including equality in public offices, discrimination between male and female ward commissioners in the name of general seats and reserved seats continues in all the rules and regulations.

In the judgment of the writ petition, which was held the Court implies that since the City Corporation Ordinance does not make any distinction between the ward commissioners, whether elected in the general seats or in the reserved seats, while running the affairs of the Corporation and any such distinction whether it is made by the Government or the Corporation itself, shall be illegal. The Court also held that the ward commissioners of all the seats are clothed with equal rights, duties and responsibilities within the ambit of the Ordinance in the true spirit of the Constitution. As a whole, judgment of this case provides a wonderful example of innovative and socially sensitive judging.

5. CEDAW Provisions as applicable to Local Government

Convention on Elimination of all forms of Discriminations Against Women (CEDAW) adopted by the United Nations General Assembly in 1979, it ensures women's political participation in both central and rural arenas. CEDAW does not in particular mention women's right regarding the participation in local Government bodies but article 7 clause (b) mentions that State parties of CEDAW are really bounded to ensure ample opportunities for women for upgrading their true political

status. Moreover CEDAW includes a separate article for the rural women. Article 14, Clause 2 is related with gender equality of the rural women to have access and benefit from the rural development programme. Article 14, Clause 2(a) ensures the participation of rural women in development planning at all levels. Signatory State parties have to take all appropriate measures to eliminate discrimination in the political field of all levels of the country. State parties should encourage popular participation of women in the political arena of the country.

5.1 Reflection of CEDAW Provisions

Reflection of CEDAW Provisions in laws and local government elections as compliance of the CEDAW provisions in Bangladesh has been reported by 8 separate progress reports by the Government to the Committee of CEDAW. [67] In the local government sector reserved seats for women on the basis of selection was started from 1976. This type of reserved seats is treated as only symbolic not true representation of women. Bangladesh ratified CEDAW in 1984 and direct election in local government started from 1997.*In the time of making or amending local government election laws, CEDAW commitment is not manifested rather the laws related to political agenda in local level have been changed frequently and amended at different times but nothing is done directly in accordance with CEDAW. Either government officers or Election Commission have never used the term CEDAW in their activities. Political parties are also careless about implementation of CEDAW provisions.*Almost all political parties have a separate section in their election manifestos that feature their key policy objectives for meeting women's needs.[68]

Article 14 of CEDAW is concerned about gender equality and participation at all levels in rural area. *The women representatives of rural area are not seen to be aware of their CEDAW rights.* In Bangladesh the absence of operational guidelines and terms of reference for female elected representatives is a systematic discrimination and this biasness by male elected colleagues can be seen as factors for hindrance of women's meaningful participation in local government. Even though their constituencies are larger than male commissioner, female ward commissioners don't obtain more allowances. So the environment is not well-structured to encourage women in this sector.

Only the commissioners who are elected in general seats could issue certificates of nationality, character, birth, death etc. Although Bangladesh ratified CEDAW in 1984 this circular was issued by the Government in 2002 completely ignoring

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[67] The eighth report has been submitted in May 2015 and the NGOs working in the country also submitted concurrent alternative reports after government report.

[68] Pranab Kumar Panday, *Op. Cit.*, at page no.82

CEDAW and thus it shows that the country is not loyal to establishing gender equality in practice.

In the judgment of the Shamima Sultana case the High Court mentioned the CEDAW provisions briefly. It is not possible in Bangladesh to challenge internationally recognized rights directly until the country has transformed or adopted the provisions in its own statutory laws.The court discussed CEDAW rights briefly but did not ask government to follow CEDAW article. For meaningful implementation of CEDAW, government should make the roles, responsibilities and authority of the elected women representatives' of the local government more explicit and familiar to them.[69]

6. Findings of the Study

- The laws on the segments of local government exist in urban and rural level and city corporations are distinct arrangements for the cities only. As no discriminatory laws existed in local government sectors of Bangladesh women are equally eligible to participate in general elections in every stages of the local administration. Moreover in every stages of local governance women are positively discriminated and entitled to hold one third portion of the post through reserve seats.
- The Constitution is found to have inserted and omitted local government provisions in its state policies. Fifteenth amendment rearrange earlier provisions of article 10 in article 19.3 but provisions of earlier article 9 on representation of women are totally omitted.
- Direct elections of *Union Parishad* reserved seats have been continuing from 1997 whereas in *UpazilaParishad* the first election of reserve seat was held in 2015. To this date no *ZilaParishad* election has been held. The City Corporation election used to be operated by separate Acts of different City Corporations. From 2009, a consolidated Act has come into operation.
- The 33% quota for women is indeed an important drive to women's empowerment in rural Bangladesh because in the recent past the local government elections for vital posts are found to be held with political symbol.
- The members, despite being male or female who are elected in general seats enjoy numerous facilities but such facilities are not allowed to the female members elected in the reserved seats, Women members asked judicial remedy to challenge discriminatory privileges and the judiciary upheld Constitutional equality.

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[69] Observation of CIC–BD on the 8th Report of the Government of Bangladesh on the CEDAW,Eight CEDAW Shadow report to the UN CEDAW Committee, submitted by Citizens' Initiatives on CEDAW, Bangladesh (CIC-BD) Dhaka, Bangladesh February 2016p.4

- After 18 years of signing CEDAW the government circular has been found discriminatory on the point of general seats and reserved seats which reserve seats are assembled for women's empowerment.
- Government, Election Commission, Political Parties even candidates are not found to be conscious about CEDAW implementation.

7. Suggestions

- Laws should be for the benefit of the people -- not for the convenience of the Governments, therefore frequently changing the law should be coherent and rationale.
- Specific programs should be introduced by the Government and non-government organizations alike in order to create awareness among women in the grass root level so that political parties would give them proper access to the political representation of the place of interest.
- Direct Election should be introduced at all levels of local government.
- Terms and conditions and facilities should be made equal for representatives of both general and reserve seats.
- The Government should be sincere in implementation of CEDAW provisions at the local level of politics.

Conclusion

Many changes to the local government related laws at different times by different governments have made it complicated to understand. The present Government has reformed almost all the existing laws related to local government before election. Actually numerous changes and amendments regarding the laws of local government have created confusion to detect the accurate provision.At present in some posts local elections are held by using political symbols so that the political parties caninfluence the local politics. A woman has to be a member of a particular political party and her name must be proposed and supported by a member of that political party to be eligible for thegeneral or thereserved seat. Political parties should encourage their female members to contest not only in reserved seats but also in general seats as well as for membership and chairmanship of the local bodies.

In most cases Acts and Ordinances are not clear about the duties and responsibilities of women members of reserved seats. Originally women are discriminated on the shadow of general seats and reserved seats. In some cases government circulars determine the duties for women representatives in reserved seats in relation to women and children affairs. Honour and opportunities must be identical. Government is bound to make or improve laws in accordance with CEDAW style but CEDAW Convention is only discussed in between Bangladesh Government and CEDAW committee. Women in general or elected women in particular can never claim CEDAW rights from the Government.

The Role of Courts in Combating Sexual Harassment in Bangladesh: Judicial Activism versus Feminism?

Dr. Chowdhury Ishrak Ahmed Siddiky*

1. Introduction

The opening of the various service sectors for women in order to empower them has seen mixed results in Bangladesh as their male colleagues have not always been cordial and professional in their dealings with them. Although in certain sectors the employers took adequate steps to ensure a safe working culture for women, in most sectors of the economy including the garments sector[1], women still do not feel comfortable and secure because of the adverse working environment and sexual harassment from their male counterparts. The sexual harassment of women in the workplace not only impedes their work performance but also affects their mental health. This loss of honour and dignity also results in them losing their confidence which also has an adverse affect in their personal lives.

This paper aims to evaluate the concept of sexual harassment within the existing legal framework of Bangladesh. It would then critically analyze the approach taken by the courts in the cases relating to sexual harassment and the role played by them due to the legal vacuum in this area. In analyzing the approach taken by the courts, this paper would further analyze this judicial activism of the judiciary from the perspective of feminist legal theories.

The first part of the paper discusses the concept of sexual harassment from the landmark judgements given by the court. It is argued that the definition of sexual harassment is ambiguous and the circumstances and the context of the allegation of the victim may be taken into account before classifying a case as sexual harassment. The second part of the paper analyses the current legal framework in regard to sexual harassment cases and the problems and implications of some of the legislations enacted by the legislators in order to deal with sexual harassment on women.

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[1] The garment sector provides more than half of Bangladesh's revenue and almost 85 percent working in this sector are women.

The third part of the paper looks at the various feminist legal theories and applies it to analyse the judicial activism of the court. It is argued that if understood from the feminist perspective, the courts tend to be more liberal in nature when dealing with the sexual harassment cases. Finally the fourth part of the paper discusses the judicial activism of the court due to the lack of legislations in this area and how far the courts can achieve their quest for gender equality despite some obvious constraints in regard to their authority. While analysing the effect of the court guidelines on sexual harassment, the feminist perspective on this issue would also be taken into account.

2. The concept of sexual harassment

There has been a lot of writing in both academic journals and in newspaper columns about sexual harassment at workplaces for women in Bangladesh and also in other parts of the world. The issue in regard to the female garment workers being constantly harassed and stalked by their male colleagues is quite common in Bangladesh. There are also allegations of sexual harassment and intimidation in other service sectors as well. But just what is sexual harassment? If wrong, why is it wrong? What can you actually say at work which will not get you into trouble? Can you tell a dirty joke? Ask your subordinate out for a date? Comment on someone's clothes?

In most instances of sexual harassment cases the concept of 'I know –it-when I –see-it-ness is involved.[2] Most average people can distinguish between a tentative but unwanted, sexual overture or a clumsy compliment on one hand and a hostile and demeaning sexual remark on the other. As a result the sexual harassment doctrine is in most cases filled with vagueness and contradictions as there is a grey line which could be interpreted as sexual harassment or an innocent flirtatious behaviour.

In Bangladesh till recently, there weren't any set guidelines on sexual harassment.[3] As a result on a public interest litigation filed in 2009[4], the High Court Division of the Supreme Court of Bangladesh in its Writ jurisdiction called on the Government to explain their failure to act in respect of sexual harassment and why no legislation has been formulated to deal with this issue. The court gave its judgement in 2009 and gave guidelines in respect to sexual harassment. The court defined sexual harassment in the following manner: Sexual Harassment includes : a) "unwelcome

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[2] This term was coined in the case of *Jacobellis v Ohio*, 378 U.S. 184, 197, while claiming about obscenity, 'I know it when I see it'.

[3] The two landmark cases which set guidelines for sexual harassment are : *Ms Salma Ali v Bangladesh & others*, 29 BLD (2009) (HCD) 415 and *Bangladesh Women Lawyers Association v Government of Bangladesh & others*, 31 BLD (2011) (HCD) 324.

[4] Ibid.

sexually determined behaviour b) attempts to establish sexual relation by use of administrative power or position c)sexually coloured verbal representation and expecting sexual favours d)sexually coloured remark or showing pornography e) Indecent gesture including teasing through abusive language, stalking and jokes f)insult through letters, telephone, mobile phones etc g) taking still or video photographs j) preventing participation in sports, cultural organisation and academic activities".[5]

The definition of sexual harassment provided by the court is quite ambiguous as the definition was taken from the Convention on the Elimination of Discrimination against women (CEDAW). The definition provided by the court falls into the 'I-know-it-when-I see it ness' category, as the courts would have to judge the context and the circumstances of the sexual harassment on women in the workplace to judge whether there has been a case of sexual harassment. In Bangladesh although sexual harassment on women in the workplace is high, it is important not to have such broad generalisations of what constitutes sexual harassment as the context and the circumstances of the allegations made against the perpetrators could change from case to case. As a result although the court guidelines provide a valuable tool in defining what could be construed as sexual harassment, direct transplantation of the definition from an international convention has caused certain ambiguities.

3. The existing legal framework dealing with sexual harassment

There are a number of provisions in the Constitution of Bangladesh that deals with sexual harassment. Article 10 of the Constitution has mandated the participation of women in all spheres of national life, Article 28 prohibits discrimination on the ground of sex while Article 29 guarantees equal opportunity of women in the public sector.[6] Moreover Article 36 guarantees right of free movement to every citizen. Apart from Article 10 of the Constitution, the other articles are considered as fundamental rights of every citizen and the State as a result is obligated to ensure those rights. Further if the State fails to provide those fundamental rights to its citizens, Article 44 of the Constitution grants a person aggrieved to move a petition before the High Court Division of the Supreme Court of Bangladesh under Article 102 of the Constitution to enforce their fundamental rights.

Although Article 28 of the Constitution ensures that there should not be any discrimination on the grounds of religion, sex, race, caste or place of birth, there is no specific provision which deals with sexual harassment on women. Article 28 (4)

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[5] See *Ms Salma Ali v Bangladesh & others*, 29 BLD (2009) (HCD) 415. The court defined sexual harassment along the following lines. The exact wording and certain provisions defining sexual harassment were however omitted for the purpose of this paper as they were repetitive.

[6] See the Constitution of the Peoples Republic of Bangladesh.

comes closest as it states that " Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens".[7] This allows the legislators to enact special laws to protect the rights of women as and when required to protect them.

The government has also promulgated new laws over time to protect the interest of women. Some of these legislations are The Dowry Prohibition Act 1980, The Cruelty to Women (Deterrent Punishment) Ordinance 1983, The Women and Child Repression (Special Provision) Act 1995, The Prevention of Women and Child Repression Act 2000 and The Acid Control Act 2002. The government enacted these laws in order to protect women from certain crimes and most of these laws have not been drafted taking sexual harassment on women into account. Most of these laws are knee-jerk reactions by the government to protect women subjected to particular crimes at a particular time. Such ad-hoc legislations resulted in these laws being repealed several times due to imperfect definitions of crimes.[8]

The Penal Code of 1860 also has no specific provisions dealing with sexual harassment. The two provisions which deal with sexual harassment are Section 354 which deals with actions involving assault and Section 509 which deals with words, act or gestures insulting the modesty of women. Both these penal code provisions are not effective in dealing with sexual harassment cases as it stereotypes women based on the concept of modesty. Section 509 assumes that fact that all women are modest and the law will only protect women when they will be considered modest. This type of stereotype might prejudice sexual harassment cases as this will create a criteria in regard to what constitutes modest and immodest, which is prejudicial to the victim of sexual harassment.[9] Further the Labour Act of 2006 also refers to modesty and honour of women. Section 332 of the Act, specifically refers to being respectful towards the modesty of women.[10] This is also another instance where the court would be bound to consider the modesty of the women in a sexual harassment case, since it is stated in the legislation to protect the labour rights of the workers.

Although the Government has over the years passed various forms of legislations to curb violence on women, there has not been any specific law dealing with the sexual harassment of women at workplaces. Moreover severe punishments including death penalty in respect to certain crimes committed against women have also failed to stop violence against women.

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[7] Constitution of the Peoples Republic of Bangladesh, art 28.4.

[8] See S J Tania, 'Special Criminal Legislation for Violence Against Women and Children'-A Critical Examination'(2007) (Special Issue) *Bangladesh Journal of Law* 199.

[9] Ibid.

[10] The Bangladesh Labour Act 2006 <http:// bdlaws.minlaw.gov.bd/ chro_index_update.php>

Further despite the Constitution providing gender equality, the provisions do not go far enough in combatting sexual harassment on women. Until recently the vast majority of women were engaged in the private sphere – i.e. domestic and household labour. Therefore the harassment and discrimination of women in the work place escaped the notice of the government. This explains the lack of legislation dealing with discrimination and harassment.[11] Moreover since there is also a lack of knowledge among most Bangladeshis about their constitutional rights, women have been slow to avail the protection provided to them by the constitution. This results in sexual harassment on women going unchecked at times.[12]

4. The feminist legal theories

It is difficult to define what feminism is as modern feminists believe that there should not be any single definition defining feminism. However for the purpose of this paper, feminism will be defined as "a concept that commits to equality of sexes at the substantive level and at the methodological level it implies a commitment to gender as a focus of concern and to analytic approaches that reflect women's concrete experiences".[13] Feminism in general focuses on gender equality between a male and female and rejects patriarchy and promotes liberation of women. Moreover feminist theories and practitioners are not only interested in gender issues, but also in race, class, sexual orientation, especially how these categories might cross-roads with gender.[14] In fact many cross paths with issues of justice and peace.

Further feminist legal theory emerged at the last quarter of the 20th century during a time when feminists challenged the stigma in regard to women working. As a result Feminism is part of a critical tradition of jurisprudence that connects to legal realists and critical legal studies and is grounded in the civil rights movement.[15] Hence it can also be said that feminist theory has its legal roots in the 19th century women's movement as well.[16]

Many feminists also believe that law is not a neutral system and they argue that that the legal concepts of impartiality and objectivity are views of male dominated society. They also observe that "if sexes are unequal and perspective participates in

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11 See Tania, above n 8.

12 Most women in Bangladesh do not report cases of sexual harassment unless and until it is serious in nature. See N Mahtab, 'Women in Bangladesh: From inequality to Empowerment' (*AHDPH*, Dhaka, 2007).

13 D L Rhode, 'The "No problem" Problem: Challenges and Cultural Change' (1991) 100 Yale Law Journal, 1731.

14 H Barnet, *Introduction to Feminist Jurisprudence* (Cavendish Publishing Limited, London,1998).

15 C Smart, *Feminism and the Power of Law* (Routledge , London, 1989).

16 Ibid.

situation, there is no ungendered reality or ungendered perspective".[17] During the 1960s and 1970s many feminist legal theories emerged that can be classified as liberal theory, cultural theory, dominance theory and postmodern theory. However for the purpose of this paper only liberal, cultural and dominance theory would be discussed.

4.1 Liberal Theory

The liberal feminists believe that the subordination of women is caused by social and legal barriers that result in women not being able to participate in politics and economics. They advocate that women are fundamentally similar to men and that they should be treated equally with men. Liberal feminists argue that law should be gender blind and that there should not be any restriction or special assistance on the grounds of gender.[18] Liberal theory was extremely popular during the 1970s as it resulted in women getting access to employment, education and politics.

Although liberal theory has proven to be successful in ensuring access to women in education and in other sectors of the economy as it challenged the discriminatory laws and classifications, the theory was less effective in challenging laws that justified different treatment on the basis of real differences. This 'real difference' law is difficult to apply in the cases where there is no man as a comparison, such as in pregnancy cases or cases of domestic or sexual violence.[19] Another problem with the theory was its benchmark of "male standard". Critics of the theory argue that liberals did not challenge the concept of the discriminatory law and that they only sought gender neutrality. As a result the law reflects only male experiences and does not help women much especially women coming from disadvantaged backgrounds. Further equal treatment between men and women would not result in any real equality as in many cases men will be benefitted.[20]

4.2 Cultural Feminist Theory

Cultural feminism on the otherhandfocusses on the differences between men and women. They advocate that the main role of feminism is not to assimilate women into patriarchy and try to prove that men and women are equal but to change institutions with the view to understanding women's unique virtues of love, patience, empathy and concern.[21] According to cultural feminists, men and women

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[17] K A Mackinnnon, *Method and Politics in Towards a Feminist Theory of State* (Harvard University Press, Cambridge, 1989) 114.

[18] See above n 12).

[19] H H Kay, 'Equality and Difference : The Case of Pregnancy' in P Smith (ed) *Feminist Jurisprudence* (Oxford University Press, New York, 1993).

[20] This is especially applicable for custody and divorce rules.

[21] See Mahtab, above n 12).

undergo different moral development.[22] Cultural feminists also argue that modern jurisprudence is 'masculine' because it is of the belief that men and women are materially separate and that they should be treaty differently.[23] As a result according to them, a greater volume of feminist scholarship is required which is grounded in women's subjective experience.[24]

However cultural feminist have also come in for criticism as they are accused of stereotyping women from the 19th century known for their emotional, domestic and nurturing qualities. This is dangerous according to some as this would affirm the difference between men and women and accept male superiority over women.[25] Further this bias might adversely affect women as this may cause discrimination in respect to labour laws that might preclude different types of women work on the ground that they might need protection and that this unequal treatment is needed on the basis of women's inherent difference with men even though it means putting them in a subordinate position.[26]

4.3 Dominance Theory

Dominance feminism does not see the issue of gender equality as an issue of sameness but rather as an issue of domination of women by men. The main protagonist for this approach is Catherin Mackinnon who argues that both liberal and cultural feminists embrace maleness as a norm. She states that "concealed is the substantive way in which man has become the measure of all things. Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure".[27]

Moreover according to dominance feminism the equality issue is not a question of sameness but a question of distribution of power and gender not a question of difference but of male supremacy and female subordination.[28] Further both the liberal and cultural feminist could not confront the issue of sexual harassment,

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22 C Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1982); Carol Gilligan explains in her book that men and women typically undergo a different moral development. She finds that male respondents typically responds to the moral problems with an "ethic of Justice" while female respondents typically respond with an ethic of care.

23 R West, 'Jurisprudence and Gender' (1988) 55 *University of Chicago Law Review* 1, 1988.

24 Ibid.

25 C A Mackinnon, 'Difference and Dominance: on sex discrimination' in *Feminism unmodified: Discourse on life and law* (Harvard University Press, Cambridge 1988).

26 Williams, 'Deconstructing Gender', in Hilaire Barnet (ed) *Sourcebook on Feminist Jurisprudence* (Cavendish Publishing Limited, London 1997).

27 See West, above n 23.

28 Ibid.

violence on women and children with their approach of feminism. This is because the subordination of women is central instrument of male dominance.[29]

However the dominance theory has been criticized as one dimensional as it only concentrated on women as the victims. Although the connection between sexuality and gender inequality is accurate, the use of sexuality for male dominance is over exaggerated.[30] Further many feminists have also tried to explore the connection of sexuality, gender and law in order to understand the prevailing social inequality on women.

5. The role of court in dealing with sexual harassment cases

The Constitution of Bangladesh together with other legislations dealing with violence and discrimination on women did not till 2009 have any specific guidelines dealing with sexual harassment cases. The High Court Division of the Supreme Court of Bangladesh in 2009("2009 Case") and in 2011("2011 Case") laid down the guidelines for the first time to deal with issues relating to sexual harassment of women.[31] The court gave the guidelines in response to a public interest litigation filed before the court by Miss Salma Ali, head of Bangladesh Women Lawyers Association. The court in its judgement stated that "These directives are aimed at filling up the legislative vacuum in the nature of law declared by the High Court Division under the mandate and within the meaning of Article 111 of the Constitution".[32] As a result the court has taken it on itself to interfere in its constitutional capacity in order to protect the interest of the general public.[33]

The court in its 2009 case judgement also stated that the objectives and functions of the judiciary include the following: "a) To ensure that persons are able to live securely under the Rule of Law b) To promote, within the proper limits of the judicial function, the observance and the attainment of human rights and c) To administer the Law impartially among persons and between persons and the state".[34]

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[29] P A Cain, 'Feminist Jurisprudence: Grounding the Theories' (1990) 4 *Berkley Women's Law Journal* 1990.

[30] N Kapur, *Erotic Justice: post colonialism, subjects and rights* (Glasshouse Press, London 2005).

[31] See *Ms Salma Ali v Bangladesh & others*, above n 4).

[32] Ibid.

[33] This action of the court is termed as Judicial Activism. Judicial Activism or Judicial legislation occurs where there is casus omissus(gap in the statute the court can fil in). However if there is no law and hence there is no question of filing in the gap then the judiciary can also take steps in the interest of the Society. Lord Reid in his article " The Judge as Law-maker", *The Journal of Public Teachers of Law*,1972, stated that "when it was thought almost indecent to suggest that judges make law-they only declare it.....but we do not believe in fairy tales any more".

[34] See above n 4, 415.

The third objective of the court as stated in the judgment is the most significant aspect of the court interfering in order to promote equality among both men and women. The court saw the need to step in as the State had failed to give any guidelines through its legislative powers to protect women from sexual harassment. This aspect of the court is more akin to the liberal feminist approach which promotes the idea that there should be gender equality in respect of protecting the rights between both male and female. In this case it could be argued that the court tried to promote the equality between the genders.

Moreover it could be argued by the radical feminists that the court had failed to identify the problem. The problem of sexual harassment arises out of the subordinate status of women and the victimsation by men. Sexual harassment for radical feminism is but one manifestation of the victimisation of women by men. Granting women greater equality does not solve the problem of sexual harassment, as according to radical feminists this is the outcome of the way that society is structured.

The court also held that conducts would amount to discrimination "if a woman has reasonable grounds to believe that objecting to the conduct would disadvantage her in terms of her recruitment or promotion or when it creates a hostile work environment".[35] The court also recognized that the duty of the employer or 'other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required".[36]

The court also placed an obligation on employers in both public and private sectors to take "appropriate steps to prevent sexual harassment" and provide for appropriate penalties against the offender.[37] Employers in both the public and private sectors must provide procedures for deterring workplace sexual harassment.[38] Upon the creation of such workplace rules, the employer must notify all workers of the anti-sexual harassment policy.[39] As a result the court imposed an affirmative duty on the employer to prevent sexual harassment in the workplace. The court also directed that a complaint mechanism be created in the employer's organisation to redress the

[35] Ibid 418.
[36] Ibid 419.
[37] Ibid 425.
[38] Ibid 425.
[39] Ibid 426.

complaint made by the victim and that such a committee should be headed by a woman.[40]

The measures directed by the court in order to protect women from sexual harassment might be read with scepticism if analysed from the radical feminist perspective. However CEDAW, which is the basis for the court's sexual harassment guidelines, is regarded as a radical feminist convention.[41] Article 5(a) of CEDAW intends to "modify the social and cultural patterns of conduct of men and women.....". Hence it shows that the guideline is trying to promote consciousness in the society regarding sexual harassment. However it can be argued that since the guideline relies so much on radical feminism, it is flawed as all women do not want to be perceived as victims.

Further the examples of workplace harassments stated in the judgment all relate to men in superior positions trying to abuse their administrative position in order to receive sexual favours.[42] As a result from the radical feminist perspective, the court passed its judgment through its 'male standard' rather than taking into account the women's perspective. Further it could also be argued that the stance taken by the court is more akin to liberal theorists as it tried to promote gender equality and work safety for women which will increase the participation of women in the workforce.

The 2011 case further improved the definition of sexual harassment as it included 'eve teasing and stalking' into its definition of sexual harassment.[43] However the court in its judgement stated that "teasing is usually harmless if it is done between friends in a friendly environment and if the same is welcomed by the female recipient".[44] It further stated that "while teasing may be enjoyable and pleasant to an American or British female of the same age because of cultural difference".[45] This description of teasing may be in direct contradiction with the 2009 case judgment, where it was specifically stated that sexual harassment includes "..... jokes having sexual implication".[46] This further reiterates the point made earlier in this paper, that it is important to understand the context and the circumstances of the allegations made. The definition of sexual harassment provided by both the 2009 and 2011 cases contradict each other as although the 2009 case do not discuss about the context and the circumstances which could be interpreted as sexual harassment, the 2011 case clearly does.

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[40] Ibid 427.
[41] See Kapur, above n 30.
[42] See above n 4, 326.
[43] See above n 3, 327.
[44] Ibid 327.
[45] Ibid 328.
[46] Ibid 328.

Moreover although in the 2011 case the court describes various conducts that could be described as eve-teasing, it stops short of defining it. The reason being it falls in the "I –know-it-when-I-see it ness" category, as depending about the situation and the context it could be interpreted as whether the action of the person can be considered as sexual harassment or an flirtatious behaviour. As a result such cases are filled with vagueness and contradictions which make it difficult for the court to intervene as one of the parties might be prejudiced.

The 2011 case also discriminates against women coming from different backgrounds while dealing with the issue of sexual harassment. It states that "What may be normal for a girl in Dhanmondi or Gulshan may be the reason for mental disturbance of a girl in a remote conservative village". In this case both Gulshan and Dhanmondi being affluent neighbourhoods in Dhaka, it was perceived by the court that women living there would be more liberal and open to teasing than a conservative girl in a village in Bangladesh. This type of sterotyping goes against the general principle of sexual harassment as it prejudices women living in different areas. However it can also be argued that the court is promoting equality between the genders by adopting a more contextual approach. To expect all women to behave like village women would be essentialising, which is a criticism of radical feminism.

Taking into account the dominance theory perspective, such generalisation by the court goes against gender equality as women are held at a particular male standard of what should be conservative and liberal. The wording of the judgment further reiterates the radical feminist perspective that gender inequality among other things is dependent on men's control over women's sexuality and laws plays a significant role in maintaining the gender inequality through its regulation of women's sexuality.[47]

Both the 2009 and 2011 cases is significant for Bangladesh because of its recognition of the problem of sexual harassment and the fact that it is an experience many women are almost routinely subjected to in the workplace. These two cases could be considered as transformative despite their being no legislation dealing with sexual harassment cases in the country.

6. Judicial Activism versus Feminism

The court in the 2009 and 2011 cases stated that the responsibility of the court under Article 102 of the Constitution, for the enforcement of the fundamental rights covered under chapter III of the Constitution in the absence of any form of legislation, allows the court to intervene.[48] Further it also stated that 'the

[47] See West, above n 27.
[48] See, above n 4.

fundamental rights guaranteed in chapter III of the Constitution of Bangladesh are sufficient to embrace all the elements of gender equality including sexual harassment or abuse and that the independence of the judiciary is an integral part our constitutional scheme".[49] This shows that the separation of the judiciary from the executive has emboldened the court to fill the legal vacuum left by the legislators. As a result this judicial activism is possible for the courts due to the constitutional powers given to it by the Constitution.

Further due to lack of access to justice by the majority of people in the country, the fundamental right of the people gets violated. To these weaker and poorer segment of the population, the rights conferred by the Constition means nothing as they do not feel adequately protected. As a result the court sees it as their duty to intervene in order to protect the basic human rights of the people. The High Court Division of the Supreme Court of Bangladesh gave these two proactive judgements because sexual harassment violated the fundamental rights enshrined in the Constitution. The court relied on both domestic and international law in order to give these judgements. It also recognized that sexual harassment impairs the goal of equality in employment.

The 2009 and the 2011 cases define sexual harassment and lays down the guidelines for employers and educational institutions to ensure that their institutions prevent future sexual harassment on women. Employers were also required to set up complaints committees to take up complaints of sexual harassment and investigate those complaints thoroughly.[50] Although these guidelines have highlighted the problem of sexual harassment, much remains to be done to address gender stereotyping and harassment in the workplace and to ensure that women have some form of recourse to effective resolution of their complaints.[51] The guidelines laid down by the High Court Division of the Supreme Court of Bangladesh are not being followed adequately in all spheres of employment and in fact some employers are even ignorant about such guidelines.[52]

The judicial activism of the court in the 2009 and 2011 cases from the feminist perspective shows that the current Bangladesh sexual harassment cases only focus on the non-consensual cases of harassment.[53] As a result, although the court's decision has brought about change, it did not question male supremacy as it subjects

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[49] Ibid.
[50] Ibid.
[51] Ibid.
[52] See D M Siddiqi, 'Do Bangladeshi factory workers need saving? Sisterhood in the post-sweatshop era' (2009) *Feminist Review* 91, 2009.
[53] See C A Mackinnon, 'Women's Lives, Men's Laws' (2006) 40(3) *Law and Society Review*.

the regulation of sexual harassment to questions of consent. The concern is that 'beneath the surface, a moralism may be being smuggled into sexual harassment litigation"[54] as the courts will identify unwelcome behaviour "with an attempt to outrage the modesty of a female employee".[55] The unwelcomeness aspect in the 2009 and 2011 cases forces women to act in a manner which is considered as virtuous and chaste which is socially acceptable in order to bring about a credible sexual harassment claim.[56] The courts as a result will protect only virtuous and chaste women as they will consider them as the genuine victim.

In analysing both these two cases from the feminist legal perspective, the action of the court in dealing with sexual harassment cases are liberal in nature as they try to promote equality between men and women by being gender blind. However although the liberal theory is outdated in the western world as most of the western countries have gone far ahead in terms of empowerment of women, the liberal theory still plays an active role in developing countries like Bangladesh due to the Bangladeshi society's late realization regarding the problem of sexual harassment.

The two cases have brought the sexual harassment issue at the forefront and in the public domain. They have also been successful in brining reforms in this area but they have been one dimensional as they have applied the law only on sexual harassment on women. Sexual harassment law in the western world is understood as relevant to women's life experiences more than to men's.[57] But the Bangladeshi guidelines is only limited to its applicability on women.

The 2009 and the 2011 cases have still not been challenged in the Appellate Division of the Supreme Court of Bangladesh.[58] As a result if the judgment is appealed by any party, there is a possibility that the judgment might be reversed, resulting in the guidelines being considered null and void.[59]

7. Conclusion

The court in the sexual harassment cases has shown the way to combat sexual harassment in a male dominated society of Bangladesh. They have been proactive in their approach and the guideline laid down by them is the only guideline available to women suffering from sexual harassment. However lack of enforcement of the

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[54] Ibid.

[55] See, above n 49.

[56] Ibid.

[57] Ibid.

[58] The Supreme Court of Bangladesh is made up of two divisions: The High Court Division and the Appellate Division. The Appellate Division is the Highest Court of the country.

[59] See N Choudhury, 'The Immodest Truth: An Evaluation of The Measures Taken To Combat Sexual Harassment' (2012) *Bangladesh Journal of Law* 2012.

guidelines is one area that needs care as it is making the guidelines ineffective. Most of the employers in Bangladesh consider the implementation of the guidelines as a hassle. Further the employers argue that since there is no legislation that imposes penalty or criminal action for not implementing a law, the High Court guidelines are not taken seriously by the private employers.[60]

Further in both the cases, the court has taken help from foreign legislations and conventions as there was no domestic law to follow. As a result this transplantation of foreign law in dealing with our sexual harassment cases can cause problems in regard to how we define the concept of sexual harassment. It is important to take into account the context and circumstances of the allegation because there is a grey area in regard to the definition of sexual harassment. Their Lordships in their judgement have frequently pointed out the difference between western and Bangladesh's conservative society but they did not consider whether western definition of sexual harassment is applicable in our society.

Further the court have been liberal in their interpretation of sexual harassment as they preferred to be gender blind in order to protect women from sexual harassment. Further feminist legal theory is at an infant stage in Bangladesh and the court has been careful to draw a line between the liberal interpretations of sexual harassment in order to protect the livelihood of women in the country.[61] It should be noted that although a lot more needs to be done in order to lower sexual harassment of women in Bangladesh, greater action is required both from the public and the legislators to protect women from sexual harassment, as judicial activism alone cannot deal with this problem.

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[60] See above n 51.

[61] See F. Azim, 'Feminist struggles in Bangladesh' (2005) *Feminist Review*, 80, 2005.