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INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW

Dr. M. Ershadul Bari

I. Introduction

International humanitarian law, which is an emergency law applicable in international or non-international armed conflicts, is a branch of international law. It is also called the law of armed conflict. Its traditional name was the law of war. International humanitarian law is usually traced to the law of Geneva and the law of The Hague. The expression 'humanitarian law' was suggested by Jean Pictet, who was the Director-General of the International Committee of the Red Cross and is considered as the father of modern international humanitarian law. Accordingly it was first used in the early 1950s by the International Committee of the Red Cross (ICRC) only to mean the law of Geneva put in concrete form by the four Geneva Conventions, 1949 for giving protection and ensuring human treatment to individuals placed *hors de combat*, (i.e. military personnel) as well as persons not taking an active part in armed conflicts (i.e. civilians). Thus the Geneva Conventions, which contain over four hundred Articles, have been drawn up solely for the benefit of the individual and, as such, primacy has been given to the individual and the principles of humanity. For Jean Pictect defined humanitarian law in 1966 as "that considerable portion of international law which owes its inspiration to a feeling for humanity and which is centred on the protection of the individual. This expression of humanitarian law appears to combine two ideas of a different character, the one legal and the other moral. Now, the [relevant] provisions .... are .... precisely a transposition in international law of considerations of a moral order, and more especially humanitarian. This then would

seem to be a satisfactory designation."[1] Therefore, it is evident that the term humanitarian law was not initially used to mean the law of The Hague, or the law of war properly so called, embodied mainly in the Hague Conventions of 1899, revised in 1907, which determines the rights and duties of belligerents in the conduct of military operations and limits the choice of the means of doing harm to the enemy with the ultimate object to mitigate the human sufferings. The laws of war, which are partly based on military necessity, provide that belligerents shall not inflict harm on their adversaries out of proportion with the object of warfare, which is to destroy or weaken the military strength of the enemy. This law of The Hague, "do not inflict more harm on your enemy than the object of the war demands," replaced the old motto of the rules of war, "do as much harm to your enemy as you can." However, with the adoption of the two Protocols Additional to the Geneva Conventions in June 1977, which extend protection to any person affected by an armed conflict and stipulate that the parties to the conflict and the combatants shall not attack the civilian population and civilian objects and shall conduct their military operations in conformity with the recognised rules and by laws of humanity, it can be said that both the law of Geneva and the law of The Hague have been merged in the two Protocols. Thus "the distinction between the movement of Geneva and that of the Hague appears to be fading away"[2] and the term 'international humanitarian law' is presently used to mean both the law of Geneva and the law of The Hague. As in 1987, the International Committee of the Red Cross, taking into consideration this new development (adoption of the two Protocols), defined international humanitarian law as to mean "international rules, established by treaties or customs, which are specifically intended to solve humanitarian problems

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1. Pictet, Jean, The Principles of International Humanitarian Law, first appeared in the International Review of the Red Cross (Geneva, 1966), 9.
2. Pictet, Jean, Development and Principles of International Humanitarian Law (Dordrecht, 1985), 2.

directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of the parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by the conflict."[3]

Thus the provisions of international humanitarian law are the result of a compromise between two opposed notions: the principle of military necessity to obtain the aims of war and the principle of humanity aiming at to restrain belligerents from committing wanton cruelty and ruthlessness and, as such, to protect as best as possible the individuals who do not or no longer participate in the hostilities. As Hans – Peter Gasser says, "International humanitarian law seeks to mitigate the effects of war, first in that it limits the choice of means and methods of conducting military operations, and secondly in that it obliges the belligerents to spare persons who do not or no longer participate in hostile actions."[4] In short, the aim of the humanitarian law is to humanise war as humanism restrains barbarism. Without such a kind of law, war might degenerate into utter barbarism.

It should be kept in mind that the international humanitarian law is silent on whether a state may or may not have recourse to the use of force. It does not itself prohibit armed conflicts; it is not even concerned with the lawfulness or unlawfulness of such conflict. Thus humanitarian law is often called as the *jus in bello* which deals with facts, with the fact of an armed clash, irrespective of what caused the conflict and whether it can be said to have any

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3. Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Yves Sandoz, Christophe Swinarski and Bruno Zimmarmenn, eds., International Committee of the Red Cross (Geneva, 1987) xxvii.

4. Gasser, Hans – Peter, International Humanitarian Law, translated from German by Sheila Fitzerld and Susan Mutti, separate print from Hans Haug, Humanity for All, the International Red Cross and Red Crescent Movement, Henry Dunant Institute (Hauput, 1993), 3.

justification. In humanitarian law only facts matter, the reasons and justification for the war are of no interest and, as such, it is applicable whenever an armed conflict actually breaks out. Thus the international humanitarian law, *jus in bellow, is* different from the rules of international law governing the use of force between States often referred to as *jus ad bellum*.[5]

However, in this paper first an attempt will be made to trace the development of international humanitarin law. In doing so, the principles and contents of contemporary international humanitarian law will also be examined.

II. Development of International Humanitarian Law

From the very beginning of life, human beings opposed each other. 'War is as old as life on the earth'. War is a rot to humanity and involves most brutal and arbitrary violence. In all ages, men have suffered under the sword and the yoke. Even so, some norms or rules were developed in the hoary past for the purpose of limiting the consequences of war. In the words of Jean Pictet, "... the laws of war are as old as war itself"[6]. The laws of war are to be found in leading religions, practices of warlords, writings of philosophers, customary rules of warfare and multilateral treaties concluded mostly in Geneva and The Hague in the 19th and 20th Centuries

(i) Leading Religions and International Humanitarian Law

The provisions limiting the right of the parties to armed conflicts to use the methods and means of warfare of their choice or protecting persons or property during or after the conflicts are to

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5. The Charter of the United Nations prohibits war; it even prohibits the threat to use force against the territorial integrity or political independence of any State, (para. 4, Art. 2). The Charter does not, however, impair the right of a State to resort to force in the exercise of its right to individual or collective self – defence (Art. 51). These rules governing the use of force may de described as *'jus ad bellum'*.

6. Pictet, Jean, supra note 2, 6.

be found in various leading religions, e.g. Hinduism, Buddhism, Christianity and Islam, of the world.

a) Hinduism and International Humanitarian Law

The oldest texts of the Hindu religion, e.g. Manu Smriti, *Ramayana,* and *Mahabhrata,* contain provisions concerning means of combat, military targets, persons wounded and sick in the battlefield and prisoners of war, which may well be described as the humanitarian regulation of warfare.

Regarding the use of weapons in warfare, the Manu Smriti (codified in 200 B.C.) says: "Let not the king strike with concealed weapons, nor weapons which are barbed, poisoned or the points of which are blazing with fire"[7]. Mahabharata also contains this rule in Santi Parva : "poisoned or barbed arrows should not be used", both *Lakshmana* in *Ramayana* and *Arjuna* in *Mahabharata* were asked not to use hyper-distinctive weapons of *Brahmastra* and *Pasupathastra* respectively as these could have caused indiscriminate loss of lives of combatants and non-combatants alike especially when the enemy had not used such weapons and the war was limited to conventional weapons.

The *Manu Smriti* and the *Mahabharata,* by providing for the rules concerning individuals who could and could not be attacked during war, laid down the basis of distinction between combatants and non-combatants, which has become one of the fundamental principles of modern international humanitarian law. The *Manu Smriti* imposed the following restrictions on every soldier which he must keep in mind while fighting his foes in the battle-field:

> "He should not strike when he is on his chariot, one who is on the ground; he should not strike a person who is an eunuch, or who has surrendered or in fleeing from the battle-field or one who is sitting or accepts defeat. Nor one who is sleeping, nor one who has lost his armour, nor one who is naked, nor one who is only a spectator, nor one who is

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7. Quoted in Jois, M. Rama, I Legal and Constitutional History of India, 663

> engaged in fighting with another. Nor one whose weapons are broken, nor one who is afflicted with sorrow, nor one who is grievously wounded, nor one who is in fear."[8].

Similarly, *Mahabharata* provides that a warrior should never attack a chariot driver, animal yoked to the chariot, or pages bringing weapons, or drummers or buglers who announce a battle, he would not kill a woman or a child or an aged man or a warrior deprived of his chariot and in a sad plight with his weapons broken.

Since a warfare, as a rule, confined to combatants only, the target of military attack was the combatant force alone wherever it existed and, as such, according to *Agni Purana,* fruits, flower gardens, temples and other places of public worship could not be molested during war or when armies were on march.

The *Santi Parva* of *Mahabharata* contains the practice regarding prisoner of war, sick and wounded soldier: "Enemies captured in war are not to be killed but are to be treated as one's own children." Although a male prisoner could be kept as a slave with his consent, he was to be freed after one year. If a female prisoner declined to marry person of the conqueror's choice, she was duly sent back to her residence with a proper escort.

In a similar manner, the sick and wounded soldiers were treated : they were sent back home after they were cured having received proper treatment.

b) Buddhism and International Humanitarian Law

The Buddha renounced a princedom, spent a long life time in the ceaseless search for an end to human sorrow and established Buddhism in 600 B.C. which propounded a mission of compassion, advocating pity as a spur to mutual assistance. Although Emperor Asoka, who accepted Buddhism as his religion, invaded Kalinga in 225 B.C. and became victorious, he was disgusted by the horrors of war. The bleeding consequences sensitised the victor

8. 8, Id., at 663-664.

Emperor to renounce war itself which accentuated H.G. Wells to pay him the highest tribute thus:

> "Amidst the tens of thousands of names of monarchs that crowd the columns of history their majesties and graciousnesses and serenities and royal highnesses and the like, the name of Asoka shines and shines almost alone a star .... More living men cherish his memory today than have ever heard the names of Constantine of Charlemagne."[9]

c) Christianity and International Humanitarian Law

Christianity influenced the development of humanitarian law in the medieval period. According to the Judeo – Christian religion, all men were created in the image of God Jesus Christ, preaching love and compassion, elevated human consciousness into a divine principle. Since human love was a reflection of divine love, it should be extended to everyone, even to one's enemies. Christ himself made no pronouncement on war or how it should be conducted. But it is to be found that some passages in the Bible asked the Israelites not to kill enemies who surrendered, to show mercy to the wounded, to women, children and old people. Bible speaks of "the peace of God which passeth all understanding".

Saint Augustine, a great personality in the history of Christianity, elaborated at the beginning of the 5th century the doctrine of "just war" which had been enunciated by the Romans and Stoic Philosphers (Stoic School was founded by Zeno shortly after 310 B.C. in Greece). Since the end justifies the means, acts of war carried out for the cause of the sovereign are exempted from sin. The war is declared to be a just war; it is a war desired by God; the adversary is, therefore, the enemy of God, and cannot possibly wage any but an unjust war."[10] According to Saint Augustine, "When a just war is waged, it consitutes a struggle between sin and justice, and any victory, even if it is gained by sinners, humbles the

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9. Wells, H.G., "The Outline of History", 402.
10. Pictet, Jean, supra note 2, 13.

vanquished who, by the judgement of God, suffer the punishment and penalty due to their evil deeds."[11] The Church acknowledged the right to kill enemy captives and to take them as slaves, including the women and children.

d) Islam and International Humanitarian Law

Islam is the religion of peace, goodwill, mutual understanding and good faith. Therefore, an ordinary war, which may be fought for temporary benefits of this world, e.g. for territory, revenge, military glory, is condemned in Islam. The just war in Islam is the "jihad" (holy war) in accordance with strict conditions under a righteous Imam, purely for the defence of faith and Allah's Law. The Holy Qur'an contains provisions concerning the treatment of prisoners of holy war. The verse 67 of Sura Anfal, which was revealed with reference to seventy prisoners of the Battle of Badr (the first battle between Muslims and the Makkan infidels fought in the second year of the Hijra) when the Prophet (S.) decided to take ransom for them in accordance with the advice of the majority of His Companions, the Qur'an disapproved receiving ransom for the release of prisoners thus:

"It is not fitting
For an Apostle
That he should have
Prisoners of war until
He hath thoroughly subdued
The land. Ye look
For the temporal goods
Of this world; but Allah
Looketh to the Hereafter."[12]

Later on, the matter (release of prisoners of war) has been dealt with in Sura Muhammad thus:

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11. Id. at 14.
12. Verse 67, Sura VIII : Anfal.

"Therefore, when ye meet
The Unbelievers (in fight),
Smite at their necks;
At length, when ye have
Thoroughly subdued them,
Bind a bond
Firmly (on them) (i.e. prisoners may be taken) : thereafter
(Is the time for) either
Generosity or ransom:
Until the war lays down
Its burdens. Thus (are ye
Commended)."[13]

Thus once the fight (Jihad) is entered upon, it shall have to be carried out with utmost vigour, and blows must be made at the most vital points, the neck of the enemy. When an enemy is taken as a prisoner of war, generosity (i.e. release of prisoner without ransom) or ransom is recommended to free him.

The Holy Qur'an also contains provisions concerning the fate of the non-combatant population. It has been stated in Sura Baqara that:

"Fight in the cause of God
Those who fight you,
But do not transgress limits;
For Allah loveth not transgressors."[14]

It is evident from the above verse that holy war is permissible under well-defined limits which must not be transgressed. The verse speaks of fight against "Those who fight you" which means women, children, old and infirm men (i.e. non-combatant/civilian

13. Verse 4, Sura XLVII : Muhammad.

14. Verse 190, Sura II : Baqara.

population), should not be molested, nor trees and crops cut down. As Prophet (S.) gave directives to his lieutenants before going to battle : "Go to war in the name of Allah and follow his path : fight the infidels, but do not deceive, do not betray, do not mutilate and do not kill any children."Hazrat Abu Bakr, the first Caliph of Islam, also issued almost similar directives to three of his generals before the conquest of Syria : "Do not attack children, women or elders; and you will find people who have sought seclusion in towers, (i.e. monks) leave them to devote themselves to what they are seeking." On another occasion, he gave ten commandments to one of his generals : "Do not kill any women, children, elders or wounded. Do not burn them. Do not destroy inhabited place. Do not have cows or sheep drowned. Do not be guilty of cowardice, and do not be inspired by hatred."

Islam does not approve mutilation, torture and drowning of combatants whether they are dead or alive. After the enemy retreated from the Battlefield of Uhud, Prophet (S.) found his very affectionate uncle Hamza lying on the battlefield who had been disemboweled and whose liver had been crushed (by Hind, mother of the future Caliph Muawiya) which caused him to shout: "By Allah, if He gives us victory over them, I shall punish them as no Arab has ever done." In this context, it was revealed in Sura Nahl of the Holy Qu'ran:

"And if you catch them out,
You are not entitled to strike a heavier blow
than ye received:
But if ye, show patience,
That is indeed the best (course)
For those who are patient"[15]
"And do thou be patient,
For thy patience is but

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15. Verse 126, Sura XVI; Nahl.

From Allah; nor grieve over them:
And distress not thyself,
Because of their plots"[16]
For Allah is with those
Who restrain themselves,
And those who do good"[17]

Therefore, it is evident that Islam has made substantial contribution to the development of international humanitarian law by providing for provisions concerning the treatment of prisoners of war, non-combatant (civilian population) and combatant.

(ii) Warlords and International Humanitarian Law

In the European Middle Ages, Chivalry or Knighthood, which was originally a Germanic institution and brought together into an elite corps men (nobility) who had the right to bear arms and fight on horseback, adopted strict rules relating to the declaration of war, banning of certain weapons, and the status of those who used to carry a flag of truce. It was recognised that like the game of chess, there should be rules in war and that one does not win by overturning the board. But the rules were only applicable to the Christians and even then indeed to the benefit of Chivalry alone. Only a captured nobleman had to have his life spared and he could purchase his freedom. The crusades (in the eleventh century) constituted the historic epoch in which Christianity as well as Chivalry converged to face Islam as their adversary, but did not succeed.

(iii) Writings of European Political and Legal Philosophers and International Humanitarian Law

In the 17th and early 18th centuries, some European political and legal philosophers, e.g. Hugo Grotius, Montesquieu, Jean Jacques

16. Verse 127, id.
17. Verse 128, id.

Rousseau, expressed their views about the laws of war.

Hugo Grotius in his famous treatise *De jure belli ac pacis* (1625) did not rule out war, but wrote, "In war we must always have peace in mind." "The conduct of war is subject to legal restraints." He insisted that violence beyond what was necessary for victory was not justified, that civilians and even combatants should be spared whenever military needs made this possible. Thus "The *temperamenta in* bello, or constraints on the waging of war, which he then expounded in his book as requirements of a higher moral order, are similar in many respects to the rules of humanitarian law which we know as the positive law of our day."[18]

In the 18th century, Montesquieu in his book, "The Spirit of Laws" (1750) wrote that the only right in war that the captor had over a prisoner of war was to prevent him from doing harm. Later on, Jean-Jacques Rousseau stated the basic principles of the modern international humanitarian law in the Social Contract (1762) : "War is in no way a relationship of man with man but a relationship between States, in which individuals are only enemies by accident, not as men, but as soldiers ..." He further said that, soldiers may only be fought as long as they themselves are fighting. Once they lay down their weapons "they again become mere men," their lives must be spared.[19]

Thus the intellectual foundation for the development of international humanitarian law in the 17th and 18th Centuries was laid down by the European legal and political thinkers.

(iv). Conclusion of Treaties of Friendship and Peace and International Humanitarian Law

History also at times witnessed the humanisation of war and a world of violence was punctuated by the conclusion of certain

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18. Kalshoven, Frits, Constraints on the Waging of War (Geneva, 1987) 4.
19. Rousseau, Jean – Jacques, A Treatise on the Social Contract, Book I, Chap. IV.

treaties of friendship and peace in the 17th and 18th Centuries. The Treaty of Westphalia, 1648, which concluded the Thirty years War, provided for the release of prisoners without ransom and, as such, is generally considered in the Western World as marking the end of the era of widespread enslavement of prisoners of war. Later in1785, the "Treaty of Friendship and Peace," arrived at between Frederick the Great and Benjamin Franklin, stipulated that "in case of conflict the parties would abstain from blockades and that enemy civilians would be allowed to leave each country after a certain time. Prisoners of war would be fed and lodged in the same manner as the soldiers of the detaining power and a man of confidence would be allowed to visit them and provide them with relief."[20]

(v) Customary Laws and International Humanitarian Law

In course of time, the practices to spare the lives of captured enemies, treat them well, spare the enemy civilian population, protect the prisoners of war and exchange them without ransom, and treat the sick and wounded soldiers gradually developed into a body of customary rules relating to the conduct of war which may be summed up as follows:

"1. Hospitals shall be immunised and be marked by special flags, with identifying colours for each army.
2. The wounded and sick shall not be regarded as prisoners of war; they shall be cared for like the soldiers of the army which captured them and sent home after they are cured.
3. Doctors and their assistants and chaplains shall not be taken as captives and shall be returned to their own side.
4. The lives of prisoners of war shall be protected and they shall be exchanged without ransom.
5. The peaceful civilian population shall not be molested."[21]

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20. Supra note 2, 21.
21. Id., at 22.

The customary law of war was reflected in the work of Professor Francis Lieber, an international lawyer of German origin, who had migrated to America. In April 1863, he prepared 'Instructions for the Government of Armies in the Field', popularly known as the Lieber Code, to be followed by the American Army during the Civil War (1861-1865). The Lieber Code contains detailed rules relating to the conduct of war proper, protection of the civilian population, decent treatment of specified categories of persons such as the prisoners of war, wounded, doctors, nurses, and chaplains and protection of hospitals. Based on the Lieber Code, President Lincoln promulgated "Army Order No. 100" entitled "Instructions for the Armies of the United States in the Field." Although Lieber Code was a national document prepared keeping in mind the American Civil War, it was used as the basis for the first attempted codification of the customary law of warfare at the Brussels Conference of 1874. The Conference failed to adopt a treaty in this regard, but it adopted a declaration which is very similar to The Hague Conventions of 1899 and 1907. In fact, the Lieber Code served as the principal basis for the codification of the laws and customs of war, and provided for the basis of the development of the Hague Conventions of 1899 and 1907 which in turn exerted tremendous influence on subsequent developments. Thus Professor Francis Lieber made significant contributions to the concept and contents of contemporary international humanitarian law.

The process of codification of the customary rūles of warfare started after the middle of the 19th Century with the conclusion of multilateral treaties which provided certainty to the customary rules of warfare. This codification led to the emergence of two distinct trends in the law of armed conflict, namely, the Geneva trend (law of Geneva) which more particularly concerned with the condition of war victims and The Hague trend (law of The Hague) relating to the conduct of war proper and permissible means and methods of warfare.

(vi) Humanitarian Conventions : Law of Geneva

In the middle of the 19th Century, two wars – Crimean War, 1854 and the Battle of Solferino, 1859 – exposed the vulnerability of, and witnessed the disregard to, the customary rules of warfare.

When the Crimean War broke out in 1854, the medical service of the Franco – British expeditionary corps was virtually non-existent; 83,000 sick armed personnels died in unspeakable conditions and mortality rate among the amputees was 72 percent. Florence Nightingale (Lady of the Lamp), a 26-year-old English nurse, could not keep silent seeing the bleeding chaos in the war – torn cosmos. She successfully reduced the toll of death and misery of the soldiers during the war period (1854 – 1855).

In the Battle of Solferino, fought in Northern Italy between the Austrians and the Franco - Italian Forces in June 1859 in which Austric was defeated, about 38,000 men were killed or wounded in 15 hours. In course of the battle, all customary rules of warfare were put to dust. Field hospitals were shelled. Doctors and stretcher bearers in the field were subjects to fire. Whoever (wounded soldier, combatant or medical and auxiliary personnel) fell into enemy hands, was taken as prisoner.[22]

Henry Dunant, a young swiss businessman, who had arrived at nearby town by Castiglione shortly after the battle, was horrified seeing the uncountable wounded soldiers abandoned on the battlefield. For days, he and a few other volunteers did what they could to treat the wounded and alleviate the sufferings of the dying. Deeply affected by the misery he had witnessed, he retired for a while from active life and described his experiences in a book entitled *Un Souvenir de Solferino* (A Memory of Solferino) which was published in 1862 and profoundly aroused public opinion throughout Europe particularly in Switzerland. In this book, Dunant made two proposals: the first was to establish in every

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22. Draper, G.I.A.D., 1 The Geneva Conventions of 1949, (1965) 64.

country a volunteer relief society to train and prepare itself in peacetime to assist the army's medical service in time of war; and the second proposal was that the various States should meet in a congress and adopt an inviolable international principle, guaranteed and sanctioned by a convention, to provide a legal basis for the protection of military hospitals and medical personnel.

Within one year of the publication of the book, "A Memory of Solferino", Gustave Moynier, who read the book and was the President of the Geneva Public Welfare Society, convened a meeting of the Society to study Dunant's proposal with a view to translate it into action. A Commission was first appointed and then a five – member Committee consisting of Dunant, Moynier, General Dufour, Doctor Appia and Doctor Maunior. At its first meeting on 17 February 1863, the Committee established itself as a permanent institution under the name of the International Committee to Bring Relief to the Wounded.[23] In 1880, it adopted the name of the International Committee of the Red Cross.[24] Its seat was established in Geneva with its membership confined only to Swiss nationals. Although it is national in composition, the Red Cross is international in character and activity and is now deeply established in humanity's conscience as a lighted candle of love amidst the encircling gloom of terror and horror. The soul of the Red Cross is alleviation of suffering, national or international. Dunant is, therefore, generally recognised to day as the founder of the Red Cross movement.

The second proposal of Hanry Dunant was implemented (within two years of the publication of his book titled A Memory of

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23. Dunant, Andre, History of the International Committee of the Red Cross (Geneva, 1985) 6.

24. All brances use the symbol of the Red Cross on a white ground, except Muslim branches which use the Red Crescent. The Diplomatic Conference, convened in Geneva in 1929, recognised the right of Muslim countries to use a red crescent in place of a red cross. But Iran first used a Red Lion and Sun as the symbol which it abandoned in 1980 in favour of the red crescent.

Solferino) with the adoption of the (First) Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field on 22 August 1864. The Convention, which was adopted by the Diplomatic Conference convened by the Swiss Federal Council at the request of the Geneva Committee in which 26 official delegates representing 16 States were present, was the starting point for the whole of humanitarian law. It provided first the legal basis for the neutralisation and the activities of army medical units on the battle field as proposed by Henry Dunant. The Convention, which contains only ten articles, has four important features:

In the first place, in war on land, ambulances and military hospitals would be recognised as neutral and, as such, protected and respected.

Secondly, the hospital and ambulance personnel would have the benefit of the same neutrality when on duty.

Thirdly, civilians coming to the assistance of the wounded were to be respected; wounded and sick combatants, to whatever nation they may belong, shall be collected and cared for.

Finally, hospitals, ambulances and evacuation parties would be distinguished by a uniform flag bearing a red cross on a white ground.

Thus the 1864 Convention, which provided for the first legal base to international humanitarian law and principally meant to protect wounded soldiers during the war on land, was accepted in an exceedingly short time by all the then independent States, and by the United States in 1882. In 1906, the first revision of the Geneva Convention of 1864 was made on the recommendation of the International Committee of the Red Cross increasing the number of articles (from ten) to thirty-three. The amended Convention of 1906 explicitly stated that the wounded and sick were to be respected which had been implicit (mentioned in articles 1 and 6) in the original Convention of 1864.

The First World War began fifty years after the adoption of 1864 Geneva Convention. This War was a serious test for the law of Geneva. The Diplomatic Conference, convened in 1929 in Geneva, revised the text of 1906 Geneva Convention taking into account the experience of the First World War. This (amended) 1929 Convention contains provisions concerning medical aircraft, and the extension of the use of the emblem to the peace time activities of the Red Cross Societies. The Conference also added a new Convention to the law of Geneva i.e. the Convention on the Treatment of Prisoners of War, which provided for the better protection of the prisoners of war. The newly adopted Convention introduced a categorical ban on reprisals against prisoners of war.[25]

The Second World War was a macro-scale disaster with scenes of savagery which no eye had seen before, no heart conceived ever, and no human tongue could describe the desperate theatres of terror. Fifty million persons were killed, of which, as it was estimated, 26 million were members of the armed forces and 24 million were civilians. Not only combatants and non-combatants were killed, they were tortured, interned, deported and subjected to systematic inhuman treatment. The existing humanitarian law proved to be incomplete and ineffective during the Second World War and the global holocaust had a seminal impact of awakening human kind to the urgency and adequacy of forbidding and punitively dealing with belligerent barbarity in the name of human dignity and peaceful progress of all peoples. The three Geneva Conventions (one of 1907 and two of 1929) in force had to be revised and a convention for the protection of civilians, the absence of which had led to grievous consequences, to be adopted.

The Diplomatic Conference for the Establishment of International

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25. It should be kept in mind that the treatment of prisoners of war was at that time (in 1929) governed not by the Geneva Convention but by the Regulations annexed to the Hague Convention of 1907 (No. IV).

Conventions for the Protection of Victims of War, convened by the Swiss Federal Council, as trustee of the Geneva Conventions, was held in Geneva from 21 April to 12 August, 1949. Of the sixty-three Governments represented at the Conference, fifty-nine had sent plenipotentiaries; four sent observers only. Representatives of the International Committee were invited to participate in the capacity of experts.

After four months of continuous debate on 12 August 1949, the Geneva Conference adopted four new Conventions, for the protection of the victims of war. These Conventions were the result of lengthy consultation which the ICRC had undertaken on the strength of its experiences during the Second World War. They were the work not only of legal experts and military advisers, but also of representatives of the Red Cross movement. The newly adopted four Geneva Conventions substituted the earlier three Conventions providing improved versions of many existing rules and filling lacunae The law of Geneva was enriched by an entirely novel Convention (i.e. the Fourth Geneva Convention) on the protection of civilian persons in time of war. Thus the four Geneva Conventions deal with the wounded and sick on land; the wounded, sick and shipwrecked at sea; the prisoners of war; and the civilians.

The four Geneva Conventions of 1949 began to show shortcomings during the course of year. The two Additional Protocols to the Geneva Convention were adopted in June 1977 in the Diplomatic of Conference held in Geneva for the protection of victims of international armed conflicts (Protocol 1) and of the victims of internal armed conflicts (Protocol II).

(vii) Humanitarian Conventions: Law of The Hague (the Law of War)

The Law of The Hague not only includes the law of war adopted in the Hague but also the law not bearing the name of the Netherlands city, such as the St. Petersburg Declaration of 1868, prohibiting the use of certain projectiles in time of war and the

Geneva Protocol of 1925 condemning asphyxiating, poisonous or other gases and bacteriological methods.[26]

The St. Petersburg Declaration, adopted in the Conference convened by the Russian Tsar in St. Petersburg, prohibited the use of explosive projectiles in time of war weighing less than 400 grammes. Although these explosives projectiles were not more effective than ordinary rifle bullets, it caused far graver wounds and, as such, greatly aggravated the sufferings of the victims. The motivation for the prohibition of the use of explosive projectiles during war stemmed from the notion of what was perceived as civilised. As it was mentioned in the preamble to the Declaration: "considering that the progress of civilisation should have the effect of alleviating as much as possible the calamities of war." The importance of the Declaration also lies in the fact that it obliged, as it was stated in the preamble, the belligerents to limit the use of force in meeting a legitimate military objective : "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy."

In 1899, the Convention with respect to the Laws and Customs of War on Land, with annexed Regulations, was adopted in the First Peace Conference held in The Hague. It was adopted, as it was mentioned in the preamble to the Convention, "Animated by the desire to serve ... the interests of humanity and the ever increasing requirements of civilisation ..." The Hague Regulations of 1899 prohibited the use of poisonous gasses in war. The Conference, convened by the League of Nations in 1925, adopted the Protocol prohibiting the use of poisonous gasses and bacteriological methods of warfare, which has become a rule of customary international law and is therefore binding on all States.

Of the 13 Conventions adopted at the Second Peace Conference held in 1902 in the Hague, the most important for the development of international humanitarian law was the Hague Convention No.

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26. Supra note 1, 11.

IV of 1907 concerning the laws and customs of war on land, with annexed Regulations, which was, in fact, a revision of the Convention and Regulations of 1899. The preambular paragraphs to the Hague Convention No. IV contain one sentence which speaks of balancing military necessity against the requirements of humanity and, as such, forms the basis of the Convention and makes it one of unique importance.

The (Frederic de) Martens Clause, so called after the Russian representative in the Conference who was a Professor of International Law at the University of Petersburg, stipulates that in cases not covered by the rules of law, "the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established by the civilized peoples, from the laws of humanity, and the dictates of public conscience." The Martens Clause constitutes a "legal safety net" : where there are loopholes in the rules of positive law, then a solution based on basic humanitarian principles must be found.

The Hague Regulations respecting the Laws and Customs of War on Land codified the law of war and contains particularly rules on the treatment of prisoners of war, on the conduct of military operations -- with an important chapter on the "Means of Injuring the Enemy, Sieges and Bombardments" - and on occupied territory. In its judgment of the major Nazi war criminals, the Nuremberg Tribunal considered that these Regulations had become part of the international customary law and were therefore binding on all States[27], which remains true even to this day.

III. Principles and Contents of International Humanitarian Law

The historical development of international humanitarian law shows that it is consisted of Conventions, Declarations, Regulations

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27. XXII, Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 497.

etc. adopted mainly in Geneva and The Hague, agreements between States and customary law. Although the UN (established in 1945) showed the same indifference as the League of Nations towards the further development of the international humanitarian law, in 1946 the General Assembly of the United Nations reaffirmed in Resolution 95(1) the principles contained in the London Agreement (August 1945) for the prosecution and punishment of major war criminals, as reformulated by the International Military Tribunal in its judgment (and therefore usually referred to since as the "Nuremberg Principles"), generally valid principles of international law.[28] Later, the principal progressive step taken was the adoption, through an International Conference held in 1954 at the Hague under the auspices of the UNESCO, of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts. Cultural property of perpetual value is a global asset which shall not be a prey to the ravages of war. The UNESCO has been given the charge to implement the provisions of the Convention. Since the existing humanitarian law didn't provide for restrictions concerning the use of certain conventional weapons, a special Conference of the UN adopted, on 10 October 1980, the Convention on *Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects,* and its three protocols, on the basis of preparatory work done by the ICRC. It aim is to limit the use of certain particularly grim weapons. The General prohibition of the law of The Hague and of Article 35 of Additional Protocol to the Four Geneva Conventions

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28. Kalshoven, Frits, supra note 18, 18-19. The Charter of the International Military Tribunal defined three categories of war-crimes, namely, crimes against peace, war-crimes, and crimes against humanity. It also stated the principle of individual criminal liability, notably that the official position of the defendants would not be considered as freeing them of responsibility or mitigating punishment. It was also stated that the plea of superior orders would not free a defendant from responsibility but might be considered in the mitigation of punishment if the Tribunal determined that justice so required.

of 1949 is thereby given concrete form and made into specific prohibitions that can be applied in practice. The protocols deal with incendiary weapons, mines and non-detectable fragments.

Thus these two Conventions – the Hague Convention for the Protection of Cultural Property and the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons – also constitute an important part of international humanitarian law.

The United Nations, in its sweeping concern for human rights, in the course of time has also shifted its focus from human rights in times of peace alone to human rights in times of peace as well as war. The United Nations has found justification for this shift in the Charter of the United Nations whose madate is the protection and promotion of human rights without any distinction as to peacetime and wartime. The shift in the focus of the United Nations has conferred the status of human rights on international humanitarian law which applies in the event of armed conflicts. In December 1968, twenty years after the adoption of the Universal Declaration of Human Rights, the General Assembly adopted a resolution entitled "Respect for Human Rights in Armed Conflicts" and invited the Secretary-General to carry out studies in consultation with ICRC in this regard. This close interaction between the UN and the ICRC is a strong foundation for the humanitarian law of armed conflicts in contemporary circumstances.

However, it should be mentioned that the four Geneva Conventions of 1949 and its two Additional Protocols of 1977, which contain more than 600 Articles, no doubt represent, at least as far as size is concerned more than three quarters of the law of war in existence today. The four Geneva Conventions are:

I. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August, 1949.

II. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces

at Sea, of 12 August, 1949.

III. Geneva Convention relative to the Treatment of Prisoners of War, of 12 August, 1949.

IV. Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August, 1949.

The first three Conventions cover well-known topics, namely protection of the wounded and sick on land; the wounded, sick and shipwrecked at sea; and prisoners of war. The Fourth Geneva Convention, however, breaks a new ground in that it protects two categories of civilians in particular; enemy civilians in the territory of a belligerent party and the inhabitants of occupied territory; categories of civilians, that is, who as a consequence of the armed conflict, find themselves in the power of the enemy. The purpose of the new provisions was, to some extent, to prevent civilians from becoming the direct victims of war. The Fourth Geneva Convention is the evidence that the international community had learned from the failure since it is common knowledge that the worst crimes during the Second World War were committed against civilian persons in occupied territory.

Thus the Fourth Geneva Convention is a constructive contribution in the humanitarian dimension to international law. This new Convention is an elaboration which runs into several Articles and prohibits in particular:

(a) "Violence to life and person, in particular, torture, mutilations or cruel treatment.

(b) The taking of hostages.

(c) Deportations.

(d) Outrages upon personal dignity, in particular humiliating or degrading treatment, or adverse treatment founded on differences of race, colour, nationality, religion, beliefs, sex, birth or social status.

(e) The passing of sentences and the carrying out of executions

> without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees recognised as indispensable by civilised peoples."

The 1949 treaties also led to a further extremely important development: the extension of the protection under humanitarian law to the victims of civil wars. The Geneva Conventions are, in fact, founded on the idea of respect for the individual and his dignity. Persons not directly taking part in hostilities and those put out of action through sickness, injury, captivity or any other cause must be respected and protected against the effects of war; those who suffer must be aided and cared for without discrimination. In particular, Article 3 common to the four Geneva Conventions stipulates that those persons who do not take part directly in the hostilities be treated with humanity in all circumstances. It also prohibits threats to their lives, their physical integrity and their dignity. In addition, international humanitarian law prohibits the forced displacement of civilians.

The diplomatic Conference attended by the representatives of 102 States on the Reaffirmation and development of International Humanitarian Law applicable in Armed Conflicts, held in Geneva from 1947 to 1977, adopted the two Protocols additional to the Geneva Conventions on 8 June 1977. The two Additional Protocols, which have supplemented are:

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I);

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

The Additional Protocols extend this protection to any person affected by any international or non-international armed conflict.

The injunctions imposed by international humanitarian law on the civilian and military authorities are numerous and specific.

Common Article 3 and Additional Protocol II expressly prohibit twenty-three different acts, ranging from murder and torture to the threat of indecent assault. Types of behaviour other than those expressly prohibited can also be considered to implicitly forbidden by the general obligation of human treatment set forth in both instruments.

The four Geneva Conventions of 1949 entered into force on 21 October, 1950. They have almost received universal ratification: the number of State Parties to the Geneva Conventions is 188. Out of 185 State Members of the United Nations, only three States – Urethra, Marshall, Nauru – are not parties to the 1949 Geneva Conventions. The 1977 Protocols entered into force on 7 December, 1978. The numbers of State Parties to the Additional Protocol I and Additional Protocol II are 150 and 142 respectively. Bangladesh, which became State Party to the four Geneva Conventions on 4 April 1972, is the first SAARC country to become the State Party to the Protocols on 8 September 1980. The only other SAARC country which followed the path of Bangladesh is Maldives which became State Party to the Protocols on 3 September 1991. But unlike India, the Parliament of which passed the Geneva Conventions Act, 1960 to enable effect to be given to International Conventions done at Geneva on twelveth of August 1949," Bangladesh has not yet adopted any law to fulfil its obligations. Under the four Geneva Conventions, the High Contracting Parties are obliged, *inter alia,* to:

- respect and to ensure respect for the Conventions in all circumstances;[29]
- enact legislation necessary to provide effective penal sanctions "for persons committing or ordering to be committed any of the grave breaches" of the Conventions as defined under the Conventions;[30]

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29. Art. 1, common to all the four Conventions.
30. Art. 49 of the First Convention, Art. 50 of the Second, Art. 129 of the Third and Art. 146 of the Fourth Convention.

- take measures necessary "for the suppression of all acts contrary to the provisions" of the Conventions other than grave breaches;[31]
- take measures necessary "for the prevention and suppression, at all times, of the abuses" of the emblems – the red cross, the red crescent and the red lion and sun.[32]

However, the entire body of written and unwritten international humanitarian law is anchored in a few fundamental principles by a group of legal experts from the ICRC and the Federation of Red Cross and Red Crescent Societies, which form part of the foundation of international law. Those principles do not, however, take precedence over the law in force, nor do they replace it. Rather, they highlight guiding principles and thereby make the law easier to understand. These fundamental rules of humanitarian law applicable in armed conflicts are:

"1. Persons *hors de combat* and those who do not take a direct part in hostilities are entitled to respect for their lives and physical and moral integrity. They shall in all circumstances be protected and treated humanely without any adverse distinction.

2. It is forbidden to kill or injure an enemy who surrenders or who is *hors de combat.*

3. The wounded and sick shall be collected and cared for by the party to the conflict which has then in its power. Protection also covers medical personnel, establishments, transports and *materials.* The emblem of the red cross (red crescent, red lion and sun) is the sign of such protection and must be respected.

4. Captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity,

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31. Para 3, Id.

32. Art. 54 of the First Convention and Art. 45 of the Second Convention.

personnel rights and convictions. They shall be protected against all acts of violence and reprisals. They shall have the right to correspond with their families and to receive relief.

5. Everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be held responsible for an act he has not committed. No one shall be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment.

6. Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.

7. Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare the civilian population and property. Neither the civilian population nor civilian persons shall be the object of attack. Attacks shall be directed solely against military objectives.[33]

IV. Conclusion

The foregoing discussion reveals that international humanitarian law was mostly developed in Geneva and it was developed at a time when recourse to force was not illegal as an instrument of national policy; when there was no disgrace in beginning a war. The religions values, writings of political and legal thinkers, and customary rules of warfare laid down the basis on which this branch of international law developed. The aim of the international humanitarian law is to protect and safeguard the dignity of the human beings in extreme situation of armed conflicts. The motivation for restraint in behaviour during war stemmed from notions of what was considered to be honourable and, in the 19th

33. International Review of the Red Cross (1978) 248-249.

century in particular, what was perceived as civilised. Although the objective of humanitarian law is to protect combatant as well as non-combatant in armed conflicts, what baffles international community today is its implementation.

The main question at issue in humanitarian law is to balance humanity against military necessity which we have failed to achieve to a great extent. Ironically there are numerous examples of violations of international humanitarian law in conflicts around the world. Ever increasingly the victims of warfare are civilians. So many people have not been saved. However, there are important cases where international humanitarian law has made a difference in protecting civilians, prisoners, the sick and wounded and restricting the use of barbaric weapons. Undeniably, countless people have received protection under the Geneva Conventions. Geneva Conventions have become now bulwark against the harshness, hardship and horror of war. The Humanitarian Conventions have been tuned to the current needs of a warring world with no holds barred and adapted to defend bleeding mankind victimised by victory through massacre. The finest hour of Humanitarian Law of the four Geneva Conventions, which are central to international humanitarian law to defend human dignity in war and among the most widely ratified treaties in the world, will arrive when, in the field of human conflict or calamity, the sick and wounded, the innocent civilians and helpless victims of armed conflict, find a source of justice and a means of rescue and hope. The Conventions do not contain the last words in the field of international humanitarian law. On the contrary, it is essential that this body of law should benefit from the new experience gained during each armed conflict and should take into account weapons developments and humanitarian problems of modern times. Let us "call upon the living for them to break the thunderbolts of war and tyranny". Our goal is human survival in war and the protection of human dignity, a cherished goal to be achieved in years to come.

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INTERNATIONAL CRIMINAL COURT (ICC) : REVISITING ITS COMPOSITION AND COGNIZANCE PROCEDURE

Dr. Mizanur Rahman

1. Introduction

Armed conflicts and serious violations of human rights and humanitarian law continue to victimize millions of people throughout the world. In such a scenario, the reasons for an international criminal court are compelling. Today's conflicts are often rooted in the failure to repair yesterday's injury. Unless the injuries suffered by the victims and their families are redressed, wounds will fester and conflicts will erupt again in the future. Accountability is, therefore, an indispensable component of peace building. But while the hitherto dominant trend in international law favoured accountabilitiy i.e. responsibility of states, establishment of the ICC ushers in a new dimension of international posibility responsibility of individuals for commission of "most serious crimes of concern to the international community", namely genocide, crimes against humanity, war crimes and aggression.

Liability of individuals for committing such heinous crimes and violations of human rights is not totally new in international law. More than half a century ago, it was accepted by the international community that,

> "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[1]

Accepted though it was as a maxim of jurisprudence, states were reluctant to put it into practice apprehending that criminal

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1. International Military Tribunal at Nuremberg, Judgement, 1 October, 1946.

responsibility of individuals under international law might divulge state sovereignty and in a world of sovereign nation states, few were prepared to sacrifice sovereignty.[2] The establishment of the ICC is a clear mark to the fact that we live in a world of new interstate relations where state sovereignty is becoming increasingly restricted and eroded. Today, the international community, acting through the UN for example, is capable of imposing serious sanctions vis-a-vis a recalcitrant/ perpetrator state. But experience shows that very often this is not sufficient. The example of Yugoslavia is a glaring example to this. Sanctions imposed by the international community against that state have seriously affected the peace-loving common people of the state, it is the people and not President Slabodan Milosevic—accused of flagrant human rights violations, who had to suffer the heat and onslanght of NATO bombings. It is therefore, extremely essential that leaders be brought to justice. The ICC has been established to ensure such inividual accountability.

Thus we find that, for crimes against peace, humanity and war crimes, states would have international responsibility and individual physical persons would bear criminal liability.[3] The institution entrusted with the jurisdiction to attain this objective is the ICC. However, from the time of initial negotiations it was very widely believed that in order to be "independent, fair and effective judicial Institution" the ICC must meet the following seven benchmarks;[4] (1) a jurisdictional regime free of any state consent requirement, (2) independence from the Security Council, (3) an ex-officio prosecutor, (4) qualified deference to state claims of jurisdiction (complimentarity) (5) authority over war-crimes whether committed in international or non-international conflicts,

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2. More on this see J.G. Starke Introduction to International Law.
3. I.I. Lukashuk, A.B. Naumov, International Criminal Law, (in Russian), Moscow 1999, p. 96.
4. Human Rights Watch, Summary of the Key Provisions of the ICC Statute. http://www.hrw.org/hrw/campaigns/icc/icc-statute.htm

(6) clear legal obligation for state parties to comply with court requests for judicial co-operation; and (7) the highest standards of international justice respecting the rights of the accused and appropriate protection for witnesses. Only a thorough examination of the ICC statute might reveal how far these qualities have been reflected and accomodated there.

In my paper, I will focus, albeit briefly, on composition and trigger mechanism of the ICC, and examine the intricate relationship that the ICC is thought to posses with the Security Council of the UN. The study, therefore, will not deal with all the benchmarks of the courts composition and procedure.

2. Composition of the ICC

Under the Rome statute, the ICC has four organs : (1) the Presidency; (2) an Appeals division, a Trial Division and a Pro-Trial Division; (3) the office of the Prosecutor and (4) the Registry.[5]

The President together with the First and Second Vice Presidents, who are to be elected from amongst the judges, constitute the Presidency. The Presidency is responsible for the proper administration of the court and other functions conferred upon it in accordance with the statute.[6] In discharging its responsibility, the Presidency "shall co-ordinate with and seek the concurrence" of the Prosecutor on all matters of mutual concern.[7]

The Prosecutor heads the office of the Prosecutor which acts independently as a separate organ of the Court and is responsible for receiving referrals from the State-party and the Security Council and any substantial information on crimes within the jurisdiction of the Court, for examining them and for conducting

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5. Article 34, Rome Statute of the International Criminal Court, 17 July 1998, A/CONF, 183/9 (hereinafter referred to as Rome Statute).
6. Article 38, Rome Statute.
7. Article 38 (4), Rome Statute.

investigations and prosecutions before the court.[8] The Prosecutor is elected by secret ballot by an absolute majority of the members of the Assembly of State parties and is assisted by one or more Deputy Prosecutors to carry out any of the acts required of the Prosecutor under the statute.

The Court will consist of 18 judges (article 37) with a possibility to increase the number to cater for the court's increased workload[10] or decrease the number at a later period with reduction in the workload, but in no case the total number shall be less than 18.

3. Qualification, Nomination and Election of Judges

Under the Statute, judges are to be chosen from persons of high moral character, impartiality and integrity, who possesses the qualifications required in their respective countries for appointment to the highest judicial offices.[11] In addition, each candidate for election to the Court must have either established competence in criminal law and procedure as well as experience in crimial proceedings as a judge, prosecutor or advocate[12] or alternatively, competence in relevant areas of international law, such as human rights or international humanitarian law, and extensive experience in a professional legal capacity relevant to the judicial work of the court.[13]

The nomination and election procedures contained in Article 37 of the Statute are rather cumbersome. Under the Statute, candidates for election to the Court may be nominated by any state Party to the Statute but they are limited to nationals of a State Party.[14] A State Party may choose to follow its own procedure for nominating

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8. Article 42, Rome Statute.
9. Ibid.
10. Article 36(2), Rome Statute.
11. Article 39(4), Article 36 (3), Rome Statute.
12. Ibid, Article 36 (3) (b) (i), Rome Statute.
13. Ibid, Article 36 (3) (b) (ii), Rome Statute.
14. Article 36 (4), Rome Statute.

candidates for appointment to the highest judicial office. Or alternatively, a State may decide to follow the procedure used for nominating candidates through national groups for the International Court of Justice.[15] Pursuant to the Statute, for the purposes of the election, two lists of candidates will be prepared corresponding to the two categories of qualifications mentioned in Articls 36 (3) (b) (ii) (iii). Elections would be conducted on the basis of two lists and that a majority of the judges for the Pre-trial and Trial chamber's would be drawn from the list of candidates who had criminal trial experience. At the first election, at least nine judges would be elected from such a list and five from a list of candidates with competence in international law. Subsequent elections would also be organized in such a way as to maintain the equivalent representation of the two categories. In all cases, the election of judges would be by secret ballot at a meeting of the Assembly of State Parties.[16]

4. Representation of Principal Legal Systems and Geographical Representation

Under the Statute, in the election of judges, State Parties have to take into account the need within the membership of the Court for the representation of the Principal legal systems of the world, equitable geographical representation and a fair representation of female and male judges. They will also have to take into account the need to include judges with legal expertise on specific issues, including but not limited to violence against women and children.[17]

It seems quite pertinent to compare this provision with similar provision of the Statute of the ICJ. The latter recognizes the consideration that in the body as a whole the representation of the main forms of civilization...' should be assured.[18] The accepted

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15. Article 36 (4) (a) (i) and (ii), Rome Statute.
16. Supra note 3 at p. 105.
17. Article 36 (8) (a) and (b), Rome Statute.
18. Article 9, Statute of the International Court of Justice.

view, however, is that this element is already covered by the requirement that states take into account geographical representation as well as the principal legal systems of the world.

It is interesting to note that the statute mentions, the formula of equitable geographical representation, as opposed to equitable distribution— a notion followed in the Statute of the International Tribunal for the law of the sea (Article 2).[19] The statute accepted the view that universality of the court in essence requires that its composition must reflect an equitable geographical representation. Whether this is really the case is yet to be seen.

5. Gender Balance and Legal Expertise on Specific Issues

In the process of selection of judges the ICC statute makes it incumbent upon the State parties to take into account the need for "a fair representation of female and male judges" and incldue "judges with legal expertise on specific issues, including but not limited to, violence against women or children"[20] The inclusion of both these considerations is novel and progressive in the statutes of international courts and tribunals.

The statute as a matter of fact evades any situation of 'quotas' in respect to composition of the judges. While maintaining a fair representation of female and male judges', it makes it a necessity to select the judges on the basis of merit.

6. Office of the Prosecutor

An effective international court requires not only a prosecution who is independent and able to access necessary information, but an international framework which ensures that he is able to make vital decisions without undue pressure or restraint. Under the

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19. See, Medard R. Rwelamira, Composition and Administration of the Court. In : Roy S. Lee (ed) The International Criminal Court. The Making of the Rome Statute, Kluwer, 1999, p. 166.

20. Article 36 (8) (a) (iii), Rome Statute.

statute, the office of the Prosecutor acts independently as a separate organ of the court.[21] and will be elected by an absolute majority of the members of the Assembly of State Parties.[22]

The office of the Prosucutor is also given operational independence. The Prosecutor has full authority over the management and administration of the office including staff facilities and other resources.[23] The statute provides for the appointment of one or more full-time Deputy Prosecutors.[24] Both the Prosecutor and Deputy Prosecutor are to be persons of high moral character, competent and with extensive practical experience in the prosecution and trial of criminal cases.[25]

7. 1. Initiating An Investigation

The Initiating mechanism of the ICC which comprised one of the most contentious points of discussion among the negotiating parties, provides a compromise solution which on the one hand, makes the ICC a potentially viable organ for international criminal justice, and on the other, imposes certain restrictions on independent functioning of the court by putting it at a peculiar dependency relation with the Security council of the UN.

Pursuant to the Statute, the ICC Prosecutor can investigate allegations of crimes not only upon referral from the Security council and state parties, but also on information from victims, non-governmental organizations or any other reliable source.[26]

7.2. Role of the Security Council

Article 13(b) of the Statute provides that the ICC may exercise its jurisdiction with respect to a crime referred to in Article 5 of the

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21. Article 42, Rome Statute.
22. Article 42 (4), Rome Statute.
23. Article 42 (2), Rome Statute.
24. Ibid.
25. Article 42 (3), Rome Statute.
26. Article 15, Rome Statute.

statute if "a situation in which one or more of such crimes appear to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations." That the Security Council can legitimately trigger an investigation by referring a situation to the Prosecutor does not give rise to any doubt ever since the 1995 decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Tadic case*.[27]

7.3. Deferral of Proceedings by the Security Council

Article 16 of the Statute stipulates that investigations on prosecutions triggered by whatever means and administered by the prosecutor can be stopped or prevented if the council adopts a rosolution under chapter VII of the UN charter making a request to that effect. The suspension or prevention of such proceedings will also be limited to a renewable 12 month period.

The reference to the 12-month time-limit might raise the possibility of a conflict if, for instance, a council resolution requests an indefinite duration or a duration in excess of 12 months. In those circumstances, the primacy of UN Charter obligations would appear to require States Parties to give effect to decisions of the Security Council pursuant to Articles 25 of the Charter over conflicting rights and obligations under the Statute. Article 103 of the Charter of the United Nations provides that, in the event of a conflict between the obligations of the members of the UN under the charter and their obligations under any other international agreement, their obligations under the charter prevail. While the Court, as a non-party to the charter, would not be bound to refrain from proceeding after the expiry of 12 month period, states parties to the Statute might, depending on the terms of the Security Council Resolution, be prevented by the provisions of the charter from other triggering proceedings before the Court or rendering co-operation to the Court under the Statute.

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27. *The Prosecutor V. Dusko Tadic*, opinion and Judgement 1 No. IT-94-1-T (Feb. 3,1995), reported in 1L.M. 32 (1996) at pras. 28-48.

7.4. Prosecutor's Ex-officio Powers for Triggering Jurisdiction

The ex-officio provisions are arguably the most important of those that give the victim and survivors a role in the ICC process, by enabling them to trigger investigations. It is believed that the *proprio motu* role of the Prosecutor is a key feature of an independent and effective criminal court.[28] This necessitated to cloth the Prosecutor with ex-officio powers for triggering the jurisdiction of the Court.

If the prosecutor himself decides that the case should not proceed, he must go back and inform the source of the original information. If the decision is that there is a reasonable basis to proceed with an investigation, this is then subject to pre-trial judicial approval. This judicial review mechanism is not, however, an opportunity for state or individual suspects to challenge admissibility. Ex-officio powers of the Prosecutor may be exercised only upon consideration of factors that include inter alia "interests of justice"[29] A decision based on the interests of justice does not in any case become effective until the pre-trial chamber confirms it. Investigative powers of the prosecutor are also quite limited placing them, basically, on the good-intentions of the state authorities concerned.

Thus, the ICC Statute has achieved a delicate balance between the search for international justice which will punish individual perpetrators committing serious crimes on the one hand, and the need for maintenance of international peace and security as set out in the UN Charter.

8. Conclusion

An evaluation of the composition and trigger mechanism of the ICC must take into account the fact that it is not without reasons that it took the General Assembly of the UN 50 years to break the

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28. Articlo 15 (1), Rome Statute.
29. Supra note 4.

impasse on creating a criminal court.[30] The subject-matter of the ICC is the prosecution and enforcement of the law which are carefully guarded sovereign prerogatives. Unless states are prepared to concede some of their power, ICC would be left with the possibility of exercising its competence only in areas which are clearly beyond national jurisdiction (for example in the International SeaBed Area).

Additionally, the ICC subject-matter relates to individual criminal responsibility for the most serious crimes, and is therefore of great concern to persons who may directly or indirectly be involved in making or executing decisions pertaining to military or para-military actions. High officials, both civil and military, therefore, have a particular interest in this matter, though their views and concerns may be very different. All these factors have made the ICC issue very complex and sensitive. States are likely to always take extra precautions to ensure that their national jurisdiction is not impaired by recognizing the jurisdiction, though complimentary of the ICC.

Notwithstanding these impeding factors, the ICC Statute represents enormous progress and also opens up new opportunities.[31]

First, the principle of complementarity makes it possible for the court to fill gaps in situations where national courts are either unable or unwilling to exercise jurisdiction, and at the same time stimulates national courts to exercise their jurisdiction.

Second, the provision for the court's automatic jurisdiction is a welcome departure from the traditional arrangement and represents an important breakthrough in the development of international courts and tribunals.

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30. In the late 1940s, three important human rights projects were before the UN General Assembly for consideration : a universal declaration of human rights, a convention to prevent genocide and an international criminal court. Both the Universal Declaration of Human Rights and the Genocide Convention were adopted in 1948.

31. More on this see Roy S. Lee (ed) The International Criminal Court. The Making of the Rome Statute, Kluwer Law International, 1999, Chapter Eight, Sections II, IV and V, Chapter Ten, Introduction, intra.

Third, the definition of crimes contained in the Statute reflects contemporary and progressive development of international law. The inclusion of sexual offenses and gender-related crimes is an important development. Non-state actors may also be brought to the ICC to be accountable for international crimes. This affirmation of the criminality of non-state actors, it is expected, will furnish a useful deterrent to those who hitherto thought themselves beyond the reach of international law.

Fourth, the Statute's international criminal justice system represents the successful product of harmonization of the distinctive principles, rules and procedures derived from the major legal systems of the contemporary world. This justice system addresses all the major concerns and maintains a delicate balance of the different interests.

Fifth, the creation of the office of the independent prosecutor and the carefully balanced and regulated role of the prosecutor are important innovations and breakthroughs in the fight against impunity and in the enforcement of the law.[32]

Sixth, the statute offers a delicate balance between the search for justice through prosecution and punishment by the court on the one hand, and the responsibility given by the UN charter to the Security Council for the maintenance of peace and security on the other.

In September 1999, Bangladesh became the 3rd signatory of the ICC statute from asian region. Bangladesh itself was a victim of genocide during its Liberation War in 1971. It is therefore, only natural that Bangladesh has a particular interest in the establishment of a permanent international court to ensure that such heinous crimes are not committed in future and perpetrators brought to justice. Bangladesh played an active role in the making of the ICC and it is hoped that it would continue to play this role in the functioning of the court in the near future.

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32. More on this see Christopher C. Joyner (ed) Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights. Proceedings of the Siracuse Conference, 17-21 September, 1998.

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THE LEGAL STATUS OF THE EMERGING PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

Liaquat A. Siddiqui

Over the last few decades, international community has adopted a good number of environmental principles under various international legal instruments to address major global environmental problems. These principles have significant impact on the development of international environmental regulatory regimes. They form the basis of legal responsibilities formulated under various environmental regimes. Indeed, there is a discerning trend both at the national and international levels to adopt and recognise legal principles especially to meet the normative needs of environmental regulatory system. Although these principles have originated from various sources of national and international law, it is often difficult to define the parameters or precise legal status of these emerging principles.[1] The frequency with which the environmental principles are being endorsed by various national and international organisations suggests the need to enquire into the nature and extent of their present legal status.

Principles are different from rules. Rules may impose obligation dictating what exactly is required. Unlike rules, principles generally provide guidance with reference to a course of action. A rule may be based on a guiding principle even though the former is legally enforceable and the latter is not. It is observed, a 'rule..is essentially practical and, moreover, binding...;there are rules of art as there are rules of government'[2],

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1. See, Ian Brownlie, Principles of Public International Law, Clarendon Press, Oxford, 4th ed., 1990.p.19.
2. D. Bodansky, The United Nations Framework Convention on Climate Change: A Commentary, 18 Yale Journal of International Law, p.501.

while a principle 'expresses a general truth, which guides our action serves as a theoretical basis for the various acts of our life, and the application of which to reality produces a given consequence[3].' It is also observed that principles 'embody legal standards, but the standards they contain are more general than commitments and do not specify particular actions, unlike rules'.[4]

The legal effect of a particular principle depends upon the consideration of a number of factors like its source, its textual context, the specificity of its drafting, and the circumstances in which it is being relied upon including its frequent use in international legal instruments and reliance by international tribunals and state practice. Although principles are found in various materials, Philippe Sands is of the view that principles which are found in a treaty will have a firmer international legal quality than those set out in non-binding instruments. Moreover, a distinction should be drawn between those principles elaborated in the preamble of treaties and other international acts, and those elaborated in the operational parts.[5] Some of these principles reflect rules of customary law; others reflect emerging rules; and yet others reflect ideas or concepts of even less well developed legal status specially when they are intended to be inspirational in effect or reflect future intent. Principles can have three main legal consequences. First, principles can assist in interpreting rules of obligations the meaning of which might not be clear. Secondly, they can provide a basis for the negotiation and elaboration of future international legal obligations. Third in certain areas, they

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3. Id.

4. Id.

5. Philippe Sands, International Law in the Field of Sustainable Development : Emerging Legal Principles, in Winfried Lang (ed), Sustainable Development and International Law, Graham & Trotman / Martinus Nijhoff, London, 1995, p.57. He comments, the 1992 Rio Declaration 'represents the culmination of recent efforts by the international community to define a comprehensive set of principles on international environmental law and policy to achieve sustainable development.' p.57.

can provide specific guidance as rules of customary international law.

This article traces out the legal development of major international environmental principles enshrined in various international environmental legal instruments. It intends to examine the nature and extent of their application in the context of relevant environmental problems. The article especially embarks on an investigation as to the present legal status of a few selected emerging environmental principles. These are (1) Principle of Sustainable Development (2) Principle of Harm Prevention (3) Principle of Common but Differentiated Responsibility (4) Precautionary Principle and (5) Principle of Intergenerational Equity. These principles have been selected because they have played an important role in the recent development of international environmental law especially in the formation of successful environmental regimes.

Principle of Sustainable Development

The principle of Sustainable Development attempts to resolve the conflict between development needs and the protection of environment. The term 'Sustainable Development' came into use following the report of the World Commission on Environment and Development widely known as Brundtland Commission Report, in 1987. It defined sustainable development as, 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.' It contains within it two concepts: (a) the concept of 'needs' in particular the essential needs of the world's poor, to which overriding priority should be given; and (b) the idea of limitations imposed by the state of technology and social organisation on the environment's ability to meet present and future needs.[6]

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6. World Commission on Environment and Development, Our Common Future (Oxford University Press, 1987), p.43.

The World Conservation Union (IUCN) and their partners, in their report 'Caring for the Earth: a strategy for sustainable living' defined sustainable development as, 'improving the quality of human life while living within the carrying capacity of supporting ecosystems'.[7] The Australian national strategy defines Ecologically Sustainable Development (ESD) to be, 'using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased.[8]

The Expert Group Meeting on Identification of Principles of International Law for Sustainable Development, has identified 17 such principles and concepts which include:

-Principle of interrelationship and integration

-Right to development

-Right to a healthy environment

-Eradication of poverty

-Equity

-Sovereignty over natural resources and responsibility not to cause damage to the environment of other States or to areas beyond national jurisdiction

-Precautionary principle

-Duty to co-operate in the spirit of global partnership

-Common heritage of humankind

-Public participation

-Access to information

-Environmental impact assessment and informed decision-making

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7. IUCN,UNEP,WWF, Caring For the Earth: A Strategy For Sustainable Living, Switzerland,1991, p.10.

8. See, Australian National Strategy.

-Peaceful settlement of disputes in the field of environment and development

-Equal, expanded and defective access to judicial and administrative proceeding

-National implementation of international commitments

-Monitoring of compliance with international commitments.[9]

These aforementioned principles represent features of a legal framework supportive for sustainable development. Although the term sustainable development has been widely used in international environmental instruments, there is no generally accepted international legal definition of sustainable development[10]. The recent UNCED (United Nations Conference on Environment and Development) instruments also refer to the principle of sustainable development. Principle 1 of the Rio Declaration, 1992 declares that 'Human beings are at the centre of concerns for sustainable development. They are entitled to a health and productive life in harmony with nature'[11]. Similarly, Principle 4 of the Declaration requires that 'in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'[12]. The Framework Convention on Climate Change, 1992 also refers to the sustainable development principle in the preamble by recognising that 'all countries, especially developing countries, need access to resources required to achieve sustainable social and economic development'.[13]

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9. The meeting was held in Geneva in September 1995. The Report was prepared for the Fourth Session of the Commission on Sustainable Development, April-May 1996, Department for Policy Co-ordination and Sustainable Development, New York.
10. Id.
11. See, Principle 1, Rio Declaration, 1992.
12. See, Principle 4, Rio Declaration, 1992.
13. See, Preamble, Framework Convention on Climate Change, 1992.

Brinie and Boyle have opined that the Icelandic Fisheries case, and the existing fisheries treaties support that there is a customary obligation to co-operate in the conservation and sustainable development of the common property resources of the high seas. The provisions of a growing body of global and regional treaties on international water courses, wildlife conservation, habitat protection, endangered species, protected marine areas, cultural and natural heritage suggest that conservation and sustainable development have acquired a wider legal significance beyond that implied in the Icelandic Fisheries cases. However, in their view, it is difficult to treat these treaty regimes or the limited indication of customary rules derived from case law, as an endorsement of an obligation of conservation and sustainable development of all natural resources in international law. They have refused to assume that comparable obligations apply to areas which fall under national sovereignty such as tropical forests[14].

They observe that there is a lack of consensus on the meaning of sustainable development, or as to how to give it concrete effect in individual cases. In their opinion, the international instruments that adopt the concept do not identify what constitutes sustainable development in any particular context even though they point to the emerging legal status of sustainable development as a principle of international law and the changing status of natural resources and ecosystems which can no longer be regarded as property to be freely exploited. They conclude that 'international law now requires a standard of sustainable development to be met is not untenable; it simply lacks adequate articulation at present for confident generalisations to be made'[15].

In view of the present writer, sustainable development in the

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14. Patricia W. Birnie and Alan E. Boyle, International Law & the Environment, Clarendon Press, Oxford. First Edition, 1992, reprint, 1994, p.122

15. Ibid, p.124. See, also, Handl, 1 Y.I.E.L, 1990, pp. 24-28.

sense that development activities should take place with due consideration of environmental concerns is widely approved by the national and international instruments. Environmental impact assessment (EIA) as a tool of ensuring sustainable development is now recognised by almost all the legal systems of the world. Environmental laws of almost all states require some form of EIA to ensure that development projects do not have any adverse impacts on the surrounding environment. In this regard it should be pointed out that Bangladesh Environment Conservation Rules, 1997 requires such environmental assessment of certain types of projects and industries having significant impact on the environment[16]. EIA is also widely recognised under international instruments. Thus, in view of the present writer, legal recognition coupled with state practices strongly supports the fact that sustainable development has emerged as a rule of customary international law.

Principle of harm prevention

Under this principle states are required to take adequate steps to control, prevent and regulate sources of serious global environmental pollution or transboundary harm arising within their territory or subject to their jurisdiction. Under the customary international law, this principle of harm prevention is also a basis for reparation after the harm has taken place. Support for such an obligation can be found in arbitral and judicial decisions as well as in widely accepted international legal instruments, which establishes a compelling basis for the view that it now reflects a general rule of customary international law.[17] Thus, the well known Trial Smelter arbitration held that, 'no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another.'[18] Similarly, the

16. Rules 7 of the (Bangladesh) Environment Protection Rules, 1997.
17. Philippe Sands, supra, p.62.
18. Trial Smelter Case, (1938-1941) 3 R.I.A.A. 1905.

Court in the Corfu Channel case indicated that it was 'every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states.'[19]

The Principle of harm prevention has also been recognised by international environmental instruments along with the Principle of state sovereignty over natural resources. Thus, Principle 21 of the 1972 Stockholm Declaration while affirming that states have sovereign rights to exploit their own resources pursuant to their own environmental policies, recognises that states have responsibility 'to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or to areas beyond the limits of national jurisdiction'. Similarly Principle 2 of 1992 Rio Declaration reiterates the Principle of state sovereignty over natural resources as well as the obligation not to cause harm to the environment beyond the limits of national jurisdiction. These two principles taken together ensure that the rights of the states over their natural resources in the exercise of permanent sovereignty are not unlimited.[20]

A number of UN resolutions have also recognised the Principle of harm prevention[21]. In addition, many multilateral environmental treaties have adopted these principles of state sovereignty and harm prevention. For example, Principle 21 of the Stockholm Declaration is fully incorporated into the Biodiversity Convention, and Principle 2 of the Rio Declaration is incorporated into the Preamble of the Climate Change Convention and in the preamble of the Ozone Convention. The normative character of the Principle 21 has also been recognised in Articles 192,193, and 194 of the 1982 UN Convention on the Law of Seas (UNCLOS).[22]

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19. ICJ Rep.1949, 22. See also, Nuclear Tests Case (Australia v. France) ICJ Rep. 1974. 388.; Lac Lanoux arbitration, 24 ILR, 1957,101,123.
20. Philippe Sands, supra, p.63
21. UNGA Res.2849 XXVI,1971; 2995 XXVII,1972;2996 XXVII,1972;3281 XXIX,1974;34/186,1979.
22. Birnie and Boyle, supra, p.91

Although the principle of harm prevention generally deals with transboundary harm between states, Birnie and Boyle hold that many recent international instruments require states to protect global common areas, including Antarctica and those areas beyond the limits of national jurisdiction, such as the high seas, deep sea-bed, and outer space.[23]

The main importance of the Principle of harm prevention is that it requires states to take suitable preventive measure which is more than making reparation for environmental damages. The 'due diligence standard' of conduct that is generally used in such situations does not make the state an absolute guarantor of the prevention of harm. It simply considers the effectiveness of the control measures adopted if any, the amount of resources available to the state in question and the nature of the activity that requires control etc, before determining the liability of a state. To mitigate the open-textured nature of the obligation under the due diligence rule, resort can be had to the internationally agreed minimum standards set out in treaties or in the resolutions and decisions of international bodies. Alternatively 'standard of diligence' can be developed by reference to the use of 'best available technology' or similar formulations, such as 'best practicable means.'[24] Thus, Birnie and Boyle are of the view that whether or not they are found in legally binding instruments, it is now often possible to point to specific standards of diligent conduct which in turn can be monitored by international supervisory institutions or employed by international tribunals to settle disputes.[25]

Indeed, almost all scholars agree that the Principle of harm prevention has become a customary rule of international environmental law.

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23. Ibid., p. 191
24. Ibid, pp.93-94. See also, Articles 210 and 211,1982 UCLOS.
25. Ibid., p.94.

Principle of Common but differentiated Responsibility

The Principle of common but differentiated responsibility, in the context of global environmental problems, addresses the equity issue between the developed and developing countries. Rooted in international economic law, the principle was initially applied in the context of GATT rules and latter adopted by environmental legal instruments.

Although the principle acknowledges the common responsibility of states for the protection of the environment, it considers each state's contribution to the creation of a particular problem and its capacity to respond to such problem in determining its qualitative and quantitative obligations under a particular treaty[26].

The implications of the principle are : first, it requires all concerned states to participate in international response measures. Second, it allocates different levels of obligations between and among different states. Thirdly it obliges the developed countries to provide financial and technological support to the developing countries in order to help them comply with the treaty obligations. The principle has been adopted, among others, by the Rio Declaration[27], the Climate Change Convention[28], the Biodiversity Convention[29], and the Montreal Protocol[30]. Thus, in accordance with this Principle, both the Montreal Protocol and the Kyoto Protocol have adopted different sets of obligations for developing countries[31]. They have also established mechanisms for financial and technical support for the developing countries. These

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26. Philippe Sands, supra, p.64.
27. Principle 7, Rio Declaration, 1992.
28. Article 3 (1), Framework Convention on Climate Change, 1992.
29. Preamble, Biodiversity Convention, 1992.
30. Preamble, Article 2, Montreal Protocol, 1987.
31. See, Article 2 of the Montreal Protocol, 1987 and Article 4 of the Climate Change Convention, 1992.

mechanisms make the compliance by developing countries conditional upon the compliance by developed countries to perform their obligation to provide financial and technological support under these treaties.

However, in the view of the present writer, the principle of common but differentiated responsibility has not attained the status of a customary rule of international environmental law for a number of reasons. First, the principle has been recognised only in the context of a few specific global environmental problems. Second, even the negotiating developed countries have constantly refused to make it a precedent.

Precautionary principle

Precautionary principle generally implies that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[32] Although various formulation have been used to express this principle in different international instruments, scholars have identified a number of common elements which could be found in virtually all the instruments which endorsed the precautionary principle. These are:

-the vulnerability of the environment;

-the limitations of science to predict accurately threats to the environment and the measures required to prevent such threats;

-the availability of practical alternatives (both methods of production and products) which enable the termination or

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32. Principle 15, Rio Declaration,192; Alexandre Kiss describes this principle as the most generally acceptable approach. See, Alexandre Kiss, The Rights and Interests of Future Generations and the Precautionary Principle, in David Freestone, and Ellen Hey (eds), The Precautionary Principle and International Law : The Challenge of Implementation, The Hague, The Netherlands,1996,p.27.

minimisation of inputs into the environment; and

-the need for long term holistic economic considerations, which internalise, among other things, the real cost of environmental degradation and the costs of waste treatment.[33]

Precautionary Principle differs from the Principle of harm prevention in that in the latter case the certainty of the environmental damage that would result from a particular action is clearly established, whereas in the former there is a lack of scientific certainty about cause and effect relationship or the extent of possible environmental harm which does not legitimate delaying the imposition of some kind of regulatory mechanism over the activity in question. The Precautionary Principle rejects the so-called assimilative capacity approach to environmental policy and emphasises the use of clean methods of production as well as environmental impact assessment. Thus, there is a shift of focus away from trying to determine the level of pollution which the environment can assimilate to technologies which will eliminate or at least reduce the pollution to the environment.[34]

It requires positive action to protect the environment even before the scientific proof of harm can be made available. The emphasis is on the timing of, rather than the need for, remedial action. From the legal perspective it implies that once a prima facie case is made that a risk exists, then scientific uncertainty works against the potential polluter rather than in his or her

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33. David Freestone and Ellen Hey, Implementing the Precautionary Principle: Challenges and Opportunities, in David Freestone, and Ellen Hey, (eds), Ibid. p. 258. See also, Ellen Hey, The Precautionary Concept in Environmental Law and Policy: Institutionalising Caution,' 4 Georgetown International Environmental Law Review, pp. 303-318,1992.

34. David Freestone, and Ellen Hey, Origins and Development of the Precautionary Principle, in David Freestone and Ellen Hey (ed). The Precautionary Principle and International Law: The Challenge of Implementation, The Hague, The Nathelands,1996.

favour.[35] According to Freestone and Hey the Precautionary principle assumes that the cost of remedial clean-up measures may be prohibitive, or that essential biological life-supporting services may already be irreplaceable if action to protect the environment is taken only when scientific certainty is available. It also argues that current economic accounting methods do not adequately recognise the true costs of resource depletion, frequently underestimating the future environmental costs of substituting man-made systems for damaged natural ones and overemphasising short term economic costs of remedial measures[36]. Since its first explicit formulation at the international level in late 1990 in the Declaration of the Second International North Sea Conference on the Protection of the North Sea,[37] the principle has been adopted by many binding and non-binding international legal instruments including the UNCED instruments. Thus, Rio Declaration,[38] Agenda 21,[39] Climate Change Convention,[40] London Amendments to the Montreal Protocol,[41] Convention on Biological

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35. David Freestone and Ellen Hey, ibid, p.13
36. David Freeston and Ellen Hey, Implementing the Precautionary Principle: Challenges and Opportunities in David Freestone and Ellen Hey (eds) ibid, p.258.
37. David Freestone and Ellen Hey, Origins and Development of Precautionary Principle in David Freestone and Ellen Hey (eds) supra, p.5 observe, 'The first explicit formulation of the precautionary concept at the international level was contained in the Declaration of the Second International North Sea Conference on the Protection of the North Sea (London Declaration), Paragraph VII, London Declaration, London, November 25,1987.
38. Principle 15, Rio Declaration, 1992.
39. Chapter 17, paragraph 17.21.; also chapter 22, para 22.5 (c), Agenda 21.
40. Article 3 (3), Climate Change Convention, 1992.
41. Preamble, paragraph 6 of the Montreal Protocol on Substances that Deplete the Ozone Layer, as amended at the Second Meeting of the Patties to the Montreal Protocol, London 27-29 June 1990, Doc.l UNEP/Os.L.Pro2/ 3,Annex II,p 25. Text in the Y.I.E.L.,1990,vol, 1, pp.591-657.

Diversity,[42] the Second Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution[43] etc. have adopted this principle.

The issue whether the Precautionary Principle has become a rule of customary international law is disputed. Birnie and Boyle observe, 'Despite its attractions, the great variety of interpretations given to the precautionary principle, and the novel and far-reaching effects of some applications suggest that it is not yet a principle of international law. Difficult questions concerning the point at which it becomes applicable to any given activity remain unanswered and seriously undermine its normative character and practical utility, although support for it does indicate a policy of greater prudence on the part of those states willing to accept it'.[44] Similarly Handl noting the various definitional ambiguities of the concept, states that 'at present, the precautionary principle is not a term of art'.[45] However, Cameron and Abouchar observe, 'We argue that the precautionary principle in environmental regulation is now a general principle of international law with sufficient state practice evident to make a good argument that the principle has emerged as a principle of customary international law'.[46]

In view of the present writer, the Precautionary Principle has emerged as a customary rule of international environmental law for a number of reasons. First, although different formulations have been used in defining precautionary principle in various

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42. Preamble, Biodiversity Convention, 1992.

43. Preamble, Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions, 1994 United Nations Doc GE.94.31969.

44. Birnie and Boyle, supra, p.98.

45. Gunther Handl, Environmental Security and Global Change: the Challenge to International Law' in Gunther Handl (ed),Yearbook of International Environmental Law, 1990, p.23.

46. Cameron and Abouchar, The Status of the Precautionary Principle in International Law, in David Freesonte, and Ellen Hey (ed), supra, p.30.

international instruments, we can identify some common elements from all of them such as, threat of non-negligible harm due to regulatory inaction, lack of scientific certainty on the cause and effect relationship, and non-justification of regulatory inaction under such circumstances. These common elements sufficiently defy any allegation of vagueness of the precautionary principle. Second, increasing recognition of the precautionary principle both at the national and international levels supports the view that precautionary principle has emerged as a customary rule of international environmental law. In R v. Secretary of State for Trade and Industry ex parte Duddridge, a UK court accepted that the precautionary principle exists[47]. Similarly, Indian courts have also applied the precautionary principle in recent environmental cases. In Vellore Citizens Welfare Forum v. Union of India & Others, the Supreme Court of India accepted the Precautionary principle as an essential feature of sustainable development. In the Court's view, the Precautionary principle, in the context of the municipal law, means (i) environmental measures--by the State Government and the statutory authorities—They must anticipate, prevent and attack the causes of environmental degradation, (ii) where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures of prevent environmental degradation, and (iii) the 'onus of proof' is on the actor of the developer-industrialist to show that his action is environmentally benign[48]. All these evidences strongly favour the view that precautionary principle is now a customary rule of international law.

Principle of Intergenerational Equity

The Principle of intergenerational equity proposes that the

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47. See, R v. Secretary of State for Trade and Industry ex parte Duddridge et al (unreported case) October 3 1994.

48. In Vellore Citizens Welfare Forum v. Union of India & Others, AIR.1996 VI AD S.C. 577.

members of the present generation hold the earth in trust for future generations and as such they have a duty to utilise and conserve natural resources in such a way that the rights of future generations are not compromised. It requires that the needs of the future generation are to be taken into account by the present generation in their current activities.

Edith Brown Weiss is one of the proponents of this Principle. Her theory focuses on the inherent relationship that each generation has to other generations, past and future, in using the common patrimony of natural and cultural resources of the planet. Each generation is both a custodian and a user of the common natural and cultural patrimony. As custodians of this planet, we have certain moral obligations to future generations which can be transformed into legally enforceable norms. Our ancestors had such obligations to us. As beneficiaries of the legacy of past generations, we inherit certain rights to enjoy the patrimony. This can be viewed as intergenerational planetary rights and obligations.[49]

While identifying three kinds of equity problems between generations such as depletion of resources, degradation in quality of resources and discriminatory access to the use of and benefit from the resources received form past generations, the theory emphasises that for the proper allocation of burdens and fruits between generations, intergenerational equity must extend to the intergenerational context.[50]

The theory of intergenerational equity asserts that all peoples also have a set of intragenerational planetary rights and obligations

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49. Edith Brown Weiss, In Fairness to Future Generations: International Law, Common Patrimony and Intergeneration Equity, United Nations University, Tokyo, 1989, p.21

50. Intergenerational refers to relationships between present and future generation, while intragenerational refers to relationships among members of the present generation.

designed to implement justice between generations.[51] As beneficiaries of the planetary legacy, all members of the present generation are entitled to equitable access to the legacy. In the intragenerational context, intergenerational equity requires wealthier countries to assist impoverished countries in realising such access.[52]

According to Edith Brown Weiss four criteria should guide the development of principles of intergenerational equity. First, the principles should encourage equality among generations, neither authorising the present generation to exploit resources to the exclusion of future generations, nor imposing unreasonable burdens on the present generation to meet indeterminate future needs. Second, they should not require one generation to predict the values of future generations. They must give future generations flexibility to achieve their goals according to their own values. Third, they should be reasonably clear in application to foreseeable situations. Fourth, they must be generally shared by different cultural traditions and be generally acceptable to different economic and political systems[53].

She proposes three basic principles of intergenerational equity. First, each generation should be required to conserve the diversity of the natural and cultural resource base, so that it does not unduly restrict the options available to future generations in solving their problems and satisfying their own values, and should be entitled to diversity comparable to that of previous generation. This principle may be called 'conservation of options.' Second, each generation should be required to maintain the quality of the planet so that it is passed on in no worse condition than the present generation received it, and should be entitled to a quality of the planet comparable to the one enjoyed by previous generations.

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51. Id.
52. Ibid, pp. 27-28
53. Ibid, p.38.

This is the principle of 'conservation of quality'. Third, each generation should provide its members with equitable rights of access to the legacy from past generations and should conserve this access for future generations. This is the principle of 'conservation of access.'[54]

Over the last few decades, increasing number of binding and non-binding international instruments[55] have adopted this principle. International treaties that have adopted this principle include 1946 international Whaling Convention,[56] 1972 World Heritage Convention,[57] 1992 Biodiversity Convention,[58] 1992 Climate Change Convention.[59] It seems that the principle has not yet developed as a rule of customary international law. There are two reasons for this. First, limited recognition of the principle both at the national and international levels. Second, lack of legal modalities to accomodate various interests of future gerenations.

Although reliance on this principle by judicial institutions is

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54. Id.

55. See, Principle 1, Stockholm Declaration,1972; UN General Assembly Resolution 35/8 on Historical Responsibility of States for the Preservation of Nature for Present and Future Generations,' 30 October,1980; Preamble, World Charter for Nature, 1982; Principle 3, Rio Declaration; Principle 2(b),Forest Principles,1992; Agenda 21.(para 8.7).

56. The preamble recognises that the 'interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks'.

57 Under Article 4 the parties agree to protect, conserve, present and transmit cultural and natural heritage to 'future generations.'

58. See, the preamble expresses a determination 'to conserve and sustainably use biological diversity for the benefit of present and future generations,' Biodiversity Convention,1992

59. Preamble expresses a determination 'to protect the climate system for..future generations.' Also, Article 3(1), Climate Change Convention,1992.

not yet significant,[60] many scholars have suggested for various actions including the reformations of the UN system in order to develop appropriate mechanism for the implementation of this principle.

Maxwell Bruce, drawing upon the Maltese proposal to the UNCED preparatory committee, proposes the establishment of an 'office of Guardian for Future Generations.' The guardian would represent future generations at hearings of any agency or tribunal within the jurisdiction of a state, maintain relations with states, specialised agencies and international tribunals, file briefs and other materials, recommend actions and take other appropriate steps.[61]

Dr Emmanuel Agius suggests that the role of the guardian would be not to decide, but to promote enlightened decisions with power of advocacy to plead for future generations.[62] Professor Christopher Stone suggests for a number of distinct guardians for distinct objects such as tropical forests, oceans, whales, etc.[63]

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60. See, Decision of the Supreme Court of the Philippines, Minors Oposa v. Secretary of the Department of Environment and Natural Resources (DENR), 33 ILM 173,1994. In that case, 44 minors and the Philippine Ecological Network, representing their generations as well as future generations, brought an action calling on the defendant to cancel all logging permits in the country on the basis of surveys claming that only 850,000 hectares of virgin old growth rainforest were left in the country which is about 2.8 percent of the entire land mass of the Philippines archipelago. The court stated, 'We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility in so far as the right to a balanced and healthful ecology is concerned'.

61. M. Bruce, 'Draft Instrument Establishing the Role of a Guardian,' in E. Agius, S. Busuttli, et al (eds), Future Generations & International Law, Earthscan, London,1998, pp.163-165.

62. E. Agius, 'Obligation of Justice Towards Future Generations: a Revolution in Social and Legal Thought, Ibid., pp. 3-12

63. C.D. Stone, Safeguarding Future Generations. ibid, pp.65-79.

However Philippe Sands is of the view that 'these important efforts to establish a guardianship function should concentrate on enhancing the contribution of non-governmental actors to the development and application of international laws and standards.' In the line of the UNCED instruments, he suggests for strengthening the role of non-governmental actors including citizen's action at national level for the purpose of implementing the principle of intergenerational equity.[64]

Conclusion

From the above discussion it becomes clear that the Principles of international environmental law enshrined in the multilateral environmental treaties are now at different stages of their formation. A few of them have already become rules of customary international law, while the others are only emerging as such. It is also evident that the scholars maintain contradictory views about their legal status. However, their increasing use by the international community in recent international legal instruments reflects its political commitment to give effect to these principles. States are also using these principles at various forums of their decision making process. In a number of recent conventions and protocols, these principles have been used as a basis of framing out detailed obligations for the parties. An appreciation of the legal status of these principles can be a useful means to examine and understand the obligations of developing countries under various multilateral environmental treaties. No court in Bangladesh has yet relied on these principles in reaching its decision. In FAP-20[65], the Supreme Court of Bangladesh has referred to the Rio Declaration, 1992 which contains a number of these environmental principles. However, it is expected that in near future, once the environmental courts come into operation,[66] these principles will provide to these courts important guidance in the administration of environmental justice in Bangladesh.

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64. Philippe Sands, 'Protecting Future Generations: Precedents and Practicalities,' ibid., pp. 89-90.

65. Dr. Mohiuddin Farooque v. Bangladesh 17 BLD (AD)(1997).

66. See, the (Bangladesh) Environmental Courts Act, 2000.

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MAINTENANCE TO MUSLIM WIVES : THE LEGAL CONNOTATIONS*

Dr. Taslima Monsoor

Definition of Maintenance or Nafaqa

Maintenance is the lawful right of the wife to be provided at the husband's expense with food, clothing, accommodation and customarily extends to other necessaries of life.[1] It is incumbent on a husband to maintain his legally weded wife. The authorisation of the wife to maintenance derives from the injunctions of the Holy Quran, Prophet's Tradition and Consensus of the jurists. In the Holy Quran the husband is ordained to maintain the wife. The Quranic ruling states :

> Men are protectors and maintainers of women Because God has given them more strength then the other, And because they support them from their means.[2]

Once it is due the maintenance of the wife is deemed a debt on the husband from the date of withholding it. Only on payment, such debt is settled under the *sharia.*

The Prophet preached in his last sermon :

> Show piety to women, you have taken them in trust of God and have had them made lawful for you to enjoy by the word of God, and it is your duty to provide for them and clothe according to decent custom.

☆ This is a modified version of a part of the Ph.d Thesis of the author, titled "From Patiarchy to gender equity : Family Law and its impact of women in Bangladesh" from University of London in 1994.

1. Nasir, J. Jamal : *The status of women under Islamic Law.* London 1992, p.59; Hodkinson, Kieth : Muslim Family Law. London 1984, p.147.

2. *The Quran,* LV : 34.

Maintenance of a wife during the subsistence of the marriage is a legal obligation of the husband in Islam.[3] But the *sharia* provision of maintenance of the wife from her husband is conditional. The maintenance is only due to the wife, if she is under a valid marriage contract, if she allows her husband free access or *tamkeen* to herself at all lawful times and if she obeys his lawful commands in the duration of the marriage.[4] When the wife is working against the husband's wishes she becomes a rebellious or disobedient or *nashuza* and is not entitled to maintenance from her husband. A wife is *nashuza* as held in the case of Ahmed Ali v Sabha Khatun Bibi.[5] if without a valid excuse she disobeys his reasonable orders, refuses to cohabit in the house he has chosen, goes on hajj without his consent unless it is obligatory for her to go, takes employment outside the house without his consent, or is imprisoned so as to be inaccessible to him. However, she will not be a disobedient wife if her acts are in reply for her husband's inability to accommodate her in accordance to law or failure to pay prompt dower when demanded or when he has broken the stipulations in the *kabinnama* or has acted with cruelty.[6]

Islamic law grants a Muslim wife right to maintenance from her husband not only during the subsistence of the marriage but also reasonably after dissolution of the marriage.[7] There is no controversy that the husband is bound to maintain the wife during the three months of *iddat* period, but there is a considerable controversy whether the maintenance extends beyond the *iddat* period (see for details below). It has been specifically provided in the Holy Quran that the divorced women shall wait for remarriage for three monthly periods and the woman in *iddat* live in the same

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3. *The Quran,* ii : 29.
4. See for details, Nasir (1992) London, p. 60-65.
5. PLD 1952, Dacca 385.
6. See for details Hodkinon (1984) London, p. 147.
7. *The Quran,* 2 : 228 and 2 : 241.

style as you live, according to your means. It is also provided that for divorced women maintenance should be provided on a reasonable scale.[8]

In cases on maintenance, the courts did not previously provided for past maintenance unless stipulated in the *kabinnama,* nor would allow post-iddat period maintenance to divorced Muslim wives. In Bangladesh, women had to rely on other techniques to secure some post-divorce maintenance. One writer suggested a hopeful trend towards adoption and enforcement of clauses in the marriage contract or *kabinnama* which would clearly and in unambiguous terms provide for maintenance, as this offers protection against arbitrary and capricious subjugation.[9]

The Bangladeshi Judge of the highest level of judiciary have only very recently made celebrated judgment providing for past maintenance for Muslim women in Jamila Khatun Vs. Rustom Ali[10] but how far the decision is being implemented in reality are yet to be analysed. However, the judgment providing for post divorce maintenance in Hefzur Rahman vs. Shamsun Nahar Begum[11] has been recently overturned by the Appellate Division of the Supreme Court of Bangladesh.[12]

In this paper we are first of all concerned with the development of the law of maintenance during the British Indian, Pakistani period and finally the situation of the law in Bangladesh. We are more concerned with the legal connotations of the law than the social implications. However an emperical study of urban and village women will predicate the same picture of deprivation of

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8. *The Quran,* 2:228 and 2:241.
9. Malik, Shahbdeen : 'Saga of divorced women : Once again Shah Banu, maintenance and the scope for marriage contracts' In 42 DLR (1990), Journal, pp.35-40, at p.39.
10. 16 BLD (AD) (1996) 61
11. 47 DLR (1995) 54.
12. 51 DLR (AD) (1995) 172

maintenance. The enforcement of the law of maintenance is highlighted by the case studies not only from the highest tier of the judiciary but also from the lowest to project the attitude of the judges towards women in Bangladesh.

The Law of Maintenance under British India

There is no provision in the Hanafi Code of Muslim law enabling married Muslim women to obtain a decree from the courts dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or certain other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India. The Hanafi jurists, however, have clearly laid down that in cases in which the application of Hanafi Law causes hardship, it is permissible to apply the provisions of the Maliki, Shafi or Hanbali Law. This device to select and combine various elements of different schools of law is known as *takhayyur* or an eclectic choice between parallel rules of the various schools of Islamic Law.[13] This selective process of overcoming divergences was hardly followed. Even though the courts in British India were given powers before 1939 to apply the law of one of the schools of Muslim law in a case in which the parties were followers of different schools, on grounds of justice, equity and good conscience, the courts were reluctant to apply the more liberal rules of Maliki law to parties following other schools.[14] Acting on this principle on 17th March 1939 the Dissolution of Muslim Marriages Act, 1939 (Act VIII of 1939) came into being.

The new Act was an attempt to reinstate liberal Muslim provisions

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13. Layish, Aharon : 'Shariah, Custom and Statute Law in a Non-Muslim State'. In Cuomo, I.E. (ed.) : Law in Multi-Cultural Societies. Jerusalem 1985, p.102; Coulson, N.J. : A History of Islamic Law, Edinburgh 1964, p.185.

14. Hussain, Syed Jaffer : 'Legal Modernism in Islam : Polygamy and Repudiation'. In Journal of the Indian Law Institute. Vol.7, 1965, pp.384-398, at p.396.

which were not contrary to Muslim law. Under sec. 2 (ii) of the Act a wife is entitled to the dissolution of her marriage when her husband has failed to provide for her maintenance for a period of two years. The entitlement of the wife to maintenance depends on the principles of Muslim law. However, there are provisions of the Act which effect substantive changes and in some ways, as claimed by some scholars, contravene the principles of Muslim law. Tahir Mahmood has explicitly described the circumstances in which the husband might have withheld maintenance.[15] In particular, if the wife is nashuza (disobedient) or refractory, under Muslim law she is not entitled to maintenance and so her marriage cannot be dissolved on the ground of the husband's failure to provide maintenance for a period of two years.[16] Further on, it has been held by the courts that a wife who refuses to return to her husband without sufficient cause is not entitled to maintenance.[17] The rulings of the courts are mutually contradictory as they are based on the "fault" theory and contrarily the modern "breakdown' theory.[18] The view that judicial dissolution or *faskh* can be granted irrespective of the wife's faulty conduct has been criticised by some scholars as it is not in consonance with the principle of *Nushuza* under Islamic law.[19]

As we saw under the Hanafi law inability to maintain was not by itself considered as a ground for divorce,[20] whereas under the Act

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15. Mahmood, Tahir : *The Muslim law of India.* 1st ed. Allahabad 1980, pp.97-101, 2nd ed. 1982, 3rd ed. 1987.
16. Rahman, Tanzil-ur : *A code of Muslim personal law* Vol.I, Karachi 1978, p.288.
17. *Majida Khatoon* v *Paghalo Mohammad* PLD 1963 Dhaka 583; *Sardar Muhammad* v *Nasima Bibi* PLD 1966 Lahore 7.
18. Mahmood (1980), p.101.
19. Fyzee, Asaf A.A : *Outlines of Muhammadan Law.* 4th ed. New Delhi 1974, p.172.
20. *Asmat Bibi* v *Samiuddin,* 79 IC 1925 Cal 991 also Manchanda, S.C : *The law and practice of divorce.* Allahabad, 4th ed. 1973, p. 727.

failure to maintain, even on account of poverty, ill-health or imprisonment, is a good ground for the dissolution of the marriage.

The law of Maintenance in Pakistani period

The statutory law regarding the issue is found under section 9 of the Muslim Family Laws Ordinance of 1961 (this Ordinance will be regarded in the paper as MFLO). The Arbitration Council was also given powers by the MFLO in the areas of family law,i.e. a wife's claim of maintenance. It stated under section 9 (1) of the MFLO that if any husband fails to maintain his wife adequately, the wife may apply to the Arbitration Council, who shall specify the amount which shall be paid as maintenance by the husband. Appeal may be made to the Sub-divisional Officer under section 9 (2) of MFLO within 30 days (under section 16 of the Muslim Family Law Rules, 1961) and his decision will be regarded as final.[21]

The Arbitration Council could issue a certificate specifying the amount which the husband has to pay as maintenance. There are no specified rules by which the quantum of maintenance could be determined. The amount of maintenance to be paid is to be determined by the Arbitration Council. If not paid in due time, it could be recovered under section 9 (3) of the Muslim Family Laws Ordinance as arrears of land revenue. Thus, section 9 of the MFLO provides that the Chairman of the Arbitration Council may issue a certificate specifying the amount which should be paid as maintenance by the husband, only if the husband fails to maintain his wife "adequately". In Sardar Muhammed v Mst. Nasima Bibi,[22] it was held that the word "adequately" includes cases of total neglect or refusal. The judges seem to have extended the provisions of the Ordinance as they gave the Arbitration Council

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21. In Bangladesh the right of the Subdivisional Officer for revision has been taken over by the Assistant Judge's Court, projecting the encroachment of the judiciary in the local administrative sphere.

22. 1967 19 DLR (WP) 50.

power to grant allowances for a period prior to the time of making of application.[23]

In Gul Newaz Khan v Maherunnessa Begum,[24] The High Court of Dhaka ruled that since willful non-payment of maintenance constitutes a ground for divorce, willful non-payment of dower due on demand entitles a wife to seek a judicial decree of divorce.

Overall, was can see that the courts in Pakistan were implementing the provisions of the MFLO and in some cases extending the meaning of certain provisions. However, the effects of this legislation on the society as a whole seem to have been minimal, as the concern to protect women was not so strong. The requirement of women in South Asia to have freedom from economic deprivation and violence were not focused on in the judicial decisions. Although some emphasis was given in the MFLO on giving maintenance and dower for wives, the courts were only alerted when there was total neglect and refusal. Moreover it has been argued that the legislation could only affect the elites of the society.[25] Thus, the patriarchal domination of Pakistani family law continued despite some well-sounding legislation and cases which paid lip-service to protecting the needs of women. The law as a whole would not come to the rescue of most women who found themselves confronted with violence and economic deprivation.

In summing up it can be critically commented that the Muslim Family Laws Ordinance of 1961 fell short of the needs and expectations of women's organisations and other social reformers who aspired for the betterlegal protection of women. The Ordinance

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23. *Id.*

24. 3 PLD 1965 Dacca 274-276.

25. See for details Carroll, Lucy : 'The reception of theMuslim family laws Ordinance, 1961, in a Bangladeshi village'. In *Contributions to Indian sociology*. Vol.12, No.2, 1978. pp.279-286; Pearl, David : 'The impact of the Muslim Family Laws Ordinance in Quetta (Baluchistan) 1966-68'. In *Journal of the Indian Law Institute*. Vol. 13, Oct-Dec. 1971, pp. 561-569.

did ignore some of the important issues crucial to women, such as khul divorce, custody of children and past maintenance for women, as had been recommended by the All Pakistan Women's Association.[26]

The Ordinance was within the ambit of modern versions of Islamic norms. But the Arbitration Councils could not ensure full justice to the aggrieved women in Pakistan. Matters referred to an Arbitration Council would usually be decided in accordance with social norms prevailing in the society.[27] In the patriarchal setting of Pakistan, this form of local dispute settlement could not effectively rescue Muslim women from economic deprivation and violence.

The law of Maintenance in Bangladesh

The law of maintenance in Bangladesh is a combination of codified law, local traditions and the traditional Muslim law. The quantum of maintenance is regulated under the schools of Muslim law by considering different circumstances. The Hanafi law determines the amount of maintenance by referring to the social position of both husband and wife, whereas the Shafi law only considers the position of the husband and the Shia law focuses on the requirements of the wife.[28] Bangladesh mainly follows Hanafi law but the cases do not reveal that the courts are taking into consideration the social position of both husband and wife while ascertaining the amount of maintenance.

There were two types of device available for redress in the cases of maintenance. First, a person could have instituted a criminal

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26. *Recommendation of Family Laws Ordinance 1961.* All Pakistan Women's Association (APWA), Lahore 1961.

27. For details see Pearl, (1971), pp. 561-569, at p. 561; Carroll (1978), pp.279-286.

28. Tyabji, Faiz Badruddin : *Muslim Law.* Bombay 1968, pp. 265-266; Ali, Ameer Syed : *Mohammedan law.* Vol.II, Calcutta 1917, p. 462; Anderson, Norman : *Law reform in the Muslim world.* London 1976, pp. 132-133.

suit in a criminal court under section 488 of the Criminal Procedure Code, 1898. Secondly, a civil suit might be instituted in the civil courts. In Meher Negar v Mojibur Rahman[29] the High Court Division of the Supreme Court held that it seems from the decision of Abdul Khaleque v Selina Begum,[30] that the jurisdiction of the Magistrates to entertain application under section 488 CrPC have been ousted and maintenance is a Family Court matter now. But considering the legal provisions, facts and circumstances the Court further held that the Family Courts Ordinance, 1985 have not taken away the power of the Magistrates to order for maintenance u/s 488 CrPC. Thus, in Banglaesh, both the Magistrate Courts and the Family Courts had concurrent jurisdiction in passing order for maintenance of wife and children untill the judgement passed in the case of Pochon Rikssi Das v Khukhu Rani Dasi and others.[31] In this case it was held that the criminal courts cannot entertain maintenance cases any longer and that by the Family Courts Ordinance, 1985 criminal courts jurisdiction has been ousted. Although this article is circumscribed to legal connotations and does not specifically deal with the social implications. It is undisputed that negligible portion of disputes actually comes up to the courts for the reasons of social stigmas and conventions attached to it in this patriarchal society.

The courts are institutions which could enforce newly created statutory rights into part and parcel of this society. An examination of the maintenance cases reported after 1971 illustrates this point.

In former East Pakistan the Subdivisional Officer or the local administrative sphere had the right of revision. The only procedural development that has been made in Bangladesh relating to the law of maintenance is that revision against the Arbitration Council is done by the Assistant Judge's Courts,i.e. the lowest tier of the

29. 47 DLR (1995), 18.

30. 42 DLR (1990), 450.

31. 50 DLR (1998), 47.

judiciary under the Muslim Family Laws (Amendment) Ordinance of 1985 (Ordinance xiv of 1985). This portrays that law is turning towards judiciary than the executive for it's implementation.

This brief discussion shows that the issue of maintenance is an amalgam of substantive Muslim law and statutory legislation. The query analysing the case law in Bangladesh will project whether the courts are giving more preference to the traditional Muslim law than the statutory legislation.

Application of the legislation relating to maintenance by the courts in Bangladesh

This part of the paper will focus on the application of this legislation as reflected through case-law. First of all, we are concentrating on the unreported decisions of the Family Courts then we will deal with the decisions of the higher tier of the judiciary to observe the attitude of the judges towards granting maintenance to women. Finally we will focus on the problems faced by women when they want to enforce the law.

Eleven unreported judgments on realisation of maintenance in the Family Courts of the capital city of Dhaka were gathered. The cases are usually brought for the realisation of dower and maintenance together. Because the rift between the parties had already started, a maintenance claim is the only weapon women have to restore their position or at best to have some relief from economic constraints. The cases on the issue of maintenance as a fundamental right of Muslim women appears that the Family Courts are showing that they are strictly applying the traditional Muslim law, infact they are not.

Other judgements are revolving in a similar trend where the doctrines of traditional Muslim law is forcefully applied even when it is not applicable. As for example the doctrine of *nashuza* or disobedience is applied to wives and it is regarded as their fault if they leave their matrimonial home even when their husbands live abroad and the mother-in-law ill-treats them. But in accordance to the Sharia law if there is sufficient cause for the wife to refuse

to live with the husband she is entitled to maintenance. According to Mahomed Ullah Ibn S. Jung :

> Maintenance is due to the wife even when she is in her fathers residence, unless she refuses to live in her husbands house.[32]

In Monawara Begum v Md. Hannan Hawladar,[33] the Family Court of the village Madhurchar in the Dohar upazila of the Dhaka district did not allow the wife maintenance on the ground that she was not present in her in-law's house while her husband was working abroad. This means that the judges are concerned for the presence of the wife in the matrimonial home, not only for the performance of the marital obligations. This is further evidence that judicial attitudes are influenced by stereotyped concerns about controlling women's movement. In the above case, what was the wife expected to do in the in-law's house? The parties were married under a registered *kabinnama* on 18.2.83 with a dower of 30,000 taka and the delegation of the right of divorce to the wife. The plaintiff pleaded that the husband left the country in 1987 for a job in the Middle-East and she was treated cruelly by her mother-in law and was compelled to leave the matrimonial home. It had been held in a very old case[34] that the wife is not entitled of maintenance in such a situation, as quarrels and disagreement with her mother-in-law did not constitute a legal reason for her to leave her husband's house. This situation could be tackled if the right of separate residence and maintenance for such ill-treatment or differences had been stipulated in the *kabinnama*, as in a much older case.[35] The court may have based the judgment on the former case, although there is no reference to any case law. On the other hand, the court was relying on the wrong or fault of the plaintiff

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32. Jung, Mahomed Ullah Ibn S.: Dissertation on The Muslim Law Of Marriage-Compiled from the origial Arabic Authorities, Allahabad 1926, p.41.

33. Family Suit No. 15 of 1989 (unreported).

34. *Mohammad Ali Akbar* v *Fatima Begum*, AIR 1929 Lahore 660.

35. *Sabed Khan* v *Bilatunnissa Bibi*, AIR 1919 Calcutta 825.

and not the defendant's staying abroad. This might itself be the effect of the patriarchal notions influencing the attitude of the judge. The court ascertained that the wife had left her husband's residence without his permission, as she could not produce any letter showing that her husband had given approval for her to leave the residence. Thus, absence of documents in such situations could deprive the wife of her rights. The court decided that she was not entitled to maintenance during the subsistence of the marriage. Perhaps the traditional concept of disobedience or *nashuzah* was a basis of this judgment also, although it was not explicitly mentioned in the judgement. The court held that as the wife had divorced her husband by the power of delegated right of *talaq-e-tafweed*, she was only entitled to maintenance for the *iddat* period (1,200 taka for three months, i.e. 400 taka per month). The law of *talaq* and *talaq-e-tafweed* is same and in both the wives are entitled to maintenance within marriage and in *iddat.*

The courts are interpreting the fact that when a plaintiff is not living with her husband it tantamounts to refusal to perform marital obligations. In Ambia Khatoon v Md. Yasin Bepari,[36] the facts of the case were that the plaintiff and the defendant were married on 7.7.87 and their marriage was registered under a registered *kabinnama* which also mentioned dower of 50,000 taka and stipulated that the wife was entitled to maintenance in a respectable manner. The Family Court ascertained that the marriage subsisted and rejected the claim of the defendant that he had paid maintenance. The court decided that, as it was stipulated in the registered *kabinnama,* the plaintiff was also entitled to past maintenance when she was cohabiting with the defendant; i.e. from 7.7.87 to 6.4.88. However, the court did not allow maintenance for the time when the plaintiff was not living with the defendant.

In Mst. Hafeza Bibi v Md. Shafiqul Alam,[37] the plaintiff and

36. Family Suit No. 98 of 1990 (unreported).

37. Family Suit No. 28 of 1992 (unreported).

defendant were married under a registered *kabinnama* on 9.7.86 with the dower money fixed at 50,001 taka. The defendant gave *talaq* to the plaintiff on 18.11.91. The court did not grant maintenance to the wife during the subsistence of the marriage, as she was not obedient to her husband. One of the main criteria of her disobedience was that she was staying away from her husband. However, the court allowed maintenance for the *iddat* period.

In Mst. Razia Akhter v Abul Kalam Azad,[38] a suit for the realisation of dower and maintenance, the parties were married under Islamic *sharia* on 11.6.87 and a son had been born from the wedlock. The court ascertained that the defendant gave *talaq* on 5.1.89 when the plaintiff was not residing in the defendant's house. The son was born on 2.6.89. The court granted the woman maintenance for the *iddat* period, i.e. until the son was born five months after the *talaq*. This extension of the period of maintenance is in line with traditional Islamic law and the statutory enactment. Islamic law provides for this extension of *iddat* period of maintenance to ascertain the lagitimacy of the child. Under section 7(5) of the Muslim Family Laws Ordinance of 1961, if the wife is pregnant at the time of *talaq*, it is not effective unless the pregnancy ends. Thus, the judgment only gave extended maintenance to the woman till the baby was born but does not allow maintenance within the marriage when she was not residing in the defendants house.

Sometimes the Family Courts do not recognise the false allegations of the husband that the wife does not have any moral character and was married before but strangely allow the maintenance of the *iddat* period. In Mst. Shahida Begum v Md. Mahbub Hossain,[39] the plaintiff prayed for the realisation of maintenance only for the *iddat* period. The facts of the case state that the parties were married on 3.2.90 and the *kabinnama* was registered. After

38. Family Suit No. 193 of 1989 (unreported).

39. Family Suit No. 112 of 1991 (unreported).

leading a conjugal life for eight months, the defendant gave the plaintiff *talaq* on 21.10.90. The defendant alleged that the plaintiff had married him while her marriage was already subsisting with another man and she did not have a good moral character. The court rejected these defences as the defendant could not prove any of them sufficiently. The court held that as the defendant had given *talaq* to the plaintiff, she was entitled to maintenance for the period of *iddat.*

There is a strong sentiment of female seclusion of *lojja* and *sharam* working within women of Bangladesh, so that they do not like their private affairs to be opened in public. But these emotions might have changed their attitude in the legal battle. In Mst. Meherunnahar v Rahman Khondakar,[40] the Family Court squarely applied the classical Muslim law that when the marriage is not consummated, the wife is not entitled to any maintenance.[41] The facts of the case were that the parties were married under the Islamic *sharia* on 7.3.85 but after a few months, in September 1985, she was sent back to her father's house and on 25.5.87 the marriage was dissolved by *talaq*. The court rejected the allegation of the defendant that the wife had veneral disease but decided that *talaq* was effectively given. The court ascertained that the defendant had failed to provide maintenance to the plaintiff but did not allow maintenance to the wife as she herself had stated that there was no consummation of the maggiage. Although the facts and circumstances showed the opposite, the court ruled that admitted facts need not be proved. It was evident that the plaintiff (wife) lied in the court about not having intecourse with her husband. But why did she lie? Was the force of female seclusion (*lojja or sharam*) even stronger than her claim for maintenance? However, such attitudes of women are never considered in a court of law.

It is important to point out that it can not be gathered from the

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40. Family Suit No. 24 of 1987 (unreported).

41. See Ali, Ameer Syed : *Mohammedan law.* Vol. II, Calcutta 1917, p.463.

judgments whether the courts are following the traditional doctrine of taking into consideration the social position of the parties for ascertaining the quantum of maintenance. It could not also be assessed what principle they are following to ascertain the precise amount of maintenance. In the *kabinnama*, maintenance is usually regarded as to be given in a respectable manner (*bhodrochito hare*). But it is not expressed how much maintenance can be regarded as respectable.

In some cases, where the husband is residing abroad, the Family Courts are granting a higher scale of maintenance. In Margubater Rouf v A.T.M. Zahurul Haq Khan,[42] a suit for the realisation of dower and maintenance, the facts of the case disclose that the parties were married on 20.10.88 and the marriage was registered. In the *kabinnama* the dower was fixed to the extent of 300,000 taka, which might be for show of status or security for the wife. The plaintiff pleaded that the defendant left for abroad and did not provide any maintenance for her. The defendant alleged that the plaintiff was having an affair with another man and was unwilling to lead a conjugal life with him. The reasons behind this might be the migration dilemmas arising when husbands work abroad, as well as the social disapproval of the wife living without her husband. The husband gave *talaq* to the wife on 25.2.90. The court decided that, as *talaq* had been given effectively, in accordance with the Muslim Family Laws Ordinance 1961, no marriage subsisted and the wife was entitled to maintenance during the *iddat* period. The court reasoned that the wife was not entitled to any maintenance during the subsistence of the marriage as she was not willing to have conjugal relations with the husband. But it is interesting to note that the court ascertained 40,000 taka as the maintenance of the wife for three months,i.e. 13,000 taka per month, whereas in similar cases only 600 to 1,000 taka per month were given. It may be assumed that the court was here taking into

42. Family Suit No. 1 of 1992 and Family Suit No.3 of 1992 (analogous hearing) (unreported).

account the financial ability of the husband, who was working abroad. Alternatively, it was compensating the wife for the fact that matrimonial cohabitation ceased not due to her fault, but the husband's absence for being abroad. However, in Nasima Bilkis v Md. Abdus Samad,[43] the maintenance for the *iddat* period was ascertained as 2,500 taka per month when the husband was not working abroad. It cannot be gathered from the judgment why the court awarded such an high amount. The facts of the case are that the parties were married on 23.3.90 by a registered *kabinnama.* The plaintiff, alleging her husband's cruel behaviour, was living in her father's house from 19.7.90. The defendant persuaded the plaintiff to stay with him and the plaintiff stayed for seven days and then came back to her father's house again on 17.3.91 with the same allegation. The plaintiff divorced the defendant on the basis of her delegated power of divorce on 2.6.91 and registered the *talaqnama.* The Family Court decided on the evidence of a letter of the plaintiff's father that the relationship of the parties was not harmonious and so the plaintiff was not entitled to maintenance during the subsistence of the marriage not even for the seven days when she was staying with the defendant. But the Family Court decided that the plaintiff was entitled to maintenance for the *iddat* period.

There are some unreported cases in the Family Courts of Dhaka which portrays a positive picture where the courts not only allowed maintenance in the subsistence of marriage but also in *iddat.* In Mst. Roksana Begum v Md. Abul Khair,[44] the basic facts of the case were that the plaintiff and defendant were married under Islamic *sharia* on 10.2.88 with the dower money mentioned as 50,000 taka in the *kabinnama.* The defendant claimed that he had given *talaq* to the wife but he could not prove it in the court. The court therefore held that the *talaq* was not effective. The court

43. Family Suit No.12 of 1992 (unreported).

44. Family Suit No. 96 of 1991 (unreported).

decided that the defendant must pay within thirty days of the judgement maintenance of 1,000 taka per month to the plaintiff for the time when the proceedings were conducted, i.e. from the date of instituting the suit to the date of judgement (May 1991 to March 1993). The court also directed the husband to pay the monthly maintenance to the wife within the first 10 days of the month.

In Mst. Angari Begum v Md. Iqbal Rashid,[45] the parties were married on 6.11.89, fixing the dower money at 20,000 taka. The court found that the marriage subsisted and granted the wife maintenance not only for the time when the proceeding was going on (the suit was instituted on 6.4.91 and ended on 5.1.92) but long before that (from 1.8.90 to 5.1.92) and also ordered the defendant to pay further maintenance to the plaintiff within the first week of each month. The court fixed the monthly amount of maintenance at taka 800.

In Mst. Fatima Begum v Mohammed Golam Hossain,[46] the court held that the wife was entitled not only to maintenance for the present time but also past maintenance for the last seven months, as there was an agreement to pay maintenance in the negotiation or *shalish* in the Commissioner's office. This shows that the courts are also considering other contracts than the *kabinnama* to ascertain the maintenance and, in particular, that they are willing to build negotiated settlements into their decisions.

The reported cases of maintenance of the higher level of judiciary does not generally project a modernist trend of the law. Although, the latest decisions of the highest tier of the judiciary has suddenly made a substantial development in the law of maintenance.

In a fairly recent reported case on maintenance, the High Court shows itself to be static and does not deviate from the traditional concept of providing past maintenance unless the claim is based

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45. Family Suit No. 52 of 1991 (unreported).

46. Family Suit No. 61 of 1991 (unreported).

on specific agreement or a decree of a court. In Rustom Ali v Jamila Khatun,[47] the High Court Division of the Supreme Court did not grant the past maintenance allowed by the lower Court as the wife was not staying with her husband. Thus the husband, with his sexual rights over the wife, controls residence in his marital home. Where the wife refuses to cohabit, she becomes a disobedient wife a or *nashuza*, which was in this case regarded as a prima facie cause for not allowing maintenance.[48] Muslim law only allows the wife maintenance if she is staying in her father's house, when the husband did not request her to come to his house, or it would involve danger or risk of her life or health to remove her from her father's house.[49] The court did not cosider the conditions which compelled the wife in Rustom Ali v Jamila Khatun,[50] to stay separate. This conveys an impression of unsympathetic attitude towards women and also exhibits a strong desire to control women's movement. The court only allowed maintenance from the date of institution of the suit till three months after the decree for dissolution of marriage,i.e. during the period of her *iddat.*

In Hosne Ara Begum v Md. Rezaul Karim,[51] the High Court Division of the Supreme Court ordered the husband to pay maintenance even when the wife left the husband's residence. The wife was living away from the matrimonial home on the ground of cruelty. Perhaps, the evidence of cruelty of the husband made the court considerate towards the wife. However, in Sirajul Islam vs. Helana Begum and others[52] the High Court Division of the Supreme Court decided that the Court has the jurisdiction to pass

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47. 43 DLR (1991) HCD 301.
48. For the law on this see Mahmood (1982), pp.76-79; Tyabji (1968), pp.263-267.
49. Ali (1917), p. 461.
50. 43 DLR (1991), HCD 301.
51. 43 DLR (1991) 543.
52. 48 DLR (1991) 48.

decree for past maintenance in an appropriate case and the decision of Rustam Ali v. Jamila Khatun[53] was held not to be applicable.

The latest position of Sunni Law in the Subcontinent regarding past maintenance of Muslim wife is held by the appellate Division of the Supreme Court in Jamila Khatun vs. Rustom Ali[54] is that the wife is entitled to past maintenance even in the absence of any specific agreement.

In South Asia the jurists had also argued that the husband should provide maintenance during subsistence of marriage and during the *iddat* period.[55] This was, perhaps, because in Islam after dissolution of marriage the parties are entitled to remarriage and the woman returns to her natal family.[56] It is just not fair to burden a man with the obligation of maintenance when he is no more her husband as marriage is a religious and social contract under Islamic law. Moreover, according to Islamic law, the deferred dower is seen as the safequard for divorced women. Nevertheless, women in Bangladesh are usually deprived of their deferred dower. But what happens to those women whose natal family can not provide for them? There is no state welfare system in South Asian countries as in the West. Islamic law states that if the natural family can not maintain the divorcee her maintenance will be a charge on collective resources of the Muslim Community as a whole. If there is a *Baitul Mal* or a community fund the divorcee could be provided from it or savings out of *waqf* property can also be used for such purpose.[57]

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53. 43 DLR (1991) 310.
54. 16 BLD (AD) (1996) 61
55. Fyzee (1974), p. 186; Diwan, Paras : *Muslim Law in modern India.* Allahabad 1985, p.130.
56. Mahmood, Tahir : *Personal laws in crisis.* New Delhi 1986, p. 87.
57. Shabbir, Mohd. : *Muslim Personal Law and Judiciary.* Allahabad, 1988, p. 288.

In India it has been argued that maintenance after divorce is an obligation of the ex-husband on the basis of the argument provided in the original sources.[58] The appellant stressed that the amount which was stated to be given after divorce is the deferred dower. Conclusively *Mata* is a gift to be given to divorcee or at the time of departure to console her or to conciliate her grief at the critical and delicate moment. But this argument did not satisfy the court and they decided that divorcee should be provided for maintenance till remarriage or death. This decision by the apex of the Judiciary in India exploded the Muslim community into a great controversy and debate. Majority of the Muslim community was of the opinion that the line of reasoning adopted by the Supreme court was contrary to the *sharia.* It was opined that it is neither desirable nor reasonable to bend the personal laws beyond their limit to unsettle the well-established rules of Muslim personal law.[59] This agitation in the Muslim circle led to the passing of the Muslim Women (Protection of Rights on Divorce) Act, 1986.[60]

From the women's viewpoint it is seen that the wife who has spend her whole life and labour for her husband's household, which was not rewarded, should not just be turned out of her house without any subsistence. In Bangladesh these problems are not articulated yet. The High Court Division of the Supreme Court had taken steps to provide for post-divorce maintenance. In Hefzur Rahman vs. Shamsun Nahar Begum[61] it was held that a person after divorcing his wife is bound to maintain her on a reasonable scale

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58. In the celebrated case of *Shah Bano* (Mohd. Ahmed Khan AIR 1985 SC 945) in India the court allowed post divorce maintenance. See for details, Naseem, Mohammad Farogh : *The Shah Bano case : X-rayed.* Karachi 1988; Ali, Asghar (ed.) . *The Shah Bano controversy.* Bombay 1989.

59. Shabbir, (1988), p. 285.

60. For the current development under the *Muslim Women (Protection of Rights on Divorce) Act* of 1986 see Menski, W.F.: 'Maintenance for divorced Muslim wives'. In *Kerala Law Times.* Journal 1994 (1), pp. 45-52.

61. 47 DLR (1995) 54.

beyond the period of *iddat* for an indefinite period till she loses the status of a divorcee by remarrying another person. The verse in the Holy Quran (2:241) translated by Abdullah Yusuf Ali was relied on :

> For divorced women maintenance (should be provided) on a reasonable scale. This is a duty on the righteous.[62]

The High Court Division considered only the literal meaning of the first part of the verse. The transliteration runs as : *"Wa lil-mootalla kate mataaoon* bil-maaroof'.[63] However, the Appelate division of the Supreme Court held that the learned judges of the High Court Division did not give any attention to the real translation of the two arabic words *"Mataa"* and *"Nafaqa"* and wrongly held that a divorced woman is entitled to maintenance till she remarries.[64] *Mataa* has been translated as consolatury gift or compensation or indemnity. It is basically different from regular maintenance of the divorcee.[65]

Traditional Muslim juristic opinion is to the effect that the injunction of the Quran does not go beyond the iddat period. According to *Hedaya* translated by Charles Hamilton[66]

> Where a man divorces his wife, her subsistence and lodging are incumbent upon him during the term of her edit, whether the divorce be of reversible or irreversible kind.

Neil BE Baillie in his book also imitated the view from the *Hedaya* and stated that a *mooutuddah* or women who are divorced on account of repudiation for any cause other than her own, is entitled to maintenance and lodging during her *lddut*.[67] This has been

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62. Ali, Abdulla Yusuf : *The Holy Quran,* Delhi 1979.
63. Ibid.
64. 51 DLR (AD) (1999) 172.
65. Ibid, 173.
66. Book iv, chapter xv, section 3, p.145
67. *The Digest of Moohummudan law,* London 1865, p.450.

recently upheld by the Appellate Division of the Supreme Court of Bangladesh in Hefzur Rahman vs. Shamsum Nahar Begum.[68] The Quranic verse 65:6 which is considered in this regard directs the husband's to pay maintenance to their divorced wives during *iddat*, it says :

> "Let the women live (In *iddat*) in the same style as ye live, According to your means : Annoy them not, so as to restrict them. And if they carry (life in their wombs), then spend (your subsistence) on them until they deliver their burden : and if they suckle your (offspring) give them their recompense : and take mutual counsel together; according to what is just and reasonable. And if ye find yourselves in difficulties, let another women suckle (the child) on the (father's) behalf."[69]

Consequently, the Appellate Division ruled that the judgement of the High Court Division is based on no sound reasonings and it is against the principles set up by Muslim jurists of the last fourteen hundred years. The judgement was perhaps a reflection from earlier decisions. In Aga Mahomed Jaffer Bindamen vs Koolsoom Beebee and others as early as in 1870 it was held by the Privy Council that it would be wrong for the court on a point of this kind to attempt to put their own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority.[70]

In the above case[71] it was also held by chief justice ATM Afzal that the Quranic verses can not be understood in total isolation and not only on its literal construction but with the help of the prophet's (peace be upon him) teachings and practices and subsequently by the enunciations of Islamic jurists and scholars. Justice Mustafa Kamal in his decision stated that if *mataa* means maintenance it will run counter to *ayats* 233, 236 and 237 of *Sura Al-Baqarah* and

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68. 51 DLR (AD) (1999) 172.
69. Ali (1979), p. 1565.
70. 25 ILR (1870) Cal 9.
71. *Hefzur Rahman* vs. *Shamsun Nahar Begum* 51 DLR (AD) (1999) 173.

Ayats 6 and 7 of *Sura Al-Talaq*. If *mataa* does not mean maintenance it means consolatury gift or compensation or indemnity which should be provided to the divorced women in accordance to the Holy Quran.

There are problems which continually crop up in all maintenance cases. Firstly, there is the question of determining the amount of maintenance, i.e. how do the law and the Family Court arrive at an just and adequate sum? It has been shown in the discussion of the cases that there is no firm policy, although sometimes the husband's income is taken into consideration. Secondly, the problem is more acute, as husbands evade to pay maintenance in the majority of the cases. The only sanction left to the wife is to execute the decree, which is also not difficult for the husband to escape as the law is hardly implemented. Moreover, men in the patriarchal society of Bangladesh have the advantage to use social harassment, family slander and, in the extreme, physical threat so as not to implement the law. This is another element of the patriarchal arbitrariness which is the result of male authority in society. However, it is true that the enforcement of Maintenance decree is very difficult where the husband is unwilling to pay, but the statutory provisions are there. The need of the hour is enforcement of the law.

The execution of Family Court decrees in accordance to the Family Courts Ordinance, of 1985 is dealt in section 3 which states that if the decree is the payment of money and the decretal amount is not paid within the time specified by the court, the Family Court will act as the Civil Court. But if it is for the order for payment of fine the Family Court will act as the Criminal Court and may issue a warrant, pass an order for imprisonment if the decretal amount is not paid. The execution of maintenance decrees is similar to the the decree of the payment of money. It is suggested here that where the decree is the payment of money the Family Courts power should be as the Criminal Court. This will ensure that the husbands pay maintenance. It is also recommended that the sanctions of the Family Courts could be strengthened by providing them with a criminal court's power to attach the property

of the husbands to pay maintenance to the wife.

The real difficulty in availing the legal remedy for obtaining maintenance is the time factor involved in getting a decree for maintenance. It has been rightly pointed out by an author that maintenance for the wife is an immediate need and the delays in litigation often defeat the purpose.[72] It is suggested that reforms should be made in the Family Courts Ordinance, 1985 for providing interim orders not only for preventing persons from frustrating the suit as provided under section 16A of the Ordinance. But providing for an interim order pending final disposal of the suit, for a deposit in the Family Court every month, an amount tentatively determined by such court for payment as maintenance of wife and children. The powers of the Family Courts should be enhanced in this regard. By this method for an interim maintenance order it will give relief to the deserted and poor wives who does not have any other means of livelihood.

The present paper has shown in various ways that wives in Bangladesh are denied of their Islamic right of maintenance. It is suggested that reforms should be made in the Family Courts Ordinance, 1985 to make this statutory right more effectively enforced.

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72. Patel, Rashida : *Women and law in Pakistan.* Karachi, 1979, p.67.

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UNDERSTANDING SEXUAL HARASSMENT IN BANGLADESH : DYNAMICS OF MALE CONTROL AND FEMALE SUBORDINATION

Dr. Sumaiya Khair

Introduction

Sexual harassment of women has only just begun to emerge as an issue in Bangladesh. The issue, involving aspects of power and sex in respect of violence against women, is gradually coming under public scrutiny. The growing impoverishment and lack of security of women has been a long-standing concern of the women's movement in Bangladesh where women are categorised as dependents whose material entitlements are endorsed and controlled by the male members of the family. As such, women experience poverty and insecurity more acutely than do men. While there is no doubt that women are assigned a subservient role in the patriarchal society of Bangladesh, socio-economic changes and the breakdown of the moral economy have compelled women to depart from sex-stereotyped roles and engage in income generating activities outside their homes. 'Push' factors such as landlessness, unemployment, natural disasters, river erosion, drought and so on together compel women of poor households to seek viable alternatives in the city. That poverty places a strain on patriarchal bonds is apparent in the growth of the number of women who have, in recent years, begun to move about in the 'male space' in search of waged employment.

While the participation of women in the labour market has ensured a degree of economic empowerment and a renegotiation of gender relations, the situation has simultaneously triggered off another phenomenon that considerably adds to the overall disempowerment experienced by women. Sexual harassment of women in the streets and workplace is a common occurrence,

which is experienced by women from almost every segment of the society. Given the traditional backdrop in Bangladesh where chastity in a women is of utmost importance, victims of sexual harassment suffer in silence rather than protest against such practice, which would only invite unwarranted attention that would be socially demeaning. Moreover, while issues of violence in respect of gender relations received considerable attention of relevant quarters including the media, academia and the legal profession, very little has been done to address gender-based sexual harassment in its proper perspective. The paper aims to explore the issues pertaining to processes that expose women to exploitation and sexual harassment in their workplaces and on the streets, in an attempt to highlight the ways in which the phenomenon violates women's basic right to work and move safely and with dignity.

Conceptualising Sexual Harassment

Definitions of sexual harassment that have emerged as part of the Western ideology have a number of components to them. Some of the important features that are construed as constituting sexual harassment are : behaviour unwanted by the recipient; sexual dimension to the incidents; the power the harasser exerts, which may, apart from being sexual in nature, exploit an economic or authority dimension existing between the parties; and the loss experienced by the victim.[1]

Given the above-mentioned facets, sexual harassment has been defined varyingly by experts. Russel, for example, describes sexual harassment as deliberate or repeated unsolicited verbal comments, gestures or physical contact of a sexual nature that is considered to be unwelcome by the recipient'.[2] In her definition

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1. Houghton-James, H., *Sexual Harassment,* Cavendish Publishing Ltd., London, 1995, p.6.
2. Russel, D., *Sexual Exploitation,* Sage Publications, Beverly Hills, 1984, pp 269-70.

Farley adds, "staring at, commenting upon or touching a woman's body, requests for acquiescence in sexual behaviour, repeated non-reciprocal propositions for dates, demands for sexual intercourse and rape" as aspects of sexual harassment.[3] Sexual harassment has also been defined, in terms of exployment conditions, as "any physical or verbal conduct of a sexual nature... [which is] unsolicited, repeated and unwelcome; or when submission to such conduct is implicitly or explicitly a term or condition for decisions which would affect promotion, salary or any other job condition; or when such behaviour creates an intimidating, hostile or offensive work environment for one or more employees".[4] Offensive behaviour may include both verbal and non-verbal conduct-ranging from sexist jokes, graffiti and sexually explicit pictures of women, lewd gestures to actually touching, fondling, caressing and other acts of sexual nature. It is clear therefore, that the term covers a diverse range of behaviour in given contexts.

There are two main assertions that run through definitions of sexual harassment. First, sexual harassment involves acts or behaviour, which have sexual overtones and are unwelcome and unreciprocated. Second, it demonstrates a dimension of unwanted sexual power, which is reflective of existing gender relations. In the circumstances, sexual harassment may be described as; the imposition of unwanted sexual demands on another person in a relationship of unequal power.[5] This indicates that the perpetrator's behaviour enables him to place the victim in a subordinate position in relation to himself. While the subordination is generally on a gender level, there may also be an economic dimension to it

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3. Farley, A., *Sexual Shakedown,* McGraw-Hill Book Company, United States, 1978, p.33.
4. Hadjifotiou, N., *Women and Harassment at Work,* Pluto Press Ltd., London, 1983, p.8.
5. MacKinnon, C., *Sexual Harassment of Working Women,* Yale University Press, London, 1979, p.1.

if the victim's working conditions are affected. Therefore, it may be surmised that, while sexuality is integral to sexual harassment, abuse of power and authority by the male on the basis of the assumption that gender power lies with men is fundamental to the undermining of the safety and security of women.

The Cultural Backdrop to Sexual Harassment

In order to understand the occurrence of unwanted sexual behaviour in its proper context it is necessary to evaluate the construction of gender roles and their impact on behaviour patterns, sexuality and ultimately the relations between men and women. Existing socio-cultural norms in Bangladesh relegate women to an inferior position within the family and the wider community. This is possible mainly because patriarchy, as an ideology, apart from setting out basic standards for women to which they are expected to conform, also allows men to exercise full control over the property, person and labour of women. Gender roles are learnt through socialisation, which takes place from birth. The process, shaped to a great extent by patriarchal norms, begins at home affecting male and female children in different ways. It is common for parents to instill traditional and sex-stereotyped ideologies into children's minds. Consequently, while a boy's gender development is generally based on identification with the male head, a girl is required to follow into the footsteps of the women of the family. Socialisation of girls in Bangladesh is in keeping with the lifelong role of subservience and self-effacement that women are expected to play. A girl learns to defer to her brother(s) and the male patriarch and perceive the fact that she is merely a transitory member of the family. Initiation processes, ordained largely by social norms, begin by training the girl to perform the part of a docile daughter in preparation for her role as a compliant wife and dependent mother.[6]

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6. Parts drawn from Chapter 2 of *Changing Responses to Child Labour : The Case of Female Children in the Bangladesh Garment Industry*, unpublished Ph.D thesis by Khair, Sumaiya, 1995, University of East London, U.K.

Women in Bangladesh traditionally live in a dichotomised world, which indicates the culturally differential power and resources allocated to men and women in the society. This essentially imposes a strict division of labour, and fosters a systematic supremacy of the male. By relegating women to the 'private' sphere, they are denied liberty, visibility and independence-a situation often perpetuated by women themselves as it is important not to challenge the formal authority of men if good relationships within households are to be maintained. Women's dependence has a cultural meaning because it is a matter of shame if the man of the house is unable to support his family in full. In the interests of good relationships in the households and social status in the community it is, thus, important that women remain passive and unassertive by subordinating their needs to those of the dominant male members of the family.[7]

The dichotomy between the public and the private is often justified by referring to men and women's inherent physical and biological qualities. Theories on the subordination of women are based on the perspective of biological determinism.[8] It is observed that these theories reduce women to biological entities, and their tasks are viewed as the work of 'nature' whereas men are elevated to the status of culture by regarding their tasks as truly human.[9] Thus it is contended that

> This covert or overt biological determinism, paraphrased in Freud's statement that anatomy is destiny, is perhaps the most deep-rooted obstacle for the analysis of the causes of women's oppression and exploitation... [W]omen...find it very difficult to establish that the unequal, hierarchical and

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7. Khair, ibid.
8. Punalekar, S.P., Gender, Class and Culture . Situation of Girl Children in India' in Devasia, L. and Devasia, V V. (eds.), *Girl Child In India,* Ashish Publishing House, New Delhi, 1991, pp. 25-37, at p. 26.
9. Pandhe, S., *Women's Subordination. Its Origin,* Kanak Publications, New Delhi, 1989, pp.30-31.

> exploitative relationship between men and women is due to social... factors. One of our main problems is that not only the analysis as such, but the tools of the analysis, the basic concepts and definitions, are affected-rather infected-by biological determinism.[10]

The rather one-sided view of biological determinists, that sexual divisions have emerged by natural selection, as a result of different biological roles, is however, met with a justified retort :

> To claim that, of all human activity only female nurturance is unchanging and eternal is indeed to consign half that human race to a lower existence, to nature rather than to culture.[11]

Sanctified by fundamental religious interpretations, biological determinism succeeds in perpetuation patriarchal notions that project images of male strength and dominance and female weakness and dependence. It is argued that

> Islam clearly states that women and men have their own spheres of activities-a scheme of functional division in accord with their respective natural dispositions and inherent physical and psychological qualities and characteristics... This is how the doors of a number of social and economic ills have been closed.[12]

The above contention presents a double edge. While advocating women's activities in their own sphere, what it actually conveys is that enforced segregation between men and women has actually closed the doors of social and economic emancipation and independence for women.[13]

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10. Mies, M., 'Social Origins of the Sexual Division of Labour' in Mies, M. et al. (eds.), *Women : The Last Colony,* Zed Books Ltd., London et al., 1988, pp.67-95, at p. 68.
11. Lerner, G., *The Creation of Patriarchy,* Oxford University Press, New York, 1986, p.26.
12. Maududi, A.A., *Purdah and the Status of Woman in Islam,* Islamic Publications Ltd, Lahore, Pakistan, 1972,p.82.
13. Khair, op.cit.

It follows therefore, that although that public/private dichotomy is purportedly based on natural biological differences, such division is really socially constructed in a manner that works to the advantage of men and disadvantage of women.

Just as gender roles are socially constructed, so is sexuality.[14] Men essentially gain power through ways in which culture constructs sexuality and male female relations. The segregation between men and women in the economic sphere is duplicated and reinforced at the ideological and religious levels in Bangladesh where observance of purdah acts as a powerful operator. Adherence to purdah (seclusion) norms helps to maintain the distinction between male and female spaces. Apart from isolating women from economic arenas, purdah is considered essential in order to protect the chastity of the female since sexual purity is traditionally an overriding consideration at marriage. The principal measures of securing family honour in Bangladesh are based on female modesty and the control of their sexuality. In a patarchal backdrop sexuality of women is qualified in two ways : women, on the one hand, are regarded as sex objects who are required to be secluded in order to protect men from their charms, and on the other, they are seen as being susceptible to sexual assaults, requiring protection themselves. In other words, women are, at the same time, sexually aggressive and vulnerable. In the circumstances, purdah is deemed essential for the control of sexual desire and aggression and for the maintenance of moral standards specified by society.[15]

The distinction provided by purdah norms generates a 'double standard of sexuality'. One of the overriding factors discouraging female participation in activities in the public or male space is the fear of sexual aggression against women. A female crossing over to male space is regarded as moving away from the protection of

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14. Caplan, P., *The Cultural Construction of Sexuality*, Tavistock Publications, London, 1987, p.10.

15. Khair, op.cit.

the family, 'legitimately' attracting male harassment and violence.[16] The practice of purdah demonstrates a double standard that helps rationalise prevalent male sexual attitudes and their control over women's behaviour. It is pointed out that :

> While it is obvious that female presence in public areas certainly makes access to them easier than if they were enclosed within their homes... it assumes that a man is totally unable to control his sexual impulse and a women has no right over her body, nor any choice in sexual matters.[17]

This form of division of labour not only imposes on women in segregated societies a great responsibility in the moral sphere,[18] but the public/private dichotomy indicates the culturally differential power and resources allocated to men and women in the society and the consequent subordination of women therein. It is observed that,

> in the patriarchal, partilocal, patrilineal society of Bangladesh, socio-cultural values sanction segregation of the sexes, impose strict gender division of labour and foster a systematic bias of male supremacy.[19]

Thus, men grow up seeing women objectified in specific contexts. Since women's identity is often tied to their bodies, women are subjected to control of men through sexual exploitation. The fact, that social construction of sexuality regards the behaviour of men as socially and biologically acceptable male assertiveness, gives them the option of not questioning their attitude towards women. Men do not want women to challenge their masculinity and as

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16. Lewis, D.J., et al., *Going It Alone : Female Headed Households, Rights and Resources in Rural Bangladesh,* Occasional Paper 01/93, March 1993, Centre for Development Studies, University of Bath, U.K., p.20.

17. Jahan, R. *Women and Development. Challenges and Opportunites,* Ford Foundation Dhaka, 1988, p.214.

18. Papanek, H., 'Purdah : Separate Worlds and Symbolic Shelter' in Papanek, H. and Minault G., (eds.), *Separate Worlds. Studies of Purdah in South Asia,* Chanakya Publications, New Delhi, 1982, pp.3-52, at p.36.

19. Jahan, op.cit,1988.

such, strive to ensure that women are socialised into adopting a submissive and dependent role, which would deter them from asserting themselves against men when sexually harassed.

The Impact of Sexual Harassment: Emerging Power Relations and the Culture of Silence

Although male control and domination of females in the public space may take various forms, this control is usually premised on the aggressive occupation of the space in which women are tolerated only within very rigid limits of movement, dress and activity. Any transgression of the prescribed limits by women is met with swift and very often, harsh retribution by way of physical or sexual violence. Men who constantly make women aware of their sexuality through looks, gestures, laughter and ribaldry heighten the objectification of women as sexual entities. Women in the public space therefore suffer considerably by the control of their sexuality by way of sexual harassment.

Sexual harassment leaves a lasting impact on the victims. Women who are or who have been sexually harassed experience multidimensional losses in respect of their status and power, which are more often than not, physically, emotionally, psychologically and economically debilitating. Sexual harassment is about exerting control over disadvantaged groups through threats to their integrity and safety. It is about putting women in their places in an attempt to undermine their authority and autonomy. It is about exploitation of the gender advantage and institutional power that results in the loss of dignity and self-esteem of the victim. It provides perpetrators with the sordid opportunity of seeking sexual gratification. Innuendo and suggestive behaviour involved in sexual harassment of women generate an anxiety and invoke a feeling that such behaviour could become more violent and intrusive. Consequently, women suffer from a perpetual sense of insecurity. Their movements become guarded and inhibited and their vulnerability increases manifold. Many are forced to come to terms with unwelcome encounters

either by retiring from public life or by neutralising what occurred, the latter being rather difficult given the enormity of the situation. As a result, women feel ashamed, embarrassed, cheap and angry at their own vulnerability.

There are occasions when victims feel personally responsible for the incidents. Where women imbue traditional attitudes about men, they are inclined to accept male authority and aggression. It is almost as though having ventured into the male space the women have asked for trouble. Women feel that in some way, whether by dress or demeanor, they may have precipitated unwanted sexual advances by men. Since interacting with women in terms of their sexuality is condoned as acceptable male behaviour, it is deemed natural for men to conduct themselves in this fashion.

A basic problem with sexual harassment is its acceptance, on account of its pervasiveness, as a common feature of relations between men and women in their daily existence. As indicated earlier, culture defines behaviour as essentially male and female and indicates parameters that constitute sexual harassment, which is also considered to be the result of a typical male/female interactive behaviour. Since practices vary across cultures, so do ways in which women react to incidents of harassment. Where sexual harassment is considered culturally acceptable, women are more likely to feel embarrassed by the incidents rather than to protest against such conduct and seek redress. This attitude stems from the cultural conditioning that persuades women to believe that men do not really intend any harm and are simply demonstrating their macho personalities. Women may not necessarily approach events by how they feel about particular situations or modes of bahaviour, but in terms of the way they have been socialised to react.[20] In the circumstances, women are reluctant to report incidents to harassment of avoid public scrutiny, which means that unwanted sexual conduct is not highlighted much less perceived as an offence.

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20. Houghton-James, op.cit., p.52.

There are a number of factors that compel victims to conceal instances of harassment. Since the victims occupy a status subordinate to that of the harasser on account of gender, they are powerless to overcome most situations. Economic constraints also disable women from seeking redress and the possibility of recurring incidents, effectively deter women from pressing charges. Fear of backlash and reprisals involving physical assault also comple women to suppress instances of harassment. Moreover, where, as in Bangladesh, chastity is considered to be a women's best ornament, any allusion to being sexually harassed would seriously compromise a women's reputation in society. Therefore, talking about sexual harassment can disempower women. Women who make sexual offence allegations often have their lifestyles analysed to determine whether they qualify for protection or denigration. Ironically, individuals of both sexes scrutinise a victim's story in a manner whereby the victim's character becomes an issue and not that of the perpetrator. Women have been found to be harsh judges of each other's character as they are conditioned to judge women based on their perception of acceptable female behaviour as prescribed by societal norms. In many ways women are held accountable for their own misfortunes. Media coverage in the circumstances, accentuate women's vulnerability by producing material that obscures the real issue of the intent of the perpetrator. Moreover, the culture of silence is reinforced by the presumption that women are inclined to exaggerate, fantasise or even lie in order to draw attention to themselves. They are considered to be prone to hysterical outbursts and therefore, not to be taken seriously. Women's experiences are often thus ignored or dismissed. Hence, the suppression and social control of women occur at both institutional and individual levels.

While there are obvious dangers of exposing and talking about sexual harassment, keeping silent about the occurrence can be equally risky. Not talking about sexual harassment allows the phenomenon to continue unchallenged. In the circumstances, silence helps propagate this form of oppression giving rise to and

reinforcing other manifestations of oppression like rape, trafficking, causing bodily harm and so on. Disclosure of each case sheds light on the issue and assists other women to protect themselves from this unwelcome intrusion.

Addressing Sexual Harassment : An Inquiry into the Role of Law

Having established how prevalent sexual harassment is, and its pervasive nature, question arises as to the means of addressing the problem. In this regard it is essential to examine the role of law as a source of redress and social changes in respect of conduct that is so fundamental to gender relations.

Until recently, apart from provisions in The Penal Code of 1860, there was no specific legislation that acknowledged or addressed the issue of sexual harassment as an offence. Sections 354 and 355 of The Penal Code state that aggravated assault includes the intent to outrage the modesty of a woman and the intent to dishonour a person respectively. Section 509 of The Penal Code further states that, the uttering of words, the making of any sound or gesture, or the exhibiting of any object intending to insult the modesty of a woman is punishable. For example, in *State vs Hetram* the accused was booked under Section 354 for dragging a 15 year-old girl to a secluded spot as she was returning from her mother's home.[21] Again, in the case of *Muhammed Sharif vs State* it was held that a group of young men following a group of young girls and pestering them and using indecent gestures and words constituted an offence under Section 509 of The Penal Code as it was tantamount to insulting their modesty.[22] In another case, *Tarak Das Gupta vs State,* the accused sent a letter with indecent contents to an English nurse with whom he was not acquainted. It was held to have been an insult to her modesty under Section 509

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21. 1982 Cr. L R (Raj.) 522 cited in Saxena, Shobha, *Crimes Against Women and Protective Laws,* Deep and Deep Publications, New Delhi, 1995, p.217.

22. 9 D.L.R. (1957) S.C., 127.

of the Indian Penal Code.[23]

Provisions of Section 294 of The Penal Code prohibiting obscene acts or songs causing annoyance to others may also be used to redress sexual harassment. For instance, Saxena records a case where a school teacher was plagued by indecent jokes by the headmaster in the presence of other teachers. Since there was clear evidence of the incidents not only from the complainant, but also from her colleagues, the accused headmaster was found guilty under Section 294 of the Indian Penal Code.[24]

The *Nari O Shishu Nirjaton Domon Ain 2000,* a modification of the Women and Children Repression (Special Provision) Act 1995, was enacted in view of escalating violence against women and children. The Act seeks to focus on issues that have not hitherto been addressed, such as child sexual abuse and sexual harassment. Section 10(2) of the Act provides that any man who outrages the modesty of a woman— in order to satisfy has carnal desires or makes indecent gestures will be guilty of sexual harassment and will be punishable with rigorous imprisonment of not more than 7 years and not less than 2 years. He will also be liable to tender compensation. Initiatives to enact a special law for protecting women and children by incorporating different dimensions of violence were undertaken more zealously following an unfortunate incident which occurred inside the Dhaka University campus on new year's eve on 31 December 1999 when a young woman was assaulted and disrobed by a group of young men as she joined the revelries on the campus. Only thirteen days later another woman met with a similar situation as she and her husband, both doctors, were going out in their car and were stopped by some young men on a pretext. As the couple protested,

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23. AIR (1926) Bom., 159.

24. *Chandra Kala vs Ram Krishna,* 1985 Cr LR (SC), 365 cited in Saxena, op.cit., pp.219-220.

the lady was disrobed and harassed.[25] Cases have been filed in both the above-mentioned instances under relevant provisions of The Penal Code.

Limits of the Law

Although law is considered to be neutral, it is important to see law for what it really is in actual operation, rather than what it appears to be. Since law aspires to treat men and women on equal terms, it is necessary for law to rise above existing social inequalities for the objective enforcement of legislation protecting women.

In order to appreciate the problems vulnerable people face in dealing with the law it is first essential to understand the nature of law itself. Law reflects and reproduces the dominant norms of society. As such, the unequal status of socially vulnerable and disadvantaged groups of people is not simply an accident. The powerlessness and subordination experienced by these people are created and engendered by prevalent social, political, economic, and legal forces. As Schuler points out :

> Societies regulate the acquisition and control of land, jobs, credit and other goods and other services through their legal systems... What happens in all societies is that law skews access to these resources to the benefit of some and detriment of others.[26]

Women are no different to any other disadvantaged group in that, they are discriminated against by the law. Although women's legal position is implied in various legal instruments in Bangladesh, women's rights embodied therein remain largely unenforced. The prevailing legal system in Bangladesh is paternalistic towards women to the extent where protection of women is tantamount to protection of a man's property. Consequently, the law

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25. Facts compiled from newspaper clippings collected from Ain O Shalish Kendra (ASK).

26. Schuler, M. (ed.). *Legal Literacy. A Tool for Women's Empowerment,* UNIFEM, 1992, pp.24-25.

institutionalises male dominance over women in almost every sphere of life, which refers not only to the inadequacy of the law but also to the many discriminatory legal provisions that affect women adversely. The legal subordination of women in Bangladesh is manifest in several key areas, particularly in the personal laws that govern rights and obligations in marriage, divorce, custody, guardianship and inheritance. This subordination is also evident from women's unequal access to employment opportunities, property rights and participation in public affairs.

It has often been argued that legal subordination of women results from the fact that law is 'male', an ideology that emerges from the observation that most lawyers and lawmakers are male. Mackinnon, for example, points out that, ideals of objectivity and neutrality in law are values that are essentially masculine and they are universally accepted as such.[27] In the circumstances, if may be deduced that when a man and women appear before the law, it is not that law fails to apply objective criteria when faced with a feminine subject, but precisely that it does apply objective criteria that is inherently masculine.[28] It follows therefore, that ideals of equality, neutrality and objectivity are judged by values that are fundamentally masculine. In the context of Bangladesh this would mean that law enforces the power relations sanctioned by society by regulating people's lives in a certain manner on the one hand, and permitting people to conform to normative ideologies on the other. Thus, law plays a dual role, that of the 'regulator' as well as 'legitimiser'.[29] In other words, law regulates people's existence and legitimises the process by actually institutionalising

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27. MacKinnon, C., *Feminism Unmodified : Discourses on Life and Law,* Harvard University Press, Boston, MA, 1987 quoted in Smart, C., *Law, Crime and Sexuality. Essays in Feminism,* Sage Publications, London et al., 1995, p.189.

28. Smart, ibid.

29. Drawn from workshop proceedings on Acknowledging Sexual Harassment in Bangladesh organized by the British Council, 2-3 July 1998, p.9.

normative traditions within the body of law.

Hence, where sexual harassment is concerned, the popular assumption is that since women's place is in the home anything that happens to them if they venture into the public space is their fault. Asymmetrical power relations compel women to ignore the incidents. The cultural level of law has an invariable impact on the structural aspect of law. While there is no dearth of substantive laws in Bangladesh, their application is hardly consistent. Moreover, structural issues such as lack of enforcement are often the result of biased attitudes of law administrators and enforcers. Court proceedings beng expensive, cumbersome and legthy effectively discourage women from taking legal action and enforcing their rights in court. Moreover, the harassment and complexities involved compel women to conceal incidents of violence.

Lack of clarity and ambiguity of expressions in legal texts, result in protracted legal controversies, which deprive women of protection. Since existing laws do not cover many dimensions of violence against women, the focus of the prosecution also tends to be narrow. Thus, while protective legislation specifies only certain forms of aggression such as causing death, grievous hurt, rape and so on, and imposes stiff penalties accordingly, it is confined in its dimension and fail to identify other diverse forms of violence that affect women. Consequently, acts outside the ambit of existing laws enacted to combat gender violence do not merit any remedy. For example, sexual harassment at work and on the streets like wife battering, child abuse, psychological torture and so on, have not, until the enactment of the *Nari O Shishu Nirjaton Domon Ain 2000,* been addressed in relevant laws. Archaic criminal law provisions against 'outraging the modesty of a woman'[30] or insulting the modesty of a woman' [31], as discussed above, was the closest

30. Section 354 of The Penal Code, 1860.

31. Section 509, ibid.

Bangladeshi law ever came to addressing the issue of sexual harassment. Apart from the fact that these provisions have strong moral overtones, they are often interpreted as nothing short of rape.[32] The other problem with penal laws is that they seek to punish an individual wrong rather than address the discriminatory behaviour which is characteristic of conducts like sexual harassment.

A prosecution for sexual harassment under Section 354 of The Penal Code depends on proof of two matters. One, that the accused used criminal force or assaulted the woman and two, that such assault was done with an intent and knowledge that it was likely to outrage the modesty of a woman. Therefore, it is not enough to prove that assault has actually taken place but that it was done with full intention and knowledge. While corroboration is desirable it is not mandatory for proving a charge of sexual harassment. This brings us to the problem of furnishing evidence in such cases.

Cases of violence require the application of the laws of evidence, which often involve queries of delicate and intimate nature, which most women in the socio-cultural context of Bangladesh find difficult to respond to. In the circumstances, the defense lawyers frequently indulge in unnecessary character analysis of the victim vitiating from the actual context. Victims, in the process, suppress real evidence. Moreover, the prevalent patriarchal system nearly always places the burden on the woman to prove that she did not actually consent to the offending act. Where a person is subjected to violence law presumes there will be some perceptible signs. Being a more elusive form of intimidation, sexual harassment hardly leaves visible evidence of injuries. Proof of sexual harassment may not be easy to obtain as the nature of the behaviour is such that it usually occurs when there are no potential

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32. Kapur, Naina, 'Respecting Difference : Sexual Harassment in India', paper presented at the Workshop on Acknowledging Sexual Harassment in Bangladesh, organised by the British Council, 2-3 July, 1998.

witnesses, and the victim may subsequently be too ashamed to speak to anyone about the incident.[33]

While victims of overt sexual violence like rape, may be in a position to substantiate their complaints by producing witnesses or necessary evidence, victims of sexual harassment frequently suffer from a lack of discernible indication. At this point it may be useful to think in terms of an example. Say, a woman is walking through a crowded shopping mall. Preoccupied with the list of things she needs to buy she hurries along without so much as glancing at anyone. At this juncture she hardly considers herself as belonging to a specific sex. A passing man brushes against her and touches her indecently. The incident happens so fast that she only has the time to look at the departing back of the man. The woman is deterred from protesting or retaliating, as, within the given social scenario, any attention by the public was more likely to cause her utter embarrassment. Apart from this, in certain cases, the people may end up blaming her for provoking the occurrence. This instance demonstrates how women are regarded only as sexualised bodies that are open to use and abuse without resistance. The form of abuse does not necessarily have to involve touch-it can simply be a look or a comment. Thus, it is not the actual physical harm that is an issue here, rather what the act invokes. Hence, it may be argued that whether the harasser intended to harass the victim should not be an issue, it is how the victim feels that is important.[34]

Alternative Remedies to Sexual Harassment

Where there is an absence of adequate criminal laws or a lack of their proper implementation regarding the issue of sexual harassment, recourse may be had to the law of torts for an alternative remedy. Certain acts of sexual harassment do fall

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33. Houghton-James, op.cit.,p.129.

34. Herbert, C., *Talking of Silence : The Sexual Harassment of Schoolgirls,* Falmer Press, Lewis, 1989, P.32.

within the purview of trespass to person, more specifically assault and battery.[35] Battery is a direct and intentional application of force to another person without his/her consent. Since battery does not necessitate actual bodily harm, any form of insult or interference ranging from spitting to unwanted touch will constitute the tort of battery. Assault is the causing of reasonable apprehension of imminent bodily harm by the defendant.[36] Thus, there may, arguably be a place for tort in redressing against interference with a person that causes offence to honour and dignity.

In case of trespass to person the lack of consent is a key component. As with other areas of law where consent is essential in establishing liability, the law of torts also excludes liability for conduct that has presumably been consented to by the plaintiff. In case of sexual harassment, in the absence complaint or protest by the victim, the law assumes that the victim has consented to the act by implication. Yet the fact that sexual harassment is frequently perpetrated by someone in the position of authority over the victim is often overlooked. Moreover, such acts, being culturally acceptable, may be perceived as behaviour that has to be tolerated. Again consent is interpreted in various ways. For example, the manner in which a victim is dressed is often considered an important indicator of whether the victim actually consented to such conduct. There is a prevalent notion that a woman incites or discourages sexual attention by what she wears. Thus, where a woman dresses provocatively, it heralds availability and is construed as an invitation to sexual attention. Whether a particular form of clothing is provocative or not is decided by men and the fact that the way the victim dresses is significant to consent to sexual conduct demonstrates how male stereotypes about women prevail even in

35. For assault and battery please see James, Philip S., *General Principles of the Law of Torts,* Buttersworth, London, 1978; Markesinis, B.S. and Deakin, S.F., *Torl Law,* Clarendon Press, Oxford, 1994.

36. The Penal Code 1860 also has provisions relating to assault as a threat to use criminal force under sections 351, 353-357.

value judgements within legal contexts.[37]

Tortious liabilities are rarely invoked in Bangladesh as compensation is of little value particularly when the defendant is unable to pay. Nevertheless, in a culture of evading the law and getting off scot-free, any compensation, however, nominal, would serve to redress unwanted sexual attention.

Apart from tortious remedies, specific guidelines may be useful in addressing sexual harassment and questioning state accountabilitiy for such acts. The judgement of the Indian Supreme Court in *Vishaka vs State of Rajasthan*[38] is a case in point whereby two social realities received recognition : one, sexual harassment and two, gender-based violence being discrimination in that it violates a women's basic human rights. It all began when a female social worker, engaged in a state run programme in Rajasthan, was gang raped by five upper caste men in 1992. The rape was an act of vengeance against the social worker for her advocacy against child marriage. The incident received scant attention of the police, medical personnel and the magistrate who were rather trying to prevent the woman from registering her case. Before the rape incident, the woman social worker complained to the local authorities about sexual harassment by the accused, which went unheeded. Consequently, she was left to fend for herself. The lack of any functional policy on sexual harassment of village development workers questioned state accountability and amongst other issues, this became the basis of a public interest litigation filed by women's organisations in the Supreme Court of India.

Invoking the international human rights principles contained in the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) the Indian Supreme Court recognised the need to develop comprehensive guidelines in a human rights context, which would address the problem of sexual harassment

37. Houghton-James, op.cit.,p.175.

38. (1997) 6 SCC 241.

in the work place and other institutions. The process of developing the guidelines involved extensive liasing between lawyers, NGOs and grass roots women workers from which several salient points emerged for the Court to consider. It was postulated that failure by the state to recognise the vulnerability of all working women, particularly those working as agents of change, to harassment and abuse, encourage women, who were already having to endure social ostracism, to remain silent about their suffering. This essentially violated their freedom of movement and denied their rights to equality and to live with dignity. Moreover, repeated instances of sexual harassment of working women and the failure of the state to recognise the same as occupational hazard, results in inequitable treatment of women. In the present case, given the emotional, physical and psychological torture and humiliation experienced by the victim at the hands of dominant powers, she was entitled to compensation. Thus, the focus of the case shifted from a criminal wrong to a systemic discrimination, which required elimination.[39] On the basis of these postulations the Court ruled that :

> The immediate cause for the filing of this writ petition is an incident of alleged brutal gang-rape of a social worker... The incident reveals the hazards to which a working woman may be exposed and the depravity to which sexual harassment can degenerate; and the urgency for safeguards by an alternative mechanism in the absence of legislative measure. In the absence of legislative measures, the need is to find an effective alternative mechanism to fulfil this felt and urgent social need. Each such incident results in violation of fundamental rights of Gender Equality and the Right to Life and Liberty.[40]

The alternative mechanism was interpreted thus :

> In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of International Conventions and norms are significant for

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39. Kapur, op.cit.

40. *Vishaka vs State of Rajasthan (1997) 6 SSC 241.*

> the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19 (10) (g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the Constitution...[41]

Thus, in the absence of specific legal enactment on sexual harassment, some sort of a guideline or code of practice may be applied to ensure the prevention of such conduct. Green points out, for example, that in 1991 the European Commission issued a Recommendation on Sexual Harassment accompanied by a Code of Practice on how to combat sexual harassment at work. Although such Recommendations do not have express legal force they clearly treat sexual harassment as sexual discrimination which violates the European Union's Directive on equal treatment for women and men as regards access to employment, vocational training, promotion and working conditions, Following the Recommendation legal cases on sexual harassment were taken across the European Union.[42]

It is common for women to prefer informal methods of settling problems of sexual harassment, as they may feel intimidated, embarrassed and reluctant to draw attention to themselves. As such, they may shy away from the prospect of airing their grievances in a formal setting. In many cases women simply want the harassment to stop rather then subject the perpetrator to discipline. This may perhaps be best achieved through informal procedures, which would restrain offensive behaviour towards women and create an enabling environment for them to participate in activities outside their homes.

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41. Ibid.

42. Green, Kate, 'Living Dangerously : Women Talking About Sexual Harassment', paper presented at the Workshop on Acknowledging Sexual Harassment in Bangladesh, organised by the British Council, Dhaka-2-3 July 1998.

Conclusion

The fact that societies do not necessarily possess the same cultural norms regarding appropriate gender behaviour, indicates that the roles of men and women are not 'natural', but constructed by existing culture.. The respective roles that men and women in Bangladesh adopt are a product of socio-cultural and religious conditioning which stress on certain human traits as particularly masculine and feminine. Stereotypical gender behaviour is inculcated so that being feminine, or masculine, produces conformity, which in turn reinforces the stereotype.[43] Thus, where cultural definitions protray women as inferior and weak, sexism is bound to develop and be perpetuated. In the circumstances, controlling women through sexual harassment amounts to control at a cultural level. Although sexual hearassment as a controlling process may not be overtly visible, victims do suffer from health and psychological problems as a result of harassment. Fear of repetition of incidents, often compel women to modify their lifestyles altogether.

Harassment is one way of ensuring that women remain in their place and remember their role as sexual objects. The behaviour that men on the streets and in the workplace randomly accord to passing women, serves to classify them as imperious members of the society to whom the streets belong. In the circumstances, women are inevitably assigned a passive part. Consequently, sexual harassment has been slow to surface and capture the requisite attention and recognition. Although sexual harassment has traditionally been considered as harmless, it is really a part and parcel of the more massive forms of violence against women. It is contended that by its seeming harmlessness and triviality, sexual harassment actually impedes women's right to personal integrity and encourages men to transgress against women's rights to move, interact and participate freely.

Women have a right to say no, to protest and expose male invasion of their bodies and privacy. They have a right to be evaluated on the basis of their intellect, merit and skills and not on their sexual

43. Herbert, op.cit., pp.23-24.

and physical traits. There is thus a critical need to place gender-biased sexual harassment within the context of women's structural inequality, as a means of breaking down the distinction between the private and the public life, that often excludes sexual harassment of women from the human rights agenda. Since women experience a general lack of power there is a great need to recharacterise civil and political rights in order to ensure that women are not denied access to justice and economic resources. It is necessary to adopt an all encompassing legislation that would override the ad hocism and ennui, which traditionally pervade legal actions against perpetrators of violence. Such legislation, in order to be effective, would have to spell out clear guidelines on sentencing and enforcement. It would have to provide protective and rehabilitative services accompanied by provisions for victim compensation and counseling in order to ensure a progressive and determined societal action.

It is equally important to acknowledge the limits of the law. Legislation alone cannot eradicate the problem. While law may benefit women in many ways, incidents would have to be reported before law can be used to deal with them. This is unlikely to occur unless sexual harassment is recognised as unacceptable behaviour and awareness of the issue is raised. It has been said that sexual harassment is an issue of power rather than of right or wrong.[44] It illustrates women's oppression within society based on sex that accentuates the cultural and structural inequalities experienced by women. In Bangladesh where law is frequently seen to benefit only the rich and the powerful, women, by virture of their subordinate position, are often precluded from its protection. For example, since domestic violence or sexual harassment is seen as a natural corollary to womanhood, such issues hardly receive legal attention or acknowledgement. In the circumstances, an ethos of collective care, vigilance and responsible conduct by all members of the civil society, including educationists, lawyers, judges, police, towards females in general, is central to effective and vigilant law enforcement.

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44. MacKinnon, op.cit., 1979, p.173.

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"DOUBLE TROUBLE": HINDU WOMEN IN BANGLADESH—A COMPARATIVE STUDY.....

Dr. Shahnaz Huda

Introduction

The following article deals with particular personal laws relating to Hindu women in Bangladesh. Comparative reference is made to the law applicable to Bangladeshi Muslim women. Although the focus of the article is on Bangladeshi Hindu women, attempts have been made to analyse the disadvantages faced by women of both religions. The purpose is to present a comparative view of the situation of women belonging to these very different religions in the Bangladeshi context. The article also touches upon legislative reforms affecting Hindu and Muslim Women in Bangladesh while at the same time comparing the reforms made in India.

The situation of Muslim women in Bangladesh and their status under the law is a subject which continues to be widely discussed since the majority of Bangladeshis are Muslim. However, the circumstances of women who belong to the minority religions are not subjected to the same amount of scrutiny. Efforts are made in this article to critique the Hindu law as it is applied in Bangladesh today in view of the wide ranging reforms effected in India.

Protection of minority rights and non-discrimination based on religion is one of the tenets upheld, at least theoretically by all civilised systems of law, as it in Bangladesh. The irony is that this has been construed to mean non-interference with the personal laws of different religions and this has in its turn effectively ensured discrimination of the minority amongst the minority i.e. women belonging to minority religions, specifically in this article, Hindu religion. This discrimination is supported by the patriarchal system of the Hindus as it is in the case of the Muslims. Bhasin

writes that most religions consider women to be inferior, impure and sinful:

> .....inequitous relationships are sanctioned and legitimised by recourse to "religious creeds and fundamental tenets".[1]

Women in Bangladesh, both Muslim and Hindu, suffer due to disparate religious laws which because of politicisation of religion have not been reformed as they ought to have been. Again, while it is difficult to bring reforms to laws affecting the majority of the population of a country, it is close to impossible to do so in the case of minorities and withstand allegations of interference with religion.[2] When it comes to safeguarding the patriarchal system through the use of religion, depriving women becomes the common rallying ground for most religions.

Personal laws: sources and Nature:

There is no uniform law applicable in Bangladesh so far as family or personal matters are concerned. Matters such as divorce, marriage, maintenance, custody, adoption and so forth are determined for Muslims by Muslim law and for Hindus by Hindu law. The same rule applies in the case of other religions.

In the case of Muslims, Bangladeshis belong to the Sunni Hanafi

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1. Bhasin. Kamla (1993) What is Patriarchy; Kali for women; New Delhi. at p.10.

2. In 1985 in the Indian case of Mohammad Ahmed Khan v. Shah Banu [1985 (1) SCALE, p. 767 ; Air 1985 SC 945] the Supreme Court decided in favour of a Muslim womans' right to get maintenance beyond the period of *iddat* based on the Courts interpretation of Islamic law as well as on the basis of Sec. 125 of the Criminal Procedure Code, 1973 applicable in India. In the end the Government had to bow down to the pressure of the orthodox portion of the Indian Muslim community. Muslims women, by virtue of the Muslim Women's (Protection of Rights on Divorce) Act, 1986 were declared to be exempt from Sec. 125 of the Indian Cr. P.C. and her right to maintenance during the period of *iddat* was reiterated. For more on the Shah Banu case see Latifi, Danial (1993). "Women's Rights" ---Paper presented at the International Conference of Lawyers on Changing Scenarios of Human Rights, February 20-21, 1993. New Delhi.

school. Apart from the religious or Shariah law, the main pillars of which are the Quran and the Sunna, sources of Muslim law include several legislative enactments aiming to introduce certain reforms, and judicial precedents.[3]

Hindus in Bangladesh belong to the *Dayabagha* school.[4] Hindu law is considered to be part of the *Dharma* and the *Srutis* (i.e. that which was heard) or the *Veda* are considered to be the original source of Hindu law i.e. the *Dharmashastras*. *Sruti* or the Vedas are of divine origin and the words of God which were passed on to their disciples until such time that they were compiled and put into writing. Since they are superhuman works, they are eternal, faultless and self evident.[5] In significant contrast to Islamic law. this process of revelation is not from one identified God to his Prophet, but from an unknown God or Great Power.[6] The Code of Manu is considered to be the most authoritative.

After the *Smruti* comes the Smriti i.e. that which was remembered

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3. For more on the sources of Muslim Law see, among many others, the following
   Ali, Syed Ameer (1929). *Mahommedan Law;* Thacker, Spink and Co., Calcutta;
   Baillie, Neil B.E. (1875). *A Digest of Moohummudan Law,* part I the Doctrines of the Hanifeea Code of jurisprudence, 2nd edition; Smith, Elder and Co., London.
   Fyzee, Asaf A.A. (1964). *Outlines of Muhammadan Law;* Oxford University Press, London.
   Macnaghten, W.H. (1825). *Principles and Precedents of Moohummudan Law;* Calcutta.
4. There are two main schools of Hindu law -- the Dayabagha and the Mitakshara. The Dayabagha school, also known as the Bengal school, prevails in Bangladesh. The major difference between the two schools are as regards principles of inheritance and the joint family.
5. Nagpal, Ramesh Chandra (1983). *Modern Hindu Law;* Eastern Book Company, Lucknow at p.23
6. Rakshit, Mridulkanti Sree (1985) *The Principles of Hindu Law-- the personal laws of Hindus in Pakistan and Bangladesh;* Sree, Mrinalkanti Rakshit, Chittagong at p.8.

by the *rishis*. Thus the basis of *Smriti* is the *Sruti* but they are human works.[7]

> The Smritis (what is recollected or remembered) are of human origin and refer to what is supposed to have been in the memory of the sages who were the repositories of the revelation.[8]

During the post *Smriti* period, when the composition of the *Smritis* came to a halt, discussion on *Dharma* took the form of commentaries on the *Dharmashastras* which included assimilation of the customs and usages prevailing during that time.[9]

Another vital source of Hindu law is custom. A custom, if proved, can outweigh any written text of law.[10] The word custom as used in Hindu law is derived from the Sanskrit word *sadachar* or *shistachar* i.e. the customs of good men.

Thus, Hindu law is the law of the *Smritis* as expounded in the Sankrit Commentaries and Digests which, as modified and supplemented by custom, is administered by the courts.[11] As in the case of Anglo-Muhammadan law:

> Hindu law as administered by the British-Indian Courts was a mixture of Shastric Law, custom, and case law, with a hardy dose of English legal concepts and notions, simplified and standardised for ease of application and administrative convenience.[12]

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7. Ibid at p. 24.
8. *Mayne's Treatise on Hindu Law ;* 13 th Edition; revised by Kuppuswami, Justice Alladi; Bharat Law House, New Delhi at p.14-15.
9. For more on the schools, sources and development of Hindu law see Mullah's principles of Hindu Law, 13 th Edition, by Desai, Sunderlal T.; N.M. Tripathi Private Ltd, 1966; Mayne's Hindu Law (Ibid)
10. Madura v. Mootoo Ramlinga (1868) 12 MIA 397 (463).
11. Supra note 8 at p.1.
12. Carroll. Lucy (1986). "Law, custom, and statutory social reform: the Hindu Widow's Remarriage Act of 1856" in *The Indian Economic and Social History Review,* 20,4 (1986); pp.363-388 at p. 369.

After the initial sources, there are more modern sources e.g. legislative enactments and precedents which play, as in the case of Muslim law, an immensely important role in determining what the law is for the Hindus in Bangladesh. The Colonial Government of India had the legislative authority to change the personal laws of the Indians and they used this power in several cases. This applied especially in the case of practices they could justify as being particularly abhorrent e.g widow remarriage, child marriage, *sati* and so forth.[13] After partition in 1947 while there were major legislative changes in India as regards Hindu law there were close to none in the then Pakistan. After the independence of Bangladesh, this trend continues and significant legislative reforms to Hindu laws are negligible. The Hindu law of Bangladesh thus, generally remains at the position the British left it in 1947.[14] As far as judicial activism is concerned, although in many cases interpretation of Hindu laws have been given by the courts, there is the danger of the ignorance and lack of codified guidelines of the above law translating itself into faulty interpretations of the law.

In India, demands for a codified Hindu law, which would reform the family laws in favour of women and remove legal disabilities in their favour was raised from the 1930's . However, vehement opposition from the orthodox community to such a Code defeated attempts to legislate on such a Code time and time again. Ultimately the proposed code was split up into four enactments and passed in the 1950's. These enactments are:

The Hindu Marriage Act, 1955; The Hindu Minority and Guardianship Act, 1956; The Hindu Adoptions and Maintenance

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13. For a discussion and critique of the reforms made by the British Raj see Ibid and Chowdhry, Prem (1993). "Conjugality, Law and State: Inheritance Rights as Pivot of Control in Northern India" in *National Law School Journal:* Special Issue 1993 on *Feminism and Law;* 95-116.

14. Menski, Werner F. and Rahman, Tahmina (1988) . "Hindus and the Law in Bangladesh" in South Asia Research Vol. 8, No. 2 November 1988 pp. 111-131 at p.1.

Act, 1956; The Hindu Succession Act, 1956.

The above Acts are not applicable in Bangladesh.

Marriage:

For both Hindus and Muslims, the institution of marriage is regarded as extremely important. Socio-cultural as well as religious considerations augment the importance of marriage for women of both religions. Irrespective of religion, single women are not socially acceptable.

Muslim marriages are contracts of a relatively simple nature which only requires offer and acceptance in front of two witnesses. Apart from socio cultural practices, Muslim marriages require little ceremony or ritual to give the marriage legality. In effect it is a civil contract with religious overtones.

For the Bangladeshi Hindus, uncodified marriage laws continue to govern the institution of Hindu marriages. Whatever statutory innovations exist are the gift of the British colonisers. Unlike a Muslim marriage, a Hindu marriage is a religious sacrament and certain ceremonies are essential to the legality of the marriage. In the case of AMULYA CHANDRA v. THE STATE it was held that the two essentials for a valid marriage under Hindu law are:

i) Invocation before the sacred fire and

ii) The taking of the seven steps before the sacred fire by the bride and the bridegroom, i.e. *Saptapadi.* The marriage becomes complete when the seventh step is taken ---until then the marriage is incomplete and not binding.[15]

Age of marriage: As far as the age of marriage is concerned, both the religions permit child marriages.[16] Banerjee writes that Hindu

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15. (1983) 35 DLR. 160.

16. For more on the age of marriage under Muslim law see Huda, Shahnaz (1997). "Child Marriage: Social Marginalisation of Statutory law" in *Bangladesh Journal of Law,* Vol. 1 No. 2, December 1997; Bangladesh Institute of Law and International Affairs; pp. 138-181.

minors are not only eligible for marriage, but are the fittest to be taken in marriage:

> ....marriage of a woman after she has attained puberty, though declared sinful, is not absolutely void, though some degree of blame is always attached to it.[17]

Under Muslim law, persons under a certain age have the power to repudiate marriages contracted during minority exercising what is known as the option of puberty, which under traditional Hindu law a Hindu does not have.

The Child Marriage Restraint Act, enacted by the British in 1929 (amended in Bangladesh in 1961 and 1984) however attempted to stop underage marriages and this act applies equally to all citizens of Bangladesh. In reality the ineffectiveness of the Child Marriage Act is obvious with the absence of proper birth registration and so forth. The Child Marriage Restraint Act in the case of both Hindus and Muslims fail to invalidate a marriage where the party/parties are below the legal age of marriage, it only makes it a punishable offence.[18]

Consent:

In the case of a Hindu woman, the consent of the bride is unnecessary---under Muslim law, the girl must consent (at least theoretically) if she is above the age of puberty. In both religions the father is always the preferred guardian.

Polygamy:

Polygamy amongst the Muslims is permitted and polyandry is prohibited and punishable by criminal law. However by virtue of the Muslim Family Laws Ordinance 1961, restrictions have been introduced to the right of polygamy amongst the Muslims and a man wanting to marry again during the subsistence of a marriage

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17. Banerjee Gooroodass (1879). *The Hindu Law of Marriage and Stridhan;* Tagore Law Lectures; Thacker, Spink, and Co., Calcutta at p.46-47.
18. For more on child marriages and the Act see supra note 16.

must take permission from the appropriate authorities.[19]

As in the case of Muslim men, polygamy is also permitted for Hindu men while polyandry is prohibited. Unlike the 1961 Act. restricting the Muslim mans' right of polygamy to a certain extent, a Hindu man in Bangladesh wishing to marry during the subsistence of his marriage (s), faces no restrictions whatsoever. This practice effectively means that a woman is left with little recourse in case of her husband wanting another wife. Even in the case of Muslims, the statutory requirement of obtaining the requisite permission in reality becomes largely ineffectual when the woman is almost always financially dependent on the husband and must acquiesce to his demands, however unreasonable. In case of Bangladeshi Hindu law the situation becomes especially hard since divorce is not allowed (see later). In India however, by virtue of the Indian Marriage Act of 1955 monogamy has been established and bigamy is punishable both for the male and the female. Section 5 (i) of the Indian Hindu Marriage Act thus prohibits not only polyandry but also polygamy. Section 11 of the Act makes a bigamous marriage null and void and Section 17 makes it a penal offence for both Hindu males and females under Ss. 494 and 495 of the Indian Penal Code.[20]

Other changes made to the laws on Hindu marriage in India include the legalisation of intercaste marriages which continues to be forbidden in Bangladesh.

Registration of marriage:

As far as registration is concerned although Bangladeshi law provides for registration of Muslim marriages[21] through legal

19. Section 6 (1) of the Muslim Family Laws Ordinance, 1961 states:
No man, during the subsistence of an existing marriage, shall, except with the pervious permission in writing of the Arbitration Council, contract, another marriage, nor shall any such marriage be registered under the Muslim Marriage and Divorces Registration Act 1974 (LII of 1974).

20. Diwan, Paras (1993) *Modern Hindu Law;* Allahabad Law Agency, Allahabad, at pp. 106-108.

21. Muslim Marriages and Divorces Registration Act 1974.

mechanisms, albeit faulty, as far as Hindu marriages are concerned there are no provisions at all for the registration of Hindu marriages. The Muslim Family Laws Ordinance of 1961, covered the question of registration until 1974, when the first Parliament of Bangladesh enacted the Muslim Marriages and Divorces (Registration) Act, 1974. By virtue of this Act, provisions were made for the registration of divorces as well as marriages.

As mentioned above, there is no requirement for registration of Hindu marriages in Bangladesh.[22] Since registration is not a requirement, the court's technical approach, in particular the failure to recognise customary forms of marriage, may cause considerable difficulty to women who seek to validate their rights.[23] The Indian Marriage Act, 1955 provides for registration of marriages. However lack of registration does not effect the validity of the marriage in the Indian Context.

Dissolution of Marriage

For the Hindus the marital bond is eternal and unbreakable. The sacramental marriage amongst Hindus have three characteristics :

> it is a permanent and indissoluble union, it is an eternal union, it is a holy union.[24]

Shastric Hindu law does not allow dissolution of the marital tie, however painful cohabitation may be. However in some communities the custom of divorce obtained and the courts enforced such custom provided they fulfilled the requisites of a valid custom.[25]

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22. Huda, Shahnaz (1999). *Registration of Marriage and Divorce in Bangladesh, A Study on Law and Practice;* Bangladesh Legal Aid and Services Trust, (BLAST), Dhaka.
23. Hossain, Sara (1994). "Equality in the Home : Women's Right's and Personal Laws in South Asia" in *Human Rights of Women;* Cook, Rebecca (Editor); The University of Pennsylvania Press, Philadelphia; pp. 465-494 at p. 477.
24. Supra note 20 at p. 68.
25. Sankaralingam v. Subban 1894 ILR 17 Mad 479.

As far as Muslim women are concerned, it is true that they have the right of divorce but in a much more limited manner than the unfettered right possessed by the Muslim male.[26] The Muslim wife may divorce with her husbands consent, on mutual agreement or if she has been delegated the right by her husband. She may also involve herself in messy judicial divorce proceedings under the Dissolution of Muslim Marriages Act 1939.

It is interesting to compare the statutory innovation regarding dissolution of marriages enacted in 1939, (applicable to both Indian and Bangladeshi Muslims) and the provisions for dissolution made available to Indian Hindus by the Marriage Act of 1955. The Act applicable to Muslims grants the power to women to seek dissolution of marriage by judicial decree on certain grounds. The Hindu Marriage Act of 1955 applicable in India, gives both parties to the marriage the right to go to court for dissolution and furthermore grants the wife additional grounds.[27] Under the Indian Act of 1955 (Section 13) either husband or wife may seek divorce on grounds of cruelty, adultery, desertion, insanity or incurable disease and so forth. Cruelty, desertion, insanity, impotency, incurable disease are also grounds for Muslim women to go to Court under the Dissolution of Muslim Marriages Act, 1939 although adultery is not. Under the Hindu Marriage Act, 1955 marriages may be voidable and may be annulled by a decree of nullity on grounds of impotency of the respondent (Sec.12). Like the traditional concept of option of puberty for the Muslims recognised by Section 2 (vii) of the Dissolution of Muslim Marriage Act of 1939, the Indian Act of 1955 by Sec. 13 (2) (iv) provides that the Hindu wife may petition for dissolution of her marriage on the ground :

> that her marriage (whether consummated or not) was solemninized before she attained the age of fifteen years and

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26. For more on Muslim laws on divorce see Huda, Shahnaz (1993). "Untying the knot-Muslim Women's Right of Divorce in Bangladesh"; in *The Dhaka University Studies*, Part F, Vol.V, No.1. June, 1994.

27. See Section 13 (2) of the Hindu Marriage Act 1955.

> she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Widow Remarriage :

There are and were no bars against widows remarrying under Muslim law. Traditional Hindu law prohibited widow remarriage amongst higher caste Hindus. Under orthodox Hindu law :

> ... a woman, on the death of her husband, might either immolate herself on his funeral pile, or lead a life of perpetual widowhood.[28]

The practice of *sati* was abolished by the British in 1829.[29]

By the Hindu Widow's Remarriage Act of 1856, which owes its origin to Pundit Ishwar Chandra Bidyasagar, remarriage of widow's was legally sanctioned.[30] However if a widow remarries she cannot retain the property of her previous husband.

> Widow's right to inherit her late husband's property is conditioned on her capacity to confer spirtitual benefits on her dead husband-Loss of such right is a characteristic of the Hindw Law following her remarriage founded on texts as well as on the underlying principles regarding law of inheritance.[31]

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28. See supra note 17 at p. 199.
29. Interesting to note how even practices which are obviously illegal and likely to bring upon criminal punishments continue in spite of age old laws. In 1987 the celebrated Indian case of Roop Kanwar from Rajasthan who burned on her husband's funeral pyre shocked India and brought home the fact that these practices continue to exist and may be more widespread than is acknowledged. Dowry deaths, child marriages and so forth continue unabated in all the countries where legislation prohibiting such practices have been in force for years.

    Also for more on the background of the colonial legislation to abolish the practice of sati see Mani, Lata (1987). "Contentious Traditions : The DEBATE on SATI in Colonial India" in *Culture and Critique*, 1987 Fall, pp. 119-156.
30. Supra note 12.
31. Nurunnabi v. Joynal Abedin (1977) 29 DLR (SC) 137.

Even if custom allows re-marriage, a Hindu widow by such marriage forfeits her right to her deceased husband's property.[32]

Section 2 of the Hindu Widow's Remarriage Act States :

> All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to remarry, only a limited interest in such property with no power of alienating the same shall upon her remarriage cease and determine as if she had then died; and the next heirs of her deceased husband or other persons entitled to the property on her death, shall thereupon succeed to the same...

Adoption

Adoption is recognised under Hindu law but not under Muslim law. Although many childless Muslim couples in reality do adopt, the child does not inherit property as a natural child. This means that adoptive parents usually have to go through complicated procedures to gift their property to the child. Unlike Muslim law, adoption is permitted amongst the Hindus. The aim of adoption under Hindu law is two-fold. The first is religious i.e. to secure spiritual benefit to the ancestors and to the adopter by having a son for the purpose of offering funeral cakes and libations of water to the manes of the adopter and his ancestors. The second is secular i.e. to secure an heir and perpetuate the adopter's name. In Bangladesh the Shastric uncodified law relating to adoption continues to exist. Under this law only a male can be adopted. He must belong to the same caste as his adoptive parents and his mother must NOT be within the prohibited degrees to his adoptive father i.e, he must not be a boy whose mother his adoptive father could not have married. Under Shastric law only a man can adopt unilaterally. A wife or a widow, in most places, may adopt only with the husbands express consent.

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32. Sowdamini Ray Malakar v. Narendra Ch. Barmau (1952) 4 DLR 492.

The Hindu Adoptions and Maintenance Act of 1956 has in India changed, amended and codified the law relating to adoption. All adoption in India after 1956 are secular, and to be valid must conform to the requirements of the Act.[33] In the case of adoption changes have been made in India which gives a woman rights almost equal to that of a man. A married Hindu male cannot adopt without the consent of his wife [Section 5 (1)]. A Hindu woman, unmarried, widow or divorcee can adopt but a married woman cannot adopt even with her husband's permission. The husband must adopt with her permission. (Section 8).

Property Rights

In Bangladesh the kinds of property that a Hindu woman may possess continues to be divided into a) *Stridhan* and b) Property inherited by her and to which she has limited rights. *Stridhan* property is property over which a woman generally has absolute control. Loosely defined, *Stridhan* means property which a woman has power to give, sell or use independently and which passes on her death to her heirs.

When a Hindu man inherits property, whether from a man or a woman, he takes absolutely and becomes the fresh stock of descent i.e. after his death the property passes to his heirs. When however, a female inherits property whether from a male or a female she only takes a limited estate and upon her death the property reverts back to the reversioner, i.e. the next heir of the person she had inherited the property from. The estate inherited by a widow from her dead husband is called widow's estate. The estate taken by every other limited heir is similar in its incidents to a widow's estate. Although the woman is entitled to enjoy the estate inherited by her she cannot dispose of such property by gift, sale and so forth.

A daughter's right to her fathers property depends, astonishingly enough, upon whether she has or can have a son. Little wonder

33. Supra note 20 at p. 217.

therefore the importance placed upon a male offspring! The daughter is fifth in line to her fathers property. In the absence of a son, son's son, son's sons son, widow (s) the daughter inherits. Preference is given to the maiden daughter who may possibly have a son in the future, then to a daughter who has a son. Barren daughters, widowed daughters who have no children or who have daughters are excluded.[34]

In India however, after independence, the State, through direct and positive intervention brought about 'fundamental and radical changes in the law of succession in breaking violently with the past.[35] In 1956, the Hindu Succession Act was enacted. Granting equal property rights to women was seen as a threat to the system of joint Hindu family, an intrinsic part of the Hindu social system and thus vehemently opposed.

Of the most broad changes made by the Hindu Succession Act, 1956 is the abolition of the limited estate of the female Hindu. A Hindu female had now the right to deal freely with and dispose of in any manner any kinds of property acquired by her. Section 15 of the Act prescribes a list of heirs entitled to succeed to the property of the woman upon her death.

(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

By the 1956 Indian Act the property of a male Hindu devolves in equal shares between his son, daughter, widow and mother. Male and female heirs are now treated as equal without any distinction.[36]

As far as Muslim women are concerned, except for a few

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34. For more see Supra notes 6 at p. 172 and Supra note 8 at p. 850.
35. Chowdhry, Prem (1993). "Conjugality, Law and State : Inheritance Rights as Pivot of Control in Northern India" in *(1993) I NLSJ,* Special Issue 1993 on Feminism and Law, pp. 95-116 at p. 106.
36. Hindu Family Law : An action Study on proposed reforms of Hindu family law; BNWLA, NY at p.13.

exceptional cases, most women inherit half of their male counterparts e.g. the daughter inherits half of what the son interits. She nevertheless inherits absolutely with full powers of disposal. The demand has been for equal inheritance rights for Muslim women.[37]

Maintenance

Under Muslim law a man must maintain his wife and children. The husband is under a duty to maintain his divorced wife during the period of *iddat*. The question of past divorce maintenance was settled in the case of Jamila Khatun v. Rustom Ali[38] where it was decided that the wife is entitled to past divorce maintenance even in the absence of any specific agreement. In Hefzur Rahman v. Shamsun Nahar Begum,[39] the High Court Division of the Supreme Court of Bangladesh, held in favour of the divorced wife's right to maintenance until remarriage. However, this decision was reversed by the Appellate Division. Now a Muslim wife is entitled to file a civil suit under the Family Courts Ordinance or under Section 9 of the Muslim Family Laws Ordinance, 1961. The jurisdiction of the Criminal court to entertain suits under Section 488 of the Cr.P.C. was ousted in the case of Pochon Rissi Das v Khuku Rani Das.[40]

Under traditional Hindu Law, the husband has the duty to maintain his wife and minor children. A father is bound to maintain his daughter until marriage. The responsibility to maintain his wife is a personal obligation arising out of the fact that she is his wife and independant of the possession of any property by him.

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37. For more see Huda, Shahnaz (1998). "Women's Property Rights in Bangladesh : Effect of Religion and Custom" in *Development Issues Across Regions : Women, Land and Forestry;* Wickramasinghe, Anoja (editor); CORRENSA, Peradiniya, Sri Lanka; pp. 294-308.
38. 16 BLD (AD) (1996) 61.
39. 47 DLR (1995) 54.
40. 1998 to DLR 47.

After the Hindu Women's Right to Separate Residence and Maintenance Act of 1947, a woman may be entitled to maintenance even if she is living separately, based on several grounds.

Under the Hindu Marriage Act of 1955, *applicable to India,* both parties to the marriage can make an application for maintenance *pendente lite* as well as for permanent maintenance and alimony (under sections 24-25 of the Hindu Marriage Act of 1955). Under the Hindu Adoption and Maintenance Act of 1956 maintenance is defined as including, "...provisions for food, clothing, residence, education and medical attendance and treatment..." Section 3 (b) (i). The Act makes provisions for civil proceedings to obtain maintenance while under Section 125 of the Indian Criminal Procedure Code, 1973 maintenance is made recoverable by summary proceedings. The above mentioned section also clarifies that "wife includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried". Thus, under the Act a destitute divorced wife may be entitled to maintenance until remarriage.

Conclusion :

The lives of women in Bangladesh, both Muslim and Hindu, continue to be symbolized by unequal treatment and unequal laws. Only few laws relating to certain family matters apply to all communities e.g. The Child Marriage Restraint Act, 1929; The Dowry Prohibition Act, 1980; The Family Courts Ordinance, 1985.

As shown above, the far-reaching legislative enactments of independent India have revolutionised the Hindu woman's rights in regard to succession and inheritance :

> Many of the prescriptions of the Shastric Law have been superseded by an emphasis on modernity, social emancipation, equality of the sexes, and by the social exigencies of the new era.[41]

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41. Supra note 12 at p. 388.

Intervention by the state in the case of Hindu personal law has thus resulted in Indian Hindu women gaining increased legal rights, although they have not gained complete legal equality.[42] The same may be said of Bangladeshi Muslim women, although statutory interventions reforming the Shariah law have in no comparative manner played as major a part as in the case of India.

Reminiscent of the struggle to pass the Hindu Code in India, in 1961 the Pakistani move to introduce reforms to several Muslim laws evoked strong response from the fundamentalist Muslim Community.

The Muslim Family Laws Ordinance of 1961 may be said to be the most important statutory innovation of the last four odd decades. It has restricted the right of polygamy, made the registration of marriages compulsory, introduced a period of three months and requirement of notice before divorce and so forth. However, reform of Shariah law through legislative encatments have not been as wide as those that have amended Hindu law in India.

In Bangladesh the situation of women is made more complicated due to the fact that the women of the minority communities face discriminations resulting from the failure to follow a more modern version accepted in India while on the other hand the reforms are much less far ranging as regards the women belonging the majority religion i.e. the Muslim women. Indian Hindu women have greater rights but Indian Muslim women due to the fact that they belong to a minority religion continue to be governed by archaic personal laws. It is alleged that :

> Setback to Muslim women arises from the fact that Indian Muslims now live in a state which can legislate for Hindu women without arousing suspicions and insecurities, but which cannot do the same for Muslim women.[43]

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42. Parashar, Archana (1992). *Women and Family Law Reform in India;* Sage Publications; New Delhi et al at p. 201.

43. Saiyed, A.R. (1992). "Muslim Women in India : An overview" in *Muslim Women in India;* Anjum, Mohini (Editor). Sangam Books Ltd., Dhaka at p.5.

The cry of religion in danger is used in case of majority communities also. Parashar cites an Indian case where the petitoner contended that an Act prohibiting polygamy amongst the Hindus while leaving Muslim men to freely practice it denied Hindu men equality before the law and discriminated against Hindus on grounds of religion only.[44]

The case is somewhat different in the Bangladeshi context where changes to laws especially which give greater rights to women are opposed both in the case of Muslim and Hindu law. Similarities in the two countries exist however in the use of religion, in both countries, as a political pawn.

Equality is demanded in two ways-that men and women should have equal rights and that all women, irrespective of religion should have the same rights. The dichotomy between two of the fundamental rights guaranteed by the constitution i.e. that is equality irrespective of gender and freedom to practice religion is difficult to reconcile.

The demand that all women should be treated equally means a demand for a uniform civil code. However fears have been voiced that this may mean Hindulisation or Muslimisation of laws depending on which religion forms the majority in the same manner that the British are accused of having Brahmanised Hindu law in their attempt to reform certain laws. Questions remain regarding the substantive success of such code as well as its acceptance. The argument whether it is more useful to have a uniform civil code to ensure equality or whether it would serve women's purposes the same way by amending each communities personal laws to guarantee equality is a debate which seems to be unending. The question of practicality however compromising, may have to be debated.

> It is only by understanding the contradictions inherent in women's locations within various structures that effective

44. Supra not 42 at p. 208.

> political action and challenges can be devised.[45]

The pressing need of the moment is wide ranging codification and legislative reforms to alleviate the situation of Hindu women in Bangladesh. There is not much evidence of judicial activism and/ or a desire by the Bangladeshi judiciary to 'make' laws.[46] Some of the widely accepted advantages of having a code are the achievement of uniformity, completeness and clarity in the expression of law.[47] It is also suggested that the codification of law makes further development of law much easier *inter alia* as the legislator's job also made simpler because he/she has to deal with the provisions of a code rather than with judge made law.[48] Rochi commenting on Pakistani Hindus comments :

> Given the sensitivity attached to religion and the force of customs and traditions, such laws which depend purely on interpretations of religion and tradition leave those governed under this law vulnerable to unexpected interpretations.[49]

Codification of such laws is essential so that sudden religious pressures can be avoided and the application of the law is uniform and less flexible.[50]

The other option is to have what may be called an empowering law. These kinds of laws would allow a person to choose what law (s) he chooses to be governed under. It would reconcile the contradictions between enforcing an uniform code upon people

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45. Mohanti, Chandra Talpade (1997). "Under Western Eyes : Feminist Scholarship and Colonial Discourses" in *The Women, Gender and Development Reader;* Visvanathan, N. (Co-ordinator) and Duggan, L. et al; The University Press Limited, Dhaka; pp. 79-86 at p. 85.
46. Supra note 14 at p. 131.
47. Supra note 42 at p. 243.
48. Ibid.
49. Ram, Rochi (NY). "Family Laws as applicable to Hindus in Pakistan" in *Family Laws and the Rights of Women;* AGHS legal Aid Cell, Lahore; pp. 9-11 at p.11
50. Ibid at p.11.

who vehemently object to such; on the other hand it is equally repressive forcing persons to choose religious laws which they do not wish to be bound by, especially as regards personal matters such as disposition of property and so forth; i.e. issues over which a persons freedom of choice is essential. However as Parashar[51] points out having an optional uniform law would mean that the majority of the women in India would not have privilege of making choices about their rights. She goes on to say that if the intention of the code is to give legal equality to women then an optional uniform code will be merely a cosmetic measure.[52] In India the Special Marriage Act of 1954 enables two persons to be married irrespective of what religion or religious beliefs they hold. Under Section 4 of the Act 'a marriage between any two persons may be solemnised under this Act' provided they fulfil certain conditions regarding prohibited degrees, valid consent, insanity. The parties under the Special Marriage act applicable in India, must be above the age of 18 and 21 and must not have a spouse living at the time. The Act also makes provisions for registration of the marriage, divorce by both husband and wife, permanent alimony and maintenance of the wife (Section 37). In Bangladesh the Special Act of 1872, enacted by the British, applies. This Act provides that persons belonging to different religions may marry but expressly excludes Muslims from marrying under the Act. Sec. 2 of the 1872 Act states that marriages may be celebrated under the above Act between parties neither of whom professes the Christian, Muslim, Hindu, Jewish, Parsi, Buddhist, Sikh or the Jaina Religion.

> or between persons each of whom professes one or other of the following religions that is to say, the Hindu, Buddhist, Sikh or Jaina religion...

The Special Marriage Act of 1872 is rarely used since it requires

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51. Supra the note 42 at 261-262.
52. ibid.

the parties to renounce their religion and personal laws and also limits rights to divorce, succession and adoption.[53]

One of the objections put forward by conservative Indian Muslims before the enactment of the Special Marriage of 1954 was that it would encourage people to circumvent their religious laws and obligations.[54] They had demanded that Muslims should be exempt from the purview of the Act. Unlike India, Bangladesh no longest explicitly commits to secularism—neither does the Constitution of Bangladesh, as in the case of India, make a pledge towards an uniform civil code.[55] Political considerations undoubtedly play a big role in determining what laws are going to be enacted. The enactment of an uniform code is viewed as a potentially disastrous election strategy. Coupled with that is the fact that a large portion of the community genuinely oppose the move to establish an uniform code. One must also keep in mind that those who oppose include a large number of women of that particular community. However every modern State is pledged towards the protection of the rights of its citizens. As Pereira points out, there is the choice of having a distinct, separate and overriding personal Code on the one hand and on the other having a parallel system whereby religious as well as a secular set of laws should have a fair life.[56] In this manner the State need not disturb the already existing

53. Supra note 23 at p.476.

54. Supra note 42 at p.161.

55. The constitution of the People's Republic of Bangladesh of 1972 originally contained the guarantee of secularism in both its preamble and Article 8 (1). This was reposed by proclamation Order No. 1, 1977 with 'principles of absolute trust and faith in almighty Allanh.' The Indian constitution guarantees secularism and in Article 44 contains a directive principle that: the state shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.

56. Pereira, Faustina (1998). Draft key Note Paper. Round Table Consultation on Personal Law Reform in Relation to women in Bangladesh and Assessing the Feasibility of a Uniform Personal Code: Organised by law Review and The British Council, October 27,1998, Dhaka. pp.1-7 on p.3.

personal, customary norms within each religion while at the same time, fulfilling its duty to:

> provide a uniform parallel system for its citizens who find themselves adversely affected by the customs and rules of their specific religious community.[57]

The rituals, customs and ceremonies which are so important need not be left out and can be incorporated with the parties deciding to opt for a secular outcome of their marriage if they so wish.

After several decades since the adoption of the Constitution, the Indian State has not made any progress towards realising the goal of an uniform civil code.[58] Thus despite formal guarantees of equality,

> Indian women's lives continue to be characterised by pervasive discrimination and substantive inequality.[59] Legal reform cannot in reality change womens lives.

For reasons common to the application of Muslim law in Bangladesh, ignorance of law, attitudinal inhibition like fear of public opinion and incapacity to reach and use the legal mechanism prevent women from realising the claims available under law. With increase in poverty levels women's lack of personal safety increases because poverty disempowers women even more than it does men. Although the realisation that empowerment of women is essential for the development of the country, has brought about many positive changes to women's lives:

> For every woman who sits in parliament, or has done a Ph.D. or goes to the Supreme Court to argue a case, you have

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57. Ibid at p.6
58. Supra note 42 at p.201.
59. Kapur, Ratna and Crossman, Brenda (1993). "On Women, Equality and the Constitution: Through the Looking Glass of Feminism" in *(1993) 1 NLSJ*; pp.1-61 at p.p

> thousands in a village who don't even know their basic rights and that they are equal citizens.[60]

The gradual development of religious personal law demonstrates the dynamic nature of religion and also that religious law continuously adapts itself in response to the changing trends of society which is denied by the orthodox, conservative community.[61] The increase in incidents of crimes against women is conveniently blamed upon the increased participation of women in activities outside the house thereby justifying seclusion and segregation of women. The legal system in most countries is both patriarchal and bourgeois, i.e., it favours men and the economically powerful classes.[62] Statutory innovations will fail until the whole underlying structural concepts of gender inequality is shaken.

Although the Hindu Community must play the crucial role in the demands for codification and modernisation of Hindu family laws in Bangladesh, the State must fulfills its constitutional obligations of ensuring justice to all its citizens. In the new millenium, the expectation of Bangladeshi women, of all religions, is justice, equality and equity. The Constitution of Bangladesh promises equality of treatment, equal protection of law and non-discrimination. These commitments must be translated into reality so that all Bangladeshis, irrespective of gender or religious belief, economic, political or social position are protected.

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60. Bumiller, Elisabeth (1990). *May you be the mother of a Hundred Sons;* Penguin Books, Calcutta at p.129.
61. Supra note 42 at 47.
62. Supra note 1 at p. 10.

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LEGAL ASPECTS OF RESTITUTION OF CONJUGAL RIGHTS

Md. Khurshid Alam

I. Introduction

Restitution of conjugal right arises out of a valid marriage. Now, marriage (nikah) is a civil contract which has for its objects the procreation and legalization of children. Marriage among Mohammadans is not a sacrament, but purely a civil contract and though solemnized generally with recitation of certain verses from the Holy Qur'an, yet the Mohammadan Law does not positively prescribe any service peculiar to the occasion.

Marriage confers important rights and entails corresponding obligations both on the husband and on the wife. Some of these rights are capable of being altered by an agreement freely entered into by the parties, but in the main the obligations arising out of a marriage are laid down by the law. An important obligation is consortium, which not only means living together, but also implies a union of fortunes. A fundamental principle of matrimonial law is that one spouse is entitled to the society and comfort of the other.[1] Thus, where a wife, without lawful cause, refuses to live with her husband, the husband is entitled to sue for restitution of conjugal rights;[2] and similarly the wife has the right to demand the fulfillment by the husband of his marital duties.[3] So, any of the party of a valid marriage may enforce restitution of conjugal rights on lawful ground.

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1. Latey, Divorce, 166.
2. Moonshi Buzloor Ruheem v. Shumsoonnissa Begum,1867 II M.I.A. 551.
3. Abdur Rahim, Jurisprudence 334.

In this article an attempt will be made to examine the nature of the law of restitution of conjugal rights under the Islamic Law. In this context the existing laws in the Indian sub-continent, recent legislation and contemoporary decisions of the Supreme Court will also be examined.

II. Restitution of Conjugal Rights and Islam

Fulfillment of conjugal rights and duties are essential for a happy and fulfilling married life. Though neither the Holy Qur'an nor the Sunnah directly deal with the matter of restitution of conjugal rights, yet Islam goes much further in setting the course of behavior for husbands and wives and encourages fulfillment of conjugal rights and duties. There are statements of the Holy Qur'an and Sunnah that describe kindness and equity, compassion and love, sympathy and consideration, patience and goodwill towards one another. The Holy Qur'an enjoins husbands to keep their wives with kindness or to part with them with an equal consideration. Almighty Allah has laid down in the Holy Qur'an:

> "O believers! ... live with them (wives)
>
> on a footing of kindness and equity.
>
> if you dislike something in them
>
> may be that what you dislike,
>
> Allah may have kept in it a great deal of good."[4]

The Prophet (PBUH) goes as far as to declare that the best Muslim is the one, who is best to his family, and the greatest, most blessed joy in life is a good, righteous wife.

III. Restitution of Conjugal Rights in the Indian Sub-continent

Based on Christian ecclesiastical law, restitution of conjugal rights developed into an English notion. This notion was applied

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4. Surah 4 (Al Nisa): Verse 19.

by the English rulers in the British India. The law of restitution of conjugal rights have been practiced in the Indian sub-continent for more than a century.[5]

The law is that if a wife ceases to cohabit with her husband without lawful cause, he may sue her for restitution of conjugal rights.[6] It is, therefore, necessary for the husband to come to the Court with clean hands, otherwise this relief will not be granted to him.[7]

The wife can similarly demand the fulfillment by the husband of his marital duties.[8]

Whenever a case of this nature arises, the Muslim husband being dominant in matrimonial matters, the Court leans in favour of the wife and requires strict proof of all allegations necessary for matrimonial relief.[9] The husband can divorce a wife who is disinclined to live with him, or marry a second wife, leaving his first wife alone and in peace. The Court may order the husband to be attentive to his wife; and, if he has more than one wife, to be just and equal between them, notwithstanding any consent having been given by any wife to unequal treatment.[10] The husband (unless he has contracted otherwise) can always divorce his wife, and thus get rid of most of his matrimonial liabilities. But he may not be willing to divorce: that might render him liable for the mahr, a circumstance that may not be negligible. The wife, on the other hand, is more in need of protection, as she cannot so release herself. The Sharaya-ul-Islam indeed suggests a kind of arbitration

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5. This is evident from the year of cases cited in this article. The year of the oldest case cited here is 1867.
6. Moonshi Buzloor Ruheem v. Shumsoonnissa Begum,1867 II M.I.A. 551.
7. Mulkhan Bibi v. Muhammad Wazir Khan, P.L.D. 1959 Lah. 710.
8. Abdur Rahim, Jurisprudence 334.
9. Abdur Rahiman v. Aminabai, 1935, 59 Bom. 426, Tayabji, 166.
10. Tyabji, Muhammadan Law, 167.

where there is a discord between them.[11]

The obligation of wife to live with her husband is not absolute. The law does recognize circumstances, which would justify her refusal to live with him.[12] For instance, if he has habitually ill-treated her, has deserted her for a long time, or if he has directed her to leave his house or even connived at her doing so, he cannot require her to re-enter the conjugal domicile or ask the assistance of a Court of justice to compel her to live with him. The bad conduct or gross neglect of the husband is, under the Muslim law, a good defense to suit brought by him for restitution of conjugal rights.[13]

The husband is not entitled to restitution of conjugal rights in the following cases:

a. Irregular marriage:

Irregularity of the marriage is a good defense to a suit for restitution of conjugal rights, as it is necessary for a marriage to be valid according to Muslim personal law before the Courts can grant a decree for restitution of conjugal rights.[14] Irregularity is a good defense even when consummation has taken place.[15]

b. Option of puberty:

When the marriage of the wife had taken place during her minority and she had repudiated it on attaining puberty, the husband cannot ask for restitution of conjugal rights.[16]

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11. Bail II, 88-89.
12. Fayzee, Outlines of Muhammadan 3rd Edn. 116.
13. Ameer Ali, Muhammadan Law, 382, 6th Edn.
14. Ghulam Muhammad v. Shah Jira Khanum, P.L.D. 1959, Lah. 1014.
15. Mt. Bakh Bibi v. Quaim Din A.I.R. 1934 Lah. 907, 154 I.C. 677.
16. Mt. Bhawan v. Gaman, 1934, 146 I.C. 292, Abdul Karim v. Amina Bai, 1936, 59 Bom. 426, 157 I.C. 694.

c. Non-payment of prompt dower:

If a wife makes a demand for payment of prompt dower and it is not paid by the husband, then he would not be given a decree for restitution of conjugal rights.[17] However, after the consummation of the marriage, the non-payment of dower even though proved, cannot be pleaded in defense of an action for restitution of conjugal rights.[18] The Court may allow the sum due as prompt dower to be paid into Court before decree, or give decree with a condition that it can only be executed on prompt dower being paid.[19]

d. Cruelty to wife:

Cruelty to the wife is a good defense to a suit for restitution of conjugal rights.

Cruelty, for the purpose, has been defined in the following manner:

i. Cruelty to a degree rendering it unsafe for her to return to his dominion;[20]

ii. Actual violence infringing the right to safety of life, limb and health or reasonable apprehension of such violence;[21]

iii. Charges of immorality and adultery and the heaping of insults constitutes cruelty.[22]

e. Failure to perform obligations:

If there were gross failure on the part of the husband to

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17. P.L.D. 1959, Lah. 710 Supra.
18. 30 Bom. 122=8 All. 149=11 Mad.327 and 17 Cal. 670.
19. 164 PR 1889.
20. Moonshe Buzloor Ruheem v. Shumsoonissa, 1867, II M.I.A. 551.
21. Asha Bibi v. Kadir Ibrahim 1909, 33 Mad. 22, Tayabji s.88.
22. Husaini Begum v. Muhammad Rustam Ali Khan, 1906 29 All 222.

perform the obligations imposed on him by the marriage contract, the Court would be justified in refusing such relief.[23]

f. False charge of adultery:

A false charge of adultery by the husband against the wife would be a good ground for refusing a decree for restitution of conjugal rights.[24] But if the husband bona fide retracts the charge of adultery brought against the wife earlier, a decree for restitution of conjugal rights can be given.[25]

g. True charge of adultery:

If the charge of adultery was true, it was no ground for refusing a decree for restitution of conjugal rights[26]. It was observed by their Lordships that refusal to grant the decree would amount to putting a high premium on immorality.

h. Treatment of wives:

When the husband has two wives, it is for him to prove that he is treating them on equal footing. If he fails to do so, he is not entitled to the discretion being exercised in his favour, in a case of restitution of conjugal rights.[27]

i. Agreement for separate living:

No decree for restitution of conjugal rights will be given if there is an agreement between the parties for separate living. In case of estrangement between husband and wife and long separation, decree for restitution of conjugal rights should not be passed[28].

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23. Moonshi Bazloor Ruheem vs. Shumsoonnissa, 1887,11 M.I.A. 551.
24. Mussammat Maqboolan vs. Ramzan 1927, 2 Luck, 482, 101 I.C. 261.
25. Khirodenissa v. Sekandar Biswas P.L.D. 1952 Dacca 179.
26. Jamiruddin vs. Sahera, 1927 54 Cal. 363, A.I.R. 1927 Cal 579.
27. Mulkhan Bibi v. Muhammad Wazir Khan, P.L.D 1959. Lah. 710.
28. Abul Hussain Bi 6 Bom. LR 728.

j. Discretion of the Court:

Restitution of conjugal rights is at the court's discretion and one has to prove that he has come to court with clean hands, for instance where he has married two wives, he must prove that he is treating both the wives on equal footing[29].

While concluding our discussion of the law of restitution of conjugal rights in the Indian sub-continent, it is worthy to note that the law may also be invoked by members of other communities, as it is seen in a suit for restitution of conjugal rights by a Hindu husband, where the husband is not necessarily entitled to a decree in the absence of a plea of cruelty by the wife. Where the wife has pleaded that she was deserted or neglected[30] by her husband and that the suit is not bona fide, he should be allowed to lead evidence so that the Court may be in a position to judge whether the relief sought for by the husband should be granted or not, and if so on what conditions, if any[31].

IV. Restitution of Conjugal Rights and Recent Legislation

The Courts entertained suits for restitution of conjugal rights under Section 115 of the Code of Civil Procedure. In 1985, the Family Court Ordinance has been passed, which amongst others, recognizes and deals with suits for restitution of conjugal rights. Section 5(b) of the Ordinance provides

"Subject to the provisions of the Muslim Family Laws Ordinance 1961 (VIII of 1961), a Family Court shall have exclusive jurisdiction to entertain, try and dispose of any suit relating to ...restitution of conjugal rights."

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29. Mulkhan Bibi v. Muhammad Wazir Khan, P.L.D. 1959 P. Lah. 710.
30. (1935) 16 Lah.892.
31. (1927)51 Bom.329.

We should note that the Ordinance did not grant any right of restitution; It simply provided an exclusive forum for enforcement of this right.

V. Restitution of Conjugal Rights and Recent Decisions of the Supreme Court of Bangladesh

The apparently settled law of restitution of conjugal rights, which was practiced for more than a century, received a setback, for the first time, in Bangladesh, in 1982, when in a decision, the Supreme Court declared that the law of restitution of conjugal rights was unconstitutional. This mark the beginning of a long controversy. There have been a series of decisions on the topic, some declaring the law not to be in conflict with the constitutional, while others declared it unconstitutional. We will now go through these decisions and evaluate the present position of the institution of restitution of conjugal rights.

a. Nelly Zaman v. Giasuddin Khan[32]

In 1982, in this case, it was held that the plea for restitution of conjugal rights is violative of the accepted state and public principle and policy and the constitutional.

His Lordship Mr. Justice Syed Mohammad Hussain held that by the lapse of time and social development the very concept of the husband's unilateral plea for forcible restitution of conjugal rights against a wife unwilling to live with her husband has become outmoded and does not fit in with the acceptable state and public principle and policy of equality of all men and women being citizens equal before law, entitled to equal protection of law and to be treated only in accordance with law, as guaranteed in Articles 27 and 31 of the Constitution of Bangladesh. In the husband's unilateral plea for forcible restitution of conjugal rights as against a wife unwilling to

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32. 34 DLR (1982), 221 (H.C.), Date of judgment 17th March, 1982.

live with her husband, there is no mutuality and reciprocity between the respective rights of the husband and the wife, since such plea for restitution of conjugal rights is not available to a wife as against her husband apart form claiming maintenance and alimony. A reference to Article 28 (2) of the Constitution of Bangladesh guaranteeing equal rights of women and men in all spheres of the state and public life would clearly indicate that any unilateral plea of a husband for forcible restitution of conjugal rights as against a wife unwilling to live with her husband is violative of the accepted state and public principle and policy.

If appears that Mr. Justice Syed Mohammad Hussain's, view "In the husband's unilateral plea for forcible restitution of conjugal rights as against a wife unwilling to live with her husband, there is no mutuality and reciprocity between the respective rights of the husband and the wife, since such plea for restitution of conjugal rights is not available to a wife as against her husband ..." cannot be considered as a correct proposition of law. For restitution of conjugal right is a mutual right available not only to the hushand but also to the wife, as Sir Abdur Rahim said that the wife can also demand the fulfillment by the husband of his marital duties. [33]

b. Sharmin Hossain @ Rupa v. Mizanur Rahman (Tuhin)[34]

Following the decision of Nelly Zaman v. Giasuddin Khan (1982), in 1994, in this case it was again held that suit for restitution of conjugal rights is in violation of the constitution.

Mr. Justice Muhammad Abdul Mannan held that the law of restitution of conjugal right is void upon an application under section 24 of the Civil Procedure Code for transferring a

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33. Abdur Rahim, Jurisprudence 334.

34. 2 BLC (1997) 509 (H.C.), Date of judgment 10th August,1994.

family court case for restitution of conjugal right from Pirojpur to any other court of competent jurisdiction. The suit for restitution of conjugal rights is in violation of Article 7 of the Constitution of Bangladesh and with the promulgation of the Constitution the said provision of law has became void as the same is directly against the provisions of the Fundamental Rights guaranteed by the Constitution. The constitutional guarantee of equality of man and woman and liberty of the citizen in such circumstances the wife cannot be dragged and compelled by the husband to live with him by a decree of restitution of conjugal rights against her will. Moreover, the decree even if passed cannot be executed and so if the decree is inexecutable then the suit is infructuous. According to the provision of the Code of Civil Procedure, decree could be executed by sending the defendant to the jail for the same but subsequently it was amended in 1923 and the provision was abolished. Thereafter, it can be only executed by attachment of the property of the defendant but in almost all the cases where the suit is restitution of conjugal right against the wife by the husband the decree cannot be executed as in every case wife has got no property. The marriage is a human relationship between a man and woman and the same exists with the adjustment between the parties and if there is breach in this relationship nothing remains in respect of this peaceful happy relationship. In Muslim law marriage is a social contract between a man and woman in presence of witnesses solemnized by the recitation from the Holy Qur'an. So if there is breach of contract of marriage by any party it can be challenged in the Court. But if there is a decree in the suit against the person of the defendant be effectively executed. The male partner of the contract of marriage has got arbitrary power of divorce of his female partner just by pronouncing divorce but the female partner of marriage has got no arbitrary power in this respect and therefore subsequent legislation has allowed her right of

talak-e-taufiz. That means right of divorce by the female to her male partner in the contract of her marriage and more so she can file suit for dissolution of marriage of the husband on specific grounds as embodied in the Muslim Dissolution of Marriage Act of 1939. In the Constitution of the People's Republic of Bangladesh the Fundamental Rights under Articles 26 (2) read with Article 7 declare such law as void, Article 27, 28, 31 and 32 of the Constitution have been incorporated in the Constitution and so in consideration of those provisions of law of the Constitution it has been decided by this court that the dictum of restitution of conjugal right is a violation of life, liberty, freedom, equality and social justice as guaranteed in the above Articles of the Constitution, so no law can be passed and the existing law which is against the provision of the Constitution must become void. In such circumstances, his Lordship said that he can safely say and declare that the restitution of conjugal rights either by the husband against his wife or by the wife against her husband is an invalid and void piece of law and so no suits for restitution of conjugal right can continue before the Courts as the same are void and illegal.

c. Khodeja Begam and other v. Md. Sadeq Sarker[35]

Following the decision of Nelly Zaman v. Giasuddin Khan (1982) and Sharmin Hossain @ Rupa v. Mizanur Rahman (Tuhin) (1994), again in 1994, in this case it was held that restitution of conjugal rights is violative of the constitution.

Mr. Justice Muhammad Abdul Mannan held that Muslim marriage is a social contract. The relationship is based on social justice and adjustment but if these social justice, equality adjustment and tolerance to each other is lost by any

35. 18 BLD (1998), 31 (H.C.), Date of judgment 4th July, 1994.

reason then there remains nothing. In cases where there is no divorce or dissolution of marriage by either side then title suit for restitution of conjugal rights can be instituted either by the husband or the wife and if there is a decree then the decree can be executed only by attachment of the defendant's property under Order 21, Rule 32 of the Code of Civil Procedure. Now, if the defendant is the wife, in most cases she has no property, then the decree against her becomes inexecutable. In such circumstances the court should not pass an inexecutable decree. So the provision for restitution of conjugal rights itself is a bad piece of law against a wife. In case of a decree against a husband the unwilling husband can divorce his wife by pronouncing his arbitrary power of divorce. Thus the suits for restitution of conjugal rights is always instituted to compel the unwilling wives to live with their husbands and always a repressive law used against the wife as an engine of harassment. Article 7 sub-Article 2 of the Constitution expresses that this Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic and if any other law is inconsistent with this Constitution that other law shall to the extent of the inconsistency be void. This provision of fundamental law is expressed in the Article 26 of the Constitution in part III. Fundamental rights as "All existing laws inconsistent with the provisions of this part shall, to the extent of such inconsistency, become void. The law of restitution of conjugal rights is a violation of social justice as enunciated in the preamble of the Constitution and under Article 27 for equal protection of law: Article 28 guarantees no discrimination of any citizen on grounds only of religion, race, caste, sex or place of birth and woman shall have equal rights with men in all spheres of state and of public liberty of the Fundamental Rights guaranteed by the Constitution. The dictum of restitution of conjugal rights is a violation of life and liberty, freedom, equality and social justice as guaranteed

in the Constitution. So the law is repugnant to the Constitution and void. Therefore, no such law and suits for restitution of conjugal rights can legally exist in Bangladesh. The relationship between the husband and wife being a mutual human relationship of adjustment and so one can not bind another by courts decree in a title suit in the nature of declaration of right, title and interest of the land and recovery of khas possession if one of the parties refuse to live with the other. It is an inhuman law where man or woman is considered as property. Moreover, the decree in respect of a suit for restitution of conjugal rights can not be executed when that relationship of adjustment between the husband and wife is lost.

d. Chan Mia (Md.) v. Rupnahar[36].

In conformity with the traditional law, and contrary to the three earlier decisions, one in 1982 and two in 1994, in 1998, in this case it was held that restitution of conjugal rights is neither discriminatory nor violative of any provision of the Constitution.

Mr. Justice Kazi A. T. Monowaruddin held that marriage confers important rights and entails corresponding obligation both on the husband and the wife. An important obligation is consortium, which does not merely mean living together but implies a union of fortunes. A fundamental principle of matrimonial law is that one spouse is entitled to the society and comfort of the other. Thus where a wife, without lawful cause refuses to live with her husband the husband is entitled to sue for restitution of conjugal rights; and similarly the wife has the right to demand the fulfillment by husband of his marital duties and obligations. Where either the husband or

36. 51 DLR (1999), 292 (H.C.), Date of judgment 3rd March,1998.

wife has, without lawful ground withdrawn from the society of the other, or neglected to perform the obligations imposed by law or by the contract of marriage, the court may decree restitution of conjugal rights and may put either party on terms securing to the other the enjoyment of his or her rights (Ref. Tyabji's Muslim Law, Edn. Paragraph 87; Abdur Rahim Mdn. Jurs. 334; Anis Begum Vs. Md. Mostafa Wale (1933) 55 All 743). The said right, however, is not absolute. The Qur'an enjoins husbands to keep their wives with kindness. The restitution of conjugal rights is a reciprocal right thus it is neither discriminatory nor violative of any of the provisions of the Constitution. His Lordship, however, said that it is neither desirable nor expected that the court should pass a decree for restitution of conjugal rights where the relationship of adjustment between the husband and wife is lost or it is otherwise inequitable, impracticable or impossible to implement.

e. Hosna Jahan (Munna) v. Md. Shajahan (Shaju) and Others[37]

Again the traditional law was upheld in this case. It was also strongly urgued that after coming into force of the Family Court Ordinance (1985), which in Section 5(b) amongst others recognizes and deals with restitution of conjugal rights, the decision in Nelly Zaman v. Giasuddin Khan (1982), where restitution of conjugal rights has been held unconstitutional, cannot be uphold any more. Again, the decision in Sharmin Hossain @ Rupa v. Mizanur Rahman (Tuhin) (1994), which hold that the law of restitution of conjugal right is void, has also to give way to the Ordinance of 1985.

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37. 51 DLR (1999), 295 (H.C.), Date of judgment 2nd April, 1998.

Mr. Justice M. A. Aziz held that section 5 (b) of the Family Courts Ordinance, 1985 and section 281 of the Mahomedan Law provides that where a wife without lawful cause ceases to cohabit with her husband, the husband may sue the wife for restitution of conjugal rights. In section 5 (b) of the Ordinance of 1985 which amongst others deals with restitution of conjugal rights the wordings of section 281 of the Mohamedan Law, i.e. restitution of conjugal rights, have been bodily lifted and verbatim reproduced in section 5 (b) of the Ordinance of 1985 and the decision reported in 34 DLR 221 has created an anomalous situation, the one challenging the other. Those 2 (two) contradictory concepts cannot co-exist. One must give way and make room for the other. Now the question is, which one is to give way. The Family Courts Ordinance, 1985 having come into force on 30-3-85 and the decision reported in 34 DLR 221 having been delivered on 17-3-82 the findings and observation made in the judgment to the effect "A reference to Article 28 (2) of the constitution of Bangladesh guaranteeing equal rights of women and men in all spheres of the state and public life would clearly indicate that any unilateral plea of a husband for forcible restitution of conjugal rights as against a wife unwilling to live with her husband is violative of the accepted state and public principle and policy "can no longer be deemed to hold the field inasmuch as the legislature in its consolidated wisdom having considered the judgment delivered on the 17th March 1982 nullified through the enactment of section 5 (b) of the Family court Ordinance which came into force on the 30th March, 1985 exactly 3 (three) years and 13 days thereafter. The answer thus is quite obvious as to which of the 2 (two) conflicting and contradictory concepts is to give way. The decision reported in 34 DLR has to give way. The decision reported in 2 BLC 509 holding "the law of restitution of conjugal right is void" has also to give

way for the very plain and simple reason that none of the judges sitting singly and exercising jurisdiction under the 115 (1) of the Code of Civil Procedure were invested with the jurisdiction to strike down a piece of legislation which is the absolute and exclusive jurisdiction of a properly constituted court exercising jurisdiction under Article 102 of the Constitution of Bangladesh.

After going through the five recent decisions of the Supreme Court, we can summerize that,

a. three decisions declared that the law of restitution of conjugal rights to be violative of the provisions of the Constitution; and

b. two decisions declared that the law of restitution of conjugal rights is neither discriminatory nor violative of any provisions of the constitution.

CONCLUSION

The foregoing discussion reveals that the apparently settled law of restitution of conjugal rights, after being practiced for more than a century, now faces serious challenge due to the conflicts and contradictions for and against the recent decisions of the Supreme Court.The consolidated reasoning behind the three decisions that declared the law of restitution of conjugal rights to be violative of the provisions of the Constitution are as follows:

a. By the lapse of time and social development this concept has become outmoded;

b. This concept does not fit in with the acceptable state and public principle and policy of equality of all men and women being citizens equal before law, entitled to equal protection of law and to be treated only in accordance with law, as guaranteed in Articles 27 and 31 of the Constitution of Bangladesh;

c. The law of restitution of conjugal rights violets life and liberty, freedom, equality and social justice as guaranteed in

the Preamble and in Articles 26 (1), 27, 28, 31 and 32 of the Constitution of Bangladesh. So, the dictum of restitution of conjugal rights is repugnant to the Constitution and as such void. Therefore no such law and suits for restitution of conjugal rights can legally exist in Bangladesh. The Constitution in its various Articles, such as, Article 7 (2) provides that this Constitution is the supreme law of the Republic and if any law is inconsistent with this Constitution that other law shall to the extent of the inconsistency be void. Article 26(1) of the Constitution provides that all existing laws inconsistent with the provisions of Part III of the Constitution shall, to the extent of such inconsistency, be void. Article 27 of the Constitution provides equal protection of law to all citizens. Article 28 of the Constitution provides guarantee against discrimination on grounds of religion, race, caste, sex or place of birth and woman shall have equal rights with men in all spheres of state and of public life. Article 31 of the Constitution guarantees equal protection of law and Article 32 protects right to life and personal liberty.

d. The relationship between husband and wife is a relationship of mutual adjustment. When such adjustment no longer exists and one of the parties refuses to live with the other, then one cannot bind another by court's decree in a title suit in the nature of declaration of right, title, interest of the land and recovery of khas possession. The law of restitution of conjugal rights is an inhuman law where man or woman is considered as property. Moreover, when that relationship of adjustment between the human and wife is lost, a decree for restitution of conjugal rights cannot be executed.

e. A decree for restitution of conjugal rights can be executed only by attachment of the defendant's property under Order 21 Rule 32 of the Code of Civil Procedure. Now, a decree against a wife who has no property cannot be executed. In

such circumstance the court should not pass an inexecutable decree. So, the provision for restitution of conjugal rights itself is a bad piece of law against a wife. On the other hand, in the case of a decree against a husband, the unwilling husband can divorce his wife by pronouncing his arbitrary power of divorce thus making the decree futile and infructuous. So, the suits for restitution of conjugal rights is always instituted to compel the unwilling wives to live with their husbands and always a repressive law used against the wife as an instrument of harassment.

f. This right lacks mutuality and reciprocity between the respective rights of the husband and the wife since this right is not available to a wife as against her husband apart from claiming maintenance and alimony.

The consolidated reasoning behind the two decisions that declared the law of restitution of conjugal rights is neither discriminatory nor violative of any of the provisions of the Constitution are as follows:

a. An important obligation imposed by marriage is consortium which dos not merely mean living together, but implies a union of fortunes. A fundamental principle of matrimonial law is that one spouse is entitled to the society and comfort of the other. Thus, where a wife, without lawful cause, refuses to live with her husband the husband is entitled to sue for restitution of conjugal rights; and similarly the wife has the right to demand the fulfillment by husband of his marital duties and obligations. Where either the husband of wife has, without lawful ground withdrawn from the society of the other, or neglected to perform the obligations imposed by law or buy the contract of marriage, the court may decree restitution of conjugal rights and may put either party on terms securing to the other the enjoyment of his or her rights. This right is not

absolute The Qur'an enjoins husbands to keep their wives with kindness. However it is neither desirable nor expected that the court should pass a decree of restitution of conjugal rights where the relationship of adjustment between the husband and wife is lost or it is otherwise inequitable, impracticable or impossible to implement.

b. The restitution of conjugal rights is a reciprocal right thus it is neither discriminatory nor violative of any of the provisions of the Constitution.

c. Section 5 (b) of the Family Court Ordinance (1985), which amongst others, deals with restitution of conjugal rights and the decision in Nelly Zaman v. Giasuddin Khan (1982), reported in 34 DLR, 221 has created an anomalous situation, one challenging the other. Those 2 (two) contradictory concepts cannot co-exist. One must give way and make room for the other. Now the question is, which one is to give way. The Family Court Ordinance (1985) having come into force on 30-3-1985 and the decision reported in 34 DLR 221, having been delivered on 17-3-1982 the findings and observation made in the judgment to the effect "A reference to Article 28 (2) of the constitution of Bangladesh guaranteeing equal rights of women and men in all spheres of the state and public life would clearly indicate that any unilateral plea of a husband for forcible restitution of conjugal rights as against a wife unwilling to live with her husband is violative of the accepted state and public principle and policy", can no longer be deemed to hold the field inasmuch as the legislature in its consolidated wisdom having considered the judgment delivered on the 17th March 1982, nullified through the enactment of section 5 (b) of the Family court Ordinance, which came into force on the 30th March, 1985 exactly 3 (three) years and 13 days thereafter. The answer thus is quite obvious as to which of the 2 (two) conflicting and contradictory

concepts is to give way. The decision reported in 34 DLR has to give way. The decision reported in 2 BLC 509 holding "the law of restitution of conjugal right is void" has also to give way for the very plain and simple reason that none of the judges sitting singly and exercising jurisdiction under the 115 (1) of the Code of Civil Procedure were invested with the jurisdiction to strike down a piece of legislation which is the absolute and exclusive jurisdiction of a properly constituted court exercising jurisdiction under Article 102 of the Constitution of Bangladesh. Again, the view taken by a single of the High Court Division in the case of Khodeja Begam and others v. Md. Sadeq Sarker reported in 18 BLD 31 that restitution of conjugal rights is violative of social justice and repugnant to Article 27 of the Constitution is not a correct proposition of law.

Therefore, it is evident that where the wife refuses to live with her husband without lawful cause, or where the husband refuses to fulfill his marital duties and obligations, then the other spouse may sue for restitution of conjugal rights. This right is not absolute. The law does recognize circumstances where the Court should not pass a decree on this matter, e g where the husband habitually ill-treats his wife. This is the traditional law, which have been practiced for more than a century, and in my opinion, there is nothing wrong with the law. Right to restitution, being a mutual right, is not discriminatory, and definitely it does not violate the fundamental right to equality before law. Right to restitution is not a tool of oppression. For example, lets say two young people of sound mind and of marriagable age fell in love and they got married, which the parents of the wife do not approve. So, some how the parents managed to get her into their house, and prevented her from going back to her husband against her will. Husband and wife, who are in love with one another, do have the right to live together. So, the husband institutes a suit for restitution of

conjugal right. This is the only way by which they could be together. In this case definitely right to restitution is not a tool of oppression, since this is the only chance they have. Again, where the wife is unwilling to live with her husband on reasonable grounds, and the husband institutes a suit for forcible restitution of conjugal rights, the Court can simply dismiss the suit, taking into account all relevant circumstances, especially the well being of the wife. So, there is nothing wrong with the right to restitution, the wrong, if any, lies in the application. If the Court is cautious in decreeing a suit for restitution, no injustice can happen. It is apparent that, short of divorce, the enforcement of right to restitution is the only remedy available to save a marriage and allow it to continue. Restitution of conjugal rights can, therefore, be strongly supported and what is needed is that a decision of the Appellate, Division of the Supreme Court, in order to put an and to the conflicting decisions of the High Court Division in this regard.