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GENERAL LAW AND FAMILY LAW RELATING TO HIV/AIS: A BANGLADESHI PERSPECTIVE

Dr. Taslima Monsoor *

HIV related law can be defined as that branch of the law that specifically addresses the problem, issues and challenges posed by the HIV epidemic by (i) supporting and channelling resources for epidemiological surveillance, policy initiatives and interventions; (ii) mandating interventions for healthier life styles and other preventive measures such as education, counselling, treatment and disease management; (iii) establishing the rights and duties of persons with HIV / AIDS as well as of others; (iv) regulating human behaviour and laying down norms for conduct; (v) specifying the quality and use of products such as blood, semen, organs, tissue, HIV test kit and condoms; and (vi) creating a supportive and an enabling environment in which affected individuals and communities as well as others can mutually co-exist to enhance their quality of life.[1] Acquired Immunodeficiency Syndrome or AIDS is a fatal disease and it has been spreading worldwide alarmingly. It is considered the most devastating epidemic in human history. About 40 million (4 crore) people around the world are currently living with HIV. About 5 million (2.5 crore) people died from AIDS so far including about 3 million (30 lakhs) in this year alone. Everyday 15000 new infections take place. If the devastating disease continues to spread at the present rate, it is estimated that, by 2010 in Africa alone more than 4 crore (40 million) children will become orphan due to AIDS. [2]

Bangladesh has not yet been able to get a clear picture of the epidemic of the Human immunodeficiency virus or HIV as it is little known how many people are living with HIV and AIDS.[3]

* Dean, Faculty of Law, University of Dhaka

1 Jayasuriya, D.C.: 'HIV Law : The expanding frontiers'. In HIV Law, *ETHICS AND HUMAN RIGHTS.* New Delhi, 1995, pp. 9-33, at p. 11.

2 *Hoque , Abunasar Ehsanul:* PRESENT SITUATION & FUTURE PROBLEM OF AIDS IN BANGLADESH. WHY AIDS IS A BIG PROBLEM FOR BANGLADESH? *In abunasar.hoque@ yale.edu*

3 UNAIDS : HIV & AIDS : *Resource Guide for Media Professionals in Bangladesh.* Dhaka 1997, p. 42.

It is a recognised fact that the Human immunodeficiency virus or HIV is spreading fast in Bangladesh making AIDS (Acquired Immunodeficiency syndrome) a perilous and dangerous problem in Bangladesh. However, the Government and the public in Bangladesh bear a wrong perception that AIDS is not a big problem for a traditional Muslim country like Bangladesh. However, such a perception is wrong as the statistics give a different picture. Many studies report that premarital and extra-marital sex in Bangladesh is common and widespread. Caldwell et al (1997) found that nearly half of their respondent had engaged in sex before marriage in Bangladesh. The same study found that a significant proportion of all types of male travellers separated from their wives occasionally engage in commercial sex. If we look at the Islamic countries like Indonesia, which has not been saved from HIV and AIDS by its cultural and religious value, we can easily foresee the future for Bangladesh.

The atrocity of the problem is not being visualised for lack of data or proper statistics. The World Health Organization estimate in 1993 that 20,000 individuals were infected with HIV in Bangladesh and that over 100,000 people could be infected by 1997. However, there was no sentilence surveillance at that time to prove or disprove this estimate.[4] We are still uncertain about the exact number of HIV positive people. Government reports 208 infected persons whereas SEA/WHO regional office estimated that 13,000 adults are living with HIV/AIDS in Bangladesh till April 2001.[5] It was reported in Worlds AIDS Day (1st Dec.) that 136 HIV positives are added to the country list of Bangladesh this year.[6]

People in Bangladesh, is at risk of a rapidly spreading HIV infected epidemic because of number of reasons. They range from lack of knowledge, lack of concern, surrounded by countries with high numbers of people with this infection, Pre and extra marital sex, sexually transmitted diseases are

4 Ibid.

5 *Hoque, p.2.*

6 The Daily Star, Dhaka Monday December 1, 2003, p.12.

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4 Ibid.

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common, intravenous drug use, commercial sex workers, low use of condom, faulty blood transfusion services and international migration. The HIV virus is present in body fluids, e.g., blood, semen, vaginal fluid, breast milk and other body fluids containing blood. When any of these body fluids from an infected individual enters into another uninfected individual she/he may get infected with HIV. The main ways people acquires HIV infection are the following:

Having unsafe sex (without properly using a latex condom throughout the sexual intercourse) with someone who has HIV. Unsafe (without Blood screening or HIV testing) blood transfusion (Transfusion of HIV infected/ contaminated blood).

Using needles for intravenous drug use that are contaminated with HIV.

Body piercing or tattooing or being cut with needles, razors, or other sharp objects that are contaminated with HIV and have not been properly sterilized.

In addition, children can be infected in the womb, during childbirth, or during breast feeding if their mothers are HIV infected.[7]

In the context of HIV/AIDS, Bangladesh is considered as a "Low Prevalence but High Risk" country. Bangladesh, being one of the world's highly populated countries, is highly susceptible to the transmission of epidemic. Recent sentinel surveillance by the Bangladesh Government reveals that the high-risk groups such as injecting drug users; commercial sex-workers, and truck drivers have 2% prevalence of HIV. Third Sentinel Surveillance shows that a majority of married men reported to have unprotected sex with commercial sex workers, street girls, and other men.[8] In Bangladesh, the intravenous drug users (IDU) are the most potential carriers of HIV/AIDS

7 UNAIDS 1997, pp. 43-45.

8 HIV in Bangladesh: where is it going, Background document for the dissemination of the third round of national HIV and behavioral surveillance, Nov, 2001.

among the vulnerable groups in the country.[9] The fourth round of the National Serological Surveillance found presence of 4% HIV infection among the IDU's in Dhaka.[10] According to the National AIDS Committee and surveillance team members and experts, this rate is quite alarming as it remains 1% less than the highest 5% HIV epidemic index.

The social and cultural environment is not favorable for the people, who have already been identified as infected or affected from HIV/AIDS. Curses of poverty, illiteracy, ignorance, increased number of migrant workers, unsafe practice in health service, unsafe sex practice, and proximity of Bangladesh to the so-called 'Golden Triangle' & high prevalence of sexually transmitted diseases (STDs) make Bangladesh alarmingly vulnerable. With the theme- Live and let live the country observed the World AIDS Day this year.

National Programmes which ought to be taken are highlighted as follows:

1. Multi sectoral response to HIV/ AIDS;
2. Maximising public awareness towards HIV/ AIDS;
3. NGO's to reach out to eradicate HIV/AIDS;
4. Strengthen blood safety system and STD services;
5. Ensure effective case and support those infected and their families;
6. Protection of Human Rights so that stigma is reduced.

Since there is neither any vaccine nor any drug to cure this fatal disease which can spread to others, urgent action is needed for its prevention. There are three ways for prevention. One is the information communication; the other is education and finally legal enforcement. The use of electronic media, radio, and television when focusing attention on the causes of HIV/AIDS will prove in some way effective prevention to the mass population. The curricula of the secondary and higher

9 The Daily Star Dhaka Monday December 1, 2003, p.12.
10 Ibid, p.11.

secondary education should include the issue of HIV/AIDS but that will not be enough to solve this hypercritical problem ahead of us.

A) General Law and HIV/AIDS:

The legal response to HIV/AIDS is important to equalize the dilemma of individual Human Rights vis-à-vis public rights. There is a traditional misunderstanding that the public health threat of HIV/AIDS is opposed to the individual rights of the AIDS victims. Thus the AIDS victims according to the conventional attitude should not have any rights. There must be a compromise. We can not deny the Human Rights of the AIDS affected people on the other hand the public health, safety and security has to be taken into serious consideration. The public health laws have to be reviewed to ensure that they adequately address the issues raised by AIDS. The Public health authorities may not consider the public secure unless, for instance, infected persons undertakings of behaviour modification or lifestyle change are credible or can be reliably policed.[11] In this perspective the pattern of law is prescriptive and coercive.

It is provided in the international guidelines that the states should review and reform public health legislation. So that it ensures that it adequately addresses the public health raised by HIV/AIDS and is consistent with international human rights obligations.[12] After the HIV/AIDS cases were being reported from most of the countries they had age old laws dealing with contagious diseases, these laws have continued to remain in force without being updated to address current infection control and disease management systems or the rights and duties of the affected persons and communities.[13] Bangladesh has already the law for transmission of any contagious diseases under section 269 and 270 of the Bangladesh Penal Code 1860. If

11 Cook, J. Rebecca : 'Human Rights, HIV infection and women., In *HIV-LAW, ETHICS AND HUMAN RIGHTS*. New Delhi, 1995, pp. 235-270, at p. 259.

12 Guidelines for state action no. 3, in *HIV/AIDS and Human Rights International guidelines*, United Nations, New York and Geneva, 1988, p. 12.

13 Jayasuriya (1995), p. 11

such diseases are transmitted punishment is provided which will range from six months to two years. But is it enough punishment when one can take away another life by transmission of the disease? State should implement and provide legal support services that will educate PLHAs or people living in AIDS and HIV about their rights and free legal services to enforce those rights.[14]

i) Individual Right vs. Collective Right:

The aphorism that a virus has no rights is a traditional approach.[15] The response we are reflecting in this article is that it is necessary to advance a particular human rights value in relation to HIV/AIDS. It has been rightly stated that:

There is no society in which sex workers, injecting drug users, male homosexuals and women are not marginalised, stigmatised and generally disempowered. The experience of a number of countries in responding to HIV/AIDS is that removal of legal and social disabilities, if not the empowerment of these groups, is critical to a country's ability to deal with HIV/AIDS.[16]

Confidentiality and privacy is specially considered in HIV/AIDS related disease otherwise PHAS are stigmatised, condemned, marginalised and alienated in our societies. However legislation mandating reporting of HIV infection is consistent with human rights principles where public health authorities are obliged to undertake public health protection without undue disclosure of their identities.[17]

The Constitution of Bangladesh guarantees a set of rights pertaining to Human Rights within the meaning of our study of HIV/AIDS and Human Rights. These rights inter alias have been elaborated in articles 31, 32, 33 and 35, of the Constitution.

14 Guidelines for state action no. 7, in *HIV/AIDS and Human Rights International guidelines*. United Nations, New York and Geneva, 1988, p. 20.

15 David Buchanan:" Public health vs. Individual rights" ' In *Law, ETHICS & HIV.* Proceedings of the UNDP inter country consultation, Philippines, 1993 pp. 221-227.

16 Ibid., p.222

17 Cook, (1995), p. 259.

Article 31 reads that:

To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with the law, is the inalienable right of every citizen, wherever he may be. Also for every other person for the time being within Bangladesh and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

Article 32 reads as:

No person shall be deprived of the life or personal liberties save in accordance with law.

Article 33 reads as:

No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

Article 35 reads as:

(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law.

(4) No person accused of any offence shall be compelled to be a witness against himself.

(5) No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.

(6) Nothing in clause (3) or clause (5) shall affect the operation on any existing law which prescribes any punishment or procedure for trial.

The Constitution of Bangladesh, 1972, contains some basic features of which fundamental rights as enumerated in Part III of the Constitution is one. The Constitution guarantees under Article 26 that all existing laws inconsistent with the fundamental rights would be declared void and the state is forbidden not to the make any law inconsistent with the fundamental rights. Right to equality before the law; equality of opportunity in public employment; right to protection of law; protection of right to life and personal liberty; safeguards as to arrest and detention; protection in respect of trial and punishment; freedom of movement and protection of home and correspondence; all these rights are guaranteed under Articles 27-43 of the Constitution of Bangladesh, 1972. Even the Government is not immune although they have sovereign immunity if they violate fundamental human rights. In a case in India a HIV positive wife of a sailor were allowed not to evicted from the Naval Headquarters and be reinstated in his job.[18]

The enjoyment of any right is subject to reasonable restrictions imposed by law in the interest of security of the state or public order or public health. Preventive measures to protect from HIV/AIDS related disease could be identified in different legislation. The Indian Penal Code of 1860 is applicable to Bangladesh. The Code in Chapter XIV dealing with Offences Affecting Public Health and Safety under section 270 states:

Whoever malignantly i.e., by malice, does any act which is, or which he knows or has reason to believe to be likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or both.

18 Grover, Anand : 'In the Public Interest Litigation for PLHA." In *Human Rights and HIV/AIDS : Effective Community Responses.* (HRI) Human Rights Internet, Ontario, 1988, pp. 76-78. At p. 77.

The Epidemic Diseases Act, 1897 under section 2 empowers the Government that if it is satisfied that the state is threatened with outbreak of any dangerous epidemic disease to take measures. The Government can take any measure which it thinks fit and could prescribe temporary regulations that would be required to be observed by the public or any class of persons necessary to prevent the outbreak and spread of such disease. It further provides for the inspection of persons travelling by railway or otherwise and the segregation in hospital or temporary accommodation or otherwise of persons suspected by the Inspecting Officer of being infected with any such disease.

Thus, laws are there for public safety from an epidemic by segregation from the infected people of the general population. There are no specific regulations prohibiting or restricting the use of un-sterilised injections, but compulsory screening of blood before transfusion have been made mandatory by a recent Statute. Moreover there are laws which prevent sexual transmission i.e. kidnapping, trafficking, rape and prostitution which are not enough to tackle the situation prevalent in Bangladesh. It has to be presented clearly that trafficking, rape and kidnapping are also human rights violations.[19]

The Cruelty to Women Deterrent Punishment Ordinance, 1983 was repealed and the Repression against Women and Children (special enactment), Act xviii of 1995 was promulgated[20] which

19 Weschler, Joanna, : 'Documenting Human Rights Abuses :HIV/AIDS and the trafficking of Burmese women and girls into Thai Brothels.' In *Human Rights and HIV/AIDS : Effective Community Responses.* (HRI) Human Rights Internet, Ontario, 1988, pp. 64-66, ATP. 66.

20 The Repression Against Women and Children (special enactment), Act xviii of 1995 provided under section 9 punishment for kidnapping or abduction for immoral activities with imprisonment for life or rigorous imprisonment for a term of 7 years which may extend to 10 years and shall be liable to fine.
The Repression Against Women and Children (special enactment), Act xviii of 1995 provided under section 9 punishment for trafficking life imprisonment and also liable to fine. However, The Repression Against Women and Children (special enactment), Act xviii of 1995 has repealed the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 which provided death sentence for trafficking under section 5.
The Repression of Women and Children (special enactment), Act xviii of 1995 provided death penalty for ten crimes against women and children (under sections 4, 5(b), 5(d), 6(1)-(4),7, 10(1) and 12). The crimes affecting women and children include causing death by corrosive substance, causing permanent damage of the body by corrosive substance, for rape, for rape with murder, for rape with attempt to murder, for group rape, for group rape with murder, for dowry death and for trafficking of children.

however was repealed by The Prevention of Cruelty to Women and Children Act, 2000.

Persons selling and buying minor girls for prostitution may be imprisoned for 10 years as provided in sections 372 & 373 of the Penal Code. The punishment is less with regard to the prevailing situation when poor girls are enticed away to prostitution. The punishment should be more severe. This has been changed by the Cruelty to Women and Children Prevention Act 2000 under section 5(1) has been extended in the sense that if any person with the intention of prostitution or any other illegal activities send some women abroad or bring them from abroad or transfer or hire any women for any type of cruelty or for this type of purpose retain or possess or have custody of any such women will be entitled to death sentence or life imprisonment or 20 years maximum or minimum 10 years rigorous imprisonment.

Under section 6 for trafficking of children the person will also be liable to death sentence or life imprisonment and also liable for fine.

Under section 7 for Abduction of women and children for other purposes then referred in section 5 (prostitution) then the person will be liable for life imprisonment or 14 years rigorous imprisonment and will also be liable for fine. However, in reality the Acts and Statutes are seldom affected.

B) Family Law and HIV/AIDS:

Before British-India Muslim law had been administered as the law of the land.[21] The law of the Moghul Empire was founded on Sharia, Fatwa-i-Alamgiri [22] and Hedaya [23]; these sources were also identified by other authors. [24] The non-Muslims had been governed in matters of their personal laws by their own personal and customary laws. [25]

21 Gledhill, Alan: The republic of India. Westport 1970, p.220; O'Malley, L.S.S. (ed.): Modern India and the West-a study of the interaction of their civilization. London 1968, p.110.

22 A collection of decisions or fatwas made in the reign of Aurengzeb.

23 Hedaya was translated by Charles Hamilton and first published in 1791. There are complaints about the Hedaya's accuracy see Ali, Syed Ameer: Mohammedan Law. Calcutta 1912, Vol.i, pp.244-254.

24 Rankin, George Clause: Background to Indian law. Cambridge 1946, p.4; Ali, Syed Ameer: 'Islamic jurisprudence and the necessity for reforms'. In Wasti, Syed Razi (ed.): Syed Ameer Ali in Islamic history and culture. Lahore 1968, pp.223-230, at p.224.

25 Ramadan, Said: Islamic law and its scope and equity. 1961, p.143; Fyzee, A.A. Asaf: 'Development of Islamic law in India'. In Singh, Attar (ed.): Socio-cultural impact of Islam on India. Chandigarh 1976, pp.107-115, at p.112.

The personal laws of the Christians and Parsis were codified by the British by the Parsi Marriage and Divorce Act, 1865, the Indian Divorce Act, 1869, the Indian Christian Marriage Act, 1872, the Indian Succession Act, 1925 and the Special Marriage Act, 1872. Tahir Mahmood states that the English Matrimonial Causes Act, 1857, has found itself reproduced into these Indian statutes.[26]

The judges who were administering justice at this time were either British or Western-trained. There is no evidence in the literature on whether these judges were dedicated to the traditional knowledge. English and other laws and concepts were often introduced by the judges when there was a lack of knowledge of traditional Arabic or Sanskrit texts. Moreover, there was a general difficulty for the judges in properly ascertaining the terms of Islamic law from the authoritative Arabic texts.[27] This led to scholarship on translations and to the compilation of commissioned texts.[28] However, up to 1856 the judges were assisted by law officers, i.e. Muftis or pandits, to declare the rule of law applicable to a case.[29] Thus it was acknowledged that a great part of Islamic law has been modified deliberately or accidentally by the judiciary since 1772, when the East India Company first undertook to administer India directly and it was circumscribed to personal laws only.30 Tahir Mahmood points out that Muslim personal law cover the following topics: 'Marriage and its dissolution, family rights and obligations, testamentary and intestate succession, personal property, religious and charitable endowments and pre-emption'.[31]

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26 Mahmood, Tahir: Personal laws in crisis. New Delhi 1986, pp.98-99.

27 Coulson, N.J.: A history of Islamic law. Edinburgh 1964, p.155.

28 Baillie, Neil B.E.: A digest of Moohummudan law. 2nd ed. London 1875; Hamilton, Charles: The Hedaya. Lahore 1975; Macnaghten, W.H.: Principles and precedents of Muhummuden law. Calcutta 1825; Wilson, Roland Knyvet: A digest of Anglo-Muhammadan law. London 1895.

29 Rankin (1946), p.139; Jung, Ibn. S. Mohamedullah: A dissertation on the administration of justice of Muslim law. Allahabad 1926, p.91.

30 Derrett, J. Duncan M.: Religion, law and the state in India. London 1968, p.514.

31 See Mahmood, Tahir: Family law reform in the Muslim world.Bombay, 1972, p.167.

Bangladesh inherited the legacy from British-India and Pakistan and has a dual legal system consisting of the general and the personal law. The general law is based on egalitarian principles of sexual equality but the personal or family law, based on religion does not operate on the basis of absolute equality to men and women.

The family law in Bangladesh is based on religion. That is why the personal laws are regarded as religio-personal law. This projects that the law of Bangladesh is a reflection of a plural society having a complicated legal history. The laws which are in force in Bangladesh comprise the General Law and the Family Law. Moreover, the family law as practised in Bangladesh also consists of legislation that is based on egalitarian principles during British-India and Pakistani period.[32] There are also reforms in Bangladeshi period but it is acclaimed that the laws did not cross the parameters of Sharia.

This historical review establishes that in Bangladesh religion has played a major role in determining the law that governs personal relations. This can have a positive and a negative impact in relation to the HIV/AIDS. On the positive side, if the laws provide satisfactory remedy to the issues arising from the disease than it can be enforced with no objection and with full support from the community. In the negative side, the laws may have to be changed or reformed so as to provide more suitable approach to the HIV/AIDS epidemic. [33] But if the required change is not provided in the divine laws or is not even within its periphery it will be difficult to effect. However, reforms have been made in Muslim Family Laws where it did not conflict with the basic tenets of the

32 See for details, Monsoor ,Taslima: *From patriarchy to gender equity: Family Law and its impact on women in Bangladesh* (Ph.D Thesis, University of London) a book published by the University Press Limited (UPL) Dhaka, 1999.

33 For thorough understanding ,see, Siraj, Mehrun: "Law, traditional Family customs and HIV infection-- A Malaysian perspectives". In *Law, Ethics & HIV*-Proceedings of the UNDP Inter Country consultation, 1993, pp.41-54, at p.43.

religion. Law reforms in Family Law were made as, the Child Marriage Restraint Act, 1929 (CMR Act), The Dissolution of Muslim Marriages Act, 1939 (DMMA), the Muslim Family Laws Ordinance (MFLO) 1961, the Dowry Prohibition Act, 1980. The Family Courts Ordinance 1985, the Prevention of Cruelty to Women and Children Act, 2000. Thus, reforms have been made on religious family law on procedural barriers to polygamy, restraint of child marriage, registration of all marriages have been made compulsory etc.

Tahir Mahmood says that there are methods by which reform in Islamic Family law can be made they are Thakhayyur, Talfiq, Siyasa Sharia and Ijtihad.[34] Thus, reforms can be made in Islamic family law by employing these techniques. Moreover, within the set parameters of Islam reforms can be affected as there is no prohibition against any change. However, in the pre Islamic age there were people who were gays and lesbians which is one of the causes of the HIV/AIDS. It might be that the disease was also prevalent at that time but not in the form of an epidemic.

This historical backdrop of family law of the majority of Bangladeshi people reflects the following issues:

i) Dissolution of Marriage and HIV/AIDS:

Muslim marriage being a sanctified civil contract can be terminated although it is the most detestable permitted thing in the eyes of Allah. Justice S.A.Rahman said in the case of Khurshid Bibi .v. Md. Amin:

> Marriage among Muslims is not a sacrament, but is in the nature of a civil contract. Such a contract undoubtedly has spiritual and moral overtones and undertones. But legally in essence, it remains a contract between the parties which can be subject of dissolution for good cause. [35]

34 See for details, Mahmood, Tahir: *Family Law Reform in the Muslim World.* Bombay 1972, p.12.
35 PLD 1967(S.C.) 59, at p.97.

The question that arises is that whether HIV/AIDS should be regarded as a just cause for the dissolution of marriage. Moreover there is confusion whether the non disclosure of the fact that the spouse was suffering from HIV positive before marriage will affect the right to privacy or can it be regarded as a ground for dissolution. Several states in Australia, the Republic of Korea and Singapore have made it a criminal offence for a person who is aware of his or her HIV status to have sexual intercourse with another unless they disclose that fact.[36]

There are different forms of dissolution of marriage by the act of the husband is talaq (repudiation), Ila (vow of continence), Zihar (injurious assimilation), by the act of the wife is talaq-e-tafwid (Delegated divorce), by mutual consent is Khula (redemption), Mubarra (Mutual freeing) and by judicial process is Lian (Mutual imprecation) and Faskh (Judicial rescission).

A Muslim woman can also take HIV/AIDS as a ground for dissolution if her husband delegates the right of talaq. Moreover if she is unable to obtain the former forms of dissolution she can always apply her Khula rights and pay her Dower or other property to have her freedom from being infected with this deadly virus.

In Faskh (Judicial rescission) a Muslim woman can apply for a divorce under section 2(vi) of The Dissolution of Muslim Marriages Act of 1939 when the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease. This section may be extended to include HIV/AIDS as grounds for dissolution of marriage. Moreover, a Muslim woman can apply for dissolution of her marriage under section 2(viii) (a) & (b) of The Dissolution of Muslim Marriages Act of 1939 when the husband associates with women of evil repute or leads an infamous

36 Jayasuriya, 1995, at p. 25.

life and attempts to force her to lead an immoral life. Thus pre and extra-marital sexual relations are prohibited and is regarded as *zina* under the Islamic law and the legislation in Bangladesh. If these deterrent prohibitions are successfully enforced it will control sexual relations and vis-à-vis spread of HIV/AIDS. However, the actual effect of the relevant provisions of the statutes will depend on the interpretation of the courts.

ii) Maintenance of Wife and other relatives during the disease of AIDS:

According to Islamic law the liability to maintain rests entirely on the males, as a father, husband, brother and son. Females are not obliged to maintain anyone except her illegitimate child. It is incumbent on a husband to maintain his legally wedded wife. The authorisation of the wife to maintenance derives from the injunctions of the Holy Quran, Prophet's Tradition and Consensus of the jurists.[37]

In Bangladesh the husband should provide maintenance during subsistence of marriage and during the iddat period.[38] This was perhaps, because in Islam after dissolution of marriage the parties are entitled to remarriage and the woman returns to her natal family.[39] A wife's maintenance is however, lost for certain conditions or 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.[40] When the wife is working against the husband's

37 Monsoor, Taslima: "Maintenance to Muslim wives: The legal connotations". In Dhaka University Studies part- F, Vol. 9. No.1. June 1998, pp.63-86.

38 Fyzee Asaf A.A. : *Outlines of Muhammadan Law*. 4th ed. New Delhi 1974, p. 186; Diwan, Paras : *Muslim Law in modern India*. Allahabad 1985, p. 130.

39 Mahamood, Tahir : *Personal laws in crisis*. New Delhi 1986, p. 87.

40 See for details, Nasir, J.Jamal: The status of women under Islamic Law. London 1992, London, pp.60-65.

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 [41] 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.

In relation to HIV/AIDS and the disobedient wife or nashuza there raises plenty of questions. Whether a woman can refuse to have sexual relations with her husband unless they practice safe sex? Is she a nashuza if she refuses herself from her husband and has the reason to believe from his activities that he may be at risk of contracting HIV infection? Whether she would be regarded as nashuza if she chooses to leave the house as her infected husband forces himself on her? Finally the query is whether the wife has the right to protect herself from the HIV infection without losing her right of maintenance? If she is nashuza the wife looses her right to be maintained. But, if she is not nashuza her husband is bound to maintain her. Thus, the court of law should consider the reasons of the wife's action and if it is a valid reason they should extend the law to provide her maintenance in these new circumstances.

When it is the wife who contracts HIV/AIDS, there is no excuse for the husband to refuse to provide maintenance unless the husband alleges that the wife has contracted the disease by adulterous relationship and can prove it as there are other ways of contracting the disease. A Muslim husband can not avoid responsibility on the excuse of zina or adulterous relationship without proper proof.

A Muslim woman is entitled to maintenance whether she has HIV/AIDS or not from her husband or her relatives or if her

41 PLD 1952, Dacca 385.

relatives are destitute from the state treasury or Bait-ul-Mal.[42]

The situation is same for any Muslim person who has lost his source of income due to HIV/AIDS. He has a right to claim maintenance from his relative who is a male member of the family in the same order that they would have been entitled to inherit the estate of that relative had the issue been succession or inheritance and not maintenance.

iii) Custody of Children with Parents Effected by HIV/AIDS:

The cases of custody show that the judiciary in Bangladesh is deciding the issue on the paramount consideration of the welfare of the minor. But where one parent has HIV/AIDS, that fact may be used against him or her while deciding the custody of the child.

Islamic law recognises that a mother is of all persons most desirable to have the custody of her infant child, so that proper care is given to him or her.[43] Mother is considered fit to care for the child. But the difficulty is whether custody will be awarded to the mother when she is infected by HIV virus. The reality is that even if infected by the virus mother or anyone in care will be able to attend the child as long the disease doesn't become acute. If the disease is in its final stage it will be difficult to take proper care of the child and the child must be transferred to a person who is more able to take proper care and give utmost attention to the child.

Remedies to prevent the HIV/AIDS:

1. Prevention of sexual transmission diseases: Most HIV/AIDS accounts from sexual transmission. Education leading to changes in sexual behaviour is one

42 Siraj, Mehrun: (1993), p.47.

43 See for explanation, Monsoor, Taslima: "Women's Rights under Muslim Family Law with particular reference to custody and guardianship" published in The Dhaka University Studies, part- F, Vol. 8 No.1, June 1997.

of the methods to prevent this disease. The judges of the courts of law should be provided with the sufficient information about HIV/AIDS to assist them while interpreting those cases. Stringent rules preventing trafficking, rape and kidnapping is not the only remedy. There must be attitudinal changes. Training should be given to the parents to help them handle children with HIV/AIDS or husbands or wife's if their spouse has the infection or the disease. Pre-marriage courses should be introduced including the rights of spouses to protect from the risk of HIV. Counselling units should be established to assist the people affected by HIV/AIDS. Amendments should be made to the legislation as suggested (see above).

2. Prevention of transmission through blood and blood products: Due to economic constraints, screening of blood before transfusion is inadequate in Bangladesh. Proper laws should be introduced ensuring such screening. Government is establishing 97 safe blood centres.

3. Prevention of transmission through used syringes and medical instruments: Use of sterile materials for injection must be introduced. The drug users should also be made aware of the problem that any piercing in the skin could cause HIV/AIDS if the material is not sterile. It can also be contagious through the razor or dental instruments used by the HIV/AIDS infected people if the object is not sterilised properly.

4. Non-discriminatory policy towards AIDS infected people: The individual rights of AIDS infected people doesn't insure that all people without any discrimination what-so-ever, have access to proper care, privacy, mobility, protection in workplace including sick benefits, medical aid, leave, insurance, indemnity, pension and retirement policy should be in line with existing laws

relating to other serious conditions and life – threatening diseases.

5. The public health law has to be reviewed to ensure that they adequately address the issues raised by AIDs. In this perspective the model of law is prescriptive and coercive laws are enforced. This contradicts with individual human right which includes protection against discrimination of the HIV/AIDS affected people and the protection of confidentiality of persons affected by HIV/AIDS.

In its instrumental model law focuses on combating subordination and seeks to change the values and patterns of social interaction. The HIV/AIDS is not an easy virus to contact its transmission is personal and hence the cultural and social values play an important part. In a patriarchal society like Bangladesh the problem is more acute as social conventions play a vital part as for instance talking about sex is a confidential and secret issue not to be discussed in public than how can you teach people about safe sex? Thus, there needs to be attitudinal and behavioural change to combat this pandemic virus. Mere cosmetic changes will not answer the problem.[44] Hence it is desirable to bring about a social change in a broader social context.

44 Ayappa, geetha Devi : 'Women and HIV/AIDS : an Indian scenario.' In *Law, ETHICS & HIV.* Proceedings of the UNDP intercountry consultation, Phillipines, 1993 pp. 55-61. at p. 58.

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FEMALE CHILDREN IN THE LABOUR MARKET: DETERMINANTS OF FACTORY EMPLOYMENT

Dr. Sumaiya Khair

1. Introduction

The usual scene that meets the eye in the early morning on the streets of Dhaka is that of an army of women walking purposefully in groups, each with a lunchbox in hand. While most of them are young, some are merely children, and far too young to be designated as women. They leave their homes in the slums each day to fill the morning streets of Dhaka's industrial areas and head for the city's various garment factories. This army is the country's female garment industry workers. In Bangladesh, most industries prefer to engage young, single females as workers. In the garment export sector the trend is particularly marked. The bulk of the workforce in this sector comprises women. The workforce also absorbs a considerable number of girl children without whom the 'assembly lines' within the factory cannot function properly.

The present paper is based on an empirical investigation that was carried out some years ago to assess the situation of girl child workers in the country's garment industry.[1] Although the data may be a few years old the findings are nevertheless important in that they are a useful supplement to the sustained debates and dialogues worldwide regarding the issue of child labour.

507 female child workers in the garment industry made up the primary category of respondents followed by 33 parents/guardians and 62 employers/owners of garment factories. A combination of quantitative and qualitative methods was employed to gather the data. Admittedly, while

[1] Drawn from the author's unpublished Ph.D. thesis titled *Changing Responses to Child Labour : The Case of Female Children in the Bangladesh Garment Industry, University of*

quantitative data are necessary to determine the prevalence of a phenomenon, it is the qualitative study that reveals the complexities of a given scenario.

The paper examines various characteristics, at the household, workplace and individual levels, in an attempt to discover the motives behind children's decision to take up factory employment. Working conditions are examined in the light of the existing factory laws of Bangladesh to reveal the gap between law and practice. The paper also intends to demonstrate how little children know of, or are affected by, laws formulated especially for them.

2. The Socio-Economic Profile of Female Child Workers

This section seeks to portray a brief profile of the girl child respondents in terms of living conditions, age, marital status, family composition in order to gain some understanding of the particular socio-economic characteristics and background of the respondents.

Most of the respondents, 89.5 per cent out 507 children and 51.5 per cent out of 33 adults, were found to be living in bastees or slums after having migrated to the city from the rural areas. One can hardly miss the slums which have sprouted like mushrooms all over Dhaka and its adjoining areas over the last few years. Slums are mostly unauthorised settlements hosting a dense population occupying one-roomed overcrowded houses. The single-roomed shacks with overhanging roofs of rusty corrugated metal, bamboo or scrap materials and rattan walls, sometimes resting on stilts to avoid the trickle of grey water thick with waste, had dark interiors with very little provision for light and air.

Despite this dismal picture, life in each of the slums visited functions with clockwork precision. Smoke billows from wood

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East London, Essex, U.K., 1995.

fires over which staple food for the family simmers while young housewives clean their living quarters. Half-naked young children crowd every dwelling, engrossed in their own world of play and make-believe. Men and women bathe in separate communal bathing areas functioning with a single tube-well or a public tap which provides water free of cost but only for a few short hours. While drinking water is scarce in the slums that I visited, the sanitation system is deplorable. Latrine facilities on a private basis are totally absent--the makeshift structures outside meant to serve as latrines are for communal use and are far from hygienic.

Of the 507 child respondents the majority 'self-reported' as being in the 10-14 years age bracket. The youngest respondent was 8 years old. The reason why I use the term 'self-reported' is due to the absence of birth certificates in Bangladesh and the inability of respondents to state their age accurately. The ordinary people of Bangladesh, in the majority of cases, reveal total ignorance of their actual chronological age. This is a major drawback, which clouds the credibility of many research studies where age is an important factor. I experienced similar difficulties in my research.

The difficulty experienced in computing the age of adult guardians was enough to warn me of the difficulties I would face in discovering the children's ages. Moreover, many of the children appeared undernourished, making it even more difficult to tell their age. This, in fact, is one of the most popular arguments offered by factory owners in an attempt to justify the appointment of underage children in their factories. I began by asking the children their age and gradually tested the credibility of their answers by asking them about major events in the country, like a particular epidemic, or a natural catastrophe like the floods of 1988, or the regime of a particular leader. In this way, I pin-pointed 507 respondents, out of a group of nearly 600, as being in the category of 'child', that is, 14 and below.

The exercise involved a lot of mind-boggling calculations, but in the end I managed to narrow them down sufficiently to produce a figure representing the actual age as accurately as possible. In the circumstances, the conclusions are the best that could be drawn.

51.5 per cent of the 33 parents/guardians interviewed worked in the garment industry where they were engaged in various occupations. Of the total adult respondents, 45.5 per cent were women who had young daughters working in the garment industry.

The investigation revealed that 96.6 per cent of the child respondents were single and had never been married. Only one out of the 507 children refrained from responding to the question regarding her marital status. Presumably, she was married but was embarrassed to admit it. The children replied in the negative when asked whether they would prefer marriage to work.

When the parents/guardians were asked about marriage plans for their daughters, their responses revealed a shift in the traditional practice of early marriage for female children. The respondents said that besides assisting them economically, their daughters' incomes also enable them to set aside a small amount for their marriages in future. However, they do not contemplate marriage for their daughters until they are at least 20 years old. After all, early marriage would also mean the premature loss of their much-needed income.

90.9 per cent of the total adult respondents comprising parents/guardians admitted that work in the garment industry is an effective deterrent to child marriage. If it were not for the factory work, their daughters would have been long married.

Moreover, it is found that the factory authorities are reluctant to engage married workers. They appear to prefer unmarried

females who are free to devote their entire time, attention and energies to the factory floors without suffering from any domestic constraints common to married females. Women can be paid less than men, they appear more acquiescent to enforced periods of overtime work, and they can also be laid off in the absence of orders without too much protest. Unencumbered single women are preferred who are willing to give 'undivided attention to their work without the constant anxieties about their husbands, their inlaws or their children'.[2] If the foregoing is true of young women one can imagine the benefit of engaging children in this trade.

All the child respondents came from fairly large families; the average family size of the respondents interviewed is 7. The families are basically nuclear in nature. The vast majority of the respondents belong to families comprising parents and their children only. Very few have dependents like an ailing grandparent or a widowed aunt. Some have relatives living with them but this is rare.

The majority, 67.3 per cent of the total child respondents, belonged to male-headed families where the father is the dominant figure. 29.7 per cent of the respondents have families that are 'headed' by their mothers, on account of their fathers working sporadically or having irregular jobs. Many women in Bangladesh are increasingly taking up the reins of the family in the absence of their husbands by way of death, divorce, desertion, re-marriage or simply due to migration to the city for a job. It should be noted however, that despite the presence of adult male members, women in my study were symbolic 'heads' of their families by virtue of their steady income. This is a departure from the popular notion that sees women as heads of families primarily in the absence of males. Other respondents had fathers who were too old or too sick to work.

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[2] Kabeer, Naila, 'Women's Labour in the Bangladesh Garment Industry: Choice and Contraints in Camillia Fawzi El-Solh et al. (eds.), *Muslim Women's Choices. Religious*

An attempt was made to discover whether the sex of the household head had any specific impact upon the education of the children. The effect of having a relative as head of the household was also examined. The following cross. table reveals the effect of household heads on the schooling of children. 502 children, that is, 99 per cent of the total were out of school at the time of this study. Therefore, the following table reveals the findings on the basis of those 502 children.

TABLE 1: Cross Tabulation of Reasons for School Dropout by Household Heads

Reasons for School Dropout	Male-Headed	Female-Headed	Kin-Headed	Total
Reluctance of Parents	43 12.7	9 6.0	2 13.3	54
Poverty	211 62.5	95 63.8	11 73.3	317
Respondents' Reluctance	38 11.2	9 6.0		47
To work	46 13.6	35 23.5	2 13.3	83
Lack of Voc. Training		1 0.7		1
Total Total Percent	338 67.3	149 29.7	15 3.0	502 100.0

Belief and Social Reality, BERG, Providence/Oxford, 1994, pp.164-183, at p. 165.

The above cross table reveals that 67.3 per cent out of 502 children came from male-headed households, 29.7 per cent out of 502 children came from female-headed households and 3.0 per cent out of 502 children belonged to families that were headed by kin members. The table demonstrates that poverty is the chief reason for school dropouts. 62.5 per cent of the children from male-headed (father) households and 63.8 per cent of children from female-headed (mother) households have cited poverty as their main reason for dropping out of school. Interestingly, 73.3 per cent of the children belonging to households headed by kin members have dropped out of school due to poverty. Therefore, although poverty is all pervasive it appears that education of children living with kin members is more likely to be affected by poverty. It may be that while parents try to educate them with whatever means they have, kin members are less likely to spend their paltry earnings on the education of their relative's child.

Another aspect that is evident from the above cross table is that children coming from female-headed households dropped out of school mainly in order to work and earn for the family. The options used in the cross table as possible reasons for school dropout require an explanation here for a clearer understanding. 'Poverty' and 'to work and earn' have been used here to denote different categories. The reason being that it is often found that families which are poor have children who do not attend school and yet do not work to earn for a living either. In contrast, there are poor families whose children drop out of school for the sole purpose of earning a living. in this light, the largest group of children, 23.5 per cent out of the 149 children from female-headed households (mother) have dropped out of school for the purpose of earning a living. It is clear from this data that children from mother-headed households experience and share the family's poverty more intensely than those belonging to father-headed households since females are more economically

vulnerable due to the existing private/public dichotomy that essentially segregates women form the world of men. This finding only confirms that female household heads indeed experience multidimensional difficulties in the Bangladeshi society.

2.1 Factory Employment and Decision-Making

The capacity of making their own decisions demonstrates the girl children's transformation from mute non-entities to active and confident social actors. Questions regarding decision-making within the household about a daughter's employment in the factory brought forth various responses. In a traditionally male dominated society like Bangladesh it is usually the sons who are permitted to seek fresh pastures away from home. Male children have more freedom in choosing a vocation of their own. Daughters, on the other hand, are duty-bound to obey the parents without question. With the advent of recent changes in the social structure, girls are applying various mechanisms in an attempt to gain the approval of their parents for factory employment.

Normatively the chief decision-maker in the family is the father (if he is alive). It is his permission that a daughter requires if she wishes to step out of the bounds of the house and into the world of work in the factory. In the absence of the father, it is the brother who steers the family. If she is married then it is her husband who decides her future as a possible wage-earner.

However, women are often permitted now by the male authority in the family to combine their domestic duties with paid employment. One of the primary motives behind this unusual display of consideration by the male is, perhaps, to exploit and usurp the earnings of the women. Rani's (12) story of her friend clearly illustrates this situation. She recounted the tale of a married friend who was forced by her husband to work in the garment factory. The husband said that since the dowry

paid by the girl's family was not enough, she should either work in order to pay it off or get it from her family. He threatened her with divorce if she refused to abide by his decisions. Rani stated that her friend, being physically weak, finds it very difficult to cope with the pressure of carrying a double burden of home making and factory employment. Nevertheless, she has to do as her husband wishes or risk being divorced. Rani's friend had no choice but to give in and work in the factory.

In many cases daughters faced considerable opposition to seeking outside employment. The standard reaction of some parents, in particular fathers, is utter horror at the prospect of their daughter going out to work. Again there are others who were bold enough to defy their parents' disapproval and join paid employment in the factory. Rukuni, 12, directly disobeyed her parents in joining factory work. She said that her father wanted her to study but Rukuni did not see how schooling could fulfil her immediate needs. Her parents, however, gradually and perhaps grudgingly, accepted her single-minded commitment to factory employment. Rini, 14, adopted a different strategy. She conspired with her mother to keep her factory employment secret from her father who was a rickshaw-puller. Her mother covered for her most of the time and since her father was mostly engaged in drinking and gambling in his free time he did not suspect anything.

The employment of strategies as seen above, reveals a transformation in patterns of decision-making that give children greater leverage in decisionmaking in response to growing awareness of their own needs. Children, like women, have their own ways of resisting against their relegation to a subordinate status. The following breakdown table reveals the trend further.

TABLE: 2 Breakdown of Decision-Making Within Family

Decision-Making by	Frequency	Percent
Children	355	70.0
Parents/Guardians	1 52	30.0
Total	507	100.0

While 70 per cent out of 507 children responded that they sought factory employment on their own volition, 30 per cent said that they did so at their parents' encouragement. Although it was not easy for many of them to seek factory employment, as is evident from the qualitative statements above, many children nevertheless took the decision on their own. Clearly, therefore, seeking factory work is not necessarily made in tandem with parental visions of a daughter's role or a family's economic plan.[3]

2.2 The Family Economy and the Use of Children's Wages

While 43.8 per cent of the total child respondents stated that both they and their parents use the wages that they earn, 87.9 per cent out of 33 adult respondents said that their children hand over their entire wages to them. The obvious gap between the responses of the children and the parents/ guardians suggests that there may have been an overall shift in the family economy as far as children's wage contribution is concerned. On the other hand, it could also mean that the children are keen on working overtime so that they can retain the overtime payment for themselves after giving their basic salary to their parents. Whatever may be the case, the following table reveals the breakdown of the use of children's wages.

[3] Wolf, Diane L., 'Daughters, Decisions and Domination: An Empirical and Conceptual, Critique of Household Strategies', *Development and Change, Vol.21, pp.43-74, at p. 51.*

TABLE: 3 Breakdown of the Use of Children's Wages

Use of Children's Wages by	Frequency	Percent
Parents/Guardians	85	16.8
Self	200	39.4
Both	222	43.8
Total	507	100.0

It appears from the above table that the notion of family dependence is somewhat overstressed and children today work for themselves as much as for their families alone. 39.4 per cent out of 507 children spent all their wages on themselves, whereas only 16.8 per cent of the children gave their entire earnings to their parents. The rest, 43.8 per cent, contributed some of their wages to the family economy.

Another aspect that influences children not to give their wages to parents is the apparent thoughtlessness with which they spend them. Nirmala, 14, explained vehemently:

> *My father is good for nothing. My mother, who is terrified of him, can never disobey him for fear of his beatings. At the beginning I used to contribute to the family economy but my father took everything from my mother only to lose it in gambling. We went without food. I vowed thereafter never to give them cash. Instead, now I try to buy my mother whatever she needs.*

Children therefore, take measures to suit particular situations and not all of them are favourable for parents/guardians. Children are conscious of the social changes around them and are consequently poised to take full advantage of them. Some of the young girls contemplated saving a portion of their incomes for their dowries (an inevitability these days). Thus,

they would be taking the burden of some of their parents' costs during their weddings. While some of the guardians admitted the truth of this, others were either hesitant or silent.

Some of the adults believed that the new-found independence and moneypower are making their girls deviant and irresponsible. Not all, they alleged, contribute to the family income, but instead blow away their earnings in frivolous ways: on clothes, cosmetics and movies. They complained that their children are not bothered about the financial constraints of the family and spend their earnings on whatever takes their fancy. The number of girls in this category is low as the alleged frivolous activities are usually undercut by traditional values according to which daughters invariably bow to familial influence. Moreover, as work in the factory allowed very little free time, chances of engaging in 'frivolous' activities, such as going to the movies, seem remote.

3. Work History and Conditions of Work

An attempt is made in this section to discover and describe the conditions in which children were found to be working in the factories. It includes a detailed study of choice of work, work processes, terms of work, problems at work and security in the workplace with specific regard to female children of the industry.

3.1 Age When Children Started Work and Motives for Seeking Factory Employment

Section 66 of The Factories Act 1965 specifically prohibits the employment of children who have not completed their fourteenth year. A child who has completed the age of fourteen shall be permitted to work in a factory only when he/she has received a certificate of fitness from a Certifying Surgeon upon application of the child or his/her parent/guardian or the manager of the factory where the child wishes to work.[4] During

the field research there were situations in which none of the above requirements were fulfilled. While children under the permitted age were openly visible on factory floors, my doubts regarding the existence of fitness certificates were confirmed. In fact, the practice of procuring false certificates confirming the age of children, which in most cases are. made available by bribing the doctor concerned, flourished only after the Harkin Bill began to take its toll.[5] The same rule applied in the case of visits from Factory Inspectors who are easily mollified by a bribe. Since children are an invisible force anyway, they are not listed in factory registers and consequently, the duties of factory inspectors become less strenuous and easier to justify.

The employers in the sample denied that age, as is generally alleged, is the principal criterion upon which selection of young workers is based. They regarded the notion that children are preferred, because they can be paid less, as without foundation. They argued that in view of the abundant adult labour supply, where an unemployed adult would be more than willing to work for the same wages as those paid to a child, employers have very little to gain by engaging young children who are clumsy and inexperienced. However, since children often accompany their mothers/sisters to work, they try their hand as sewing helpers and pick up a few pointers in the process. Said one employer:

When parents request us to take on their children we

[4] Sections 67 and 68 of The Factories Act 1965.

[5] In August 1992, following campaigns by major labour organizations in the United States, an American Senator Tom Harkin introduced a Bill into the American Senate to deter child labour in manufacturing industries. As the measure was introduced too late for passage in 1992 it was reintroduced into the Senate in 1993. The Bill, commonly known as the Harkin Bill, sought to prohibit importation of any product made wholly or in part by children under the age of 15. The sanction created a great deal of tension in the garment industry of Bangladesh which employed a considerable number of young girls.

have very little choice. We can hardly afford to lose the services of the parents who are good workers. It is easier to give in to their requests and take their children in. Moreover, whatever they earn here is well supplemented by the children's wages. At the end of the day they all stand to gain from it.

Moreover, the employers argued that children who work on their own are in the habit of changing factories frequently so they quickly learn the work processes. 77.4 per cent out of 62 employers cited 'experience' as opposed to young age, as the basic premise which influences the selection of children.

Although at the time of this study most of the children interviewed were between the ages of 10 and 14, many of them had already worked for some years. While the largest group, 27.0 per cent of the total children, started work at the age of 10, only 2.4 per cent claimed to have started work at the age of 14. This reveals how early children are initiated into paid employment, despite legal restrictions. It is evident that even before they dropped out of school, many of them have, in one way or the other, assisted their parents in income generating activities. Jyotsna, 13, confirmed:

I don't see why you should be so surprised at hearing how early we started work. As far as I can remember, I have worked around the house and assisted my elders in various ways since I was a toddler. Since I come from a large family, errands for elders were also endless. Moreover, nobody seemed to think that I would be unable to do the chores set for me on account of my age--for that matter, neither did I!

The following frequency table demonstrates the age at which children have started work.

TABLE: 4 Breakdown of Ages At Which Children Started Work

Age (in years) when children started work	Frequency	Percent
7	2	.4
8	17	3.4
9	82	16.3
10	136	27.0
11	104	20.7
12	90	17.9
13	60	11.9
14	12	2.4
Total	503	100.0

Missing Cases: 4

[Note: Missing cases are those who failed to respond].

From the above cross table it is evident that there is a general tendency for children to begin to labour in factories between the ages of 9-12. Among the 503 children who responded to this question, 136 or 27.0 per cent of the children started work at the age of 10 and 104 or 20.7 per cent of them began to work from the age of 11.

Economic constraints appear to be the principal cause, which propel these children to take up work at an early age. 97 per cent of the total adult parents/guardians said that they sent their children to work in order to supplement family income. Those belonging to single-parent families seem to face a greater challenge than those coming from two-parent families. The absence of the father, either through death or desertion, often complicated matters. When asked how far their families were

dependent on the income of their children, 84.8 per cent of the total parents/guardians replied- 'enormously'. The following cross table demonstrates how the need for children to supplement family income affects their decision to drop out of school.

TABLE: 5 Cross Tabulation of Children's School Dropout by Necessity for Children's Income for Family Survival

Reasons for School Dropout	Yes	No	Total
Reluctance of Parents	49 10.1	5 29.4	54
Poverty	314 64.7	3 17.6	317
Respondents' Reluctance	41 8.5	6 35.3	47
To Work	81 16.7	2 11.8	83
Lack of Voc. Training		1 5.9	1
Total Total Percent	485 96.6	17 3.4	502 100.0

As indicated earlier while computing Table 1, 502 children out of 507 of them were out of school at the time of the investigation. Therefore, the above table has been computed on the basis of 502 children. From the above cross table it is evident that 96.6 per cent out of 502 children dropped out of school as their income was essential to their families. 64.7 per cent out of 485 children who responded that their income was essential for the survival of their families cited poverty as the principal cause. The financial contribution of each child worker

must, therefore, supplement her family economy significantly.

Another reason often cited as a cause for child work is that the parents/guardians are reluctant to leave their daughters alone at home when they leave for work. The argument is that they fear exposing the children to various forms of abuse, not only from bad elements in the area, but also from members of the family. Consequently, they are compelled to take their children along with them to their workplace. Hanufa, 36, explained in hushed tones:

> *One cannot trust one's child with anybody these days. How can I leave my daughter on her own in the bastee when I know of the dangers to which she might be exposed? If anything happens to her in my absence she will have to carry the shame for the rest of her life. She will never be able to make a decent marriage in future.*

It seems, therefore, that it is the duty of the parents/guardians to safeguard the chastity of their daughter/ward against possible violations by outsiders, sometimes even by insiders. It is also the duty of the girl to save herself from abuse by absenting herself from her own home. Since 'chastity' of the girl is an essential ingredient of marriage in Bangladesh, the above statement also demonstrates that marriageability continues to be very important within the family and wider community.

While it is true that economic imperatives propel children into work, it is evident from my discussions with them that it is often not the only reason. A number of young girls, as well as responding to immediate financial compulsions, worked in order to secure an income for personal expenditure. Exposure to city life opens up avenues where the lure of modern clothes and cosmetics encourage young girls to earn a living from a relatively early age. Rupjan, 10, said excitedly:

> *I saw how the girl next door used to dress. You know,*

> *she even used nail polish and lipstick! She could do all that with the money she earned from the factory where she worked. I dreamed of the day when I would be able to the same. More than anything I wanted to apply nail polish and lipstick just like the other girl.*

Many children appeared to have taken up factory employment to escape familial control over their lives. Work in the factory enables them to stay away from the ordinary drudgery of their households. Some of them also mentioned that they wanted some financial autonomy from their families and therefore, decided to work in the factory. Rahima, 11, stated:

> *My father was against my joining the factory. I, however, wanted to be like the other girls working in the factory. They are free to roam the streets and wear what they like. When my friends leave for work I have nothing to occupy myself with apart from housework. I am sick of looking after my baby brother. Now that I work in the factory I can spend the major portion of the day away from the daily routine that was such a bore.*

It is clear, therefore, that apart from financial necessity at a family or group level, other factors also operate at a more personal level when children feel encouraged to join waged employment outside their homes. The stand taken by children in choosing their own vocations is indicative of their capacity to devise 'strategies' to resist their ideological subordination within the family. Since 'strategies' are shaped by several levels of constraints'[6], this mode of resistance by girl children dissolves the division that is created by the exercise of authority over them, not only by men but by adults in general.

3.2 Choice of Occupation

It is interesting to note that despite the existence of other kinds

6 Kandiyoti, Deniz, Bargaining with Patriarchy', *Genderand Society,* Vol.2, No.3, 1988, pp.274-290, at p, 285.

of factories in Bangladesh, female children are more attracted to employment in the garment factories. When asked why they joined the garment industry, the girls replied that they are restricted in their choice of occupation by reason of their gender. They contended that being girls there are very few jobs to choose from.

83 per cent of the total child respondents stated that work in the garment industry is their first occupation and for 16.6 per cent of them the contrary is true. For those who had worked elsewhere prior to their occupation in the garment industry, a higher salary was the chief attraction of this sector. 64.3 per cent of this group stated that they left their previous jobs in favour of factory work on account of the higher wages paid in this industry.

Almost all the children expressed their preference for factory work to any other occupation. When I put a hypothetical question to them that, if they were not already working, which sector would they prefer to join, the majority, 87.8 per cent out of a total of 507, voted in favour of the garment industry. The table below shows the trend in children's selection of occupation.

TABLE: 6 Breakdown of Children's Choice of Occupation

Choice of Occupation	Frequency	Percent
Garment Factory	445	87.8
Domestic Service	1	.2
Others	61	12.0
Total	507	100.0

When questioned about their obvious preference for the

garment sector, they unanimously replied that even if the pay is less than normal standards, at least work is available. By 'normal standards' it may be assumed to indicate the sum of money that would normally be paid for that particular kind of work. The reference, however, remained unclear from the children's point of view. Perhaps, they meant that had an adult worked at the same occupation, he/she would have received more pay. Perhaps, the employer could have paid more but was intentionally not doing so. Upon further elaboration, the children appeared to favour the latter possibility. Another reason for their preference is that they have the scope to earn a little extra in the garment industry by working overtime.

They enjoy a sense of security during work in the factories and said that the working environment prevailing in the factories is far more congenial than can be found anywhere else. In other words, the children felt that they would not have felt as comfortable and safe working anywhere else. Moreover, they had the freedom to go home at the end of the day unlike say, domestic service, which appeared to be a matter of great significance to the respondents.

The last thing that the majority of the children want is to work in people's homes as domestic servants. When questioned about their apathy towards domestic work, they replied that it is often poorly paid, if paid at all, and has no uniform working hours. Moreover, there is no dignity in this work. Since domestic service afforded no holidays or free time, they would always be at the beck and call of the inmates of the house.

The children stated that unlike the garment industry, which pays reasonably well if they work hard enough, domestic work does not pay enough no matter how hard they work. They also referred to incidents where domestic servants were severely beaten and maimed by their employers on the slightest of pretexts. Apart from a handful, most of them were careful not

to comment on sexual harassment of domestic servants by male employers in private households. Gentle inquiries brought forth a torrent of information, most likely gleaned from hearsay and stories told from newspapers, on sexual harassment in private households. Sakhina, 10, recounted her horror of domestic work on account of the stories she heard:

> *I go cold when I think of the things that happen within the four walls of a house. If someone kills and buries you nobody will know. I hear people talking in the bastees about violent incidents in people's homes. I do not ever want to place myself in such a situation. In contrast, the factory is a much better place to work in. There are people everywhere and one feels safe in here.*

When the adults were asked why they had placed their children in the garment industry, 42.4 per cent out of 33 stated that they chose to send them there on account of the good salary that is paid. Moreover, 84.8 per cent of the total adult respondents stated that their children benefit in many ways by working in the garment industry and 60.6 per cent said that they do not think that their children would have fared better elsewhere. The benefits for them, it appeared, are more financial than anything else.

Some, however, expressed mixed feelings. They said that although it is true that the garment industry came as a blessing for the female population of the country, it also brought social evil in its wake. Many adults believed that the close proximity of men and women at work and economic independence are having adverse effects on their children. While many children are believed to be associating with unscrupulous people, others, they maintained, have become mothers of illegitimate children. Moreover, they have become disobedient and arrogant and do not have regard for their elders.

3.2.1 Factory Preference for Girl Children

When the employers were asked whether girl children are preferred to adults in the garment industry, 87.1 per cent out of 62 answered in the affirmative. They said that young girls are quick to learn and are hardworking. Although the employers denied that age is not the principal criterion for the selection of workers, they nevertheless admitted that young girls are preferred in view of their submissiveness. Girl children are a more docile workforce who are easy to control. It seems that the traditional attributes of femininity in Bangladesh, i.e. passivity and submissiveness, greatly influence the selection of young girls. As Kabeer points out:

> *Employers seeking to tailor their labour recruitment strategies to the needs of profit maximisation, demonstrate a preference for certain characteristics in their workforce--cheapness, docility and dispensability. The ascription of secondary-earner status to women in many cultures gives them a competitive edge in the market for these jobs...*[7]

This inclination to employ young female labour demonstrates how gender relations succumb to shifts, even under the strictest of traditional normative principles which dictate what is proper, and what is not, for young females. Another factor that influences the incorporation of children into the factories in Bangladesh is their non-admission to worker's unions. Robert, in a similar study on female workers in the clothing and textile industries in newly industrialised countries, observes that 'this emphasis on passive and ornamental femininity is intended to forestall the rise of any sense of independence or unified strength among the women'.[8]

7 Kabeer, Naila, 'Cultural Dopes or Rational Fools? Women and Labour Supply in the Bangladesh Garment industry, *European Journal of Development Rlesearch*, Vol.3, Part 1, 1991, pp.133-160, at p. 135.

8 Robert, Annette, 'The Effects of the International Division of Labour on Female Workers in the Textile and Clothing Industries', *Development and Change*, Vol.14, 1983 pp.19-37, at p. 29.

However, the employment of children is not without problems. While 43.5 per cent of the total employers complained about unscheduled absences from work, 40.3 per cent said that the child workers were also largely responsible for damaged equipment on the factory floors. As one disgruntled employer said:

> *Nobody seems to realise how difficult it is to work with children. Although they hardly know how to handle machinery, their curiosity gets the better of them as they try their hands at the sewing machines when nobody is looking. The result is a large number of broken needles and jammed machinery. Sometimes I think children are more a hindrance than help.*

The impression I received was that the employer went out of his way to help the child workers despite the material loss. Unfortunately, the 'truth' is not always so clear-cut.

3.3 Modes of Recruitment and Terms of Work

While a large number of girls in the sample stated that they found their jobs on their own, the majority, 60.9 per cent out of 507, admitted that they obtained their jobs through friends and family. The research demonstrates the growing independence of children in the choice and procurement of their own jobs. Those who found jobs on their own initiative live in the vicinity of the factories. The employers, on the other hand, preferred to state that most of the children were granted jobs upon the request of a parent or a relative. 27.1 per cent out of 62 employers responded that children are mostly recruited through the good offices of friends/relatives already working in the concerned factories. This was also stated by a number of parents.

As for the existence of contracts, 99.6 per cent of the total child respondents replied in the negative when asked about the existence of a contract. This tallies to a certain extent with the

response of the employers of whom 82.3 per cent admitted that no written contracts are drawn up in the event of appointing children.

Children are initially required to work for a period of one to three months (depending on the individual factory) on a trial basis. Only after they have worked to the satisfaction of the management are they 'officially' appointed as employees in the factory. Terms are agreed upon, sometimes verbally. At others, they are set out in a paper bearing their photographs, which require either their signature or their thumb impression.

It was evident from the interviews of the children that the somewhat loose nature of their appointments enabled them to switch jobs freqbently. Job-hopping is an accepted pattern among the young employees--they are willing to leave their existing job for one, which offers only a fraction more in terms of salary and other benefits. Saleha, 14, explained the need for additional cash, however little:

> *A single taka makes a world of difference in a poor man's house. I know that a lot of people think we are greedy to be hopping from job to job just for a taka, but how can I make you understand what it means for us to earn whatever little extra we can? You see, every little bit counts.*

Although they are more or less free to leave their employment, economic considerations may compel them to stay on at a particular job until they find work that offers better pay.

3.3.1 Working Hours and Work Processes

According to Section 70 of the Factories Act 1965 no child or adolescent shall be required or allowed to work in any factory-

(a) for more than five hours in any day, and

(b) between the hours of 7 p.m. and 7 a.m.

Moreover, the period of work of all children employed in a factory shall be limited to two shifts, which shall not overlap or spread over more than seven and a half hours in any day.

All child respondents in my sample, however, worked a full day. 54.4 per cent of the total children stated that they worked twelve hours each day. None was found to work for the specific hours fixed by law for child workers. In fact, they work as long as any adult in the factory. In the sample the respondents said that although they are supposed to start from 9 a.m. in the morning and continue until 5 p.m. in the afternoon, the general trend is to work from 8 a.m. in the morning until 9 p.m. in the evening, with an average break of about one hour for their mid-day meal.

Although they would have liked to say that children only worked for the specified hours, 84.7 per cent of the total employers admitted that girls under 14 often worked overtime. However, from their point of view, they were referring to eight hours of work as 'specified' and not what is generally permissible for children under the law. Moreover, they refrained from elaborating on the actual length of overtime work.

The young girls are expected to work particularly hard when there is a deadline to meet in respect of orders from foreign buyers. In that case, they work from 8 a.m. in the morning until the early hours of the next day, often until 3 a.m. The situation gets worse when they are required to report for work at 9 a.m. on the same day. Working hours are not strictly adhered to and often exceed the usual length. Rests during working hours are not common. However, some children I found had the time during working hours to frolic around the bales of cloth, lost in play in their respective factories, but I knew that they were the exception and not the rule.

Children face many problems when they have to work late.

While some of them are aware of the risks on the streets at night, others are more affected by the physical exhaustion resulting from a long and hard day's work. The following table demonstrates their responses.

TABLE: 7 Breakdown of Children's Problems of Working Long Hours

Problems	Frequency	Percent
Street Risks	231	45.6
Lack of Rest	264	52.0
Others	12	2.4
Total	507	100.0

While 45.6 per cent of the total children mentioned risks on the streets, 52.1 per cent stated that the main problem of working late was the lack of rest. Since they have to leave home for work quite early in the morning, late nights were not easy to cope with. Whenever, they work late, they feel run down the next day.

With regard to work processes, children are always appointed as sewing helpers and are engaged at trimming thread and help cut up excess cloth from the finished goods. Their absence often holds up work processes because the work being conducted in 'lines', suffers serious disruptions in the event of even a single gap therein. Although this is true mainly of machine operators, sewing helpers constitute a large enough work force to contribute significantly to production activities. They assist machine operators who, in most cases, are adults. The reason why I say 'in most cases' is that I also found over 21 underage females operating machines. Despite their age, these young girls have acquired sufficient skill in handling machines.

The monotony experienced by child helpers is relentless. As

Chameli, 12, informs:

> *I get tired of doing the same thing every day. My feet ache from having to stand most of the day. The lines would be held up if I did not work properly. The work is so dreary that sometimes I just want to give it up.*

In every case, the child labourers were found to be continuously and actively involved in their work which indicates that theirs is no small contribution. Instead, their work is central to various parts of the production activities and is integral to its completion and reproduction. Apart from their normal tasks, children are also required to pass tools and run errands for others.

I found that allegations that children in the garment industry are required to carry out heavy and/or overtly dangerous work are largely without foundation. Instead, their problem is one of sheer monotony which does not appear to involve any immediate danger. However, there may be isolated cases where young sewing helpers are also required to undertake heavy work--cases that I did not come across.

3.3.2 Terms of Payment

Despite their workload, children were found to receive very low wages. The child respondents in the sample claimed that they are paid a fixed sum irrespective of the type or length of work. According to White and Tjandraningsih, although there is a tendency for children to be concentrated in the lowest-paying jobs, (one of the reasons for the low wages is the concentration of children in those tasks), it is difficult to find a special 'children's wage rate'.[9] They contend that wage rates are the same for children and adults. However, there are mechanisms whereby children may be paid less than adults. For one thing, children fear the power and position of authority of the employer and other adults within the factory. Moreover, the

9 White, Benjamin and Tjandraningsih, Indrasari, 'Rural Children in the Industrialisation Process: Child and Youth Labour in "Traditional and Modern" Industries in West Java, Indonesia', 1992, The Hague et al., 1992, at p.31.

possibility of being fired in favour of a more skilled adult hovers over their heads. Consequently, children are more eager to do more work for less reward.

Although the employers in my sample stated that children received substantial wages for their work, I found that their wages varied between Taka 300-400 every month. This was typical of all the factories that I visited. However, 55 per cent of the total employers admitted that wages paid to machine helpers are not in accordance with the minimum wages laid down by the Minimum Wages Board of 1984 formed in accordance with the provisions of Section 3 of the Minimum Wages Ordinance 1961. The Board fixed Taka 627 as the minimum wages of an unskilled worker in the garment industry. The girl child labourer receives only Taka 300-400 in the capacity of an unskilled labourer.

The trend of paying children low wages flows from a number of factors:

Firstly, the positions of sewing and finishing helpers are disproportionately filled by underage workers, whose attachment to their jobs in a particular factory is unpredictable and relatively unstable. The somewhat 'footloose' nature of the child workers affects the management in their decision in awarding good salaries to young workers.

Secondly, most of the young workers are found to be illiterate and unskilled. Prior to their factory jobs the majority were occupied in household chores. In fact, they often learn their skills on the floors of the factories they work in 'at the expense of the management'.

Thirdly, and most importantly, they suffer from a dual stigma--that of being children and of being female. As it is, females are considered to be workers of secondary grade and therefore, not worthy of an enhanced pay. Being female children makes the

situation worse because their labour is considered only to supplement the main functions in a given factory. Moreover, the illegal nature of their employment enables the employers to induce a feeling of gratitude in those children, almost as though they were doing them an enormous favour by permitting them to work in their factories.

There is a general irregularity in the payment of children's wages each month. The children's age and their helplessness in the power hierarchy within the factory compel them to refrain from demanding their wages outright. Consequently they wait in anticipation of their pay both individually and as a group. Abeda, 11, reports:

> *There is no guarantee that we will receive our wages each month, let alone in the first week. There have been so many times when our wages have remained unpaid for a couple of months together. Even when they were paid, they were below what we are entitled to.*

Consequently, a general uncertainty prevails at the beginning of each month as the child workers anxiously await their salaries. Section 5(1)(a) of the Payment of Wages Act 1936 states that

> *the wages of every person employed upon or in any factory or industrial establishment upon or in which less than one thousand persons are employed, shall be paid before the expiry of the seventh day.*

Under this section, however, establishments having one thousand or more persons may pay the wages within ten days. Although the majority of the factories I visited employed less than one thousand persons, the payment of wages was found to be erratic.

Non-payment of wages on time made life difficult for impoverished families. As Rashida, 11, commented:

There being no excess food at home, it is imperative that we receive our wages on time...but each month we have to borrow money in the face of such gross uncertainty, a practice we can hardly afford. Each month our burden of loans increases---why do they [the factory owners] treat us like this?

Therefore, although salaries are supposed to be paid to them on a monthly basis, 74 per cent of the total children said that they did not receive their wages regularly. While only 9.1 per cent out of 507 children said that they received their salary in the first week of each month, 65.9 per cent of the respondents in the sample claimed that there is no certainty about payment dates. The following frequency table shows there is neither a fixed pattern nor any regularity with regard to payment of the wages.

TABLE: 8 Breakdown of the Basis of Wage Payment

Pay Day	Frequency	Percent
Ist Week of Month	46	9.1
2nd Week of Month	127	25.0
Uncertain	334	65.9
Total	507	100.0

Most of the respondents stated that they are not content with their wages. They believed that considering their workload, they ought.to be paid more. Sometimes they are required to help out at three or four machines at a time. Selima, 13, stated:

We are not properly paid. They think that because we are young they can cheat us. Do you know how many other people we run errands for besides our own work?

> *Add them up and you will see that we work more than two adults put together! It is because of poor pay that we change jobs so often. Whoever offers even one taka more, we don't hesitate to quit our present jobs. A taka makes a world of a difference for poor people like us.*

Given the option, the children would prefer to work on a piece-rate basis, in which case their hard labour would fetch better pay.

Salaries are paid directly to the young workers on a monthly basis and not to their parents/guardians. Upon receipt of the pay each child has to sign in, or leave a thumb impression on the salary record books. Increments for child workers are unheard of in the factories.

3.3.2.1 Non-Payment for Overtime Work

It was found that major irregularities prevailed with regard to payment for working overtime. 48.4 per cent out of 507 child respondents said that generally they work for an average of four hours after regular working hours. The pressure of work became particularly intense during peak seasons when there are deadlines to be met. 55.4 per cent of the total child workers stated that their wages do not include overtime payment, but that they are led to believe that they will get a reasonable sum if they work overtime. According to Section 58(1) of the Factories Act 1965, work in excess of nine hours in any day should be rewarded with overtime payment at the rate of twice the ordinary rate of wages. Since this provision is applicable to adult workers, employers find it easy to deceive child workers of their dues. However, for every hour worked after 5 p.m. the amount received as overtime payment varies from factory to factory. While some children said that they are promised half of their basic salary as overtime payment, others stated that they are only given a few takas per hour of extra work.

Although these workers are supposed to receive the overtime

payment of the preceding month with the regular pay of the current month, it does not take place in the majority of cases. Sometimes overtime payments are withheld to prevent the children from leaving the factories for another job.

Interestingly, 99.8 per cent of the total child respondents admitted that working overtime is a norm rather than an exception. In other words, it is compulsory for them to work overtime. This negates the notion that working overtime is a matter of choice. Dilara, 13, responded with some surprise:

> *I never knew we had a choice with regard to overtime work. The factory authority makes it sound as though it is part of the work schedule. Moreover, since we are illiterate we cannot calculate how much we are being paid for our overtime work. We go home satisfied with whatever they decide to give us.*

However, it was found, contrary to what is ordinarily believed, that children are more willing to work overtime than most adults. A Research Fellow at the Bangladesh Institute of Development Studies (BIDS) recalled an incident during one of our discussions, which backs up this inclination on the part of children. She narrated her experience with children in a glove manufacturing industry, which did not make their employees work overtime. She informed me that children were reluctant to work in that factory simply because there was no scope for earning a little extra and getting a bit of extra food.

It is quite evident, however, that none of the child respondents were clear about their situation as far as overtime wages are concerned and that they are largely ignorant about how their wages are calculated. In all probability they are, in the majority of cases, being cheated out of their well-deserved earnings.

The low wages paid to the children indicate how grossly their contribution as producers is underestimated. That children are integral to the work processes is denied by depriving them of

the minimum wages they are entitled to. Although low wages to children point to several aspects of the problem of child labour, it focuses upon children's vulnerability to exploitation.

3.4 The Factories

Most of the factories that I studied were found to be inappropriate in their planning and design to serve as an industrial unit. The majority of these factories function in rented premises built primarily for residential purposes. While some of them are housed in buildings that are incomplete, just bare structures of brick and mortar, others are hemmed in on all sides by existing blocks of shops on busy streets. Consequently, they are ill equipped to meet the demands of a large workforce. The factory buildings are overcrowded with low roofs affording inadequate ventilation in the hot and humid climate. The buildings have narrow staircases, often numbering only one, with no provision for backstairs to facilitate the safety of the workers in the event of a fire. Interestingly though, 56.15 per cent of the total number employers stated that the conditions prevailing in their factories are in accordance with the provisions contained in Chapter III of the Factories Act 1965.

3.4.1 Lack of Rest and Lunchroom Facilities

Although Sections 45 and 46 of the Factories Act 1965 provided for proper canteens and restrooms respectively, none of the factories I visited had either arrangement. Most of the workers ate their lunch wherever they liked--either in the factory corridors, verandas or rooftops. One of the most dangerous aspects of this is evident in factories that are devoid of railings on their rooftops or banisters on the stairs. Accidents in those cases are inevitable. Some of the respondents who live in the vicinity of the factories go home for their midday meal--this is considered to be a great advantage. Others take their own food to work. Factories do not provide refreshments except during overtime shifts. In fact, many children were found to

prefer overtime work in order to procure that extra bit of food. It seems therefore, that the poor, by being pragmatic, find comfort in many forms. Although they are cheated of their overtime payments, they are happy about whatever little food they receive when they do work overtime.

3.4.2 Sanitation

Although the employers reported that the toilet facilities in the factories were adequate, discussions with the girl child labourers revealed that toilets lacked proper maintenance and cleanliness as envisaged in Section 20 of the Factories Act 1965. With regard to lack of maintenance the employers are inclined to blame the workforce for their apparent lack of knowledge of the proper use of toilets. However, there are separate provisions for male and female workers. It is to be noted that children do not constitute a separate category and are, therefore, expected to use the toilets meant for female workers. The girl children informed that the number of latrines were not enough for the entire workforce.

3.4.3 Holidays

The children complained of being overworked without being awarded regular holidays. Apart from festival days like Eid, (Muslim religious festival), they are expected to report to work seven days a week without fail. They are not spared from work on Fridays, which is the weekly public holiday in Bangladesh. Therefore, although Section 51 of the Factories Act 1965 provides that workers shall not be required to work on a Sunday or a Friday as the case may be, work on Fridays is commonplace. When I asked Benu, 12, about working on Fridays, she replied:

> *Holidays? There is no holiday for us. Every day is a working day. If I choose to take a holiday, I would suffer a cut in my salary.*

The employers had a different story to tell. 77.4 per cent of the total number of employers responded that the children/workers received regular/weekly holidays. I was, however, inclined to believe the children as I have visited them on many occasions in the factories on Fridays. Provisions in Section 79 (1) of the Factories Act 1965 on allowing every worker at least ten days festival holidays (on special social/religious occasions) with wages are regularly violated.

3.4.4 Rest and Recreation

The children said that their daily work left little room for recreation. Part time schooling is also out of the question because the dictates of the family demand that they help out with the chores at home after work. Gender plays a very active role here. Responses to questioning revealed that the respondents' brothers are not expected to pitch in and help. Sometimes these girl workers are so tired that they skip dinner and go to bed directly on reaching home. Beauty, 12, smiled tolerantly and explained:

> *School? Games? I have no time for those. When I return home my family expects me to do my share of the household chores. I have family obligations which do not disappear simply because I work in the factory.*

Having experienced the ideologies of the poor during my research, I asked myself whether the children would be able to really play, as is so earnestly advocated for children of their age, had they not been engaged in factory work. The factors that I perceived negative the possibility--little girls grow up long before their time anyway, with little scope for play. Welfare of the family, often to the exclusion of self-interest, is of paramount importance in their lives. The traditional practice of self-sacrifice by girl children within the social and familial boundaries renders them devoid of a childhood in its Western sense. Under the circumstances, I do not think factory work

makes much difference in this regard.

3.5 Problems at Work: Material and Physical Discomforts

One of the common difficulties focussed upon the children is the interminable length of working hours. They said that since their work is repetitive the ensuing monotony is tiring. Devoid of proper training, the children find it difficult to master the art of cutting thread and materials evenly. If the work is not neat, they are fined. The fine is usually deducted from their salaries. In addition, they are often scolded and beaten. The latter practice depends greatly on the temperament of the supervisors concerned.

When the respondents are absent from work due to illness they generally suffer a cut in their salaries at the rate of about Taka 10, (which in most cases is equivalent to a day's wages), for each day of absence. Although 79 per cent of the total number of employers said that children received medical attention in the event of any accident at work, 93.7 per cent of the total number of child respondents answered negatively. When sick, the children have to pay for their own treatment and medication, even when they are hurt during working hours. Unless the injury sustained is gross, the management does not bother with them. As for compensation in the event of injuries during work, 96.3 per cent out of 507 children replied in the negative. Of the 3.7 per cent who replied in the affirmative, 73.7 per cent admitted that the amount awarded is very little. Some of them, however, said that they are given painkillers by supervisors to help ease headaches or other minor ailments during work. Concern, it would seem, is more for the loss likely to be incurred as a result of the illness of the workers rather than for the children's welfare. Others maintained that the management have no room for compassion for sick workers whose employment is often terminated if their illness persists. 'How can the rich understand the poor man's sorrow?' was the

standard reaction. Since children are legally excluded from factory work and are therefore, invisible, employers do not bear any direct responsibility in the event of their illness.

The children complained about the regimented hours that regulated their visits to the toilet. 80.5 per cent of the total number of respondent is said that they are not allowed to go for a drink of water whenever they wish and 68.4 per cent stated that they are not free to use the toilet whenever they want. On average they are permitted to go for a drink of water or to the toilet once every five hours, irrespective of the degree of the need. Some of them claimed that restrictions on the frequency of the use of toilets compel them to drink less water as a result of which a number of them have developed urinary problems. Consequently, they suffer from acute pains at times. As Khodeja, 13, explained:

> *How can we control our physical problems? One day I was suffering from dysentery. I was in acute pain. However, I reported to work for fear of being fined for absence. I was not allowed to visit the toilet even though I explained my predicament. It was only when I nearly collapsed did they allow me to use the toilet and lie down on a bench in the corridor.*

Although Section 22(3) of the Factories Act 1965 prohibits the locking or fastening of doors affording exit, the work-rooms are locked from the outside and the doorman keeps a strict vigil over the movements of the workers. Labourers, children and otherwise, can never 'sneak-out' without attracting attention. I discovered, however, that one of the principal reasons for keeping the gates locked is to prevent the smuggling out of clothing made of high-quality imported textile material. As one exasperated employer reported:

> *These children are utter thieves! I would not put anything past them. Only the other day we caught one of*

them as she tried to sneak past the guard with some of the expensive cloth stuffed underneath her dress.

When asked about any physical discomforts resulting from long hours of work, the children replied that their eyes burn after a hard day's work under the glare of fluorescent lights. Very often their eyes itch and water for days on the end. Most of them complained about the fluff that floats everywhere. They never seem to be able to get rid of it. It sticks to their clothes and hair and the exposed parts of their bodies. Jasmine, 14, informed dramatically:

I am sure that we are going to get cancer if we continue to work in such unhealthy conditions. But then, when I think of the alternatives, I feel this place is better than anywhere else...in spite of the fluff and long hours of work.

The respondents complained of experiencing dull aches all over their bodies at the end of each working day. This is not surprising as the children are mostly occupied in activities that do not permit them to work from a seated position. 73.4 per cent of the total number of child respondents claimed that they are required to discharge their duties from a standing position. Given the long stretch of working hours the practice can indeed be painful.

Employers' Response

From the employers' point of view, employing children can be troublesome. While 43.5 per cent out of 62 employers complained about children's unannounced absences from work, 40.3 per cent of them mentioned the destruction they wrought on the factory floors, particularly with regard to the machinery and equipment. The employers cited various ways when asked about the kind of disciplinary measures taken against child labourers in such circumstances. They admitted that they are not always aware of the way the children are treated by the

managers or the supervisors. To their knowledge, however, no extraordinary or extreme measures are employed. They added:

> *How much can you punish a child? They forget the punishment almost immediately and get up to mischief again in no time. Pulling their ears is a standard procedure for slight offences.*

Salary cuts are, however, usual in case of more serious offences. Table 9 reveals the usual methods used by factory authorities in disciplining their child workforce. It demonstrates the various penalties that are usually imposed while dealing with various problems created by child workers.

TABLE: 9 Breakdown of Disciplinary Actions

Penalties	Frequency	Percent
Salary Cut	29	51.8
Job Termination	7	12.5
Other (e.g. physical punishment)	20	35.7
Total	56	100.0

Missing Cases 6

[**Note:** Missing cases are those who refrained from answering].

It is clear from the above table that 51.8 per cent out of 56 employers said that the usual method for disciplining child workers is to cut an amount from their salaries. While 35.7 per cent spoke of other measures, like light slapping, only 12.5 per cent of the employers said that they fired the children from their jobs. It is evident therefore, that child workers usually suffer monetary loss for whatever wrong they commit on the factory floor.

3.5.1 Personal Security of Factory Child Workers

As shown already, most of the children stated that they feel quite safe and secure working in the garment industry. They maintained that people outside have no idea how things operate within the factories. Consequently, outsiders harbour misconceived notions about factory life. Jamila, 11, said:

> *I tell everyone how nice it is to work in the factory where there is no time to be involved in bad activities (at this stage she looks at me knowingly). It is, however, difficult to convince people about it. I found it hard to convince my own father who, at the beginning, was not keen on my joining the garment industry, as he, too, had heard about 'incidents' in the factories. Now, after seeing how well I am adjusted, he does not worry any more.*

When asked whether they faced any sexual overtures from their male colleagues or supervisors or managers in the workplace only .2 per cent answered in the affirmative. 51.1 per cent denied any problem of this kind and 48.7 per cent admitted to hearing about such occurrences in other factories. The presence of unrelated males alongside female counterparts on the factory floors is yet another break with socio-cultural norms, a development objected to by the more orthodox section of the local community.

The respondents pointed out that problems often arise when young male colleagues proposition a young girl in the factory. As the relationship develops, either they marry with everyone's blessings or the affair ends on a bitter note. In the latter case, accusations often include allusions to sexual harassment and exploitation. Kabeer in her observation regarding the effect of de-segregating the factory floor states that

> *..the breakdown of the 'natural' principle of sex segregation represented by factory work was denounced in the strongest terms. Not only was it seen as taking away work from unemployed men-the breadwinners of*

> *the families--but more fundamentally as a threat to the very fabric of the moral community.*[10]

When asked what remedy they have to this problem, 52.3 per cent of the total girls replied that the standard is to suffer in silence. My initial understanding was that children, particularly girls, would remain silent in such circumstances, as they would probably receive the raw end of the deal and be sacked if the management learned about it. Surprisingly, 52.3 per cent said that in such cases both male and female workers would be dismissed.

While the respondents regarded their workplace as quite secure, they appeared more concerned for the lack of security on the streets, particularly when they commuted to and from work. Men frequently make abusive catcalls and call out to them suggestively when they commute to work. It is as if by being bepurdah (purdahless) they are more 'available' and consequently, to be treated as 'fallen women'. The girls reported that they are bothered not only by the men on the streets, but also by local mastans (musclemen or hooligans) and the police. According to the children the police posed a greater threat as being 'protected by their uniforms' (a figure of speech, meaning their jobs) they could commit atrocities with impunity.

Most of the respondents were found to belong to areas near to the factories in which they worked. The children commute with fellow workers, some with their guardians and very few alone. Therefore, although females have come out of their seclusion to work, they are still faced with constraints on their mobility. Despite attempts at 'bargaining' against patriarchal domination women and female children are compelled to negotiate their roles within the parameters of what is socially construed as 'respectable'. Consequently, despite their participation in the 'public' territory women and female children continue to cling on to the practice of purdah, even if in a modified manner. This

[10] Kabeer, Naila, 1991, op.cit., at p.151.

is primarily due to their wish to herald their worthiness of protection and respect. Although changing, ideologies therefore continue to exert a powerful force in the lives of those very young women who are actively seeking to escape them. However, among the child respondents who have made the break with socio-cultural norms, considerations of financial gain and personal autonomy have become predominant.

Absence of Kin in the Respondents' Factories

The notion regarding the presence of kin in the factories is one of the principal grounds justifying the presence of children by employers. My findings, however, reveal a different pattern. Contrary to popular belief, I found that a large proportion of child workers, constituting 61.7 per cent of the entire group, do not have any relative working in the factories where they work. This goes against the prevalent notion that most child labourers in the garment industry accompany family members who are already working there. The following frequency table demonstrates the proportion of relatives working in the same factory to that of the respondents.

TABLE: 11 Breakdown of the Presence of Kin in Respondents' Factory

Kin Presence in Respondents' Factory	Frequency	Percent
Yes	194	38. 3
No	313	61.7
Total	507	100.0

The presence of relatives in the same factory is deemed to serve as a potential safety measure against sexual harassment at work. However, as mentioned earlier, even where there are no

relatives, children are perceived to be well-looked after by their adult co-workers, both male and female.

It is clear from the accounts of the children that the threat to their reputations by the male-female proximity is diffused by the creation of fictive kinship within the factory. Thus, it is usual to find them referring to complete strangers as 'bhai' (older brother), 'chacha' (uncle), 'apa' (older sister) or 'khala' (aunt).

3.5.2 Relations with Employers, Management and Adult Co-Workers

As regards the employers, the children appeared to be reasonably well disposed towards them. They remarked that although they hardly see the employers, except when they accompany foreign buyers, they nevertheless treat them kindly whenever they see them. The children often displayed a curious sense of affection for their employers that belied the power relations. Rupban, 13, said emphatically:

Our Malik (owner) is like our father. He may punish us in any manner he wishes. After all, don't our parents punish and discipline us when we make mistakes? Whenever he sees us our Malik behaves very kindly. It is sad that we do not see him more often.

The real problem lay with supervisors and managers who keep constant vigil over the progress of their work. They carry out whatever disciplinary measures are deemed necessary thereby incurring the children's wrath. the following frequency table reveals the breakdown of the treatment of child workers by the management body.

TABLE: 10 Breakdown of Treatment by the Management

Children How Treated	Frequency	Percent
Well	88	17.3
Badly	191	37.7
Moderately	228	45.0
Total	507	100.0

The foregoing table reveals that while 17.3 per cent of the total children said that they are treated well and 45 per cent said that they are moderately treated by the management, 37.7 per cent alleged that they are treated badly by them. The respondents hastened to add that even the adult workers are not partial towards the supervisors and managers. However, the children revealed an understanding unusual in ones so young when they admitted that the managerial personnel are only doing their job and that there is nothing personal in there attitude towards them.

As for the relationship with adult co-workers, it is a relationship fused with ties of friendship and kinship. 74.1 per cent of the total respondents claimed that their adult co-workers treat them well and always look out for them. They are mostly sympathetic to their needs and are always ready to lend a helping hand. Even where the children are unaccompanied by relatives, they hardly seem to feel the absence as the vacuum is readily filled by well meaning 'pseudo-guardians'.

4. Absence of Legal Awareness

Most of the respondents in the sample were hardly aware of the existing legal measures with regard to child labour. They said that their employers did not acquaint them with any such provision. In this regard, given the unconcerned manner in which factory regulations are violated, I was quite willing to believe the children. Some of them stated rather doubtfully that

although they heard something about 'child rights', they are not very sure what is meant by it. 91.7 per cent of the total number of children replied in the negative when they were asked whether they are aware that law prohibits employment of children below 14 years in industries. Of the 8.3 per cent or 42 respondents who answered in the affirmative, 40.5 per cent claimed to have learned about it from friends/acquaintances/relatives who worked in the same or similar factories as the children.

Although the respondents are largely ignorant about domestic labour laws, a vast majority, 89.2 per cent of the total children were found to know about the Harkin Bill. Tables 12 and 13 reveal the evident disparity between the child workers' awareness of domestic labour laws and that of the Harkin Bill, i.e. a proposed foreign legislation.

TABLE : 12 Breakdown of Children's Awareness of Domestic Laws Regarding Their Employment

Aware of Domestic Laws	Frequency	Percent
Yes	42	8.3
No	465	91.7
Total	507	100.0

TABLE: 13 Breakdown of Children's Awareness of the Harkin Bill

Aware of Harkin Bill	Frequency	Percent
Yes	452	89.2
No	55	10.8
Total	507	100.0

From the above tables it is clear that the great majority of the child workers in the garment factories that I studied were devoid of any knowledge of domestic factory laws, even those which directly concerned them. 91.7 per cent of the total respondents denied any knowledge of local laws relating to their employment in the factories.

On the other hand, the Harkin Bill, a proposed foreign legislation that was yet to gain legal force, made considerable impact on these children. 89.2 per cent of the total respondents said that they are fully aware of its implications and that they feared it. The respondents claimed that they first heard about it in the factories when young children were being fired in keeping with the potential requirements of the foreign legal instrument. Moreover, young workers were herded into small rooms away from the factory floors in the event of visits from foreign buyers. Soon the entire system became alert to the issue and word spread like wildfire.

Responses from adults, on the other hand, revealed that, contrary to what I had learned during my pilot study, a large number of them know about the legal restrictions on child labour in industries. While 57.6 per cent of them stated that they have no legal awareness, 42.4 per cent replied in the affirmative. This demonstrates that a considerable number of adults are aware of laws related to child employment in factories. They admitted that poverty is the chief factor that encourages them to break the law and engage their children in wage employment. 66.7 per cent of the total number of the adult respondents had heard about the Harkin Bill, mostly from their children. While the majority still had their daughters working in the factories, 33.3 per cent of them said that their children lost their jobs as a result of the Harkin Bill.

The employers were surprisingly honest about the existence of children in their factories. 58.1 per cent out of 62 employers

admitted to having young girls under the age of 14 working there. 52.8 per cent of the total number of employers at the time employed children numbering between 1199. Of the 42.9 per cent who answered in the negative, 76.9 per cent said that the principal reason for their absence is the American embargo. Very few cited personal disapproval of child labour. As far as knowledge of local labour laws is concerned, the employers appeared sufficiently informed about it. Although some of them came up with fragmented responses (computed under 'No' in the table below), a good number professed to know both about the domestic laws and the relevant ILO provisions. The following breakdown reveals the proportion of the employers' awareness of existing domestic labour laws and ILO provisions.

TABLE: 14 Breakdown of Employers' Knowledge of Laws

Aware of Laws	Frequency	Percent
Yes	2 7	43.5
No	35	56.5
Total	62	100.0

The above table reveals that apart from the much-debated Harkin Bill, 43.5 per cent of the employers professed to know about the domestic laws as well as the ILO conventions applicable in Bangladesh regarding child labour. 53.2 per cent of the employers answered in the negative. This finding coincides with the children's allegations that they have not been duly informed of the laws by the factory authorities. However, it is doubtful whether such knowledge would make much difference in employment patterns.

4.1 Attitudes Towards Protective Legislation

The child respondents were quite articulate about their perceptions of the future. They appeared to be very worried about their job prospects in view of protective legislation like the Harkin Bill, particularly because the local garment authorities have geared up measures to eliminate child workers from the garment industry. They were quite vehement in their responses to the effects of the Harkin proposal and stated that laws ought to be designed to help them instead of cheating them of their livelihood. 99.8 per cent of the total number of children said that they do not believe that termination of their jobs would give them better access to health and education because, as they see it, without work they and their families would be as good as dead. Their families shared their views. Similarly 74.2 per cent of the 62 employers enterviewed stated that they do not believe that work in the garment industry is harmful for young children. In fact, 91.1 per cent of them said that if children have to work at all, work in the garment industry is best suited for them.

Moreover, while 87.1 per cent denied sharing the sentiments contained in the Harkin Bill, 98.4 per cent of the total number of entrepreneurs believed that if anything, such action would have a negative impact over the lives and development of these young girls. They said that protective legislation like the Harkin Bill is definitely not friendly to children. They alleged that it is all set to drive the children out of their jobs and onto the streets where, deprived of their independent lifestyle, they will resort to robbery, prostitution and other anti-social pastimes. The employers believed that it is the need for money that influences the choices of children in selecting an occupation that promises cash money over one, which merely promises food, clothing and shelter in, for example, domestic service. Protective legislation, they alleged, robbed children of their financial stability and their hard earned and much treasured sense of independence.

5. Conclusion

It was evident from the study that the role of the Bangladeshi female has undergone a redefinition, a process that has impinged in a similar fashion on the female child population of the country who have until recently been confined to agricultural and household activities.

One of the principal factors that encourages children's employment in export factories in Bangladesh is their individual desire for personal autonomy and independence. Although the desire to have money for their own use is not new among impoverished children, it appears to be more acutely experienced by the present generation. The export factories open up seemingly unlimited opportunities whereby children can exercise their personal autonomy, particularly in respect of consumer purchases. Many of them are attracted to this area of employment in order to gain economic independence.

Although the desire for independence, experience and economic solvency is paramount, girls are increasingly bowing to the influence of global and national consumer culture by allowing themselves to be drawn into wearing fashionable clothes, using cosmetics, patronising cinemas and so forth. The meaning of 'survival', i.e. a concept of 'relative poverty', thereafter takes on a new dimension where media and peer pressure make it important for children not just to have sufficient food and clothes, but to have certain kinds of clothes, ornaments and other possessions, to consume certain kinds of food and drinks, and to engage in certain kinds of activities which are the attributes of 'proper' people [11] This was evident from my experiences with the young factory workers. They dressed in accordance with, or at least tried to imitate, the latest trend in the city. Some of them even cut their hair in a way

11 White, Ben, 'Children, Work and "Child Labour": Changing Responses to the Employment of Children', Inaugural address delivered at the Institute of Social Studies,

which is unusual for girls of their social and economic standing. Others sported cheap wristwatches. This indicates how the factory girls are developing strategies that will bring them on a par with those who they consider to be 'proper' people. Therefore, while economic needs have compelled a break with traditional norms, it is also true that young girls choose to continue to work in the export sector on account of the sense of material independence gained through the experience.

The foregoing discussion demonstrates how young female children are making radical departures from their traditional way of life. However, despite their progress, gender ideology and subordination continue to affect the employment of young girls in garment factories. Apart from being very cheap, the female labour force on the whole can be mobilised to work throughout practically the entire year. This is particularly true of female children who do not even require, for example, maternity benefits or leave. In other words, they are available to work at all shifts for very little.

Suffering from the dual stigma of being minors and females, young girls often find themselves at odds with existing situations. While having to deal with repetitive, low skilled, underpaid work, they are also compelled to contend with the general disapproval of their 'boldness' and 'shamelessness' from various sections of the society. Their use of cheap makeup and gaudy ribbons and psychedelic coloured shalwar-kameez and sarees often invite scathing remarks as the girls, their heads uncovered, walk down the streets on their own. The children's responses in this regard, though varying between anger, despair, shame and a deep sense of guilt, nevertheless, revealed determination and grit as they vowed to overcome all odds in order to be able to continue to work.

Their accounts reveal how they broke with the conventional

The Hague, June 16, 1994, at p. 41.

authority by redefining their roles as earning members of the family. In the light of this empirical analysis, it may be said that girl children in the Bangladesh export factories are not exactly passive 'victims'. The horror stories linked with children's employment in export factories are, in my research, largely fictional. Children are not in need of 'rescue' from horrendous working conditions, but rather of empowerment in their workplaces. I believe that it is no more acceptable for adults to face similar situations of abuse and degradation simply because they are adults. All these points could be applied to workers of all ages, not just to children.[12] In fact, the children's own preferences are often undermined where noble ideas demand the abolition of child employment but are at odds with the views of the children themselves. In this regard I agree with White as he explains:

> *The kinds of work situations seen by intervention agencies as acceptable or relatively unproblematic are often, from the child's point of view, precisely the kinds of work which bring the most problems. Seen from the other side of the coin: the kinds of activity which intervention agencies have tended to define as the 'problem', for children often represent precisely the search for a solution to other important problems which they face.*[13]

By imposing absolute prohibition on employment of children in the garment industry or such other export factory, we can only succeed in depriving them of whatever little freedom they have achieved from the bonds of patriarchy and the right to work their way out of absolute poverty. Moreover, not all chiidren are able to reconcile the global dictates of 'right' and 'wrong' with their immediate need for food and money. To quote White again

12 Morice, A., 'The Exploitation of Children in the "Informal Sector: Proposals for Research in Rodgers, G. and Standing, G. (eds.), Child Work, Poverty and Underdevelopment, ILO, Geneva, pp.131-158, at p. 157.
13 White, Ben, 1 994, op. cit., at p. 7.

as he reminds us:

> *Some children may reject the global message and instead wish to work in support of their parents or even in support of social, political and environmental 'causes', which is also their right. Another much more practical argument is that it is highly doubtful that children's employment can be meaningfully 'humanized' while it continues to be criminalized.*[14]

Therefore, suppose that children in waged employment in factories were ensured of the best working conditions; worked for short hours; were granted sufficient facilities for rest, recreation, health and education; were paid well and on time; earned the right to be heard and gained respect and recognition as able workers. In such a situation it would be meaningless to abolish all kinds of children's work. Instead, it would be beneficial for all concerned if a framework of children's rights is created that balances both societal values and children's unique needs.

14 Ibid., at p. 49.

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PROTECTION OF DEFENSELESS PERSONS IN INTERNATIONAL HUMANITARIAN LAW

Dr. Borhan Uddin Khan

1. Introduction

In discussing the protection of defenseless persons in International Humanitarian Law,[1] one should at the out set be clear about the term 'protection'. In this paper the term 'protection' means to guard 'defenseless persons' against measures that could do them harm: violence, deprivation of their basic rights, attacks on their physical or moral being. It also includes, assistance to them with what they lack to maintain a minimum level of existence: food, clothing, care and shelter, moral, intellectual and spiritual relief. Assistance and protection are twin pillars of relief. Reciprocally, an operation to provide assistance often opens the way to protective action. For the purpose of this paper 'defenseless persons' are those persons who do not participate in the hostilities or who are no longer taking part in the hostilities. Thus, they may include sick, wounded, shipwrecked members of the armed forces; prisoners of war; those who did not take part in hostilities but provided support to armed forces and civilians who never took part in hostilities.

The first three Geneva Conventions i.e., *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949*, (hereinafter referred to as the first Convention); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949,* (hereinafter referred to as the second Convention); *Geneva Convention relative to the Treatment of Prisoners of*

1. The term "Humanitarian Law" applies to those rules of international law which aim to protect persons suffering from the evils of arxted conflicts as well as, by extension, not directly serving military purposes. There is therefore an essential difference between 'humanitarian law' and 'human rights', for the latter do not apply only in time of armed conflict. International Humanitarian Law generally consists of the four Geneva Conventions of 1949 and the two Additional Protocols of 1 977.

War, of 12 August 1949, (hereinafter referred to as the third Convention) deal with protection of combatants and the fourth Convention i.e., *Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 1949* deals with the protection of civilians (hereinafter referred to as the fourth Convention). In a broad and generalised sense, combatants may simply be defined as those who take part in hostilities or are involved in aiding those who are taking part, while civilians are those who do not take part in hostilities of armed conflict.

In international humanitarian law the protection of defenseless persons is twofold: protection of defenseless persons in international armed conflict and protection of defenseless persons in non-international armed conflict. Apart from the four Geneva Conventions of 1949, the two Additional Protocols to the Geneva Conventions adopted on 8 June 1977 which supplement the four Geneva Conventions, the first one i.e., Protocol I concerns protection of victims of international armed conflict, while Protocol II which supplements common Article 3 of the four Geneva Conventions[2] is solely devoted to the protection of victims of non-international armed conflict.

2. Protection of Defenseless Persons in International Armed Conflict

Common Article 2 of the four Geneva Conventions provide that the Conventions *inter alia* " ... shall apply to all cases of declared war or of any other armed conflict which may arise between two or more High Contracting Parties, even if the state war is not recognised by one of them". There is no longer any need for a formal declaration of war, or for recognition of the state of war, as preliminaries to the application of the Conventions. The Conventions become applicable as from the actual opening of hostilities. The existence of armed conflict between two or more Contracting Parties brings it

[2] Common Article 3 of the four Geneva Conventions introduced for the first time rules of protection to defenseless persons applicable in non-international armed conflict.

automatically into operation.

Now the question arises what is meant by 'armed conflict'? The substitution of this much more general expression for the word 'war' was deliberate. One may argue almost endlessly about the legal definition of 'war'. A State can always pretend when it commits a hostile act against another State, that it is not making war, but merely engaging in a police action, or acting in legitimate self-defense. The expression 'armed conflict' makes such arguments less easy. Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2 even if one of the parties denies the existence of a state of war.[3]

The protection of various categories of defenseless persons in international armed conflict is elaborated below.

2.1 Protection of Wounded, Sick and Shipwrecked Persons

The first Geneva Convention of 1949[4] delineates rules of protection of the wounded and sick in armed forces in the field while the second Convention of 1949,[5] provides rules of protection of the wounded, sick and shipwrecked members of armed forces at sea. The definition of the above three categories of persons does not appear in the Geneva Conventions but in the Additional Protocol I of 1977.[6]

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[3] See Jean S. Pictet *et al, Commentary on the Geneva Convention*, Vol. I, Geneva, ICRC, 1952 p. 32

[4] For the text of the first Geneva Convention see, *Handbook of the International Red Cross and Red Crescent Movement,* ICRC Geneva, 1994, pp. 23-46. For discussion see Jean S. Pictet *et al, Commentary on the Geneva Convention* Vol. I, Geneva, ICRC, 1952.

[5] For the text of the second Geneva Convention see, *Handbook of the International Red Cross and Red Crescent Movement,* ICRC Geneva, 1994, pp. 47-66. For discussion see Jean S. Pictet et al, Commentary on the Geneva Convention Vol. II, Geneva, ICRC, 1952.

[6] Article 8 of the Additional Protocol I defines sick, wounded and shipwrecked as follows:

"wounded" and "sick" mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as infirm or expectant mothers, and who refrain from any act of hostility.

"shipwrecked" means persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility. These persons, provided that they continue to refrain from any act of hostility, shall continue to be considered shipwrecked during their rescue until they acquire another status under the Conventions or this Protocol.

The first and second Geneva Conventions respectively envisage in Article 12 that the wounded, sick and ship wrecked persons,

> ... shall be treated humanely and cared for by the Parties to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria. Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments; they shall not willfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created.

Protocol I of 1977 has added to the list of prohibited acts, such as: physical mutilation and removal of tissue organs, while laying down strict rules for amputation, skin grafts or blood transfusions carried out in the interests of patients, consistent with generally recognised standards.[7]

Article 15 of the first Convention provides that parties to the conflict shall take all possible measures to "search for and collect the wounded and sick, to protect them against pillage and ill-treatment". It is generally necessary to collect the wounded, sick and shipwrecked persons after military engagements, and for this reason arrangements should be made whenever possible for a cease-fire.[8]

The parties to the conflict under Article 16 of the first convention should record as soon as possible any particulars, which may assist in the identification of each wounded, sick or dead person of the adverse party. Such information should be forwarded to the Information Bureau as described in Article 122 of the third Geneva Convention. The first Convention in Article 18 has provided for the role of the population. It envisages that the civilian population shall respect the wounded

[7] Article 11(2) of 1977 Protocol I.

[8] See, Rezek, J.F., "Protection of the victims of armed conflicts: wounded, sick and shipwrecked persons", in *International Dimensions of Humanitarian Law*, Toman, J., (ed.), UNESCO, p. 156.

and sick and in particular abstain from offering them violence. Reprisals against the wounded and sick personnel are prohibited.[9]

As mentioned earlier, the second Geneva Convention provides rules for the protection of the wounded, sick and shipwrecked members of armed forces at the sea. Accordingly Article 16 provides that the wounded, sick and shipwrecked persons who has fallen into the hands of enemy shall be recognised as the prisoners of war, and the provisions of international law concerning prisoners of war shall apply to them. Article 18 provides rules regarding search for casualties after an engagement. After each engagement parties to the conflict shall without delay take all possible measures to "search and collect the shipwrecked, wounded and sick to protect them against pillage and ill-treatment". Following the first Convention, the second Convention in Article 19 provides that parties to the conflict shall record as soon as possible any particular, which may assist in the identification of each shipwrecked, wounded and sick person of the adverse party.

Besides the first and the second Geneva Conventions, Protocol I of 1977 provide provision on protection and care,[10] role of civilian population[11] and prohibition of reprisals[12] regarding the wounded, sick and the shipwrecked persons. The Protocol I of 1977 in Article 19 further provides that the neutral and other states not parties to the conflict shall accord protection to the sick, wounded and the shipwrecked persons.

2.2 Protection of Prisoners of War

The protection of prisoners of war is detailed in the third Geneva Convention.[13] Article 4 of the Convention catalogues list of persons who would be treated as prisoners of war while Article

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[9] See, article 46 of the first Geneva Convention of 1949.
[10] Article 10 of Protocol 1.
[11] Article 17 of Protocol 1.
[12] Article 20 of Protocol 1.
[13] For the text of the third Geneva Convention see, *Handbook of the International Red Cross and Red Crescent Movement* ICRC Geneva, 1994, pp. 67-135. For discussion see, Pictet, J.S. *et al Commentary on the Geneva Convention* Vol. 111, Geneva, ICRC, 1952.

44 of the Additional Protocol I defines prisoners of war. [14]

Following the first and second Geneva Convention, the third Geneva Convention in Article 13 provides that the prisoners of war must at all time be humanely treated. They are entitled to respect for their person, both physical and moral. The following acts for example, are contrary to respect for the physical person: any unlawful act or omission causing death or seriously endangering the health of a prisoner of war, not to mention physical mutilations, medical or scientific experiments which are not justified by the patient's treatment, removal of tissue or organs for transplantation;[15] acts of violence or intimidation;[16] prolonged questioning, whether or not accompanied by acts of brutality, with the aim of extracting information;[17] omission of medical care to the wounded and sick;[18] prolonged deprivation of sanitary facilities[19] or of physical, intellectual and recreational pursuits;[20] inadequate conditions of food,[21] quarters[22] and clothing[23] extended over any length of time; keeping prisoners in a danger zone[24]; making them do labour of a dangerous nature or one which does not take into account the prisoners' physical aptitude or their professional qualifications.[25]

A prisoner of war shall be tried only by a military court offering guarantees of independence and impartiality and affording the accused the rights and means of defence provided for by the Convention.[26] He shall, in particular, be entitled to choose

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14 Article 44 reads as follows: "Any combatant, as defined in article 43, who falls into the power of an adverse Party shall be a prisoner of war".
15 Article 13 of the third Convention; Article I I(1) and 11(4) of Additional Protocol 1.
16 Article 13 paragraph 2 of the third Convention.
17 Article 17 paragraph 4 of the third Convention.
18 Articles I5 and30 of the third Convention.
19 Article 29 of the third Convention.
20 Article 38 of the third Convention.
21 Article 26 of the third Convention.
22 Articles 15 and 25 of the third Convention.
23 Articles 15 and 27 of the third Convention.
24 Article 19 paragraph 1 of the third Convention.
25 Articles 52 and 49 of the third Convention.
26 Articles 84 and 99 of the third Convention.

counsel for his defense, to call witnesses and to obtain the services of a competent interpreter; the representatives of the Protecting Power shall be entitled to attend the trial and give assistance to the accused,[27] who shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition.[28] If death penalty is pronounced on a prisoner of war the sentence shall not be executed before the expiration of a period of six months from the date when the protecting Power receives, at an indicated address the notification of findings and sentence.[29]

2.3 Protection of Civilians

The fourth Geneva Convention[30] deals with protection of civilians. The definition of civilian does not appear in the Convention. Article 50 of the Additional Protocol I defines 'civilian' and 'civilian' population as follows:

> 1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.
>
> 2. The civilian population comprises all persons who are civilians.
>
> 3. The presence within the civilian population individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

The following paragraphs elaborate the protections offered to

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27 Article 105 of the third Convention.
28 Article 106 of the third Convention.
29 Article 101 of the third Convention.
30 For the text of the fourth Geneva Convention see, *Handbook of the International Red Cross and Red Crescent Movement,* ICRC Geneva, 1994, pp. 136-187. For discussion see Jean S. Pictet et al, *Commentary on the Geneva Convention* Vol. IV, Geneva, ICRC, 1952.

the civilians under the fourth Geneva Convention and the Protocol I.

2.3.1 Protection of Civilians in General

Section I of Part III of the fourth Convention deals with the treatment of civilians in the power of the enemy. It ensures elementary human rights of the protected persons in the hands of a party to the conflict, which will even be responsible for the treatment given to them by its agents.[31] According to Article 27, protected persons are to be treated humanely at all times without any adverse distinction based, in particular, on race, religion or political opinion. Towards this end, the Party to the conflict is obliged in all circumstances: a) not to use violence against the life and physical integrity of the protected persons; b) to protect them against all acts of violence or threats thereof and against insults and public curiosity; c) to respect their persons and honours; d) to respect their family rights; e) to respect their religious convictions and practices; and f) to respect their manners and customs.

Under the fourth Convention, prohibited forms of ill-treatment are physical or moral coercion, in particular, to obtain information from protected persons,[32] as well as "any measure of such a character as to cause the physical suffering or extermination of protected persons".[33] These measures comprise "murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person", and also "any other measures of brutality whether applied by civilian or military agents".[34] No protected person is to be "punished for an offence he or she has not personally committed".[35] Collective penalties

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31 Article 29 of the Fourth Convention.
32 Article 31 of the Fourth Convention.
33 Article 32 of the Fourth Convention.
34 Id.
35 Article 33 of the Fourth Convention.

and reprisals against protected persons and their property as well as "all measures of intimidation or of terrorism" and pillage are prohibited.[36]

The fourth Convention lays down in Articles 69 to 78, certain other minimal standards for the Occupying Power's own system of penal administration against protected persons in occupied territory. Such as they should not be arrested, prosecuted or convicted by the Occupying Power for acts committed or opinions expressed before the occupation, except for the breaches of the laws and customs of war.[37] An accused person is entitled to be informed, in writing, in the language which he understands, of the charges leveled against him and shall be brought to trial as rapidly as possible.[38] An accused person enjoys the right of defense,[39] and, if convicted, the right to appeal.[40] In pronouncing the judgment, the court will take into account the duration of the arrest period awaiting trial, which will be deducted from any period of imprisonment awarded.[41]

2.3.2 Protection of Children

Children are the most severely affected victims of war and armed conflict. The question arises what should the word 'children' be considered to mean for the purposes of the fourth Geneva Convention? Although children have an important place in the Convention, there is no general definition of the word. On the other hand the fourth Convention has fixed various age limits in the provisions prescribing preferential treatment for children: fifteen years of age, in Articles 14,[42] 23,[43] 24 and 38(5);[44] twelve years of age in Article 24,

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36 Id.
37 Article 70 of the Fourth Convention.
38 Article 71 of the Fourth Convention.
39 Article 72 of the Fourth Convention.
40 Article 73 of the Fourth Convention.
41 Article 69 of the Fourth Convention.
42 Hospital and safety zones.
43 Consignment of relief supplies.
44 Measures relating to child welfare.

paragraph 3;[45] and, as will be seen, eighteen years of age in Articles 51, paragraph 2[46] and 68, paragraph 4.[47]

However, Article 14 of the fourth Convention *inter alia* seeks to create hospital and safety zones for the protection children under the age of fifteen. Article 24 seeks to ensure the maintenance and education of children by the state if the children are orphaned or separated from their parents. Thus, where children are deprived of their natural protectors as the result of an even of war, the Convention makes it obligatory for the country where they are living to adopt the necessary measures to facilitate, in all circumstances, their maintenance, their education and the exercise of their religion. The Convention does not specify the measures to be taken and the Parties to the conflict therefore enjoy great freedom of action; they may apply the measures, which seem most appropriate under the conditions prevailing in their territory. The maintenance of the children concerned means their feeding, clothing, and accommodation, care for their health and, where necessary medical and hospital treatment.[48]

Article 50 enjoins upon the occupying power to facilitate the proper working of institutions devoted to the care and education of children. The obligation of the Occupying Power to facilitate the proper working of institutions for children is very general in scope. The provision applies to a wide variety of institutions and establishments of a social, educational or medical character, etc., which exist under of great variety of names in all modern State (e.g. child welfare centres, orphanages, children's camps, children's homes and day nurseries, "medico-social" reception centres, social welfare services, reception centres, canteens, etc.). All these organizations and institutions, which

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45 Identification
46 Compulsory labour.
47 Death penalty.
48 See Jean S. Pictet *et al, Commentary on the Geneva* Vol. IV, Geneva, ICRC, 1952 p.187.

play a most valuable social role even in normal times, become of increased importance in wartime when innumerable children are without their natural protectors, who have fallen on the battlefield, or have been victims of bombing, conscripted to do forced labour, interned or deported.[49]

2.3.3 Protection of Refugees and Stateless Persons

Among the enemy aliens in the territory of a party to a conflict there may be one category of persons whose position warrants special consideration- namely refugees who have been forced by events or by persecution to leave their native land and seek asylum in another country. Article 44 of the fourth Convention concerns with the protection of refugees. The provisions of Article 44 applies to a person, a national of an enemy state, who is without diplomatic protection either because he has severed relations with his country's government or because he does not wish to claim its protection. Since a refugee is technically an enemy alien being devoid of assistance of a protecting power, he occupies a special position. Article 44 reduces the difficulties of the refugee by imposing an obligation on the Detaining Power not to treat the refugee as an enemy alien who may very well be a 'friendly enemy'. On the other hand, article 44 does not exempt refugees absolutely from security measures such as internment. The status of refugee does not itself guarantee immunity.[50]

Article 45 provides that in no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs. 'Protected persons' under the Fourth Convention are persons who "find themselves, in case of a conflict or occupation, in the hands of a Party . . . of which they are not nationals".[51] Stateless persons therefore, by implication

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49 Ibid, p 186.

50 See, Pictet, J.S., *et al, Commentary on the Geneva Convention Relative to the Protection of Civilian Persons in Time of War,* Vol. IV, Geneva, ICRC, 1952, p. 264.

51 Article 4, paragraph 1.

enjoy the status of protected persons. Article 73 of Protocol I of 1977 explicitly grants them such status. Article 73 reads as follows:

> Persons who before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the parties concerned or under the national legislation of the state of refuge or state of residence shall be protected persons within the meaning of Parts I & III of the Fourth Convention, in all circumstances without any adverse distinction.

Although they are not explicitly protected by the 1949 Convention, stateless persons enjoy the protection of all the provisions of the Fourth Convention by virtue of Article 4, paragraph 1. According to this provision, "persons protected by the Conventions are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals".[52]

As regards Part I of the Fourth Convention, Article 73 of the Protocol has the effect of modifying Article 4 of that Convention by adding to the list of protected persons "refugees in the sense of Article 73 of the Protocol" and eliminating the restrictions of paragraph 2 in respect of them.[53] Thus, refugees enjoy the protection of all the relevant provisions of the Fourth Convention, irrespective of their nationality and regardless of the Party in whose power they have fallen.

3 Protection of Women in International Armed Conflict

The four Geneva Conventions and Protocol I provide measures of protection to women in international armed conflict both as

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52 Pictet J.S., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, 1987, p. 854.

53 Id.

members of civilian population not taking part in hostilities and also as combatants, fallen into the hands of the enemy. The following paragraphs elaborate the various aspects of such protection.

3.1 Protection of Women as Members of Civilian Population

In an International armed conflict, women are among the persons protected by the Fourth Geneva Convention relative to the protection of civilian persons in time of war. Under general protection, they benefit from all the provisions which state the basic principle of humane treatment, including respect of life and physical and moral integrity, particularly forbidding coercion, corporal punishment, torture, collective penalties, reprisals, pillage and the taking of hostages. Furthermore, in the event of infractions committed in relation to the conflict, women have the right to trial by an independent and impartial court established by law respecting the generally recognized principles of judicial procedure.

In addition to the general protection from which all civilians benefit, "women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault".[54] According to Article 38 "pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned". Likewise, the Occupying Power shall not hinder the application of any preferential measures . . . which may have been adopted prior to the occupation in favour of children under fifteen years, expectant mothers, and mothers of children under seven years.[55]

Article 85 guarantees provision of separate sleeping quarters and sanitary conveniences for the use of women internees. The above guarantee is a case of a particular application of the

[54] Article 27 paragraph 2 of the Fourth Convention, and Articles 75 and 76 of Protocol 1.
[55] Article 50 of the Fourth Convention.

general principle laid down in Article 27, paragraph 2, concerning the respect due to women's honour. For the same reasons, a woman internee shall not be searched except by a woman.[56]

Further, in international armed conflict, women benefit from supplementary protection. Protocol I, Article 76(2) specifies that pregnant women and mothers having dependent infants who are arrested, detained for reasons related to the armed conflict, shall have their cases considered with the utmost priority. This is intended to make sure that pregnant women are released as rapidly as possible. In 1949, a similar provision was included in the Fourth Convention urging the Parties to conclude agreements during the course of hostilities for the release, repatriation, and return to places of residence or the accommodation in a neutral country of interned pregnant women.[57] This Article does not specify an obligation to reach such agreements but it does constitute an urgent recommendation based on experience.

The Fourth Convention in Article 89 provides that "expectant and nursing mothers in occupied territories shall be given additional food, in proportion to their physiological needs". According to Article 76(3) of Protocol I the Parties to the conflict shall endeavor to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.

3.2 Protection of Women as Members Taking Part in Hostilities

Like men, women who take part in hostilities, are protected by international humanitarian law from the moment they fall into

[56] Article 97 paragraph 4 of the Fourth Convention.
[57] Article 132 ofthe Fourth Convention.

the power of the enemy. It is essential for them to be members of the armed forces of a Party to the conflict if they are to be considered as combatants entitled to the status of prisoners of war, once captured. Apart from the general protection from which women benefit on the same basis as men, they enjoy special protection resulting from the principles previously stated.

The Third Geneva Convention contains various provisions based on the principle in Article 14, paragraph 2, stipulating that "women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men". Article 25 paragraph 4 states that in any camps in which women prisoners of war, as well as men, are accommodated, separate dormitories shall be provided for them. Furthermore, under the terms of Article 29 paragraph 2 in any camps in which women prisoners of war are accommodated, separate conveniences must be provided for them. The question of sanitary conveniences is of the utmost importance for the maintenance of cleanliness and hygiene in camps. These conveniences should be so constructed as to preserve decency and cleanliness and must be sufficiently numerous. It goes without saying that the most elementary rules of decency require that separate conveniences should be provided for women prisoners of war.

In no case may a woman prisoner of war be awarded or sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than a male member of the armed forces of the Detaining Power dealt with for a similar offence.[58] Articles 97 and 108 provide in particular that women prisoners of war, undergoing disciplinary or penal punishments, respectively shall be confined in separate quarters from male prisoners of war and shall be under the immediate supervision of women.[59]

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[58] Article 88 paragraph 2 of the Third Convention.

[59] See, also article 75(5) of Protocol I.

If women in real life are not always protected, as they should be, it is not due to the lack of a legal basis. Despite adoption of the Fourth Geneva Convention and the two Additional Protocols, women as members of the civilian population continue to be the first victims of indiscriminate attacks against civilians, since the men are usually engaged in the fighting. Article 27 of the Fourth Convention, which provides special protection for women against any attacks on their honour and in particular against rape, enforced prostitution or any form of indecent assault, did not prevent the rape of countless women in the conflict in Bangladesh in 1971 for example. This was one of the reasons why the authors of Protocols I considered it necessary to repeat in Article 76(1), the contents of the earlier Article.

International humanitarian law undoubtedly gives extensive protection to women. They benefit not only from all the provisions, which protect the victims of armed conflicts in general. In addition, among the approximately 560 Articles in the Geneva Conventions of 1949 and the Additional Protocols of 1977, about 40 are of specific concern to women.

4. Protection of Defenseless Persons in Non-International Armed Conflicts

In the absence of a general definition of non-international armed conflict, which may take very different forms, an attempt should be made to describe situations of this type in relation to the objective facts characterizing them.

First, a non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory. It is therefore appropriate to raise the question whether all forms of violent opposition to a government, from simple localized

rioting to a general confrontation with all the characteristics of a war, can be considered as non-international armed conflicts.[60]

The expression "armed conflict" gives an important indication in this respect since it introduces a material criterion: the existence of open hostilities between armed forces that are organized to a greater or lesser degree. Internal disturbances and tensions, characterized by isolated or sporadic acts of violence, do not therefore constitute armed conflict in a legal sense, even if the government is forced to resort to police forces or even to armed units for the purpose of restoring law and order. Within these limits, non-international armed conflict seems to be a situation in which hostilities break out between armed forces or organized armed groups within the territory of a single State.[61]

Common Article 3 of the Conventions constitutes the keystone of humanitarian law applicable in non-international armed conflicts. Protocol II supplements, develops and amplifies Article 3 without changing the conditions of its application. Although common Article 3 lays down the fundamental principles of protection, difficulties of application have emerged in practice, and this brief set of rules has not always made it possible to deal adequately with urgent humanitarian needs. In the following sections, the protection of various kinds of defenceless persons in non-international armed conflict are detailed.

4.1 Protection of Wounded, Sick and Shipwrecked Persons

All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by

60 Pictet J.S., *Commentary on the Aditional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, 1987, p. 1319.

61 Ibid, p. 1320

their condition. There shall be no distinction among them founded on any grounds other than medical ones.[62] Article 8 of Additional Protocol II envisages that whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead, prevent their being despoiled, and decently dispose of them.

4.2 Protection of Medical and Religious Personnel

Medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties. They shall not be compelled to carry out tasks, which are not compatible with their humanitarian mission. In the performance of their duties medical personnel may not be required to give priority to any person except on medical grounds.[63]

4.3 Protection of Civilian Population

The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primay purpose of which is to spread terror among the civilian population are prohibited.[64]

The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter,

62 Article 7 of Additional Protocol II.
63 Article 9 of Additional Protocol II.
64 Article 13 of Additional Protocol II.

hygiene, health, safety and nutrition.[65]

4.4 Protection of Children

Children shall be provided with the care and aid they require, and in particular: a) they shall receive education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care; b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated; c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups not allowed to take part in hostilities; d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured; e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.[66]

4.5 Protection of Women

In a non-international armed conflict, women are protected by the fundamental guarantees governing the treatment of persons not taking part in hostilities, which are contained in Article 3, common to all four Conventions. However, this Article does not provide special protection for women. Protocol II completes and develops this provision. Its Article 4 expressly forbids "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form

65 Article 17 of Additional Protocol II.
66 Article 4(3) of Additional Protocol II.

of indecent assault". Article 5 paragraph 2(a) specifes that women, who are arrested, detained or interned "shall be held in quarters separated from those of men and shall be under the immediate supervision of women except when members of a family are accommodated together". Death penalty shall not be carried out on mothers of young children and pregnant women.[67] Protocol 11 also specifies that women arrested, detained or interned shall be held in quarters separated from those of men and shall be under the immediate supervision of women except when families are united.[68]

5. Conclusion

The state of war and armed conflict justifies the recourse to violence against an active adversary, with the aim of destroying or weakening its military potential. On this basis, it can be said that reason, cold and amoral, leads to the respect of those unable to do any harm. The motive for protecting wounded, sick, shipwrecked persons and the civilians is however to be found in the feeling of humanity. While reason is the basis of a passive attitude as demonstrated in the respect shown to these persons, the active protection which modern law grants them, has its origin in pity, an emotion which, more than a century ago, overwhelmed the solitary witness of the suffering at the battle of Soliferino.

The question of the protection of victims of armed conflicts has gained through international humanitarian law, a great significance, marked by two salient characteristics: the prohibition of reprisals, and the assistance provided by neutral States. On the one hand, breaches of the provisions of this law may not be justified by the fact that they are made in response to illicit acts of an identical nature. On the other hand, the neutrality of States not parties to the conflict is in no way compromised by such relief actions as they may undertake.

[67] Article 6 paragraph 4 of Additional Protocol II.
[68] Article 5 paragraph 2(a) of Additional Protocol II.

This is in fact no more then logical since the victims should be protected by the enemy as well as by the State on which they depend, and no reasonable argument can stem from a neutrality which could be invoked to compel neutral States to abstain from such protection.

The four Geneva Conventions of 1949 along with the two Protocols of 1977 have gone a long way in alleviating the sufferings of defenseless persons and protecting them in both international and non-international armed conflicts. The machinery available within the four corners of its provisions can ensure justice and humanity where previously injustice and human sufferings existed, but much depends upon the will of the state parties to abide by and implement the norms set in the Conventions and the Protocols.

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THE NEW MILLENNIUM: LEGISLATION AND PRECEDENTS RELATING TO WOMEN IN BANGLADESH

Dr. Shahnaz Huda

Introduction:

The new millennium saw the enactment of several new laws related to women as well as the pronouncement of judicial decisions affecting women in Bangladesh. The laws and precedents relate to a variety of issues, both civil and criminal. This article discusses and critiques some of the innovations and changes made by such statutory enactments as well as the interpretation of laws by the judiciary during the period between January 2000 and June 2002. The present article focuses on some of the most important changes made in the new millennium relating to women. The discussion is however not exhaustive and does not cover the Acts in their entirety or deal with all the reported cases.

Violence Against Women:

Nari O Shishu Nirjatan Daman Ain, 2000[1]

The most significant legislation of the year 2000 was the law relating to the issue of violence against women and children. The escalation of violent acts committed against women (and children) saw the enactment in the new millennium of the Woman and Child Repression Prevention Act of 2000 (Nari O Shishu Nirjaton Daman Ain of 2000)[2]. This law followed the footsteps of similar laws enacted earlier to protect women against different types of violent acts e.g. the Cruelty to Women Deterrent Punishment Ordinance of 1985[3] and the Woman and

[1] Act No. VIII of 2000; Bangladesh Gazette; Dated 14 February 2000.

[2] The majority of the Acts discussed here have been enacted in Bangla and no official Bangla version exists. The English titles used are mine as are the translations of the Sections.
For reference of laws see Khan, Borhan Uddin et al (2002). Encyclopedic Compendium of the Laws of Bangladesh; BLAST, Dhaka.

[3] Act No. LX of 1983 repealed by Section 29 of the Nari O Shishu Nirjatan (Bishesh Bidhan) Ain, 1995.

Child Repression (Special Provision) Act of 1995 [(Nari O Shishu Nirjaton (Bishesh Bidhan) Ain, 1995][4]. The justification behind the enactment of yet another law to combat gender violence was the need for even more severe laws. In the year preceding the enactment of the new law, i.e. 1999, the number of incidents of violence against women reached alarming proportions. 2198 cases of violence of various types were reported among which there were 1238 cases of rape, 253 dowry related cases of violence and 153 acid attacks.[5] 618 of the victims were murdered. The Act was therefore based on the reasoning that:

> 'it was timely and necessary to deal with offences committed against women and children harshly'[6].

Whether the above purposes were achieved is debatable and the justification and success of the new enactment has been questioned.

Section 26 of the Act of 2000 lays down that for the trial of offences under the Act every district town will have a Tribunal which shall be known as the Nari O Shishu Nirjatan Daman Tribunal (hereafter referred to as the Woman and Child Repression Prevention Tribunal). All offences under the Act of 2000 are to be tried by these Tribunals. If required the government may constitute more than one Tribunal in one district. Each Tribunal will have one Judge and the government will employ District or Sessions Judge to act as Judge of such tribunal. If necessary the government may employ any District or Sessions Judge to act as Judge of the Tribunal in addition to his other duties. District or Session Judge includes additional District or Sessions Judge. Unless otherwise provided in the Act, the provisions of the Criminal Procedure Code, 1898

[4] Act 18 of 1995 repealed by section 34(2) of the Nari O Shishu Nirjatan Daman Ain of 2000.
5 ASK (2000). Human Rights in Bangladesh 1999; Ain o Shalish Kendra (ASK)., Dhaka at p.80.
6 Report of the Standing Committee of the Ministry of Law, Justice and Parliamentary Affairs on the examination of the Nari O Shishu Nirjatan Daman Bill 2000; 29 January, 2000; Bangladesh Jatiyo Sangshad.

(Cr.P.C.)[7] shall apply regarding the institution of the complaint, investigation and trial and the Tribunal shall for all purposes be considered to be a Sessions Court and shall have the same authority (Section 25).

The Repression Prevention Act of 2000 aimed at several changes intended to make the law regarding violence against women and children more effective and stringent. The Act of 2000 imposes the death penalty for several offences which include murder or attempt to commit murder or for causing grievous injury of certain nature specified by the Act by the throwing of corrosive substances like acid (Section 4); for trafficking (Section 5); kidnapping for ransom (Section 8), for death caused due to dowry (Section 1); rape and gang rape (Section 9). The law provides for the provision of compensation of victims of violence—a new concept introduced for the first time by this Act. The provision of maintenance for children born out of rape is another innovation.

The new Act also provides for departmental punishment of investigating officers for negligence or intentional mistakes. Since the tendency to harass people had been a major problem under previous enactments, the Repression Prevention Act of 2000 also provides for trial and punishment by the Tribunal in cases of harassment of innocent persons through the institution of false cases under the Act (Section 17). For speedy trial of cases under the Act, a limit of 180 days has been imposed. Previously the Act of 1995 had set the time limit at 120 days. All offences under the Act are declared to be cognizable and non-bailable (Section 19). In case of non-completion of trial, the Act provides for bail of the accused unless there are suitable reasons not giving bail which must be mentioned [Section 20(4)]. In a case instituted under the previous Act of 1995, the High Court held that the accused may be granted bail if the trial cannot be concluded within the time scheduled and the trial is

7 Act No.V of 1898.

'delayed inordinately without sufficient reasons'.[8] Although Section 34 of the Act of 2000 has repealed the Act of 1995, Sec. 34(2) contains the proviso that cases initiated under the previous Act and for which proceeding is continuing will be deemed to fall under the jurisdiction of the Tribunal formed under the Act of 2000 and any appeals against any order, judgment or punishment shall lie before any court of appropriate jurisdiction as if such Act had not been repealed.

Section 14 imposes a ban on the media from identifying the woman and child victims of violence. It imposes a punishment of maximum two years and one lakh taka or both for non-compliance of the above Section. This provision has its pros and cons. The media often proves to be a powerful catalyst behind the conviction of offenders and often focuses the attention of the public upon various forms of oppression and thereby makes those responsible more accountable — a case in point is the murder of Yasmeen[9] by law enforcing agents. Then again the tendency to sensationalise and obtain cheap publicity has in many cases led to further victimisation of the victims and in that sense the above provision seems proper. On one hand therefore, the media is needed to raise public consciousness about atrocities committed in the family and outside while on the other, there are allegations regarding the tone and style of many reports and the accusation about sensationalisation and making money out of peoples 'pain and shame.[10] Naripakkha suggest that the opinion of the victim should be given priority and this should have been mentioned the act. [11]Whether this is practically possible is of course another question.

Safe Custody:

8 Sohel vs. The State 5MLR (2000) (HC) 380.

9 15 year old Yasmeen of Dinajpur was raped and murdered by the Police in 1995. Widespread publicity through the media resulted in the conviction of those involved.

10 See Jahan, Roushan (1994). Hidden Danger-Women and Family Violence in Bangladesh; Women ForWomen, Dhaka at p. 27-28.

11 Naripakkha (2000). Nari o Shishu Daman Ain, 2000---Akti Porjalochana.

The contentious issue of 'safe custody' has been much debated'. A large number of women are sent into what is euphemistically known as safe or protective custody by order of the Court. The number of cases of abuse while in such custody has been subject of much concern. Many of these cases have hit the headlines and question have arisen regarding the impunity of the police and other law enforcing organs of the State machinery. Various forms of repression within custody including rape and murder are reported.

In the case of Rokeya Kabir (Mrs.) vs. Government of Bangladesh and others[12] the Court opined that:

> Keeping a victim minor girl in safe custody/judicial custody has no express provision of law in support thereof but there are series of judicial decisions of our apex court which lay the strong legal basis of judicial custody of minor victim as a matter of long practice in our legal system.

In this case it was also held that since the question of safe custody does not involve community interest, so a member of the Public who is not a person aggrieved has no locus standi and cannot invoke writ jurisdiction. The Women and Child Repression Act of 2000 contains provisions related to safe custody. Section 31 states:

> During the continuance of the trial of any offence under this Act, if the Tribunal considers it necessary that any woman or child should be kept in safe custody, it may order such woman or child to be kept, in any place outside the prison, specified by the government for this purpose, under governmental supervision or in the custody of any person or organisation.

The Repression Prevention Act of 2000 therefore gave statutory

12 5 MLR (2000) (HC) 58.

recognition to the concept of safe custody and tried to protect women from abuses committed while in the custody of law enforcing agencies. However, the section does not deal with cases where a woman or child may, ostensibly for her protection, be placed in the custody of the police even before the case is brought before the Tribunal e.g. immediately upon the commission of the crime. Again, the Tribunal has been given the authority to determine where it is 'safe' for the woman (or child). The woman's right to decide where she would be safe has not been given consideration.

Rape:

The offence of rape is considered to be the most heinous of crimes. The number of such crimes committed against women and children has reached horrendous proportions and forms. During the period of January 2000 to June 2002, 637 rapes were reported in the media.[13] 95 of the victims were killed while 3 of them committed suicide, 104 were grievously hurt and one victim was burnt.[14] The Repression Prevention Act of 2000 deals with the offence of rape and imposes severe penalties. Section 9 deals with punishment for rape, gang rape as well as injury or death caused as a result of rape. For the offence of rape, the perpetrator will be sentenced to rigorous life imprisonment with additional fine. For death caused by rape or incidental to rape, the accused may be sentenced to death or rigorous life imprisonment and will be required to pay fine up to the limit of one lakh taka. In the case of death or injury caused as a consequence of gang rape, each of the perpetrators will be sentenced to death or rigorous imprisonment with the requirement of additional fine up to the limit of one lakh taka. In the case of attempt to cause injury or death after rape, the accused will be punished with the sentence of life imprisonment with fine. For attempt to rape, the penalty fixed

13 Data compiled by Children and Women Studies (CWCS) from six national and four local daily newspapers.
14 Ibid.

by the act is rigorous imprisonment for seven to ten years with additional fine.

Marital rape: The explanation to section 9 reiterates the age of consent as fourteen years and sets under-fourteen as the age at which the sexual act will be construed as statutory rape even when the girl consents. The concept of marital rape remains confined to girls under the age of fourteen which is the age of consent according to the Penal Code, 1860[15]. Even if the husband forcibly has intercourse with his wife who is above the age of fourteen it will not be considered as rape. Following from this, if a husband causes the death of his wife in this situation, the Act of 2000 will not be attracted and the offence will be tried under the Penal Code. Another aspect is that the inconsistency between the legal age of marriage (which is eighteen years) and the age of consent continues. Marriage under the minimum legal age is still considered to be legally valid. Thus a thirteen year old girl may be legally married but her husband may be guilty of rape under the Act. The question of age of the girl/woman continues to be extremely significant.

For the first time the question of who is to be responsible for the maintenance of a child conceived as a result of rape is dealt with. Section 13 states:

Irrespective of anything contained in any other act, if any child is born as consequence of rape--

a) the rapist will be responsible for the maintenance of the child;

b) after the birth of the child, the tribunal shall determine who will be the custodian of the child and the amount to be paid by the rapist to such custodian for the purpose of maintenance of the child.

c) unless such child is disabled such sum shall be payable

15 Act No.XLV of 1860.

> in case of a son until the age of 21 years and in the case of a daughter until her marriage and in case of a disabled child until such child becomes capable of maintaining himself or herself.

This section has been critisised for being illogical and impractical. There are several objections to this section, the most pertinent of which seems to be the fact that it foresees a connection between the victim and the rapist for life which is 'illogical and inhuman'.[16] The section also does not address the question of legitimacy of the child neither does it deal with cases of gang rape in which case it will be impossible to determine the paternity of the child.[17] In view of the fact that there exists no easily available scientific method (for example DNA testing) in Bangladesh to determine paternity it may lead to harassment of innocent persons. Ain o Salish Kendra notes that even though there is an increase in the filing of rape complaints, women and their families are greatly intimidated by the fear of social stigma and the process they will have to follow to obtain justice and it is true that :

> The insensitive and abusive attitude of lawyers and court officials seems no less violent than the rape itself. [18]

Despite enactment of the new law these intrinsic flaws and attitudes continue to exist.

Dowry:

The system of dowry as a type of socially enforced marriage payment has become widespread. This system affects the woman and her family detrimentally because of the coercive aspect attached to it. The Dowry Prohibition Act of 1980[19] prohibits the taking or giving of dowry. Many types of abuse

16 Op.cit. Naripakkha (2000) at p.36.
17 Ibid.
18 Op.cit. ASK (2000) at p. 86.
19 Act No. XXXV of 1980; Bangladesh Gazette; Dated 26 Decernber 1980.

are attributed to dowry demands and this includes violence of a grievous nature and sometimes murder. The Repression Prevention Act of 2000 defines dowry as:

> Money, goods or other property given or promised directly or indirectly by the brides side to the groom or his father, mother or any other person from the bridegrooms side at the time of marriage or before or during the continuance of the marriage as consideration or condition of the marriage and any such money, goods, or property demanded from the bride or the bride's side by the groom, his father or mother or any other person from the groom's side [Section 2(j)].

The issue of dowry violence has been addressed in this Act. Section 11 lays down the penalty for causing death etc. for dowry. The Section states:

If any woman's husband or husband's father, mother, guardian, relation or any person acting for the husband, causes the death of that woman for dowry or attempts to cause death or injures such woman or attempts to cause such injury the husband, husband's father, guardian, relation or person shall:

a) for causing death be punishable by the death penalty or for attempt to cause death by life imprisonment and in both cases shall be liable to pay additional fine.

b) for causing injury shall be punishable by rigorous life imprisonmnent or for attempt to cause injury be punishable by rigorous imprisonment up to the term of maximum fourteen years but not less that five years and in both cases be liable to additional fine.

Several decisions of the Courts reported in the various law digests relate to cases instituted before 2000 and under the Act of 1995 but decided afterwards and may be relevant in future

cases as precedent of persuasive authority even though the law itself has been repealed. In the case of Abdul Matleb Howladar Vs. The State[20] under Section 10(1) of the Nari-O-Shishu (Bisesh Bidhan) Ain, 1995, the Appellate Court put the onus upon the husband to explain his wife's murder:

> Husband when living with wife in the same house has to explain as to how his wife was murdered. Failure to offer satisfactory explanation points to the guilt of the accused husband.

When the inmates of the house of the accused do not come to support the prosecution case, circumstantial evidence can well be relied upon to base the conviction. It was further held that in case of murder of wife for dowry sentence of death is the appropriate sentence.[21]

In some cases, in order to bring an offence within the stringent law of 2000, the allegation of dowry demands or death or injury caused as a result of dowry is made.

This is due to the fact that even where it is proved that the husband murdered his wife in the absence of cogent proof that the murder was committed for dowry the special laws relating to violence against women will not be attracted - the offence of murder will come under section 302 of the Penal Code.[22]

Domestic vilence: Wife Battering:

The Act of 2000 continues like earlier laws to ignore domestic violence as an offence by itself although spousal violence in the form of wife battering is undeniably rampant in Bangladesh. Domestic violence in Bangladesh is still regarded as a family or private matter rather than a crime.

In our country, especially in the villages, beating the

20 5 MLR (2000) (AD) 362.
21 Ibid.
22 See State vs. Abul Kalam 5 BLC 230.

> wife by the husband on flimsy pretext is a common day affair. Normally, such beating is to chastise the wife for unbecoming behaviour. Such beating becomes excessive -when the wife provokes (sic) the husband. [24]

The husband's violence seems to be predicated on the wife's behaviour. According to Jahan the acceptance of physical violence committed by the husband as a legitimate disciplinary method causes the wife to suffer such violence without much protest and publicity....[25]

In case of violence which is domestic in nature the victim has to rely on the Penal Code. In many cases such offences are trivialized by the police and are often construed to belong to the private sphere of life where the male family member is all powerful. In many cases even where a grievous injury is caused to the woman she cannot take recourse to the Act of 2000 since such violence in order to fall within the scope of the Act of 2000 must be related to dowry demands or other offences under the Act of 2000.

Sexual Abuse and Sexual Harassment:

The Act uses and defines the terms sexual abuse and sexual harassment for the first time. Section 10(1) states that if any male, in order to satisfy his carnal desires, touches the sexual or any other organs of any woman or child with any organ of his body or with any other object, his action will amount to sexual abuse and for this offence he may suffer rigorous imprisonment for any period between three to ten years and be required to pay additional fine. This section presumably is meant to deal with child abuse and such other cases.

Sexual harassment as an act of violence has been for the first time been acknowledged in legal terms. Even though there were some laws relating to offences constituting harassment against

23 Abdul Khaleque vs. The State **13 BLD (HCD)401.**
24 Op.cit. Jahan (1994). at. p.21.

females, the Repression Prevention Act of 2000 has for the first time used the term sexual harassment in the Bangladeshi context. Section 10(2) of the law states:

If any male, trying to illegally satisfy his carnal desires, abuses the modesty of any woman or makes any indecent gesture, his act shall be deemed to be sexual harassment and for this such male will be punished by rigorous imprisonment for a term which may extend up to seven years but shall not be less than two years and shall additionally also be liable to fine.

The definition contained in the Act falls short of encompassing the various modes that harassment may take place.[26] Various women's organizations were consulted before the enactment of the law of 2000. It has been claimed that for the first time in the history of Bangladesh, people's participation in the law making process has been ensured through consultation with members and leaders of various organizations representing concerned persons and stakeholders[27]. The Shammilito Nari Samaj had suggested the following definition of sexual harassment:

> If any person, by any gesture or sign or by any obscene comment either verbally or on the telephone, annoys any woman, he will be liable to be punished with rigorous imprisonment which may extend up to ten years but shall not be less than five years and shall also be liable to fine to the maximum of ten thousand Takas.[28]

On an examination of the above it seems that in Section 10(1) the offence of sexual abuse may be committed against both

26 See Huda, Shahnaz (2001). Report on Sexual Harassment in Bangladesh, Working paper for the ILO (unpublished), Dhaka.

27Statement of purpose and causes, Nari Shishu Nirjaton Daman Bill, 2000.

28 Proposed Draft of the Sammilito Nari Samaj on the Nari O Shishu Nirjetan (Bill), 1998; June 1998.

women and children but in the case of harassment [Section 10(2)], the Act is confined to only women and this means that harassment of any female under the age of fourteen is not covered. However, harassment of school girls of all ages is widespread and frequent all over Bangladesh.

Acid volence:

Acid Oporad Daman Ain 2002[29] and Acid Niontron Ain- 2002[30]

Acid throwing has become another method of perpetrating violence against women in Bangladesh, which may be said to be uniquely Asian in its origin. Acid, which leaves permanent scars on the victims, is easily available in Bangladesh.

The reasons for attacks committed by the throwing of acid are varied. They may include revenge and retaliation, political enmity, family feuds and property disputes, rejection of offers of marriage or love, refusing to have physical relations, failure to fulfill dowry demands and so forth.

A new provision was inserted in the Penal Code dealing with such crimes.[32]

Section 4 of the Repression Prevention Act of 2000 deals with crimes committed with corrosive and other substances. Two new acts were enacted in the year 2002 to deal with Acid crimes: Acid Oporad Daman Ain, 2002 (Acid Crimes Prevention Act of 2002) and Acid Niontron Ain, 2002 (Acid Control Act, 2002).

The Acid Oporad Daman Ain (Acid Crime Prevention Act) was enacted for the purpose of dealing with acid crimes harshly. It is to take precedence over other laws (Section 30). The Act applies to all victims of acid attacks-male and female so it is

29 Act No. 2 of 2002; Bangladesh Gazette, dated 17 March 2002.
30Act No. I of 2002; Bangladesh Gazette, dated 17 March 2002.
31 Op.cit. Odhikar (2001) at p 98.
32 Section 326 (A).

more comprehensive than the Repression Prevention Act in that sense. Section 4 of the Woman and Children Repression Prevention Act, 2000 deals with such crimes under the heading of crimes committed by corrosive, poisonous and acidic substances. The Act of 2002 contains 30 Sections dealing with various aspects of the punishment, trial of offences committed by acid throwing. It provides for death penalty or rigorous life imprisonment for death caused by acid attacks and imposes in addition fine up to the limit of one lakh taka (Section 4). For severe injury caused by acid, such as complete or partial privation of sight or hearing, disfigurement of face, genitals or breasts, the punishment is death or rigorous life imprisonment with additional fine (Section 5). For disfigurement or destruction of any member, joint or portion of the body or for injury to any other part of the body the punishment is rigorous imprisonment which may extend to fourteen years but shall not be below seven years with fine to the amount of fifty thousand taka. The Act also punishes the very act of throwing acid even if no physical, mental or other harm is caused. In such case, the offender will be punished with rigorous imprisonment ranging from three to seven years with additional fine of fifty thousand takas (Section 6). The punishments under the Acid Crimes Prevention Act are almost the same as those provided for in the Woman and Child Repression Prevention Act of 2000. However in the latter Act, attempt to cause death by acid throwing is made punishable, along with the act of causing death itself, with death or life imprisonment. The Acid Crimes Prevention Act of 2002 does not mention the attempt to cause death as being punishable so presumably if anyone throws acid with the intention of causing death and no harm results the offender will be punished with the relatively less severe punishment prescribed under Section 6.

The Act of 2002 also provides for compensation of victims (Section 9). All the offences under the Act are to be non-bailable, non-compoundable and cognizable (Section 14). It

also contains provisions regarding trial procedures, investigation of offences, and negligence of investigating officers, medical examination and so forth. The Act of 2002 sets up an Acid Crimes Prevention Tribunal and all offences under the Act are to be tried by this Tribunal. Appeals against any order, judgment or punishment imposed by the Tribunal must be made to the High Court within 60 days. Section 28 also contains the provision for safe custody for any person during the continuance of the trial and specifies that such custody shall be outside the prison and by order of the Tribunal.

There may be some confusion as to which Act will cover injury or death caused by acid since the Penal Code of 1860, the Women and Child Repression Prevention Act of 2000 as well as the above mentioned law of 2002 all deals with such offence. However since the Acid Prevention Act is a special law[33] it will take precedence over other laws.

Acid Niontron Ain, 2002:

The Acid Niontron Ain or the Acid Control Act of 2002 was enacted to control the import, production, transport, sale and production of acid; to stop the misuse of acid as a corrosive flammable substance and for the treatment, rehabilitation and legal aid of persons harmed by acid. It sets up a National Acid Control Council with the Home Minister as Chairman and the Minister in charge of the Ministry of Women and Children Affairs as Co-Chairman (Section 4). The other members include, amongst others, the Secretaries of different Ministries, Chairperson of the Jatiyo Manila Sangshad, and a woman M.P. nominated by the Speaker. Every district is to have a District Committee under the National Council (Section 7). The Act provides for the setting up, by the Government, of a Center for the Rehabilitation of persons harmed or injured by acid. The Government will be the licensing authority for the import and production of acid while at the district level the District

33.A "special law" is a law applicable to a particular subject. (Section 41 of the Penal Code, 1860.

Commissioner will be the authority responsible for the control of sale, production, transport, use of acid (Section 16). The official empowered by the government in this regard, if satisfied that any shop selling acid or vehicular transportation of acid should be temporarily closed or stopped may order such closure or stoppage for a period of up to fifteen days (Section 18). The licensing authority may also, by written order, temporarily suspend the license of any person if it is apparent that such person has failed to follow or has broken any condition of the license (Section 20).

The various sections of the Act contain provisions regarding the issuing of warrants, search, search without warrant, arrests, seizure of acid and other goods and documents etc. The intention of the Act is to control the illegal use and availability of acid.

Legal Aid:

The Legal Aid Act of 2000 - Aingoto Shayaota Pradan Ain 2000[34]:

To ensure access to justice to those who for lack of financial means, or those who are without assets and who are unable to access the law and obtain justice the Act to provide legal aid was enacted. Section 2(a) mentions that legal aid includes aid for obtaining legal advice, fees for lawyer and costs of the case and all other assistance in any court including the Supreme Court. The Act provided for the setting up of a National Legal Aid Committee with its main office in Dhaka. The Managing Board will be responsible for the administration and running of the Committees and its members will include, among others, the Chairperson of the Jatiyo Mahila Sangstha, three members nominated by the government of any non governmental organization engaged in legal and human rights which has operation in all districts. [Section 6 (i) and (j)] as well as three

34 Act No. VI of 2000. Bangladesh Gazette, dated 26 January 2000.

members nominated by the government of women's organizations which have operations in all districts. Section 9 states that all districts are to have a District Committee and amongst the members of such Committee will be included the District Women and Children Affairs officer if present, the Chairman of the Jatiyo Mahila Shangstha and one nominated member of such Sangstha. The District Committee will be chaired by the District and Sessions Judge. All requests or applications for legal aid shall be made before the Board or District Committee wherever appropriate. If the District Committee refuses any request or application for legal aid, the person seeking such aid may appeal to the Board within 60 days and the decision of the Board in this matter shall be final (Section 16). One criticism which may be made is that there is an apprehension that the Board which is the main authority as well as the Appellate body, is mainly constituted of persons who are for all purposes political appointees which may bias the process of selection of suitable legal aid receivers. More members of the civil society should have been included.

Legal aid may be sought under the act for both civil and criminal matters. Civil matters include family matters including those under the Family Courts Ordinance, 1985. Criminal matters such as dowry cases, child marriages, offences under the Penal Code or the Repression Act of 2000, Special Powers Act of 1974 may all come within the purview of the Legal Aid Act. Women who are seeking justice in such matters, i.e. plaintiffs or complainants, as well as those who are defendants or accused in any case may apply for legal aid.[35]

The intentions behind the enactment of Legal Aid Act are undeniable laudable. However the question as to whether the Act is being able to achieve its purpose of helping indigent persons of better accessing the law remains questionable. Under Section 9(h) and (m) the President of the District Bar

35 See Nariphakkha; Aingoto Shayayota Pradan Ain, 2000---Legal Aid; January 2002.

Association will be a member of the District Committee while the elected general secretary of the Bar Association shall act as Member-Secretary of the Legal Aid District Committee.

In order to achieve the purposes for which the Legal Aid Act was enacted there needs to be greater publicity and awareness raising efforts. Few members of that portion of the population the Act intends to assist are aware of its existence. The greater involvement of the Bar Association of every District may fulfil this purpose to a certain extent since the lawyers themselves are more closely in contact with persons seeking justice but unable to access the law due to various constraints. Following from this the District Court should have an office for dealing with legal aid cases. The failure of the laws relating to legal aid is obvious if one examines data available. In the year 1996 it was known that not even 10% of the funds made available to district committees was utilized, mostly due to obstructive bureaucratic procedures set up for accessing this fund by poor litigants.[36] Unofficial estimates between 1997[37] to 2001 show that in the last eight years only about 800 cases have come under the legal aid scheme.[38] At the end of each financial year a huge sum of money, earmarked as legal aid, is returned to the exchequer as unspent. Since it is impossible, in the context of Bangladesh, that people do not require legal aid, the scenario obviously points to loopholes within the process.

Local Government:

The inclusion of women in the different tiers of the local government as a way towards including women in the process of governance has been perceived as a method of achieving women's empowerment. By virtue of the Local Government

36 Human Rights in Bangladesh 1996: A Report by Ain O Salish Kendra, Bangladesh Legal Aid and Services Trust and Odhikar; University Press Limited, Dhaka at p.79.
37 The Resolution of the Law, Justice and Parliamentary Affairs Ministry dated 19 March 1997, S.R.O. No.74-Law/1997 dealing with legal aid was repealed by Section 26 ofthe Legal Aid Act of 2000.
38 Personal Interview with Dr. Shadeen Malik.

(Union Parishad) (Second Amendment)Act[39] of 1997 direct election on the basis of adult franchise to three reserved seats for women members was introduced in the lower tiers of administration.

A woman can also be elected to the nine general seats of the Union Parishad. It has been said that the Union Parishad election of 1997 was a milestone in the history of women's political rights in Bangladesh.[40] However the quality of participation remained minimal and the elected women of the Union Parishad, both from the reserved and general seats could not enjoy and exercise any significant power. In 2000 the Zila Parishad Ain[41] (the District Council Act), was enacted. Under the Act of 2000, every District is to have a Parishad or Council which would be a body corporate with perpetual succession, capable of suing and being sued (Section 3). The Act makes provision for the first time for five reserved seats for women as members of the Zila Parishad [Section 4(3)]. The Chairman as well as the male and female members shall be elected by a Voters Panel or Electoral College. This Panel/College shall comprise of the Mayor and Commissioners of the City Corporation where included in the District; the Chairman of the Upzila Parishad; the Chairman and Commissioners of the Pourashava and the Chairman and members of the Union Parishad (Section 17). The activities of the Zila Parishad may pertain to a variety of affairs related to the District, including educational, cultural, social welfare and economic activities.

Family matters:

By virtue of the Family Courts Ordinance enacted in 1985, all matters concerning dissolution of marriage, restitution of conjugal rights, dower, maintenance and guardianship and

39 Act No. XX of 1997; Bangladesh Gazette dated 8 September 1997; 50 DLR 1998 (BS) pp.2-3.
40 Husain, Professor Shawkat Ara and Siddiqi, Professor Najma (2002). "Women's Political Rights:Bangladesh Perspective" in State of Human Rights in Bangladesh: Women's Perspective; Women For Women; Dhaka p. 121-122.
41 Act No.XIX of 2000; Bangladesh Gazette; Dated 6 July 2000: 52 DLR (BS) pp.53-80.

custody of children are properly within the exclusive jurisdiction of the Family Court. An appeal against any judgment, decree or order of the Family Court will lie to the District Judge (Section 17) which is therefore the Family Appellate Court. There is no scope for overstepping this jurisdiction and going to the Higher Court Division in appeal or otherwise against any decision of the Family Court except for the transfer (upon application or of its own accord) and stay of suits and appeals (Section 25). Thus Revision Petition under Section 115 of the Code of Civil Procedure is not maintainable where there is scope for presenting an appeal before the District Judge. [42]It was further held that the District Judge i.e. the Family Appellate Court cannot exercise power in sending the suit back on remand to the Family Court for disposal and it can only decide the appeal keeping its authority within the four walls of the Ordinance itself.[43]

In the case of Kowsar Chowdhury vs. Latifa Sultana [44] the High Court Division of the Supreme Court of Bangladesh held in favour of a woman suing for additional maintenance. The Court held:

> Where a magistrate has exercised his maximum power in granting maintenance in a previous case that case cannot be treated as a pending case, thereby barring a suit in the family Court for a claim for enhanced maintenance due to changed circumstance.

Thus although the jurisdiction of the Criminal Court to award maintenance under Section 488 of the Cr.P.C. been ousted after the coming into force of the Family Courts Ordinance[45], the above decision clarifies the position of a woman who has already gotten relief earlier relief under the Cr.P.C. and wishes

42 Atiqur Rahman (Md.) vs. Ainunnahar 52 DLR (2000)453.
43 Ibid.
4422 BLD (HCD) (2002)241.
45 Pochon Rissi Das vs. Khuku Rani Das ard Others 1998 50 DLR 47.
46 Maksuda Akhter vs. Md. Serajul Islam 5 MLR (2000)(HC)276.

to go to the Family Court for enhancement of the amount of maintenance.

The Family Court Ordinance, 1985 is a special law for dealing effectively with certain family matters. [46] Section 16(3B) provides for imprisoning the judgment debtor for three months for failure to pay decretal money. It was held by the High Court that when the court allowed installments of the decretal amount to be paid by the judgment-debtor on his own seeking, he is bound to pay the same and:

> In case of failure of payment of decretal money the judgment debtor is liable to suffer imprisonment for default of each installment.[47]

Conclusion:

In Bangladesh economic, psychological, cultural and social issues combine together to accentuate the vulnerability of women. Such vulnerability continues to exist so that most laws aimed at curbing violence against women. as well as empowering and protecting women, fall a long way short of their expected goals. Again, many of the laws enacted seem to be inconsistent and unclear. For example, confusion may be created in cases where the same offence is dealt with in several existing laws. Acid crimes come under the Acid Crimes Prevention Act of 2002, but the provisions of the Penal Code, 1860 as well as the Woman and Child Repression Prevention Act of 2000 regarding the same offence has not been omitted and this may create confusion as to which Court or Tribunal or which law the case should be instituted under. Even though as special law these take priority, and the laws themselves state this, the confusion persists and ought to have been clarified. The same problem may arise in the case of rape which is covered by both the Code and the Act of 2000.

47 Ibid

The age of the girl child/woman is extremely important in various cases of criminal liability as well as civil issues such as custody and guardianship. However, great confusion and ignorance regarding age is common in Bangladesh. The Birth and Deaths and Marriages Registration Act of 1886[48] provides for birth registration at different levels. But only a small percentage of the population registers births. An UNICEF survey found that only three per cent of the children of the respondents had been registered.[49] The absence of any reliable evidence as to a child's age poses fundamental problems for the enforcement of different laws. [50]It is obvious that the present system is inefficient and obsolete. The Government needs to take this matter into serious consideration.

The vulnerability of women in Bangladesh and their inability to access the legal system is directly connected to their socio-economic status. Although women have made significant strides in employment outside the home, such employment is still confined within specific sectors. Even within these, women are discriminated against. Despite constitutional and other legal guarantees of non-discrimination, discrimination as regards wages and types of work continues to exist and no substantive steps have been taken to address such issues.

Although the enactment of new laws to protect women may be based on good intentions, the fact remains that even now many woman continue to be unable to access the legal system for various socio-religious, economic, cultural and other reasons. It is still difficult for a woman to walk in, unaccompanied, to a police station. And since contact with the police is generally the first stage in their search for justice, many women are discouraged from taking recourse to the law. For the many cases reported in the media there are hundreds, which go unreported or unpunished. The main aim of punishments i.e.

48 Act No. VI of 1886 -- amended several times.
49 UNICEF (1997). Children of Bangladesh and their Rights; UNICEF Bangladesh Dhaka at p.52.
50 Ibid.

that of deterrence, seems to have failed as is obvious from the ever-growing numbers of violent acts committed against women. Prevention rather than punishment should be emphasized since it is very little consolation to the victim who has suffered horrendous acts of violence that the perpetrator may face punishment. In their struggle for justice, individuals feel traumatized by an archaic system of justice and unfriendly law enforcement.[51] Women's access to the legal system therefore remains impeded. Despite efforts to make the system work more efficiently:

> Access to justice continues to remain a time-consuming, lengthy, complicated and expensive undertaking: These factors, coupled with inefficient sometimes, corrupt practices particularly at the lower level have seriously compromised the human rights situation in the country.[52]

Political and other corruption have become almost institutionalized and to such an extent that a woman faces challenges in every step, whether it is to seek legal aid or to discharge duties as local government official. Based on newspaper reports published in the Janakantha of 17th May, 1999, ASK reports that four female Union Parishad members were sexually assaulted, raped and gang raped. [53] The fate of politically disempowered women can only be imagined. It is not enough that token numbers of women are included in the process of governance; whether it is as nominated members of the Parliament or as members of the Union or Zila Parishad. The empowerment of women must become a reality. Violence against women is closely associated with the preservation of male supremacy in society:

51 Op.cit. ASK (2000) at p. 80.
52 Op.cit. Human Rights in Bangladesh 1996 at p. 79.
53 Op.cit. ASK (2000) at p.94.
54Tambiah, Yasmin (1986). Sri Lanka: Violence and Exploitation; in Empowerment and the law— strategies of Third World Women: Schuler, Margaret (Editor); 154

> ...the inferior status accorded to her by patriarchy is often exacerbated by other oppressive forces. Hence, women must create a multi-faceted struggle to achieve freedom dignity, independence and autonomy.[54]

Discriminations regarding family matters persist and no initiatives have been taken to reform or change personal laws, which are opposed to the human rights of women. As in many other Third World countries, in Bangladesh also a pattern of legally sanctioned and sometimes constitutionally guaranteed subordination of women is practiced.[55] The most obvious areas of law which require attention, whether for the purpose of reform or proper enforcement, are labour laws, personal and civil laws. The different types of discrimination and human rights abuses women in Bangladesh face continue, because the society is essentially patriarchal and subordination of women is the norm. This concept of socially sanctioned patriarchal domination cannot be changed by the enactment of newer and newer laws. Bangladeshi women can only become empowered if they are given the ability to utilize the law through legal awareness, education and personal security and safety and if the laws are enforced impartially and efficiently. Women's rights need substantive enforcement not only normative guarantees contained in the law books.

55 Schuler, Margaret (1986). Introduction to Empowerment and the Law ---Strategies of Third World Women; Schuler, Margaret (Editor); OEF International, Washington at p.3.

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DAMS AND OTHER PLANNED MEASURES THE INTERNATIONAL LEGAL ASPECTS

Dr. Md. Nazrul Islam

1. Introduction

Dams are built for a number of purposes including for hydropower, industry and irrigation. Large dams on transboundary rivers have remained as a source of enormous tension between countries for many decades.[1] While their contribution to development is recognized even in the recent report of the World Commission on Dams, it is also warned there that construction and operations of dams in many cases involve "unacceptable and unnecessary price" in social and envirommmental tarms.[2] The Commission noted that large dams and diversion projects can led to the loss of forests and wildlife habitat, aquatic biodiversity and can affect downstream floodplains, wetlands, riverincs, estuarine and adjacent marine ecosystem. The Commission therefore pointed out that clarifying the rights of the riparian states involving a proposed project on a transboundary river is "an essential step in identifying the legitimate claims and entitlement that may be affected by the project".[3]

This paper examines the international legal aspects of construction and operation of dams and other planned measures on transboundary rivers by analyzing the provisions of the 1997 UN Conventions on the Non-Navigational Use of International Watercourses. It aims to argue the desirability and scopes of application of the relevant provisions of 1997 Convention for effectuating an equitable resolution of the tensions associated with the construction of dams, barrages and other planned measures on the transboundary rivers of South-Asia.

1 World Commission on Dams, "Dams and Development, A New Framework for Decision-Making, the Report of the World Commission on Dams", 2000, Executive Summary, p.xxxv
2 Ibid, An Overview, p. 5.
3 Ibid, Executive Summary, P. xxxiii.

It comprises of three parts. First: it analyses the relevant procedural principles of the 1997 Watercourses Convention to illustrate its effciency as a framework convention. Second: it examines the extent to which the 1997 Convention, as a treaty instrument, can be said to be potentially applicable to the disputes involving planned construction on the international rivers. Third: it examines the extent to which the provisions of the 1997 Convention can be evaluated as reflective of customary international law and what arguments could be made on the applicability of that 'customary law'.

1. The 1997 Watercourse Convention

The General Assembly adopted the convention entitled 'Convention on the Law of Non-navigational Uses of International Watercourses' [hereinafter the Watercourse Convention or the 1997 Convention or the Convention] on 21 May 1997, by a vote of 103 in favour [including Bangladesh] to 3 against with 27 abstentions [including India and Pakistan].[4] The Watercourse Convention was opened for signature on the same day and remained open for signature until 20 May 2000 (Article 34). It will enter into force on the 19th day following the dae of deposit of the 35th instrument of ratification, acceptance or accession with the UN Secretary General (Article 36).

The 1997 Watercourse Convention[5] is the only convention of a *universal* character on utilisation of the international watercourses.[6] It sets forth the general principles and rules governing non-navigational uses of international watercourses in the absence of specific agreements among the States concerned and provides guidelines for the negotiation of future agreements.[7] Although it preserves existing agreements, it recognises the necessity, in appropriate cases, of harmonising such agreements with its basic principles.[8]

4 UN, *GAOR*, 51st session, 99th Plenary meeting, 21/5/97, p.7-8.
5 See the text of the 1997 Convention in 36 *ILM 700* (1997).
6MaCaffrey and Sinjela, (1998), 'The 1997 United Nations Convention on international watercourses', 92 *AJIL* 106.
7*UN Press Release*, GA/924, 21/5/97 'General Assembly adopted Convention on the Law of Non-navigational Uses of International Watercourses',1.
8Article 3(1) and 3(2) of the 1997 Convention.

The 1997 Convention consists of seven parts containing 37 Articles: Introduction; General Principles; Planned Measures: Protection Preservation and Management; Harmful Conditions and Emergency Situations; Miscellaneous Provisions and Final Clauses. An annex to the Convention sets forth the procedures that could be used in the event the parties to a dispute have agreed to submit it to arbitration.

This section discusses the procedural principles of the Convention that are relevant to the construction of dams and other artificial structures on international watercourses. Part III of the Convention sets forth these procedural principles concerning new projects as well as changes in existing uses and Article 33 of Part VI describes the dispute settlement procedures. While discussing the above principles, this section takes into account the relevant 'Statements of Understanding' of the Sixth Committee Working Group[9] and the commentaries of International Law Commission (ILC) to the draft articles it adopted in 1994.[10]

1.2. Procedural principles concerning planned measures

Planned measures are defined as 'new projects or programmes of major or minor nature' as well as 'changes in existing uses of an international watercourse' and these measures essentially include dams, barrages and many other artificial structure.[11] Procedural principles concerning planned measures have been

9During the elaboration of 1997 Convention, the Chairman of the Working Group took note of the 'Statements of Understanding pertaining to certain articles of the convention. These Statements were included in the Report of the Sixth Committee Working Group to the General Assembly. McCaffrey and Sinjela, (1998), supra note 6, p. 102, described these Statements as *travaux preparatoires* of the 1997 Convention.

10These commentaries appear in *1994 ILC Report*, UN, GAOR, 49th session, Supplement no 1, pp.197-327. The legitimacy of invoking ILC commentaries is established by the Sixth Committee Working Group during its elaboration of the Convention. The Sixth Committee Working Group (in 'Statements of understanding pertaining to certain articles of the Convention) "Throughout the elaboration of the draft Convention, reference had been made to the commentaries to the draft articles prepared by the International Law Commission to clarify the contents of the articles".

11Para. 4 of the commentary to Article 11, 1994 *ILC Report*, ibid, p. 260.

laid down in the 1997 Convention in order to achieve two objectives. One is to maintain an equitable balance between various uses of an international watercourse and the other is to avoid disputes relating to new projects by watercourse States.[12] From an early stage, the ILC underscored the necessity of these principles to address issues concerning new uses as well as existing uses.[13] Accordingly, the Convention incorporates a comprehensive set of procedural principles concerning planned measures.

a) Exchange of information: Article 11 defines obligations of exchange of information concerning planned measures. Under this article, watercourse States are required to exchange information, consult and, in appropriate cases, negotiate on the 'possible effects' of planned measures on the condition of an international watercourse. These obligations are unconditional, and irrespective of actual effects of planned measures.[14] These are intended to avoid problems inherent in a unilateral assessment of the effects of planned measures.

b) Notification: Provisions concerning notification of planned measures define more specific obligations for enabling a potentially injured State to evaluate possible effects of planned measures by other State. As Article 12 requires, before a watercourse State implements planned measures which 'may have a significant adverse effect' upon other watercourse States, she shall provide such States 'timely' notification of the planned measures. Notification shall be accompanied by 'available technical data and information including the result of any environmental impact assessment'. Under Article 13 and 14, the notifying State is also obliged to provide the notified State with any additional data and information requested for, and to restrain from implementing the planned measures during the period of reply by the notified State, which might extend from

12Para 1 of commentary to Article 12, ibid., 260.
13McCaffrey, Second Report, YILC (1986), II (2), pp. 139-141, paras. 192-7.
14Para 3 of the commentary to Article 11, supra note, 10, pp. 259-60.

six months to one year. Under Article 18, if a watercourse State fails to serve notification, the potentially affected Watercourse State can request the former State for such notification.

C) Consultation and Negotiation: Article 16 and 17 deal with obligations that follow notification of planned measures. According to Article 16, if the notifying State does not receive any reply from the notified State under Article 15, she can proceed with the implementation of planned measures subject to her obligation under Article 5[15] and 7[16]. On the other hand, if the notified State communicates to the notifying State that the planned measures would be inconsistent with the provisions of Article 5 or 7, then according to Article 17(1), both States have to begin consultation and, if necessary, negotiation with a view to arriving at 'an equitable resolution of the situation'. Article 17(2) provides that consultation and negotiation have to be conducted on the basis that each State 'must' in good faith pay reasonable regard to 'the rights and legitimate interests' of the other State. For that purpose, Article 17(3) requires the notifying State, if she is so requested by the notified State, to refrain from implementation of the planned measures for at least six months.

Thus the principles concerning planned measures basically lay down obligations proceeding to actual dispute. These principles and Article 33 (concerning dispute resolution) appear to form

15 Article 5 of the Convention requires a watercourse State to exercise her rights to utilise an international watercourse in an 'equitable and reasonable manner'. The objectives are to attain 'optimal and sustainable utilization', to take into account the interests of the other Watercourse States concerned and at the same time, to ensure 'adequate protection of the watercourse'. Article 6 contains a non-exhaustive list of factors to be taken into account in determining whether an utilisation of international watercourse is equitable and reasonable. These factors include conservation, protection, development and economy of use of the water resources along with other long established factors: the natural condition of the watercourse, social and economic needs of the watercourse States, dependent population, effect of a use of the watercourse on other watercourse States, existing uses of the watercourse and available alternatives.

16 Article 7 requires a watercourse State to 'take all appropriate measures to prevent causing of significant harm' to other watercourse States. If significant harm, however, is caused, Article 7 requires the State causing such harm to give due regard to Article 5 and 6 and to consult the affected State in order to eliminate or mitigate such harm and to discuss the question of compensation in appropriate cases.

an integral procedural framework for implementing equitable utilisation of international watercourses.

13. Dispute settlement: compulsory fact-finding

Article 33 contains dispute settlements procedures in order to respond to the 'complexity' and 'inherent vagueness' of the criteria to be applied for equitable utilisation of international watercourses.[17] These dispute settlement procedures can be invoked gradually: first bilateral methods, thereafter optional methods of third-party settlement and lastly, if optional methods are not agreed, a mandatory Fact-finding Commission.

Bilateral settlement: Anicle 33(2) requires the disputing States to enter into negotiation before making any effort for third party settlement. Negotiation has to be conducted in good faith and in a meaningful way for an equitable solution of the dispute.[18] If negotiation fails, the watercourse States can make use of any existing joint watercourse institution established by them.

Optional third-party settlement: Article 33(2) provides for optional procedures of third party dispute settlement, which are as follows: mediation or conciliation by a third party or submission of the dispute to arbitration or to the International Court of Justice (ICJ). Article 33(10) provides an automatic process of submission of dispute to arbitration or to the ICJ. According to this, while ratifying, accepting, approving or acceding to the Convention, a State can declare, in a written instrument submitted to the Depository, that she recognises such submission as compulsory *ipso facto*. However, this process of dispute settlement would apply in respect of only those States who would make similar declaration. With regard to the process of establishment and operation of the arbitral tribunal, the Parties may accept the provisions laid down in the Annex to the Convention or they can agree different provisions.

17para. 21 of the Commentary to Article 7, *1994 ILC Report*, supra note 10, p. 244.
18Para 2 of the commentary Article 33, *1994 ILC Report*, supra note 10, p. 323.

Mandatory Fact-finding Commission: Making resort to the methods of third-party settlement under Article 33(2) and Article 33(10) essentially depends on consent of all the States involved in the dispute. In contrast, Article 33(3) and 33(5) make provisions for submission of a dispute to a Fact-finding Commission, which can be established by any of the parties to a dispute. The purpose of such Fact-finding Commission would be to facilitate resolution of a dispute through the 'objective knowledge of the facts'.[19] Article 33 put noticeable emphasis on Fact-finding Commission by making detail provisions to explain the procedures concerning the appointment and functions of such Commission.

2. Applicability of the 1997 Convention as a treaty instrument

From our above discussion, it can be said that the 1997 Watercourse Convention has the potentials of minimizing the risk of dispute that may be caused by the construction of dams, barrages and other planned measures on international rivers. Article 3 of the Convention addresses the question of existing projects disputes on which are not fully covered by existing agreements. The first three provisions of Article 3 of the 1997 convention read:

> Watercourse agreements
>
> 1. In the absence of an agreement to the contrary, nothing in the present Convention shall affect the rights or obligations of a watercourse State arising from agreements in force for it on the date on which it became a party to the present Convention.
>
> 2. Notwithstanding the provisions of paragraph 1, parties to agreements referred to in paragraph 1 may, where necessary, consider harmonizing such

19Para 4, ibid., p. 324.

agreements with the basic principles of the present Convention.

3. Watercourse States may enter into one or more agreements, hereinafter referred to as "watercourse agreements", which apply and adjust the provisions of the present Convention to the characteristics and uses of a particular international watercourse or part thereof.

It is evident from the above provisions of Article 3(3) that the utility of the Convention lies mostly in the requirement that the future watercourse agreements would 'apply and adjust' the provisions of the Convention to 'the characteristics and uses of a particular international watercourse or part thereof'. Article 3(2) of the Convention, however, provides that if it is necessary, the contracting Parties to the Convention 'may' 'consider' harmonising existing agreements with the basic principles of the Convention.[20] The necessity of such harmonisation lies in the broader spectrum the 1997 Convention has covered and in the efficiency of the procedural techniques the said Convention has established.[21]

3. Relevance of the 1997 Convention as codification of customary law

The 1997 Convention is based on the draft articles the International Law Commission adopted in 1994.[22] As a product of ILC's study, these articles represent the 'codification and progressive development' of international law of the non-navigational uses of international watercourses.[23] This has been

20 To quote McCaffrey and Sinjela, (1998,)7 supra note 6, p. 98, the Convention 'mildly encourages' conecrned States to consider such harmonisation.

21 For example, see a comparison between the 1997 Convention and the 1997 Ganges Waters Treaty between Bangladesh and India in Islam, M.N, (1999), "Equitable sharing of the Ganges: Applicable procedural principles and rules under international law and their adequacy", PhD thesis, SOAS, University of London, pp. 300-305.

22 McCaffrey and Sinjela, (1998), 'The 1997 United Nations Convention on international Watercourses', 92 AJIL 106.

23The ILC was established in 1946, under Article 13, Para. I(a) of the UN Charter, to promote 'progressive development' and 'codification' of international law. on International Law Commission, see Sinclair, (1987), *the International Law Commission.*

confirmed in para 2 and 3 of the preamble of the 1997 Convention. If we take into account the meanings of 'codification' and 'progressive development', as they are explained in the Statute of the ILC the 1997 Convention can be said to have incorporated both existing or emerging rules (codification) and developing principles of international law (progressive development).[24]

The ILC, as its usual practice, did not specify which of the provisions of the 1994 draft articles are 'codification' of law and which provisions are 'progressive development of law'. However, the commentaries, which the ILC made to the draft articles of 1994 and which the Sixth Committee Working Group invoked during negotiation of the 1997 Convention, made some valuable indications as to the status of the principles enshrined in the articles.

3.1. Customary rules in the 1997 Convention

While making commentaries to the draft articles, the ILC used various phrases like 'established rule of international law', 'basic rule', 'well established rule', 'general obligations' which are indicative of their status as rules of customary law. In the context of Ganges case, we would here focus only on the principles of equitable utilisation, no harm and the procedural principles.

1. As regards Article 5 on equitable utilisation and participation, the ILC commentary provides that this article sets out 'the fundamental rights and duties of States' and that one of the 'most basics' of these is the 'well-established rule' of equitable utilisation which is 'complemented' by the principle' of

24As Article 15 of the ILC Statute (quoted in Harris, 1998, *Cases and materials on international law*, 66) provides, 'progressive development' of international law means 'the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States', and 'codification' means 'the more precise formulation and systemisation of rules of international law in fields where there already has been extensive State practice, precedent and doctrine'.

25Para 1 of the commentary to Article 5, *1994 ILC Report*, supra note 10, p. 218.

26Para 10, ibid., p. 222.

equitable participation.[25] The ILC observed that 'all available evidences of the general practice of States, accepted as law, in respect of the non-navigational uses of international watercourse ... reveal an overwhelming support for the doctrine of equitable utilisation as a general rule of law'.[26] It is thus obvious that equitable and reasonable utilisation of international watercourses is existing rule of customary law.

2. According to the ILC commentary, the no-harm principle enshrined in Article 7 sets forth the 'general obligation' for watercourse States and such obligation is reflected in various international conventions and treaties.[27]

3. The 1997 Convention does not provide any rigid formula for implementation of equitable utilisation or for assessing the extent to which infliction of harm would be equitable in each particular case. It requires the watereourse States to comply with procedural principles for determination of that question. In this respect, as the ILC commentaries provide, regular exchange of data and information on the watercourse condition is 'the general minimum requirement',[28] data and information supply on new uses or on changes in existing uses amounts to 'general obligation',[29] notification of new project is 'embodied' in various sources of state practice,[30] consultation is 'required in similar circumstances' in international instruments and decisions.[31] Among dispute settlement provisions, negotiation in good faith and in a meaningful way is 'a well-established rule of international law',[32] fact-finding has received 'considerable attention by States' whereas other methods of third-party settlement are optional in the text of Article 33.[33]

The ILC commentaries thus reflect that: 1) equitable utilisation

27Paras 3-7 of the commentary to Article 7, ibid., pp 236- 9.
28Para 1 of the commentary to Article 9, ibid, p. 250
29Para 2 of the commentary to Article 11, ibid., p. 259.
30Para 6 of the commentary to Article 12, ibid., p. 262.
31Para 2 of the commentary to Article 17, ibid., pp. 274-5.
32Para 1 of the commentary to Article 33, ibid., p. 323.
33Para 4, ibid., p. 324

and no-harm principles are established rules of international law. 2) The principle of negotiation for dispute settlement in relation to planned measures including dams and barrages is an established rule. ILC commentaries are not that much specific about the customary status of principles of notification, information exchange and consultation. These obligations are, however, inseparable from the obligation of negotiation in the sense that a negotiation without notification and information exchange can serve the objective purposes for which the negotiation is required. These principles thus cannot be taken as anything less than establishe rule of customary law. The status of the provision concerning Fact-finding Commission is merely in a formative stage.

4. Conclusion

The strength of the 1997 Watercourse Convention lies in its emphasis on the observance of the procedural principles for achieving equitable resolution of water utilisation disputes. In the international domain, the benefits of enhancing the role of procedural principles concerning the planned measures including dams and barrages are being increasingly recognised even in some dearth water areas.[34] This is done by concluding treaty instrument for establishing competent joint institution for integrated river basin development and management.[35]

The 1997 Convention represent a synthesis of the modern and traditional methods for effectuating equitable and reasonable utilization of the international rivers. As found in the foregoing

34 For example, see, the Zambesi River Systems Agmement of 1987, 31 *ILM* 814; The Kagera River Basin Agreement of 1977, 1089 *UNTS* 165; The Conventions on Senegal River of 1972, in UN Natural Resources/Water Series no 13, (sales no, E/F. 84.II A.7, 16 and 21). International donor agencies' and countries' preference for such integrated development plan has already become noticeable. It can be assumed that after the adoption of the 1997 Convention, whatever would be its legal force, this preference would become more dominant in the coming years. See, in this regard, Sergent, (1994), 'comparison of the Helsinki Rules to the 1994 UN draft artichs' 8 *Vill. Envtl.* L.J. 477.

35As it is observed in the Report of the ILC on the work of its 46th session (in UN, *GAOR*, 49th session, supplement no. 10, p. 224, para. 12), these 'modern agreements' rather than 'specifying the respective rights of the parties', have gone 'beyond the principle of equitable utilisation by providing for integrated river basin management'.

discussions, it has enormous potentials in preventing and resolving disputes concerning construction and operation of dams and diversion projects on international rivers. The Convention has special importance in the South-Asian context given the unresolved and partially resolved disputes concerning the utilization of the rivers of this region.[36] It is, therefore, suggested that the construction of planned measures on the transboundary rivers in the South Asia should be regulated by the comprehensive procedural techniques as enunciated in the 1997 Convention.

36 For example the tensions concerning the Ganges, Teesta, Gandak, Gangara, Koshi and Mahakali. Although many of the project, on these rivers are now covered by bi-lateral agreements, in most cases these agreements failed to fully resolve the tensions because of their limitations in addressing the procedural principles. See, Islam M.N., n. 21, pp. 111-28, 277-79.