



# **Dhaka University Law Journal**

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# Dhaka University Law Journal

(The Dhaka University Studies Part-F)

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

Two copies of manuscripts should be sent to the correspondence address, and a copy must also be submitted by email attachment to: <lawfacdu@gmail.com>. A covering-letter giving a short biographical note on the author(s) along with a declaration as to the originality of the work and the non-submission thereof to anywhere else must accompany the manuscripts.

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

## References, Footnotes and Layout

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

### Journal Articles: Single Author

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

### Journal Articles: Multiple Authors

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

### Books: Single Author

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

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

### Books: Multiple Authors

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

**Books: Edited**

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

**Chapters in Edited Books**

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

**Books: Corporate Author**

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

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

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

**Theses**

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

**Working Paper, Conference Paper, and Similar Documents**

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

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

**Newspaper**

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

**Internet Materials**

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

**Cases**

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

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

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

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

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

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

#### **Statutes (Acts of Parliament)**

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

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

#### **Delegated Legislation**

Family Courts Rules 1985, r 5.

Financial Institutions Regulations 1994, reg 3.

Abbreviations should be written out in full when they appear first in the text or form the first word in a sentence. Leave out full stops in abbreviations made up of capitals as, for example, SEC, HCD, and JATI.

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

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# Empowerment of Women and the Development of Muslim Family Law: A Perspective from Bangladesh

Dr. Taslima Monsoor\*

## 1. Introduction

This study stipulates the challenges to the concept of empowerment of women globally as they are not getting their rights under the Muslim Family Law. With the growth of women's studies, more and more authors have identified labour, power and sexuality as the main structural elements shaping the relationship between gender and power.<sup>1</sup> The United Nations Development Fund for Women (UNIFEM) also includes the same factors in its definition of women's empowerment.<sup>2</sup> Eileen Kuttab reminds us about women empowerment in the context of Palestine as:

*'Women want not only access to resources, but also control over them. They want not only to participate in decision-making through quotas for women, but to do so with full rights as equal citizens. Women don't want to work in any employment opportunity, but to be employed in protected and decent work. In such a situation women become empowered and this is why this kind of empowerment cannot happen under colonial occupation and patriarchal domination'.<sup>3</sup>*

Empowerment of women, therefore, requires the full participation of women in the formulation, implementation and evaluation of decisions determining the functioning and well-being of societies.<sup>4</sup> The economic position of women in society is reflected according to an eminent author as: Ability to own, or inherit and control, income earning assets; Ability to participate in economic activities; Control over their husband's income, which is usually determined by the level of their education,

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\* Professor & Dean, Faculty of Law, University of Dhaka.

1 See for example R. W. Connell, *Gender and Power* (Stanford University Press, London 1987) 104.

2 V. Mahajan, *Women Empowerment and Social Justice: A Social Feminist Social Approach. International Conference on Humanity, History and Society* (IPEDR, IACSIT Press, vol. 34 Singapore, 2012).

3 E. Kuttab, 'Empowerment as Resistance: Conceptualizing Palestinian Women's Empowerment' in (2014) A. Cornwall and J. Edwards (eds) *Feminisms, Empowerment and Development: Changing Women's Lives* (Zed Books, London) 207.

4 UNFPA, *Women Empowerment* (New York, 1994, Issue 7) <<http://www.unfpa.org/resources/issue-7-women-empowerment>> accessed 17 September 2015.



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4 UNFPA, *Women Empowerment* (New York, 1994, Issue 7) <<http://www.unfpa.org/resources/issue-7-women-empowerment>> accessed 17 September 2015.

the age and pattern of their marriage, family structure and residential status; and right and ability to control property.<sup>5</sup>

All over the world women from various cultural and social backgrounds have a long tradition of rights and responsibilities to live in society with respect and dignity. Though there are difference between men and women in specific aptitude, powers and functions, they have to be regarded as complementary to each other. We can't deny that one sex is making up what other lacks acting in specific sphere in different roles. But throughout the history it is observed that women face oppression, maltreatment and discrimination.

To provide for the women their rights and responsibilities the world community came forward with the volume of conventions, conferences, treaties and municipal laws as, The Universal Declaration on Human Rights (UDHR) 1948, The International Covenant on Civil and Political Rights (ICCPR) 1966, The European Convention on Human Rights, Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) and so on. But the diverse imposed customs, patriarchal social mentality, reluctance of government, orthodoxies and superstitions are keeping their rights unimplemented.

Women's rights of property are already granted in the *Sharia* law and under official law. As those rights are not being implemented women are actually deprived of those rights which can empower them and bring about the economic empowerment. The justification of this article is that many women today are deprived even of the rights granted by the religious and state sponsored family laws. Significantly, women are deprived of their rights of maintenance, dower, and dissolution of marriage, custody, guardianship, and other forms of property.

Women constitute 50% of the population of Bangladesh as a victimized, powerless, poorest and invisible group. Women in Bangladesh are, subordinated within an intensely hierarchical system of gender relations which constantly attempts to deny women not only access to social power and control over their own lives but also granted rights to which they are entitled.<sup>6</sup> Female employment in Bangladesh did not provide women control over main production, landownership or income earned.<sup>7</sup> Thus, in Bangladesh, religion and official family laws are concerned about

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5 Alia Ahmad, *Women and Fertility in Bangladesh* (Newbury Park, London 1991) 31.

6 Naila Kabeer, 'Subordination and Struggle: Women in Bangladesh' (March-April, 1988) 168 *New Left Review* 95-121, at 101.

7 Zarina Rahman Khan, *Women, Work and Values: Contradictions in the Prevailing Notions and the Realities of Women's Lives in Rural Bangladesh* (Centre for Social Studies, Dana Publishers, Dhaka, 1992) 198.

betterment of the status of women. But there is always a power game to deprive women from economic empowerment and they suffer systematic denial of land and property rights in many cases.

Many laws and regulations have been enacted and there is a volume of legal reforms in Muslim Family Law to combat the ideas and practices of depriving women of their rights and to ensure the economic empowerment of women. The Constitution of Bangladesh also aptly highlights provisions for women empowerment in different articles. But the provisions regarding the rights of women in these instruments have failed to show proper success, mainly due to a deficient societal approach, including values of the society and the mind setup of its inhabitants, especially the males who try to dominate the society identifying the patriarchal dominance. Sometimes it is argued by the dominant portion of the society that religion did not give equal status of women with men and this mindset often deprives women even of their rights guaranteed by religion. It is neither religion nor tradition, but the lack of values, conflict of interests and dangerous ways of exercising power that create such difficult situations. They try to misinterpret the moral and ethical framework of religion as a justificatory framework for controlling women in all respects and try to treat women as lower element of society negating empowerment of women and hence ensuring social justice. Bangladeshi women are not demanding sexual equality, freedom and liberation as in the West<sup>8</sup> rather they would prefer gender equity within the conventional social structure.<sup>9</sup> This is not the same as absolute equality, but giving their rights under the religious laws. So the elegant practice of giving more importance to women's rights is the utmost resort of empowering women in their social jurisdiction.

The rights of women are governed by customs and conventions which in many cases do not even allow for gender equity and we are shouting for gender equality. However, increase in educational level and growing awareness and respect of women's rights among the people at large are contributing to bring positive change in the situation. The basic objective of this paper is to show the legal development in family laws concerning empowerment of women. However, rights guaranteed by law as catalyst to the empowerment of women are hardly implemented due to the patriarchal attitude of society and lack of state mechanism.

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8 Julia Brophy and Carol Smart, 'From Disregards to Disrepute: The Position of Women in Family Law' in Whitelegg, Elizabeth et al (eds), *The Changing Experience of Women* (Oxford, 1989) 207-225.

9 Taslima Monsoor, *Gender Equity and Economic Empowerment: Family Law and Women in Bangladesh* (Dhaka: British Council, EWLR. 2008) 1.

## 2. Conceptualizing the Empowerment of Women

The term empowerment denotes giving power, authority and the capacity to increase one's self-reliance and intellectual strengths and the ability to gain control over material and non-material resources. Empowerment is the dynamic and on-going process to bring changes at the personal and collective level and it is an important element for human development.<sup>10</sup> Economic empowerment of women is one of the elements of women empowerment to provide them their rights, specially their rights of property.<sup>11</sup> Empowerment of women is not restricted only to financial empowerment rather it includes complete empowerment of women in all spheres of life. Batliwala defined empowerment as 'the process of challenging existing power relations and of gaining greater control over the sources of power.'<sup>12</sup>

Feminist work emphasises that empowerment is relational. There is a complex reciprocal relationship between women's 'self-understanding',<sup>13</sup> 'capacity for self-expression'<sup>14</sup> and their access to and control over material resources. They should not be treated as fertility machines that have only the goal and the purpose of reproducing.<sup>15</sup> UN guidelines for empowerment of women describe five components in defining women empowerment:<sup>16</sup>

1. Women's sense of self-worth;
2. Their right to have and to determine choices;
3. Their right to have access to opportunities and resources;

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- 10 V. Mahajan, *Women Empowerment and Social Justice: A Social Feminist Social Approach. International Conference on Humanity, History and Society* (IPEDR Vol. 34. Singapore: IACSIT Press, 2012).
  - 11 Taslima Monsoor, *Gender Equity and Economic Empowerment: Family Law and Women in Bangladesh* (Dhaka: British Council, EWL. 2008) 3.
  - 12 S Batliwala, 'The Meaning of Women's Empowerment: New Concepts from Action' in G. Sen, A. Germain, and L.C. Chen (eds) *Cambridge Population Policies Reconsidered: Health, Empowerment and Rights* (Harvard University Press, Cambridge 1994) 130.
  - 13 Naila Kabeer, *Reversed Realities: Gender Hierarchies in Development Thought* (Verso, London 1994).
  - 14 G Sen, 'Empowerment as an Approach to Poverty' in Working Paper Series 97.07 *Background paper for the UNDP Human Development Report* (UNDP, New York 1997).
  - 15 CARE Bangladesh, **Women Empowerment in Bangladesh** (2011) <[http://www.carebd.org/part\\_long.php](http://www.carebd.org/part_long.php)> accessed 2 September 2015.
  - 16 United Nations Population Information Network (POPIN) (n.d.), *Guideline on Women's Empowerment for the UN Resident Coordinator System* (New York: UN Population Division, Department of Economic and Social Affairs, with support from the UN Population Fund UNFPA) <<http://www.un.org/popin/unfpa/taskforce/guide/iatfwemp.gdl.html>> accessed 02 September 2015.

4. Their right to have the power to control their own lives, both within and outside the home;
5. Their ability to influence the direction of social change to create a more just social and economic orders, nationally and internationally.

Women's empowerment is not one-dimensional, not just access to finance. It encompasses access to social resources, removal of inequalities in the family and social interaction, access to social, legal and political institutions, as much as access to labour market as well.<sup>17</sup> Gender equality, implies a society in which women and men enjoy the same opportunities, outcomes, rights and obligations in all spheres of life. Equality between men and women exists when both sexes are able to share equally in the distribution of power and influence; have equal opportunities for financial independence through work or through setting up businesses; enjoy equal access to education and the opportunity to develop personal ambitions.<sup>18</sup>

The empowerment of women is connected with education, employment and mobility and it is not restricted in equal opportunity with men in public and private life. However, gender equity demands the equity which permits positive discrimination for ensuring the empowerment of women in family and private life. It is believed that when women become educated, they will earn and control income and eventually women with economic power have better control over their own lives and can directly take part in decision making in the household. The fight for empowerment of women is not only the fight for empowerment of women themselves, but it is also part of the fight for holistic human empowerment. Justice VR Krishna Lyer's observation is pertinent here:

*'The fight is not of women status but for human worth. The claim is not to end the inequality of women but to restore universal justice. The bid is not for leaves or fishes for the forsaken gender but for cosmic harmony which never comes till women comes. The soul of men is women, when she goes; there is no goodness, strength left'.<sup>19</sup>*

The attitude of patriarchal society towards the women empowerment is being changed in urban space and not in the rural space. The deep root of changing attitude

17 O M A B Khalily, *Massage. Outcome Document: International Conference on Gender and Women Empowerment* (13-14 November, 2014, Institute of Microfinance InM)12.<[http://www.inm.org.bd/document/Conference%20Volume\\_International%20conference%202014.pdf](http://www.inm.org.bd/document/Conference%20Volume_International%20conference%202014.pdf)> accessed 17 September 2015.

18 M Srivastava, *Essay on Women Empowerment*, (4 October 2009) <<http://ssrn.com/abstract=1482560>> or <<http://dx.doi.org/10.2139/ssrn.1482560>> accessed 12 September 2015.

19 V K Krishna J Iyer, *Of Law and Life* (Vikas Publishing House, 1979) 145.

in urban stretch also been traced in the benefit of male counterpart who is not able to manage singly to arrange the family expenditure. But the scenario of women employment in urban area does not represent the whole prospect of the country. So without the importance of economic empowerment of women and education, it will be more difficult to achieve gender equity and to ensure social justice.<sup>20</sup>

### 3. Islamic Sharia and the Women Empowerment:

According to the classical theory of Islamic law, Islamic law is a divine law and based on two primary sources. One is Quran, the words of Allah and the other is Sunnah, the teachings of the Prophet. As we see the Prophet (PBUH) said in his last sermon

‘O people, I am leaving you with the Book of God (the QUR’AN) and my SUNNAH (the life style and the behavioural mode of the Prophet), if you follow them you will never go astray.’

Islamic law is not rigid and static<sup>21</sup> rather on the basis of these two main sources many juristic principles have been adopted as to the necessity of time and demand. There are other secondary sources of Islamic law such as *Ijma*, consensus of the opinion of the learned ones in Islamic jurisprudence and *Qiyas* or *Ijtihad*, the systematised process of deduction by analogy relating to a matter not falling within the text of the Quran, the Sunnah or the *Ijma* but coming within their intendments<sup>22</sup> and custom and court’s precedents. As the Islamic law is not stagnant within the only orthodoxy, modern Muslim countries are updating laws according to the exigencies of the society on the basis fundamental principles of Quran and Sunnah. Legal reforms were undertaken, as professor Anderson has explicitly analysed, in four different ways.<sup>23</sup> Out of them the second way was employing *Takkayur*, the picking and choosing from dicta or provisions from other school of thought. The potentials and instrumentality of *Takkayur* is appropriately described by Professor Alamgir M Serajuddin:

20 The UN Eight MDGs for 2015, *The Third One is to Promote Gender Equality and Empowerment of Women* <[http://www.themodernreligion.com/prophet/prophet\\_lastsermon.htm](http://www.themodernreligion.com/prophet/prophet_lastsermon.htm)> accessed 01 Dec. 2015.

21 Muhammad Ekramul Haque, *Muslim Family Law: Sharia and Modern World* (London College of Legal Studies (LCLS), Dhaka 2015) 33.

22 Tanzilur Rahman, *A Code of Muslim Personal Law* (Hamdard Academy, Vol. I, Karachi 1978) 10.

23 J N D Anderson, ‘The Eclipse of the Patriarchal Family in the Contemporary Islamic Law’ in Anderson, J N D (ed), *Family Law in Asia and Africa* (London 1968) 221-234.

*'While the rules of any particular school may be found to be inflexible, conservative and restrictive in a particular social situation, the totality of the desirable legal rules of all the schools may prove to be quite rich, flexible and progressive and answer most of the challenges and needs of the present age.'*<sup>24</sup>

Islamic sharia does not negate women empowerment rather tries to uphold the status of women as is seen in Quran and Sunnah. Financially she retains her own separate estate and has absolute authority what she acquires by inheritance, by gift or as the fruit of her own labour.<sup>25</sup> There are eight female Quranic heirs out of twelve and women also become the full legal owner of the property inherited and can transfer it according to their own choice. Moreover, Islamic family law narrates the provision of dower/*Mahr* and maintenance to guarantee the empowerment of women in their respective area. But In practice, there are serious misconception about the rights and status of women in Islam. Some controversial issues and areas of misconception, with regard to the empowerment of women in Islam, include women's the law of inheritance and which ultimately hamper the way to empowerment of women. To large extents these misconceptions are often mingled with male dominant social practice.

Islam has logical justifications in favour of these issues regarding gender. The male and female dynamics in Islam are such that there is equality of sexes in the spiritual life. However, Islam contains an ambivalent message concerning the equality of the sexes in the worldly affairs and social relationship between people.<sup>26</sup> Islamic law justifies gender differentiations on the ground of creation and nature, giving special rights and duties to both male and female.<sup>27</sup> Islam does not believe in the concept of sexual equality which ignores the natural differences and normal aptitudes between men and women, rather it regards men and women as complementary to each other.<sup>28</sup> At the same time, it never says that women was created for men and does not hold any derogatory ideas concerning women.<sup>29</sup>

24 A M Serajuddin, *Sharia, Law and Society, Tradition and Changes in the South Asia* (Karachi 2001) 8-9, Quoted by Dr. Taslima Monsoor *Gender Equity and Economic Empowerment: Family Law and Women in Bangladesh* (Dhaka: British Council, EWLR. 2008)14.

25 Maurice Gaudetroy- Demombynes, *Muslim Institutions*, translated By J P McGregor (Allen & Unwin, London, 1950) 132.

26 Taslima Monsoor, *Gender Equity and Economic Empowerment: Family Law and Women in Bangladesh* (Dhaka: British Council, EWLR. 2008) 12.

27 M Muthhari, *The Rights of Women in Islam* (The World Organization for Islamic Services, Tehran, 1981) 113-123. See also Mohammad Misbah T. et al., *Status of Women in Islam* (Islamic Propagation Organization, London, 1990) 10-11.

28 Mohammad M. Siddiqui, *Women in Islam* (Institute of Islamic Culture, Lahore, 1966) 21-22.

29 Islam does not hold any derogatory ideas concerning women

Islam says that men and women were each created for the other as was narrated in the holy Quran:

هُنَّ لِبَاسٌ لَّكُمْ وَأَنْتُمْ لِبَاسٌ لَّهُنَّ

*They are a vestment for you (man) and you are a vestment for them, (Qur'an, 2:187).*<sup>30</sup>

One of the traditions of Prophet (PBUH) is most pertinent in this respect about the status of women in Islam. It was reported by Abdullah that:

*'If a girl child is born to someone and he brings up her well and educates and trains her well and whatever mercy is shown to him by Allah is showered by him on his daughter, that girl will be a screen and a curtain for him to the fire of hell.'*<sup>31</sup>

The question is whether the abuse and discrimination concerning gender are religious itself or is due to misconception, misinterpretation and improper implementation of religious provisions. The answer depends on the attitude of male members of the family. Our analysis shows that many laws have been enacted in response to Bangladesh's commitment under international law and there is basically no religious impediment about women's empowerment. Religious provisions to some extent are becoming a matter of discord about the rights and empowerment of women due to the misinterpretation of religious dogmas or disputes over interpretation. Interestingly, it happens because of the improper implementation of religious doctrine.<sup>32</sup> The real problem is the dominant patriarchal nature of the society, where discrimination is deepened into its heart.

#### **4. Development of Muslim Family Laws in Bangladesh and Empowerment of Women**

Muslim Family Law is applicable in Bangladesh by dint of The Muslim Personal Law (*Shariat*) Application Act 1937 and there have been volume of changes in Muslim Family Law before and after the independence of Bangladesh. We will discuss here the development of Muslim family law and its impact on the empowerment of women in Bangladesh.

30 Translation available at <<http://www.al-islam.org/rights-women-islam-ayatullah-murtadha-mutahhari/part-five-human-status-woman-quran/particular-philosophy-islam-concerning-family-rights>> accessed 20 September 2015.

31 Qurtubi- see Ziaul Quran, commentary on verses Q.16: 58-59. Quoted by Hussain J. Mr. Aftab, *Status of Women in Islam* (PK Educational Press, 1987) 127.

32 Sharmeen A. Farouk, *Violence against Women: A Statistical Overview, Challenges and Recommendations* (Bangladesh National Women Lawyers Association, Dhaka, 2005).



Generally Muslim Family Law in Bangladesh is regulated by some statutes. As of today there are many remarkable laws and many reforms in family law that are set forth for women, applicable for Muslim also, in Bangladesh such as The parents maintenance Act 2013, Domestic violence Act 2010, The Acid Crime Control Act 2002 and Nari O Shishu Nirjaton Daman Ain 2000 (Women and Children Repression Act 2000), the Dowry Prohibition Act of 1980, Child Marriage Restraint Act 2014 (Draft), Muslim Marriages and Divorces (Registration) Act 1974 and its Rule in 2009, The Muslim Family Laws Ordinance 1961, The Dissolution of Muslim Marriage Act 1939.

The legal system of Bangladesh has its legacy from British India and Pakistan and it has a dual system consisting of general and personal laws. The general law is formally based on egalitarian principles of sexual equality, but the personal and family law is based on religion and culture with principles of gendered interactions that do not operate on the basis of absolute equality of men and women but rather recognise their symbiotic co-existence.<sup>33</sup> There are some personal issues which are directly governed by personal laws or family laws, to specify, marriage, divorce, dower, maintenance, guardianship, custody and inheritance. Islam, in particular, is the religion which roughly 88% of Bangladeshis adhere to play a vital role in structuring the normative rules and ideology of the family in Bangladesh. Our main focus goes to the development of Muslim family laws and the empowerment of women.

#### **4.1 Islamic Family, Women and Dissolution of Marriages:**

Marriage being a civil contract under Muslim law can be terminated for the benefit of the parties as any other contract. In pre-Islamic Arabian society males could take as many wives they wanted or liked<sup>34</sup> and also divorce was unlimited<sup>35</sup>. Among the ancient Arabs divorce was free and easy occurrence. The society was completely male dominated patriarchal.

The Quran refers to divorce or reconciliation between spouses as a collective decision of both the wife and the husband, according to the holy Quran<sup>36</sup>:

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33 Dr Taslima Monsoor, *Gender Equity and Economic Empowerment: Family Law and Women in Bangladesh* (Dhaka: British Council, EWLR. 2008)1.

34 Statutory Reformation in Bangladesh: Polygamy was restricted by MFLO sec.6.

35 Statutory Reformation in Bangladesh: Dissolution was given procedural barriers by section 7 of MFLO.

36 The Holy Quran under chapter II verse 229

'A divorce is only permissible twice; after that the parties should either hold together on equitable terms i.e. retain them with humanity or separate them with kindness.'

The basis of the law can be traced in the fourth chapter of the Quran, which deals with wives.<sup>37</sup> Syed Ameer Ali reported that according to *Shahih al Bukhari*, the power of the *Qadi* to pronounce a divorce is also founded in the express words of the Prophet that if a woman be prejudiced by a marriage, let it be broken off.<sup>38</sup>

Thus, there are differences among the schools of Islamic law concerning the precise grounds which would entitle a Muslim wife to judicial dissolution of her marriage. The *Shafi* school allows the wife's right to judicial divorce on the grounds of her husband's inability to maintain her, as well as his imprisonment, insanity, or affliction with serious disease. The *Malikis*, in addition, would allow a wife a judicial divorce if her husband failed or refused to maintain her, had been missing for four years, had abandoned or deserted her, or ill-treated her.<sup>39</sup> The Hanafi School only allowed a wife to apply for judicial dissolution of her marriage for the husband's impotency, insanity and leprosy.<sup>40</sup> However, she could also obtain dissolution of her marriage on the grounds of putative widowhood if her husband had become a missing husband.<sup>41</sup> The jurists were also not happy with the possibility of divorce as it also concerns moral and ethical considerations. It is said that

'Divorce is fundamentally prohibited because it ends marriage which has both spiritual and material benefits.'<sup>42</sup>

The right to dissolve a marriage is an original right of a husband. The classical Muslim scholars agree that a husband has a right to divorce his wife by simply

37 Holy Quran. iv: 34-35 as cited by Tahir Mahmood, *Muslim Personal Law-Role of the State in the Indian Subcontinent* (All India Reporter, 2nd ed. Nagpur 1983) 45; A. A. Asaf Fyzee, *Outlines of Muhammadan Law* (Oxford University Press, 1st ed. Bombay 1949, 2nd ed. 1955, 3rd ed. 1964, 4th ed. New Delhi, 1974) 168.

38 Syed Ameer Ali, *Mahomedan Law*. (Allahabad Law Emporium, Vol. ii, 5th ed. New Delhi, 1985) 519.

39 Lucy Carroll, 'Muslim Women and Judicial Divorce: An Apparently Misunderstood Aspect of Muslim Law' (1985) Vol. (1) *Islamic and Comparative Law Quarterly* 226-245, 230; Tahir Mahmood, *Muslim Personal Law-Role of the State in the Indian Subcontinent* (Vikas Pub. House, 2nd ed. Nagpur 1983) 45.

40 Jamal J. Nasir, *The Islamic Law of Personal Status* (Kluwer Academic Publishers Group, London 1986) 114; Carroll (1985) 230-231.

41 N J Coulson, *A History of Islamic Law* (Edinburgh University Press, Edinburgh 1964) 185.

42 Al-Marghinani, *Al-Hidaya* 2:532.

pronouncing a specific formula and it is not mandatory for him to inform the court or the government about such a divorce.<sup>43</sup>

Authors and Jurists agree that women has very limited possibilities to ask for the dissolution of a marriage as compared to the almost unrestricted right of a husband to dissolve the marriage. Justifications include for example the fact that a man is obliged to pay a dower, which remains to the wife's disposition; the obligation of maintenance is also sometimes linked to this issue. See e.g. the reservation entered by Bangladesh to article 16 of the CEDAW. Some authors deny that there is any discrimination in divorce laws.<sup>44</sup>

There is a difference existing between the Hanafi School and other schools in relation to the ability of a woman to conclude a marriage contract herself. It was stated that the Hanafi School recognizes this ability of women and although making it subject to certain control allows women more freedom in this respect than other schools in relation to the possibility for women to apply for dissolution of her marriage to a judge. This possibility is limited in the traditional doctrine of the Hanafi School only to cases of impotence and other diseases preventing sexual intercourse and procreation. Some later jurists of this school also added the case of insanity to this list.<sup>45</sup> Nevertheless, it is obvious that the freedom given to women at the stage of the conclusion of a marriage has to be paid by a price of virtual impossibility for a woman to get out of the marriage. Even cases of lack of maintenance and mistreatment are not reasons enough to allow for a divorce by a judge.<sup>46</sup>

The various schools of Islamic law accepted the basic principles of dissolution of marriage but differed on the circumstances in which it should be applied.<sup>47</sup> Syed Ameer Ali stated the differences among schools to dissolve the status of marriage by a *Qadi* or judge.<sup>48</sup> For example, under the *Hanafi* doctrine, inability to provide maintenance is not sufficient ground for asking for a divorce when the husband does

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43 For an overview of classical opinions of Muslim scholars on divorce see, for example: Hammudah Abd- Al Ati, *The Family Structure in Islam* (American Trust Publications (ATP), Boston, 1977) 222-243; Ekaterina Yahyaoui Krivenko, *Women, Islam and International Law: Within the Context of the Convention on the Elimination of All Forms of Discrimination Against Women* (Martinus Nijhoff Publishers and VSP, Leiden, 2009) 60.

44 Tahir Mahmood, *The Grandeur of Womanhood in Islam* (1986) VI Islamic Comparative Law Quarterly 11.

45 In all cases before granting a divorce, a judge shall ordain a waiting period to see whether some improvements in the state of the husband will occur. Thus, for example, in the case of impotence this waiting period is laid down at one year.

46 Ekaterina, 2009, p.68.

47 Mahmood (1983), p.45.

48 See Ali (1985), pp.519-533.

not have sufficient means. Whereas, under the *Shafi* law, inability to provide maintenance, wilful or otherwise, is a cause for the *Qadi* to dissolve the marriage.<sup>49</sup> Thus to secure dissolution, a Hanafi woman, might be tried by a *Shafi Qadi*, whose pronouncement is also binding on her. This device to select and combine various elements of different schools of law is known as *Takhayyur* or an eclectic choice between parallel rules of the various schools of Islamic law.<sup>50</sup> This selective process of overcoming divergences was hardly followed. Even though the courts in British India were given powers before 1939 to apply the law of one of the schools of Muslim law in a case in which the parties were followers of different schools, on grounds of justice, equity and good conscience, the courts were reluctant to apply the more liberal rules of Maliki law to parties following other schools.<sup>51</sup> This led to the passing of the Dissolution of Muslim Marriages Act of 1939. On the ground that the husband had more wives than one and did not treat them equitably in accordance with the injunctions of the Quran, under section 2 (viii)(f) of the Act of 1939 the wife could dissolve the marriage.

In modern national legislation of Muslim states the traditional approach is dominant. However, various procedural measures are often introduced with the aim to mitigate possible negative consequences for women. Many states recognize in their legislation the widest possible range of grounds on which a judge can be asked for a divorce as well as the largest possible powers of a judge to grant a divorce without the consent of a husband. Thus, although the traditional view of the Hanafi school allows for dissolution of marriage on the petition of a wife without consent of a husband only in the case of impotence and other similar diseases and under a condition that the wife was not aware of these defects at the time of marriage, in Muslim countries where the Hanafi school is the prevailing one and its opinions form a basis for the legislation in issues of personal status, the modern legislator nevertheless introduced some additional grounds for divorce by a judge.<sup>52</sup> For example the legislation of Bangladesh, although based on the Hanafi school, recognizes "other grounds" on the part of a husband as imprisonment, absence of a husband and the non-payment of maintenance as additional grounds for granting divorce to a wife without asking the consent of a husband.

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49 Ibid., pp.520-521.

50 Aharon Layish, 'Shariah, Custom and Statute Law in a Non-Muslim State' in I.E. Cuomo (ed.), *Law in Multicultural Societies* (Proceedings of the IALL Meeting, Jerusalem 1985) 102; N.J. Coulson, *A History of Islamic Law* (Edinburgh University Press, Edinburgh, 1964) 185.

51 Syed Jaffer Hussain, 'Legal Modernism in Islam: Polygamy and Repudiation' (1965) 7 *Journal of the Indian Law Institute* 384-398, at 396.

52 Ekaterina, 2009, p.69.

*Talaq* is perceived as a man's divorce, available to the husband without assigning any reason, at any time and in any place. But this unfettered and unilateral right of the husband is often exercised arbitrarily, making the lives of women miserable hence hampering to the empowerment of women. But to make an end to this crux The Muslim Family Law ordinance (MFLO) 1961 was enacted and its section 7 clearly states that husband can't *Talaq* in a single pronouncement without giving due notice to the chairman of arbitration council.<sup>53</sup> A woman did not have a reciprocal right of unilateral divorce, but she could acquire the ability to choose divorce if her husband delegated his power of *Talaq* to her. Jurists from the main Sunni schools of law recognized the right of the husband to delegate such power, although they differed in their understandings of the conditions related to such delegation (*Tafwid*).<sup>54</sup>

*The case law indicates that progress has been made especially in the cases of delegated divorce where by the device of Talaq-e-tafwid women are entitled to dissolve their marriage easily. As we saw, in Khula cases women are sacrificing their right of dower in exchange for a divorce. In Talaq cases, although men are legally obliged to give women dower and Iddat money, this is rarely observed. Thus, Bangladeshi divorce law, overall, does not protect women well from economic deprivation and violence and the way forward, it appears, is more widespread and creative use of stipulations in the marriage contract.*

#### **4.2 Inheritance or Intestate Property Rights and Empowerment of Women:**

The Muslim law of inheritance states that as a general rule, a female is given one half the share of a male. This has aroused considerable debate globally. The

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- 53 Section 7 of MFLO 1961: (1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of *Talaq* in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife.  
 (2) Whoever contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for term which may extend to one year or with fine which may extend to ten thousand taka] or with both.  
 (3) Save as provided in sub-section (5), a *Talaq* unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under sub-section (1) is delivered to the Chairman.  
 (4) Within thirty days of the receipt of notice under sub-section (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.  
 (5) If the wife be pregnant at the time *Talaq* is pronounced, *Talaq* shall not be effective until the period mentioned in sub-section (3) or the pregnancy, whichever be later, ends.  
 (6) Nothing shall debar a wife whose marriage has been terminated by *Talaq* effective under this section from re-marrying the same husband, without an intervening marriage with a third-person, unless such termination is for the third time so effective.

- 54 E Judith Tucker, *Women Family and Gender in Islamic Family Law* (Cambridge University Press, Cambridge, 2008) 9.

International Conventions and Declarations have erased this discrimination and are pursuing nations who have reservations in the religio-personal laws to do the same. However, no one seems to see that whatever is there in official and Islamic law are not even realised. The UN Convention on the Elimination of All Forms of Discrimination against Women of 18th December 1979 purports to guarantee equal rights to women.<sup>55</sup> The Constitution of Bangladesh and the general law also apparently guarantees women in Bangladesh sexual equality. But patriarchal interpretation of the law continues the dominance of patriarchal attitudes.<sup>56</sup> However, there are internal contradictions within the Constitution between granting sexual equality and making special laws for women. All of these influence the position of women in family law but the religious and official family laws of Bangladesh clearly aim for gender equity rather than absolute sexual equality. If the gender equality concept were translated into family law, it would disturb the equilibrium of the social fabric and the power relationship between the sexes. As women also benefit from living in a patriarchally dominated system they are to be maintained and have to be provided for with dower. Moreover it will involve injury to their religious susceptibilities which could even be felt by the British who ruled India; that the personal laws of the indigenous population were to be interfered with as little as possible as they are connected with religious feelings.<sup>57</sup>

However, there have been a large number of reforms in the field of Family Law in Bangladesh which did not directly affect the law of inheritance<sup>58</sup>. Inheritance is always regarded as a precious religious place which cannot be trespassed. But in some Muslim majority countries the state laws have deviated from *Sharia* inheritance as in Turkey or Albania. It will not be discussed here whether going out of the parameters of the Islamic law has done better or worse for the women of those countries simply because the women of Bangladesh do not even enjoy their granted rights of inheritance under the Islamic and Official law of the land. Women's right of inheritance here is regulated by customs and conventions which does not even

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55 On this Convention see for example Tinker, Catherine, 'Human Rights for Women: The U.N. Convention on the Elimination of All Forms of Discrimination Against Women' (1991) 3(2) *Human Rights Quarterly* 32-43.

56 On this see in detail World Bank, *Bangladesh: Strategies for Enhancing the Role of Women in Economic Development* (Washington DC 1990); Roushan Jahan, 'Hidden Wounds, Visible Scars: Violence against Women in Bangladesh' in Bina Agarwal (ed), *Structures of Patriarchy: State, Community and Household in Modernising Asia* (Kali for Women, New Delhi 1991) 216-226.

57 David Pearl, 'Modernising the Personal Laws in India' (1972) 5(2) *South Asia Research* 147-151.

58 For reforms in Muslim Family Law see, Tahir Mahmood, *Family Law Reform in the Muslim World* (N. M. Tripathi, Bombay 1972); Taslima Monsoor, *From Patriarchy to Gender Equity: Family Law and its Impact on Women in Bangladesh* (University Press Ltd., Dhaka 1999).

allow them to realise their statutory rights. As for example men do not give their property to women on the belief that if the woman dies earlier he will not get any share of the property. In fact the husband shall get half of her estate if there are no issues and one-fourth of it if there are issues. On the other hand if the man dies earlier the woman gets one-fourth of the deceased husband's estate if there are no issues and if there are issues the woman gets one-eighth of her husband's estate.<sup>59</sup>

Other studies revealed that there are some practical problems of doing research on women's right to succession. First of all most women are away from their father's property as by marriage they are usually taken to another village and if they become widows in their early age they are usually deprived of the property of their deceased husband when they return back to their natal village. Thus, usually women do not have control and possession of their property and are only de jure owners. Moreover, women are actually being disinherited from their property by securing ties with their natal family. In particular its implications in the respect of maintenance rights of women and succession suggest that women should not be deprived of their property rights just because their husbands maintain them.

Finally, there are anomalies in the land settlement and sometimes there are gaps between the actual situation of the properties and the record of the properties. Sometimes non-inherited land is bought 'Benamdar' or in anonymous name to avoid taxes and are usually put in the women's name by their husband or father and controlled by them. The law of the state is that the 'Benamdars' are the owners of the property under the Law Reform Ordinance of 1984 even if they are women.

The dilemma of inheritance of grandchildren from the predeceased child is one of the most critical areas<sup>60</sup> in the sharia law of inheritance. We won't go to the debate whether the doctrine of representation contrasts with sharia or not rather, we will try to show that the consequence of reform in section 4 of MFLO empowers the women even within short sphere. According to the orthodoxy interpretation of sharia law of inheritance if a person dies leaving a son and a predeceased son's son, the son will exclude the son's son and inherit the full property according to the principle of exclusion. But this creates apparently an inhumane consideration for the descendant of deceased. To solve this problem and being persuaded from the teaching of Quran, to remove the suffering to the orphan grandchildren section 4 of MFLO was adopted and which states that

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59 Tanzil-ur Rahman, *A Code of Muslim Personal Law* (Hamdard Academy, Vol. I, Karachi 1978) 476-478.

60 Muhammad Ekramul Haque, *Islamic Law of Inheritance: Rules and Calculation* (London College of Legal Studies (LCLS), Dhaka 2009) 236.

*'In the event of the death of any son or daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stirpes receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive.'*

The direct impact of this doctrine to the empowerment of women clearly is found from the analysis of the share of specific person under the sharia law of inheritance. Such as if a person dies leaving a son and a predeceased son's daughter. According to the sharia law the son will exclude son's daughter and inherit full property. But as per section 4 of MFLO the son will share the property equally with son's daughter who basically represents her father and will get the portion of her father could get if alive. This provision directly financially empowers the women and the same analysis is applicable to the predeceased daughter's daughter who will represent her mother and will get per stripe share as her mother could get if alive.

#### **4.3 Maintenance and Empowerment of Women:**

Maintenance is the lawful right of the wife to be provided at the husband's expense with food, clothing, and accommodation and customarily extends to other necessities of life.<sup>61</sup> 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. In the Holy Quran the husband is ordained to maintain the wife. The Quranic ruling states:

*'Men are protectors and maintainers of women, Because God has given them more strength than the other, And because they support them from their means.'*<sup>62</sup>

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

The Prophet preached in his last sermon:

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

Maintenance of a wife during the subsistence of the marriage is a legal obligation of the husband in Islam.<sup>63</sup> But the *sharia* provision of maintenance of the wife from her husband is conditional. The maintenance is only due to the wife, if she is under a

61 J Jamal Nasir, *The Status of Women under Islamic Law* (Graham & Trotman, London 1992) 59; Kieth Hodkinson *Muslim Family Law* (Croom Helm Publishers, London 1984)147.

62 The Quran, LV:34.

63 The Quran, ii:29.



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.<sup>64</sup> When the wife is working against the husband's wishes she becomes a rebellious or disobedient or *Nashuza* and is not entitled to maintenance from her husband. A wife is *Nashuza* as held in the case of *Ahmed Ali v Sabha Khatun Bibi*<sup>65</sup> if without a valid excuse she disobeys his reasonable orders, refuses to cohabit in the house he has chosen, goes on hajj without his consent unless it is obligatory for her to go, takes employment outside the house without his consent, or is imprisoned so as to be inaccessible to him. However, she will not be a disobedient wife if her acts are in reply for her husband's inability to accommodate her in accordance to law or failure to pay prompt dower when demanded or when he has broken the stipulations in the *Kabinnama* or has acted with cruelty.<sup>66</sup>

Islamic law grants a Muslim wife right to maintenance from her husband not only during the subsistence of the marriage but also reasonably after dissolution of the marriage.<sup>67</sup> There is no controversy that the husband is bound to maintain the wife during the three months of *Iddat* period, but there is a considerable controversy whether the maintenance extends beyond the *Iddat* period. It has been specifically provided in the Holy Quran that the divorced women shall wait for remarriage for three monthly periods and the woman in *Iddat* live in the same style as you live, according to your means. It also provided that for divorced women maintenance should be provided on a reasonable scale.<sup>68</sup>

In cases on maintenance, the courts did not previously provided for past maintenance unless stipulated in the *Kabinnama*, nor would allow post-*Iddat* period maintenance to divorced Muslim wives. In Bangladesh, women had to rely on other techniques to secure some post-divorce maintenance. One writer suggested a hopeful trend towards adoption and enforcement of clauses in the marriage contract or *Kabinnama* which would clearly and in unambiguous terms provide for maintenance, as this offers protection against arbitrary and capricious subjugation.<sup>69</sup>

The Bangladeshi Judges of the highest level of judiciary have only very recently made celebrated judgment providing for past maintenance for Muslim women in

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64 See for details, Nasir (1992) London, p.60-65.

65 PLD 1952, Dacca 385.

66 See for details Hodkinson (1984) London, p.147.

67 The Quran, 2:228 and 2:241.

68 The Quran, 2:228 and 2:241.

69 Shahdeen Malik, 'Saga of Divorced Women: Once again Shah Banu, Maintenance and the Scope for Marriage Contracts' in (1990) 42 *DLR Journal* 35-40, at 39.

*Jamila Khatun v Rustom Ali*<sup>70</sup> but how far the decision is being implemented in reality are yet to be analysed. However, the judgment providing for post divorce maintenance in *Hefzur Rahman v Shamsun Nahar Begum*<sup>71</sup> has been recently overturned by the Appellate Division of the Supreme Court of Bangladesh.<sup>72</sup>

Recently, Pita Matar Bharon Poshon Ain 2013 (The Parent's Maintenance Act 2013) has been enacted to provide proper maintenance to the parents. This Act deals with the obligation of the children to provide maintenance not only to their parents<sup>73</sup> but to their grandparents<sup>74</sup> in the absence of their parents. It strictly prohibits keeping the parents in old care center and describes the higher degree of punishment<sup>75</sup> in the breach of the provision of this Act.

#### 4.4 Dower/Mahr: Economic Empowerment of Women

The dower is a sum of money or other property which becomes payable by the husband to the wife as an effect of marriage<sup>76</sup>. According to Abdur Rahim:

*'A marriage is valid though dower is not settled at the time and it is wrong to say that dower is a consideration proceeding from the husband for the contract of marriage. In reality it is an obligation imposed by Mohammedan law as a mark of respect for the wife.'*<sup>77</sup>

Thus, the notion in Islamic law is that where there is a marriage there is dower. It is a bridal gift. It is a token of respect to the wife.

The *Qur'an* ordains:

*'And give the women (on marriage) their dower as a free gift.'*<sup>78</sup>

The husband thinks twice before divorcing a wife when he knows that upon divorce the whole of the dower would be payable immediately. In pre-Islamic Arabia *Mahr* was known as *Sadaqa* and paid to the wife's father and could therefore be regarded as it tantamount to sale-price. But Islam insisted on payment to the wife. A provision

70 16(BLD) (AD) (1996) 61.

71 47 DLR (1995) 54.

72 51 DLR (AD) (1999) 172.

73 The Pita Matar Bharon Poshon Ain, 2013, s 3.

74 Section 4.

75 Section 5.

76 J Jamal Nasir, *The Status of Women under Islamic Law* (Graham & Trotman, London 1992) 43.

77 Abdur Rahim, *Muhammadan Jurisprudence* (Kausar Bros, Lahore, 1911) 334.

78 *Qur'an*: Sura Nissa, IVS. VS 4.

for the rainy days of the wife and socially it became a check on the capricious exercise by the husband of his almost unlimited power of divorce.

Mr. Justice Mahmood defines dower in the case of *Abdul Kadir v Salima* as:

*'Dower under the Muslim law is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage and even where no dower is expressly fixed or mentioned at the marriage ceremony, the law confers the right of dower upon the wife.'*<sup>79</sup>

The learned Judge however, clarified that he used the term consideration by way of simile and not in an identical or true sense. He proves his judgment beyond any reasonable doubt by expressing his understanding as:

*'The payment of dower is enjoined by law merely as a token of respect for its object (the women), wherefore the mention of it is not absolutely essential to the validity of a marriage, and for the same reason, a marriage is also valid, although the man was to engage in the contract on the special condition that there should be no dower.'*<sup>80</sup>

With regard to the mode of determining the amount, dower is divided into specified and unspecified or proper. Specified dower is also categorised into Prompt and Deferred. Deferred Dower becomes payable at the termination of dissolution of marriage either by death or divorce.

Prompt Dower may be considered a debt, always due and demandable and payable upon demand and the wife is under the Mohammedan law entitled to refuse herself to her husband until and unless the prompt dower is paid. Case: *Nuruddin Ahmed v Masuda Khanam*<sup>81</sup>

The legal position as regards the issue of dower remains the same in Bangladesh as it was after independence from Pakistan. It has been argued before that the division of dower into prompt and deferred creates anomalies and sometimes reduces the amount of dower if the husband can falsely prove that the prompt dower has been paid.<sup>82</sup> In the Pakistani period, the dowers, which were not specified, were regarded to be realized in full on demand under the *Muslim Family Laws Ordinance* of 1961.<sup>83</sup> This is still the law in Bangladesh.

79 *Abdul Kadir v Salima* (1886) 8 ALL 149.

80 *Ibid*, p. 149.

81 9 DLR (WP) (1957) p.8.

82 See details Dr Taslima Monsoor, *From Patriarchy to Gender Equity: Family Law and its Impact on Women in Bangladesh*. (University Press Limited, Dhaka 1999) 103.

83 See *Ibid*, p. 108.

Islamic law does not fix any maximum amount of dower, but makes it obligatory for the husband to pay whatever amount has been specified and whatever amount is assessed if not specified.<sup>84</sup> Fixing of excessive amounts of dower is being used in South Asia as a means to control and check the husband's unilateral and unlimited power of divorce, as he has to pay the full amount of dower at the time of divorce. But it also acts as a status matter, in which case there is no intention to pay the stipulated amount in full.<sup>85</sup>

We saw earlier that it was found in a study of the metropolitan city of Dhaka that 88% of Muslim wives did not receive any dower at all.<sup>86</sup> If this is the situation in the capital city, one can anticipate an alarming situation in the rural remote areas. Why are women not receiving their legal right of dower? To inquire into this one has to probe into the causes for not giving dower. Here the same causes for which the women in Bangladesh are being subordinated come in, as women are dominated in the patriarchal family and in the wider socio-religious arena. It was ascertained before that the women's right to dower is being enlarged or reduced by local customary conventions.<sup>87</sup>

A recent study has shown that the judiciary in Bangladesh has so far remained unsensitised about the economic importance of dower.<sup>88</sup> They seem to be unaware that the amount of dower is lessened in reality by showing an amount as *Ushool* (paid) in the marriage deed or *Kabinnama* without actually paying or paying less than the amount written. In a number of cases the courts placed heavy reliance on what is written in the marriage deed or *Kabinnama* even in disregard of any other evidences. No doubt the courts applied the 'best evidence' rules. But these judicial decisions resulted in either denial or reduction of dower to the Muslim wives for no fault of their own. In some other cases, after presuming some facts, the courts tended to reduce the amount of dower injudiciously, i.e., without giving any explanations<sup>89</sup>. The question here is, could the courts look into the social realities and give dower to the claimants? Should the court avoid its obligation to inquire into whether or not the dower had actually been paid or *Ushool*?<sup>90</sup>

84 Tahir Mahmood, *Muslim Personal Law: Role of the State in the Indian Subcontinent*. (All India Reporter, 2nd Ed. Nagpur 1983) 62; Paras Diwan, *Dowry and Protection to Married Women* (Deep & Deep Publications, New Delhi 1988) 42.

85 John L. Esposito, *Women in Muslim Family Law* (New York 1982) 24; David Pearl, *A Text Book on Muslim Law* (Croom Helm, 1st ed. London 1979) 59.

86 See Monsoor (1999), p. 4.

87 See Ibid, p. 103.

88 See Dr. Taslima Monsoor, 'Mahr/Dower- the Weapon for Empowerment of Women' (2000) 5 *Chittagong University Journal of Law* 104-122, at 114.

89 M Rouf V. A. T. M. Zahurul Haq Khan, unreported case of the Family Court (Assistant Judge), 1st Court, Dhaka (Family Suit No. 3 of 1992) is such a case.

90 Pitifully, there are some *Kabinnamas* where it is shown that the whole amount of prompt dower is *Ushool*, in which case, the women have nothing to claim as prompt dower and have to wait till dissolution of marriage to claim any amount of deferred dower.

The cases in Bangladesh on the issue of dower indicated that, on the one hand, there is evidence of growing support and protection of women by allowing the wives to have their right of dower. On the other hand, there are attempts to reduce the amount of dower by different customary conventions. However, dower does act as a bar for the husbands to refrain from divorcing their wives; evidence shows less cases of *Talaq* than *Khula*. This seems to indicate also that not many *Talaq* cases to court because men just *Talaq* their wives and the wives do not see any point in challenging this unfettered and unilateral right of their husbands. On the other hand, it might be that there are not more *Talaq* cases as the husbands refrain from giving divorce, thus forcing wives to go for judicial *Khul*. In that case the husband will not only be freed from the payment of deferred dower but also gets in return what he might have given to the wife during the marriage.<sup>91</sup> Even though this financial side of the husband's willingness for judicial *Khul* was clearly pointed out, it was never emphasized in Bangladesh. Moreover, dower also contributes to desertion, as husbands who cannot divorce their wives and pay for it just desert them. It must be emphasized in this context that desertion has become an acute problem in Bangladeshi society.

In dower cases, the payment is a legal obligation, whereas in social practice the question of payment arises only at the instance of divorce. For example, in *Khula* cases the right of dower is relinquished to end an undesired marriage. The fact remains that, in social reality women rarely get any portion of their dower unless the husband is adamant to give *Talaq*. Sometimes the social position of female litigants who are economically dependent influences the claim for dower as the last financial support. Thus, the theoretical right of women's potential power of demanding dower does not exist in practice. It was already mentioned earlier that in Dhaka itself 88% of the Muslim wives did not receive any dower. This is proof of the patriarchal arbitrariness of Bangladeshi society which regards women's claims to dower as challenging the existence of the patriarchal system itself, despite the fact that it is an Islamic obligation and the law of the land.

#### 4.5 ADR in Family Law and the Empowerment of Women:

Islamic law underpins the kindness and equity, love and affection, sympathy and consideration in the family between husband and wife. But the patriarchal dominance articulated the society as their whims and treated their wife as an instrument of enjoyment. They even used to give *Talaq* their wife without considering love and affection before the enactment of formal laws regarding arbitration system. In addition to this, Delay in the disposal of cases and limited access to formal justice for poor and disadvantaged become a common event.<sup>92</sup> To open the door of this dark and to provide a comparative advantage to women, the

91 Doreen Hinchcliffe, 'Divorce in Pakistan: Judicial Reform' (1968) Vol. 2, *Journal of Islamic and Comparative Law* 24.

92 J A Chowdhury, *ADR Theories and Practices: A Glimpse on Access to Justice and ADR in Bangladesh* (London College of Legal Studies (LCLS), Dhaka 2013.) 34.

MFLO 1961 provides the arbitration system which basically goes in favour of women as we see in case of *Talaq* and its sections 3,6,7,8,9 discuss the process of the resolution of family disputes. Because of the limitation<sup>93</sup> of system provided by MFLO 1961, the Family Court Ordinance 1985<sup>94</sup> was promulgated establishing family court having exclusive jurisdiction to exercise formal ADR system for all including Muslim. Though there are system of both formal and informal ADR in family dispute, women are most likely to negotiate for what they think they 'can' get and not for what they think they 'should' get.<sup>95</sup> This is because of impact of gender discrimination and male dominance in the society.

### 5. Concluding Analysis:

A study found that 90% of family suits are filed by women as plaintiffs. This is because, gendered problems within family matters mostly involve violations of some rights granted to women.<sup>96</sup> The debate about proper role of the judge in a society is a perennial debate and ubiquitous in all jurisdiction.<sup>97</sup> Bangladesh is not an exception and judicial activism in Bangladesh is still at a rudimentary stage.<sup>98</sup> Traditionally, our judiciary is less women friendly and judges think themselves not to cross line of the plain text of law. In addition to this, the adversarial nature of our legal system gives the judges limited scope to put their own interpretation to the existing law.<sup>99</sup> Analysis shows that court's decisions help—though in a slow process—change social realities. Court activity and involvement of sensitized judges may help to establish institutions like the court itself as a right platform to protect women from economic deprivations and violence.<sup>100</sup> Though the courts in our country have limited scope for judicial activism, recent decisions of our judiciary show a commitment of judicial minds towards the gender parity and empowerment of women.<sup>101</sup> The High Court Division (hereafter referred as HCD) of the Supreme Court (hereafter referred as SC) of Bangladesh in *Md. Sirajul Islam v Mst. Helena*

93 The arbitration system described in MFLO 1961 is only applicable to Muslim, the system is administered by local male leader and it is the out of court process, hence is not strictly applicable and beneficial to women.

94 Ordinance No. XVIII of 1985 was proclaimed on 24th March 1982 and came into effect on the 15th June 1985.

95 PE Bryan, 'Killing us Softly: Divorce Mediation and the Politics of Power' (1992) 40(2) *Buffalo Law Review* 441-523.

96 See details: Jamila A Chowdhury, 'Gender Justice in Bangladesh: A Time and Cost Impact to Resolve Family Disputes through Litigation vs. Court-connected Mediation' in (2012) 2(2) *Dhaka University Law Journal* 41-63.

97 Dr. Ridwanul Hoque, *Judicial Activism in Bangladesh: A golden Mean Approach* (Cambridge Scholar Publishing 2011) 1.

98 Shahdeen Malik, 'Civil Society and the Rule of Law: The Bangladesh Context' in Khan M R and M H Kabir (eds), *Civil Society and democracy in Bangladesh* (Academic Publisher, Dhaka) 102.

99 See details: Shaheen S. Ali, *Gender and Human Rights in Islamic and International Law*. (Kluwer Law International, The Hague, London and Boston, 2000) 140.

100 See details: Monsoor(2008) pp.140-142.

101 See details: *ibid* at p.140.

*Begum*<sup>102</sup> that court had jurisdiction to pass the decree for past maintenance and the Appellate Division (hereafter referred as AD) of the SC in *Jamila Khatun v Rustom Ali*<sup>103</sup> held that the wife is entitled to past maintenance even in the absence of any specific agreement by overruling the decision of HCD *Rustom Ali v in Jamila Khatun*.<sup>104</sup> The satisfactory approach of the higher judiciary in above cases creates the platform for the empowerment of women specifically for economic empowerment.

Revolutionary attempt of the HCD of the SC to uphold the divorced women's right to the post divorce maintenance in *Hefzur Rahman v Shamsun Nahar Begum*<sup>105</sup> shows Court's concern for the empowerment of women. The verdict of the HCD was that the person after divorcing his wife is bound to maintain her on a reasonable scale beyond the period of *Iddat* for an indefinite period, that is to say, till she loses the status of a divorce by remarrying another person.<sup>106</sup> However, AD overruled this decision of HCD in *Shamsun Nahar v Hefzur Rahman*<sup>107</sup> on the ground that in Muslim law there is no such obligation on the husband to maintain his divorced wife after the *Iddat* period. With due respect to the judgment of highest court it can be said that the verdict of the Appellate Division of Supreme Court confronts the Sharia law regarding post divorce maintenance hence ensuring empowerment of women. One of the most ancient but illustrious exegetes of the Qur'an Imam Abu Jafar Mohammad Jarir al-Tabari in, his feted exegesis candidly and boldly advocated the right of women to *Muta*.<sup>108</sup>

So, It can be concluded that *Muta'h* should be ruled the right of women as a part of empowerment herself and should be mandatory on husband to give the wife her due. The payment of *Mata'a* is the basement of Women Empowerment and surely an umbrella of her rainy days. Now the point of issue is, when Bangladeshi women will enjoy the *Mataa* as their right?

The Family Courts Ordinance also stipulated for the mediation through compromise and reconciliation under the supervision of Family Court.<sup>109</sup> Within a short period the mediation courts embraced an unexpected and commendable success. The

102 Bangladesh. (1996) Bangladesh Law Digest (BLD)). p.47.

103 Bangladesh (1990) Bangladesh Law Digest (BLD)). p.434.

104 Bangladesh. (1996) Bangladesh Law Digest (BLD)). No.16 (AD). p.61.

105 Bangladesh. (1995) *Dhaka Law Reports* (DLR). No.47. p.54.

106 For liberal interpretation, see: F. Rahman, 'Post-divorce Maintenance for Muslim Women in Pakistan and India' (1998) 2(1) *Bangladesh Journal of Law* 26-52. See also: R. Hoque and M. Khaled, 'Right to Post Divorce Maintenance in Muslim Law: The Shamsun Nahar Revisited' (1999) 4 *Chittagong University Journal of Law* 1-32.

107 Bangladesh. (1999) No. 59 AD Dhaka Law Reports (DLR) 172.

108 Mohammad Adam Sheikh, *Post Divorce Financial Support from the Islamic Perspective* (IIIT, 2012) 173.

109 The Family Courts Ordinance, 1985, ss1 0(3), 13(1), 23 .

average of substantive disposal by mediation has come up to 60% in comparison to court decrees.<sup>110</sup>

Outside the family matters, the Court is progressively upholding the rights and protection of women which is clearly seen as stepping stone towards the empowerment of women. In *Shamima Sultana v Bangladesh*<sup>111</sup> the HCD held, “in our day-to-day life, in order to forsake discrimination towards women in real and practical sense, a mere equal treatment would not do. The handicaps and drawbacks inherent in the life of a woman in our social context must be appreciated.” In *Jatiyo Mohila Ainjibi Samity v Bangladesh and other*<sup>112</sup> the HCD laid down guidelines which must be followed in educational institutions and work places to combat sexual harassment. In *Dalia Perveen v Bangladesh Biman*<sup>113</sup> and *Rabia BasriIrani v Bangladesh Biman*<sup>114</sup> the HCD held the gender discrimination inconsistent with the Constitution.

A major problem of the family law—both religious and statutory law—system in Bangladesh appears to be that it does not take into account the reality of the social conditions, particularly women’s concern about freedom from economic deprivation—either by incorporating them into various enactments or by giving the appropriate importance while interpreting the law in context.<sup>115</sup> The official personal law seems unambiguous to set its aim towards gender equity instead of absolute sexual equality. But the problems arise over abuses of this relative status system.<sup>116</sup> Women are not given their granted rights and status under personal law by the dominant patriarchal system. Women are deprived of their economic rights by the customs and conventions of the society that challenges their economic empowerment.

In Bangladesh, the laws and policies seem quite adequate theoretically in the sense until and unless they are fully implemented in practice we cannot attribute them inadequate. Laws and policies are not strongly enforced and are not taken care of due to the lack of gender-sensitive mindset of the dominant male portion of the society. The religion and the Constitution of Bangladesh evidently guarantee certain rights of women. But the patriarchal understanding of the law continues the supremacy of patriarchal attitudes.<sup>117</sup>

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110 K M J Hasan, ‘Mediation in the Family Courts: Bangladesh Experience’ (1-3 November 2012, New Delhi) *Unpublished Paper in the First South Asia Regional Judicial Colloquium on Access to Justice*.

111 Bangladesh. (2005) Dhaka Law Reports (DLR). No.57. p. 201

112 Bangladesh. (2007) Dhaka Law Reports (DLR). No.59. p.447

113 Bangladesh. (1998) Dhaka Law Reports (DLR). No.48. P.132

114 Bangladesh. (2002) Dhaka Law Reports (DLR). No.52. P.308

115 Taslima Monsoor, *Gender Equity and Economic Empowerment: Family Law and Women in Bangladesh* (Dhaka: British Council, EWLR. 2012) 13.

116 Ibid

117 See details: Mundial, B., *Bangladesh: Strategies for Enhancing the Role of Women in Economic Development* (World Bank, Washington DC, 1990) 79.



# **Gender Bias 'Preferential gift' is illegal: New interpretation**

**Dr. Muhammad Ekramul Haque\***

## **Introduction**

Gift or '*hiba*' under Islamic law is a form to dispose of one's own property during his lifetime. One of the main distinguishing points between 'gift' and 'will' is that a 'gift' becomes effective during the lifetime of the donor, while a 'will' becomes effective after the death of the testator. It is generally believed that unlike the power of making a 'will', the power to make a gift is unlimited. Thus, a person can make a gift of any amount of his property in favour of any person. The main rationale is that the ownership of a property extends to the complete liberty to dispose of the owned property by the owner at his will. The power of making 'will' is restricted by two conditions: no 'will' for more than one third of the total property of the testator and a 'will' cannot be made in favour of any heir of the testator. Thus, what a testator cannot do by way of a 'will', he can do that by making a 'gift'. For example, if a person wants to give more property to one of his children, then he can make a 'gift' of his property to that particular child. The gift that is made to give preference to one of his children is generally termed as a 'preferential gift'. A preferential gift can, inter alia, frustrate the scheme of the Islamic law of inheritance. For example, if a person wants to give his all property to his sons, which sometimes happens in patriarchal society, depriving his daughter/s completely (just because they are daughters and not sons), he can do that by making a 'gift' of his entire property to his sons during his lifetime. There is nothing in the existing Islamic law—which is now applicable in Bangladesh—that can prevent making such a preferential gift.

The objective of writing this article is to examine the relevant laws regarding the preferential gift. I will argue to change the existing law regarding preferential gift for Muslims in Bangladesh. It is submitted that an unlimited scope for making a preferential gift is in practice being used as a tool to deprive women systematically from their Quranic entitlements on the property by succession. This practice is clearly a controversial mechanism of economic oppression and injustice, which goes against the basic tenets of Islam.

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**Sharia or Hanafi law: which one is applicable in Bangladesh?**

The Shariat Application Act, 1937 says that certain matters of the Muslims will be regulated by the Shariat:

Notwithstanding any custom to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq ila, zihar, lian, khula and mubaraat, maintenance, dower guardianship, gifts trusts and trust properties, and waqfs (other than charities and charitable institutions and endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

Thus, a 'gift' can be made by a Muslim, which will be regulated by the sharia law. The Act did not further define the sharia law. However, the Courts in Bangladesh generally followed Hanafi law as the sharia law, as most of the Muslims in Bangladesh belong to Hanafi school. It is worth mentioning here that till now four schools of thought have become popular schools among Muslims: Hanafi, Shafi, Malikli and Hanabali. All four schools are considered as falling within the sharia. In the absence of a detailed code of law laid down either by the Quran or Hadith, the Islamic jurists developed the law or 'fiqh' by analyzing the two main sources: Quran and Hadith. In doing so, the jurists were divided into many thoughts of which the above four are the most prominent. Nowhere of the Act is it mentioned that Hanafi law has to be applied in Bangladesh. There is no final ruling of the higher Court as well on the point. Even the principle of adherence to any particular school of thought or madhab is also controversial. I would like to clarify one point here that there is nothing in Bangladeshi laws which could suggest that hanafi law should be applied here. The only statutory obligation is to apply the sharia law. Thus, if a particular rule that is found to be contradictory with Hanafi view but is in conformity with any other school of thought, that can be applied here as a sharia rule within the meaning of section 2 of the shariat Application Act of 1937. Even a rule that is not supported by any of the four schools of thought but has been found to be within sharia by way of *ijtihad*, that rule also can be applied as a sharia law in Bangladesh.

**What is a preferential gift?**

The term preferential gift means a gift that is made in order to give preference to some persons over the other or others with an ulterior motive. One of the objectives of making such a gift is to deprive someone which he or she could obtain under Islamic law of inheritance if such a gift had not been made. For example, Mr X has one son and one daughter. If he dies leaving his son and daughter then the son would get 2/3

and the daughter would get 1/3 of his entire property. Now, if he wants to change such proportion of distribution in order to give more property to his son or in order to give some particularly more valuable property or business to his son, then he can make a gift, under the existing Islamic law, of that property in favor of his son during his lifetime. In other words, this is a device to avoid sharia distribution of property according to the law of inheritance. In practice, usually such a preferential gift is made in favor of sons in Bangladesh in order to exclude the daughters to enjoy their rightful shares on their parental property. It is true that a Muslim person got the authority to donate his property during his lifetime at his sweet will. However, question arises when a clearly bad motive is found behind making a gift, that is, to deprive female heirs from getting their rightful shares from their parental property.

#### **Validity of 'preferential gift': general analysis**

It is submitted that the provision for making a preferential gift is given by Islamic law in order to ensure more justice, if required. For example, if one child is blind and the parents thought to give him a little bit more property so that he can run his life smoothly. In no case, a gift can be allowed in order to deprive some heir in a well calculated manner without any reasonable justification. It must not be used as an evading device to Islamic law of inheritance.

#### **Validity of preferential gift: an examination of juristic opinions**

Among the Imams, there are two prominent views on the point of validity of a preferential gift. Firstly, preferential gift is void. This is the view of Imam Ahmed, Ishaq, Ath-Thawri, Tawus and some followers of Imam Malik.<sup>1</sup> The second view is that a preferential gift is not void, though is detestable. The Hanafi, Shafi and Maliki are of this view.<sup>2</sup> It is worth mentioning here that even the second view does not support making a preferential gift. It terms it as 'detestable', though has not barred the execution of such a gift. Thus, no opinion provided full length of legality and correctness to a preferential gift.

#### **Preferential gift is void:**

This view mainly relied on a Hadith cited in Bukhari:

"Equate between your children in the giving. If I were to prefer any one, I would have preferred the women."<sup>3</sup>

Based on this Hadith, Imam Ahmed and others are of the opinion that '[i]t is not lawful for any person to prefer some of his children on another in the giving, to what is in it of a plantation of the hostility and severance for the relationship which Allah

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<sup>1</sup> Fiqhussunnah, 432.

<sup>2</sup> Ibid 433

<sup>3</sup> It was narrated by Ibn Abbas that the Prophet (sm) said it.

(The Exalted) ordered that it is tied.<sup>4</sup> Thus, a preferential gift which makes 'preference between the children is void and is an oppression, and revoking it is enjoined on its doer.'<sup>5</sup> It appears that apart from the Hadith cited above, they have mentioned two practical arguments in favour of their opinion: first, such a preference may implant the seed of hostility between the siblings, which can eventually lead towards the severance of the blood relationship which has been categorically ordered to maintain and keep tied. Secondly, this is a tool of oppression. It can be used as a means of oppression of some children, if it is treated as a valid gift.

There is another Hadith which does not support a preferential gift:

On the authority of Ash-Sha'bi, from An-Nu'man ben Bashir. He said: My father gave a giving. Ismail ben salem said from between the people: He gave his sona grant. He said: Then my mother Amra, the daughter of Rawaha said to him – Go to the Messenger of Allah (may the blessings and peace of Allah be upon him) and make him a witness. He came to the Holy Prophet (may the blessings and peace of Allah be upon him) and he mentioned that to him. He said: I granted my son An-Nu'man a grant, and Amra had asked me to make you a witness on that. He said: Do you have other than him? He said: Yes. He said: All of them, I gave them like of what I gave to An-Nu'man? He said: No. He said: Then some of those narrators said: This is oppression, and others said: This is a refuge. Let other than me testify on this. Al-Mughira said in his hadith: Does not it please you, that you have in the benevolence and tenderness equality? He said: Yes. He said: Then let other than me testify on this. And he mentioned Mujahid in his hadith: It is their right on you to be just amongst them, and you have a right due on them, to be filial to you.

It appears that the Prophet (sm) did not agree to be a witness in a transaction of a preferential gift. However, as the Prophet (sm) said to find out another witness other than him and as he did not declare it altogether void except not agreeing to be a witness, some scholars used this hadith in favour of validity of a preferential gift, which will be discussed in the following point. It is submitted that the refusal to be a witness clearly indicates that the Prophet(sm) did not approve the gift.

**Preferential gift is detestable, though not void:**

Majority of Imam believe that a preferential gift will be executed, though they termed it as detestable. This view mainly relied on the later Hadith cited above and general legal reasoning.

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<sup>4</sup> Fiqhussunnah, 433.

<sup>5</sup> Ibid 433.

**Validity of preferential gift: existing law in Bangladesh**

There is no statutory law in Bangladesh on the point of preferential gift. However, the courts assume that Hanafi law is the sharia law to be generally applied in Bangladesh. The present Bangladeshi law does not adhere to even Hanafi law completely on the point. Rather the Hanafi view is partly accepted and as such treats every preferential gift is as valid as a general gift without any restriction whatsoever. In the light of the analysis of sharia law on the point of preferential gift it appears that sharia law has been misconstrued in Bangladesh.

**Impact of treating preferential gift as valid in Bangladesh**

The eventual impact of considering a preferential gift as valid is that women are generally deprived of their rightful shares in their parents' property. There is a common practice in Bangladesh to make gifts of a significant portion of the property in favour of sons in order to deprive the daughters. There are many instances in this society where the 'men' (fathers) do not want their daughters to get the property after their death at the proportion of male:female=2:1. In order to ensure that their daughters are not getting half of their sons' shares, they make preferential gifts in favour of their sons during their lifetime. Thus, the device of preferential gift is used as a device to frustrate the scheme of Islamic law of inheritance. Eventually, women are being deprived from their proprietary entitlements through inheritance.

In most of the cases, daughters are generally adversely affected by preferential gift. In a patriarchal society, sometimes fathers become reluctant to give their 'business' to their daughters. Usually that is given only to sons to the exclusion of daughters by making a preferential gift. In the absence of such a preferential gift daughters could enjoy proportionate benefits of their fathers business by the application of the existing law of inheritance. Such a preferential gift is a barrier against women's economic empowerment. Thus, it is submitted that the practice of preferential gift is a tool of oppression to systemically deprive women from getting property from their parents, which they could get otherwise under the law of inheritance in the absence of such preferential gifts.

**Conclusion and recommendations:**

There are two findings about the sharia law on the point of validity of a preferential gift: One group considered it as void. The other group considered it 'detestable', although they treat it as effective. Thus, there is no opinion found in any madhab that says that a preferential gift is perfectly valid without any defect. Rather all schools of thought that considered a preferential gift as valid, they treat it as 'detestable' at the same time.

So, my finding is that it is an erroneous application of sharia law to treat a preferential gift as valid as a general gift without imposing at least some restrictions in order to prevent such a 'detestable' act to take place.

In conclusion, I would like to recommend adopting either of the two alternatives: first, the adoption of Hanabali view that bans a preferential gift. Thus, if it is found in any gift that that is not a mere gift, but that has a definite connection to law of inheritance and made with a motive deprive some heirs, then that gift should be declared as void treating it as an evading device to Islamic law inheritance.

The alternative recommendation is the adoption of reformulated Hanafi view that would make a preferential gift at least subject to a judicial scrutiny which will determine the validity of every preferential gift. Even if Hanafi is followed properly, then also a wholesale validity cannot be awarded to preferential gift. The policy of Hanafai law is that such a gift is detestable. Thus, the state can make a law in order to prevent a work that is identified by the Imams as detestable. It is submitted that the gifts made in favour of any heir can be made subject to judicial scrutiny so as to determine its reasonableness. Thus, the burden of proof will lie on the donor who has to justify the gift on the grounds of equity, justice and good conscience. If the second recommendation is taken, then the law should be made in way that will declare all preferential gifts as void except which are confirmed by the court as valid.

However, considering the serious patriarchal form of the Bangladeshi society, it is submitted that the adoption of the first proposal which will contain a provision declaring every preferential gift is void in line with Hanabali view is more appropriate. Such legislation would also be a step forward to protect women from deprivation of their rights by the patriarchal society.

# Gender Parity through Evaluative Mediation: Controlling Disparity under the Post-structural Notion of Power

Dr. Jamila Ahmed Chowdhury\*

## 1. INTRODUCTION

Although mediation, in its traditional form, traces its origin to the Confucian culture, mediation as practiced in contemporary world owes its origin to the American ADR movement of the 1970s, and in particular to the 1976 Pound Conference.<sup>1</sup> At that conference, Chief Justice Warren E. Burger explained society's dissatisfaction with litigation noting that it is "*too costly, too painful, too destructive, too inefficient for a truly civilised people.*"<sup>2</sup> Since then the practice of mediation has grown exponentially, with much hope being placed in the process as an efficient approach to resolvedisputes. Later, in 1983 Derek C. Bok, former President of Harvard University, re-emphasized the importance of non-adversarial dispute resolution by proclaimingthat "*society's greatest opportunities will lie in tapping the human inclinations toward collaboration and compromise rather than stirring our proclivities for competition and rivalry.*"<sup>3</sup> Following Bok's line, Justice Sandra of US Supreme Court further asserted her expectation on alternative methods of resolving disputes and noted that "*The courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried.*" Thus, the alternative and democratic nature of mediation was emergedas

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<sup>1</sup> Frank E Sander, 'Varieties of Dispute Processing' (1976) 70 *FRD* 111; Jeffrey W Stempel, 'Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?' (1996) 11 *Ohio State Journal on Dispute Resolution* 297.

<sup>2</sup> Warren Burger was the 15th Chief Justice of the United States from 1969 to 1986. He addressed at the Pound Conference on Causes of Dissatisfaction with Justice (1976), reprinted in Leo Levin and Russell Wheeler, (eds) *The Pound Conference: Perspectives on Justice in the Future*, (St Paul: Minnesota, West, 1979).

<sup>3</sup> Derek Bok, 'Law and Its Discontents, A Critical Look at Our Legal System' (1983) (Mar-Apr) *Bar Leader* 21, 28; see also Michael McIlwrath, 'Can Mediation Evolve into a Global Profession?' *International Mediation Institute* at <<https://imimediation.org/mediation-profession>>.

a process that had the capacity “to provide more creative, particularized, flexible and participative solutions to problems than the more traditional and adversary legal system could offer.”<sup>4</sup>

In the same line, mediation has already been acclaimed in Bangladesh for a low-cost and quick resolution of disputes as delay in the disposal of cases through contested trial, and consequent high cost of litigation result in limited access to formal justice to the poor. Of those interviewed in a survey conducted by the Transparency International, Bangladesh<sup>5</sup>, 53.9 per cent of plaintiffs/ defendants were uncertain about when their cases might be resolved. The ‘existing judicial system cannot ensure justice for the poor; many people in this country are never produced before the court because of their poverty and the loopholes in our judicial system’<sup>6</sup>. As women are one of the most vulnerable sections of our society, they have particular problems of access because of their reduced ability to bear the costs of justice<sup>7</sup>. Therefore, “the formal legal system has no attraction for the people [of Bangladesh] especially women”<sup>8</sup>. Because of delays in justice, the system affords those who are “economically stronger retain[ing] possession of the subject of the dispute over a longer period of time”, who are ‘least liable to injustice’ and denies the rights of those who are ‘most exposed to oppression’<sup>9</sup>. Though many protective legal provisions are theoretically available in different laws of the country, because of the high-cost and delay in litigation, women may not be able to access the benefits of such laws through litigation. As prudently observed by Rhode<sup>10</sup>, “[p]rocedural

<sup>4</sup> Carrie Menkel-Meadow, ‘Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities’ (1997) 38 *South Texas Law Review* 417; see also Carrie Menkel-Meadow, ‘The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms and Practices’ (1995) 11 *Negotiation Journal* 217, 223.

<sup>5</sup> Transparency International, *Corruption in South Asia: Insights and benchmarks from citizen feedback*, (Transparency International, 2002).

<sup>6</sup> Moudud Ahmed, ‘Mediation techniques: Alternative Dispute Resolution (ADR) in the civil justice delivery system in Bangladesh’. (The former Minister of Law Justice and Parliamentary Affairs, Bangladesh, was speaking as chief guest at the inaugural function of a division-level training workshop, a city hotel, 24 July, 2003).

<sup>7</sup> Sumaiya Khair, *Alternative approaches to justice: A review of ADR initiatives under the democracy partnership* (The Asia Foundation, 2001); see also, Nusrat Ameen, ‘Dispensing justice to the poor: The village court, arbitration council vis-a-vis NGO’ (2005) 16(2) *The Dhaka University Studies Part F* 103-22; see more, Asian Development Bank, ‘Bangladesh: Gender, Poverty and MGDs 2004’, *Asian Development Bank (ADB)*, <<http://www.adb.org/Documents/Reports/Country-Gender-Assessments/ban.asp>> accessed 15 February 2010.

<sup>8</sup> United Nations Development Programme (UNDP), *ADR practitioners’ guide* (Centre for Democracy and Governance, 1998).

<sup>9</sup> Willard Estey, ‘The changing role of the judiciary’ (1985) 59 *Law Institute Journal* 1072-76.

<sup>10</sup> Deborah Rhode, ‘Access to justice’ (2001) 69(5) *Fordham Law Review* (2000-01) 1785-1811.



*hurdles and burden of proof may prevent the have-nots from translating formal rights into legal judgment”.*

To improve this situation through reduced backlog and delay in courts, one alternative adopted by many developed and developing countries is the use of mediation that may provide a low-cost quick access to justice for women. Because it has the potential to provide a low-cost alternative means to access justice, family mediation has been popularized in the family courts of Bangladesh since 2000<sup>11</sup>. “Mediation has flourished in the country against the backdrop of a logjam of cases, leading to unacceptable delay and expenses in the adjudication of disputes and stagnation of civil litigation”<sup>12</sup>. The reform movement which started at the beginning of 2000 has made initial progress in developing mediation in a more methodical way in the family courts of Bangladesh thus mitigating backlogs of cases and getting enormous support from the legal community at large<sup>13</sup>. The former Chief Justice KM Hasan<sup>14</sup> observed:

Within this short period, the mediation course embraced an unexpected and commendable success. Average rate of substantive disposal by mediation has come up to 60 [per cent] in comparisons with contested decrees.

Despite such positive outcomes, mediation of family disputes is criticized and even opposed by many scholars on the grounds of gendered power disparity that may exist in a society<sup>15</sup>. Scholars who have an orientation towards Western style *facilitative mediation* identify such power disparity as a hindrance to women’s capacity to negotiate effectively in mediation and a barrier that may cause

<sup>11</sup> Though the provision of conducting mediation by family court judges was inserted in ss. 10 and 13 of the Family Courts Ordinance 1985, this provision was hardly used by the family court judges before policy makers took the initiative to popularise the use of mediation in the family courts in 2000.

<sup>12</sup> The former Chief Justice, ‘Mediation Techniques-Alternative Dispute Resolution in the Civil Justice Delivery System in Bangladesh’, (Workshop organized by the Legal and Judicial Capacity building Project (LJCBP) financed by world Bank, Chittagong, 17 July 2003).

<sup>13</sup> Chief Justice Mustafa Kamal, ‘Introducing ADR in Bangladesh: Practical model’ (Paper presented at the seminar on Alternative Dispute Resolution: In quest of a new dimension in civil justice system in Bangladesh, Dhaka, 31 October 2002); see also, K M Hasan, ‘Mediation in the Family Courts: Bangladesh experience’ (Paper presented at the first South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, 1-3 November 2002).

<sup>14</sup> Ibid.

<sup>15</sup> Diane Neumann, ‘How Mediation can Effectively Address the Male-female Power Imbalance in Divorce’ (1992) 9(3) *Mediation Quarterly* 227-39; see also, Joan Kelly, ‘Power Imbalance in Divorce and Interpersonal Mediation: Assessment and intervention’ (1995) 13(2) *Mediation Quarterly* 85-98; see more, Kathy Mack, ‘Alternative Dispute Resolution and Access to Justice for Women’ (1995) 17(1) *Adelaide Law Review* 123-46.

inequitable outcomes for them as a consequence<sup>16</sup>. However, this paper argues that the critiques of power in mediation are themselves culturally located and thus they may not all apply in the context of Bangladesh. The critiques of power in mediation by Western scholars are critiques of *facilitative mediation* whereas *evaluative mediation* is practiced in Bangladesh where 'law' plays a much more extensive role and forms the basis of mediators' interventions to manage power relations between the parties.

To address the issue of power in mediation, the first part of this paper delineates the notion of Foucault's post-structural theory of power, and explains how society may contribute to the creation and perpetuation of gendered power disparity over time. Then, using the gender theory of power, this paper outlines how gender and family violence may affect the negotiation capacity of women during mediation. However, in the middle of this paper, it is argued that a practice of evaluative mediation under the shadow of law and counseling from mediators, along with other enabling environments, may control power disparity during mediation and facilitate women to negotiate effectively in mediation. Although mediators may not be able to minimize the real power disparity in a society, they can at least control the effects of these factors in mediation, to ensure effective negotiation between parties. Further, empirical data gathered through observation of mediation sessions and interview of mediators is used to validate such theoretical proposition. The last section concludes the paper with a positive note that a practice of evaluative mediation under the shadow of law could ensure effective participation of women in mediation.

## 2. GENDERED POWER DISPARITY, FAMILY VIOLENCE AND MEDIATION

Power is sometimes defined as "*the ability to influence or control others*", or "*the possibility of imposing one's will upon the behavior of others*"<sup>17</sup>. But, from where such ability to influence or control others may arise? As observed by Haynes, power is the "*control of or access to emotional, economic and physical resources desired by the other party*"<sup>18</sup>. It is the "*ability to control recourses, or the access to recourses, that the other wants or needs*"<sup>19</sup>. Therefore, though different in their expressions, both of these definitions perceive power as the hold or control over resources desired by others. From these definitions, we may get an impression that power is always coercive or negative or that a person in power always deprive others from getting their desired resources if those other persons do not work to satisfy the

<sup>16</sup> Ibid.

<sup>17</sup> Albie Davis and Richard Salem, 'Dealing with Power Imbalances in the Mediation of Interpersonal Disputes' (1984) 6(4) *Mediation Quarterly* 17-26, 18.

<sup>18</sup> John Haynes and Stephanie Charlesworth, *The fundamentals of family mediation* (Federation Press, 1996).

<sup>19</sup> Scott Hughes, 'Elizabeth's Story: Exploring power imbalances in divorce mediation' (1995) 8(3) *Georgetown Journal of Legal Ethics*, 553-95.

will of a person in power. However, power should not always be negative; it could be positive as well<sup>20</sup>.

That power is not always negative can be understood if we consider both distributive and integrative approaches<sup>21</sup> of negotiation<sup>22</sup>. In a distributive approach, persons with power have a tendency to maximize their own share in a fixed entitlement by coarsely curtailing the share of their counterparts. In an integrative approach, on the other hand, a person may deploy his/her power positively, in a way that could benefit all<sup>23</sup>. Person in power may use it positively by offering something extra e.g. a reward or bonus to another person if the other person agrees on what a person in power wants them to do<sup>24</sup>. Scholars have claimed different factors, including education, income, employment, and association with others, the possession of which can make a person powerful<sup>25</sup>. Under this popular notion of power, as discussed in the following sub-section, women in Bangladesh are much deprived both in their family and their society.

## 2.1 Gendered power disparity and family violence in Bangladesh

This sub-section discussed about the nature and extent of gendered power disparity and family violence in Bangladesh. To understand the impact of such power disparity and family violence on women's capacity to get a fair outcome through mediation, sub-section 2.2 discusses about barriers that power disparity and violence may impose on women's effective negotiation capacity in mediation.

### a. Gendered power disparity

As discussed earlier, gendered power disparity still remain pervasive in Bangladesh. Most of these disparities arise from deep rooted social customs. For instance, because of the social custom, women are sometimes barred from working outside. Even when they do get involved in economic activities, they are employed as non-

<sup>20</sup> Hilary Astor, 'Some Contemporary Theories in Mediation: A primer for the puzzled practitioner' (2005) 16(1) *Australian Dispute Resolution Journal* 30-39; see also, Bernard Mayer, 'The Dynamics of Power in Mediation and Negotiation' (1987) 16(1) *Mediation Quarterly* 75-86; Kelly, above n 11; see more, Roger Fisher, 'Negotiating power' (1983) 27(2) *American Behavioral Scientist*, 149-66.

<sup>21</sup> Simultaneous use of both distributive and integrative approaches is common in mediation. Ibid, Mayer.

<sup>22</sup> As mediation is a form of controlled negotiation, power theories discussed in the context of negotiation will also be applicable to serve our purpose.

<sup>23</sup> Mayer, above n 20.

<sup>24</sup> Ibid.

<sup>25</sup> Penelope Bryan, 'Killing us Softly: Divorce mediation and the politics of power' (1992) 40(2) *Buffalo Law Review* 441-523; see also, Kelly, above n 15; see more, Rachael Field, 'Mediation and the Art of Power (Im)balancing' (1996) 12 *Queensland University Technology Law Journal* 264-73.

paid family workers or are employed in part-time activities<sup>26</sup>. Although a recent labour force survey by the Bangladesh Bureau of Statistics<sup>27</sup> indicates women are increasingly being engaged in the labour force, more women still have to work mostly as unpaid family workers (60.1 per cent) compared to their male counterparts (9.7 per cent) and the incidence of such unpaid female labour is remarkably higher in rural areas (71.8 per cent) compared to its incidence among urban women (22.3 per cent). Even when women are engaged in paid employment outside the home, most are employed in low-paid part-time work.

For example, wage data shows that in 2005, urban women employed in the ready-made garments sector earned 75.9 per cent of the earnings of their male counterparts. While as many as 25 per cent of male labourers earned more than Tk.5000 only 3.7 per cent of female workers reached that level. Twenty-six per cent of female workers earned less than Tk.3000 while none of the male workers earned such a low income in 2005. Women labourers receive a lower income in comparison with their male counterparts even for performing the same work. For example, for the same hours worked, female machine operators and female helpers in the readymade garments sector earned 71.3 per cent and 52.7 per cent respectively of the earnings of their male counterparts.

Women also face discriminatory attitudes from society in regard to education. Due to a government subsidy in female education, the net enrolment ratios of females exceeded that of males (109 female students enrolled per 100 male students) in primary and (71.35 female students per 100 male students) in secondary levels of education. The percentage of females in education decreases at higher levels of education where no such subsidy is available for women. Despite the remarkable change in women's educational attainments and consequent achievement of gender parity in education, one should not claim that in terms of education women have gained an equal position in the social mindset. According to a UNICEF study, parents of school-going girls responded that their daughters can learn only a little of their required roles and responsibilities through the school curriculum<sup>28</sup>. Even two decades earlier, parents were placing only a little value on education as a means to enhance their daughters' knowledge; rather, for most of them, education of their daughters is treated as a means of social status. This could be the reason why women's increased participation in education does not reflect their participation in labour force. However, as new generation is becoming parents, they might place a

<sup>26</sup> Jahanara Haq, *Empowerment of Women in Bangladesh: Nairobi to Beijing* (Women for Women, 1995); see also, S Hamid, *Why Women Count: Essays on women in development in Bangladesh* (The University Press Limited, 1996).

<sup>27</sup> Bangladesh Bureau of Statistics (BBS), *Population census 2001* (BBS 2007) 7, 9.

<sup>28</sup> A Husain, *Empowerment of Women* (1995) 97.....

higher value on education for their daughters, and therefore contribute towards women's participation in labour force.

Discriminatory social attitude towards women in terms of education and income continues for their role in household decision making. The role of women in household decision-making has special importance in our discussion of gender roles of women in Bangladesh, as a large majority of women in Bangladesh are housewives and do not work outside the home<sup>29</sup>. So, households are the major area where these women demonstrate their gender role and negotiation capability against their husbands — the parties with whom they have to negotiate during family mediation. Due to the gender role ideology mentioned above, generally women in Bangladesh are not welcome to contribute much in household decision-making<sup>30</sup>. For example, a study conducted by Jahan<sup>31</sup> on women in Bangladesh, two-thirds of whom were housewives, demonstrated that husbands make the decisions regarding all major household events, such as the purchase of assets and other valuables, the birth of children, schooling of children etc. Wives are consulted only in the case of the marriage of children and purchase of jewellery.

Another study conducted by Nasir<sup>32</sup>, on the role of lower middle class urban working women revealed that though the participation in household decision-making improves for working women, they only make decisions relating to day-to-day activities involving smaller financial involvement. In a sample of 30 women who were working in lower grade formal sector employment, 28 responded that though they make day-to-day household expenditures and also spend for some special occasions such as festivals by themselves; the major expenditure relating to household assets, such as purchase of property or valuables, are made by their husbands. Ironically, even though husbands consult with their male friends and colleagues or relatives while making purchase of such valuables, they never consult with their wives. Forced intrusion by wives may even jeopardise their marital relationship. Husbands sometimes leave their wives to decide on day-to-day expenditures as husbands find these daily affairs tedious and complex<sup>33</sup>. Regarding

<sup>29</sup> Sumaiya Khair, *Legal Empowerment for the Poor and the Disadvantaged: Strategies Achievements and Challenges: Experiences from Bangladesh* (CIDA 2008).

<sup>30</sup> Rasheda Nasir, 'Role and Status of Urban Working Women' (1991)8(1&2) *Social Science Review* 135-50; see also, Taslima Monsoor, *From Patriarchy to Gender Equity: Family law and its impact on women in Bangladesh* (The University Press Limited 1999); see more, S Akhter, 'Changing Role and Status of Working Women in Urban Bangladesh: A study of Dhaka city' (2000)17(1) *Social Science Review* 233-45; Ibid, Khair.

<sup>31</sup> Rowshan Jahan, *Hidden danger: Women and family violence in Bangladesh* (Women for Women, 1994).

<sup>32</sup> Nasir, above n 30.

<sup>33</sup> Jahan, above n 31; see also, Nasir, above n 30.

financial matters, women are sometimes used by their husbands as custodians or cashiers rather than as managers of their business.

**b. Family violence in Bangladesh**

Though it varies in nature and severity, family violence against women inside families exists as a global and deep-rooted social problem in developed and developing countries of the world<sup>34</sup>. Women in Bangladesh particularly face many types of family violence from their partners and in-laws. The violence may take the form of physical assault, sexual abuse, psychological or mental torture through forced social isolation, financial deprivation, or threats to inflict physical harm. Begum<sup>35</sup> showed in one of her experimental studies that mental or psychological violence faced by women in Bangladesh is more prevalent than the physical violence that may be inflicted on them. Women may also face sexual violence from their partners yet such violence is usually hidden from others because of the social stigma attached to it. For example, women in Bangladesh do not usually discuss the coerced sexual intercourse with their husbands that they must endure because of its personal nature. However, the occurrences of coerced intercourse may persist because today's society is still accepting of such actions<sup>36</sup>. In an experimental survey in Bangladesh, over half of the women respondents were of the view that husbands have a right to coerce their wives to have sexual relations<sup>37</sup>. Women living in extended families also face sexual harassment and sexual coercion from their male in-laws, especially when their husbands are absent from the house. Nevertheless, as society follows a victim-blaming strategy in the case of sexual harassment, women usually suppress these incidents to keep the reputation of their family, avoid mistrust from their husbands and other in-laws, and to remove any other stringent social sanctions that may follow such incidents<sup>38</sup>. It is about exploitation of the gender advantage and institutional power that results in the loss of dignity and self-esteem of the victim. It provides 'perpetrators the sordid opportunity to seek sexual

<sup>34</sup> Sanaiya Ansari, 'Violence against Women: Law, implementation and reform' in Waliur Rahman and M Shahabuddin (eds), *Judicial Training in the New Millennium: An anatomy of BILIA judicial training with difference* (Bangladesh Institute of Law and International Affairs (BILIA) 199-203.

<sup>35</sup> H Begum, 'Combating Domestic Violence through Changing Knowledge and Attitude of Males: An experimental study in three villages of Bangladesh' (2005)12(1) *Empowerment* 53-69.

<sup>36</sup> Abdullahel Hadi, 'Prevalence and Correlates of the Risk of Marital Sexual Violence in Bangladesh' (2000) 15 *Journal of Interpersonal Violence*, 787-805.

<sup>37</sup> Jahan, above n 31.

<sup>37</sup> Begum, above n 35.

<sup>38</sup> Sumaiya Khair, 'Understanding Sexual Harassment in Bangladesh: Dynamics of male control and female subordination' (1998) 9(1) *Journal of the Faculty of Law* 87-110; see also, Bangladesh National Women Lawyers' Association, *Violence against Women in Bangladesh 2004* (Bangladesh National Women Lawyers' Association (BNWLA) 2005).

gratification<sup>39</sup>. All this leads to the under-reporting of family violence in the country and the consequent lack of reliable statistical data.

For instance, in their 2004 report on violence against women, BNWLA included only 772 cases of family violence incidents were reported in different national daily newspapers during January to December 2004<sup>40</sup>. Such a small figure does not represent the true level of family violence faced by more than 38 million married women living in 25.5 million households of the country<sup>41</sup> where 50 per cent of the husbands think that to inflict physical assault on their wives is a normal event in their life<sup>42</sup>. This is because newspapers tend to cover only those issues where violence causes death or other grievous injuries to a victim. Because of the unreliability of newspaper-based reports, results from different quantitative and qualitative studies of family violence in Bangladesh are preferred in this paper as a more reliable account of the nature and extent of family violence in Bangladesh. Unlike newspaper reports, these studies have not covered all the regions of Bangladesh. Nevertheless, consistent results derived from different studies conducted in different regions of Bangladesh confirm a strong prevalence of family violence against women in the country<sup>43</sup>.

One of the most comprehensive surveys of family violence in Bangladesh was conducted by the International Centre for Diarrhoeal Disease Research, Bangladesh (ICDDR, B). Considering the responses of 3130 randomly selected samples from 42 rural and 39 urban clusters, this study looked at the physical and sexual family violence inflicted on urban women compared with their rural counterparts. The study tried to identify the usual perpetrators of such violence and the extent to which women were reporting such violence to others<sup>44</sup>. In that study, ICDDR, B found 1878 women, or 60 per cent of the respondents, were victims of physical or sexual violence at some point in their life.

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<sup>39</sup> Ibid, Khair.

<sup>40</sup> BNWLA, above n 38.

<sup>41</sup> Estimation has been made on the basis of 2001 data. In 2001, 63.2 per cent or 64 per cent of the total women were currently married. These married women are residing in 25.5 million households.

<sup>42</sup> Jahan, above n 31.

<sup>43</sup> Begum, above n 35; see also, United Nations Development Program (UNDP), *Human Security in Bangladesh: In search of justice and dignity* (United Nations Development Programme (UNDP) 2002); see more, Bangladesh Bureau of Statistics (BBS), *Statistical pocket book-2006* (Bangladesh Bureau of Statistics (BBS) 2006).

<sup>44</sup> Ibid, Begum; see also, Hadi, above n 32; see more, ICDDR,B, 'Domestic Violence against Women in Bangladesh' (2006) 4(2) *Health and Science Bulletin* 1-6.

<sup>45</sup> Ibid, ICDDR,B.

In another empirical study conducted among 150 married women from three villages in Bangladesh, 90 women (66 per cent) reported being battered women<sup>45</sup>. One government report on married women in *Dhaka* city also depicts a 60 per cent prevalence rate of battery or physical assault on women by their husbands<sup>46</sup>. Though small in size, a study by International Women's Rights Action Watch (IWRAP) on female hospital patients strengthens the validity of other research findings mentioned earlier. In a survey conducted on 79 women attending *Dhaka* Medical College Hospital, it was found that in 63 per cent of cases women faced physical violence inside their home<sup>47</sup>. As observed by Johnson<sup>48</sup>, non-random samples on women who came to law enforcement agencies, shelter homes and hospitals can better reveal the disproportionate rate of violence women face in their home compared with their male counterparts. Therefore, results of different empirical studies conducted on different rural and urban localities of Bangladesh using different methodologies, confirm that over 60 per cent of women in Bangladesh face physical violence in their family.

In addition to such physical violence, in their study, ICDDR, B found a 37 per cent and 50 per cent prevalence of sexual violence perpetrated by husbands in urban and rural areas respectively<sup>49</sup>. Another study conducted by Hadi<sup>50</sup> to measure the sexual coercion against women in Bangladesh confirms the existence of forced sexual intercourse against women in Bangladesh during their marital life. This study involved in-depth interviews of 500 women from 70 villages in 10 regions of Bangladesh. Since family violence is a sensitive issue which victim women may hesitate to discuss with others, female interviewers in this study stayed in study villages for more than two years to establish personal relationships with the respondents that permitted them to ask questions on the very personal nature of forced sexual intercourse<sup>51</sup>. Analysis of data compiled by Hadi<sup>52</sup> indicates that more than a quarter of the total respondents faced forced sexual intercourse from their husbands<sup>53</sup>. Since sexual abuse by husbands is seldom the subject of newspaper coverage, incidents of widely prevalent marital coercion in Bangladesh remain

<sup>45</sup> Begum, above n 35.

<sup>46</sup> Ibid.

<sup>47</sup> Naripokkho and Bangladesh Mahila Parishad, *Baseline Report Violence against Women in Bangladesh* (2006) International Women's Rights Action Watch (IWRAP) Asia Pacific, Kuala Lumpur <<http://www.iwraw-ap.org/aboutus/pdf/FPvaw.pdf>> accessed 10 November 2009.

<sup>48</sup> Michael Johnson, 'Patriarchal Terrorism and Common Couple Violence: Two forms of violence against women' (1995) 57(2) *Journal of Marriage and the Family* 283-94.

<sup>49</sup> ICDDR,B, above n 43; see also, Begum, above n 31; see more, Hadi, above n 36.

<sup>50</sup> Hadi, above n 36.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.



unnoticed in official statistics<sup>54</sup>. In Bangladesh, society considers sexual intercourse between husbands and wives as a private matter not to be interfered in by others<sup>55</sup>. Marital coercion, or coerced sexual intercourse by a husband is not considered as an offence either in the *Penal Code 1860* (Act No. XLV of 1860) or in any other subsequent laws of Bangladesh, unless the coerced wife is aged below 12 years<sup>56</sup>. This implies social acceptance of marital coercion in the country<sup>57</sup>. In a study conducted by Nahar et al.<sup>58</sup>, based on data collected from hospital patients, it has been demonstrated that more than 60 per cent of the women are suffering from different psychological problems caused through mental torture from their husbands. Many of them were also victims of sexual coercion in their marital life.

## **2.2 Impact of power disparity and family violence on women's capacity to negotiate during mediation:**

As discussed above in part a, society values women's stake in education, employment, and decision making as subordinate to men. Not only that, society usually treat women as more dependable, less demanding, more sober and compromising towards their male counterparts. This sub-section discussed the impact of such discrimination at societal level may have an impact on women's capacity to negotiate effectively during mediation.

### **a. Impact of gender role ideology**

It is observed that women who usually get a lower return from the society also demonstrate lower reward expectation when they attend mediation. Consequently, women tend to acquire only a lower distributive share in mediated outcome<sup>59</sup>. Generally women are most likely to negotiate for what they think they can get and not for what they think they should get<sup>60</sup>. 'Since not everybody has [equal] ability [to negotiate] it is seen as a danger of [mediation] that the capacity to articulate oneself restricts the application of this method to specific social classes'<sup>61</sup>. So, the 'traditional sex role ideology'<sup>62</sup> in a society leads women usually to expect the

<sup>54</sup> Jahan, above n 31.

<sup>55</sup> BNWLA, above n 38.

<sup>56</sup> Ameen, above n 7.

<sup>57</sup> BNWLA, above n 38.

<sup>58</sup> Cited in Begum, above n 35.

<sup>59</sup> Bryan, above n 25.

<sup>60</sup> Ibid.

<sup>61</sup> Heike Stintzing, *Mediation- a Necessary Element in Family Dispute Resolution? A comparative study of the Australian model of alternative dispute resolution for family disputes and the situation in German law* (Peter Lang, 1994).

<sup>62</sup> Traditional sex role ideology anticipates a very different marital relationship (from modern or egalitarian sex role ideology): a spousal partnership exists, but equality and role interchange ability do not. Traditional sex role ideology depicts husbands as competent, assertive, and rightfully dominant, and wives as emotive, nurturing, passive, and rightfully submissive. The

minimal returns and so they end up with a lower share of the negotiated outcome. When a woman formulates her expectation, she generally compares what another woman might earn in a similar situation, not what another man might earn in a like situation. Since men usually earn more than women for the performance of identical tasks, the expectation of a woman is usually lower than the expectation of a man in a similar situation<sup>63</sup>. Besides lower reward expectation, society has an influence in formulating the 'lower self-esteem' of women which may hinder their confidence in negotiation<sup>64</sup>. Because of this gender role socialization, women generally have lower social status, 'lower reward expectation'<sup>65</sup>, and 'lower self-esteem'<sup>66</sup>, which all work together to make women less efficient as negotiators<sup>67</sup>. These factors result from gender role socialization which attributes men as a creator of their own fate, while explaining the success of women as an outcome of their good luck rather than of their own action. This ultimately creates gender role ideology in the society<sup>68</sup>.

Gender role negatively affects women's capacity to negotiate even women who have higher incomes and better occupational status than their male counterpart in negotiation<sup>69</sup>. Research data show that in small mixed-sex groups, women with higher status and power may fail to use their competitive or superior bargaining capacity against males. Results from such studies are relevant to mediation because mediation also forms small groups where, with the presence of an unbiased mediator, parties negotiate with each other to settle for an outcome. Women who, due to their higher status, have the potential to exert dominance are deterred from doing so in mixed-sex decision-making groups<sup>70</sup>. To test the impact of gender and

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public domain becomes the husband's proper sphere of action, while the private family domain remains the wife's. Egalitarian sex role ideology contemplates and equal partnership between spouses: a sharing of roles and equal power in marital decision making'; Bryan, above n 25, 465.

<sup>63</sup> Ibid.

<sup>64</sup> Kelly, above n 15.

<sup>65</sup> Lower reward expectation tends to acquire only a lower distribution share in an outcome; Bryan, above n 25. In the case of reward expectation, women show lower expectations than their male counterpart.

<sup>66</sup> Self-esteem is the internalised image of oneself; how powerful one feels; Neumann, above n 15, 229. 'An individual's self-esteem comes from: (1) self-efficacy, the belief that one's own actions cause one's success in the world and, (2) internalisation of other's reflection regarding one's effectiveness and worth'; Bryan, above n 25, 472.

<sup>67</sup> Ibid; see also, Neumann, above n 15; see more, Field, above n 25, 264-73.

<sup>68</sup> Bryan, above n 25.

<sup>69</sup> Linda V Nyquist and Janet T. Spencer, 'Effects of Dispositional Dominance and Sex role Expectations on Leadership Behaviours, (1986) *Journal of Personality and Social Psychology* 50, 87-93.

<sup>70</sup> Bryan, above n 29.

power on capacity to negotiate, Nyquist and Spence's study<sup>71</sup> tied one high-dominant person with another low-dominant person and let them work on a gender neutral task.

In same sex groups, in 73 per cent of cases the person with higher dominance took up the leadership. But for mixed-sex groups, the result varied considerably depending on the sex identity of the dominant person in the groups. For mixed sex groups in which the dominant person was a male, in 93 per cent cases the high-dominant person assumed the leadership. But in the cases of mixed-sex groups where the dominant person was a female, in only 35 per cent cases did the dominant female assume leadership. The result from the mixed sex group with dominant women indicates that, for as much as 65 per cent of women, gender role expectation dominates their other means of exerting power. Therefore, when women with more income, education, and occupational status are compared with their male counterparts, they may fail to attain a better outcome through negotiation. Bryan<sup>72</sup> has given some explanation of why women with higher status fail to be the leader in mixed sex groups. She explained this situation by using the notion of traditional sex-role ideology. Adherence of women to traditional sex-role ideology persuades them to adopt socially acceptable submissive behaviour towards their male counterparts during mediation. This type of submissive behaviour in women has even more relevance to family mediation because research data shows that women face more difficulty negotiating with their husband than with other male persons<sup>73</sup> more explicitly adopted a similar view while resolving the contradiction between the status and dominance of women. According to Watson<sup>74</sup>, gender differences in negotiation may exist, but it is not because of the innate personality factors of women, rather it is due to the context of the lives within which they have to negotiate i.e. their work, family, class, culture, etc.

#### ***b. Impact of family violence***

It is argued that a history of family violence may exacerbate this socially created power disparity and causes an even stronger power disparity between a perpetrator husband and his victimised wife that hinders wives from negotiating effectively in mediation. Victim women may be too fearful to sit in the same mediation table and negotiate with their perpetrator husband. However, the impact of violence may be different depending on the nature of violence. For instance, in case of male controlling interactive violence or separation-engendered violence the impact may

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<sup>71</sup> Nyquist and Spence, above n 69.

<sup>72</sup> Bryan, above n 25.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

cease after separation or in course of time<sup>75</sup>. These violent events are not marked by control; however, they may generate fear and distrust in the mind of a separating wife and vice versa<sup>76</sup>. Therefore, mediation may continue if fear can be effectively controlled through proper counselling of victim women and sharing of different social and legal stands against violence.

On the other hand, in the case of persistent family violence, the impact of such disparity may be so prevalent over target women that effective mediation may not be possible<sup>77</sup>. As argued by many scholars, the objective of a perpetrator husband is to establish control over the activities and comments of his target, either by physical assault or by threats of violence<sup>78</sup>. If a husband becomes successful in establishing such control, the wife may try to placate him by restraining herself from doing or saying anything that might provoke her husband into inflicting further violence. Control established by a husband over his wife has special significance on the effectiveness of mediation because in mediation, women have to negotiate with their husbands, but a victim woman marked by control may not dare to negotiate with her perpetrator husband<sup>79</sup>. Therefore, it is claimed that family violence, in most of the cases, may restrict a target woman for negotiating effectively during mediation. It is also argued that when perpetrators successfully establish control over their targets, it is almost impossible for the targets to escape such control and, therefore, to successfully negotiate with their perpetrators during mediation<sup>80</sup>. The problem escalates when persistent assaults on targets lead them to follow some 'self-censorship' of actions that could otherwise antagonize the perpetrators to initiate another assault. By habitually modifying their behaviors to placate the perpetrators, victims are unlikely to make any challenge to the proposals made by the perpetrators during mediation, even when the husband is not explicitly trying to intimidate his wife<sup>81</sup>. Though it might not always be the case, if such a condition arises, it would

<sup>75</sup> Janet Johnston, 'Domestic Violence and Parent-child Relationships in Families Disputing Custody' (1995) 19(1) *Australian Journal of Family Law* 12-25.

<sup>76</sup> Ibid.

<sup>77</sup> Andree Gagnon, 'Ending Mandatory Divorce Mediation for Battered Women' (1992) 15 *Harvard Women's Law Journal* 272-94; see also, Hilary Astor and Christine M. Chinkin, *Dispute Resolution in Australia* (2<sup>nd</sup> edn, Butterworths, 2002); Field, above n 25, 264-73.

<sup>78</sup> see more, Johnson, above n 48.

<sup>79</sup> Astor and Chinki, above n 77.

<sup>80</sup> Barbara Hart, 'Gentle Jeopardy: The further endangerment of battered women and children in custody Mediation' (1990) 7(4) *Mediation Quarterly* 317-30; see also, Astor and Chinkin, above n 77.

<sup>81</sup> Harry Fisher, 'Judicial Mediation: How it works through pre-trial conference' (1993) 10(4) *The University of Chicago Law Review* 453-65; see also, Felicity Kaganas and Christine Piper, 'Domestic Violence and Divorce Mediation' (1994) 16(3) *Journal of Social Welfare and Family Law* 265-78; see more, Hilary Astor, 'Swimming against the Tide: Keeping violent

be difficult for a mediator to ensure fair outcomes through mediation because the victim women seem to be voluntarily sacrificing their rights in mediation.

### 3. CONTROLLING POWER DISPARITY IN MEDIATION: A POST-STRUCTURAL APPROACH

#### 3.1 Post-structural notion of power

As discussed in section 2.2 above possession of different factors like education and income may not always explain power. Moreover, though under population notion power is sometimes discussed as the position of different factors that may influence other's will positively or negatively, this traditional theory of power cannot explain why possession of different factors may vary among people in a society or what is the root cause for disparity to arise in a society cannot be explained by these theories of power. A good explanation of such disparity can be found in post-structural theory. As is perceived by the post-structural theory, power is not something that can be possessed by any person. It is rather a social construct that flows with social discourse and other cultural practices of a society<sup>82</sup>. "*Stories and 'truths' are inevitably framed by dominant cultural discourses that specify what is normal and what can or cannot be talked about, by whom and in what contexts*"<sup>83</sup>.

For example, a husband who does not want her wife to share about family violence with others may not need to persuade or coerce his wife in this regard. Battered women may remain silent by themselves, if in a society disclosure of such violence is considered as a shameful event for women. Therefore, power remains in social discourses. It is not a commodity and so we cannot measure it<sup>84</sup>. When people try to legitimize their own position, they try to do so by using the power of dominant narratives of a society<sup>85</sup>. Therefore, the dominant group of a society may use such social discourses or narratives to legitimize their dominant position and overpower other marginalized voices in the society. Pro-male discourses can also create long run disparity in the possession of income, education, and other resources by male and female.

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men out of mediation' in Julie Stubbs (ed) *Women, Male Violence and the Law* (Institute of Criminology, 1994) 147-73.

<sup>82</sup> Astor, above n 20; see also, Dale Bagshaw, 'Language, Power and Mediation' (2003) 14(2) *Australian Dispute Resolution Journal* 130-41.

<sup>83</sup> Ibid, Bagshaw.

<sup>84</sup> Michael Foucault, *The Archaeology of Knowledge and the Discourse on Language*, A M S Smith, (trans.) (Routledge Classics, 1989); see also, Astor, above n 20; see more, Bernard Mayer, *The Dynamics of Conflict Resolution* (Jossey-Bass, 2000).

<sup>85</sup> Colin Gordon(ed), *Power/Knowledge: Selected interviews and other writings 1972-1977* (The Harvester Press Limited, 1980).

Social discourse that undermines women's equal participation in education and income has already been discussed in section 2.1. Therefore, using the post-structural notion of power mentioned above we would be able to explain why males in our society become more resourceful comparing to female in terms of higher education, better employment and higher income. In short, men become more educated, hold better employment, and participate more in decision making because society place more importance on male education, employment, and participation than female. Although a male negotiator (husband in family mediation) can exploit these extra resources to get most out of mediation, post-structural notion of power opens up a possibility that a mediator can manage such power play in mediation.

### 3.2 Controlling power disparity in mediation

#### *a. Application of evaluative mediation rather than facilitative mediation*

Mediation under a post-structuralist view allows for consideration of the context of the dispute and enables a mediator to challenge the dominant discourses that may contribute to the power disparity between parties in mediation<sup>86</sup>. However, to apply post-structural notion of power, a mediator need to abandon the traditional view of facilitative mediation where mediators maintains strict neutrality in facilitating negotiation between parties. A mere procedural equality in mediation, as suggested by the proponents of facilitative mediation may not ensure effective participation of women in mediation, when widespread gender disparity in the society places women in a much subjugated position. One of the clearest presentations of this argument is in the work of Astor who elegantly argued that 'the consequence of treating unequal parties with equality is inequality'<sup>87</sup>.

In a related vein, Bagshaw<sup>88</sup> has advocated mediators not to define their role as 'neutral'. Rather, that they should see their role to challenge the dominant discourse that may subjugate the voice of indigenous people, women, or children in mediation whenever possible. Cobb and Rifkin<sup>89</sup> also emphasised that the 'traditional notion of

<sup>86</sup> However, a mediator should not assume power disparity between parties at the inception of mediation by looking at their outlooks only see Davis and Salem, above n.17. Power of a person in family mediation may arise simply from her/his sense of entitlement while others may not be able to negotiate effectively even if they bring substantial amount income, education or self-esteem in mediation; Astor, above n 20. Therefore, '[i]throughout the mediation process, mediators must observe how power is asserted; note whether and how the assertion tilts the participatory and negotiating power of the parties' Kelly, above n 88.

<sup>87</sup> Astor, above n 20, 147-73, 153.

<sup>88</sup> Dale Bagshaw, 'The three M's-Mediation, Postmodernism, and the New Millennium' (2001) 18(3) *Mediation Quarterly* 205-28.

<sup>89</sup> Sara Cobb and Janet Rifkin, 'Practice and Paradox: Deconstructing neutrality in mediation' (1991) 16(1) *Law & Social Inquiry* 35-62.

neutrality' in mediation may uphold power imbalance and result in 'unjust agreements'. Depicting an empirical study, they further affirmed that mediators can ensure fair justice through mediation by actively participating in the formation of issues and settlement of disputes. Cobb and Rifkin<sup>90</sup> describe a form of neutrality that allows mediators to use their procedural power not only to assist parties in telling their stories positively but also to take part in 'discursive formation' that protects the voice of parties with marginalised discourse in mediation. Therefore, mediators may practice evaluative mediation and take part in framing the content of disputes but such intervention is not possible if the mediators stick to the literal meaning of neutrality.

Family mediators in Bangladesh commonly use their procedural power and power of law, i.e. prerogative power, to intervene into the content of a dispute and challenge dominant discourses of husbands during mediation. Recalling the notion of post-structural power, we can say that power is created by dominant social discourses. However, power created through social discourses does not remain constant. *'Power is always a definite form of momentary and constantly reproduced encounters among a definite number of individuals'*<sup>91</sup>. Therefore, following the result of such encounters, there is always a possibility for change in existing power relations between parties. The mechanism of a *'change in power through knowledge'* is what Foucault<sup>92</sup> termed as *'Genealogy'*:

[A] genealogy should be seen as a kind of attempt to emancipate historical knowledge from that subjection, to render them, that is, capable of opposition and of struggle against the coercion of a theoretical, unitary, formal, and scientific discourse. It is based on a reactivation of local knowledge of minor knowledge, ....'genealogy' would be the tactics whereby, on the basis of the descriptions of these local discursivities, the subjected knowledge which were thus released would be brought into play.

As observed by Bagshaw<sup>93</sup>, *"stories and 'truths' are inevitably framed by dominant cultural discourses that specify what is normal and what can or cannot be talked about, by whom and in what contexts"*. Therefore, there is a possibility that mediators may use an alternative pro-women discourse to challenge the power of male biased social discourses and attain power parity in mediation, even though gendered power disparity exists in wider social context.

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<sup>90</sup> Ibid.

<sup>91</sup> Gordon (ed), above n 85, 87.

<sup>92</sup> Ibid, 85.

<sup>93</sup> Bagshaw, above n 82.

***b. Challenging dominant social discourses under the shadow of law***

The post-structuralist approach opens up the possibility that a mediator who knows local culture can contribute to shape a coherent story in mediation by considering the marginalised discourse of women that would not be heard otherwise. Mediators can also use the gender equalising or in some case pro-women legal discourses to challenge dominant discourses that would otherwise marginalise women's position in mediation. As an example of how a mediator might use his/her evaluation to minimise power disparity in mediation, in one out-of court mediation observed in *Dhaka* district, a husband was making an unreasonable demand that his wife remain at home, even though he was not able to provide her wife with necessities including her regular maintenance. As the husband said:

**Husband:** (to the mediator) *I am her husband; she has to comply with all my orders. I told her not to do work outside without my permission.*

**Wife:** (to the mediator) *I have to work because my husband remain absent from home for long time and does not provide any maintenance. I do not have any other means to feed my children but to go outside for work.*

**Mediator:** (to husband) *You cannot forbid your wife to work outside without providing for her maintenance. You are legally bound to maintain your wife and your children. If you do not provide her maintenance, you cannot expect that she will comply with your words. Moreover, your wife has also right to work. You cannot solely decide on it obstructing her to do work outside. Though people sometimes believe that women have to comply with all orders of husbands irrespective of its legitimacy or they should not work without the consent of her husband, legally, you cannot restrict her movement limiting her right to work outside and stop maintaining your family.*

In one of the in-court mediation sessions, for example, it was observed that the mediator made his evaluation on the content of the dispute when a husband urged his wife to live with her in-laws without showing any reasonable grounds against his claim.

**Mediator:** (to the wife) What is your discontent with your husband?

**Wife:** He (my husband) told me not to come to *Dhaka* (the capital city where the husband resides) and instead live in the village with my in-laws. But, there are so many problems in rural areas. There is no pure water, no electricity.



- Mediator** Where have you (wife) grown up?
- Wife:** I have grown-up in *Dhaka* city but my husband says after marriage, women should live with their in-laws; so should I.
- Mediator** (asked to the husband) What is your problem if she lives in *Dhaka*?
- Husband:** It is expected that a wife should live with their in-laws after marriage. My mother lives there alone.
- Mediator** That would be fine if you live with your wife in the village. But, you are working in the city and earning a handsome salary, why don't you bring your mother to *Dhaka*? As she born and brought up at *Dhaka*, she might face many problems in rural areas where there are little amenities.

In this fashion, mediators try to challenge dominant discourses and surface the marginalized voice of women in mediation. They challenge the dominant discourses to manage the power play where it may subdue the expression of marginalized discourses in mediation<sup>94</sup>. Without such intervention, there is a possibility that the discourse of a less empowered party will not be in play and that the dominant discourse will remain unchallenged.

Therefore, following the Foucault theory of power, by using the laws protecting women's rights in the country and the applying evaluative mediation processes under a shadow of law, can enhance the possibility that mediation will uphold the voice of women and assist them to get fair outcomes through mediation despite the existence of gender power disparity in the society. The extent to which such fair outcomes are actually attained by women in mediation is discussed in the next section.

### *c. Creating enabling environment to deal with violence*

Though contemporary literature argues that female victims of family violence are, in most of the cases, not capable of negotiating effectively in mediation, a different picture has been observed through observation of in-court and out-of-court mediation sessions and semi-structured interviews of mediators in Bangladesh. As mentioned earlier, in 13 of the 18 mediation sessions observed, women raised the issue of violence in mediation by themselves. In two other instances women admitted violence when asked by the mediators. Moreover, an active support from a mediator may help women to overcome their hesitation and share the issue of

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<sup>94</sup> Bagshaw, above n 88.

violence in mediation. For example, in one in-court mediation observed at Narayanganj family court, a wife asked for a divorce:

**Wife:** (to the mediator) *My husband always tortured me at home.  
(Express past violence in mediation)*

**Husband:** (to the mediator) *You please ask my neighbours whether they  
have ever seen me to physically abuse my wife.*

**Mediator:** *Violence may be mental as well. Nevertheless, how your  
neighbours would know what you do inside your home, if she  
does not inform others? May be she did not shared out of her  
shyness and social shame (Surfacing the marginalised  
discourse of women that family violence may not be shared  
with others; also Interpreting the situation for women and  
rejecting the legitimacy of the claim made by the husband).*

Further, counselling from their parents and relatives during separation helps women to get relief from the traumatic experience of past family violence. During the observation of mediation sessions in this study, in 13 out of 18 mediation cases, women voluntarily revealed past violence to mediators. For example, in a family mediation observed in the family court of Dhaka district:

**Mediator:** (to wife) *So, you complained that your husband beat you  
several times.*

**Wife:** *Yes, he wanted me to sell my inherited land and my jewellery  
for giving him as capital of business. But as I did not agree on  
it, he beat me.*

**Mediator:** (to husband) *So, you asked dowry.*

**Husband:** *I never asked dowry from her.*

**Mediator:** (to husband) *Dowry is not what you might get during your  
marriage or from the family of the bride, if you push your wife  
to provide any of her valuables including her jewellery without  
her consent that will also constitute dowry.*

In Bangladesh, women's awareness about the existence of stringent laws against violence works as a source of courage during mediation. While mediating abusive

couples, Marthaler<sup>95</sup> observed that *"it is important to follow procedures that encourage and allow the legal consequences of abuse to follow their normal course"*. *"Strict adherences to the view that past abuse has its consequence and future abuse will not be tolerated"* can change the behaviour of couples regarding violence<sup>96</sup>. Therefore, it seems that existence of stringent laws to protect women from family violence and access of such legal remedies makes them more courageous to raise their voice against their perpetrator husbands in mediation.

#### 4. CONCLUSION

Earlier discussion suggests that two variations of gendered power are at play in family mediation in Bangladesh. One is the power generated through dominant social discourses which usually favour men over women. This power is demonstrated in the voice of male participants in mediation. The other discourse which is at play and can be used to empower women is the discourse of law. This in many ways is a competing discourse because it can be used to challenge the dominant social discourse and uphold women's rights in mediation. As has been observed in Bangladesh during mediation sessions, mediators exercise continual surveillance, not only to maintain a process that ensures equal participation for both male and female but also to challenge discourses that run the risk of subjugating a woman's position in mediation. Such a continual surveillance to challenge dominant discourses is what Foucault<sup>97</sup> describes as:

genealogy [or] a kind of attempt to emancipate historical knowledge from that subjection, to render them, that is, capable of opposition and of struggle against the coercion of a theoretical, unitary, formal, and scientific discourse.

Mediation, under post-structural view, therefore, has the potential to consider the context of a dispute and challenge the power disparity between parties in that context. Though a mediator cannot influence or change the social outlook outside the mediation, he/she can effectively manage the power play during mediation. As mentioned earlier, many scholars from Western democratic countries oppose the view that mediators may challenge discourse and prefer a neutral role for mediators. If we transport this Western knowledge to the east, without considering the diversity

<sup>95</sup> Dennis Marthaler, 'Successful Mediation with Abusive Couples' (1989) 23 *Mediation Quarterly* 53-66.

<sup>96</sup> Ibid.

<sup>97</sup> Jay Folberg and Alison Taylor, *Mediation: A comprehensive guide to resolving conflicts without litigation* (Jossey-Bass, 1984).

of context, we may fall into error. Culturally located knowledge about mediation may not be applicable to the eastern societies with different cultural practices, values, and power structures in them<sup>98</sup>. For example, Western mediators most of the time use facilitative mediation and practice 'neutrality' and support party control in mediation. However, such neutrality may result in an agreement that reaffirms the existing power disparity in the society<sup>99</sup> rather than minimising it. Further, facilitative mediation may not ensure justice when widespread gender disparity in the society places women in a much subjugated position in mediation. It is not facilitative mediation, but evaluative mediation under the shadow of law that is generally practised in Bangladesh. Besides informing women about their legal rights, such evaluative mediation may challenge the dominant social discourses and uphold gender equalising legal discourses in mediation. Therefore, the practice of evaluative mediation acts as an effective tool to manage power disparity and ensure better participation of women in mediation.

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<sup>98</sup> Bagshaw, above n 88, 205-28.

<sup>99</sup> Luis Pinzon, 'The Production of Power and Knowledge in Mediation' (1996) 14(1) *Mediation Quarterly* 3-20.

# **The Law on Domestic Violence in Bangladesh: A Comparison with laws of India and Pakistan**

**Taslima Yasmin\***

## **1. Introduction:**

As a signatory to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>1</sup> and having endorsed the Beijing Declaration and Platform for Action, the Government of Bangladesh is committed to the international obligation of implementing effective measures to overcome all forms of gender-based violence, whether occurring in public or private life.<sup>2</sup> Apart from its international obligation, protection of women and children from discrimination and violence is also envisaged in the broader constitutional framework of Bangladesh.<sup>3</sup> Bangladesh has also signed and ratified the Convention on Rights of the Child (CRC)<sup>4</sup> and thereby has taken upon the positive obligation to ensure protection of children against discrimination as well as to uphold best interest of the child in all its actions and policies.<sup>5</sup> Mandated by this international and constitutional obligation, and driven by the commendable efforts by several activist groups in Bangladesh, in 2010 the government of Bangladesh has enacted the 'Domestic Violence (Protection and Prevention) Act 2010 (DVPPA) to effectively redress the victims of domestic violence, an offence which has become almost a socially accepted practice, echoing the broader social and cultural norms which justify acts of violence against women.

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<sup>1</sup> Bangladesh had ratified CEDAW on 6 November 1984.

<sup>2</sup> United Nations Declaration on the Elimination of Violence against Women, available at: <http://www.un.org/documents/ga/res/48/a48r104.htm>; CEDAW, General Recommendation No. 19 (11th session, 1992), Para 6 available at: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.

<sup>3</sup> Article 19(3): 'The State Shall endeavor to ensure equality of opportunity and participation of women in all spheres of national life'; Article 27: 'All citizens are equal before law and are entitled to equal protection of law'; Article 28(1): 'The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth'; Article 28(4): 'Nothing in this article shall prevent the State from making special provision in favor of women or children or for the advancement of any backward section of citizens'.

<sup>4</sup> Bangladesh had ratified CRC on 3 August 1990.

<sup>5</sup> Article 2 and Article 3 of the CRC.

This paper analyses the main features of the DVPPA and it includes a comparative view of the similar laws in the two neighboring jurisdictions of India and Pakistan. Considering that the law is only recently enacted and still has not gained adequate attention amongst general users as well as amongst judges and lawyers, this paper focuses exclusively on elaborating the important features of the law without scrutinizing its provisions or evaluating its implementation trends.

## **2. Pre DVPPA legal framework addressing domestic violence**

Most of the pre 2010 laws, where some forms of domestic violence could be addressed were criminal in nature, punishing the perpetrators with imprisonment or fine. The Penal Code of 1890 for instance, is the law generally criminalizing all forms of physical abuses and as such can be used against some forms of domestic violence, generally falling within any of the offences enumerated in the Penal Code. However, in reality violence committed within home has never been condemned with the same conviction as in the case of violence by strangers.<sup>6</sup> Moreover, the Penal Code does not recognize rape by husband to be an offence<sup>7</sup>; promoting thereby a tacit acceptance for committing any forms of sexual violence against wives.

A number of other special statutes also created further forums for criminalizing violence against women and children. An important statute in this regard is the Dowry Prohibition Act 1980, which criminalizes the act of giving and taking dowry. As harassment for dowry is considered to be one of the major factors in the continuation of domestic violence in Bangladesh<sup>8</sup>, this played a vital role in redressing the dowry victims. However, being limited only to penalizing dowry demands, this Act insufficiently addressed the overall domestic violence situation.

Another significant criminal statute is the Women and Children Repression Prevention Act 2000. Although the Act has innovated stringent measures to combat violence against women and children, it does not redress the victims of domestic violence adequately. The only provision that criminalizes violence by husband or in-laws is limited to serious physical abuses such as grievous hurt, hurt or causing death or attempt to cause death; and becomes applicable only when such physical violence has been committed in relation to demands for dowry.<sup>9</sup> Thus the Act does not criminalize other less severe forms of physical abuses or abuses other than

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<sup>6</sup> Nusrat Ameen, (2005); 'Ending Impunity, Monitoring Report for the Implementation of the Domestic Violence (Prevention and Protection) Act 2010', (2013), Bangladesh National Woman Lawyers' Association (BNWLA).

<sup>7</sup> Section 375

<sup>8</sup> UNFPA-Bangladesh (2003).

<sup>9</sup> Section 11

physical violence *e.g.* emotional or economic, caused by the husband or in-laws. Also other than dowry, there are several causes for domestic violence, which have not been envisioned by the Act.

Apart from the inadequacies in the laws, the fact that all these are remedies available under criminal laws, further limits the scope for domestic violence to be addressed efficiently. The remedies under criminal law by their very nature are generally less effective due to the weak enforcement mechanisms which either result in a biased investigation or non-prosecution of the offenders.<sup>10</sup>

On the other hand, before passing of the DVPPA, taking recourse to civil remedies would only mean to seek for a divorce in the Family Courts<sup>11</sup> under the Dissolution of Muslim Marriages Act, 1939.<sup>12</sup> This Act makes physical or mental cruelty by husband a ground for a woman to obtain divorce. However, merely obtaining a divorce does not sufficiently redress the situation of women who are victims of domestic violence, particularly as the social and economic vulnerability of a woman more often compels her to seek for a remedy from within the marriage.<sup>13</sup> Other than seeking divorce, applying to the Family Courts for maintenance and child custody is also available to women under the Family Courts Ordinance 1985.<sup>14</sup> However, in that case the decision will be weighed from the perspective of entitlement of the woman and not as a remedy given to her vis-à-vis the alleged domestic violence. Hence a family suit for maintenance or custody would essentially entail application of personal law of the applicant to determine her entitlements, which generally provides an uneven rights forum for women as against men. Moreover, none of the existing laws contain any explicit declaration of women's right to continue to reside in the matrimonial home which is one of the root causes of vulnerability of married women.<sup>15</sup> A woman struggling through domestic violence would need further civil remedies, such as interim protection, compensation, right over her own properties in the matrimonial house, shelter home etc. which was absent in the legal framework that existed prior to passing of the DVPPA. In addition, like criminal remedies, petitions under civil laws, too, often involve protracted legal proceedings without guarantee of a satisfactory outcome.<sup>16</sup>

<sup>10</sup> 6<sup>th</sup> and 7<sup>th</sup> Combined periodic Report of Bangladesh 2009, CEDAW, at p.40.

<sup>11</sup> Established under the Family Courts Ordinance 1985.

<sup>12</sup> Ending Impunity, BNWLA (2013) p.7.

<sup>13</sup> Amir M Sayem, *et. al.* (2012); Sidney R Schuler, *et. al.* (2008); Ending Impunity, BNWLA (2013).

<sup>14</sup> Section 5

<sup>15</sup> Manjeet Bhatia (2012), 'Domestic violence in India: Cases under the Protection of Women from Domestic Violence Act, 2005', *South Asia Research* 32, p. 103,105.

<sup>16</sup> *Ibid* at p.106.

Thus under the pre DVPPA legal framework, women as well as children victims of domestic violence were often left without any remedy. This growing comprehension of a need for an expeditious and effective forum for victims of domestic violence led to a collaborative movement among NGOs, international organizations and civil society members for a separate law on domestic violence. To this end, a number of these organizations and individuals joined together to form an alliance named as "Citizen's Initiative against Domestic Violence" (CiDV) which had ultimately, after years of lobbying and dialogues, finalized and submitted a draft bill on domestic violence to the Ministry of Women and Children Affairs (MWCA) in 2008. The aim of these collaborative efforts was, to bring a separate law specifically addressing the issue of domestic violence and providing an innovative combination of civil and criminal remedies for effectively redressing the victims.<sup>17</sup> After prolonged deliberations on the draft bill, the Domestic Violence (Prevention and Protection) Act was finally passed on 5 October 2010. The Act required rules to be framed by government notification for effective implementation of its provisions and it was only in 2013 that the rules were finally framed as the Domestic Violence (Prevention and Protection) Rules 2013.

### **3. Salient features of DVPPA**

The legal framework of the domestic Violence (Prevention act Protection) Act 2010, is a considerable advancement in the legal regime addressing violence against women and children in Bangladesh. The Act itself declares in its preamble that it is founded upon the express obligations of the State under the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC); and reaffirms the constitutional framework ensuring equality for women and children.

The Act creates altogether a new forum for addressing domestic violence, following the paths of other South Asian countries who had similarly addressed the issue in recent years.<sup>18</sup> Not only has this Act introduced a definition of 'domestic violence' for the first time; it has offered a number of new and expedient remedies for the aggrieved women and children, and has put in place a multi-agency machinery to help implement the law.

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<sup>17</sup> For a detail account of the drafting process of the DVPPA see Ending Impunity, BNWLA (2013), pp. 9-10.

<sup>18</sup> For instance, Prevention of Domestic Violence Act 2005 in Sri Lanka, Domestic Violence (Crime and Punishment) Act 2009 in Nepal, Domestic Violence Act 2012 in Maldives and Protection of Woman from Domestic Violence Act 2005 in India.



### 3.1 Scope of DVPPA

The Act allows an 'aggrieved person'<sup>19</sup> to file an 'application'<sup>20</sup> to the Judicial Magistrate Court or to the Metropolitan Magistrate Court (as the case may be)<sup>21</sup>. The definition of 'application' is noteworthy as it also includes application filed by 'any other person on her behalf', thereby allowing the aggrieved person to institute a proceeding under this Act through even a male relation or acquaintance of the aggrieved person.<sup>22</sup> The definition of aggrieved person is however gender-specific and it only includes a woman or a child who, by reason of the existence of a family relationship, is or has been at risk of being subjected to domestic violence by any other member of the family. The term 'family relationship' is defined as a relationship established through consanguinity, marriage, adoption or by being a member of a joint family.<sup>23</sup> Although the definition of aggrieved person is gender specific, definition of 'respondent'<sup>24</sup> refers to any person against whom an application has been filed under the Act.

The Act not only covers domestic violence situation between spouses, it extends to any other person with whom the aggrieved person has a family relation. 'Domestic violence' has been defined in Section 3 of the Act as follows:

**3. Domestic violence-** For the purpose of this Act, domestic violence means physical abuse, psychological abuse, sexual abuse or economic abuse against a woman or a child of a family by any other person of that family with whom the aggrieved person is in a family relationship.

The Act thus provides an expansive definition of domestic violence and allows the aggrieved person to file an application even against members of her own natal family. However, a combined reading of all these provisions draws a clear exclusion for divorced woman from getting a relief against her former husband or relatives of the husband under the Act, as both the terms 'family relationship' and 'domestic violence' only entail an existing relationship and does not include a past relationship. The definition also clearly excludes 'relationships in the nature of a marriage', although the draft bill proposed by CiDV<sup>25</sup> had specifically included this

<sup>19</sup> Section 2(6) of DVPPA

<sup>20</sup> Section 2(3) of DVPPA

<sup>21</sup> Section 21 of DVPPA; an appeal shall lie to the Chief Judicial Magistrate u/s 28 of the DVPPA.

<sup>22</sup> This is an important addition, as for various reasons, e.g. the social stigma often attached to instituting any court proceeding; a woman may feel discouraged to file the application on her own.

<sup>23</sup> Section 2(11) of DVPPA

<sup>24</sup> Section 2(13) of DVPPA

<sup>25</sup> The draft has been collected from ASK for the purpose of this research.

category within the scope of the Act. 'Domestic servants' are also not included, although in a 2005 draft prepared by the Law Commission of Bangladesh<sup>26</sup>, the same was recommended for inclusion.<sup>27</sup>

In addition to providing a comprehensive definition of domestic violence and creating a number of remedies for victims of domestic violence, the Act also creates a substantive right – the right of residence, in favor of the victim of a domestic violence. Under section 10, the Act declares for the first time that 'the aggrieved person shall have the right to reside in the shared-residence due to the existence of family relationship'. 'Shared-residence' is again defined comprehensively to include any residence where i) the aggrieved person lives; ii) at any stage has lived singly or along with the respondent in a family relationship; iii) owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them; iv) in which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity; and v) which may belong to the family of which the respondent is or was a member, irrespective of whether the respondent or the victim has any right, title or interest. Thus the definition is termed in an all-embracing language to safeguard the right of residence with maximum assurance.

### ***3.2 Scope of domestic violence under the DVPPA***

Section 3 further gives an extensive definition of what forms of violence would constitute domestic violence within the Act. According to this definition Domestic violence may entail physical abuse, psychological abuse, sexual abuse or economic abuse. Thus for the first time this Act expressly recognizes different other forms of violence that a woman often faces within her family but was not recognized unlawful by any other law before the DVPPA.

#### **Section 3**

**Explanation:** For the purpose of this section-

(a) "Physical abuse"- that is, any act or conduct which causes or may cause harm to the life, limb, health or safety of the aggrieved person and includes forcing or inducing the aggrieved person to commit a crime and causing criminal intimidation or criminal force;

(b) "Psychological abuse"- also includes:

<sup>26</sup> The draft is available at <http://www.lawcommissionbangladesh.org/reports/71.pdf>.

<sup>27</sup> However inclusion of this criteria might have the effect of convoluting the specific objective of the Act to redress violence against women within home by family relations, and the issue of the rights of the domestic workers demands to be addressed in separate legal forum.

- (i) verbal abuse, insult, ridicule, humiliation, intimidation or threats or making any such comment which mentally harms the aggrieved person;
- (ii) harassment; or
- (iii) interference with personal freedom meaning interfering with normal movement, communication or expression of interests and opinions;
- (c) "Sexual abuse"- would also include any such conduct that harms the dignity, respect or reputation of the aggrieved person;
- (d) "Economic abuse" would also include the following:
  - (i) deprivation of all or any economic or financial benefits or resources or properties to which the aggrieved person is entitled under any law or custom or by any order of a court or any other competent authority, or obstructing the aggrieved person from exercising lawful rights over such properties;
  - (ii) not providing the aggrieved person with articles of daily necessities;
  - (iii) depriving or obstructing the aggrieved person from exercising legal rights over any gifts received during wedding or *stridhan* or any other property received by way of gift
  - (iv) transferring without consent of the aggrieved person or prohibiting aggrieved person from exercising legal rights over any assets whether movable or immovable owned by the aggrieved person;
  - (v) depriving the aggrieved person from resources or benefits which the aggrieved person is entitled to use or enjoy by virtue of the family relationship or prohibiting the victim from exercising legal rights over such resources or benefits.

This explanation of various forms of domestic violence is wide ranging and non-exhaustive, leaving enough scope for the court to interpret and include any other form of violence within the four broad categories enumerated in the Act.

### **3.3 Multi-agency machinery for implementation**

The Act has put in place a number of functionaries to help and support the victim of domestic violence both before and after filing a DV (Domestic Violence) proceeding. A new mechanism that the law has created for this purpose is the office of Enforcement Officers (EO)<sup>28</sup> which plays crucial role in the overall functioning of the Act. By way of a government notification, the District and Upazilla Women Affairs Officers under the Ministry of Women and Children Affairs have been appointed as Enforcement Officers to perform the duties under the Act. The EOs are

<sup>28</sup> Section 5 of the DVPPA

assigned with a number of responsibilities<sup>29</sup> with respect to a victim of domestic violence, including recording information on domestic violence, informing the victims of their rights and remedies under the Act, assisting the court in discharging functions under this Act and submitting reports of domestic violence to the court, communicating with officer in charge of police station (OC) and informing him on domestic violence related matters, sending the victim to shelter home or medical facilities where needed, and most importantly making application to the court on behalf of the victim, if she so desires. The Act also rests the duty on the EOs to follow up the progress of domestic violence cases with the help of service providers (SP) if needed. Thus the enforcement officers are perceived to be playing the most essential role for realizing the aims of this Act.

The other functionaries created under the Act are law enforcement officers<sup>30</sup> and service providers<sup>31</sup> which are certified organizations working mainly in the area of child and woman rights; providing legal, medical or other services. The role of the police officers is limited to informing the victims of their rights under the DVPPA and under other relevant laws, as well as to informing the enforcement officer regarding any domestic violence incident that has been reported to them. A significant role that has been assigned to police officers under the Act, is to assist the enforcement officers in discharging their responsibilities under the Act or as per the direction of a court.

Besides these functionaries, the Act also makes provision for shelter home<sup>32</sup> and medical facilities<sup>33</sup> from where a victim of domestic violence can avail necessary service. Both private and government run shelter homes and medical facilities fall within the ambit of the Act.

### **3.4 Reliefs under DVPPA**

As noted earlier, the DVPPA provides wide-ranging remedies to the victims of domestic violence. Although the applications are filed before Judicial Magistrate Courts and the Code of Criminal Procedure governs the proceedings under the Act, the remedies are essentially civil in nature. However, breach of a protection order given under the Act is considered as a cognizable and bailable offence<sup>34</sup> and a punishment of not more than 6 months imprisonment or fine of taka 10,000 is

<sup>29</sup> Section 6 of the DVPPA and Rule 4 of the Domestic Violence (Prevention and Protection) Rules 2013 (hereinafter referred as Rules of DVPPA)

<sup>30</sup> Section 4 of the DVPPA, rule 7 of Rules of DVPPA

<sup>31</sup> Section 7 of DVPPA, rule 6 of the Rules of DVPPA

<sup>32</sup> Section 8 of DVPPA

<sup>33</sup> Section 9 of DVPPA

<sup>34</sup> Section 29 of DVPPA

prescribed for such offence. In addition, another criminal remedy is provided to safeguard against abuse of the law which makes a malicious application punishable with maximum 1 year imprisonment or with fine of maximum 50,000 taka.<sup>35</sup>

The Act empowers the court to give Interim Protection order u/s 13, Protection Order u/s 14, Residence Order u/s 15, Compensation order u/s 16 and Safe custody order u/s 17.

Protection orders are mainly given to restrain the respondent from committing any further violence. Under protection orders, the court can issue civil injunctions against the respondent restraining him/her from entering the workplace of the aggrieved person or communicating with the aggrieved person by any means. Any other condition can be attached to a protection order if the court deems it necessary.

Residence order also includes wide-ranging remedies that can be given to the victim to ensure her right of residence in the shared household. The extent of this remedy goes even up to evicting the respondent from the shared household or restraining his/her entry into the part of the residence where the victim resides. It also includes requiring the respondent to arrange for an alternative accommodation for the victim and directing him/her to return to the possession of the aggrieved person any of her valuables or belongings.

Compensation orders can be given for any physical, psychological, financial or property related harm that has been committed or when there is a possibility that such harm might be committed against the aggrieved person. This relief can be given also by way of a maintenance order of an appropriate amount for the aggrieved woman and her children, according to their standard of living. For enforcing the compensation order, a special provision has been created whereby, the court can direct the employer of the respondent to deduct the amount from his/her salary and deposit it in favor of the aggrieved person.

Custody orders can also be granted by courts to a victim of domestic violence at any stage of the proceeding. Under this relief, the court can grant temporary custody of the aggrieved person's child in favor of the applicant and if appropriate the order may also include provisions for visiting the child by the respondent.

Besides these reliefs, the court is also empowered to grant interim protection order under section 13 of the Act. Section 13 provides that if the court is satisfied, by examining the documents submitted by the applicant, that there is a *prima facie* case

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<sup>35</sup> Section 32 of the DVPPA

against the respondent regarding commission of domestic violence, then an *ex parte* interim protection order may be issued against the respondent. Simultaneously a show cause notice will be issued against the respondent to reply within 7 working days as to why a permanent protection order shall not be issued against him.

### 3.5 Procedure for obtaining Orders

As per the DVPPA, an aggrieved person or on her behalf an informant, an EO, SP or any other person, can apply to the court to get remedy under the Act.<sup>36</sup> The form for filling up the application is prescribed under the Rules of DVPPA which provides that such form shall be completed through an advocate.<sup>37</sup> On receiving the application, the court will fix up the date of hearing within the next 7 working days<sup>38</sup>. A Judicial Magistrate or where applicable, a Metropolitan Magistrate has been given jurisdiction to try any application filed under this Act and while granting compensation order they will have no pecuniary jurisdiction.<sup>39</sup> The Code of Criminal Procedure (CRPC) will govern all proceeding and trial of offences under the Act, following summary trial procedure as per Chapter XXII of the CRPC.<sup>40</sup>

On receiving of an application under the Act, if the court is satisfied by examining all documents presented with the application that the respondent has caused or induced domestic violence or there is a likelihood that he/she may cause such domestic violence against the aggrieved, the court will issue an *ex parte* interim protection order against the respondent as well as issue a notice to reply as to why a permanent protection order should not be issued against him/her.<sup>41</sup> If the respondent does not appear upon service of notice, the court can hold the trial in absence of the respondent or issue an arrest warrant against him/her.<sup>42</sup> If the court rejects an application due to non-appearance of the applicant, such application can be revived upon satisfaction of the court, provided the applicant applied for such revival within the prescribed time limit.<sup>43</sup> There is also provision for holding trial *in camera* if the court deems it necessary or with the consent of the parties.<sup>44</sup>

Applications will be disposed of within a period of 60 working days from the date of issuance of notice,<sup>45</sup> except in case of an application for an order of compensation in

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<sup>36</sup> Section 11(1) of DVPPA

<sup>37</sup> Rule 8 of the Rules of DVPPA

<sup>38</sup> Section 11(3) of DVPPA

<sup>39</sup> Section 21 of DVPPA

<sup>40</sup> Section 22 of DVPPA

<sup>41</sup> Section 13 of the DVPPA

<sup>42</sup> Section 26 of the DVPPA

<sup>43</sup> Section 27 of the DVPPA

<sup>44</sup> Section 23 of the DVPPA

<sup>45</sup> Section 20(1) of DVPPA

which case the time for disposal is six months following receipt of application<sup>46</sup>. However, further extension of this time limit has been allowed by the Act, if for any reasonable cause the application could not be disposed of within the prescribed time limit. Provision is also made for transferring the application to another court in case of consecutive delays in disposing of the application.<sup>47</sup>

The Act also provides for discharge of a protection order till the applicant applies for such discharge. Also, on an application by the aggrieved person or the respondent, if the court is satisfied that there is a change in circumstances requiring alteration, modification, amendment or revocation of any order made under this Act, it may, for reasons to be recorded in writing pass such order, as it deems appropriate.

Appeal against an order under this Act has to be filed within 30 working days from the date of passing of the order to the Chief Judicial Magistrate or where applicable, to the Chief Metropolitan Magistrate court. The time limit for disposing of the appeal is 60 working days from its filing and it must not be transferred more than once without any valid reason.<sup>48</sup>

#### **4. Domestic violence laws in India**

##### **4.1 Background**

In terms of the socio-legal environment surrounding domestic violence, India stands in a much closer comparison to Bangladesh. With deep seated patriarchal values, domestic violence against women remains a common phenomenon in India which had been long viewed as a matter within the private spheres and out of the scope of law. The social fabric of India, which is predominantly governed by Hindu norms and of which the patriarchal joint family system is a fundamental characteristic, furthered the subjugation of the Indian woman.<sup>49</sup> However, driven by the wider constitutional mandate of ensuring equality<sup>50</sup> and making special provision for protecting women<sup>51</sup>; India had enacted a number progressive legislations since independence to protect women from violence and discrimination.<sup>52</sup>

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<sup>46</sup> Section 16(2) of DVPPA

<sup>47</sup> Section 20(2)(3)(4)(5) of DVPPA

<sup>48</sup> Section 28 of the DVPPA

<sup>49</sup> Tahira Karanjawala and Shivani Chugh (2009), 'Legal battle against domestic violence in India: Evolution and analysis', *International Journal of Law, Policy and the Family* 23, 289–308, 290

<sup>50</sup> Article 14

<sup>51</sup> Article 15(3)

<sup>52</sup> For instance, the Immoral Traffic Prevention Act of 1956, the Dowry Prohibition Act of 1961; the Indecent Representation of Women (Prohibition) Act of 1986 and the Commission of Sati (Prevention) Act of 1987.

One of the most important developments in the post-independence period was the recognition of the practice of dowry as a social evil and the passing of the Dowry Prohibition Act, 1961, which criminalized the act of giving or taking the same.<sup>53</sup> However, the Act did not effectively curb the practice of dowry<sup>54</sup> and the number of dowry related crimes had escalated substantively over time, despite presence of the prohibitory measures.<sup>55</sup> The Indian Parliament later passed the Dowry Prohibition (Amendment) Acts in 1984 and 1986, but their impact was as negligible as that of the 1961 Act.<sup>56</sup>

In 1983, significant amendments<sup>57</sup> were made to the Indian Penal Code 1860 and for the first time the cruel treatment of a woman by her husband and in-laws was recognized as a criminal offence under Section 498-A of the Indian Penal Code.<sup>58</sup> Although this change was mainly premised on the movement against dowry<sup>59</sup>, Section 498-A can very well be said to be marking the beginning of breaking the myth that violence inside home is only a 'private matter'. Further to this, in 1986, another amendment was brought to the Indian Penal Code by introducing Section 304-B which created an entirely new offence of 'dowry death'. This provision made it possible to prosecute the husband and in-laws of a woman, if her death was caused by any burns or bodily injury within seven years of her marriage and if it could be shown that before her death she was subjected to cruelty or harassment by her husband and in laws in relation to demand for dowry.

However, the implementation of this law soon revealed significant limitations<sup>60</sup>. Since this was a criminal law provision, a higher standard of evidence, namely proof beyond reasonable doubt, was required to prove that an act of cruelty against a woman had actually taken place in the matrimonial home and thus many women were left without remedies.<sup>61</sup> Moreover, it only provided punitive relief to the victim or her family and dealt with only very severe acts of domestic violence without

<sup>53</sup> Tahira Karanjawala and Shivani Chugh (2009), 291

<sup>54</sup> Staying Alive: Evaluating Court Orders, Sixth Monitoring & Evaluation Report 2013 on the Protection of Women from Domestic Violence Act, 2005 Lawyers Collective(Women's Rights Initiative) (LCWRI) (hereinafter referred as LCWRI Report), p. xii

<sup>55</sup> Biswajit Ghosh & Tanima Choudhuri (2011), 'Legal protection against domestic violence in India: Scope and limitations', *Journal of Family Violence* 26, 319-330, 320.

<sup>56</sup> Rehan Abeyratne and Dipika Jain, (2012) 'Domestic violence legislation in India: the pitfalls of a human rights approach to gender equality', *Journal of Gender, Social Policy & the Law*, 21:2, 333,339.

<sup>57</sup> The Criminal Law (Second amendment) Act, 1983.

<sup>58</sup> Tahira Karanjawala and Shivani Chugh (2009), p.291.

<sup>59</sup> LCWRI Report, p. xii

<sup>60</sup> Manjeet Bhatia (2012), 104.

<sup>61</sup> Ibid.



taking into consideration the overall mistreatment of women in the household.<sup>62</sup> Also, only married women facing violence at the hands of the husband or their families can claim relief under both these provisions excluding violence in other non-matrimonial relationships.<sup>63</sup>

Thus, reality of violence in home either remained entirely unaddressed due to the lacuna in the existing laws or was being generally categorized as dowry related violence. Women suppressed by domestic violence were also left with no remedy under civil law other than divorce or separation. There was no provision for civil remedies such as residence in matrimonial home, provision for shelter-home, injunction or compensation. Thus the need for additional mechanisms to protect women against domestic violence became increasingly obvious.<sup>64</sup> Against this backdrop, Lawyers' Collective (a leading NGO in India) together with other women's rights organisations, took the lead, to draft a new law.<sup>65</sup> After a decade of persistent efforts and lobbying by these women rights groups, the Indian legislature had finally passed the Protection of Women from Domestic Violence Act in 2005 (PWDVA) which became effective on October 1, 2006. International treaties, agreements, and reports have played an important role in this lobbying effort.<sup>66</sup> These include particularly the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>67</sup>

#### **4.2 Salient features of the Protection of Women from Domestic Violence Act, 2005**

A comparison between the Domestic Violence (Prevention and Protection) Act, 2010 of Bangladesh and the Protection of Women from Domestic Violence Act in 2005 (PWDVA) of India reveals that the text of the Domestic Violence Act of Bangladesh has been largely influenced by the draft of the Indian Act, as there are substantial similarities between the two laws. However although the basic framework of the DVPPA is quite similar to the PWDVA, there are certain provisions that are either differently formulated in Bangladesh or are absent in the text. The important features of the Act that are similar to the DVPPA in Bangladesh, are discussed in the following section.

<sup>62</sup> Tahira Karanjawala and Shivani Chugh (2009), 293.

<sup>63</sup> LCWRI Report, p. xiii.

<sup>64</sup> Manjeet Bhatia (2012), 105.

<sup>65</sup> Ibid at p. 106, Amy Hornbeck *et.al.* 'The protection of women from domestic violence act: Solution or mere paper tiger?' *Loyola University Chicago International Law Review*, 4(2), 273, 280.

<sup>66</sup> Rehan Abeyratne and Dipika Jain, (2012), 341.

<sup>67</sup> Ibid for details

#### 4.2.1 Scope of the Act

The Indian Act endorses the concept of '*right to residence*'<sup>68</sup> which protected women from being pushed out of the house. It also introduced the concept of '*shared household*'<sup>69</sup> which was more appropriate since women in non-matrimonial relationships were also covered by the law.<sup>70</sup> However there are a number of interesting avenues of differences between the two Acts in terms of definitions of *family/domestic relationship* and *domestic violence* and the status of applicants and respondents; which would be discussed in the later section.

#### 4.2.2 Reliefs under the Act

The Act offers a range of civil remedies for protecting the aggrieved person. Other than making a distinction between an order of monetary relief<sup>71</sup> and an order of Compensation<sup>72</sup>, the other remedies are similar to the DVPPA, *i.e.* protection order,<sup>73</sup> residence order<sup>74</sup> and custody order<sup>75</sup>. Monetary reliefs are awarded to the aggrieved person for the expenses incurred and losses suffered by her and any child of hers including any maintenance, loss of earnings, medical expenses, or any loss caused due to the destruction, damage, or removal of any property from the control of the aggrieved person. Compensation orders may be additionally granted by the magistrate to the victim as compensation for any injury, including mental torture and emotional distress, which may have been caused by the aggressor.<sup>76</sup> In the DVPPA however, both the remedies of monetary relief and compensation have been merged into one single order of compensation given u/s 16 of the Act. The PWDVA also provides for interim-orders, however with significant difference from that given under DVPPA.<sup>77</sup> In providing a civil remedy, the Act is not designed to punish the abuser, and no arrests can be made based on a complaint filed under the Act. Arrests under the Act can be made only if the abuser violates a Protection Order issued by the court.<sup>78</sup>

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<sup>68</sup> Section 17 of the PWDVA

<sup>69</sup> Section 2(s) of the PWDVA

<sup>70</sup> LCWRI Report, p. xiii

<sup>71</sup> Section 20 of the PWDVA

<sup>72</sup> Section 22 of the PWDVA

<sup>73</sup> Section 18 of the PWDVA

<sup>74</sup> Section 19 of the PWDVA

<sup>75</sup> Section 21 of the PWDVA

<sup>76</sup> See Tahira Karanjawala and Shivani Chugh (2009) for general discussion on the provisions.

<sup>77</sup> This will be discussed in the following section.

<sup>78</sup> Amy Hornbeck *et. al.*, p.280

### 4.2.3 Mechanism for Implementation

The institutional functionaries that are put in place under the PWDVA are also somewhat similar to Bangladesh with few exceptions. Protection officer plays the same role as that of 'enforcement officer' and is assigned with identical duties<sup>79</sup> to some extent. The protection officers, who should predominantly be women, act as a link between the judicial machinery and the society and perform a variety of important tasks necessary to bring the relief available under the Act to the women for whose benefit it was intended. Any woman who has been the victim of domestic violence may initiate proceedings before a magistrate, or such proceedings may be initiated by the protection officer who may be informed of such domestic violence by any person who has reason to believe that it has occurred. On the receipt of such a complaint the protection officer shall prepare a 'domestic incident report'<sup>80</sup>, which shall be forwarded to the police officer of the concerned area and the 'service providers' in such area, and shall also be sent to the magistrate taking cognizance of the matter.<sup>81</sup> Service providers may also record the 'domestic incident report' and forward the same to the Magistrate and Police officers. Although the term 'domestic incident report' does not exist in the text of the DVPPA, a similar (though not identical) responsibility of recording the information of domestic violence incidents in a prescribed form is imposed on enforcement officers under the Rules of DVPPA<sup>82</sup>. Also under the DVPPA, enforcement officer is obliged to submit a 'report' containing descriptions of domestic violence incidents to the court.<sup>83</sup> The role and responsibilities of service providers<sup>84</sup> and police officers<sup>85</sup> under the PWDVA are also analogous to the relevant provisions of the DVPPA.

### 4.2.4 Procedure for obtaining relief

The overall structure of the law providing procedures to obtain relief is again analogous to that of DVPPA with few changes. The application shall have to be filed before the Magistrate under section 12. The Act requires the Magistrate to take into consideration any 'domestic incident report' received from the protection officer or service provider.<sup>86</sup> However, this report is not mandatory for passing an order and

<sup>79</sup> Section 9 of PWDVA and Rule 9 of the Protection of Women from Domestic Violence Rules, 2006 (hereinafter referred as Rules of PWDVA)

<sup>80</sup> Section 2(e) and Rule 5 of PWDVA

<sup>81</sup> The summary of the role of the protection officers has been drawn from Tahira Karanjawala and Shivani Chugh (2009).

<sup>82</sup> Rule 3(1)

<sup>83</sup> Section 6(b) of DVPPA

<sup>84</sup> Section 10 of PWDVA

<sup>85</sup> Section 5 of PWDVA

<sup>86</sup> Section 12 of PWDVA

shall be taken into consideration only in cases where it has been filed.<sup>87</sup> The first date of hearing is to be fixed within 3 working days of the receipt of application, and the time limit for disposal of application is 60 days from the date of its first hearing.<sup>88</sup> However in case of DVPPA, the time limit for disposal starts from the date of issuance of notice. An appeal shall lie to the Court of Session within 30 days from the date on which the order made by the Magistrate is served on the aggrieved person or the respondent, whichever is later.<sup>89</sup> Other than these provisions, there are a number of significant additions to the procedure of trial under the PWDVA which are absent in Bangladesh. The following section will specifically concentrate on such differences along with other significant features of the PWDVA which are lacking in the framework of DVPPA.

### **4.3 Significant Divergences in the PWDVA:**

As noted in the previous section, although the general premise and framework of both the Indian and the Bangladeshi Acts on domestic violence are similar, there are a number of significant additions in the PWDVA which are not present in the text of the DVPPA. This section endeavors to highlight some of such significant features.

#### ***4.3.1 Limited definition of aggrieved person***

The definition of aggrieved person in section 2(a) of PWDVA only refers to a woman and does not include a child. However, in section 18(c), a reference has been made to an aggrieved person which suggests that a child can also be an aggrieved person. Thus, whether a child is included within the definition of aggrieved person is unclear as most provisions in the Act are geared towards the protection of adult women.<sup>90</sup>

#### ***4.3.2 Limited scope of the definition of respondent***

The definition of respondent is given in section 2(q) as 'any adult male person who is, or has been, in a domestic relationship with the aggrieved person'. The proviso to that sub-section indicates that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or male partner. Thus under the PWDVA respondent can only be a male person or a relative of the husband or partner. Unlike the DVPPA, this Act does not include a generalized definition of respondent and thus limits the scope to file an application

<sup>87</sup> Shambhu Prasad Singh v. Manjari, Cr.M.C. No. 3083, Manu/DE/0899/2012, decided on 5.3.2012; retrieved from LCWRI Report, p. 29.

<sup>88</sup> Section 12 of PWDVA

<sup>89</sup> Section 29 of PWDVA

<sup>90</sup> Tahira Karanjawala and Shivani Chugh (2009), 294.

against any female who may not be related to the husband. For instance, under PWDVA a woman cannot initiate a proceeding against her own mother, sister or other female relations from the natal family.

#### ***4.3.3 Wider scope of the Act***

A very important addition in the PWDVA which has significant bearing for the Bangladeshi Act is the definition of a 'domestic relationship'. 'Domestic relationship' has been defined extensively, as a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption, or are family members living together as a joint family.<sup>91</sup> The two points that are significant to note are firstly this definition is wide enough to cover not only present relationships but also past relationships and hence it certainly brings divorced women within its ambit.<sup>92</sup> Secondly, this definition includes not only relationship within marriage but any other relationship that is 'in the nature of a marriage'. Thus this definition has for the first time in India recognized 'live-in relationships'.<sup>93</sup> However beyond 'live-in relationships', inclusion of such provision also gives protection in cases where marriage has been denied by the husband or the legality of the marriage is doubtful.

#### ***4.3.4 Information regarding domestic violence incident***

The PWDVA makes a special provision for allowing information to be given to the concerned protection officer either orally or in writing.<sup>94</sup> If the information is given orally, the same shall be reduced in writing and signed by the informant, or when he/she is not in a position to sign, the PO shall ensure that the identity of the informant is recorded.<sup>95</sup> This is different from filing a complaint to the PO in which case a 'domestic incident report' would be registered. The provision significantly relieves the informant from all civil and criminal liability for giving such information, provided he acted in 'good faith'. Although in the Bangladeshi law, information can also be given to the EO by any person, no such legal immunity has been created in favor of the informant. This may ultimately discourage, for example a responsible neighbor to inform an EO or a police officer about a domestic violence incident that he/she might have witnessed in his/her neighborhood.

#### ***4.3.5 Wider power of granting interim orders***

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<sup>91</sup> Section 2(f) of PWDVA

<sup>92</sup> Tahira Karanjawala and Shivani Chugh (2009), 294.

<sup>93</sup> Rehan Abeyratne and Dipika Jain, (2012) 343.

<sup>94</sup> Section 4 of PWDVA

<sup>95</sup> Rule 4 of PWDVA

Unlike DVPPA, the Indian Act sanctions the court with a wider power of granting interim orders. Section 23 of the PWDVA provides that ex parte interim orders can be granted not only in the nature of a protection order but also as residence orders, monetary reliefs, custody orders and compensation orders. Also, such ex parte orders can be given on the basis of affidavits filed by the applicant, the specific form of which is prescribed by the Rules of PWDV.<sup>96</sup>

#### ***4.3.6 Counseling***

The Indian Act makes an independent provision for counseling under section 14 of PWDVA, which can be directed by the Magistrate at any stage of the proceedings. The court may direct the respondent or the aggrieved person, either singly or jointly, to undergo counseling with any member of a service provider who possesses such qualifications and experience in counseling as prescribed by rules. Where the Magistrate has issued any such direction the next date of hearing of the case shall be fixed within the next two months. A detail process of appointment of counselors and their qualifications have been prescribed by the Rules of PWDV.<sup>97</sup>

#### ***4.3.7 Assistance of welfare expert***

Section 15 of the PWDVA authorizes the court to take assistance from a 'welfare expert' in any proceeding under the Act, to assist in proper discharge of the court's functioning. Such 'welfare expert' will be preferably a woman and may or may not be related to the aggrieved person and shall include such person engaged in promoting family welfare, as the court thinks fit.

#### ***4.3.8 Appointment and functions of Protection Officers***

The PWDVA specifies in terms of appointment of the PO, that 'they shall as far as possible be women'<sup>98</sup>. The PWDV Rules of 2006 further specifies the qualifications and experience of POs<sup>99</sup>, providing that the POs may either be appointed from the Government officials or from members of non-governmental organizations giving special preference to women. It further provides that every person appointed as PO under the Act shall have at least three years' experience in social sector and that the State Governments shall provide necessary office assistance to them for the efficient discharge of their functions under the Act and rules.<sup>100</sup> In addition to the general responsibilities of the PO provided under Act, the rules further detail various other

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<sup>96</sup> Rule 6(4) of PWDVA

<sup>97</sup> Rule 13 and 14 of PWDVA

<sup>98</sup> Section 8(2) of PWDVA

<sup>99</sup> Rule 3 of PWDVA

<sup>100</sup> Rule 3 of PWDVA

functions of the POs which include among others - preparing a 'Safety Plan' to prevent further domestic violence against the aggrieved person;<sup>101</sup> conducting a 'home visit' and making preliminary enquiry if the court requires clarification in regard to granting ex-parte interim relief to the aggrieved person;<sup>102</sup> filing a financial report on being directed by the court<sup>103</sup> etc. Moreover, under section 30, Protection Officers and members of service providers are deemed to be public servants within the meaning of section 21 of the Indian Penal Code, while acting or purporting to act under the PWDVA or its Rules.

#### ***4.3.9 Duties of Government***

The PWDVA under section 11 enumerates the Duties of Government under the Act. It provides that the Central Government and every State Government, shall take all measures to ensure that-

- the provisions of this Act are given wide publicity through public media including the television, radio and the print media at regular intervals;
- the Central Government and State Government officers including the police officers and the members of the judicial services are given periodic sensitization and awareness training on the issues addressed by this Act;
- effective co-ordination between the services provided by concerned Ministries and Departments addressing issues of domestic violence is established and periodical review of the same is conducted; and
- protocols for the various Ministries concerned with the delivery of services to women under this Act including the courts are prepared and put in place.

Although there is no similar provision in the DVPPA, rule 10 briefly makes a provision regarding responsibility of the Ministry of Women and Children Affairs to provide 'training to the EOs, police officers, service providing organizations and related persons by turn'.

#### ***4.3.10 Refusal to allow visitation rights considering interest of the child***

In terms of the remedies provided under the PWDVA, a significant addition is made regarding the custody orders of a child or children of the aggrieved person. Section 21 adds that if the Magistrate is of the opinion that any visit of the respondent may be harmful to the interests of the child or children, the Magistrate shall refuse to allow such visit. Thus an express recognition of the best interest of a child is incorporated under this provision which is missing in Bangladesh.

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<sup>101</sup> Rule 8(iv) of PWDVA

<sup>102</sup> Rule 10(a) of PWDVA

<sup>103</sup> Rule 10(b) of PWDVA

#### ***4.3.11 Relief in other suits and legal proceedings***

With regard to the forums of the remedies available under the PWDVA an important provision has been added under section 26. According to this provision, all the civil remedies provided under the Act may also be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent, whether such proceeding was initiated before or after the commencement of the Act. Such relief may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court. The Act further provides that in case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under the Act, she shall be bound to inform the Magistrate of the grant of such relief. Thus through this provision, the Act has widened the scope of domestic violence to be recognized by other forums which can award the same remedies as provided under the PWDVA, to protect the victim.

#### ***4.3.12 Penalty for breach of protection order by respondent***

Under section 31, a breach of a protection order, or of an interim protection order, by the respondent is an offence under the Act, punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both. Unlike in DVPPA, which makes only the breach of protection order punishable, the PWDVA also criminalizes breach of an interim protection order. Further, section 31 provides that while framing charges, the Magistrate may also frame charges under section 498A of the Indian Penal Code or any other provision of that Code or the Dowry Prohibition Act, 1961, as the case may be, if the facts disclose the commission of an offence under those provisions. No such provision is present in the DVPPA. Also unlike DVPPA, such offence for breach of protection order is non-bailable and includes an expressed declaration that the court may conclude that such offence has been committed upon the 'sole testimony of the aggrieved person'.<sup>104</sup>

#### ***4.3.13 Penalty for not discharging duty by Protection Officer***

Further, the Act makes it a punishable offence if any Protection Officer fails or refuses to discharge his/her duties as directed by the Magistrate in the protection order without any sufficient cause. Under section 33 of the Act, he/she shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both.

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<sup>104</sup> Section 32 of PWDVA



## 5. Domestic violence laws in Pakistan

### 5.1 Background

Similar to India and Bangladesh, oppression of women by domestic violence, is no exception for Pakistan, conditioned by similar notions of patriarchy and religious injunctions, subjugating further the status of woman to that of men. From the law enforcement agencies to the court system, women are invariably discriminated against and ignored, as domestic violence is consistently concealed as a private, familial issue.<sup>105</sup> According to the Pakistan Institute of Medical Sciences, over 90% of married women report being physically or sexually abused by their spouses.<sup>106</sup> According to the more recent estimates of international NGOs and the Human Rights Commission of Pakistan, domestic violence is one of the greatest threats to Pakistani women's security, health and well-being.<sup>107</sup> **In its 2011 report on Pakistan the Amnesty International stated 'gender-based violence, including rape, forced marriages, 'honor killings', acid attacks and other forms of domestic violence is being committed with impunity in Pakistan.'**<sup>108</sup> In a study from Pakistan, approximately 80% to 90% of Pakistani women were found to have been subjected to domestic violence.<sup>109</sup>

Compared to Bangladesh, 'Pakistani law is even more inadequate in protecting women victims of domestic violence and penalizing batterers'<sup>110</sup>. There is absence of explicit criminalization of domestic violence and police and judges have often tended to treat it as a non-justiciable, private or family matter or, at best, an issue for civil, rather than criminal, courts.<sup>111</sup> Pakistan's inadequate response, and often complete inaction leave the victims of domestic violence without any source of

<sup>105</sup> Manar Waheed (2003-2004), 'Domestic Violence in Pakistan: The Tension between Intervention & Sovereign Autonomy in Human Rights Law', *Brook. J. Int'l L.* 29 (2), pp. 937-975, p. 973.

<sup>106</sup> Carol Anne Douglas *et al.* (2002) 'Pakistan: Women's rights activist falsely accused', *OFF OUR BACKS*, 32 (5/6).

<sup>107</sup> Adeel Khan and Rafat Hussain (2008), 'Violence against women in Pakistan: Perceptions and experiences of domestic violence', *Asian Studies Review*, 32 (2), 239.

<sup>108</sup> See for details, <http://tribune.com.pk/story/263589/domestic-violence-facing-reality-another-day-another-beating/>.

<sup>109</sup> Lisa Hajjar, 'Domestic Violence and Shari'a: A Comparative Study of Muslim Societies in Middle East, Africa and Asia', available at [http:// www.sistersinislam.org.my/files/downloads/domestic\\_violence\\_and\\_sharia.pdf](http://www.sistersinislam.org.my/files/downloads/domestic_violence_and_sharia.pdf) accessed on 27/10/14; Annual Report 2004, 'Violence against women in Pakistan', Report of Human Rights Commission of Pakistan.

<sup>110</sup> Human Rights Watch, 'Crime or Custom? Violence against Women in Pakistan, Report of Human Rights Watch 1999. Available at [http://pantheon.hrw.org/reports/1999/pakistan/Pakhtml-06.htm#P501\\_102497](http://pantheon.hrw.org/reports/1999/pakistan/Pakhtml-06.htm#P501_102497).

<sup>111</sup> Ibid

domestic recourse.<sup>112</sup> In addition, women who attempt to file complaints or leave their husbands are frequently subjected to further abuse.<sup>113</sup>

Various international organizations as well as Pakistani rights groups and civil society organizations had since continued to campaign for laws to more effectively protect women who are facing violence within home. However, unlike in India and Bangladesh, the issue of domestic violence has not yet received the desired attention from the national level. There is, to date, no federal law on domestic violence. Equally, there is an acute vacuum in the arena of legal and social research on domestic violence.

## 5.2 Two new laws on domestic violence

A draft bill named **Domestic Violence (Prevention and Protection) Bill**, was however prepared and submitted by rights groups along with the National Commission on Status of Women (NCSW) of Pakistan to the Ministry of Human Rights.<sup>114</sup> This Bill was first passed unanimously by the National Assembly on August 4, 2009, but was lapsed after 90 days when the Senate returned it with some objections. It had to be retaken in a joint session to be made into law.<sup>115</sup> The Bill was re tabled to the Senate and a detail consultation was done attempting to incorporate views from all corners. However, after the 18th Amendment to the Pakistan Constitution<sup>116</sup>, many of the areas covered in the Bill became provincial subjects. Therefore, there was a need to review the Bill further. At the same time, there were objections raised against the domestic violence law suspecting its potential to interfere with the 'sanctity of home' and increasing divorce rates.<sup>117</sup> At this backdrop, the Senate passed a version of this bill unanimously in February, 2012 but that is applicable only to the Islamabad Capital Territory.<sup>118</sup>

On the other side, the Provincial Assembly of Sindh, on March 2013 **unanimously** passed the Domestic Violence (Prevention and Protection) Act 2013, being the country's first Province in which the law has been passed.<sup>119</sup> Years of struggle by the

<sup>112</sup> Manar Waheed (2003-2004), p. 942.

<sup>113</sup> Prabhu Patel, 'Pakistan: Killing in the Name of Honor, Honor Killings in Pakistan' (2000), at <http://www.apcjp.org/pakistan.htm>.

<sup>114</sup> [http://centralasiaonline.com/en\\_GB/articles/caii/features/pakistan/main/2012/03/29/feature-01](http://centralasiaonline.com/en_GB/articles/caii/features/pakistan/main/2012/03/29/feature-01)

<sup>115</sup> <http://www.dawn.com/news/708485/domestic-violence-bill-gets-new-look>

<sup>116</sup> This Amendment related to transfer of administrative, financial and political powers from the federal to provincial governments enhancing the quantum of provincial autonomy. <http://www.hss.de/pak/en/news-events/2012/federalism-in-pakistan-after-the-18th-amendment.html>

<sup>117</sup> <http://www.dawn.com/news/855084/domestic-violence-bill-to-push-up-divorce-rate-cii>

<sup>118</sup> [http://centralasiaonline.com/en\\_GB/articles/caii/features/pakistan/main/2012/03/29/feature-01](http://centralasiaonline.com/en_GB/articles/caii/features/pakistan/main/2012/03/29/feature-01)

<sup>119</sup> <http://tribune.com.pk/story/529300/celebrating-milestones-with-the-domestic-violence-act-the-hurly-burlys-done-but-the-battle-hasnt-been-won/>

*Aurat* Foundation, a leading NGO in Pakistan, together with efforts from activists, jurists, lawyers and women legislators had resulted in the enactment of the law by the provincial government despite strong opposition from conservative groups.

However, lack of a coordinated and comprehensive state level advocacy, favoring enactment and implementation of domestic violence laws, coupled with strong opposition from religion based groups had been hindering women of Pakistan from getting actual benefits of these laws. In practice, there is hardly any documentation on how these laws are being implemented or whether they are at all being implemented or not. However, at least the laws have paved the way for new domestic violence laws to be enacted nation-wide and has given recognition of the right of a woman to have a violence free home.

### **5.3 Salient Features:**

Although implementation status of these laws are unknown, a brief discussion on the provisions of the two laws would be useful in elucidating how domestic violence has been addressed so far in the legal movement in Pakistan.

The text of the Islamabad Act and the Sindh Act are largely identical with few changes. Also both these laws borrow heavily from the Indian domestic violence Act (PWDVA) and are consequently also similar to the Bangladeshi Act (DVPPA). Hence the significant aspects of these two laws are jointly discussed below:

#### ***5.3.1 Definition of aggrieved person***

Compared to the Indian Act and the Bangladeshi Act, one notable addition made by the Pakistani laws is with regard to the definition of aggrieved person. The definition as well as the preamble clearly specifies that not only women and children but also any vulnerable person can also avail the benefits of the law. The definition of vulnerable person is given as such: "vulnerable person means a person who is vulnerable due to old age, mental illness or handicap or physical disability or for other special reason.

#### ***5.3.2 Divorced women included within the scope of law***

Unlike the Bangladeshi law, Pakistani laws include divorced women within the ambit of the definition of 'domestic relationship' and 'domestic violence'. The Acts define 'domestic violence' as inclusive of but not limited to, all acts of gender-based, and other physical or psychological, abuse committed by a respondent against women, children or other vulnerable persons, with whom the respondent is or has been in a domestic relationship. The term 'domestic relationship' has been defined as relationship between persons who live, or have at any point of time lived together in a household when they are related by consanguinity, marriage, kinship, adoption,

or are family members living together. However, although this is a commendable addition, it is uncertain as to how far this broader definition of domestic relationship will be accepted in practice.

### ***5.3.3 Duties of the government***

Following the paths of the Indian Act, the Pakistani Acts also accommodated a separate provision declaring certain general duties of the government for effective implementation of the laws. The duties include, ensuring wide publicity of the Act through electronic and print media; giving periodic sensitization and awareness training to the government officers, police and members of the judicial service on the issues addressed by this Act; and formulating effective protocols to address the issue of domestic violence.

### ***5.3.4 National Commission***

In addition to the duties of the government, the laws have referred to the role of a government established commission (the National Commission on the Status of Women, in case of Islamabad) to assign them certain additional duties under the laws. Such duties include, reviewing the existing provisions of the law on domestic violence and suggest amendments therein, if any; calling for specific studies or investigation into specific incidence of domestic violence; looking into complaints and take *suomoto* notice of matters relating to domestic violence and the non-implementation of the law; and participating and advising on the planning process for securing a safe environment free of domestic violence.

### ***5.3.5 Scope of domestic violence***

Regarding the scope of domestic violence, as in case of India and Bangladesh, the laws in Pakistan also recognize various forms of violence as domestic violence within the purview of the Acts; ranging from physical abuse, emotional, psychological and verbal abuse, to sexual abuse as well as economic abuse. In fact, compared to the two Acts in India and Bangladesh, a number of new incidents of violence have been expressly recognized under the broader criteria of different forms of domestic violence. For instance, 'emotional or verbal abuse' includes among others, blaming a spouse of immorality; threats of divorce and baselessly blaming or imputing insanity, or citing barrenness of a spouse with the intention to marry again. Again 'sexual abuse' though defined with similar generic terms as in India and Bangladesh, it specifies certain acts to be sexual abuse; as for instance, compelling the wife to cohabit with anybody other than the husband.

### ***5.3.6 Criminalization of certain forms of domestic violence***

One striking feature of the Sindh law, which is missing both in PWDVA and in DVPPA is regarding criminalization of certain specific forms of domestic violence, prescribing specific punishment for such acts. Whereas in India and Pakistan remedies are predominantly civil in nature, the Sindh Act has made different forms of abuses including verbal and sexual abuses, punishable under the Act. For instance all the offences under section 5(f) of the Act which enumerates 'Emotional, psychological and verbal abuse' are punishable with imprisonment of minimum six months or with fine to be paid as compensation to the aggrieved person and which shall not be less than ten thousand rupees or with both.

### ***5.3.7 Civil remedies***

In addition to the criminal remedies, the Acts also provide for civil remedies such as protection order, residence orders, monetary relief and child custody orders. The laws empower the court to grant any interim order (other than only interim protection order) at any stage of the proceeding on the basis of affidavits. Breach of an interim order or protection order is again punishable under the laws.

### ***5.3.8 Custody order***

In terms of the custody order the Pakistani Acts make a significant departure from the text of the PWDVA and DVPPA. The provision states that when an aggrieved person is a child the temporary custody will be given to a person under the Guardians and Wards Act 1890 (VIII of 1890). When an aggrieved person is an adult, the temporary custody will be given to a service provider or some other person in accordance with the will of the aggrieved person. Thus unlike the DVPPA or PWDVA, the relief is viewed from the perspective of the child being aggrieved and not from the perspective of the mother. In addition, the proviso to this provision further declares that in any case where a complaint of sexual abuse of a child has been made and the court is prima facie satisfied that such allegation is true, the court shall grant custody of the aggrieved child to the non-respondent parent or guardian or the person making an application on his or her behalf. Thus the best interest of the child is applied when there is complain of sexual abuse. Interestingly the Act in Islamabad adds a further provision to this order by declaring that in such case of allegation of sexual abuse against a child, no order for arrangements for visitation by the respondent shall be made.

### ***5.3.9 Protection committees***

Another significant addition to the Pakistani laws are regarding constitution of protection committees by Government notification: A Protection Committee shall

comprise a Social Welfare Officer who shall be the convener, medical practitioner, a psychologist, psycho-social worker and an official appointed by the court, a female police officer not below the rank of Sub-Inspector and two women members from civil society and the Protection Officer who shall also act as the Secretary of the Protection Committee. Thus a multi-agency response system has been prescribed in a single platform to address domestic violence incidents. The duties of Protection committees are similar to that of a protection officer under the DVPPA, the main difference that it would make is in the way that it would function, as it is a combination of different service providers. Other than this, the laws in Pakistan provide for appointment of Gazette officer by government to act as protection officer, enlistment of other service providers and enumerate their duties and functions.

#### **6. Concluding remarks**

Although information on implementation status are lacking - especially in case of Pakistan, these laws are good examples of how the South Asian countries, are striving for a common platform to learn and share from each other's experiences in their struggles against issues like domestic violence. There is significant scope for Bangladesh to adopt progressive contents from the domestic violence laws in India and Pakistan and implement them in its own legal framework. Considering the common threat that the issue of domestic violence may get subdued by notions of religion, patriarchy or economic vulnerability of women; it is imperative to closely monitor the developments that may happen in future in the South Asian region regarding implementation of these laws.