

LAW JOURNAL

ARTICLES

- UNNATURAL OFFENCES : A STUDY OF MEDICO-LEGAL PROBLEMS
- IDENTIFICATION OF PROBLEMS FOR BANGLADESH IN LAW OF THE SEA MATTERS
- PROTECTION AND PROMOTION OF HUMAN RIGHTS: INTERNATIONAL PERSPECTIVE
- MARRIAGE OF MINORS IN BANGLADESH: A STUDY OF MUSLIM LAW AND STATUTORY PROVISIONS
- THE LAW OF 'QISAS' AND ITS PHILOSOPHY IN ISLAMIC CRIMINAL LAW
- PREVENTION OF CHILD MARRIAGE BY THE CHILD MARRIAGE RESTRAINT ACT, 1929: LEGAL IMPLICATIONS AND SOCIAL REALITY
- MUSLIM PERSONAL LAW: CLASH AND RECONCILIATION
- FAIR AND SPEEDY TRIAL (BANGLADESH CONTEXT)
- DEMISE OF VIRGINITY IN MARRIAGE
- THE LAY STANDARDS AND PROBATIVE VALUE OF OPINION EVIDENCE



Faculty of Law
Rajshahi University

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MUHAMMAD FAIZ-UDDIN

EDITOR



**FACULTY OF LAW
RAJSHAHI UNIVERSITY**

Therefore fear not men,
But fear me, and sell
not My Signs for a miserable
price. If any do fail to
judge by (the light of) what
Allah hath revealed, they
are (no better than) unbelievers.

Al-QURAN 5:44

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EDITORIAL

The Law Faculty for the first time has published a research Journal within a very short time. Obviously it will not be immuned from errors despite my sincere efforts. Previously the Department of Law used to publish a "Law Review" almost with similar end in view. For reasons not known to me the Law Review has not seen the light of the world for the last few years. I was prompted to fill up the gap for the academic interest of this single department faculty.

The present issue is funded from the surplus amount of the two Admission Tests (1995 & 1996) conducted during my Deanship. I thank the present administration of this University for extending financial support in bringing out this issue.

The Law Journal contains articles on various law subjects starting from personal law to International law. The contributors freely expressed their views and suggested at times amendment, repeal, new legislation in the context of socio-political changes of our time. This is just a humble beginning of noble end. It is expected that my successors will continue to publish the journal regularly every year and will enrich it in original beauty and pave the way to the discovery of new knowledge for the study of law. It is needless to mention that the personal opinions as reflected in different articles are not necessarily the opinion of the Editor or Editorial Board.

(Muhammad Faiz-Ud-Din)

Dean, Faculty of Law

&

Editor, Law Journal

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Rajshahi University

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UNNATURAL OFFENCES: A STUDY OF MEDICO-LEGAL PROBLEMS

Md. Muazzem Husain*

Sex offence or sex-delinquency is perhaps the oldest of all crimes in human history. It is not only a hated one but also a man or woman who is guilty of this sort of offence is deemed to be a danger to social peace. But why this kind of offence takes place is a question which can be answered properly if the sex-offender is rightly understood. Sexual psychology is an important but complicated science and for the study of the occurrence of such an offence it should be remembered that such an offender is a product of many complications. He or she cannot be judged by certain classic principle of law. It is an important subject to sociologists, psychologists, criminologists and lawyers, and if they want to know such a sex-offender they should better enter into the depth of the subject. For better understanding or for statistical purposes the sex crimes may broadly be classified into some major categories such as (a) prostitution, (b) rape, and (c) other sex-offences. Of them, an unnatural sex-offence (which falls in the third category) like rape is a most shocking and alarming one to human conscience and morality.

In both the civilized and uncivilized societies people regulate their sexual intercourse by law and custom, but in case of unnatural sex-offences or sexual perversions the carnal intercourse takes place against the order of nature, i.e. not taken place through proper channel. After proper

* Professor, Department of Law, Rajshahi University, Rajshahi, Bangladesh.

study of the subject the following forms of unnatural offences or sexual pervasions are found so far as men and women are concerned (and these are neither regulated nor given any legal colour anywhere in the world).

Sodomy

It is an unnatural sexual intercourse between a man as an active agent and either a man, a woman or child of either sex as a passive agent. But this sort of sexual intercourse is generally seen between males. It is also called *Paederasty* when the passive agent is a young boy (catamite), and it is sodomy or *Pederaesti* (when) forced on a boy by a man. The term *homosexuality* is ordinarily used to indicate persistent emotional and physical attraction to members of the same sex. As such it is an abnormal personality development. In such a sex-game who plays the male role is termed as active agent and who plays the female role is termed as passive agent. In this game or act of sodomy or homosexuality it is sometimes seen that it is practised between two males who alternately act as active and passive agents. In this sub-continent there are a class of male prostitutes who are commonly known as *Eunuchs* whose main livelihood is by passive paederasty. They dress and move like women, and adopt female tastes and habits. Among these sexual inverts there are distinct groups such as Hijras and Zenana. The eunuchs (*hijras*) are deprived of their genitalia mostly before puberty and the latter have them intact. These two groups live separately and preserve a distinct line of demarcation between themselves and the female prostitutes.¹

Most of these have a compulsive urge of homosexuality but there are few who are latent homosexuals and some who indulge occasionally

with an exploratory sense or when they are deprived of contact with members of the opposite sex.²

A homosexual component exists in everybody and so in this sense it is universal. In one sense it is a disease. It exists among all callings and at all levels of society.³ It is generally found that an active agent is a grown-up male and the passive agent, a boy and occasionally a girl or a woman.

Tribadism

This form of mental aberation is known as Lesbianism or female homosexuality. This is nothing but a sexual relation between two persons of the female sex. In some cases an unduly developed clitoris is used as an instrument of passion, while in other cases some artificial method is employed. Aristophane⁴ mentions the use of an artificial penis or phallus by Milesian females. This sort of inversion is found among some women, but this kind of cases is rarely brought to the notice of the law-enforcing agencies or the court because this is not covered by Section 377 of the Penal Code⁵ of Bangladesh.

Homosexual women are generally mental degenerates, and have very often natural antipathy and indifference towards individuals of opposite sex. On the other hand, they are so morbidly jealous of the women with whom they are in inverted love that they are sometimes incited to commit even murder.⁶

Bestiality

It means an abnormal and unnatural sexual connection of human beings with animals. Usually the sexual intercourse between a male and a female takes place

through vagina, but in bestiality it takes place through anus or any other orifice to receive the male organ. Generally the lower animals like cows, mares, she-asses, goats, bitches, even hens, etc. are selected for the purpose. This sort of crime may be committed with any animal, provided that intercourse, whether per anum or per vaginum is physically possible.

In this regard mention should be made about *Necrophilia*⁷ which denotes sexual intercourse with corpses. It is a senseless and very dirty form of sex perversion, and some people have the taste and desire for sexual intercourse with a dead body.

Besides the unnatural offences mentioned above, there are some other varieties of sexual perversion or unnatural offences, which are discussed below.

Sadism

In this form of unnatural offence the sadist derives satisfaction from act of cruelty which he inflicts on his sexual partner, and to him this sort of infliction of pain and torture acts as sexual stimulant. It may be practised by either sex, but it is more commonly seen in males. In order to satisfy his sexual gratification the sadist brands his sexual partner, severely bites her, flogs her with a whip, beats her with a stick, inflicts cuts on her person with knife or ill-treats her in any other way he likes. In some extreme cases the sadist may go up to the length of murdering a female to gratify his sexual desire. In such cases the victim is usually a child. The sadist may not have violated her sexually but may have caused serious injuries by hand on her private parts or genitals. And if murder is caused in such case it is called *lust murder*.⁸ It must be kept in mind

that every such murder committed during a sexual act is not a lust murder, but it may be caused out of jealousy, anger, revenge or for any other reason or motive. It is very rare that a sadist is driven to most impulsive act of violating the body soon after killing the female victim, or cuts open her body, tears out her genitals or other organs and devours the flesh to derive sexual pleasure. This kind of dreadful aberration of a sexual pervert is called *Necrophagia*,⁹ but this is rarely seen in our country.

Masochism

This is totally opposite to sadism.¹⁰ In it the pervert gets pleasure and satisfaction by being beaten or humiliated by the sexual partner. It is generally found in males, but may also occur in females who invite their lovers to subjugate them by inflicting injuries on their person. Sometimes, a masochist experiences pleasure and voluptuousness culminating even in orgasm when he allows himself to be abused, insulted or ill-treated by a woman.¹¹

In this connection, some mention may be made about *Sado-Masochism*¹² which indicates the sexual perversion to such an extent that lust craving demands may cause murder or mutilation of the body of the victim. In this form, sexual satisfaction is derived with the help of pinching, slapping or biting the sex object.

Fetichism

This kind of sexual perversion is found in males. It occurs when a man obtains sexual gratification or pleasure from a women's wearing apparels or hair, i.e. the fetishist finds sexual excitement in it and mitigates his sexual appetite. A fetishist usually comes in conflict with law, as he often exposes his perversion as soon as he sees the

object of fetich. Sometimes it is reported that a fetishist is found using the clothes of a woman for exciting his sexual appetite until he is able to discharge and wet the same with semen.¹³

Transvestism

Transvestism is also called *Eonism*. It is the perverted desire to wear the dresses of the opposite sex and to be identified likewise, i.e. a male likes to be a female in dresses, movement, manner, fashion, etc. and a female likes to demonstrate as a male in manner, habits, fashion, movement, dresses, etc. They are predominantly homosexuals and are found in both sexes, although no genital abnormality is seen in them. In one report it is available that the females were homosexually oriented and preferred to play a male role in sexual intimacy.¹⁴ Besides the homosexuals there are some transsexuals in the society, and the members of this group of transsexuals intensely desire to become members of the opposite sex and seek surgery for anatomical change.¹⁵ A male transsexual considers himself to be a female locked and covered in a male body. It is most probably due to a functional or structural abnormality (of the tanycyte layer of the ependyma of the third ventricle) in him.¹⁶

Exhibitionism

An exhibitionist exposes the genitals to others to derive sexual interest. This is nothing but some sort of indecent exposure of genital organs in public mostly by males to women, girls or children of either sex. It is very often accompanied by lewd gestures and even masturbation may be indulged in. In some cases this act is impulsive and

spontaneous, while in some other cases it is premeditated and the male organ is exposed even in an erectile position.¹⁷

A majority of the exhibitionists are psychopathic and suffer from alcoholism, epilepsy, senile dementia, general paralysis of the insane or some other abnormal mental condition. It is, therefore, advisable to order a thorough mental investigation before punishment is inflicted on them.¹⁸

Professor Bhooshana Rao cites some cases of sexual perversions like fondling, entry finger or entry stick into private parts.¹⁹ Exhibitionism is a criminal act, It also includes an obscene act and is, therefore, punishable u/s 294 of the Penal Code.

Pedophilia

It also denotes a form of perversion of sex with a child.²⁰ Sometimes the members of this class of sex perverts even commit murder after having sex with children.

Pyromania

It denotes the flame of a passive agent who gets sex-delight in association with fire and he sets fire to get sexual satisfaction.²¹ It is not generally seen that such a pervert has committed any major offence or crime.

Voyeurism

A *voyeur* means a peeper. '*Voyeurism*'²² denotes sudden attack on the opposite sex for sexual gratification. If protested, the voyeurist threatens the object with death in filthy languages, and for the purpose of deriving the sexual satisfaction he can even kill the person from whom the protest comes. The voyeur gets sexual satisfaction through 'seeing, looking and peeping'. The modern trend of teddyism

to wear tight-fit dresses indicates some form of perversion like exhibitionism and voyeurism.

MEDICAL ASPECT

Medical Examination of Active and Passive Agents

Medical Examination of Passive Agent

According to Modi²³ the following signs may be discovered if the passive agent (or boy) is not accustomed to sodomy:

1. Abrasion of the skin near the anus;
2. Laceration of the mucous membrane within the anus with effusion of blood and if the active agent has introduced his penis slowly and carefully without using force into the anus of the passive agent (who is a consenting party), this sign may not be present always;
3. Blood may be found around anus, on thighs or clothes;
4. Semen may be found in or around the anus or on clothes;
5. Signs of struggle such as bruises, scratches, etc. on his body, if he is a grown-up one and if he is not a consenting party;
6. Presence of foreign pubic hair on garments of a boy in whom pubic hairs have not appeared;
7. Lubricant around anus or on garments or recovered by swabs from rectum also constitute strong evidence of the perpetration of such crime.

In addition to the above-noted points the following points more are stated by Naushahi:²⁴

- a) Pain on walking and on defecation.

b) Prolapsus of the anus.

If the passive agent is a boy of tender age and the active agent is a healthy grown-up male, the injuries may be more extensive and well-defined.

In the opinion of Modi,²⁵ if the passive agent is a habitual one, the following signs may also be found:

1. Anal hair may be shaved but not necessarily the public hair;
2. A funnel-shaped depression of the buttocks towards anus. This may be marked in their persons but may not be present in a healthy individual;
3. Dilated and expanded condition of the anus with disappearance of its radical folds and prolapse of the rectal mucosa as the sphincter is relaxed;
4. Scar marks of old lacerations in the rectum near the anus;
5. Presence of gonorrhoeal discharge, syphilic cancer or condyloma i.e. an overgrowth near or around the anus.

In such a case if the active agent is a gonorrhoeal or syphilic patient, he may infect the passive agent, and if the passive agent is a patient of those diseases he may also infect the active agent with those diseases.

Examination of the Active Agent

Naushahi²⁶ opines that on medical examination on the person of the active agent the following signs may be available:

1. Abrasion of penis;
2. Absence of smegma in case of recent commission;

3. Presence of seminal discharge on the clothing, body or public hair;
4. Presence of blood on clothes, etc.
5. Presence of particles of faecal matter on the penis;
6. Signs of struggle or violence.

Besides the above points, Modi²⁷ states the following important signs which may be found in case of bestiality:

1. Presence of human spermatozoa in the vaginal or anal canal or in other orifices of the animal's body;
2. Presence of the animal's hairs, specially of its external genitals, on the person and clothing of the accused;
3. Presence of dung or blood on clothes or on parts of the body of the accused;
4. Presence of abrasions on generative organs of the accused;
5. Marks of injuries on the person of the accused caused by kicks, teeth or claws of the animal;
6. Laceration on the anus or external genitals of the passive animal with effusion of blood;
7. Presence of gonorrhoeal discharge in the vagina of an animal, specially a she-ass, is a positive sign of bestiality, as gonorrhoea doesnot occur naturally in such animals.

Consent to Medical Examination

Prior consent of a female is necessary for her medical examination. She cannot be examined medically without her consent. Even she cannot be compelled to submit to medical examination against her will or without her consent and her refusal to such medical examination is no evidence

against herself, and no adverse presumption can be drawn against her. She should be allowed to give her own account of the act without any question being put to her. She should be examined in presence of a witness with her prior written consent if she is of and over 12 years of age and capable of understanding the nature and implication of such examination, or with the written consent of her guardian if she is a child or a person of unsound mind²⁸ (Section 90 of the Penal Code). The examination of a female without her consent is regarded in law as an assault.²⁹ It should be kept in mind that neither the police nor the court has any power to compel her to submit the private parts of her person to the examination of a medical man, male or female. Force cannot be used by any magistrate or by his subordinate in the matter of such medical examination of a girl.³⁰ Even an attempt at undressing a woman should never be made, but she should be requested to undress herself and if she does so, her medical examination will be done in presence of a witness, preferably a female nurse.³¹ If it is the question of examining an accused who is a male, before his medical examination his written consent should also be taken after it is duly explained to him that the result of such examination may go against him.³²

Duty of Investigating Officer

According to Masood-ul-Hasan the following important things be noted by the Investigating Officer while investigating a case of rape or unnatural offence:

- a) The clothing on the person of the accused as well as on the person of the victim should be watched carefully to find out if it was torn or stained with mud, etc.
- b) Blood may be noted on the clothing or on the ground where the offence was committed.

- c) In the case of women broken pieces of bangles may be found.
- d) The footprints and fingerprings of the accused and the victim may also be noted and preserved for scientific detection.³³

But according to Hamza Hossain the following points should be noted by the Investigating Officer while investigating the case of an unnatural offence:

- i. Both participants in cases of homosexual perversion must be examined promptly by a physician.
- ii. All injuries on the body should be noted, specially scratch marks, lacerations near the region of the passive agent.
- iii. The penis of the active agent should be examined for semen and injuries.
- iv. Bloodstains on the persons, both passive and active, should be searched in wearing apparel.
- v. In case of bestiality both animal and human participants should be examined. Animal hair should be searched with man for microscopic examination.³⁴

LEGAL ASPECT

Sometimes some queer and peculiar cases come to the notice of the court. In one such a case³⁵ the husband obtained a decree from the court to divorce his wife because she was in the habit of having unnatural relation with other women by neglecting her husband in the matter of sex. In another case,³⁶ sexual intercourse per nose with a bullock was regarded and considered as an unnatural offence within the meaning of Section 377 of the Penal Code. In an English case,³⁷ it was held that the accused could not be found guilty of bestiality with a domestic fowl whose parts

were too small to admit those of the accused and which would have been torn away in the attempt. But in another such case,³⁸ it was held that -- a domestic fowl is an *animal* and any attempt to commit an unnatural offence with such a fowl will be a punishable offence. In R.V. Bourne case,³⁹ it was found that a man sexually excited his dog, compelled his wife to submit to a connection with the dog, for which he was convicted for aiding and abetting his wife to commit such offence of bestiality.

In Bangladesh, the Penal Code⁴⁰ contains only one section, i.e. Section 377 which specifically speaks about the law of unnatural offence. This offence consists in a carnal intercourse committed against the order of nature by a man with a man, or in the same manner with a woman, or by a man or a woman with a beast in any manner.

In English Law, a boy under fourteen years of age is not sexually competent to commit such offence and hence, he cannot be convicted for such an offence but may be convicted of an indecent assault under the Sexual Offences Act, 1958. But in Bangladesh there is no such age limit but in such cases the court may decide the matter in the light of the provisions of Sections 82 and 83 of the Penal Code. According to English Law, a man, who as a pathic, committed sodomy with a boy of twelve years of age was convicted of this offence, though the boy was discharged.⁴¹ A married woman who consents to her husband's committing unnatural offence with her is an accomplice.⁴²

In a case one Khanu⁴³ was found guilty of committing unnatural offence with a little child i.e. found guilty of *Buccal Coitus* or *Coitus per Os* (or the sin of Gomorrah) which falls within the provision of Section 377 of the Penal Code and he was convicted for such offence under this Section. In that case⁴⁴ Kennedy, J.C. also observed that --

"there is no intercourse unless the visiting member is enveloped at least partially by the visited organ, for intercourse connotes reciprocity. Looking at the question in the way it would seem that the sin of Gomorrah is no less carnal intercourse than the sin of Sodom". In another case, although a man forced a child to open his mouth, put his penis into it and satisfied his lust, it was held that this did not constitute the offence of sodomy⁴⁵ but the decision proceeded upon a special statute which punished the crime of buggery. Even in a Madras case⁴⁶ it was considered doubtful whether the act of having connection with a woman in the mouth would amount to the offence. But according to Section 377 of the Penal Code it is nothing but a carnal intercourse and hence, in such cases the offenders are punished.

Value of Medical Expert's Opinion

Generally the opinion of the experts in such matters carry much value. But sometimes conflicting opinions come before the courts and those opinions create hindrance in arriving at correct judicial decisions. Even sometimes the opinion of the experts do not have much support from the statements of the witnesses and in such circumstances the court is not bound to rely on the opinion of the experts. In judging such a matter, the expert evidence should be approached with considerable care and caution.⁴⁷ Though the opinion of a doctor is entitled to great weight, it may be discarded if there are good grounds for doing so.⁴⁸ On matters which are within the exclusive knowledge of medical experts, the opinion of the court should better be founded on expert evidence of some textbook of acknowledged authority,⁴⁹ and in this connection it may be said that the statement of the doctor should not be given any value, if not supported by reliable evidence.⁵⁰ In

Rahimuddin's Case,⁵¹ it is held that the opinion given by the expert is reliable. But this view is not supported by the court in another case where it is clearly stated that medical views are not always correct.⁵² It is also held by the court that even in the question of ascertaining age the medical opinion will not be conclusive.⁵³ In such matters, the real purpose is that a doctor should give a correct opinion to enable the court to arrive at a correct decision.⁵⁴ When the opinions of the doctors differ on a particular point, the one which is favourable to the accused should be accepted.⁵⁵ An expert's opinion may be considered by the court in forming its own opinion on the issue before it. Section 45 of the Evidence Act (1872) does not say that the opinion of an expert is binding upon the court. The evidence of an expert is considered in order to enable the court to come to a satisfactory conclusion.⁵⁶ In the light of the above discussion it can be said that the opinion of an expert is not a conclusive one.

Penetration

The offence is complete if the court is satisfied that penetration took place.⁵⁷ Under Section 377 of the Penal Code, evidence regarding penetration is essential.⁵⁸ There must be some *penetratio, res in re*, in order to constitute the sexual intercourse, which is a necessary part of the offence. A very slight penetration is sufficient.⁵⁹ Evidence in support of a charge u/s 377 of the Penal Code must be convincing as it is very easy to bring such a charge but extremely difficult to refute it. One of the essential ingredients to prove an offence u/s 377 (Penal Code), is among others, that penetration must have been effected. In this sense the committal of unnatural offence is very similar to that of rape where equal penetration is an essential ingredient which must be proved before conviction can be given (1

PCR 30). At least in case of sodomy -- some sort of penetration needs to be proved to constitute the offence u/s 377 of the Penal Code.⁶⁰ In such cases medical examination is highly essential. Sometimes it is alleged that there is penetration but if medical examination is done, it is seen that there is no penetration. It was held in Ramkala's case⁶¹ that if medical examination was done, it would have been found that the condition of the parts would have negated the possibility of recent complete penetration or proved that there was no penetration at all.

But penetration into anus is not essential for an offence u/s 377 of the Penal Code.⁶² Penetration in thighs is sufficient to bring the charge of the offence under this Section.⁶³

Attempt -- If a person is seen that he deliberately abstains from penetration he cannot be said to be guilty of an attempt to penetration, and if there is no attempt to penetrate the offence u/s 377 read with Section 511 of the Penal Code cannot be made out (PLD 1961 Pesh. 7). For bringing a charge of attempt to commit an offence of sodomy (u/s 377/511 of the Penal Code) actual penetration is not necessary to constitute the offence.⁶⁴ In one case⁶⁵ it was found that the accused rubbed his penis on the anus of the victim but discharged before penetration, and in that case though there was no penetration there was attempt to commit an unnatural offence against the order of nature, which rendered the accused liable u/s 377 read with Section 511 of the Penal Code. Thus an attempt to commit this offence there should be an attempt to thrust the male organ into the anus of the passive agent. At least some act on the part of the accused in that particular direction ought to be strictly proved. Where there is an intention on the part of a man to satisfy his lust by carnal intercourse

against the order of nature, he spends himself, and he does not do any act which may be said to be an attempt to commit such offence of sodomy.

Corroboration -- Corroboration is necessary to convict a man on a charge of an unnatural offence. But it was held in Sarder Ahmad's case⁶⁶ that an unnatural offence conviction may be based on uncorroborated testimony of the victim. But it is unsafe to convict a man on the uncorroborated testimony of the person on whom the offence is said to have been committed, unless for any reason that testimony is entitled to special weight.⁶⁷ It is extremely dangerous and permissible only in exceptional cases to convict a man of sexual offence on the uncorroborated testimony of the complainant. The corroboration must be by independent evidence from another person.⁶⁸ In this type of cases, the statement of the victim requires corroboration by independent evidence, in order to be believed.⁶⁹

Endnotes

¹ *Modi's Medical Jurisprudence and Toxicology* (edited by N.J. Modi), 20th Edn., p. 347.

² *Ibid.*

³ *Ibid.*, p. 348.

⁴ Casper. *Forensic Medicine* (Eng. Trans.), Vol. III, p. 335.

⁵ Act XLV of 1860.

⁶ *Modi's Medical Jurisprudence and Toxicology*, 20th Edn. (edited by N.J. Modi), p. 352.

⁷ Hossain, Hamza. *A Hand Book of Criminology* (2nd edn.), p. 120.

⁸ *Modi's Medical Jurisprudence of Toxicology* (Edted N.J. Modi), p. 353.

⁹ *Ibid.*, p. 354.

¹⁰ *Ibid.*

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- ¹¹ *Ibid.*
- ¹² *Ibid.*
- ¹³ *Ibid.*
- ¹⁴ *Brit. Med. Jour.* (December 26, 1959), pp. 1448-1452.
- ¹⁵ *Brit. Med. Jour.* (April 9, 1966), p. 23; *Jr. Ind. Med. As.* (August 1, 1955), p. 178.
- ¹⁶ *Med. Sc. & Law* (April 1975), p. 92.
- ¹⁷ *Modi's Medical Jurisprudence and Toxicology* (edited by N. J. Modi), 20th Edn., p. 354.
- ¹⁸ *Ibid.*
- ¹⁹ *Jr. Ind. Med. As.* (Aug. 1, 1955), p. 178.
- ²⁰ Hossain, Hamza. *A Hand Book of Criminology* (2nd edn.), p. 120.
- ²¹ *Ibid.*
- ²² *Ibid.*
- ²³ *Modi's Medical Jurisprudence and Toxicology* (edited by N. J. Modi), 20th Edn., pp. 349-350.
- ²⁴ Naushahi, S.I.H. *The Law of Medical Evidence*, 1987 Edn., p. 57.
- ²⁵ *Modi's Medical Jurisprudence and Toxicology* (edited by N. J. Modi), 20th Edn., pp. 350-351.
- ²⁶ Naushahi, S.I.H. *The Law of Medical Evidence*, 1987 Edn., pp. 57-58.
- ²⁷ *Modi's Medical Jurisprudence and Toxicology* (edited by N. J. Modi), 20th Edn., p. 353.
- ²⁸ *Ibid.*, p. 335.
- ²⁹ Section 354 and 355 (of Penal Code 1860) contain provisions of punishment for such offence.
- ³⁰ *Times of India*, Oct. 2, 1924.
- ³¹ *Modi's Medical Jurisprudence and Toxicology* (edited by N. J. Modi), p. 336.
- ³² *Ibid.*, p. 340.
- ³³ Hasan, Masood-ul. *Sex Problem in Law* (1987 Edn.), p. 99.

³⁴ Hossain, Hamza. *A Hand Book of Criminology* (2nd Edn.), pp. 55-56.

³⁵ *Gardner v. Gardner*, 1947 All. E.E. 630.

³⁶ *Khandu*, 35 Cr. L.J. 1096.

³⁷ *R. V. Muetreaty* (1812) 1 Russ. 822.

³⁸ *Brown* (1899), 24 Q.B.D. 357.

³⁹ *R. V. Bourne* (1952), 36 Cr. App. R. 125.

⁴⁰ Act XLV of 1860. Section 377 of this Act (Code) States that -- "whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and also be liable to fine. Explanation -- Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in the Section".

⁴¹ *Allen* (1849), 3 Cox 270.

⁴² *Jellyman* (1838), 8 C. & P. 604.

⁴³ *Khanu*, 26 Cr. L.J. 945.

⁴⁴ *Ibid.*

⁴⁵ *Jacob's Case* (1871), Russ. & Ry. 331.

⁴⁶ *Govindarajulu Naicken* (1886), 1 Weir 382.

⁴⁷ *Panchu Mondal v. E.*, 1 C.L.J. 385.

⁴⁸ *Alam Pramanik v. E.*, 1942 C. 239.

⁴⁹ *Md. Sarfaraz Khan v. Crown* (1953), 5 DLR (FC) 280.

⁵⁰ *Ghulam Quader v. Nur Ahmed*, 6 DLR (WPC) 178.

⁵¹ *Rahimuddin v. State* (1960), 12 DLR 453.

⁵² *Shahidullah Khan v. State* (1960), 12 DLR 537.

⁵³ *Banney Khan v. State* (1966), 18 DLR (WP) 28.

⁵⁴ *Sabir Hussain v. State* (1969), 21 DLR (WP) 5.

⁵⁵ *Ekabbar Ali v. State* (1970), 22 DLR 620 (at p. 621).

⁵⁶ *Prafullah Kamal Bhattacherya v. Ministry of Home* (1976), 28 DLR 128.

⁵⁷ *Robert Keepspear* (1882), Mood. 342.

⁵⁸ *Md. Shuaib v. Crown*, 1 PCR 39.

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94. ⁵⁹ Hasan, Masood-ul. *Sex Problem in Law*, 1987, Edn., p. 94.
- ⁶⁰ *Nur Muhammad v. State*, 41 DLR 301.
- ⁶¹ *Ramkala v. Emperor*, 47 Cr. L.J. (1946) 611.
- ⁶² *Muhammad Ali v. State*, 12 DLR 827.
- ⁶³ *Ibid.*
- ⁶⁴ *Ali Muhammad v. State*, 22 DLR (WP) 155.
- ⁶⁵ *Mehabar Nawshirwan Irani v. Emperor* PLD (1959) Lah. 623 (626).
- ⁶⁶ *Sarder Ahmad*, 16 Dr. L.J. (1914) 266.
- ⁶⁷ *Ganapat*, 19 Cr. L.J. (1918) 946.
- ⁶⁸ *Rashid Ahmed v. State*, 10 DLR 532.
- ⁶⁹ *Mumtaz Ahmed Khan v. State* (1987) 19 DLR (SC) 259.

**IDENTIFICATION OF PROBLEMS
FOR BANGLADESH
IN LAW OF THE SEA MATTERS**

M. Habibur Rahman*

Bangladesh emerged as an independent and sovereign republic on 16 December 1971. With a population of about 120 million squeezed into about 55,598 square miles, it is one of the most densely populated countries of the world. Bangladesh is surrounded by India in the north, west, and east and shares a considerable length of border with Myanmar (Burma) in the east. It is a land of rivers and a formation of delta of Gangetic plain. Bangladesh is classified as one of the least developed countries under UN General Assembly resolution 5487 (XXX). It is a geographically disadvantaged state in the context of UN Convention on the Law of the Sea, 1982. To the south lies the deeply indented coastline of the Bay of Bengal. The soils of Bangladesh's excessively humid plains are swampy, and most of the delta regions possess young alluvial soils of considerable fertility. Older, less fertile alluvium also occurs, notably in Barind, between Ganges and Brahmaputra rivers in the northwest corner of the country.

The rivers of Bangladesh flow from the Himalayas, the highest mountains in the world, and carry down to the bay a colossal discharge of silt. Heavy monsoon rainfall, cyclonic storms, and tidal surges together with the silt have contributed to a continuous process of erosion and shoaling both on land and in the mouths of the mighty rivers. The

* Professor of Law, Rajshahi University, Bangladesh.

coast of Bangladesh is zigzag, indented, broken, irregular and unstable and the presence of river deltas and islands in the bay have put the country into peculiar situation when it comes to decide boundaries of different sea zones.

The Bay of Bengal and the rivers are the source of various fish, and there are extensive fishing grounds in the northern region of the bay. From the coastal bay, fish such as the hilsa (a major food of the rice-eating Bangladesh people) migrate to the rivers and from there to other inland waters for breeding. The people of the coastal area live by fishing and the country depends on its fishery resources for foreign exchange. The Bay of Bengal is also rich in seaward and mineral resources. Bangladesh has no mineral ores, but it does produce salt from the bay waters. The bay is the only channel linking Bangladesh with other countries, and Bangladesh's trade and commerce depend solely on these sea routes. Thus, the entire country is the hinterland of the Bay of Bengal and the importance of the bay to Bangladesh is unquestioned.

Bangladesh initially followed the law of the sea provisions as these had been applied by Pakistan. Following independence in 1947, Pakistan complied with the Territorial Waters Jurisdiction Act, 1878, and the Fisheries Act, 1897 of Great Britain. While different states began to pass laws soon after the Truman Proclamations 1915, it was only on 9 March 1950, by the Declaration of the Governor-General, Pakistan specified that the seabed extending to the 100 fathom contour into the open sea belonged to its territory. It only signed the Continental Shelf Convention on October 1958 but did not ratify. The 19 February 1966 Proclamation of the President of Pakistan asserted claims to the 12 nm exclusive fishing zone and

the 100 mm conservation zone in the areas of the high seas adjacent to the territorial waters.

However, as an independent state, Bangladesh felt the need to apply the law of the sea provisions to its own situation. Accordingly, it enacted the Territorial Waters and Maritime Zones Act on 24 February 1974. The Act was promulgated before the second session of the UNCLOS III. As authorised by this Act the Ministry of Foreign Affairs announced on 15 April 1974 its 12 mm limit for the territorial sea 18 mm for the contiguous zone, 200 nm for the EEZ and up to the outer limits of the continental margin bordering on the ocean basin or abyssal floor for the continental shelf.

Bangladesh is a signatory to UN Convention on the Law of the Sea, 1982 but the country has not ratified it as yet. The coast of Bangladesh is concave whereas that of its neighbours India and Myanmar is convex. As adjacent coastal states Bangladesh and the neighbours need to delimit the sea zones from the coast to the outer edge of the zone concerned. The delimitation of maritime zones creates a conflict between Bangladesh and its neighbours. Disagreement arose mainly with India when the Bangladesh government in 1974 signed contracts to share production with six oil companies, granting them oil and natural gas exploration rights in its territorial waters in the Bay of Bengal. Thus, the Bangladesh line moved towards the south from the edge of its land boundary, while the Indian line took a southeasterly direction thus creating an angle within which the thousands of square miles of the bay claimed by each exactly as its economic zone. This overlapping has become a critical problem between the two

neighbouring countries. Thus, the delimitation of maritime boundaries is an all-important matter for Bangladesh and the neighbours, and their areas of authority in the seas, for example, the territorial sea, EEZs and the continental shelf will depend on how it is resolved.

Although negotiations have been going on since 1974, Bangladesh and India have not been able to settle the delimitation problem, mainly because of the concave nature of the Bangladesh coast. Bangladesh's position is that no rigid principle can be applied in the present case and that the basic guideline is equity. India on the other hand, applies the principle of "equidistance" in delimiting the boundary ignoring the physical features of the coast.

Furthermore, new islands are rising in the coastal bay. Both Bangladesh and India have claimed ownership of these newly emerging island(s). New Moore/South Talpatty in the estuary of the Haribhanga River on the border between the two countries. The boundary between Bangladesh and India in the area is the midstream of the main channel of the Haribhanga. The island formed in the estuary of the Haribhanga and the Raimangal rivers, most probably after the cyclone and tidal bore of 1970 is a new terrain, rising initially as a low-tide elevation. Known as South Talpatty in Bangladesh, it is a U-shaped formation with the eastern arm elongated towards the north in 1978 its approximate area at low-tide was about two square miles, but this may have increased. Both Bangladesh and India claim the island to have emerged in its territorial waters. Bangladesh lays claim to this island on the assumption that the midstream of the border river Haribhanga flows to the west of the island, while India

claims it on the assumption that the midstream flows to the east of the island.

Bangladesh also faces a peculiar situation on its coastal bays. On the western coast bordering India, a few miles away from the joint estuary of the Haribhanga and Raimangal rivers are neighbouring deltas. From the mouth of the rivers, a deep channel with a depth from 8 to 20 meters forms a low bank between the deltas. A small area dries up at low water. A similar situation arises with the river Naaf near its eastern coastal border with Myanmar. The river discharges into the sea between Shapura Point and Cypress Point about a mile southeastward. Where the river enters the sea, two shallow flats have been formed, one known as Shapura Flat and the other south of Cypress as Cypress Sands. Near them is St. Martin's Island, which is surrounded by a considerable region of very shallow water. All these have posed perennial problems for Bangladesh in delineating baselines.

The topography of the Bay of Bengal adjoining Bangladesh and its neighbours is very peculiar. The bay is neither a closed bay nor a bay as defined under the semicircle criterion. It is not a historic bay and, as such, no coastal state can exercise territorial rights. A close look at a map clearly illustrates the characteristics of the coastline. Geological features and climatic conditions are playing a major role in the evolution and characteristics of the coastal regions. The effects of erosion and shoaling have been monumental:

1. The estuary of Bangladesh is such that no stable water line or landward and seaward demarcation exists.

2. The continual process of alluvion and sedimentation forms mudbanks, and the area is so shallow only small boats can navigate it.
3. The navigable channels through the aforesaid banks continually change course and require soundings to establish their demarcation.

Taking into account the geological and topographical peculiarities of the coast and bay, Bangladesh has drawn baselines on the basis of the depth-method. The baselines so formulated have been fixed at ten fathoms extending 16 to 30 miles from the coastline. Since the coastal bay is highly changing, the baseline delineated even on depth criterion cannot be stable. It needs to be from time to time surveyed and to take measures are to be taken accordingly. So long there will be no delimitation of maritime boundary agreed upon by Bangladesh and its neighbours, more and more problems will arise there between them.

PROTECTION AND PROMOTION OF HUMAN RIGHTS: INTERNATIONAL PERSPECTIVE

Muhammad Faiz-ud-Din*

Introduction

In recent years the concept of human rights has become a very popular issue for discussion and implementation and it has assumed a new dimension. Different governments and non-governmental organizations and human rights workers are highly concern regarding the deteriorating state of human rights at home and abroad. In fact, human rights situation has been worsening due to ethnic, religious, political, sex and language differences. Intolerance, absence of rule of law, hatred towards humanity, high political ambitions and above all, lack of respect towards humanity are hindrances against protection and promotion of human rights. Needless to say, violations of human rights are committed by human beings themselves and not by beasts or other animals, though mankind has been proclaimed by Almighty Allah, as '*Ashraful Mokhlukat*',¹ i.e., best of all creations.

In this article I have ventured to find out the efforts so far taken internationally for the protection and promotion of human rights and to assess the success or failure thereof.

1. Human Rights defined

The terms 'human rights' mean those rights which are inherent in human beings. Men are born with these rights which are inalienable by any law or constitution.² Human rights "are those rights that are inherent in human

* Associate Professor, Department of Law, University of Rajshahi

persons and without which they cannot live as human beings.³ The words 'human' and 'rights', when used together, therefore, mean legal claims relating to men or mankind and such universal rights of human beings grew in mankind from ancient time⁴ and after undergoing changes through different stages and forms has come to present standard. Today human rights are enjoying universal attention and interest. The World Conference on Human Rights adopted a resolution known as the Vienna Declaration 1993 has stated that the human rights are universal, indivisible, interdependent and interrelated.⁵ Human rights are, therefore, nothing but birth rights which are associated with the very birth of mankind, for these are fundamental requirements for existence of human beings.⁶

Those rights, it is observed, are not only universal, inalienable and inviolable but also inclusive of fundamental rights and freedoms of all members of human family. These rights are to be enjoyed equally, freely and without any arbitrary public or private interference.⁷ Human rights are enjoyed by all individuals by virtue of birth and humanity. From birth to death they are entitled to these rights irrespective of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".⁸ Thus human rights "represent minimal moral standards for human society"⁹ and as such are concerned with the dignity and worth of the individual person. As human rights are inseparable from a human person, so nobody can illegally snatch away these rights from him except by operation of law. Arbitrary deprivation of these rights may lead to chaos and confusion in the society jeopardising peace and tranquility. Hence it is the duty of states to recognise human rights which are universal, inherent and inseparable rights of the members of human family. The United Nations, like the states, is also

concern with the promotion and protection of human rights and fundamental freedoms and this idea owes its origin from the realization by the international community that every human being, man or woman, is entitled to some basic human rights.¹⁰

Thus human rights encroached the national boundaries and entered beyond the limits of municipal law and become the international concern for their promotion and protection within the purview of International law. In this respect we may mention the Declaration adopted by the General Assembly in 1986. "All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights."¹¹

2. Development of the Concept of Human Rights

Though the protection of human rights may be traced back to Greek civilization,¹² it is believed, "international protection of human rights is firmly established in international human rights law"¹³ which has been systematically developing from the first quarter of the 20th century. Only after the Second World War, systematic attention has been given in international law through world bodies for the protection of human rights. But before the Second World War, Muslim states used to protect human rights based on the Quran and the Sunnah by their respective state laws, though, however, there were differences among them regarding the mode of implementation of these rights. In the later ages, we find national and regional arrangements for the protection of human rights. Mention may be made of Magna Carta, 1215;

the Petition of Rights, 1628; the Bill of Rights, 1689; Act of Settlement, 1702; the Virginia Bill of Rights, 1776; American Declaration of Independence, 1776; French Declaration of Rights of man and citizen, 1789; and American Bill of Rights, 1791. These were important national instruments which dealt with some human rights and fundamental freedoms applicable to the peoples of the concerned states and it is evident that these instruments were 'mostly concerned with civil and political rights. In fact, "The civil and political rights are primarily associated with the English, American and French bourgeois revolution of the 17th and 18th century. On the other hand, economic, social and cultural rights find its origins primarily in the socialist and Marxist revolutions of the early 20th century".¹⁴ However, on analysis we find in the above instruments two concepts regarding human rights and fundamental freedoms -- (i) inalienability and (ii) rule of law.¹⁵

After First World War, efforts were made for the protection of minority, religious freedom, protection and treatment of the war wounded persons. These were some provisions of human rights which were not enjoyed by all the members of human family; because there was no effective universal instrument for the protection and promotion of human rights. Only after Second World War which resulted in devastation in Hiroshima and Nagasaki in Japan as a result of atom Bomb explosion causing huge casualty of civilians and destruction of property, the world leaders thought seriously as to how humanity could be given protection. In fact, the total devastation of the Second World War which affected hundreds of millions of people led to the birth of the United Nations on 24 October 1945 in recognition that "human rights and fundamental freedoms

were corner stones for future maintenance of peace and international security.¹⁶ A study on the important international human rights instruments herein below reveals that the United Nations has been taking systematic steps for the promotion and protection of human rights and it has adopted different declarations, conventions or covenants in order to fulfil the fundamental requirements of human family.

3.1 Human Rights and the UN Charter

The UN Charter is the first international human rights instrument in which nations agreed to promote human rights and fundamental freedoms. It has been stated in the Charter that the peoples of the United Nations express their determination to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.¹⁷ One of the purposes of the UN is "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedom for all without distinctions as to race, sex, language, or religion."¹⁸ Again, the UN Charter states that the General Assembly shall take necessary step for promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinctions as to race, sex, language, or religion.¹⁹ The Charter of the UN is further promised to promote "universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion"²⁰ and in order to

materialise the provision set forth in article 55 of the Charter that "all members pledge themselves to take joint and separate action in co-operation with the organisation",²¹ article 62(2) of the UN Charter states that the Economic and Social Council is empowered to "make recommendation for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all". Furthermore, article 68 of the Charter empowers the Council to set up commissions for the promotion of human rights and such other commissions as may be required for the performance of its functions" and lastly, the Charter explains the purpose of the UN "is to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion and to encourage recognition of the interdependence of the people of the world."²² Thus the UN Charter, the most important instrument of human rights, makes repeated provisions for the protection and promotion of human rights in home and abroad in order to ensure world order.

In accordance with the provision of Article 68 of the UN Charter, the Economic and Social Council established the Commission on Human Rights in 1946,²³ the Commission on the status of women in 1947, and the Sub-Commission on Prevention of Discrimination and Protection of minorities in 1946. The Council instructed the Commission (a) to submit concrete proposal and recommendations for an international bill of human rights and also requested (b) to submit "suggestions regarding ways and means for the effective implementation of human rights and fundamental freedoms."²⁴ Human Rights Commission was consisted of 18 members, but today it is composed of 53 states.

Human Rights and International Bill of Human Rights

Historical Background:

At the United Nations conference of international organisation held at San Francisco in 1945, representatives of Cuba, Mexico and Panama proposed that the conference should adopt a Declaration to ensure the protection of the specified rights of man. But the proposal was not accepted due to the shortage of time, because it was felt that it needed careful scrutiny and consideration.²⁵ But the issue was raised again in 1946 at the first session of the General Assembly held in London. The matter was referred to the Commission on Human Rights established under Article 68 of the UN Charter as stated above.

3.2 Universal Declaration of Human Rights

The Commission on Human Rights held discussion from January to March 1947 under the chairpersonship of Mrs. Eleanor Roosevelt. After elaborate discussion it was decided to form a drafting committee consisting of the chairperson of the commission, Mrs. Roosevelt, Vice Chairman, P.C. Chang of China and Charles Malik of Lebanon for preparing an International Bill of Human Rights. But on geographical consideration, subsequently the Committee was enlarged to eight members. The members were from (i) Australia; (ii) Chile; (iii) China; (iv) France; (v) the Lebanon; (vi) the United States; (vii) the Soviet Union and (viii) the United Kingdom. This Committee was approved by the Economic and Social Council on March 28, 1947.²⁶ The Committee prepared two instruments -- (i) Declaration on human rights and (ii) international covenant on human rights and submitted to

the Commission which considered the report and draft of the Committee in December, 1947.²⁷ The Commission, after detailed discussion, provisionally adopted drafts of Declaration and a covenant for transmission to the governments with a view to obtaining their comments. After receiving comments from them, the committee prepared the draft and submitted it to the Human Rights Commission. The Commission after final preparation of the Draft of the Declaration on human rights and a covenant on human rights and measures of implementation submitted to the Economic and Social Council in June, 1948. Thereafter the Economic and Social Council submitted a draft Declaration, a draft covenant and several proposals for implementation to the General Assembly at its third session which was held in Paris in September, 1948. The General Assembly adopted only a Declaration on 10 December, 1948, without dissent, by forty-eight votes and eight member states abstained. [Resolution 217A(III) of 10 December, 1948]. The abstaining states were -- Byelorussia, Ukraine, the USSR, Czechoslovakia, Yugoslavia, Poland, Saudi Arabia and South Africa. Each representative of the abstaining states gave explanation in favour of his abstention. General Assembly proclaimed the declaration as the Universal Declaration of Human Rights and each year 10 December is observed internationally as the Human Rights day since 1950 as per decision of the General Assembly.²⁸

This is the historical background of the adoption of the Universal Declaration of Human Rights which is the first of its kind a written complete and systemic instrument on human rights and "has been hailed as a historic event of profound significance and as one of the greatest achievements of the United Nations".²⁹ It is also described

as "the greatest effort yet made by mankind to give society new legal and moral foundations and thus marking a decisive stage in the process of uniting a divided world".³⁰ The Secretary General of the UN emphasizing the significance of the Declaration said, "This declaration, the first attempt in history to write a "Bill of Rights" for the whole world, is an important first step in the direction of implementing the general pledges of the Charter concerning human rights".³¹

Though the Declaration is not a legally binding instrument but nevertheless some of its provisions either constitute general principle of law or represent elementary considerations of humanity.³² The General Assembly proclaims the Declaration as "a common standard of achievement for all peoples and all nations."³³ The Declaration recognised the inherent dignity and the equal and inalienable rights of all members of the human family³⁴ and proclaimed, "all human beings are born free and equal in dignity and rights"³⁵ and everyone is entitled to all rights without any discrimination.³⁶ The Declaration in fact, proclaims all kinds of rights -- civil, political, economic, social and cultural. The civil and political rights, as stated in the Declaration, are rights to life and liberty; security of person; freedom from slavery; freedom from torture or cruelty, inhuman or degrading treatment or punishment; right to recognition as a person before law; equality before law and equal protection of law; freedom from arbitrary arrest, detention, or exile; right to a fair trial and public hearing by an independent and impartial tribunal; right to be presumed innocent until proved guilty; freedom from arbitrary interference with privacy, family, home or correspondence; freedom of movement and residence; right to asylum; right to a nationality; right to marry and to

found family; right to own property; freedom of thought, conscience and religion; freedom of opinion and expression; right to peaceful assembly and association; right to take part in the government and right to equal access to public service of one's government and country respectively.³⁷

The Declaration also recognizes some economic, social and cultural rights which include -- right to social security; right to work and free choice of employment; right to equal pay for equal work; right to form and join trade unions; right to rest and leisure; right to a standard of living adequate for health and well-being; right to education; right to participation in the cultural life of the community; and right to the protection of the moral and material interests of scientific, literary or artistic value.³⁸

Though the civil, political, economic and cultural rights stated in the Declaration are declaratory in nature and not legally binding upon the member states of the UN, but still the Declaration is not devoid of moral and political value. 'No state, group or person will be allowed to destroy any of the rights and freedoms set forth in Declaration'.³⁹ Following the Universal Declaration of Human Rights, The European Convention of human Rights, 1950; Declaration on the Elimination of All Forms of Racial Discrimination, 1963; International Convention on the Elimination of All Forms of Racial Discrimination, 1965; The International Covenant on Economic, Social and Cultural Rights, 1966; The International Covenant on Civil and Political Rights, 1966; American Convention of Human Rights, 1969; the African Charter on Human and People's Rights, 1981; the Convention on the Elimination of All Forms of Discrimination against women, 1979 and Convention on the Rights of the Child are some of the important

instruments of human rights adopted either nationally or regionally or internationally. The Declaration left a permanent impact on the states so much so that many states subsequently inserted in their constitutions the main principle of the Declaration. Regarding the impact of the Declaration upon the constitution of different states, the comment of the then Secretary-General of the United Nations U. Thant, at the International Conference on Human Rights in Tehran in 1969, is note worthy: "There are no fewer than forty-three constitutions adopted in recent years which are clearly inspired by the Universal Declaration, and that examples of legislation expressly quoting or reproducing provisions of the Declaration can be found in all countries."⁴⁰ Bangladesh, India, Pakistan and many other states have inserted these rights under the chapter 'Fundamental Rights'. Thus it is observed that the Declaration has left a far-reaching effect in the field of human rights both for present and future.

3.3 Human Rights and International Covenants

As the Universal Declaration of Human Rights was not legally binding upon the states, as stated earlier, so it was felt as how to give legal effect to the rights stated in the Declaration in the form of covenants.

So with a view to give effect to the human rights and fundamental freedoms, the Economic and Social Council in 1954 submitted drafts, after the receipt from the Human Rights commission, to the General Assembly for adoption. The General Assembly unanimously adopted two covenants and one optional protocol⁴¹ on 16 Dcember 1966, named as (i) The International Covenant on Economic, Social and Cultural Rights, (ii) The International Covenant on Civil and

Political Rights, and (iii) Optional Protocol to the International Covenant on Civil and Political Rights. Besides, Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of death penalty was adopted and opened for signature on December 15, 1989 and entered into force on July 11, 1991. These covenants have given legal validity to the rights proclaimed by the Universal Declaration of Human Rights, 1948. These three instruments along with the Declaration are regarded as International Bill of Human Rights.⁴²

The International Bill of Human Rights is a milestone for the protection and promotion of human rights in national and international fields. The International Covenant on Civil and Political rights and Optional Protocol (1st)⁴³ to the International Covenant on Civil and Political Rights came into force on 23 March 1976, whereas the International Covenant on Economic, Social and Cultural Rights on 3 January 1976, a decade after their adoption by the General Assembly. Both these covenants were enforced by the ratification of 35 states, the required number for enforcement. The United States ratified the covenants in 1992.⁴⁴ The number of states increased significantly and by the end of 1994 the number of ratifying states to these human rights instruments reached to 130 states. Bangladesh ratified only the International Covenant on Economic, Social and Cultural Rights on 5 October, 1998.⁴⁵ Being treaties, the covenants create binding legal obligations for the states parties. The issues, therefore, relating to compliance with and the enjoyment of the rights guaranteed by the covenants are matters of international concern and not merely of domestic jurisdiction.⁴⁶

The two International Covenants contain similar provisions in their preambles, articles 1, 3 and 5. The preamble sets forth rules regarding inherent dignity of the human person, recognizes the "ideal of free human beings enjoying freedom from fear and want" in accordance with the Universal Declaration of Human Rights and reiterates the obligation of the states under the Charter of the United Nations to promote human rights and also reminds the individual of his responsibility to strive for the observance of human rights.⁴⁷

Article 1 of both the covenants provide that "all peoples have the rights to self-determination and by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" and Article 3 of both the Covenants makes provision that "the states parties to present covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and political rights." Besides the above, the ICC PR covers the most important civil and political rights which are essential for a human being. The rights include right to life;⁴⁸ prohibition against torture, cruel, inhuman or degrading treatment or punishment;⁴⁹ prohibition of slavery;⁵⁰ right to liberty and security of person;⁵¹ humanly treatment with the persons deprived of such liberty;⁵² non-imprisonment for failure to fulfil contractual obligation;⁵³ freedom of movement and choice of a residence;⁵⁴ equality before courts and tribunals;⁵⁵ non-retrospection of penalty;⁵⁶ recognition of a person everywhere as person before the law;⁵⁷ right to privacy, home or correspondence;⁵⁸ freedom of thought, conscience and religion;⁵⁹ freedom of expression;⁶⁰ right to peaceful assembly;⁶¹ freedom of association;⁶² the right to

marry and found a family;⁶³ protection of the right of the children;⁶⁴ right to take part in one's government;⁶⁵ right to equality before law and all persons are entitled to equal and effective protection against discrimination as to race, colour, sex, language, religion, political or other opinion, birth or status.⁶⁶ The covenant has provision for the establishment of a Human Rights Committee (HRC)⁶⁷ for supervising the application of the measures of implementation set out under Articles 40-45.

The Optional Protocol to the International Covenant on Civil and Political Rights which came into force after ratification by 10 states, provides scope to enable the Human Rights Committee under Article 28 of the covenant to receive and consider communications from individuals who claim to be victims of violation by the state of a right set forth in the covenant and the state party is to explain its position regarding such communication.

The International Covenant on Economic, Social and Cultural Rights also recognises some rights of an economic, social and cultural nature like right to work;⁶⁸ right to just and favourable condition of work which ensure fair wages, decent living, safe and healthy working conditions, rest and leisure;⁶⁹ right to form trade union;⁷⁰ right to social security;⁷¹ right to an adequate standard of living and right to be free from hunger;⁷² right to education⁷³ and right to take part in cultural activities.⁷⁴

The Economic, Social and Cultural Rights Covenant does not establish any inter-state or individual complaints system. It only requires the states parties to "submit on the measures which they have adopted and the progress made in achieving the observance of the rights recognized

herein."⁷⁵ The reports on measures received from the states parties under this covenant by the Economic and Social Council may be transmitted to the Commission on Human Rights (HRC) for study and general recommendation.⁷⁶ The Economic and Social Council may submit from time to time to the General Assembly reports with recommendations.⁷⁷ The Economic, Social and Cultural Rights covenant had no provision for the establishment of a special committee to review the reports. So in order to remove the shortcomings, the Economic and Social Council adopted a resolution for the establishment of a "Committee on Economic, Social and Cultural Rights,"⁷⁸ composed of 18 Experts elected in their personal capacities. The committee held its first meeting in March 1987.⁷⁹ This permanent committee, in spite of numerous obstacles, is effectively striving hard to fulfil the objectives of the covenant so that the rights enshrined in it are not infringed in any state party to the covenant.

Many states including Soviet Russia, America, Japan, Australia and India ratified the above International instruments on human rights and the number of ratifying states is increasing even to this day. Both the covenants, in reality, give "the explicit recognition that the protection of human rights is the foundation of freedom, justice and peace in the world and taken in sum, despite all omissions and ambiguities, it is obvious that the two covenants represent a most substantial achievement in prescribing for implementation by appropriate national and international authority, both new protection for individual human rights and the general conditions of free, peaceful, and abundant world society."⁸⁰ Although the provisions of the human rights and fundamental freedoms as enshrined in the International Bill of Human Rights are more or less

sufficient for the protection and promotion of human rights, but due to the insufficient measures for implementation, the covenant are not effective up to expectation simply because many states have not as yet ratified them. It is submitted, this has so happened for fear of implementation and accountability in case of violation of human rights. Bangladesh has not yet ratified the International Covenant on Civil and Political Rights. The General Assembly of the United Nations, with a view to protect and promote the human rights and fundamental freedoms, made a clarion call to the states in the Declaration on the Right to Development as follows:

All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, economic, social and cultural rights.⁸¹

4. Human Rights and other Important International Human Rights Instruments

In addition to the International Bill of Human Rights, other instruments have been adopted either in the form of Declaration or Convention/Covenant by the United Nations with a view to protect and promote human rights and fundamental freedoms internationally. Some of them, in brief, are discussed hereinbelow in order to assess the effectiveness of these instruments as to how far they are able to serve the purpose for which they were adopted by the UN. These instruments deal with genocide, racial discrimination, apartheid, discrimination against women, torture, children rights etc.

4.1 The Convention on the Prevention and

Punishment of the Crime of Genocide

The extermination of millions of Jews and members of other national due to religious or ethnic difference actually prompted the adoption of the Genocide Convention. The Genocide Convention was adopted by the UN General Assembly on December 9, 1948 and entered into force on January 12, 1951. The Convention defines "genocide" as the commission of certain acts "with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, such as (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group."⁸² The Convention declares that "genocide, whether committed in time of peace or war, is a crime under international law, and persons committing genocide, shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."⁸³

The Genocide Convention provides that individual guilty of genocide might be tried by an international criminal court, although such a court has yet to be established. Disputes between two or more state parties relating to the interpretation of the Convention shall be submitted to International Court of Justice at the request of any of the parties to the dispute.⁸⁴ ICJ does not have jurisdiction to try individuals for genocide. The UN Security Council created an *ad hoc* tribunal for the former Yugoslavia in 1993 and expanded its jurisdiction in 1994 to deal with the Rwandan genocide.⁸⁵

It was the first international judicial body created to try the Nuremberg and Tokyo War Crimes following the Second World War. Currently the UN is considering the proposal for the establishment of a permanent International Criminal Court.⁸⁶ Though the Convention makes provision for punishment of those who violate human rights committing genocide, it has not been stopped totally. Genocide on smaller scale has been taking place in Kashmir, Algeria and Srilanka. So in order to stop genocide effectively, a permanent Tribunal for that purpose should be established without delay.

4.2 International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination was adopted by the UN General Assembly, [Resolution 2206 A(XX)], on 21 December, 1965 and it was open for signature on 7 March, 1966 and was entered into force on 4 January, 1969. In fact, the ground for this Convention was prepared before two years of its adoption. On 20 November, 1963 the UN General Assembly proclaimed a Declaration on the Elimination of All Forms of Racial Declaration. The General Assembly in this Declaration solemnly affirms elimination of racial discrimination throughout the world, in all its forms and manifestations, and of securing understanding of and respect for the dignity of the human person" and points out "the necessity of adopting national and international measures to that end, including teaching, education and information in order to secure universal and effective recognition and observance"⁸⁷ of the principles of the Declaration as a legally binding instrument. It only prepared the ground for adopting a convention and with a

view to eliminate racial discrimination in all its form, the above Convention was adopted. The Convention prohibits racial discrimination which has been defined as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in political, economic, social, cultural or any other field of public life."⁸⁸ The ICJ has accepted this definition of racial discrimination as authoritative. The states parties to the Convention have the legal obligation to eliminate racial discrimination in their respective territory and to enact necessary laws for the purpose of enjoyment of various human rights.⁸⁹ The convention provides a list of basic civil, political, economic, social and cultural rights which are to be protected without discrimination.

The enforcement machinery of the Convention consists of a Committee on the Elimination of Racial Discrimination (CERD) which is composed of 18 members. A State party to the CERD submits itself to deal with inter-state communication directed against it by any other state party. Thus state complaint system under the CERD is binding and not optional.⁹⁰ But the inter-state complaint mechanism is yet to be utilized. An individual of a state party may file petition to the Committee of CERD if he becomes a victim of the violation by state party, provided the right of petition has been recognized by that party.⁹¹ The Racial Convention further confers jurisdiction on the International Court of Justice to deal with disputes between the states parties with respect to the interpretation and application of this Convention provided both the parties to

the dispute consent to it.⁹² In order to eliminate racial discrimination, it is suggested, all the member states of UN must ratify the Convention. An individual who has become a victim of such discrimination and receiving no domestic remedy, will be given chance to file petition to CERD which shall take all necessary measures including rehabilitation and also monetary compensation to the victim, if necessary.

Thus though the Convention makes an honest effort for the elimination of racial discrimination, racism has not been eliminated as yet. Nevertheless it is a step forward towards the protection of human rights.

4.3 International Convention on the Suppression and Punishment of the Crime of Apartheid

This Convention was adopted and opened for signature by the UN General Assembly on 30 November 1973. It was entered into force on 18 July, 1976 and has been ratified by more than 70 states.

The purpose of the Convention is to suppress and punish apartheid. Article 1 of the Convention proclaims apartheid a crime against humanity and declares all human acts attributable to the policies and practices of apartheid crimes, violate the principles of international law. The crime of apartheid has been defined by reference to the policies of racial segregation and discrimination being practised in South Africa. Liability for the commission of the crime of apartheid extends not only to those individuals, members of organizations and institutions and representatives of the state who commit the offence, but also to all those who directly abet or encourage or co-operate in its commission.⁹³ A person charged with the offence may be tried by any state court and by any international penal tribunal having

accepted its jurisdiction.⁹⁴ The Convention provides measures for implementation, such as a periodic reporting requirements by the states parties and the establishment of a group of three to review the reports. UN Human Rights Commission is empowered by the Convention to prepare various studies and reports relating to the crime of apartheid.⁹⁵ The establishment of Special Tribunal to combat effectively such a crime is suggested.

4.4 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

The UN General Assembly adopted this treaty on December 18, 1979 and it was entered into force on September 3, 1981 after ratification by 20 states. It has been ratified by 152 member states by 31 May, 1996. The aim of the CEDAW is to eliminate 'discrimination' against women which has been defined as "any distinction, exclusion, or restriction made on the basis of sex" that impairs the enjoyment by women of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁹⁶ Article 2 of the convention states that states parties shall take all measures in the political, social, economic and cultural field to advance the enjoyment of equal right by women in all walks of life. The spirit of the Convention is to bring equality between man and woman in all aspects of human life, for, in some parts of some states or even in some states women have become the victim of discrimination and deprivation in comparison to men. However, strict equality between man and woman is not always possible due to religions injunctions. Under Muslim personal Law, for example, a female is entitled to half of the male in case of distribution of property according to the law of inheritance.

The convention provides for the establishment of a Committee on the elimination of discrimination against women consisting of 18 members at the time of entry into force. But after ratification or accession by 35 states parties, the number was raised to 23 experts of high moral standing and competent in this field⁹⁷ and are elected by the states parties. The Committee shall review periodically the reports received from the states parties regarding the legislative, judicial, administrative or other measures⁹⁸ for removing discrimination against women. Under Article 29(I) of the CEDAW disputes between the states parties relating to the interpretation or application of the convention may be submitted to the International Court of Justice by any of the parties to the dispute.

4.5 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment

The Convention was adopted by the UN General Assembly on December 10, 1984 and entered into force on January, 1987 after the 20th instrument of ratification necessary to bring into force was deposited.

The treaty is aimed at preventing and punishing "torture" committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. Torture has been defined in the Convention as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for the purpose, *inter alia*, of obtaining from him or a third person information or a confession."⁹⁹ "Each state party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."¹⁰⁰ There shall be a Committee against Torture (CAT) consisting of ten

expert of high moral standard who are elected by the states parties.¹⁰¹ The Committee is empowered under Article 20 to make an enquiry when it receives "reliable information" regarding "well grounded indications that torture is being systematically practised in the territory of a state party." The Committee may receive and consider complaints from the individuals subject to its jurisdiction who claim to be victims of a violation by a state party, provided the party concerned declares to recognize the competence of the Committee.¹⁰² The Committee then submits its report both to states parties and the UN General Assembly.¹⁰³ The convention also permits disputing parties relating to the interpretation or application of the treaty to be appealed by any one of them to the International Court of Justice.¹⁰⁴ Physical or mental torture and inhuman treatment to human beings have become a regular affairs in almost all the states in the world either by the law enforcing agencies or by private individuals, and in the former case, the victims do not get effective remedy from the governments. So in order to stop or prevent inhuman activities, the Convention provides measures so that the state parties shall take necessary step in this regard at least for fear of accountability to the committee and adverse world opinion.

According to Article 14 of the Convention "each state party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation. In the event of the death of the victim as a result of torture, his dependants shall be entitled to compensation." If this Article is applied strictly in any state including Bangladesh, I am confident, the rate of this crime must have been reduced to a large

extent and the right to security of persons would be ensured.

4.6 Convention on the Rights of the Child

The UN General Assembly adopted this treaty on November 20, 1989 and it was entered into force on September 2, 1990. Most of the member states to the UN have ratified the Convention. This is the first time that separate convention has been adopted by the UN for the protection of the rights of the children though practically many of these rights were proclaimed in earlier international human rights instruments. The Convention defines a child as "every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier."¹⁰⁵

Though there are provisions in the International Bill of Human Rights for the protection and promotion of all human rights irrespective of sex, colour, birth or origin and age, the UN General Assembly adopted a special Convention to uphold the rights of the children only, bearing in mind that childhood should be entitled to special care and assistance, children should be afforded necessary protection and assistance, child should grow up in an atmosphere of happiness, love and understanding, a child by reason of his physical and mental immaturity, needs special safeguards and care and to improve the living conditions of children in every country. This is the first time that children have been singled out as exclusive subjects of international rights and protection.¹⁰⁶ The convention provides protection to the children against economic exploitation, illicit use of drugs, all forms of sexual exploitation and sexual abuse, and traffic in children. The states parties to the Convention shall ensure the rights of a

child to preserve his or her name, nationality, family, protection against physical and mental torture, right to health care, education, right to rest and leisure and right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. To ensure all these rights of the children, states parties shall take all appropriate measures.

The Convention makes provision for the establishment of a Committee on the Rights of the Child composed of ten members.¹⁰⁷ The Committee shall review the reports received from the states parties regarding the measures taken for the protection and promotion of the rights of the children under the Convention. Bangladesh has ratified the Convention with reservation to Article 14(1) and Article 21 which respectively restrict the right to freedom of thought, conscience, religion and adoption of children. The rights of the children provided in the Convention are violated in different states due to the absence of proper implementation. Child labour, child trafficking for sexual abuse, physical torture etc. have become the daily affairs in many member state of the UN specially in developing countries including Bangladesh.

Recently a report issued by the UN on its fifty three birth anniversary regarding the precarious conditions and ill-fate of the children of the world. This has shaken the world conscience. It has been said in the report that from 1987 to September 1998 more than 20 lakhs children have been killed and 60 lakhs wounded or crippled permanently in wars and in 50 states children have been suffering due to war. Besides, 3 lakhs children below the age of 15 years are directly fighting in the war either as insurgent or on behalf of the governments.

The report reveals the real picture about the security of person and life of the children in the present world. In spite of clear provision for the protection of children in the Convention, the UN has failed to take appropriate measures for the protection and promotion of the rights of the children.

5. UN High Commissioner for Human Rights

The creation of the office of High Commissioner for Human Rights is the greatest achievement of the UN to deal with preventing human rights violations. The idea for the creation of the office of High Commissioner for Human Rights was effectively considered in the Vienna World Conference on Human Rights held from 14 to 25 June, 1993. The conference referred the matter with recommendation to the UN General Assembly for consideration. The UN General Assembly adopted resolution (A/48/141) for the creation of High Commissioner for Human Rights on 20 December, 1993 in the line of Vienna Declaration and Programme of Action.

This office of the High Commissioner for Human Rights was first established on January 7, 1994. Mr. Jose Ayala Lasso of Ecuador's UN representative became the first High Commissioner for Human Rights. The UN High Commissioner for Human Rights shall be a person of high moral standing and personal integrity¹⁰⁸ who shall discharge duties impartially and effectively. He/She shall function within the framework of the United Nations Charter, the Universal Declaration of Human Rights, other international instruments of human rights and international law for the promotion and protection of all human rights.¹⁰⁹ The High Commissioner discharges his responsibilities "within the

framework of the overall competence, authority and decisions of the General Assembly, the Economic and Social Council and the Commission on Human Rights.¹¹⁰ The most important function, among others, assigned to the High Commissioner is to play an active role in removing the current obstacles and in meeting the challenges to the full realization of all human rights and in preventing continuation of human rights violations throughout the world.¹¹¹ The High Commissioner, therefore, shall exert all his energies and influences to solve any contemporary human rights problem and shall make all efforts to prevent human rights violations around the world and he shall also enhance international co-operation for the promotion and protection of all human rights. He is incharge of the Human Rights Centre, Human Rights Secretariat of the UN and Coordinator of the UN's promotional and protection activities. In short, he is the UN's human rights "Czar".¹¹²

His diplomatic skill, commitment and creativity, the political will of member states of the UN, the resources placed at his disposal and the support he receives from the Secretary General are the determining factors relating to his success in dealing with human rights violations.

Conclusion:

The foregoing discussions reveal that from 1945 to up to date more than sixty human rights instruments either in the form of declaration or in the form of convention or covenant have been adopted by the UN with a view to prevent human rights violations and to promote and protect human rights internationally. Only a few of those important instruments have been explained in order to study their effectiveness and the role of the concerned organization for

promoting and protecting human rights. In fact, the sincerity of the world body, effective co-operation of the states, impartial implementation of the provisions of the instruments of human rights are the determinants for prevention of violation and protection and promotion of human rights. Although UN and its subordinate organizations related to human rights are active for preventing human rights violations in different parts of the world, and they have become successful in some degree, but still it can be said without any hesitation that violations have not been stopped due to non-cooperation of the states concerned where such violations are being committed. Besides, ethnic and political difference, ideological conflict between the states or between the groups within the state are also factors of such violations. It is evident in Algeria, Afghanistan, Palestine, Bosnia and Cosovo that human rights violations are daily affairs. Human rights and fundamental freedoms, however, are birth rights and not mercy from any quarter, so their promotion and protection is the primary responsibility of the governments concerned.

It is a fact that international organizations, governmental as well as non-governmental organizations (local and foreign) are more active and aware than before for the protection and promotion of human rights. At the close of 20th century and beginning of 21st century human rights have received fuller recognition nationally and internationally. Now it is essential that effective mechanism must of necessity be discovered so that all the states of the world can strictly follow and observe the provisions of international instruments on human rights. The states as well as the governments must be made accountable in case of violation of these rights in their territory.

Besides the above, the most effective ways and means for the protection of human rights, it is submitted, is that the victims of violation of human rights must be organised to protest against such violations so that the violators will be morally weakened and the oppressed will be morally boost up and thereby active world opinion in favour of the oppressed may be formed. The days are ahead when people will be more conscious of their rights, as guaranteed in different international human rights instruments and will be more organized for the protection and promotion of their rights.

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⁸⁵ By Resolution 827 of May 25, 1993, the Security Council of the United Nations established the "International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian law Committed in the Territory of the Former Yugoslavia since 1991". Security Council expanded the jurisdiction of the Tribunal to cover the Rwandan genocide.

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⁸⁷ General Assembly Resolution 1904 (XVIII).

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⁹⁴ Article V, *Ibid.*

⁹⁵ Article X, *Ibid.*

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⁹⁷ Article 17, *Ibid.*

⁹⁸ Article 18, *Ibid.*

⁹⁹ Article 1(l), The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment.

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¹⁰¹ Article 17, *Ibid.*

¹⁰² Article 22, *Ibid.*

¹⁰³ Article 24, *Ibid.*

¹⁰⁴ Article 30, *Ibid.*

¹⁰⁵ Article 1, Convention on the Rights of the Child.

¹⁰⁶ Burengental, Thomas, *op. cit.*, p. 77.

¹⁰⁷ Article 43, Convention on the Rights of the Child.

¹⁰⁸ Article 2 (a), UN High Commissioner for Human Rights, 1993.

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**MARRIAGE OF MINORS IN BANGLADESH:
A STUDY OF MUSLIM LAW AND
STATUTORY PROVISIONS**

Sarkar Ali Akkas*

1. Introduction

Marriage in Muslim law is a civil contract. It is the institution where by men and women are joined in a special kind of social and legal relationship for the purpose of having a family.¹ It originates a legal relation, a partnership in in life, securing harmony, happiness, peace of mind, good fellowship and connubial relations between couple.² Marriage brings about a relation between a man and a woman, based of and arising from, a permanent contract for intercourse and procreation of children.³ It is recognized as the basis of human society.

Under Muslim law, every person who is of sound mind and who has attained puberty, has the capacity to enter into a contract of marriage. A minor person cannot marry without the consent and intervention of his or her guardian. A minor cannot possess sufficient understanding before attaining puberty, to comprehend the implications of a contract of marriage.⁴ For this reason a marriage contracted by a minor is not valid. A marriage contracted by a minor who has not attained the age of puberty or who does not possess understanding or who cannot comprehend the consequences of the contract is a mere nullity.⁵ Nevertheless marriage of minors in Bangladesh is very

* Assistant Professor, Department of Law, University of Rajshahi.

much a common fact. In this context the present study will attempt to give a penpicture of the position of minors in marriage and examine the provisions of Muslim law and Statutory laws in Bangladesh.

2. Who is a minor

Generally speaking a person below the age of majority is known as a minor. A person who, on account of his young age, is considered to be of immature intellect and imperfect discretion and is therefore unable to comprehend the consequences of his own act is called a minor.⁶ According to Tyabji, "Minority, in the case of either sex, continues during the period of life preceding the attainment of puberty, and a person who has not attained puberty is considered a minor."⁷ Puberty means the period of life at which persons become capable of begetting or bearing children.⁸ It is the physical phenomenon which may be attained by different persons at different ages. Puberty is presumed in the absence of evidence, on the completion of the age of fifteen years, though some have put it as low as twelve with respect to a boy and nine with respect to a girl.⁹ Under Muslim law attainment of puberty is the test of majority. The rules of majority under Muslim law were to a great extent modified by the Majority Act, 1875. Section 3 of the Act provides that:

- i. A person in respect of whose person or property a guardian has been appointed by a court of justice or a person who is under the jurisdiction of court of wards attains majority on the completion of twenty one years, and

- ii. in all other cases a person is deemed to attain the age of majority on the completion of eighteen years.

But the Majority Act has left entirely untouched the rules of majority under the Muslim law relating to marriage, dower and divorce.¹⁰ So in these areas of Muslim law 'majority' still means puberty.

It should be noted here that the Child Marriage Restraint Act 1929, has defined 'minor' as a person who is below the age of twenty-one years in the case of a male and below the age of eighteen years in the case of a female.¹¹

3. Minor's marriage and guardianship

The validity of a Muslim marriage primarily depends on the capacity of parties to marry each other. The essential ingredients of the capacity to marriage are sanity and majority. Persons who are neither minor nor insane can marry freely, personally and without the consent of any other. A minor is incompetent to contract a marriage. But a minor can marry with the consent and intervention of his or her marriage-guardian. A marriage-guardian must be (i) a person who has attained puberty, (ii) of sound mind, and (iii) a Muslim.¹² A person who is not competent to contract his own marriage cannot act as a guardian for the marriage of any other person.

In Bangladesh majority of Muslims among sunni groups belong to the Hanafi school of law and a minority group of Muslims belong to Shia school of law. Under the Hanafi law the following persons are entitled, in order of priority, to act as guardians in marriage: (i) the father, (ii)

father's father, how low so ever, (iii) the brother and other collaterals according to the priorities in the laws of inheritance, (iv) the mother and maternal relations, and finally (v) the ruling authority, that is, the qazi or the court.¹³

Under shia law the only recognized guardians, are the father and paternal grandfather, how low soever. A marriage brought about by a person other than the father or paternal grandfather is wholly ineffective until it is ratified by the minor on attaining majority.¹⁴

4. Minors marriage and the Child Marriage

Restraint Act 1929

The Child Marriage Restraint act 1929 was enacted for the purpose of restraining the solemnization of child marriage. It does not want to prohibit such marriage.

Under the provisions of the Act, a male below the age of twenty one years and a female below the age of eighteen years is a minor.¹⁵ Originally there was a difference between the definition of "Child" and "Minor" as was given in the Act. But by an amendment of 1984, that difference has been removed. After the amendment, the ages of child have been raised to 21 years for a male and 18 years for a female as mentioned in the definition, of minor.¹⁶ Under this Act a marriage to which either of the parties is a child is "child marriage".¹⁷

The Act declares the following to be guilty of offences:¹⁸

- i. any person who being a male of above twenty one years of age or being a female of above eighteen years of age contracts a chaild marriage.
- ii. any person who performs, conducts or directs any child marriage; and
- iii. any person who, having charge of a minor whether as parent or guardian or in any lawful or unlawful capacity promotes, permits or negligently fails to prevent the solemnization of that minors marriage.

In each of the above cases the offender shall be punishable with simple imprisonment which may extend to one month or with fine which may extend to one thousand taka or with both.¹⁹

Moreover, the Act, empowers the court to issue injunctions against all concerned for the prohibition of any intended chaild marriage. it further provides that whoever disobey the injunction shall be punished with imprisonment which may extend to three months or with fine which may extend to one thousand taka, or with both.²⁰

The Child Marriage Restraint Act applies to all citizens of Bangladesh alike, including the Muslims. So, when a child marriage in Muslim community takes place, various persons concerned with it may be prosecuted. But under section 6 and 12 of the Act, no woman shall be punishable with imprisonment.

5. Repudiation of Minor's marriage and Muslim law

A minor may be contracted in marriage by marriabge-guardian. But where a minor's marriage is

contracted by the marriage-guardian the marriage is in certain cases, voidable at the option of the minor. The minor has the right of repudiating such marriage on attaining puberty. This right of the minor has always been recognized by Muslim law and it is known as "khiyar-ul-bulugh" that is, the option of puberty. The law relating to option of puberty is applicable in all cases, whether the minor is a male or female.

Option of puberty is available in the following cases:²¹

- i. in all cases, where the marriage-guardian who contracted the marriage was a person other than the minor's father or father's father, and
- ii. in exceptional cases, also where the marriage-guardian was the minor's father or father's father.

Under the traditional Muslim law when a marriage is contracted by the father or paternal grandfather for his minor children or grandchildren with their equals, the children have no option of setting aside the contract on attaining majority.²²

Such a marriage is binding upon the minor, because the determination of the parents in this matter cannot be suspected to originate in sinister motives as their affection for their offspring is unquestionable; wherefore the marriage is binding upon the parties, the same as if they had themselves entered into it after maturity.²³

But when the father or grandfather 'carelessly' or 'wickedly' contracts a minor in marriage with a person who is not equal, or if the father or grandfather is not honest or

is a prodigal, or of bad behaviour or it appears that the marriage is to the manifest disadvantage of the minor, the contract is not valid, and remains dependent of the ratification of the minor on attaining puberty.²⁴ In such a case, the minor has the same freedom either to ratify the marriage or to repudiate it as in the case of other marriage-guardian.

The option of puberty must be exercised immediately on attaining puberty. The option is lost by consummation of marriage or payment of dower, as also by an inexplicable delay in exercising the same. Obviously, the option can not be kept open for an indefinite period.²⁵

The effect of the exercise of the option of puberty is that the marriage ceases to be a marriage and must be treated as having never taken place.²⁶ But in the meantime the parties to the marriage remain husband and wife for the purposes of inheritance which means that if either of them dies, the other will inherit in the capacity of wife or husband, as the case may be.²⁷

6. Repudiation of Minor's marriage and the Dissolution of Muslim Marriages Act 1939

The Dissolution of Muslim Marriages Act 1939 is a consolidating and condensing statute. This Act does not purport to effect any change in Muslim law but to clarify and consolidate it.²⁸ In spite of that the Act has made a radical change with reference to the repudiation of marriage of a minor girl.

Before the Act of 1939 a minor girl given in marriage by the father or the father's father had no option to repudiate it on attaining puberty. But this rule has now been changed by this Act. By the Act, all restrictions on the right of repudiation in the case of a minor girl whose marriage has been contracted by the father or paternal grandfather have been removed.

Under section 2(vii) of the Dissolution of Muslim Marriages Act, as amended by the Muslim Family Laws Ordinance 1961 and Ordinance XXV of 1986, a wife is entitled to obtain a decree for the dissolution of her marriage if she proves the following facts, namely:

- i. that she was given in marriage by her father or other guardian,
- ii. that the marriage took place before she attained the age of eighteen years,
- iii. that she has repudiated the marriage before attaining the age of nineteen years,
- iv. that the marriage has not been consummated.

Under Muslim law there is a presumption of attainment of puberty at the age of fifteen, but this presumption is rebuttable. Section 2(vii) of the Act adopts a fixed age of puberty without an opportunity of rebuttal. This section does not speak of puberty at all, but only of an age, though in fact it deals with the option arising at puberty.²⁹

The right of repudiation may be exercised at any time before the age of nineteen years by the girl's withholding her consent to the marriage. The withholding of consent

may be expressed in a variety of ways. It may be indicated by remarriage or by serving a notice that the option of puberty has been exercised.³⁰

A minor girl contracted in marriage retains the right of repudiation up to the age of nineteen years until she expresses her consent or disapprobation in express terms. In other words, the right of repudiation continues until the wife expressly confirms the marriage by co-habitation with the husband or by asking for dower, maintenance or otherwise.³¹

But in the case of *Ghulam Sakina Vs. Falak Sher*,³² it was held that anything done by the minor during the minority would not destroy the right which could accrue only after puberty. The co-habitation of a minor girl would not thus put an end to the 'option' to repudiate the marriage after puberty. The assent to co-habitation should come after puberty and not before; nor should the consummation have taken place without her consent.³³

Any consummation, however, for the purpose of the section 2(vii) is only to be considered as between the attainment of puberty of the wife and the attainment of the age of nineteen years. Consequently, co-habitation before the attainment of puberty by wife cannot stand in the way of repudiation after attainment of puberty.³⁴

If a minor girl does not know of her marriage till she attains the age of 19 years the option of repudiation may be exercised when she comes to know of her marriage. The girl is however to repudiate the marriage within reasonable time of such knowledge of marriage.³⁵

According to section 2(vii) of the Dissolution of Muslim Marriage Act, the position as recognized now is that a marriage of a minor girl contracted by the father or the father's father stands on the same footing, as regards the option of puberty, as a marriage contracted by any other guardian. In other words the contract by father or father's father stands on no higher footing than that of any other guardian.³⁶

7. Conclusion

Marriages at an early age is permissible in almost all systems of law. In most systems the permission or consent of the marriage-guardian is to be required, if the parties to the marriage are below certain ages. In Muslim world, marriage is generally permissible at the age of attainment of puberty. After attainment of puberty a person of either sex, whether male or female is permitted to marry. A child below the age of puberty has been permitted to marry with the consent of the marriage-guardian.

From the foregoing discussion it is observed that the traditional Muslim law and the statutory laws of Bangladesh contain several provisions regulating marriage of minors. All the laws are intended to protect the interests of minors and to save them from injustice. The Child Marriage Restraint Act, 1929 was enacted with a very modest purpose. The aim of this Act was to restrain and discourage the solemnization of child marriage. If the provisions of this Act were properly enforced, the marriage of minors in Bangladesh would be discouraged. But unfortunately marriage of minors in Bangladesh is a common phenomenon. The impacts of this marriage are not

good at all. The Act of 1929 was designed to prevent child marriage. But it does not purport to render such marriage void. Furthermore, there is no provision in dissolving the marriage that has taken place in violation of this Act. The Act only prescribes some penal provision for the persons responsible for child marriage. But the offences under this Act are not cognizable offence.

Therefore, unless a complaint is filed, no proceedings can be launched in a court. For this drawback of the Act, child marriage is uninterruptedly solemnizing in Bangladesh. The implementation of this Act is not upto the expectation. The act should be amended to make the offence cognizable. Moreover, the duration of punishment under this Act should be extended.

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THE LAW OF 'QISAS' AND ITS PHILOSOPHY IN ISLAMIC CRIMINAL LAW

Mohammad Abdul Hannan*

Introduction

There is no doubt that in our society the greatest crime known to mankind is murder. It is punishable offence under any system of law since the history of mankind.¹ In Islamic law '*qisas*' has been prescribed to combat the desire to kill others. "In '*qisas*' there is life for you"², as mentioned in the *Qur'an* is the obvious reason for legalizing this type of punishment. So Islam introduced the law of '*qisas*' in the society to eliminate special type of crime. The maxim "a life for a life" stems from the religious principle that all men are equal in the sight of Allah.³ The life of the murderer will be taken or he will have to pay blood money to the heir or heirs of the murdered by applying the principle of '*qisas*'. It was in terms of these principles that the implementation of '*qisas*' was prescribed, and it should be understood accordingly.

The '*Qisas*' (retaliation)

'*Qisas*' is one type of punishment under the Islamic criminal law. The punishment prescribed in Islamic criminal law for murder and for the infliction of injury is called '*qisas*' (retaliation). In other words, inflicting on a

* Lecturer, Dept. of Law, Rajshahi University, Rajshahi 6205

culprit an injury must be exactly equal to that he/she inflicted on his/her victim.⁴

The Arabic word '*qisas*' stands for the return of life for life in case of murder. It does not, however, mean that murderer should be killed in the same manner in which he committed the murder. It simply means that the life of the murderer should be taken as he/she took the life of the other.⁵

According to this doctrine, the quality and value of human life has been determined in order to meet the claims of justice. The value of blood and consequently retaliation for it are not to be determined by the rank of the slain or that of the murderer. It has, therefore, been clearly laid down that the murderer himself should pay for the blood.⁶ The punishment for murder and the infliction of injury in Islamic criminal law would either be '*qisas*' (retaliation) or the payment of '*diyah*' (blood money).⁷ '*Qisas*' is divided into two categories:

- a. '*qisas*' for murder; and
- b. '*qisas*' for wounds or injuries.

The Background of Qisas

In pre-Islamic Arabia a sense of hostility was a characteristic of the Arab tribesmen. Friendly co-operation in life was limited only among the members of the same tribe. One of the principal features of this state of hostility was personal revenge for homicide. The obligation of vengeance (*tha'r*) was inbred in the very nature of the Arabs.⁸ Before the advent of Islam, they put a higher value

on the blood of a member of their own clan and demanded the life of a man of the same rank from the clan of the murders from the tribe of the murderer according to the value put on the blood of the slain. On the other hand, if the murderer happened to belong to a higher rank than that of the slain, their 'judgement' was that the life of the murderer should not be taken for the life of the slain. And this inequality in the evaluation of blood was not only confined to that age of ignorance, but also practiced in the 'civilised' nations of today. They are not ashamed of declaring openly that if one person of their nation is killed, they will take the lives of fifty men from the nation of the murderer. And they put these challenges into practice. We often hear that so many people belonging to the subject nation have been put to death in order to avenge the murder of the person belonging to the ruling nation. But if the murderer would belong to a 'civilised' ruling nation and the slain to an 'uncivilised' subject nation, their judges would not pass the sentence of death. In order to guard against these unjust rules, Allah has ordained that the life of the murderer and the murderer alone should be taken for the life of the slain, irrespective of the rank or race of the murderer or that of the slain.⁹

This was not to vary from one tribe to another or according to the victim's position in his tribe. The *Qur'anic* law radically altered the legal incidents of homicide from the pre-Islamic custom of revenge (*tha'r*) to the Islamic law of '*qisas*'.¹⁰

The Law of *Qisas*

According to the Islamic criminal law, murder is a compoundable offence. It allows the heirs of the murdered

person the rights of pardoning the murderer, if they deem it proper. In that case the court cannot insist on taking the life of the murderer. Of course, he will have to pay the compensation money as is fixed for it, if the rightful claimants demand the same. ¹¹ This is brought about through an agreement between the slayer and the family of the slain, or between the two clans concerned. When the agreement is concluded, the cause of the feud is naturally removed. But even after the payment of compensation, animosity between the two parties concerned may continue for a long time. The verse of the *Qur'an* shows that retaliation was also allowed by the Prophet (Sm.) himself for wounds. It is "life for a life, eye for an eye, nose for a nose, ear for an ear, tooth for a tooth, and for wounds retaliation." ¹²

But it will be a transgression if the relatives of the slain try to retaliate even after accepting the ransom for the slain, or if the murderer (or his/her relatives) does not mean to pay the ransom gracefully, or otherwise reacts in an ungrateful manner. Both the parties should be equally generous and should appreciate the goodwill as shown by the other side. ¹³

In Islamic criminal law there are three main types of culpable homicide:

- a) '*Qatl-i-Amad*', i.e. deliberate murder (willful murder).
- b) '*Qatl-i-Shibh-i-Amad*', i.e. quasi-deliberate murder (homicide resembling willful murder); and
- c) '*Qatl-i-Khata*', i.e. accidental murder (homicide by mistake).

'Qisas' may be carried out for the first type of homicide only, while the penalty for the other two types should be the exaction of blood money.¹⁴

(a) 'Qatl-i-Amad'

In the Hidayah 'Qatl-i-Amad' is defined in the following way:

'If a person intentionally strikes another person with a weapon (e.g., a sword, or a spear, etc.) or with something which amounts to a weapon (e.g., a sharp wood, a sharp stone or fire) and kills him, he is considered to have committed willful murder.'

In the *Qur'an* the punishment for 'Qatl-i-Amad' is given in the following verses:

O Believers, the law of *qisas* (retaliation) has been prescribed for you in cases of murder, if a free man commits a murder, the free man shall be punished for it and a slave for a slave; likewise if a woman is guilty of committing murder the same shall be accountable for it. But in case the injured's brother is willing to show leniency to the murderer, the amount of blood money is to be decided in accordance with the common law and the murderer is to pay it in a genuine way. This is an allowance and mercy from your Lord. Now there shall be a painful torment for anyone who transgresses the limits beyond this. O men of understanding, there is life for you in *qisas* (retaliation). It is expected that you will refrain from breaking this law.¹⁵

It is obvious from the above verses that if the accused commits '*Qatl-i-Amad*', he/she is liable to be sentenced to death and if he/she causes hurt to some one, he/she is liable to receive a similar hurt. The free shall have to die for the free, the slave for the slave, and a female for a female. According to the Sunnah, a man shall be put to death for the murder of a woman and according to the Hanafee school, a man is liable to be so punished for the murder of another man's slave.

From the above discussion, it is clear that, the heirs of the deceased may:

- i. demand that the murderer be sentenced to death, or
- ii. demand that he be made to pay '*diyah*', i.e. blood-money, or
- iii. forgive him altogether.

On the other hand, a man who kills his own child or other descendant, or his own slave, or his son's slave, or a slave of whom he is a part owner is, according to the Hanafee school, exempted from '*qisas*'; and so also are his accomplices.¹⁶ In addition to suffering the penalty of death at the hands of his fellow-men, the slayer shall also suffer the most severe penalties for it in the next life. So we read:

"Whoever shall kill a believer purposely, his reward is hell; forever shall he abide therein."¹⁷

(b) '*Qatl-i-Shibh-i-Amad*'

This is defined in the Hidayah as follows:

'According to Abu Hanifah (Rh), if a person intentionally strikes another person with something which is neither a weapon nor something resembling to a weapon (e.g., a stick or stone etc.) and kills him, he is said to have committed homicide resembling willful murder. But according to Abu Yusuf, Muhammad and Shafi (Rh.), if the person uses a big stone or a big piece of wood (e.g., a big stick) he commits willful murder. So according to them, a person commits homicide resembling willful murder only when he uses something which does not ordinarily cause death'.

From the above definition it is understood that the determining factor, in the question whether the offence is 'culpable homicide amounting to murder' or 'culpable homicide not amounting to murder', is the type of weapon used.

The punishment for '*Qatl-i-Shibh-i-Amad*', i.e. culpable homicide not amounting to murder is the same as for '*Qatl-i-Khata*' [Hidayah].

(c) '*Qatl-i-Khata*'

This is described in the Hidayah as follows:

'Mistake (*khata*) is of two kinds: (i) mistake of intention e.g., a man darts an arrow on something which he is thinking an animal but which in fact is a human being and kills him, or throws a missile on a person whom he

thinks one of those at war with the Muslims but who in fact is a Muslim and kills him, and (ii) mistake of fact, e.g., a person throws missile at the target, but it accidentally hits a man due to which he is killed'.

In the above cases, the man is guilty of 'homicide by mistake'. But a person who intentionally aims a blow at one part of the deceased's body but hits another part and kills him is guilty of willful murder.¹⁸

The punishment for *Qatl-i-khata* is given in the following Qur'anic verse:

And he who kills a Muslim by mistake should free a Muslim slave, and blood money should be paid to his people unless they remit it as alms. But if he be from a tribe hostile to you and he is a Muslim, the freeing of a Muslim slave (suffices). And if he be from a tribe between whom and you there is a covenant the blood-money should be paid to his people along with the freeing of a Muslim slave; but he who has not the means should fast for two months successively: a penance from Allah. And Allah is Ever-Knowing Wise.¹⁹

It is found from this verse that two types of punishment are included in this respect. One is the punishment for the crime and another is the '*kaffarah*' for the sin. Punishment for the crime involves payment of '*diyah*' (blood money) to the companions of the victim, whereas the '*kaffarah*' involves the freeing of a slave. He who cannot pay for this, should fast for two months.²⁰

'Diyah' is not payable when the killed person belongs to a hostile tribe.

The punishment for hurt is given in the following Qur'anic verse:

And we prescribed for them (i.e. the Jews) there-in (i.e. in the torah) that, life is for life, and eye for eye, and nose for nose, and ear for ear, and tooth for tooth, and for wounds retaliation. But who forgoes it (in the way of charity), it shall be expiation for him. And whoever judges not by what Allah has revealed, those are unjust.²¹

It is a well-known principle of Muslim jurisprudence that when an old law given by Allah is mentioned in the Qur'an or in the Hadith, and is not expressly amended or repealed; it is a good law for the Muslims. Thus the above Biblical Law, prescribing punishment for hurt, is also followed by us.

According to this law '*qisas*' is ordained for all cases of hurt. If a person knocks out the tooth of another person, his tooth shall also be knocked out. If a person gives a blow at the eye of another person and the eyesight is gone, the offender shall also be deprived of his eyesight in '*qisas*'. In all cases of injury, wounds, etc. the offender shall be liable to receive exactly the same injury and wounds.

In accordance with the Hanafi school, equality in relation to this point is based not only on religion but also on becoming a human being; hence, '*qisas*' is to be implemented when a Muslim kills a non-Muslim, although the view of the majority does not allow '*qisas*' in this case,

but only the payment blood-money.²² But in cases in which it is not possible to inflict exactly the same injury upon the offender, or in cases where such an injury involves the risk of serious consequences such as death, etc., 'qisas' is not allowed. In these cases, 'diyyah' shall be awarded to the complainant, the amount of which may be determined by the judge.²³

It may be noted here that under Islamic criminal law, the offender is to be handed over to the heirs of the deceased or to the complainant for the execution of 'qisas', in case of murder or hurt.²⁴

The Philosophy of Qisas

The *Qur'an* states, 'there is security of life for you in the law of retaliation (retribution).'²⁵ This verse refutes the opinion of those persons who advocate abolition of capital punishment. If it is inhuman to insist on retaliation without paying any heed to all other considerations, it is equally inhuman to encourage murder by abolishing capital punishment, as has been done in some 'civilised' countries. That is why Allah declares that there is life in the law of retaliation. If a society does not pay due regards to the sanctity of life and tries to protect a murderer, it sets a premium on crime and puts the lives of many innocent people in danger.²⁶

Conclusion

From the above discussion it can be concluded that 'qisas' for homicide involves the death penalty as a punishment for the crime, whereas 'qisas' for injuries, involves a corporal punishment. The notion of 'diyyah', or

blood-money, may be compared with the modern concept of compensation to be paid to the victim or the wronged party.²⁷ It is a right of the nearest relative of the murdered person to demand retaliation or '*qisas*' and without this demand '*qisas*' cannot be inflicted. Victim's relatives may also remit retaliation freely without any compensation. This right may be exercised even after the court has ordered '*qisas*' to be executed against the culprit. And indeed, the *Qur'an* and the *Sunnah* recommend the remission of retaliation.²⁸

In Islamic criminal law, the punishment of murder or injury is primarily based on the concept of deterrence and retribution; but scope exists for reformatory elements well, particularly within the provisions of '*qisas*'. Islam holds the balance of justice in the right manner and insists on examining all conditions and circumstances in connection with the offence. These punishments were prescribed in order to frighten the criminals who feel a strong desire for committing crimes.²⁹ Whatever strong their motive may be, this type of punishment will surely make them think twice before committing any crime.

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PREVENTION OF CHILD MARRIAGE BY THE CHILD MARRIAGE RESTRAINT ACT, 1929: LEGAL IMPLICATIONS AND SOCIAL REALITY

Dr. Taslima Monsoor*

Child marriage is still a burning issue after nearly 70 years of passing of the Child Marriage Restraint Act, 1929. The Child Marriage Restraint Act came into force on 1st October 1929. The primary object of the Act was to put a stop to premature cohabitation. The Child Marriage Restraint Act itself suggests restraint of child marriage and not its prevention or abolition. The debate was about protection of girls. This article aims to give a complete picture of the situation of child marriages in a rural and urban areas in Bangladesh and also reflects the legal loopholes for which the issue still prevails.¹

The debate about minimum marriage ages in the British-India period and the emergence of the Child Marriage Restraint Act, 1929

In British India sexual intercourse was legitimate even at the age of ten under section 375 of the Penal Code, 1860. This was seen as a slur on the British name in India as it suggested that sex with any female was permissible in law from the age of ten.² The central issue in the debate on the age of consent was not the sharp division between the Indian reformers and orthodox males.³ Rather, the debate

* Assistant Professor, Department of Law, University of Dhaka.

was about British interference with the social customs, especially of the Hindu community.⁴ In fact, this was the first major intervention in the privacy of the family law of all religious communities.

Reform was attempted, first of all by an amendment to the Indian Penal Code, 1860. However this was vigorously opposed. By the Indian Criminal Law Amendment Act, 1891 (Act X) section 1, the age of cohabitation was increased to twelve years. The age of consent was raised as a result of the efforts of several Indian reformers especially in Bombay. There were also petitions from women's organisations for the enhancement of the age of consent.

The debate on child marriages became prominent after the age of consent debate and was given more importance after census ports for 1921 were published, showing the high rates of child widows. The census reported that 612 Hindu widows were babies not even 12 months old, 498 between 1 and 2 years, 1280 between 2 and 3 years and 6,758 were between 4 and 5 years of age, making a total of 12016 widows under 5 years of age.⁵ But the colonial administration declined to sponsor any legislation regarding the age of marriage, arguing that it might impede the ruling of the country.⁶ The initiative and impetus for change came from various Indian social reformers backed by those Indians who were elected to the central legislative assembly. Thus in 1927 Hari Singh Gour proposed a Bill raising the age of consent to 14 years within marriage and 16 outside marriage. The Indian government appointed an Age of Consent Committee in June 1928, which observed that many girls below that age would automatically be saved from the terrible risk of early

widowhood if marriage was deferred to a given age. During the age of consent debate, the opinion was gaining ground that more effective steps should be taken to eradicate early consummation. The Age of Consent Committee reported that growing numbers of women saw that the success of the movement for emancipation largely depended upon the advance in the marriage age.⁷ In fact, the age of Consent Committee itself recommended that in order to deal most effectively with early marriage and consummation, a law should be enacted fixing the age of marriage of girls at 14 years.⁸ The Child Marriage Bill was then introduced on 1st February 1927 and after unnecessary delay and long debates, was finally passed on 23rd September 1929,⁹ was extended to all communities, and came into force on 1st October 1929 as *The Child Marriage Restraint Act of 1929*.

The primary object of the Act, as the author of the Bill asserted, was to put a stop to child widowhood.¹⁰ Premature co-habitation occurred among Muslims as well.¹¹ Apart from the debate about the protection of girls, there was a parallel struggle over the position of Muslim law. There was some controversy in the Legislative Assembly about whether the Muslims or a big majority of them were against the Bill. There were petitions seeking to exclude Muslims from its ambit. A member of the Central legislative Council, T.A.K. Shervani argued that the report of the appointed committee showed that the majority of the Muslim witnesses who appeared before the committee were in favour of the Bill.¹² Moreover, another Muslim member, Mian Mohammed Shah Nawaz, stated that the Age of Consent Committee unanimously found that the evil of early marriage and early consummation prevailed among the Muslims of Bengal, who formed 42 per cent of the total

Muslim population of the province.¹³ Further petitions from the province of Bengal in favour of the Bill substantiated this claim.¹⁴

As regards the question whether the Bill was un-Islamic, T.A.R. Shervani argued that the Bill was not against the principles of Islamic law as the *Quran* or *Hadith* do not prohibit or prescribe child marriage.¹⁵ He further argued that the marriage of minors, which is known in Islamic law, is not based on Islamic principles, but on pre-Islamic customs.¹⁶

The Act had the wholehearted support of the All Indian Women's Conference (AIWC) and was regarded as their achievement.¹⁷

The title of the Act itself indicates its lacunae, as it suggests restraint of child marriage and not its prevention or abolition. Penalties and punishments were provided for the male who is over 21¹⁸ years and marries a girl under 14 years, but only penalty were provided for the male who is above 18 years and below 21 years and contracts a child marriage. Moreover the penalties were lenient and discretionary.

The parents or guardians who promote, permit or fail to prevent such a marriage are also punished. But where the guardian or parent is a woman, she shall be exempted from punishment of imprisonment, but only a fine shall be imposed [section 6(1) and section 12]. This milder penalty is a concession to women by the legislature indicating paternalistic attitudes in a society which does not recognise equality of the sexes. As a tool in the hands of some male relations, women are not the principal offenders and so are not punished.¹⁹ This is a form of positive discrimination

which shows that the law also recognises women as the weaker sex.

More important is the issue of validity of a child marriage. Although the parents or guardians or the bridegroom may be punished, there is nothing in the Act to invalidate a child marriage.²⁰ The significance of the Act, however, was that it raised the minimum ages for marriage for girls to 14 years and for boys to 18 years and criminalised violations. The objective of the legislators in passing this legislation was perhaps noble, but because of the procedural loopholes the objects of the Act could not be achieved. The Act could only be applied when a complaint of any child marriage was made by a private person, and enforcement depended upon the court's permission to make arrests. Moreover punishment was not adequate as the child marriage remained valid after performance, although certain penalties were prescribed. Further on, cognizance of the crime was limited to one year and to keep the marriage secret for a year, if necessary, was not a difficult problem. On the other hand cognizance for one year is a big problem as to fight a legal battle one needs not only mental strength but also financial ability.

The policy and attitude of the colonial government towards protecting child brides was ambiguous. They did not support the passage of the Act, but did not prevent it. On the one hand, the government claimed to have great respect for womanhood; on the other hand, it declared its intention to oppose the Bill, which was an important legislation for children and girls. Mr. Ramananda Chatterjee stated:

The abolition of child marriage and child mortality
and the raising of the age of consent within and

outside marital relations would tend to make Indians a physically, intellectually and morally fitter nation. But British bureaucrats have all along been very unwilling to help Indian social reformers in effecting these reforms by direct and indirect legislation.²¹

Thus, the British colonialist government pleaded that the Act was in advance of public opinion and the responsibility to educate the people rested on the Indians themselves.²²

The judiciary also erred on the side of leniency in applying the penal provisions of the Act. The efforts of the women's organisations to implement the Act were not significant enough.²³ Thus, the Act failed to fulfill its purpose not only because of the reluctance of the British administrators to enforce the Act, or the orthodoxy of the people to co-operate with it, but also because the nationalist leaders and social reformers were more engrossed in gaining independence than the enforcement of social legislation that would help women. *The Child Marriage Restraint Act of 1929* was only discouraging the practice. Since the threat of punishment has failed as an effective deterrent, child marriages persist to this day. As we shall see below the question of age of marriage is still an issue in Bangladeshi law today.

The debate about minimum marriage ages in the Pakistani period

The government of Pakistan established a Commission on Marriage and Family Laws on 4th August 1955 to review the situation and suggest necessary changes. The Commission was established with seven

members, headed by a former Chief Justice, one representative of the Muslim *ulema* and included three women experts. The Commission prepared its Report on the basis of a set of questionnaires, which was circulated to the public. The Commission was to decide whether,

The existing laws governing marriage, divorce, maintenance, and other ancillary matters among Muslims require modification in order to give women their proper place in society according to the fundamentals of Islam.²⁴

The primary object of setting up the Commission was to examine whether the existing family law needed any alterations and modifications to enhance the position of women. Professor Coulson has argued that to some degree the Commission was set up to ensure that the existing laws conformed with Islamic principles.²⁵ But that was not the sole purpose of its formation. According to the Marriage Commission itself,

The primary object of the Commission was to revive in a slightly modified form the rights, granted to women by Islam.²⁶

On 30th July 1956, a dissenting note by Maulana Ehteshamul Huq was published in the Gazette of Pakistan²⁷ He was a member of the Commission on Marriage and Family Laws, disagreed with most of the recommendations of the Commission and blamed it for distorting Islam.

If we consider the Report of the Marriage Commission and the Dissenting Note of the traditional *ulema* and other critics, the debate on the traditionalist and modernist approach to the reform of family laws in Pakistan becomes more focused. The Commission on marriage and

delay, the maital law government under Ayub Khan was bold enough to adopt many recommendations of the Commission. In March 1961 it promulgated the *Muslim Family Laws Ordinance*, against strong opposition by the *ulema*, who regarded it as totally un-Islamic.³³ In addition to granting other rights the Ordinance also protects women by raising the minimum age of marriage for girls from 14 to 16 years by making amendments in the *Child Marriage Restraint Act of 1929* [Section 12(a)].

Overview of the reforms of child marriage in Bangladesh

The reforms with regard to marriage, divorce and intestate succession and related issues in British India and the Pakistani period are applicable in Bangladesh but have been amended after independence in Bangladesh. As such, there are areas of the law in which Pakistani law and Bangladeshi law now differ. The present section gives a brief overview of the reforms made to pre-independence family laws in Bangladesh with regard to child marriage.

In the field of child marriage, the *Child Marriage Restraint (Amendment) Ordinance 1984* has increased the legal minimum ages of marriage. The *Child Marriage Restraint Act, 1929* had sought to restrain the solemnisation of marriages of children below the age of 18 for the boy and 14 years for the girl. The MFLO 1961, section 12 had raised the girl's age to 16 years. The Amendment of 1984 raised the legal marriage ages for both sexes, for the male to 21 years and for the female to 18 years and prescribed punishments to anyone marrying below that age.³⁴ Under section 4, substituted by the *Child Marriage Restraint (Amendment) Ordinance 1984*, the following is provided:

Punishment for male adult above twenty-one years of age or female adult above eighteen years of age marrying a child. Whoever, being a male above twenty-one years of age, or being a female above eighteen years of age, contracts a child marriage shall be punishable with simple imprisonment which may extend to one month or with fine which may extend to one thousand taka, or with both.

Under the *Child Marriage Restraint Act, 1929* there was a difference between a "child" (female below the age of 14; male below the age of 18) and a "minor" (person of either sex below the age of 18). Under the Act as now amended in Bangladesh, the definitions of "child" and "minor" are identical. A girl below 18 is both a child and a minor, as under section 3 of the *Majority Act of 1875* every person domiciled in Bangladesh shall be deemed to have attained majority when he shall have completed the age of eighteen years. But a boy below 21 is a child under the *Child Marriage Restraint (Amendment) Ordinance of 1984* and a major from 18 years under the *Majority Act of 1875*. But the punishment given in the 1929 Act is identical to that in the amended version of the Act of 1984. The difference is that until 1984 Bangladeshi amendments, the female spouse was not liable to punishment. Now a female spouse over 18 is made liable for punishment if she is married to a man under 21. Thus a girl who has just turned 18 and who is married to a boy a few months short of being 21, commits an offence for which the girl may be jailed and fined, while her husband is not amenable to any punishment, although her parents or guardians would be. This is discrimination against the female sections of the population as they are subject to punishment from an

earlier age than the men. Moreover, under section 6(1) of the 1929 Act, which prescribed punishment to the parents or guardians of a minor who contracted a child marriage, it was also specifically provided that no parent who is a woman shall be punishable with imprisonment. This provision is not deleted by the amendment. Thus now the bride over the legal age of 18 years is liable to punishment for marrying a bridegroom under 21 but her mother or mother-in-law are not to be punished by imprisonment.³⁵ Actually there was no punishment either by imprisonment or fine for the females in the original statute.³⁶ But now the bride can be imprisoned and fined for marrying a man below the legal age. This penalty on the bride was introduced perhaps as an oversight, or to avoid zina or problems with runaway couples. It looks like a misfired attempt to introduce sexual equality.

Whether a bride should bear such punishment at all in the social context of Bangladesh is an interesting issue. In rural Bangladesh girls are disadvantaged, secluded and are not allowed to have their own independent opinion about whom they will marry, as marriage is often arranged by their parents.

In a village study in Bangladesh it was reported that in the case of a son's marriage his consent is regarded as necessary but in the case of a daughter's marriage, she is invariably expected to obey her father's decision.³⁷ However, it is doubtful whether field studies by male researchers talking to men could actually avoid male bias.³⁸ Moreover, they may have simply failed to reveal the extent to which women have always been able to exercise a certain amount of control, both within and beyond the domestic unit.³⁹ It appears correct to re-state generally that women of all

classes in Bangladesh are subjected to patriarchy; for the rural women the effects will be more oppressive.⁴⁰ Thus, it is not reasonable that rural women should bear criminal liability in such cases.

As the legal age for marriage has been raised to 18 years for females in Bangladesh there has been a corresponding change in section 2 (vii) of the *Dissolution of Muslim Marriages Act, 1939* regarding the 'option of puberty' to the effect that a girl having been given in marriage by her father or other guardian before she attained the age of 18 years, can repudiate the marriage before the age of 19 years. This was done by the *Dissolution of Muslim Marriages (Amendment) Ordinance 1986* whose only purpose was to increase the age for the option of puberty [under section 2 (vii)]. What about the cases, however, where a child marriage was contracted by the guardians between 1984 and 1986? Will such a child have the option of puberty? Even though the amendment does not disclose whether it acts retrospectively, there is a case under the original Act, holding that section 2 of Act applies with retrospective effect.⁴¹

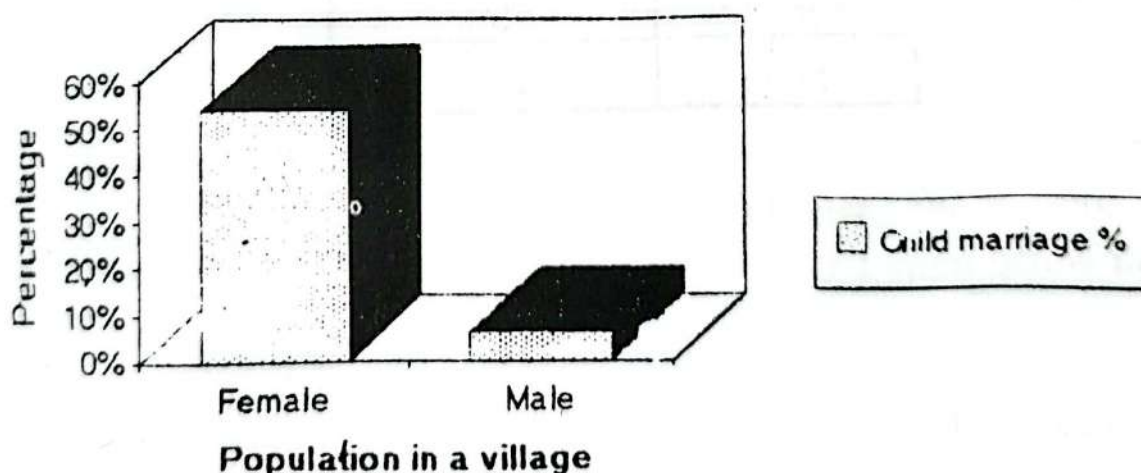
Imperical analysis

The reality of the issue can be gathered from an imperical analysis of a rural area and two contrast case studies of urban areas in the capital city of Dhaka. The survey of the article revealed that there are some practical problems of doing research on child marriages as age of people has to be gathered from other evidences as there are no compulsory birth registration procedures prevalent in Bangladesh. The research highlights with column chart what percentage of women and men had child marriages in a rural and in two urban areas of Dhaka, the capital of Bangladesh.

In the rural area the study was made of 50 families in the Barhatta road in the post office of Netrokona, in the District of Netrokona. The families on whom the study was made were questioned to find out whether child marriages were made even when they were married after 1971 i.e., after liberation of Bangladesh. In other words it was to be found whether men were married before the minimum legal age of marriage of 21 years and women were married before 18 years. It was revealed that 27 out of 50 families had child marriages. Women who were married before the minimum age of marriage were 27 in number and men were 3 in number. Thus 60% of marriages in a rural area are child marriages.

Population	Child marriage %
Female	54%
Male	6%

Percentage of child marriage before 1971 in Berhatta, Netrokona

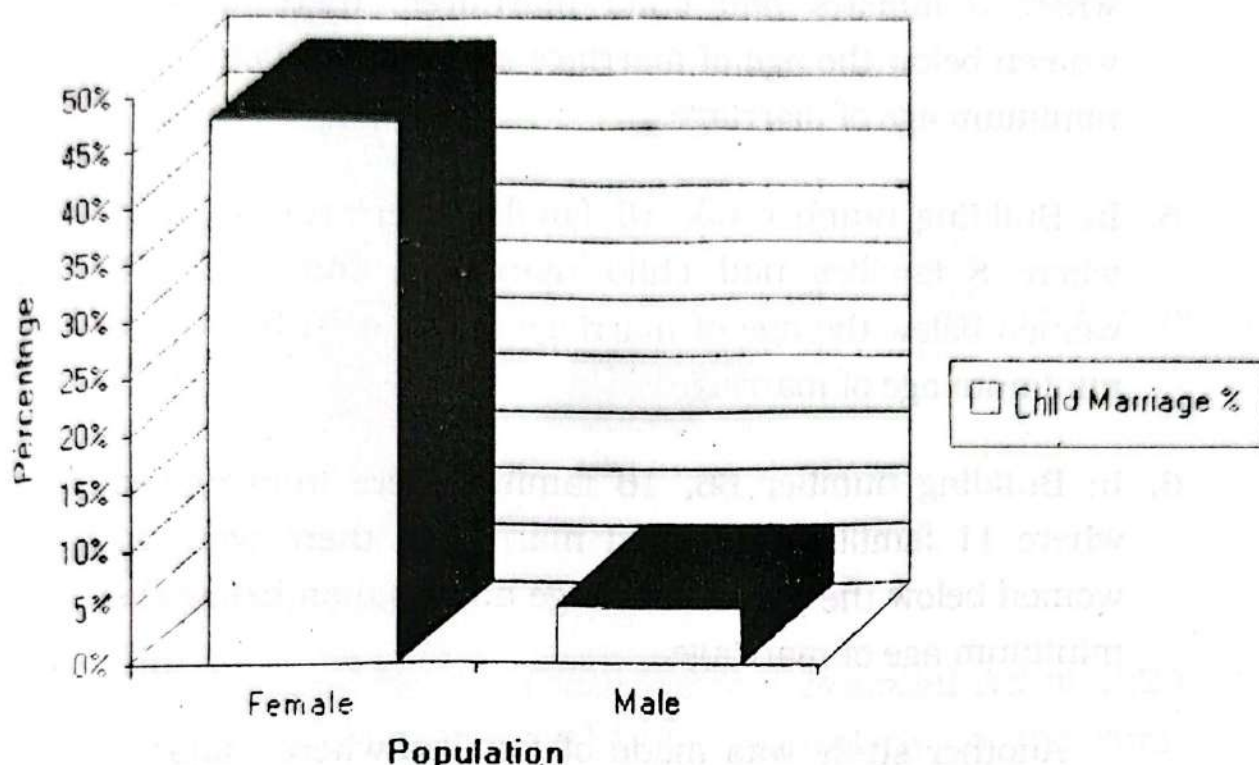


In the urban area a study was conducted on 96 families of A.G.B. colony or Accountant General's colony in Motijheel in the District of Dhaka, the capital city of Bangladesh. The study was made on families living in 6 buildings (No. 22, 28, 30, 64, 65 and 66) in the Al-Helal zone of the Motijheel A.G.B. colony. The study revealed that out of 96 families 46 families had child marriages. There were 5 families where men had child marriages and 46 families where women had child marriages. The education qualification of men were minimum S.S.C. level but the women were from class 5 to 10 generally.

The main query of the investigation was after 1971 how many families had child marriages i.e., how many men were below the age of 21 years and women below the age of 18 years at the time of their marriages?

Population	Child Marriage %
Female	48%
Male	5%

Percentage of Child Marriage in Motijheel A.G.B. Colony



The survey found that the percentage of child marriages were 53%. The study was conducted in different buildings of the colony which revealed the following:

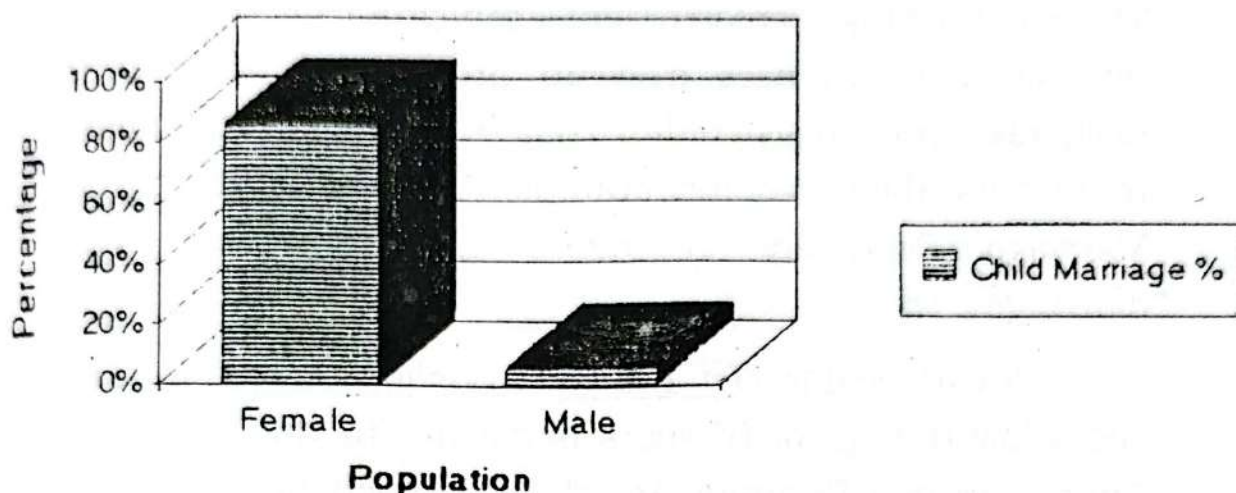
1. In Building number 22, 16 families were interrogated where 12 families had child marriages, there were 12 women below the age of marriage and 1 man below the minimum age of marriage.
2. In Building number 28, 16 families were interrogated where 8 families had child marriages, there were 8 women below the age of marriage and 1 man below the minimum age of marriage.
3. In Building number 30, 12 families were interrogated where 3 families had child marriages, there were 3 women below the age of marriage and 2 men below the minimum age of marriage.

4. In Building number 64, 16 families were interrogated where 3 families had child marriages, there were 3 women below the age of marriage and no men below the minimum age of marriage.
5. In Building number 65, 16 families were interrogated where 8 families had child marriages, there were 8 women below the age of marriage and 1 men below the minimum age of marriage.
6. In Building number 66, 16 families were interrogated where 11 families had child marriages, there were 11 women below the age of marriage and no men below the minimum age of marriage.

Another study was made of families where majority of them were financially poor in a locality named Kazipara in Mirpur, Dhaka. Fifty families were surveyed to find that 46 marriages were child marriages. There were 43 females and 3 males who had child marriages. The survey found that the percentage of child marriages were 92%. This proves that the concept of child marriages in the cities being less are not always true.

Population	Child Marriage %
Female	86%
Male	6%

Percentage of Child Marriages in Kazipur,
Mirpur, Dhaka



Conclusion

Practically, the *Child Marriage Restraint Act* of 1929 has never been truly effective, particularly in the rural areas where even today such marriages are quite common, retaining the parda and the honour of the patriarchal family. This shows the schism or dichotomy between law and life.⁴² Does this not also reveal that the state by its law is unable to change the folkway?⁴³ However, the surveys done in the rural and urban areas both indicate that the majority of marriages are child marriages and sometimes the notion that in the cities child marriages are less is not true. The raising of ages of marriage in the statutory legislation appears to have had some impact in the upper or middle strata of society, where the indirect effect of giving more education to the girl child has led to higher marriage ages, although it could not be reflected in the surveys.

A serious obstacle for the effective implementation of the legislation is that a marriage actually solemnised between children is treated as valid by the *Child Marriage*

Restraint Act, 1929 itself as well as under Islamic law.⁴⁴ All that is to be feared then is getting caught violating the Act. There is no proper enforcement agency to catch defaulters, nor are people's ages easy to prove where births are normally not registered.⁴⁵ When the parties falsely represents their age the administrative authority or the Marriage Registrars or Kazi's should prevent such marriages.

It was held in *Mst. Baksh v. Bashir Ahmed*,⁴⁶ that if a girl below the age of 16 years is married in violation of the *Child Marriage Restraint Act* of 1929, such marriage does not become void although the adult husband contracting the marriage or the persons who have solemnised the marriage may be held criminally liable. Another lacuna of the legislation is the non-cognizable character of the offence, which has been amended in India.⁴⁷ Attempts should be made in Bangladesh to amend the law in tune with India to make the Act more rigorously effective. Moreover, it would be highly applauded if special provisions were made for appointing child marriage prevention officers to enforce the legislation, as was done in the *Child Marriage (Gujarat Amendment) Act of 1963*. Moreover, since it continues to be difficult to ascertain individuals' age at marriage because of the absence of any reliable registration procedure for births, more emphasis should be given to proper registration at birth.

It should be publicised that every marriage solemnised under Muslim law should be compulsorily registered under the *Muslim Marriages and Divorces (Registration) Act of 1974*. While registering the marriage the registering authority should emphasise strictly on the issue

of child marriage and ensure that the parties are not below the minimum legal age of marriage.

In a nutshell the overall situation of Bangladesh can be gathered from these studies but how to resolve this problem of child marriages which has a far reaching effect on the booming population of Bangladesh? First of all the problem can be minimised by education and creating awareness through the mass media and the Government can take a bold step in it. Moreover, there must be proper national statistics on child marriages to evaluate the gravity of the problem. Then comes the reforms in the legislation to circumscribe the loopholes in the statute itself. After this we can prove that child marriages in Bangladesh is not our misfortune but is created for our negligence.

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¹³ *Ibid.*, p. 658.

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²⁶ The Report, p. 1203.

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MUSLIM PERSONAL LAW: CLASH AND RECONCILIATION

Dr. M. Maimul Ahsan Khan*

Introduction

It is a common belief that the modern principles of law are in sharp contrast with the Islamic principles of family law. Islam deals with marriage, divorce, maintenance, dower, dowry polygamy, inheritance and many other issues of personal law in detail. There are many schools of thoughts on these issues. Not all schools of Islam deal with them from similar point of view. During the reign of Colonialism the Muslim traditionalism could withhold the process of injecting many Western principles in the legal systems of the Muslim countries. Subsequently a good number of Western and secular principles of law were being incorporated in the personal law of the Muslim countries. These statements are more or less true for Bangladesh as well. Muslim societies are now often divided on many important issues of personal law. There is a tug-of-war in our country between the secular forces and the forces trying to Islamise the personal law.

This paper would try to analyze some legal issues of conflict between secular and religious forces on the important issues of Muslim personal law in Bangladesh. Very often it appears that the religious forces fail to understand the rationales of secular interpretations of personal law and reject them from philosophical, religious

Associate Professor, Department of Law, University of Dhaka.

and moral grounds, while secular forces rarely can appreciate the emotion, sentiment and psychology of the religious peoples.

Many codified or enacted laws adopted by the state authorities remained ineffective because of the absence of a stronger popular, religious and moral support of the masses. By imposing legal principles and norms on religious masses hardly we can bring any lasting good result in the matters of personal law.

Marriage, divorce and dowry are the areas where we need some new approaches to cope with the mounting problems. Neither the prevailing conservative religious approaches nor the present personal law appears to be appropriate to solve the innumerable problems related with marriage, divorce and dowry system. In this paper an attempt would be made to see the problems from legal point of view in a way so that we can honor the viewpoints of our religious masses and can ensure their support for legal reforms demanded by the present socio-economic conditions of the society. The paper would examine some of the secular rationales of religious principles and their potentialities to be used in the reform process of our personal law.

Marriage: Modernity and Religiosity

In Islam marriage is not a sacrament, it is a civil contract. But it is not an ordinary civil contract. This is a unique kind of contract between a man and a woman, both of whom enjoy and owe a wide range of rights and duties to each other. Muslim marriage is not merely a civil contract, because unlike other civil contracts, it cannot be made contingent on a future event.

Relationship between husband and wife has a large number of purposes. Apart from biological aspects it has many social, financial, religious, moral and spiritual aspects. In an ideal situation marriage in Islam is very near to a kind of sacrament. Sir Abdur Rahim remarks,

The Mohammedan jurists regard the institution of marriage as partaking both of the nature of ibadat or devotional acts and muamlat or dealings among men.¹

Apparently unlike any other religion marriage in Islam is a union on permanent basis between a man and woman. But this union initially forms a nucleus family, which has a lot of duties to other family members, neighbors, society and even to the state. Ideally speaking a family in Islam does not exist for welfare of an extended family in particular and society at large. Through family ties the Muslims are supposed to establish a decent and civilized society, which on its part should be helpful to build a prosperous nation and state. But in our country no important pious or religious goals of state and society could be achieved through the Muslim family life. In a word a traditional Muslim family lost almost all its religious and spiritual purposes. Families are mainly concerned for their economic upliftment and upbringing of their children. Floating children and women are deprived completely of the shelter of families.

Though family exists in the society and state protects the family relations, yet in present context its role to build a good society and prosperous nation is not at all remarkable. As a result we are caught by the waves of oppression on women, children, maidservants, women workers and very recently by child rape syndrome. The phenomena tell about the serious flaws of our family

system and state affairs. Rampant financial corruptions have direct connections with our present family system, ethics, norms and morals. Any family member bringing wealth and money to the family can easily be proud of his place and role in the family and society. A wealthy corrupt man or woman appears to be helpful to other members of the family, neighbors and other social, cultural and religious institutions. Thus Bangladesh family in general though lost its religious purposes, but it retains its religious color, which is very helpful to hide all crimes, corruptions and sins of its members.

Families turning into a major source of breeding ground of financial corruptions and other vices ultimately make the entire state machineries corrupt and inefficient. State run institutions and educational institutions alone can not develop patriotic and honest human resources for the country. Family life is very vital for any society and state to prosper.

At present most of our educated people are corrupt because of family imperatives and ambitions. A father earning and saving money to be spent in the marriage ceremonies of his children has no time or scope to judge his means and methods of earning. Similarly a husband is earning money to be spent for his wife and children and has no time and opportunity to think of the interests of society or state. Many responsible people including the officials of the law enforcing agencies earn some undue money at the great losses and miseries of the entire society and state

In Bangladesh most of the marriage ties are being established under the method of arranged marriage system. Marriages are regarded primarily family affairs

rather than personal affairs. Instead of looking at the honesty, integrity and other human qualities of bridegroom, bride's side are interested in analyzing the economic condition and future financial prospect of the bridegroom, compatibilities of both the sides usually are ignored. This is a major violation of Islamic principles and norms. But once a marriage tie is established all concerned are interested to protect it with the help of religious sentiments and inorals. This creates a paradoxical situation. Marriages at their beginnings having no religious and social commitment, all of a sudden try to salvage themselves from collapsing with the help of religion.

Thus as a whole marriage in Bangladesh is heavily burdened by financial, cultural, social and religious elements and commitments. Newly married couple fall very often in a very difficult situation to cope with huge task conferred upon their shoulders. Though a nucleus family usually is being established by and under joint family system, yet it becomes quickly vulnerable under joint family system because of changed attitude and values of younger generation. Arranged marriage still remains the most acceptable and popular from all other marriages in Bangladesh, not because of religion-cultural tradition of Bangladesh society. Economic imperatives still kept this form so widely practised in Bangladesh. In the urban areas love marriages are also becoming fashionable.

In the West two gay-men or two lesbians can register their marriage, which is completely prohibited in Islam.

In the Western countries also living-together of a man and woman without registration of marriage still is not regarded as a form of marriage. But at the early stage of Islam such cohabitation was regarded as marriage and until now shiite interpretation recognize that method as a temporary marriage. Recognizing temporary marriage tie as a valid form of marriage can give legitimacy to a larger number of children. Legitimacy of children occupies a very important place in the Muslim family life. In fact islam is interested to make a society free from extra-marital sexual ties and illegitimate children.

Islam prohibits all sorts of extra-marital sexual relations and provides severe punishment for all kinds of fornications. That is why in Muslim society marriage ceremony should be of easiest type knowing no formalities, which our present society imposes on our system. It may ultimately lead to very bad consequences. More and more young people may find themselves outside the umbrella of family ties. Number of floating women and children may increase dramatically. Needless to mention that there exist millions of helpless and homeless children and women in the country. This is one of the glaring examples of our present faulty marriage and family system. In fact Islam provides the easiest form of marriages for all irrespective of their national, racial, cultural and family identities. An adult Muslim woman can marry an adult Muslim man of any age or nationals. No social, cultural and religious ceremonies are required. Presence of two witnesses is good enough to regard their consent for marriage valid. In Islam verbal consent of both the partners is the only precondition for a valid marriage Muslim woman is prohibited to take any

risk to marry a non-Muslim male, while a Muslim man is allowed to take that risk on his own accord.

Islam on the one hand made the marriage system so easy that no legal, social or religious formalities are necessary for a valid marriage, on the other hand, desires to keep the marriage contract alive and fruitful as long as possible. This object of Islamic method is not so easy to achieve especially in a backward society of ours. Usually it has been noticed that marriage ties established through simple ceremonies also break quickly because of immaturity of either side or economic difficulties. But present adopted method of rescuing marriage at a very high cost and interests of state and society also may not work for a longer period.

Divorce Unilateral and Delegated Power

There is a common belief that Islam approves unlimited and arbitrary power of husband to divorce his wife. It is true that in pre-Islamic Arabia a husband enjoyed an unlimited power to divorce his wife at any time and on any plea. But the prophet of Islam brought a remarkable change in that unqualified right to divorce. Quran does not declare divorce as Haram (prohibited) act. It is rather a Mubah i.e. legally and religiously permitted, but depending upon the concrete situation wherein one has to exercise or execute the right to divorce with a great care. In Islam divorce is a delicate and sensitive issue. Unlike marriage it is not regarded as a simple act. Walking away from marriage tie is not an easy task. Though it is a voluntary act, but it must go under some legal, social and religious process. To establish a marriage tie both the partners have to give consent freely, while for the dissolution of a marriage decision of

either side is sufficient. The Prophet of Islam departed from Arab and Eastern notion and culture of divorce.

According to Asaf A. A. Fysee the Prophet "restrained the power of divorce possessed by husbands; he gave to women the right of obtaining a separation on reasonable grounds, and towards the end of his life he went so far as practically to forbid its exercise by men without the intervention of arbiters or a judge. He pronounced *Talak* to be the most detestable before the Almighty God of all permitted things."²

To resolve any dispute between husband and wife both the sides have equal right to represent his or her position. They should represent grievances through their appointed agents.

If you fear a breach

Between them twain

Appoint (two) arbiters,

One from his family,

And the other from hers

If they seek to set things aright,

Allah will cause

Their reconciliation.³ (Quran 4:35)

In normal case either side can exercise his or her right to divorce. But the question is whether it is an alienable right? Is it possible that on behalf of husband some one would divorce his wife? Can wife send a letter of divorce to husband directly? There are many other similar type of questions, which make divorce a complicated process. Whether the theoretical perceptions

of divorce in Islam are really complicated or the Muslims made them complicated, is altogether a different issue. Indian Justice Iyer in *A. Yusuf Vs. Sowramma* case says,

It is a popular fallacy that a Muslim male enjoys under the Qoranic Law, unbridled authority to liquidate the marriage. The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict divorce does not accord with Islamic injunctions. However, Muslim law, as applied in India, has taken a course contrary to the spirit of what the Prophet or the Holy Koran laid down and the same misconception vitiates the law dealing with the wife's right to divorce. Commentators on the Koran have rightly observed that this tallies with the law now administered in some Muslim countries like Iraq -- that the husband must satisfy the court about the reasons for divorce.⁴

Apparently it sounds ideal that all divorces should be executed by court. But in reality such a provision would be an intervention of court in the private life. Such intervention would be uncalled for and may prove to be unnecessary and ineffective. Private life of all citizens should be allowed to move forward through ups and downs of personal fate and misfortune, so that depending upon their abilities and circumstances concerned parties can take charge of their own life without any hindrance from outside. Moreover, scope of reconciliation between husband and wife should be allowed to be used up to its full length. Involvement of court or any other state institution would quickly diminish the scope of reconciliation. Any dissolution of marriage is painful and not without some stings for the

parties. But unsuccessful marriage should be allowed to be dissolved otherwise unwanted marriage tie would bring more miseries and misfortune to the concerned parties.

Problems with divorce are manifold. Rise of divorce rate may create many problems for the offsprings. But still strict regulation of divorce might not be helpful at all. Once any of the partners decides to walk away from marriage tie, it becomes impossible for others to compel him or her to live with other partners under the same roof. But both the sides should be aware of the consequence of the dissolution of marriage and should pay the required due compensation. Usually compensations are given by husband to wife. This might be the reason why there exists different types of divorce for husband, while *Talak-e-Tafwid* is the only unilateral form of dissolution of marriage for woman.

Khula (redemption) and *Mubarat* (mutual freeing) are regarded as the modes of dissolution of marriage by mutual consent. These two forms should be given full opportunity to be used for the dissolution of marriage. And *Talak-e-Tafwid* can be used as an alternative option to the methods of mutual consent for the dissolution of marriage. All relevant issues should be settled mutually at the time of dissolution of marriage. None of the financial aspects should be kept unresolved at the time of the dissolution of marriage so that both the partners may try to search for his or her better rehabilitation.

No legal, social and religious measures can stop the rise in divorce rate at the present context. But liberalized personal law may be helpful for quick settlement of disputes between husband and wife. Many

crimes, violent and sinful activities could be stopped by the dissolution of marriage in right time. Cases of oppression on women and children would decrease by dissolving unsuccessful marriages. For that end many more social and religious organizations should extend their help to the couples in need.

Remarriage between Divorced Couple

In Islam marriage is a voluntary union between a man and a women. Apart from biological aspects a marriage contract has many other delicate aspects. Marriage ties can be established quickly and suddenly. But it can not be broken so easily or suddenly. Irrevocable divorce has many serious consequences. In legal terms irrevocable divorce is not prohibited in Islam, but all kinds of divorces are discouraged in many ways. Principles and norms of Islam regulating marriage and divorce are shrouded with complicated philosophical and historical complexities.

Islam divided human activities in so many categories such as '*Farz*', '*Wazib*', '*Sunnat*', '*Mubah*', '*Mustahab*', '*Mukruh*' and '*Haram*'. It is really difficult, if not impossible to categorise all these types in legal terms. Marriage is not *Farz* or *Wazib* in Islam, though Muslim take it as an obligatory act. It is a strong *sunnat*, but no one should be compelled to enter into a marriage tie. On the other hand, marriage becomes '*Mukruh*' for a man, when he does not have proper means for maintenance of his wife. In this consideration most of the marriages of our country are *Mukruh*. *Mukruh* marriage tie is supposed to be vulnerable to breakdown. Apart from financial reasons there are many other reasons, which make the foundation of marriage very weak.

Incompatibility between husband and wife in their religious virtues and moral qualities are regarded as the causes of vulnerability of marriage tie. But no such causes or reasons can make marriage illegal. But they can make marriage contract a voidable one.

Divorce is neither *Haram* nor *Mukruh*, but depending upon the mode of dissolution of marriage it could be a sinful act or a good deed. Divorce itself is not a crime, but it may be a spiritual offence from religious point of view and at the same time a religious and social necessity. In principle Islam adopts a step-by-step approach to dissolution of marriage. A Muslim should not divorce his wife at his whim or caprice, he must have some reasonable ground to divorce his wife. The same is true for a wife.

It is expected that the husband bearing all the financial responsibility for the wife and protecting other members of the family would not divorce his wife at his whim or caprice. But not necessarily all Muslims would be of that standard of morality and decency. That is why Islam prohibits a system of pre-divorce conference to arrive at a settlement. The system of arbitration is viewed as an attempt of reconciliation. All the norms and principles of Quran and Sunnah regulating the issues of divorce in fact state that Islam is about to prohibit unilateral or arbitrary divorce. But the major complexity with the Quranic norms is that they are not categorical as the modern normative acts are. For example formally Islam does not prohibit slavery, but all moral injunctions are against the system of slavery and slave trade. The ideal economic system visualized by the Islamic tenets leaves no room for slavery in Islam.

Similarly arbitrary divorce is condemned by many moral and religious principles.

The Holy Quran says,

Divorce is only permissible twice, after that the parties should either hold together on equitable terms or separate with kindness.⁵ (Quran 2:229).

From this verse it is clear that remarriage between divorced couple is not only possible, it is desirable that after first divorce the couple would try again to live like husband and wife.

If the first attempts fails, then they are followed to be separated for second time and after that again they can establish marriage tie. But after the second failure neither side is allowed to establish marriage ie immediately with his or her life partner. The Islamic principles are very keen to maintain decency in family and social life. If a couple endlessly divorce each other and remarry again and again, it creates a bad example of taste in the society. Here Islamic norms become very strict,

So if a husband

Divorces his wife (irrevocably),

He cannot, after that,

Re-marry her until

After she has married

Another husband and

He has divorced her,

In that case there is
No blame on either of them
If they re-unite.⁶ (Quran 2:230).

This is one of the those verses of the Quran which is misunderstood or misinterpreted by many commentators of the Quran. Mechanical or literary interpretations of this verse led to a misconception that after "Tripple Talak" still there remains an immediate opportunity for the divorced couple. Only the wife has to orchestrate another temporary marriage with another man. The orchestral marriage would be of temporary character of a day or two and after that the newly married husband would divorce her so that she can remarry her previous husband. It means newly married husband would not be a real husband, at best he could be regarded as a technical husband, who is supposed to divorce his newly married wife immediately so that she can remarry her previous husband. In fact this is a very stupid and foolish interpretation of a verse of the Quran and a direct contradiction to many other important Quranic principles, such as comprehensive and stable relationship between husband and wife.

There is a no scope for any technical or mechanical marriage tie in Islam. After the triple *talak* both husband and wife would try to establish normal marriage tie with another man and woman. If the wife again fails to live with her husband peacefully or thinks that her marriage tie with previous husband was more meaningful than the present one, then after a normal divorce again she can establish marriage tie with her

previous husband, who might or might not establish another marriage tie with another woman. In fact Islam indeed has a very liberal attitude to marriage and divorce. Considering the overall interests of society and for the safeguard of offsprings Islam lends not to regulate marriage tie strictly. This is one of the main reasons why Islamic principles allow a Muslim man to maintain more than one marriage ties at a time.

The main problem with the Muslim societies is its regimented family life, which has been failing to cope with the speedy dynamics of modern society. Traditional and conservative attitude appears to disapprove the liberal individualistic approach to marriage tie and various aspects of family life. But proper interpretation of the norms and principles of marriage, divorce and remarriage of Islamic tenets shows that depending upon the concrete situation Islamic norms are on the one hand very liberal and on the other hand very strict to family relationship. But misconception of triple *talak* and remarriage of divorced couple created an understanding that a Muslim man can divorce his wife in mode of *talak-ul-biddat* or *talak-ul-bain* at one sitting. It is simply a spiritual offence from religious point of view and has nothing to do with a criminal act.

During the life time of Orophet the triple *talak* was not allowed at one sitting. With the expansion of Muslim State and society the Muslim rulers did not bother to regulate different modes of divorce in legal terms and practice of triple *talak* at one sitting has been prevailing throughout history. Taking this offence purely of spiritual and moral character, no punishment was prescribed for such offence. No compensation system

was introduced for the women divorced by her husband all of a sudden.

The Koran does not mention triple divorce in one sitting. It requires the divorce to be effective over three periods of cleanliness, giving the couple a chance to reconcile during those three months. Thus, both the Koran and the prophet prohibit arbitrary divorce. All precautions were taken to guard women's interests. However, the later jurists influenced by the male dominated values of the patriarchal society gave man absolute right to divorce his wife and brought back a measure which was pre-Islamic and which was strongly condemned by the Prophet.⁷

While an incidence of triple talak was reported to the Prophet of Islam he ordered the man to take back his wife to his house. There is a hadith in this regard. On this incident the prophet remarked that any attempt to justify such a triple *talak* at one sitting is nothing but ridiculing the divine law.⁸ The Second Caliph Hazrat Omar reported to have punished a man for pronouncing *talak* in an indecent way.⁹

The main problem with the theoretical prohibition of triple *talak* at one sitting is that practically it can not stop the divorce process. Either husband or wife can proceed to the final *talak*. Still any sound and calculative prohibition of triple *talak* may be helpful for the wife in the process of psychological adjustment to the new situation. Divorce and remarriage between the divorced couple are still regarded something very abnormal to the norm of our society. But like marriage these are very normal acts of human being and should be treated as a part and parcel of social and family life.

Dowry in Theory and Practice

Dowry is an exchange or consideration given to women by men before or after the marriage. Since 1980 all such transactions are completely illegal in Bangladesh. Not only the transactions, but mere demand for dowry is also prohibited. But in reality except some love marriages or incidental sexual relations leading to marriages very rarely marriage ties are established without various kinds of material consideration and transactions.

Educated peoples do not admit that their marriage ties are associated with any direct or indirect dowry transactions. They are quite aware that it is an offence which can not be committed by only one side. Giving and receiving dowry is an offence punishable imprisonment up to one with year. Illiterate and poorly educated or poor masses do not bother about the law because dowry money is really a serious consideration of their marriage contract. Irrespective of the amount in most cases for poor people it is a burden for the family of bride. Bride's side voluntarily often agrees to hand over property or valuable security to other side. It is true that every family is interested in finding a better-off family and husband for their daughters. As husband has to bear all the financial expenses for the wife throughout his family life, that is why he is interested to invest some property and valuable security at the time of marriage.

Thus dowry serves a sort of security bond for both the sides. Islam does not approve any material exchange or consideration given by the women to the men for entering into a marriage contract. But dowry money or transaction does not automatically make a marriage illegal. Our present law prohibiting dowry also makes no provision to regard

marriage illegal, if the contract involves property or valuable security to be given nor agreed to be given as a consideration for marriage by the bride to bridegroom. Keeping the marriage contract valid, it is almost impossible to punish any party for giving or receiving dowry. Offences related with dowry would remain under the strong protection of family ties. Only after the dissolution of marriage dowry related crimes may appear on surface, and that too only to the courts. But by that time dowry property or money were either spent or misused by the parties and sometime it is difficult to recover the property or money given by bride's side to other. That is why at present the most common mode of dowry transaction is to present ornaments to the bride or transfer some property to her name. But all this could not stop the evils related with dowry transactions. Dowry related crimes are rampant in the society and dowry transaction became a norm of the entire society. The law remains as moral directives of law books rather than legal injunctions to be executed through judicial process.

Islamic principles could be used to stop some of the dowry related crimes. Muhr is an essential element in a Muslim marriage. Wife is entitled to own some money or property from husband just because of her marriage. Husband may pay dower money at the time of marriage or may fix an amount to be paid later on. The amount of dower and its mode of transaction can be fixed at the time of marriage or any time agreed upon by both sides. In a case of dispute, court may fix the amount and its mode of transfer.

In Bangladesh dower has been taken simply as a promise of the husband to the wife not necessarily to be

fulfilled. In most cases it remains unpaid. A great majority of women still can not take dower as their right because of widely practiced dowry system. Strict obligatory payment of handsome amount of dower money or property by the husband to wife can be used as a deterrent to dowry system and divorce on any flimsy grounds.

With the rise of income of the husband he can voluntarily increase the amount of dower money or property. So the wife has a right to bargain with the husband to increase dower money. If the amount was not fixed at the time of marriage the wife can influence her husband to fix any big amount as a dower. We have to bear in that dower money can be fixed at any big amount by the parties as no bar been on it.

Prompt dower is payable at any time on the demand of the wife, while deferred dower is payable on the dissolution of marriage by death or divorce. Dower is so alienable right for a wife that virtually she can claim the fulfillment of the right at any time. The prompt portion of the dower can be demanded by the wife at any time before or after consummation. Even after the death of husband, the wife can recover the full amount of prompt dower from the estate of deceased husband. Thus the Islamic principles and norms are very categorical and modes of realization of dower money or wealth are very specific. But in reality the Muslims are accustomed to take dower lightly and the complicated and time consuming judicial system does not encourage women to go for legal battle for the realization of dower money or property.

Conclusion

The volume of Islamic sources providing principles and norms for the personal law is very big. There are many contradictory and conflicting thoughts and ideas in the sources of Muslim literatures. One of the major problem is the numerous interpretations of the same verse of the Holy Quran. Many Muslims regard Quran as a law book, in each case they see a contradiction between God-made-law and man-made-law. In fact, it is a disgraceful attitude to the Quran itself to consider it as a law book only. Of course, the Quran is the major source of Islamic jurisprudence, which is very rich in dealing with many legal issues. Islam provides an independent legal philosophy which visualises a comprehensive legal system of its own. The principles and norms regulating the issues of marriage, divorce and dowry received a great deal of attention of Muslim jurists. In all Muslim societies these issues have been predominantly regulated or influenced by the principles and norms derived from the Quran and Sunnah. Bangladesh is not an exception to this trend. We have several major problems in that regard:

Firstly, Quran is originally revealed in Arabic and most of our *ulema* and the law makers do not sufficiently understand Arabic language.

Secondly, simple Arabic linguistic knowledge is not at all enough to understand so many complicated issues of Islamic philosophy and jurisprudence.

Thirdly, the real dynamics of life is much more paradoxical for any particular source of law to elaborate or focus. Though the prophet of Islam practically set a lot of examples in the process of execution of the Quranic

principles and norms, yet the modern Muslims fail to maintain the standard set by him and his associates.

At present Muslim societies are on cross road between orthodoxy and modernity. On the whole our society has been becoming modern, but it is not liberal to many issues of our personal law, which on its part does not provide sufficient practical answers to many problems of our family life. Thus many burning issues of family life remain unaddressed in legal terms. Needless to mention that at present modernity and religiosity have been tried to bridge the gap between the two to ease tensions in the society.

One of the major problems of our religious people and intellectuals is that many of them are not capable of differentiating the pious wishes of Quranic verses and their methods of legal applications. They take the issues either completely in terms of religious consideration or in categorical language of legality. Though the Quranic principles and injunctions are religious and spiritual in character, they have many concrete secular purposes. Ignoring the secular purposes of religious principles and norms, hardly any Quranic injunction can be incorporated in the personal law.

The issues of marriage, divorce and dowry are of mainly secular and temporal character. But religious and moral principles can help make ourself more humane and civilized in dealing with the conflicting situations. The family matters are always very delicate in nature. Unruly or very strict attitude to the family matters may harm the family, the oldest human institution. As a whole yet we are not in a very bad shape in dealing with our family relations and conflicts, but urgent reforms are necessary to liberate

personal law and religious approaches. Otherwise repression on women, child trafficking and recent horrible child rape syndrome would destroy the ethos of our society. Diversion of our sincere attention to the religious code of conduct and their use in real life may greatly help combat many heinous crimes and evils of our society. Instead of clashes, a reconciliatory attitude to religious principles can help us design a more effective personal law.

Reference

¹ Cited in Dr. V.P. Bharatiya, Syed Khalid Rashid's *Muslim Law*, Eastern Book Company, Lucknow, 1996, p. 52.

² Asaf A. A. Fysee, *Outlines of Mohammedan Law*. Oxford University Press, Delhi, 1974, pp. 146-147.

³ *Quran*, 4:35.

⁴ AIR 1971, Kcr 261.

⁵ *Quran* 2: 229.

⁶ *Quran* 2:230.

⁷ V. P. Bharatiya, Syed Khalid Rashid's *Muslim Law*. Eastern Book Company, Lucknow, 1996, pp. 122-123.

⁸ See *Ibid*.

⁹ See, Justice Abdul Bari Sarker, *Concept of Islamic Statecraft*. Islamic Foundation Bangladesh, 1987, p. 243.

FAIR AND SPEEDY TRIAL (Bangladesh Context)

Khondaker Md. Abu Bakar*

Introduction:

The legal system in Bangladesh is the legacy of the British Rule in India which ended in 1947. From 1947 to 1971 Bangladesh was part of Pakistan and was known as East Pakistan. In 1971 Bangladesh emerged as a Sovereign Independent state through historic war of liberation. Most of the laws of the former times have been adapted and are still in force with certain minor changes here and there in name and nomenclature, the basic structures remaining almost the same. Because of lack of consistent and sound growth of democratic institutions due to political turmoils we could not as yet make any remarkable headway in bringing substantial reforms in our legal system needed for a truly democratic sovereign state so far the questions of fair and speedy trial are concerned. However, of late, attempts are being made to bring about comprehensive reforms to make the system adequately capable to cater to the need of the nation both by updating the existing laws and enactment of new laws where necessary and also improving the logistics and infrastructures with the support of the World Bank and other Donor agencies.

Before going into discussion on the topics I think it will be pertinent here to give a short introduction of the hierarchy of the courts and jurisdictions in Bangladesh.

* Additional Secretary (Rtd.), Ministry of Law, Justice and Parliamentary Affairs, Government of the People's Republic of Bangladesh

Broadly our legal system comprises of Administration of Civil Justice and Administration of Criminal Justice regulated procedurally by distinctly two sets of laws namely the Code of Civil Procedure, 1908 and the Code of Criminal Procedure 1898. Apart from certain special laws enacted from time to time to meet the exigencies of the situation, the Penal Code of 1860 generally deals with the offences in terms of definitions, extent of punishment and exceptions etc. In most cases in the trial of offences under the special laws, certain provisions of the Code of Criminal Procedure with regard to investigation, arrest, bail, seizure, attendance of witness etc. have been made applicable.

Constitutional Provision on judiciary:

The Constitution of the People's Republic of Bangladesh adopted in 1972 contains a separate part (Part VI articles 94-117) dealing with the judiciary. The Supreme Court of Bangladesh comprises of the High Court Division and the Appellate Division headed by the Chief Justice of Bangladesh. Besides appellate and revisional jurisdiction in civil and criminal matters, the High Court Division has extraordinary jurisdiction commonly known as writ jurisdiction under article 102 of the Constitution for enforcement of fundamental rights. The Appellate Division of the Supreme Court is the apex court which besides having jurisdiction of appeal arising out of the decisions of the High Court Division under article 103, has been vested with the jurisdiction of doing complete justice under article 104 of the Constitution to prevent miscarriage or failure of justice. The Appellate Division has also advisory jurisdiction on legal matters of public importance under article 106 of the Constitution whenever sought by the President. The Supreme Court have the jurisdiction to decide the

constitutionality of any law and also can strike down any law which is ultravires or inconsistent with any provision of the Constitution. The decisions of the Appellate Division are binding upon the High Court Division as well as on the subordinate courts and the decisions of the High Court Division on all courts subordinate to it.

The subordinate judiciary consists of the Subordinate Judges and Assistant Judges and the Magistrates. The District Judges, Additional Judges and the Subordinate Judges apart from their civil jurisdiction are also vested with the criminal jurisdictions and are classified as the courts of Sessions Judge, Additional Sessions Judge and Assistant Sessions Judge. Below the courts of Sessions there are the Metropolitan Magistrates for the Metropolitan areas and magistrates for other areas trying cases which are not triable by the Courts of Sessions. Offences punishable with imprisonment upto five years are triable by different classes of Magistrates; Assistant Sessions Judges can try offences and pass sentences not exceeding ten years; Sessions Judge and Additional sessions Judge can pass any sentence authorised by law and also sentence of death subject to confirmation by the High Court Division (SS 6,31,32 of the Code of Criminal Procedure). Against the judgments of conviction and sentences passed by Magistrate appeals lie to the court of Sessions and to the High Court Division against the judgment of conviction and sentence passed by the Sessions Judges.

Under the criminal administration of justice offences are broadly categorised into cognizable and non-cognizable with their classification as to arrest, bail, compoundability, courts by which to be tried, procedure of trial etc. shown in the Second Schedule of the Code of Criminal Procedure.

Criminal proceedings are usually initiated either by complaint or First Information Report. In cognizable cases police can arrest the alleged offenders without warrant from court. Prosecution in cognizable cases is the state-responsibility. A criminal proceeding comprises of investigation and trial ending either in conviction or acquittal of the offenders. Mainly the police are entrusted with the investigation during which offenders are detected and apprehended, evidences are collected and the case is made ready for trial. The foundation of the case is built during investigation. Detection of the real criminals and collection of proper evidence lay the real foundation of a criminal case because the success of the prosecution depends on the efficient handling of the cases by the investigators. How the investigations are to be conducted, statements of witnesses, confessional statements of accused, dying declaration are to be recorded are all regulated by specific provisions of law.

Magistrates are empowered to try summarily petty offences punishable upto two years imprisonment under chapter XXII of the Code of Criminal Procedure. The procedure of trial before the Court of Sessions are contained in Chapter XXIII of the Code. Formerly the trial aid of jurors whose majority verdict was binding upon the presiding judge. Till late seventies the trial before the Sessions Court were held with assistance of assessors in place of the Jurors. The opinions of the assessors were not binding upon the presiding judge. The system of assessor aided-trial has also been abolished.

Independence of Judiciary: Separation of Judiciary:

According to the provision of article 94(4) of the Constitution the Chief Justice and other judges of the Supreme Court are independent in the exercise of their judicial functions. Similarly all persons employed in the judicial service and all Magistrates are independent in the exercise of their judicial functions as provided under article 116A of the Constitution. The independence of the judiciary is the pre-condition of fair trial and fair justice. Another pre-requisite of sound and independent judiciary is the separation of the judiciary from the executive organ of the state. Article 22 of the Constitution contains fundamental principle of state policy to the effect that "the state shall ensure the separation of the judiciary from the executive organs". Although there is constitutional commitment for the separation of the judiciary no positive steps were taken hitherto before for the separation of the judiciary. In a recent judgment passed in writ petition No. 2424 of 1995 Masdar Hossain and 440 others vs. Government of the People's Republic of Bangladesh reported in the Mainstream Law Reports (2 MLR [1997] page 137-160), the High Court Division discussed threadbare the different aspects of separation of the judiciary from the executive and highlighted certain guidelines for the separation. meanwhile the present Government have taken some positive steps towards effecting the separation of the judiciary by tabling a bill in the Parliament.

At present the judges of the subordinate courts are under the administrative control of the Ministry of Law, Justice and Parliamentary Affairs which according to article 116 of the Constitution exercises this control in consultation with the Supreme Court. However, the magistrates are under the administrative control of the

Ministry of Establishment. The Magistrates perform both executive and judicial functions. The dual administrative control over the judges and magistrates have some adverse reflection on the independence of the judiciary affecting sometimes the fair trial.

Constitutional provision for fair trial:

To get fair and speedy trial is a fundamental right guaranteed in the Constitution. Article 35 reads as follows:-

"35. Protection in respect of trial and punishment.

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

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

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

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

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

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

The question of fair trial pre-supposes the fair investigation, fair prosecution and fairly providing scope for the defence of the accused under the legal dispensation. In our criminal jurisprudence a person accused of an offence shall be presumed to be innocent so long he or she is not proved guilty by legal evidence beyond all reasonable doubt. The doctrine of reasonable doubt plays vital role in our legal system as a safeguard against conviction of innocent person meaning thereby that even ten accused may be acquitted but not a single innocent person should be convicted. That a person shall have the protection of law is the inalienable right guaranteed in the Constitution in article 31 and 33 which read as follows:-

“Article 31. Right to protection of law. - To enjoy the protection of law, and to be treated in accordance with law and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

“Article 33. Safeguards as to arrest and detention. - (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall be denied the right to consult and be defended by a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the magistrate, and no such person

shall be detained in custody beyond the said period without the authority of a magistrate”

For the purpose of protecting social order and peace by preventing prejudicial activities against the state, the Special Powers Act, 1974 was enacted. Meanwhile this law has been largely modified. There are a lot of arguments and criticism for and against this law which curtails the fundamental rights of the citizen. Instances are not rare when concerned agencies of the Government sometimes use the provision of this law arbitrarily. Meanwhile the Supreme Court took commendable stand in checking this type of arbitrary arrest and detention by granting anticipatory bails and directing the release of some detenues forthwith. However, there persists continuing demand for the repeal of the Special Powers Act, 1974 from the conscious section of the people.

Provisions of bail :

Bail of accused in a criminal proceeding either during investigation or trial occupies important chapter. In the case of bailable offence bail may be granted as of right. But in a case of non-bailable offence grant of bail is discretion of the court. In the traditional concept in our jurisprudence grant of bail is a rule and refusal is an exception. As the question of bail involves curtailment of freedom of movement, this should be dealt with judiciously and in accordance with consistent norms and standard. In the case of grave offence such as gruesome murder, dacoity with murder, rape with murder, high treason, grievous hurt causing permanent disfiguration of face and vital parts of body by corrosive substance, drug trafficking and the like involving capital punishment, accused are refused the privilege of bail. Even in such cases bail may be granted to

accused who is a woman, or sick or infirm person or a minor below 16 years of age under section 497 of the Code of Criminal Procedure. Unless there is anything which may cause prejudice to the prosecution accused may be granted bail in the usual practice.

Exclusion of evidence made in police custody:

Exclusionary provision in the evidence law is of great significance. In criminal trial statement made to the police is not admissible in evidence. Similarly confessional statement of accused made in police custody or under threat, duress or coercion is not an evidence and cannot be used against the accused for the purpose of conviction. Only the statement made to the police in pursuance of which incriminating materials are recovered is admissible in evidence under section 27 of the Evidence Act, 1872. In order to prove the charge in a criminal trial there must be direct and reliable evidence. Ocular evidence of reliable and impartial witness carries weight towards proving the guilt of accused. Circumstantial evidence of strong nature leading unerringly to irresistible conclusion to the exclusion of any other hypothesis as to the guilt of the accused may well form the basis of conviction.

Public Prosecutor and Legal Aid:

Prosecution on behalf of the state is conducted by the Public Prosecutor before the Court of Session and by the Court Police Inspector before the Magistrate. Police is entrusted with the task of investigation and is responsible to produce witness before the court during trial. The accused may plead guilty or not guilty of the charge. In the event of pleading guilty the accused may be convicted

accordingly. The prosecution is fully liable to prove the charge with cogent and reliable evidences beyond all reasonable doubt. Only in the case of criminal breach of trust and misappropriation, accused can offer himself as a witness to give an account of the money or things given to him in trust.

Accused is entitled under law to freely consult and to be defended by lawyer of his choice. Where the accused cannot provide for his defence by engaging lawyer due to poverty he can have the legal aid at the expense of the state. In every district Legal Aid Committee constituted at the behest of the government has been looking after the matters of providing legal aid to the poor and the distressed.

Forensic Department:

The Forensic Department have an important role in relation to criminal justice involving murder, rape, grievous hurt, kidnapping and abduction. As the birth registration of child is not made in most cases, the determination of age of victim frequently becomes the subject of controversy. In the face of growing socio-economic complexities, the crimes of above nature have also increased manifold. The lack of adequate expansion in the forensic examination in many cases which adversely reflects on the fair and speedy trial.

Offence of Rape:

The punishment for the offence of rape has been enhanced and is now punishable with imprisonment for life. The Medical examination of the victim very often is delayed or not examined by doctor which leads to the hazardous consequence. The question of corroboration by independent evidence can seldom be available. Rape for a

woman is grave crime against human dignity. So the offence of rape must be dealt with from a different standpoint not requiring the dead uniformity of corroboration.

Juvenile Justice:

Juvenile justice has of late been a global concern. For the purpose of securing the best interest of the child the United Nations adopted the Convention on the Rights of the Child. Child below seven years are exempted from the criminal liability under section 82 of the Penal Code, 1860. The age between 7 and 12 years with regard to the criminal liability of a child depends on the nature of understanding to be determined by the judge. The joint trial of child with adult accused is prohibited. In the Children Act, 1974 the upper limit of age of a child has been fixed at 16 years. Juvenile offenders below the age of 16 must have to be tried by the juvenile court under the procedure laid down in the Children Act, 1974. This Act mostly conforms the norms and standard set forth in the CRC. Besides the Magistrates, District Judges are performing the functions of juvenile courts as additional duties. In the whole country there are only two Reformatory schools -- one at Tongi and the other recently established at Jessore. Although there is strict provision of law for keeping the child offender in segregation very frequently they are kept in the ordinary jail custody with the adult offenders. Sufficient remand home and separate juvenile courts need be established in every district so that the child offenders are humanly dealt with during trial with their reforms and social re-integration to lead a dignified life with the mainstream of the society as worthy citizen.

Sentencing Process.

Sentencing being the final and concluding part of trial in a Criminal case occupies an important position in relation to fair trial and fair justice. Generally our sentencing system is deterrent and retributive in nature. The whole drama of a criminal proceedings ends with the verdict of the court in which the police/investigators, the witnesses, the prosecutors and the judges/magistrates play their respective role. Apparently a criminal charge against a person in the society carries certain stigma and for that generally people try to avoid criminal charge or otherwise being entangled in criminal proceedings.

Sentence of death, imprisonment for life, imprisonment rigorous or simple, forfeiture of property and fine are prescribed by section 53 of the Penal Code which may be awarded to the offenders according to the nature of charges. By Ordinance XLI of 1985 the term "transportation for life" has been substituted by the word "Imprisonment for life" equivalent to thirty years rigorous imprisonment under section 57 which the government may commute into imprisonment not exceeding twenty years as provided under section 55 of the Penal Code (Ordinance XLI of 1985). Sentence of death passed by the Court of Sessions shall have to be confirmed by the High Court Division under section 374 of the Code of Criminal Procedure. It is well within the prerogatives of the President who can grant pardons, reprieves, respites, remit, suspend or commute any sentence passed by any court, tribunal or other authority under article 49 of the Constitution.

In passing the sentence the court must have the regard to the nature of offence, status of the accused and over all the ends of justice in all fairness of things. In no circumstances a person can be awarded the punishment in

excess of what is prescribed by law. Except in cases involving the sentence of death and imprisonment for life, the courts are given wide discretion in passing sentences of various terms. The cardinal principle is that sentence must not be excessive or disproportionate to the nature and gravity of the offence. In practical experience it is found that different courts pass different terms of sentences in similar type of cases which pricks the conscience. The judicial norms must not be at unreasonable variance which is sure to shake the people's confidence in the judiciary. The purpose of the law is that the real offenders must be punished according to the degree of the offence and the law must not be instrumental or tainted with personal motive or otherwise which may serve providing premium to the criminals to the proliferation of crimes at the cost of social security and peace. To ensure such a situation accountability in the proper sense of the term must be ensured for all who are engaged in the task of administering justice no matter whether they are Investigators, Prosecutors, Judges or Magistrates. In this regard we may refer here the case of Shima Chowdhury of Chittagong which jolted the conscience not only of the people of Bangladesh but also of the people of many parts of the world. The case of Shima Chowdhury and Yasmin murder case of Dinajpur may be exceptional cases yet we all must have serious concern in respect of the lapses on whatever parts they may be. The custodians and the guardians of justice must come forward to stop such type of erosion in the system and for that all possible effective steps must be taken in right earnest. Our laws now prevalent are not so much deficient and can well be put to the right track and may be made effectively workable keeping pace with the time if certain knots and dots are suitably ironed and

stitches are given on places ruptured. The crux of fair justice lies in the fair investigation, fair conduct of the trial, proper application of law and in fairly taking the decision in the delivery of judgment.

Speedy Trial: Back-log of Cases.

It goes without saying that delayed trial diminishes largely the attributes of fair justice. In our legal system the delay in the dispensation of justice has been a chronic problem. The mounting back-log of cases in almost all tiers of the judiciary among others is the main causes of delay in the disposal of cases. The cause of justice many times is defeated or frustrated due to inordinate delay. When justice loses its savour people lose confidence in the judiciary and that is the point where lies the peril of the civilisation. To get speedy trial under the legal dispensation is the constitutional right of the people. It is the foremost duty of the state in democracy to ensure speedy trial and fair justice. Broadly speaking the causes of delay may be summarised under two heads such as courts' delay and law's delay.

Case management: Causes of delay:

Case management in our court system is far from satisfactory. Hardly the judges barring few honourable exceptions, look to the management of cases before they come for trial. Although law is there providing certain portion of time for the judges to look after the administrative functions of the court, such time is mostly spent in doing some routine works only. Arguments of the kind are often advanced that judges are over burdened with huge piling of cases and they hardly find sufficient time to devote to the looking into the case management flow. No

doubt this aspect of the affairs with many courts is true. The Court distribution system in our country somewhat is faulty. The number of courts must be proportionate to the number of pending cases. The causes should be sorted out and suitably addressed. Even though the fact remains that all cases are not of same nature and of same complexities, yet some standard based on practical analysis must be evolved out so to bring reasonable equilibrium in the hierarchy of our court system.

To visualise the unequal situation the numbers of pending Sessions cases in Dhaka Courts are shown in the following table as a sample.

Year	No. of Sessions courts including Asstt. Sessions Judges	Number of cases disposed of	Number of pending cases at the end of the year
1995	20	806	4915
1996	23	775	6400
1997	23	875	8430

From 1995 to 1997 only three courts were created raising the number of courts trying sessions and original special cases from 20 to 23 at Dhaka. Number of pending cases increased from 4915 of the year 1995 to 8430 at the end of 1997. The increase in the number of courts was 15% and that of pending cases was more than 80%. In 1996 the disposal came down to 775 from 806 of the previous year and in 1997 the disposal however increased to 875. The disposal did not increase proportionately with the increase in the pending figures. On average each court disposed of

38 Sessions cases in 1997 that means each court disposed of roughly 4 cases in each month. As the courts enjoy one month vacation in a year the calculation has been shown on 11 months a year basis. If the number of disposal goes in this proportion 23 courts of Sessions will require 10 years to dispose of this 8430 pending cases not to speak about the new cases coming to the scenario. This is the position only with Dhaka.

Another piece of statistics as on the end of 1997 shows that there were 1411 cases pending before the Appellate Division, 86,389 cases pending before the High Court Division, 4,37,748 cases in the subordinate judges courts and 2,46,866 cases in the Magistrate courts with a total of 8,22,414 cases pending in the country. There are 5 Judges in the Appellate Division including the Chief Justice, 36 judges in the High Court Division and 670 judges in the subordinate courts with almost similar number of Magistrates. The ratio between the number of courts and the number of pending cases reflects alarming disproportion and dismal look of the judiciary. The unusual delay in the disposal of civil litigations is more horrendous as the same often takes decades to reach the finality.

Unnecessary adjournments:

Among other causes of delay are frequent adjournments of hearings granted by the courts on insufficient or frivolous grounds. Non-production of witness many times contributes to the delay. Sometimes it is found that judges do not take the seat in time and considerable part of court's time are otherwise spent or spoiled. In most cases lawyers are in the habit of dragging the cases by taking adjournment after adjournment. Some courts are over burdened by case-load. Sometimes hearings are

unnecessarily prolonged mostly by unnecessary and irrelevant talks and arguments. The task of the judges is undoubtedly arduous requiring deep concentration and application of judicial mind by proper appreciation of law and facts. Law does not approve of taking irrelevant lengthy evidence and writing of unnecessary lengthy judgement. Similarly improper- recording of evidence and writing of slipshod judgments are also not permissible. The whole adjudicatory process requires adequate knowledge of law, strong sense of proportion, and dutifulness, integrity, skill in the art of writing judgment on the part of the judges. Keeping regard to all these aspects, the process of recruitment of judges in all tiers of our legal system must be fairly sound.

Decentralisation and restructuring of the Judiciary:

As against 36 judges there are 86,389 cases pending (as on 31/12/1997) before the High Court Division. All Judges do not sit in single Bench. Factually the judges can now sit hardly in 27 Benches including a few Division Benches due to accommodation problem. For these Benches, how long God knows, it will require to clear off the present accumulation of cases. In the late eighties six permanent Benches of the High Court Division were set up at Rangpur, Jessore, Barisal, Comilla, Chittagong and Sylhet apart from the original one at Dhaka. Under the Upazila system Civil and Criminal courts were set up in each and every Upazila. All the 45 Sub-Divisions were upgraded into districts with the setting up of the district level courts. With a view to rescuing the litigant people from the curse of the old adage "justice delayed is justice denied", side by side with the increase of the number of courts, time

limits for disposal of criminal cases were fixed. However, there were serious opposition from certain quarter and ultimately the six permanent Benches were closed. Upazila system was abolished and the time limit for disposal was annulled on the ground of corruption. Propagandist against the system used to say "justice hurried is justice buried". Obviously there was some truth in the argument. In a country of 120 million people, the question of dicentralisation, restructuring and remodeling the judiciary is not a mere slogan but a dire necessity. We must think in the practical concept of the things keeping in view regard to the question of welfare of the people.

As regards the composition of our Supreme Court with Appellate and High Court Division, some positive thoughts may be given on the question whether a full fledged separate Supreme Court and three or four separate High Courts located at Dhaka, Chittagong, Jessore and Rangpur with more number of judges to cope with the mounting back-log of cases can be setup. Obviously such a move may ease the congestion in the judicial arena.

Similarly subordinate court system may be restructured for trying original cases and appeals by separate courts. A District and Sessions Judge try original criminal cases and also hear civil and criminal appeals and criminal revisions. Usually a Sessions Judge gives priority to the trials of sessions cases and bail matters. He can hardly find sufficient time to hear appeals and such appeals are being piled up day by day. So is the case with the Additional Sessions Judge. The position of the Subordinate Judge is much more precarious as he, apart from above categories of cases, has to try original civil suits/cases.

Although independence of Judiciary is guaranteed under the Constitution, the question of accountability of those engaged in the functioning of the judiciary whether they are investigators, prosecutors, lawyers, judges or magistrates, of late, has gained momentum because all of them have important share in making the judiciary fairly and effectively workable. Politicians must have political will to update the judiciary, Government have to provide adequate logistics including proportionate judicial infrastructures. When most countries entered into computer world our judiciary is still in the old system of taking evidence and writing judgments by hands of the judges. Our system needs thorough over-hauling and a pragmatic and realistic program for its reforms and improvements.

As provided under article 116 of the Constitution the Supreme Court has the power of control and supervision over the subordinate judiciary. In spite of constitutional commitment under article 22, Magistracy has not yet been separated from the executive organ of the state. The situation is standing as an impediment on the way of full and effective supervision over the subordinate courts. With a view to ensuring sound judiciary all the impediments must be removed. Unless effective supervision with accountability is put in constant operational process we cannot expect anything better than the existing ones. To overcome the prevailing situation the Supreme Court may take initiative in concert with the Governmental efforts and undertake comprehensive programme for updating the judiciary, raising efficiency and improving judicial skill to ensure fair and speedy justice.

Remedies:

Courts are the means and justice is the end. Fair and speedy trial pre-supposes fair justice. In the process of justice procrastination should be avoided as far as practicable. Unusually lengthy process brings miseries to the litigants. In order to minimise the laws' delay short and simplified procedure should be preferred. In the interest of justice the process must end at certain point of time, of course, with variance according to the gravity and nature of offence. Excepting offences of grave and heinous nature more offences may be made compoundable. We must have certain departure from the traditional court practice with a view to rejuvenating and reactivating our judiciary to expedite the process of justice instead of allowing it to run in dol drums. This I mean to say that the provision of revision should be minimised and made subject to careful scrutiny at the stage of admission hearing. The extraordinary writ jurisdiction should be exercised cautiously and in exceptional circumstances. Unless certain clog is put at least by way of strict scrutiny at the initial stage, the flood gate if continues unabated will lead to hazardous position totally unmanageable. Petty matters should be finally settled at lower levels. Serious and grave matters only may be taken to the higher courts. Separate Courts of Appeal should be established for hearing appeals exclusively.

The Judges, Magistrates and prosecutors must be given proper training about judicial norms and standard untrammelled by unnecessary time consuming exercise and rigid technicalities. Accountability and strict supervision, control and constant monitoring over the subordinate courts by the Supreme Court shall have to be ensured.

Both quality and quantity of justice must be maintained. As the police find little time after their duties relating to law and order to do the function of investigation, separate investigation Bureau should be established. Prosecutors must be appointed from honest and experienced lawyers, unnecessary adjournments must be discouraged, strict adherence to court's timing must be observed.

The present Government of Bangladesh have established Judicial Administration Training Institute, set up Permanent Law Commission and have undertaken a comprehensive programme for judicial capacity enhancement with the support of the World Bank which hopefully may bring radical changes with salutary results.

Conclusion:

The problems of delayed justice are almost similar in all South Asian Countries. By sharing experience with each other we may be mutually benefited. In similar situation Justice V. R. Krishna Iyer in his lecture published in Judicial Justice observed "This colossal management failure in judicial administration makes the court look like a dinosaur. It can not survive, indeed should not, unless court management is as able as business management and maximisation of judicial time for judicial purposes is accomplished. Bankruptcy which is the penalty for mismanagement is over-taking our court which is currently grinding to a halt."

I conclude here quoting few words of Lord Denning which he wrote in the preface of a book on Indian Supreme Court - A Socio-legal critique of its juristic techniques 1977 by Dhavan Rajiv -

Law does not stand still. It moves continually. Once this is recognised, then the task of the judge is put on a higher plane. He must consciously seek to mould the law so as to mere mechanic, a mere working mason, laying brick on brick, without thought to the over all design. He must be an architect - thinking of the structure as a whole - building for society a system of law which is strong, durable and just. It is on his work that civilised society itself depends.

DEMISE OF VIRGINITY IN MARRIAGE

M. Badaruddin*

1. Concept of Virginity

Virginity is the state of a person, especially a woman or girl, who has not had sexual relations with a member of the opposite sex. In the formation of a matrimonial contract it used to play an important role in olden days. Of course, at the back of every man's heart, still today, it is there whenever he wants to marry a woman or girl. Is she a virgin? ... is the question always peeps in his mind. Modernism might have taken him a long way towards liberalism and the old conservative ideas of chastity and virginity might have taken farewell from him, but he is still unconsciously sympathetic towards them; he still longs for the virginity of his would-be wife.

The human desire to find the continuation of himself into the future is at the root of virginity of women. In the course of nature a man's personal life may end but still he wishes to live on in his children who bear his likeness, and flesh of his flesh, bone of his bone, blood of his blood.¹ This innate desire to perpetuate himself in an invisible way through his children requires a man to beget children and for this purpose he needs a woman. Whatever might be the modern view, this was the idea which was working in the minds of people in olden days. In ancient society, specially in the East, the process of reproduction was thought similar to the process of rice harvest. The seed of rice is planted in the earth; it lies buried out of sight for some

* Professor, Department of Law, Rajshahi University.

time. It draws sustenance from the soil; and ultimately in the fullness of time it emerges as plant and becomes fruitful multiplying itself as new grains of rice. Similarly, as the concept was, man plants his seed in the shape of seminal fluid in woman; the seed remains hidden and germinate in the womb of woman. It draws sustenance from the blood of the pregnant woman. The woman's body nurtures the seed as the soil nurtures the seed of rice. The ongoing process of creation is continually renewed in the womb of earth and in the womb of woman with the planting of the seed its growth and frutation are constantly continuing.

Through marriage a man, as if, acquires the right to cultivate and produce harvest in woman.² Since the seed is the man's seed, the child is the man's child.³ The woman is the mother earth⁴ from which the child is harvested. Perhaps because of this fundamental difference of function women could never become as important as men in the society; they were dependent on men throughout their life.⁵ Cultivation and production of harvest depend on the will of man. As a farmer is very much particular about the quality of the earth in which he wants to sow seeds, a man is also careful about the quality of the woman in whom he wants to plant his seed to raise up his progeny. A farmer knows well that if the earth is used by others, it will be infested with worms and the grains may be sickly and worm eaten; similarly, if the earth is virgin, it will yield best harvest. So a man looks for a virgin woman ... a woman whose hymen has not been ruptured by any other man. He does not want to sow his seeds in a woman who has been defiled and used by his fellow man.

For the production of progeny virginity is therefore the choice of man; it is the demand of the society. Virgin brides are often believed to produce honest and pious children. From the beginning of human civilization its importance has been felt. In spite of the liberal attitude of modern men about sexual morality of women, very few will be found who do not prefer a virgin woman to a sex-experienced woman. ⁶ Virginity is of high demand in marriage-market. It is an added quality to a marketable commodity which fetches extra value and attracts the buyers most. All things being equal a woman who is having virginity will be married earlier than all her other friends. Women who are preserving virginity are easily married, while those who have lost it will find a slender chance to get husbands. Worm eaten fruits seldom attract a buyer; if perchance purchased, they are thrown to the waste-baskets.

2. Virginity and Social Protection

From its very beginning society has taken upon itself the duty of protecting the virginity of its womenfolk. It has concentrated its efforts upon restraining young men from having sex relations with unmarried women whose prospects of marriage may thereby be endangered. It has mixed sex with religion in order to protect it from its abuse. Free sex is a great sin; severe religious sanctions are prescribed for the abuse of sex and rewards are assured for the preservation of sex morality. Society has developed innumerable taboos with regard to sex excessiveness. Since women are considered inherently weak, scriptures and literatures are containing instructions in which men are

asked to honour women and abstain from having sex with them on certain occasions. ⁷ Youths are told not to lose their seminal fluid as that might lose their strength and virginity. ⁸ Their excessive preoccupation with sex can lead to their moral and spiritual degeneration. A modern writer has warned the youths against sex abuse when he says: ⁹

The *sastras* truly say that those who commit sexual excesses give birth to infirm and defective children, lose their health very early in life, are rendered incapable of all physical and intellectual work, and in the end collapse like a tree that has been eaten up by canker inside.

Sex is natural, but its excess is dangerous. Gandhi regards wanton sexual intercourse as 'criminal waste of precious energy'. ¹⁰ He says that sexual union is invariably followed by exhaustion and a man who can achieve complete continence will be healthy and will easily live long. He will not suffer from illness; mental and physical work will be healthy and will easily live long. He will not suffer from illness; mental and physical work will not make him tired. He is ever bright, never slothful.' ¹¹ Besides the physical debility in over abuse of sex, religious scriptures prescribe severe punishments for the commission of extra-marital sex crime. The Holy Quran says: ¹²

The woman and the man guilty of adultery or fornication, flog each of them with hundred strips. Let not compassion move you in their case, in a matter prescribed by God, if ye believe in God and the Last Day. And let a party of the believers witness their punishment.

The Holy Quran further states that a man or a woman guilty of extra-marital sex should marry a person similarly

guilty and not a person pure in sex, ¹³ and a man who is unable to bear the financial aspects of marriage has been advised to wait and keep himself chaste. ¹⁴

So that a girl may not lose her virginity before marriage the Dharmasastras of the Hindus have ordered the parents and guardians of girls to give them in marriage before their courses start. Thus Yajnavalkya says: ¹⁵

The father, the paternal grandfather, the brother, a *sakulya* or member of the same family, the mother likewise in default of the first, the next in order if sound in mind, is to give a damsel in marriage; *not giving becomes tainted with the sin of causing miscarriage at each of her courses*; in default, however, of the (aforesaid) givers, let the damsel herself choose a suitable husband.

Irrespective of any religion virginity of women was highly valued in this sub-continent, and its early literature is replete with stories wherein the girls are found waiting anxiously for years together with their virginity intact for their suitors. Virginity was maintained by girls, virginity was expected by boys and virginity was appreciated and honoured in society. Under the Muslim administration the personal laws of the Hindus were respected and no change was brought about in it, although in matters of marriages they applied *sharia* with full force. Since the *sastric* law of the Hindus and the *sharia* of the Muslims were unfailingly followed, virginity continued to stay at ease in the society.

3. Social Change and Virginity

This state of affairs however changed with the advent of the British people in this sub-continent. Cultural infiltration started when the British took the reins of administration in their hands. Sacrificing their own culture some people of the sub-continent started adopting foreign culture, especially the one the British people brought to this country, wherein virginity was almost a myth. A mixed culture was born where sex enjoyment was rather an aristocratic norm of the society. Virginity presupposes a conservative society with early marriage system. These two things, namely, conservative society and early marriage, were deliberately destroyed; women were allowed to dine and sleep with people of other culture and religion without any marital bond. True it is that the British rulers did not interfere with the personal laws of the Hindus and Muslims of the sub-continent; these laws were allowed to be applied to their respective people. But women who had already sacrificed their own virginity at the alter of liberalism started movement to prohibit child marriage, and it started the funeral bell of virginity to be tolled.

Never ending and competitive love of gain often makes a man blind to his surroundings and gets him at one time to sell his own self. This actually happened in this sub-continent. The resultant cross-cultural behaviour of its people stifled virginity to death. Personal laws were not touched but The Child Marriage Restraint Act was passed in 1929 to restrain the marriage of a boy under eighteen years and a girl under fourteen years of age. This was the major onslaught on virginity. The beastly attempt to

consummate the marriage of the inhuman husband of a five year old Hindu girl, Sarada, ¹⁶ made the girl bleed to death and this incident stirred the conscience of the whole human community, and the resultant was the passing of the above Act of 1929. The act of a paranoid husband and the consequent clamour of English educated, socially high placed Hindu women for raising the marriageable age of girls gave the British administrators an excuse to kick away the virginity of unmarried women of the sub-continent. Expectation for fiscal benefit and lust for promiscuous and exotic sexy social life attracted mostly middle and lower-middle class people of this sub-continent towards administration; the British people who was in the administration here exploited the situation, and in the name of socialisation snatched away the hitherto preserved virginity of the womenfolk of these classes of people. The 1929 Act was however made applicable to all communities. Virginity thus disappeared in shame from the marriage market of this land, although almost every boy at the time of his matrimonial agreement still today earnestly prays to God that his would-be wife should come to him with her virginity unspoiled. Although the virginity was wrested from women, the Child Marriage Restraint Act did not, however, contain any provision for the punishment of women, nor did it make the marriage void. It put the husbands and the accomplices of such marriage beyond the bar. Probably in exchange of their virginity women were given this privilege.

4. Personal laws and virginity

From time immemorial customary laws of the various communities of the world favour child marriage with the

reason to guard the virginity of their girls. That unless there is the sex urge there is little possibility of violation of virginity is their conviction. A person usually does not feel sex urge unless he or she attains puberty. Unless something untoward happens, virginity may be expected of every girl before she attains puberty. Puberty has thus been held to be the marriageable age of a girl. Diversity is however there among the different communities as regards the age of puberty. Some communities think it is attained by girls as soon as their menstruation starts; in others, it is the development of the body of girls which herald the advent of puberty. Customary laws are developed with these diverse views. The two major personal laws of the subcontinent, namely, Muslim law and Hindu law, are holding different age limit in matter of virginity.

Sastric Hindu law considers the starting of courses in girls as the age of their puberty attainment. *Sastra* ordains that a girl should be given in marriage before she attains the age of puberty.¹⁷ Some even declare that a girl should be given in marriage before she wears clothes.¹⁸ Since Hindu marriage is a sacrament and it is a sin¹⁹ of not giving a girl in marriage before she starts menstruating, Hindu parents and guardians give the marriage of their girls during the latter's childhood without considering the physical disabilities which the girls may face immediately after marriage. Heavenly reward becomes more important to them than the girl's earthly physical inconveniences. Girls have no apprehension for sin if they are not married before the attainment of puberty, but fathers and guardians would go to hell if the girls are not married before puberty. Girls

under Hindu law attain puberty, if they belong to the Bengal school, at the age of fifteen years, but if they belong to the Mitakshara school, on the completion of sixteen years of age.

The *sastric* conservation about marriageable age of girl is absent in Muslim traditional law. Giving girls in marriage is no doubt a duty of parents and guardians of girls under Muslim law; but the traditional law does not require these to perform this duty until the girls have reached puberty. The Holy Quran ordains that the preservation of chastity, in other words, virginity, is the duty of girls and not of their parents or guardians as found in Hindu law. The girls will be rewarded for their chastity¹⁹ and for its violation they will be severely punished.²⁰ Muslim parents and guardians are not under any heavenly compulsion for the maintenance of their girls' virginity except social censure. In Muslim law the lowest age of puberty of girls is nine years; when, however, the physical signs do not appear they are held to have attained puberty on the completion of their fifteen year of age.²¹ Probably, because of this conceptual differences as regards marriageable age of girls, the situation which led to the passing of the Child Marriage Restraint Act, 1929, did not happen in Muslim society, yet the law was made applicable to all communities.

5. Virginity and today

Girls are no doubt conscious about their virginity; they know its necessity in happy marital life and production of fair progeny; they also know that, pre-marital sex

enjoyment may lead to unwanted conception which will dwindle their parents' prestige and turn bleak the prospect of their marriage. But once they have lost virginity, they become rather desperate in misusing sex. So long virginity remains unspoiled and unsullied, girls try to preserve it at the cost of their life even, but poverty, illiteracy and strong sex desire during the long unmarried state of life after the attainment of puberty often prompts them to sell out their virginity. In the modern equal-rights society things have changed; marriage is no more looked upon as it used to have been done in the past. It is now considered as a social means of carnal conjunction whose aim is more sex satisfaction rather than legalizing generation. Today marriage in western societies and among the westernized strata of developing countries is a sort of partnership, that is, a sharing of interests and responsibilities between husband and wife on as nearly equal a basis as possible where virginity of girls or chastity of either party to a marriage has little place. The ideology of equality between the sexes dominates the marital conjunction where neither party can question the pre-marital morality of either party. Thus virginity has lost its value in marriage market. Even the temple-maids of Hindu society and nuns of Christian world are not today as ascetic as they used to be in old days; they have sold their virginity to their fellow male-mates.

Of late, government enactments have wrested the virginity from girls. Laws are causing the death of virginity of tens of thousands of girls of various communities of world. Laws have been enacted and their amendments are

being made conditioning the marriageable age of boys and girls of different countries. Through enactments governments have been raising the marriageable age of their boys and girls. As a result of this raised marriageable age the girls have to wait for marriage even after the attainment of puberty. In between the attainment of puberty and marriageable age either willingly or forcibly the virginity of girls is violated. The Child Marriage Restraint Act, 1929 which was once passed to save minor wives from being inhumanly raped by the beastly husbands has now been used as a means of controlling population boom. Attainment of sex and its probable misuse are no more in the consideration of either the law makers or matrimonial parties. So that girls may not produce more babies, the span of their fertility period has been shortened by raising their marriageable age from what was before. In 1929 under the Child Marriage Restraint Act a girl was considered a child and therefore could not be married if she was under fourteen years of age. In 1961 this age limit was raised to sixteen years by the Muslim Family Laws Ordinance; ²² again in 1985 it has been raised to eighteen years by an amendment of the Child Marriage Restraint Act. ²³ Indeed, the gap between the statutory marriageable age and puberty dangerously influences the mentality of girls and allures them shamelessly to spoil their virginity.

Very recently the research report of Alan Guttmacher Institute, an international youth organization, shows that in most parts of the world the majority of young women become sexually active in their teens. ²⁴ The report says the proportion of teen aged women who become sexually active

is roughly one-half to two-thirds in Latin America and the Caribbean countries, three-quarters or more in many countries in the developed world and nine in ten in Sub-Saharan countries. The report further says in some societies women begin sex during their adolescence because they are expected to marry and bear children at an early age. The report goes on to say that in other societies late marriage is predominant and premarital sex is common.

Pre and extra marital sex has become a source of extra income and extra favour in modern society. Its preservation is, feel the young girls, no more a virtue rather a vice as it deprives them of glamorous social life. The protectors of virginity has now become its killers. How can it be expected of modern girls? Gone are the days of virginity. Civilization has reached a stage where virginity feels extreme shy to stay with our morality-minus, showy girls.

Today virginity has knelt down to contraceptives. The old fear of premarital conception for wanton use of sex is no more there in society. Birth control pills, condoms and similar other drugs and appliances are being freely used now a days by boys and girls to ward off extra marital conception. Virginity has been given a full farewell; and it has no hope of survival anymore. The usual rustic belief that a girl who has not borne a child is a virgin will only dupe a boy to the called a dullard. Contraceptives have been misused by unmarried boys and girls, as all of them are enjoying their advantage in extra marital sex activities. Contraceptives are believed to have been invented to control the birth of more babies in societies and they are expected

to be used by married couples. But in practice things have turned otherwise. Poverty stricken, illiterate couples are little using them; they are producing babies with little abatement. The contraceptives are being greatly used for promiscuous enjoyment. In western developed countries use of contraceptives is heard to have been included in course curriculum of schools. The developing and underdeveloped countries mostly follow western countries in academic matters. This will encourage teenage boys and girls of our country to use contraceptives and enjoy sex with impunity. Where can virginity find place to stay?

Religions have now a days lost their binding force and its custodians are not trusted as before. As a result morality has almost disappeared from society. Girls do not, therefore, feel the necessity to protect their virginity. How can virginity be expected to survive in such hostile climate? No girl, no more may wait to stay virgin. Whom will the children of unmarried mothers call 'dad'? ... is an important social problem today. Human rights activists have solved it. Mothers will now play the dual role of parents and society will no more look down upon them. Article 25(2) of the Universal Declaration of Human Rights Charter provides:

Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock shall enjoy the same social protection.

How will the children born out of wedlock be received in Muslim society? How will the Muslim countries approve of

this provision of the Universal Declaration of Human Rights Charter?

Conclusion

Neither the fear of hell-fire nor the allurements of a blissful heavenly life has become able to save virginity; girls have trampled it and boys have smeared themselves with its blood. Virginity is dead, although men in their hearts still look for it. In their mid-night dream they still find themselves roaming around with their hands round the virgin damsel's waist. "God will reward the honest and pious men in heaven with virgin maidens whom no man or jinn touched before." - says the scripture. ²⁵ Still the virginity could not survive the societal trauma. Although we long for the virginity of our maidens, it has become rare today. Society has changed to worst ever. Today parents are bemoaning the character of their children; they are sadly anxious about the moral degradation of their wards. Their children are not behaving in the way they themselves used to do with their own parents. Why has it happened? Have they ever pondered over it? Death of virginity of their womenfolk and the loss of chastity of their men in their sex life are, *inter alia*, contributory to this hiatus in social fabric. How can a non-virgin mother and an unchaste father be expected to give birth to docile and good children? Whoever is born through anti-social and in an immoral way can hardly be expected to be honest and gentle. Probably virgin mothers' and chaste fathers' lawful union could have produced an honest progeny. Society has thus the need of virginity. From its grave virginity still haunts the minds of men. Can we not get our girls' virginity back and ask our

boys to remain chaste to produce a saintly community on this fair earth? Let virginity be again considered a condition of marriage and its willful loss should be made a punishable crime. Oh the times, oh the manners!

Notes and References

- 1 David and Vera Mace, *Marriage: East and West* (London, 1960), 24-25.
- 2 "The woman is considered as the field, and the man as the grain. Vegetable bodies are formed by the united operation of the seed and the field, in one season, a plant of the same quality springs in that field, with peculiar visible properties." - Manu as quoted by David and vera Mace, *op. cit.*, 262. See also the *Quran*:II:223 (References used in this article are from the *Quran* translated by Abdullah Yusuf Ali, 3rd ed. 1938).
- 3 The *Quran* XXIII: 12-14.
- 4 *Ibid.* II: 223.
- 5 See Manu as quoted by David and vera Mace, *op. cit.*, 60.
- 6 The *Quran* XXIV: 26, 33.
- 7 J.A. Dubois, *Hindu Manners, Customs and Ceremonies* (Oxford, 1897), 713-14; see also the *Quran*: II: 222.
- 8 David and Vera Mace, *op. cit.*, 89.
- 9 N. S. Phadke, *Sex Problems in India* (Bombay, 1929), 173-74.
- 10 M. K. Gandhi, *Self-restraint Versus Self-indulgence* (Ahmedabad, 1947), 106-7.
- 11 *Ibid.*, 111, 180.
- 12 The *Quran* XXIV: 2.
- 13 *Ibid.*, XXIV: 26.
- 14 *Ibid.*, XXIV: 33.
- 15 *Yajnavalkya* I: 63-64.

- 16 After the name of the child wife the Act is also known as Sarada Act, 1929.
 - 17 *Aposthamba and Gautama*: XVIII: 21.
 - 18 *Ibid.*, XVIII: 23.
 - 19 *Ibid.*, XVIII: 22.
 - 20 The *Quran* XXIV: 21; IV: 25.
 - 21 Neil B. E. Bailie, *A Digest of Moohummedan Law* (Lahore, 2nd ed. 1963), 4, fn. 5; see also *Sadiq Ali Khan V. Jai Kishori* AIR 1928 P.C. 152.
 - 22 Section 12(1)(a)
 - 23 Section 2(A)
 - 24 *The Independent*, Saturday 22 October 1998.
 - 25 The *Quran* LV: 56.
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THE LAY STANDARDS AND PROBATIVE VALUE OF OPINION EVIDENCE

Begum Asma Siddiqua¹

Introduction:

In civil and criminal cases the opinions of witnesses generally are not admissible. Witness testimony should be confined to stating of facts. The rationale of this exclusionary rule is that it is the task of the court to form any opinions which need to be formed in any particular case. When the court is perfectly capable of forming an opinion on a fact in issue, allowing a witness to state his opinion would entail a risk of intervening with the impartiality of the court. This article aims at reviewing and compiling the lay standards of opinion evidence from the Evidence Act, 1872 and case law and suggest the legal loopholes regarding the attendance of expert witness. In this article, unless the name of Act is mentioned, reference to sections will normally be from the Evidence Act, 1872.

The general rule excluding opinion evidence is subject to two exceptions, e.g., where the court lacks the witness's competence to form an opinion on a particular issue due to the lack of direct knowledge or due to the lack of expertise.

* Associate Professor, Department of Law, Rajshahi University.

Third Person's Opinion:

Statements of opinion by an eye witness to the facts in issue are often a convenient way of stating different facts. An assertion by an eye witness in a road accident case that the opposite party was driving rashly is necessary to consider the speed at which the vehicles involved were travelling. Again statements of identification might seem to be factual but they are technically speaking, statements of opinion. Witnesses may be called to depose to the good character of the parties.¹ For example, the bad character of the accused is irrelevant except where it is a fact in issue.² If evidence of good character of the accused is given under section 53, not only may the witness as to good character be cross examined for their opinion but independent evidence of bad character may also be given under section 54.

When a handwriting or a signature is required to be identified, the alleged writer or a person who saw the alleged writer doing the writing or a person who is well acquainted with the writing in question may be called.³ The court may as well compare different handwritings which are in issue⁴ or seek assistance from a handwriting expert.⁵ Although the court itself can compare any signature or handwriting under section 73 in Bangladesh expert opinion supporting the finding of the court is desired.⁶ When the court has to form an opinion as to the existence of any general custom or right, say for example, the right of the villagers of a particular village to use the water of a particular well, opinions of living persons of that particular village likely to know about the existence of such rights are relevant.⁷

Similarly a witness may give his opinion⁸ upon usage of trade and agriculture, or principle, dogma or doctrine held or maintained as truth by different religious, political or scientific group of people, or family custom or local custom, primogeniture in the families or any peculiar course of descent or tenets of a family; or the constitution and government of any religious or charitable foundation. A general or public custom may be proved by the opinion of living persons who would be likely to know of its existence if it existed⁹ or by the opinion of person who cannot be produced as witnesses, if such opinion is contained in a statement made before any controversy as to such custom arose.¹⁰ Custom, whether public, general or private may be proved or disproved by statements of deceased persons contained in any deed, will or other document which relates to a transaction by which that custom was claimed, modified, recognized, asserted or denied¹¹ as well as by proof of such transaction itself.¹² A witness may give opinion on the meaning of illegible, or not intelligible characters, of foreign, obsolete, technical, local and provincial expressions, abbreviations and of words used in a peculiar sense.¹³ Opinions of persons having special means of knowledge on the above subject would be valuable and relevant.

In the like manner when marriage of a couple or legitimacy of a child is in question opinion of friends who usually treated the couple as husband and wife or opinion of family members treating the child as legitimate child of a couple is a relevant fact.¹⁴ Foreign law or a certified copy of a foreign judicial record¹⁵ need not necessarily be proved

by an expert. Regarding foreign law the court may accept a statement in a book published under the authority of the foreign government. ¹⁶

Expert Opinion

There are issues which the court is required to determine are far removed from the court's natural understanding. In those cases the court needs to obtain the opinions of experts to help determine the questionable issue. It is not possible to list all the matters in respect of which expert evidence is required. Medical,¹⁷ chemical¹⁸ accounting, ¹⁹ scientific evidence obviously call for the opinions of experts. ²⁰ Psychiatric evidence in Bangladesh does not yet seem to have an application since most probably there could be a overlapping on fine distinction between opinion on matters of rational human nature and behaviour and diminished responsibility of an accused or a witness due to some mental disability. Psychiatry, it seems, is far from being a precise and reliable science and its contribution to human understanding may vary greatly. For example, the fact in issue is whether the accused fired a gun intentionally. The expert opinion states that the accused fired intentionally and had the court proceeded on that count the judgment would be in effect the opinion of the psychiatrist rather than the judge. It will be a total usurpation of the court's own jurisdiction.

It is important to note that an expert opinion does not become helpful only because the expert has an impressive scientific qualification. Once it has been decided to admit expert evidence, a person called as an expert must

be shown to have some special skills, if not a professional qualification, on the matter on which he is to testify. A suitably qualified expert can give expert evidence.²¹ The starting point in examination in chief of an expert witness is to establish his expertise. Expert evidence is treated as any other witness testimony²² as it is not counted as a substantive piece of evidence.²³ Independent evidence corroborating expert opinion is always required to act upon it.²⁴ The court may prefer other authentic evidence to that of an expert opinion.²⁵ The employment of experts is both necessary and desirable although it is fraught with risks, which the courts strive to minimize. In adversarial system the parties themselves employ the experts and naturally pay their fees. Consequently the scope for bias, conscious and unconscious, is considerable. Specially in highly specialized knowledge neither the judge nor the adverse party is able to subject expert testimony to searching scrutiny. The judge may face difficulty in such circumstances to adjudicate between conflicting expert opinions. An expert opinion should be based upon the facts of the particular case in question. The expert's experience and any information obtained from extraneous sources such as text books, articles and journals should form the basis of the opinion. Information are the secondary facts for the particular case but they are not necessarily hearsay evidence since it forms the basis of the expert opinion. However, expert's experience are the primary facts and should be regularly proved. The difference between primary facts and secondary facts is what the expert experiences himself directly and his inference as to that experience. Just as the facts of the case may be in dispute so may the

facts of the expertise. But proof of the facts of the expertise is not subject to all the rules of evidence. The results of experimental evidence may be proved by references to professional literature even where this involves hearsay upon hearsay. The reason for the procedural differentiation lies in the way in which expert opinion is formed. Scientific or other expert generalizations are arrived at by open debate in the field in question. Before a generalization is adopted it is usually tested and subjected to scrutiny so that flaws are likely to be exposed. It is therefore improbable that a further investigation in a court of law will add much to the professional knowledge concerning the factual basis of scientific generalization. Disputes about the factual generalizations may arise between opposing experts in court but little would be gained if the courts attempted to settle them by the machinery of judicial fact finding and according to the strict rules of evidence.

Procedure for calling and recording evidence

Summoning and attendance of expert witness is dealt by Order XVI, rule 2 of the Code of Civil Procedure, 1908 and sections 509 and 510 of the Code of Criminal Procedure, 1898. Opinion expressed by a living authority in a treatise as to usages and tenets of any body of men or family or any matter as a person having special knowledge is not admissible in evidence because of the provisions of section 60 of the Evidence Act unless he cannot be found or has become incapable of giving evidence or he cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable. Usually if the opinion of an expert on a point of science in which he is

well versed is relevant, this opinion must be given on record through his own testimony in court. ²⁶

Mode of taking and recording evidence of witnesses is guided by section 138 and Order XVIII of the Code of Civil Procedure, 1908 and by sections 353 to 363 of the Code of Criminal Procedure, 1898. In criminal cases all evidence and testimony should be taken in the presence of the accused or when his personal attendance is dispensed with, in the presence of his advocate. ²⁷ There is no law yet to protect an expert witness from the intimidation of an adverse party. Considering the legal position that a witness must depose in the presence of the accused and the social condition lacking legal protection, of those witnesses, change of the above legal position calls for rapid action. Specially in criminal cases where, expert opinion could carry much weight, protecting those witnesses from violence, harassment and temporal promise could help uplift the socio-legal condition of Bangladesh. Section 33 of the Evidence Act although considers a previous deposition of a witness as relevant in a later stage of the same judicial proceeding or a separate judicial proceeding, it is not applicable to an expert opinion in a criminal case. In different criminal cases the opinion would necessarily be different. Therefore application of Section 33 is only limited to ordinary witnesses and in a narrow sphere.

Judgments as opinion

It is appropriate to deal with judgments within this ambit. Judgments are opinions and it is inconvenient to regard them as inadmissible evidence. It often leads to

lengthy proceedings in criminal courts and reopening of issues already decided in civil courts between third parties.

Judgment in support of a plea of *res judicata* in a civil case, judgment of *autre fois acquit* in a criminal case, judgment *in rem* and judgment relating to a matter of public nature whether *inter partes* or *non inter partes* are both made admissible under the provisions of the Evidence Act. Any other judgment other than mentioned above are irrelevant, unless their existence is a fact in issue or a relevant fact under some other section of the Evidence Act. When a judgment becomes admissible, it can only be used to show that there has been a decision and cannot be used as evidence of facts found by that judgment to exist. When a judgment is sought to be used for the purpose of elucidating a particular point as evidence in a proceeding *non inter partes* the real difficulty arises. Section 43 of the Evidence Act does not authorise such use of a judgment. Consequently support could be sought from the provisions of section 13. Where a judgment being a convenient proof of the transaction of litigation, it can be given in evidence for the purpose of proving the assertion or denial of a right only. Moreover, section 13 establishes the fact of a prior decision only and not as to its correct adjudication. Judgment outside the ambit of sections 40, 41 and 42 are not relevant in respect of opinions expressed therein. Judgments qua judgments and an expression of the opinion of the Court are relevant only under section 40, 41 and 42. It appears that there is much scope for amending the law regarding judgment *non inter partes* so as to save the time and energy of the court. When a particular point has been

decided by a competent court having jurisdiction, if the trying court presumes that such point was correctly decided provided that other factors remain unchanged, it will save a party *non inter partes* from blindly accepting a decided fact and a judge from deciding on the materials before him exercising his own independent judgment.

Conclusion

Although opinion evidence is a legal intruding on the independent authoritative meditation of the court yet supremacy of the court lies in its duty to scrutinise the soundness or validity of the opinion evidence exercising its own independent judgment. Within the socio-legal system opinion evidence will always be required by the parties and the court. In this context it is desirable that the probative value of the opinion evidence is raised. It could be done by extending full security to them so that they will be beyond the reach of threat and temporal promises of the parties; when opinion is sought from a certain expert he will be considered as a court witness. Consequently the parties will not pay their fees. It is possible that in such cases the expert will retain his independent character to a greater extent.

As far as judgment as opinion is concerned specially between *non inter partes* it is suggested that when an individual issue has been decided it should count as decisive provided other conditions remain unchanged. If the surrounding conditions change then the decided issue must count as a strong piece of evidence.

References :

1 Section 140, Evidence Act, 1872.

2 Section 54, Evidence Act, 1872.

3 Section 47, Evidence Act, 1872.

4 Section 73, Evidence Act, 1872.

5 Section 45, Evidence Act, 1872;

Haragram Trust Board v. Dr. Golam Mortuza Hossain 47 DLR (1995) 160; Nowazullah and another v. Waz Khatun and another 45 DLR (1993) 279.

6 Sk. Abul Qasem and others 45 DLR (1993) 169; Khadem Ali Akand (Md.) v. State 49 DLR (1997) 441; Pratik Bandhu Roy and others v. Alok Bandhu Roy and others 49 DLR (1997) 241.

7 Section 48, Evidence Act, 1872.

8 Sections 49, and 32(4), Evidence Act, 1872.

9 Section 48, Evidence Act, 1872.

10 Section 32(4), Evidence Act, 1872.

11 Section 32(7), Evidence Act, 1872.

12 Section 13(a), Evidence Act, 1872.

13 Section 98, Evidence Act, 1872.

14 Section 50, Evidence Act 1872; see Section 32(5) & (6) of the same act.

15 Section 86, Evidence Act, 1872.

16 Section 35 read with section 84, Evidence Act, 1872.

17 Section 509, Code of Criminal Procedure, 1898.

18 Section 510, Code of Criminal Procedure, 1898.

19 Section 65(g), Evidence Act, 1872.

20 Section 45, Evidence Act 1872.

21 Abdur Rahman Syed v. State 44 DLR (1992) 556.

22 Sheikh Salimuddin v. Ataur Rahman and others 43 DLR (1991) 18.

- 23 Nurul Huq alias Md. Nurul Hoque v. State 50 DLR (AD)(1998) 88.
- 24 State v. Raihan Ali Khandker and others 50 DLR (AD) (1998) 23; Siraj Mal and others v. State 45 DLR (1993) 688; Eklas Khan and others v. Prajesh Chandra Das and others BLD (1987) 142.
- 25 Prafulla Kamal Bhattacharya v. Ministry of Home Affairs, Government of Bangladesh 28 DLR (1976) 123.
- 26 Kutubuddin Ahmed Siddiky v. East Pakistan Industrial Development Corporation 27 DLR (1975) 433.
- 27 Section 353, Code of Criminal Procedure, 1898.