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Revisiting Domestic Violence as a Gross Violation of Women's Fundamental Rights to Freedom from Torture

Dr. Afroza Begum*

1. Introduction

Domestic violence in its serious manifestation with dowry is one of the leading causes of torture to women in Bangladesh.¹ Women's dignity as core value of human rights law is deeply entrenched in numerous international instruments under which Bangladesh assumes affirmative obligations to respect and ensure this right.² Quite consistent with these obligations, safeguard from torture is repeatedly affirmed in a series of legislations in Bangladesh.³ The *Dowry Prohibition Act*, for example, was enacted in 1980 to exclusively deal with dowry and to outlaw dowry with a maximum penalty of 5 years imprisonment.⁴ Despite the fact, dowry-related cruelty becomes endemic in the country.⁵ In 2006, dowry violence alone resulted in altogether 300 violent incidents,⁶ while in 2005, 227 women were murdered and 114 suffered torture

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¹ Dowry refers to money or valuable properties which are unduly demanded by the husband or in-laws from bride's family as a consideration of marriage. See T Monsoor, *From Patriarchy to Gender Equity-Family Law and Its Impact on Women in Bangladesh* (1999) Dhaka: The University Press Limited at 223-227.

² Bangladesh ratified over a dozen of international human rights instruments including, the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) 1979 (CEDAW) 1979 General Assembly, Res 34/180, UN GAOR 34th Session, Supp No 46, UN Doc A/34/36 (1980) (entered into force 3 September 1981) and the *Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (CAT) 1984 which uphold human dignity, and prohibit torture and degrading treatment.

³ The right to freedom from torture and other forms of cruel, inhuman or degrading treatment is recognised as a fundamental right under the Constitution of Bangladesh. See, *The Constitution of the People's Republic of Bangladesh* 1972 art 35 (5); ss 324-331, 335, 339, 352, 355 and 358 of the *Penal Code* 1860 are concerned with the protection of all persons from torture and inhumane or degrading treatment; s 163 of the *Code of Criminal Procedure* 1898 prohibits police from making any threat or inducement during investigation; see also, the *Police Regulations* 1978, ss 33(b), 190 & the *Police Act* 1861, s 29 that relate to the punishment of police for committing violence towards people.

⁴ The *Dowry Prohibition Act* 1980 s 4.

⁵ S Sobhan, 'Cost- Free Legislation? An Evaluation of Recent Legislative Trends in Bangladesh Relating to Women' (1985) 3 *LAWASIA* 153 at 156.

⁶ <http://web.amnesty.org/report2006/bgd-summary-eng> (9 August 2007); 'Dowry menace still on despite govt. action' *The Independent*, Dhaka, (21 July 2002).

in connection with dowry.⁷ This number, however, represents only a fraction of total dowry-victims since women are very reluctant to unearth their 'hidden wounds' before the public for several reasons. The prominent reasons are; the loss of family honour and privacy; the fear of reprisals of their in-laws and the unresponsive legal remedies.⁸ Also, in a substantial number of cases, the perpetrators enjoy political impunity and victims are left with virtually no legal recourse.⁹ This short note, however, does not address these issues; I argued elsewhere¹⁰ how the socio-legal approach in Bangladesh became inept to capture or ineffective in capturing women's unique experiences and needs. This paper therefore looks at a different context, proposing to reconceptualising the concept of domestic violence to provide appropriate values and respect to women.

In recent years, one of the international controversies that dominate women's rights jurisprudence is whether domestic violence should be regarded as a matter of legal concern and should thereby invoke affirmative obligations of the government.¹¹ Pursuant thereto, this paper advances an argument that dowry as a form of domestic violence shares a common experience of 'torture' and constitutes gross violation of women's fundamental rights to freedom from torture. It also claims that the government, through its inaction, tolerates dowry and such a tolerance undermines country's international obligations.

In particular, this article seeks to examine that controversy that has plagued women's rights discourse with an attempt to uncover and redress a number of conceptual constraints of domestic violence. Towards this end, the following section begins with a

⁷ (<http://www.state.govt/g/drl/rls/hrrpt/2005/61705.htm> (9 August 2007); see also Staff Reporter, 'Violence against women on the rise' *The Independent* <<http://independent-bangladesh.com/news/apr/01/01042003cr.htm#A3> (1 April 2003); A K Goswami, 'Empowerment of Women in Bangladesh' (1996) 5 *Empowerment- A Journal of Women for Women* 45 at 67.

⁸ R Jahan, 'Hidden Wounds, Visible Scars: Violence Against Women in Bangladesh' in B Agarwal (ed), *Structures of Patriarchy, State, Community and Household in Modernising Asia* (1988) London: Zed Books Ltd at 217-220.

⁹ Ain O Salish Kendra (ASK), *Human Rights in Bangladesh 2001* (2002) Dhaka: ASK at 237-238.

¹⁰ See generally, A Begum 'Rape: A Deprivation of Women's Rights in Bangladesh' (2004) 5 *Asia-Pacific Journal on Human Rights and the Law* (Netherlands) at 1-48; A Begum 'Judicial Activism v Judicial Restraint: Bangladesh's Experience with Women's Rights with Reference to the Indian Supreme Court' (2005) 14 *Journal of Judicial Administration* (Australia) at 220-241; A Begum 'Equality of Employment in Bangladesh: A Search for the Substantive Approach to Meet the Exceptional Experience of Women in the Contemporary Workplace' (2005) 47 *Journal of the Indian Law Institute* at 326-350; A Begum 'Local Governance in Bangladesh: Towards a "Critical Mass" to Combat Discrimination against Women with Special Reference to India' (2007) 14 *Journal of Social Sciences* (India) at 261-273.

¹¹ R Romkens, 'Law as a Trojan Horse: Unintended Consequences of Rights-based Interventions to Support Battered Women' (2001) 13 *Yale Journal of Law and Feminism* 265 at 266.

brief exploration of the limits and strengths of international laws regarding domestic violence. Section 3 then proceeds by analysing how dowry shares a common characteristic of the right to freedom from torture while section 5 draws a conclusion.

2.1. Limits of International Law and Domestic Violence

International human rights law has been criticised for its partial role towards women facing domestic violence. The criticism stands on the two central grounds: (i) the public/private dichotomy of international law; and (ii) its failure to accord due weight to socio-economic and cultural rights.¹² The former advocates that the customary international law has been developed within the 'male-dominated' public framework.¹³ It precluded actions in the private sphere where most violence against women occurs.¹⁴ This traditional concept holds the State accountable only for its role towards the public matter and regards domestic violence as a private, cultural or religious practice rather than as a violation of legal rights or as a concern of the State.¹⁵ The latter argues that the conception of human rights overwhelmingly 'focuses on state violations of civil and political rights, thereby subordinating economic, social and cultural rights',¹⁶ which are mostly relevant and linked to women's experience in domestic violence.¹⁷ Yet, some scholars have attempted to resolve this controversy through a creative interpretation of existing international provisions. As Copelon argues, 'when stripped

¹² H Charlesworth, 'Human Rights as Men's Rights' in J Peters & A Wolper (ed), *Women's Rights Human Rights* (1995) New York: Routledge at 108; also see generally C Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' (1993) 6 *The Harvard Human Rights Journal* 87 at 89-106.

¹³ K Engle, 'A Symposium on Feminist Critical Legal Studies and Postmodernism: Part Two: The Politics of Gender Identity' (1992) 26 *New England Law Review* 1509 at 1520.

¹⁴ M Etienne, 'Addressing Gender-Based Violence in an International Context' (1995) 18 *Harvard Women's Law Journal* 139 at 157-159.

¹⁵ D Q Thomas and M E Beasley, 'Symposium on Re-conceptualizing Violence Against Women by Intimate Partners: Critical Issues: Domestic Violence as a Human Rights Issue' (1995) 58 *Albany Law Review* 1119 at 1122-1123.

¹⁶ See P Goldberg and N Kelly, 'Recent Developments: International Human Rights and Violence Against Women' (1993) 6 *Harvard Human Rights Journal* 195 at 195.

¹⁷ In a number of ways the intensity of domestic violence and its continuation in a particular society are closely linked to the socio-economic status of women. For example, in Bangladesh, traditionally women have very limited access to resources. Due to their economic subordination and its strong embeddedness in society, after marriage women are to depend on the husbands for their survival. This dependency often forces them to tolerate domestic abuses and to prevent them from seeking judicial remedies even in the worst situation such as an attempt to kill. Another apprehension about their future lives is that their natal relations may not accept them if they leave their husbands for domestic violence. All of these factors serve to perpetuate abuses against women. International law does not take into account this particular experience of women.

of privatisation, sexism and sentimentality, private gender-based violence is no less grave than other forms of inhumane and subordinating official violence [torture] that have been prohibited by treaty or customary law...'¹⁸ Thus, domestic violence should invoke similar treatment in international law.

To oppose this view that the 'private sphere' is related to State actions, counter arguments have been developed in a number of judicial decisions.¹⁹ In *DeShaney v Winnebago County Dep't of Social Servs*, the Supreme Court of the United States (US), for example, maintained that a State's failure to protect the petitioner from domestic violence 'does not constitute a violation of the Due Process Clause because the Clause imposes no duty on the state to provide members of the general public with adequate protective services.'²⁰ Similarly, in *Doe v Board of Commissioners of Toronto* the Supreme Court of Canada recommended that the *Canadian Charter of Rights and Freedom* placed no obligation on the State to ensure the right to life, liberty, or property from violent actions through means other than the State.²¹ Nevertheless, the public/private distinction becomes artificial when the government acknowledges some of the private violence through enacting and enforcing criminal laws.²² On many occasions, violent acts against women outside the home, committed by domestic partners invite State actions. This process, in turn, renders private matters public.²³ Schneider contends, no separate realm of family life exists totally beyond the reach of the State and both the family, the so-called private sphere and the market, the so-called public sphere are defined by the State. 'Public' and 'private' exist on a continuum.²⁴ Apart from the above ways to accord private violence the similar treatment of 'torture', Culliton concludes:

¹⁸ R Copelon, 'Intimate Terror: Understanding Domestic Violence as Torture' in R J Cook (ed), *Human Rights of Women- National and International Perspectives* (hereinafter *Human Rights of Women*) (1995) Philadelphia: University of Pennsylvania Press at 117.

¹⁹ *Semple v City of Moundville* (US) 963 F Supp 1416 (1997) at 1429-30; *DeShaney v Winnebago County Dep't of Social Servs* 489 US 189 (1989) at 194-203; in *Reed v Gardner* the Court held that 'the purpose of the Due Process Clause was to protect the people from the State, not to ensure that the State protected them from each other' and inaction by the state to face a known danger is not enough to impose an affirmative obligation, see 986 F 2d 1122 (1993) at 1124- 1125.

²⁰ 489 US 189 (1989) at 190; see also, *Semple* *ibid*.

²¹ (1990) 74 OR (2d) 225.

²² K Roth, 'Domestic Violence as an International Human Rights Issue' in *Human Rights of Women* n 18 at 326 & 329.

²³ K S Barnes, 'The Economics of Violence: Why Freedom from Domestic Violence must be Treated as a Developmental Right in International Law' (1998) 6 *Yearbook of International Law* 97 at 104.

²⁴ See E M Schneider, 'The Violence of Privacy' (1991) 23 *Connecticut Law Review* 973 at 977.

'[Even] if a particular domestic violence case does not reach the level of 'torture', international legal instruments prohibit cruel, inhuman or degrading treatment or punishment. This prohibition is also part of fundamental human rights and customary international human rights law'.²⁵

Based on the insight of the foregoing, the following discussion now moves on to providing a legal foundation for domestic violence.

2.2. Apparent Adequacies of Customary International Legal Approaches to Dealing with Domestic Violence

A contemporary liberal interpretation can be applied to numerous articles of the major international human rights treaties to argue that the prohibition of domestic violence is implied in those instruments and its violation will constitute the breach of the right to freedom from torture.²⁶ Article 5 the *Universal Declaration of Human Rights* 1948 (UDHR), for example, states that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment', while article 3 provides for right to life, liberty and security.²⁷ Certainly, a vivid violation of these articles occur when women experience domestic violence as they in that situation suffer from an arbitrary deprivation of life, lose their liberty and lack security.²⁸ Further, article 7 of the *International Covenant on the Civil and Political Rights* (ICCPR) 1966 requires State Parties to protect an individual from these forms of violence.²⁹ Read together, these provisions announce a legal framework for the prohibition of domestic violence.³⁰ And essentially, the implied sense and a close examination of objectives of these provisions uphold the protection of women against violence regardless of the public or the

²⁵ K M Culliton, 'Finding a Mechanism to Enforce Women's Rights to State Protection from Domestic Violence in the Americas' (1993) 34 *Harvard International Law Journal* 507 at 554-555.

²⁶ Culliton observed that 'the right to State protection from violation of a persons fundamental human rights is inherent in every international human rights legal instruments'—see *Ibid* at 513.

²⁷ *Universal Declaration of Human Rights* 1948 <http://www.unhchr.ch/udhr/lang/eng.htm> (22 February 2004).

²⁸ A K Carlson-Whitley, 'Dowry Death: A Violation of the Right to Life Under Article Six of the International Covenant on Civil and Political Rights' (1994) 17 *Puget Sound Law Review* 637 at 653-657 (explaining how dowry violence and death caused the deprivation of the right to life).

²⁹ ICCPR General Comment 28 obligates State parties to provide special protection against 'domestic and other types of violence against women, including rape.' It also urges State parties to provide information on national laws and practices in relation to domestic violence, and on legal remedies for women to the ICCPR Committee. See ICCPR General Comment 28 (Sixty-eighth session, 2000): Article 3: Equality of Rights Between Men and Women, A/55/40 vol I (2000) 133 at (paras 11 & 5).

³⁰ *Human Rights of Women* n 18 at 181.

private.³¹ '[No one] shall be subjected to torture...' as enshrined in article 5 of the UDHR neither belongs exclusively to any gender nor indicates any private or public. The core thrust is to prevent this sort of practice and to provide individuals with adequate relief. To borrow an important comment from Liebeskind:

'[it] is clear that the freedom from torture and degrading treatment is a customary norm, and insofar as gender-based violence violates that norm, State can be bound to prevent it under customary law.'³²

The above instances apart, an explicit recognition of the issue is also found in some women's human rights instruments and resolutions of a number of Committees and Conferences which attempted to move forward dowry and other violence from the private to public responsibility.³³ Consequently, domestic violence has dominated numerous decisions, reports and recommendations of the Convention and Conferences respectively under the UN system that unequivocally recognise that it causes deprivation of women's rights to freedom from *inter alia* torture.

The first effort to implicitly address domestic violence began in the 1st International Women's Conference in Mexico City in 1975 under the theme of 'conflict within the

³¹ M L Liebeskind, 'Preventing Gender- Based Violence: From Marginalization to Mainstream in International Human Rights' (1994) 63 *Revista Juridica Universidad de Puerto Rico* 645 at 669.

³² Id at 668-669.

³³ See for example, *Convention on the Elimination of all forms of Discrimination against Women* (CEDAW) 1979 General Assembly, Res 34/180, UN GAOR 34th Session, Supp No 46, UN Doc A/34/36 (1980) (entered into force 3 September 1981) arts 1, 4, 5 & 16; *General Recommendation No-19, Convention on the Elimination of all forms of Discrimination Against Women*, 11th Session 1992, CEDAW/A/47/38 at (para 1,7(b) and 9-12) (this Recommendation issued guidelines to interpret CEDAW in a manner that can give adequate protection against domestic abuse. Under this Recommendation, article 2 of the CEDAW extends the State's responsibility when it fails to intervene in private acts including dowry violence); see also *Declaration on the Elimination of Violence Against Women* 1993, GA res 48/104, 48 UN GAOR Supp (NO 49) at 217, UN Doc A/48/49 (1993) art 4(d) & (i); 'The Special Rapporteur on Violence Against Women, Its Causes and Consequences' <http://www.unifem.undp.org/bk_pro_15.htm>; see also G Kristian Miccio, 'With all Due Deliberate Care: Using International Law and the Federal Violence against Women Act to Locate the Contours of State Responsibility for Violence against Mothers in the Age of Deshaney' (1998) 29 *Columbia Human Rights Law Review* 641 at 645; Culliton 1993 n 25 at 530; R Carrillo, *Battered Dreams: Violence Against Women as an Obstacle to Development* (1992) New York: United Nations Development Fund for Women; R Copelon, 'Recognising the Egregious in the Everyday: Domestic Violence as Torture' (1994) 25 *Columbia Human Rights Law Review* 269 at 339-34; Hel ne Combrinck, 'Positive State Duties to Protect Women from Violence: Recent South African Developments' (1998) 20 *Human Rights Quarterly* 666 at 673-677; *Human Rights of Women* n 18 at 135; E Evatt, 'Eliminating Discrimination Against Women: The Impact of the UN Convention' (1991) 18 *Melbourne University Law Review* 435 at 438.

family'.³⁴ The 2nd World Conference placed special focus on domestic violence where its serious consequences were addressed with great concern and priority.³⁵ Then the issue was incorporated in the agendas of two different forums such as the Commission on the Status of Women (CSW) within the ECOSOC and in the quinquennial Congress on the Prevention of Crime and the Treatment of Offenders, and the Commission on Crime Prevention and Control. Subsequently, two resolutions of the ECOSOC adopted respectively in 1982 and 1984 obligated the CSW to label domestic violence as an offence against the dignity of the person and called for appropriate measures to combat this practice.

Most significantly, the 3rd International World Conference on Women held in Nairobi in 1985, Kenya marked the beginning of the development in substantive international law, especially designed to protect women's rights to be free from domestic violence.³⁶ It recommended that domestic violence against women 'was a major barrier to achieving the Decade's goal of equality, peace and development', and adopted preventive measures to eliminate it and to assist the victims of domestic violence.³⁷ Thereafter, until 1990 three major social science studies under the auspices of the UN stressed the importance of violence as the priority theme in the area of peace.³⁸ The following section outlines more recent international events dealing with domestic violence.

2.3. Recent Development in International Laws Recognising the Need to Mitigate Domestic Violence

Since the preceding section highlighted some of the important provisions of international law recognising the need to remedy domestic violence, this section briefly considers its recent development after the adoption of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). Although domestic violence by its name is not central to the CEDAW, a range of its provisions spell out the significance of private life and impose obligations on State parties to ensure rights within the family. Article 1, for example, prohibits gender-based discrimination, restriction or exclusion that undermines women's fundamental rights

³⁴ See the *Report of the World Conference on the International Women's Year*, Mexico City, 19 June-2 July 1975, (para 124 & 131).

³⁵ *Report of the World Conference of the United Nations Decade for Women, Equality, Development and Peace, Copenhagen*, 14-30 July 1980 s A, (para 14 (f)).

³⁶ *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace*, Nairobi, 15-26 July 1985.

³⁷ Chapter 1 s A & *Nairobi Forward-Looking Strategies* (para 3-5).

³⁸ *Human Rights of Women* n 18 at 536-537.

and freedoms. These three elements are inherent in 'domestic violence' as it has the obvious effect of depriving women of their equal rights to security and liberty and freedom from family abuse.³⁹ In particular, article 5 (a) of the CEDAW requires States to modify social and cultural practices based on the idea of inferiority which deny women's equal enjoyment of rights. Family violence and dowry death occur from traditional thinking of women's subordination.⁴⁰ In Bangladesh, for example, it is well recognised that the patriarchal society has established men's supremacy over women which has profound impact on earning and sustaining dowry in the country.⁴¹ To ensure this superiority, men predominantly receive family supports and attention in favour of developing their independent and productive careers. Consequently, the bargaining power and rating of dowry depend on the level of educational and occupational status of the groom.⁴² Eventually, this social practice has created economic dependence and powerlessness of women that began to portray them as unworthy of significance.⁴³ These practical experiences of women in Bangladesh thus qualify to have remedies under article 5 of the CEDAW.

In particular, article 16 of the CEDAW calls for the elimination of discrimination within the family that undermines women's dignity. The emotional and physical abuse attached to a dowry incident undoubtedly violates that dignity and therefore is contrary to the spirit of article 16. In this regard, Copelon maintained that the domestic abuses destroy self-esteem, the sense of wholeness and self-confidence in life and involve degradation and humiliation. The ultimate effects of domestic violence thus clearly meet the standard of article 16.⁴⁴

In attempts to provide a more direct and specific focus on domestic violence, General Recommendation 19 was adopted in the 11th session of the CEDAW Committee in 1992. It defines domestic violence as discrimination that restricts the ability of women to enjoy rights and freedoms, and confirms that domestic violence constitutes the

³⁹ Carrillo 1992 n 33.

⁴⁰ Evatt 1991 n 33 at 438.

⁴¹ Moonsoor 1999 n 1 at 22-225; see also for details, Begum, 'Politics in Bangladesh: Need for a Reconceptualisation of the Politico-Legal Approach to Mitigate Women's Disadvantaged Positions in the Parliament', (in print), *Journal of Asian and African Studies* (reviewed in USA, and will be published in UK).

⁴² A Nangia, 'The Tragedy of Bride Burning in India: How Should the Law Address It?' (1997) 22 *Brooklyn Journal of International Law* 637 at 644.

⁴³ M N Begum, 'Dowry and Position of Women in Bangladesh' – A Research Paper, Dhaka, Women and Development 1993-1994 at 3.

⁴⁴ Copelon 1994 n 33 at 339-341; see also, *Human Rights of Women* n 18 at 135.

violation of the right to freedom from, *inter alia*, torture.⁴⁵ This Recommendation issued guidelines to interpret CEDAW in a manner that could give adequate protection against domestic abuse. Under this Recommendation, article 2 of the CEDAW has extended the State's responsibility when it fails to intervene in private acts including dowry violence.⁴⁶ Also, this responsibility mandates government to take proper action against its agents who ignored 'due diligence'⁴⁷ as required under a range of international provisions to investigate and punish acts of violence, and/or to compensate the victim with proper remedies.⁴⁸ An interpretation of article 6 further obligates the State to impose criminal and civil sanctions on its agents for domestic violence.⁴⁹

After 1992, domestic violence was once again an issue of priority concern of the 4th World Conference on Human Rights held in Vienna in 1993. It called for, among other things, the promulgation of a specific Declaration and the creation of a position of Special Rapporteur to deal exclusively with the issue of domestic violence. Within six months, the General Assembly adopted the *Declaration on the Elimination of Violence against Women* (the Declaration) in 1993. The Declaration defines violence against women as 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women'.⁵⁰ It seeks to combat domestic violence through administrative and legislative reforms, including 'restructuring and sensitizing the criminal justice system'.⁵¹ To evaluate and assess the conduct of States regarding domestic violence, a Special Rapporteur was also appointed by the UN Commission on Human Rights in 1994.⁵²

⁴⁵ See *General Recommendation No 19, Convention on the Elimination of all forms of Discrimination Against Women*, 11th Session 1992, CEDAW/A/47/38 at (para 1,7(b) and 10).

⁴⁶ Id at (para 10-12).

⁴⁷ 'Due diligence' refers to government's action or inaction through which its roles towards its citizens and commitment to fulfill international obligations can be measured. See generally D Shelton, 'Private Violence, Public Wrongs, and the Responsibility of the State' (1989-1990) 13 *Fordham International Law Journal* 1 at 20-23.

⁴⁸ Id at (para 9); see also the General Recommendation No 19 n 32. Under paragraphs 2 and 9, for example, of the General Recommendation 19, states are obligated to protect women from violence through proper investigation and punishment of acts of violence, regardless of whether these acts of violence are committed by its public officials or private actors.

⁴⁹ Ibid.

⁵⁰ *Declaration on the Elimination of Violence Against Women* GA res 48/104, 48 UN GAOR Supp (No 49) at 217, UN Doc A/48/49 (1993) art 1.

⁵¹ Id art 4 (d) & (i); see also, Hel ne Combrinck, 'Positive State Duties to Protect Women from Violence: Recent South African Developments' (1998) 20 *Human Rights Quarterly* 666 at 673-677.

⁵² See 'The Special Rapporteur on Violence Against Women, Its Causes and Consequences' <http://www.unifem.undp.org/bk_pro15.htm>; see also, Culliton 1993 n 25 at 530.

The Beijing Conference on Women held in 1995 marked another important advance for the issue. The 'Platform for Action'-- the fundamental and core plan of the Conference, identified violence against women as one of the critical areas set under the agenda of the twelve major issues for urgent action. It provided means and ways of how violence needs to be addressed and remedied by the States.⁵³ In addition, the enforcement, reporting and monitoring of domestic violence are conducted by other major Human Rights Committees.⁵⁴

Hence, it seems logical to assert at the end that all these international instruments provide a definite theoretical paradigm for addressing and mitigating domestic violence by imposing a positive obligation on the State. It is important, however, to acknowledge here that despite the above development in international law, women's rights to freedom from torture or abuse are not always respected. Overlapping mandates, excessive use of reservations and the lack of authority have transformed most of the international efforts merely aspirational.⁵⁵ General Recommendation 19 and the Declaration, for example, lack binding authority and their compliance largely relies on a State's discretionary desire.⁵⁶ Women worldwide therefore still witness different forms of violence, and socio-cultural practices such as dowry continue to reinforce their vulnerability.⁵⁷ Yet, the international instruments and their substantive standards, their shortcomings notwithstanding, remain an important means of advancing women's goal of equality and of freedom from torture.⁵⁸ Despite its several weaknesses and having not very satisfying achievements, CEDAW has been increasingly referred to in judicial decisions in interpreting domestic legislation, and has gained constitutional status in a number of countries.⁵⁹ The significance of these has made it possible 'to mandate proactive, pro-women policies and to dismantle

⁵³ See generally *Beijing Declaration and Platform for Action, Fourth World Conference on Women*, 15 Sep. 1995, A/CONF177/20 (1995) and A/CONF177/20 Add 1 (1995).

⁵⁴ For example, Human Rights Committee under article 28 of the ICCPR, and CAT Committee under article 17 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984 monitor the compliance of states' obligations with the provisions of these two Conventions.

⁵⁵ B Stark, 'International Human Rights Law, Feminist Jurisprudence, and Nietzsche's "Eternal Return": Turning the Wheel' (1996) 19 *Harvard Women's Law Journal* 169 at 171-173.

⁵⁶ Ibid; Culliton 1993 n 25 at 528.

⁵⁷ Twenty-third Special Session of the General Assembly entitled 'Women 2000: gender equality, development and peace for the twenty-first century' 10 June 2000 (para 11).

⁵⁸ A X Fellmeth, 'Feminism and International Law: Theory, Methodology, and Substantive Reform' (2000) 22 *Human Rights Quarterly* 658 at 729.

⁵⁹ See 'Bringing Equality Home-Implementing the Convention on the Elimination of All Forms of Discrimination Against Women-CEDAW' <http://www.unifem.undp.org/cedawen4.htm> (2 May 2002).

discrimination.⁶⁰ Similarly, the Declaration 'strengthens the voices of victims who have been historically silenced, out of shame or fear of punishment,'⁶¹ and the overall impact of international strategies works as a useful critical tool for bringing a broader social change.⁶²

The following discussion explains how dowry as a form of domestic violence shares a common experience with 'torture' and why it should thereby warrant similar legal weight and remedies as the officially recognised 'torture' does.

3. Recognising Dowry Violence as 'Torture'

Domestic violence encompasses many other forms of repression against women,⁶³ this section, however, only deals with dowry as it contributes to 66.7% of the total number of violent incidents against women in Bangladesh.⁶⁴ Dowry refers to property, cash or goods given to the bridegroom as a consideration of marriage.⁶⁵ A number of laws in Bangladesh outlaw 'giving and taking dowry' and all cruel modes such as attempts to cause death or grievous hurt for recovering dowry.

The central law of Bangladesh on dowry is the *Dowry Prohibition Act* 1980 (the Act 1980) which defines dowry as any property or valuable security given or agreed to be given either directly or indirectly by one party to a marriage by another party at any time before or after the marriage as a consideration of marriage.⁶⁶ The Act 1980 has made dowry a criminal offence punishable with a maximum penalty of five years imprisonment, and is fundamentally concerned with a series of issues including the punishment for demanding or taking and giving dowry and its investigation and trial

⁶⁰ Ibid; the First CEDAW Impact Study reveals that '[its] legally binding and internationally accepted character renders the Convention the basic legal framework for a strategy to protect and promote the fundamental human rights of women and to eradicate inequality and discrimination.' See *The First CEDAW Impact Study: Final Report--Released During the Twenty-Third Session of the CEDAW Committee, New York, June 2000*, The Centre for Feminist Research, York University and the International Women's Rights Project at 12.

⁶¹ Libieskind 1994 n 31 at 651.

⁶² M L McConnell, 'Violence Against Women: Beyond the Limits of the Law' (1996) 21 *Brooklyn Journal of International Law* 899 at (para 10).

⁶³ R Coomaraswamy and L M Kois, 'Violence Against Women' in K D Askin and D M Koenig (ed), *Women International Human Rights Law Vol-1* (1999) New York: Transnational Publishers, INC at 186.

⁶⁴ A K Goswami, 'Empowerment of Women in Bangladesh' (1996) 5 *Empowerment- A Journal of Women for Women* 45 at 67.

⁶⁵ See N S Ravikant, 'Dowry Deaths: Proposing a Standard for Implementation of Domestic Legislation in Accordance with Human Rights Obligation' (2000) 6 *Michigan Journal of Gender & Law* 449 at (para 10).

⁶⁶ *The Dowry Prohibition Act* 1980, s 2.

proceedings. To redress the dimension of dowry, the Act was further amended in 1982, 1984, 1986 and 1986.

Although a number of statutes in Bangladesh, as referred to, recognise dowry as a crime, they fail to accord it the similar legal weight of the fundamental right to freedom from torture. The *Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (CAT), the most relevant human rights instrument to which Bangladesh is a party, sets a definite criterion for torture. Under article 1 of the CAT, four elements are necessary to constitute torture. These are; (i) an act that causes physical or mental severe pain or suffering; (ii) that act must be intentionally inflicted; (iii) there should be a specific reason and; (iv) that act involves some forms of active or passive involvement of the government.⁶⁷

In order to determine whether a particular form of deprivation should qualify as a right to freedom from torture, regard should be given to the effects of deprivation.⁶⁸ In a leading judgment in *Akayesu*, the International Criminal Tribunal for Rwanda, for example, provided sexual crime with similar remedies of genocide as the former produced same effects of the latter on the victim.⁶⁹ In following ways, an application of the elements of 'torture' to the dowry-related repression in Bangladesh can substantiate that the private violence should be treated as torture.⁷⁰

Firstly, in most dowry cases, verbal or physical assault ranging from the beating, kicking and the infliction of pain (through various objects such as rod, sticks and knives) to death are repeatedly practised on women in Bangladesh who fail to meet dowry-demand of their in-laws.⁷¹ Instances of torturing women to earn dowry are too numerous to detail in this connection. The *Khatoon*, among many, revealed that a wife was inhumanly beaten by her husband and in-laws when she failed to bring dowry from her brother.⁷² Torture and severe beating destroyed her hearing capacity including traumatic collapse of her spine and dislocation of her bones.⁷³ Such violence can

⁶⁷ The *Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (CAT) 1984, G A res 39/46, [annex, 39 UN GAOR Supp (No 51) at 197, U N Doc A/39/51 (1984)], entered into force 26 June 1987, art 1.

⁶⁸ In *The Prosecutor v Akayesu*, the International Criminal Tribunal for Rwanda provided sexual crime with similar remedies of genocide as the former produced same effects of the latter on the victim. See, [1998] Case No-ICTR-96-4-T at (para 731-732).

⁶⁹ Ibid.

⁷⁰ See Ravikant 2000 n 65 at (part IV B).

⁷¹ *Khatoon v State* [1986] 38 DLR 48 at 50.

⁷² Ibid.

⁷³ Id at 350-351 & 356.

reasonably be characterized as having the required physical or psychological severe pain of torture and their similar effects on the victims of dowry.⁷⁴ Forcing women to satisfy dowry in this manner creates a 'panic state' of mind. This 'panic-state' keeps those women in a constant mental pressure and in vulnerable situations coupled with an apprehension of further physical assault. This particular state constitutes mental suffering.⁷⁵ In a nearly similar situation to dowry violence, Walker found that 'battering' produced a state of depression, anxiety, dependency and passivity among victims when they felt helpless to leave abusive relations.⁷⁶ Repeated violence gradually destroys the mental capability of victims to function independently and to resistance that, in turn, escalate their further vulnerability.⁷⁷ This nature of conduct produces the manipulation of 'stress' of mind much the same way as does formal torture.⁷⁸

Secondly, with an explicit desire to earn dowry money, threats and physical assault are recurrently committed on the unwilling women.⁷⁹ Very recent research in Bangladesh showed that up to 50% of all women were victims of domestic violence and much of the reported violence against women were related disputes over dowries.⁸⁰ In *Howlader v State*, the Supreme Court of Bangladesh found that the accused persons had beaten the victim with a specific intent to obtain dowry and driven her 'away from the conjugal house keeping all her ornaments with them'.⁸¹ Cruel treatment appears to be unnecessary where women deliberately want to help their domestic partners. Mental or physical assault thus implies the presence of some sort of undue force and that force exposes an explicit intentional *malafide*.

Thirdly, the dowry-related repression originates with a specific purpose. The purpose is to obtain money or valuables, the inability to satisfy of which results in cruel

⁷⁴ M A Dutton, 'Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome' (1993) 21 *Hofstra Law Review* 119 at 1238-1240 (explaining of how the emotional, mental and physical pain impact on the victim of domestic abuse).

⁷⁵ L Askari, 'Girls' Rights Under International Law: An Argument for Establishing Gender Equality as a Jus Cogens' (1998) 8 *Southern California Review of Law and Women's Studies* 3 at 37.

⁷⁶ R Copelon, 'Understanding Domestic Violence as Torture', in *Human Rights of Women* n 18 at 125.

⁷⁷ Copelon 1994 n 33 at 335-339.

⁷⁸ *Human Rights of Women* n 18 at 124.

⁷⁹ See *Karim v Begum* [1988] 40 DLR 360 at 361.

⁸⁰ (<http://web.amnesty.org/report2006/bgd-summary-eng> (9 August 2007); <http://www.state.govt/g/drl/rls/hrrpt/2005/61705.htm> (9 August 2007))

⁸¹ (1994) 46 DLR 169; for a detailed discussion about the issue see generally, Begum 2005 n 10 at 231-241.

treatment or deaths of women. The failure or denial to meet this demand contributes to 'almost 50% of all murders of women in Bangladesh'.⁸²

Fourthly, in the present case, the State is actively involved through enacting, *inter alia*, the Dowry Prohibition Act 1980 to protect women against dowry violence. The State's passivity results from its failure to eradicate socio-cultural stereotypes that work to the disadvantage of women and to implement the dowry law as required, especially by the articles 4-5 of the CEDAW.⁸³

In regard to the socio-cultural values, articles 4-5 of the CEDAW mandate the State to develop special and appropriate measures to accelerate women's *de facto* equality and to eliminate, *inter alia*, social practices that perpetuate their subordinate status in the society. In Bangladesh, as mentioned earlier, it is well accepted that the socio-cultural values have ensured men's superiority by facilitating their predominant access to economic resources over women. This social attitude originated from a traditional thinking where a son is considered a future bread earner for the family and a girl is perceived as an 'unproductive burden' since in most cases the parents have to arrange, *inter alia*, dowry for her marriage. Investing money and efforts for girls in rural areas (where nearly 90% of them reside)⁸⁴, subject to a few instances in recent time, are still regarded as 'non-cost-effective' synonym to 'watering a neighbouring tree' as they will be with their in-laws after marriage. Due to this social trend, a girl from the very beginning of her childhood has to accept a sex-bias in allocation of food, education and other economic endowments. Obviously, this social phenomenon has incapacitated women to develop their potentials by legitimising men's authority in the society.⁸⁵ The government has failed to take into account these unique experiences of women. And certainly, such experiences of women in dowry fulfill the requirement of the fourth element of 'torture' and thus meet the standard of abuse as required by 'torture'.

In regard to the implementation of law, available statistics reveal that the manipulation in filing cases and investigating process by the police have been serious barriers to getting a favourable remedy in dowry cases. In numerous instances, police refused to arrest the criminals and even denied to register the case brought by a woman, believing

⁸² T Monsoor, 'Dower and Dowry: Its affect on the empowerment of Muslim women' *The Daily Star* (27 July 2003).

⁸³ See CEDAW n 2 arts 4-5.

⁸⁴ P P Majumder and S C Zohir, 'Empowering Women: Wage Employment in the Garment Industry' (1995) 2 *Empowerment: A Journal of Women for Women* 83 at 109.

⁸⁵ Begum 1993-1994 n 43 at 3.

that the victim provoked the violent incident.⁸⁶ According to the *Human Rights Report of Bangladesh 1998*, only 10.5% of dowry cases were filed against the perpetrator.⁸⁷ There is ample evidence in Bangladesh to support the claim that dowry deaths are frequently labeled as accidental or suicidal.⁸⁸ The failure of police to investigate into and to take proper action helps many offenders to go legally unchallenged.⁸⁹ Yet, there is hardly any precedent in Bangladesh that police were held responsible for their failure to perform their legal duties.⁹⁰ Nevertheless, in numerous jurisdictions, even in India, it has become a common practice to hold government liable for the acts and omissions of its public agents and private actors.⁹¹ This accountability is not for the acts and omissions of its public officials such as police but for the failure of the government to discipline or punish those actors whose misconduct caused injury to women.⁹² Also, this liability, as noted earlier, arises where the State fails to exercise

⁸⁶ See for example, R Jahan & M Islam (ed), *Violence Against Women in Bangladesh Analysis and Action* (1997) Dhaka: Women for Women and South Asian Association for Women Studies at 69.

⁸⁷ Ain O Salish Kendra, 'Human Rights in Bangladesh 1998' (1999) Dhaka: The University Press Limited at 147.

⁸⁸ L Carroll, 'Recent Bangladeshi Legislation Affecting Women: Child Marriage, Dowry and Cruelty to Women' (1985) 5 *Islamic and Comparative Law Quarterly* 255 at 263; see also Agarwal 1988 n 8 at 223.

⁸⁹ For example, in *Akbar v State*, the Supreme Court of Bangladesh held that the acquittal order has become an end-result of many cases. This is 'due to the faulty investigation of the case by the police or absolute right to silence of the accused during investigations or trial.' See [1999] 51 DLR 268. See also *Amnesty International Annual Report-2000 Bangladesh*.

⁹⁰ During the last twenty years, there has been only one successful criminal prosecution for custodial death, in which an OC (Officer in Charge) was sentenced to ten years imprisonment. Nevertheless, the period of imprisonment was later reduced to five years and after serving only about two years, he was pardoned and released. The total number of deaths in the police custody between the period of 1971-1998 was reportedly 18,911, of which only 321 deaths cases involved the police and only three of these cases went on trial. Between the October 2001 election and May 2002, 105 persons were tortured by the law enforcing agencies, of whom 54 have died in police custody, but no police have been prosecuted so far. See for details, *Islam v Bangladesh* (1991) 43 DLR 336; S Malik, 'Towards a Framework for Balancing Individual Liberty and the Security Needs of the State' A Report prepared for USIS (United States Information Service) (1998) Dhaka at 73; S K Dey, 'Murder after arrest of innocents under s 54: tortures exceed all records' *The Daily Janakantha* (23 May 2002) and ASK Report 1999 n 87 at 60.

⁹¹ See for example, *Saheli v Commissioner of Police, Delhi* (1990) AIR SC 513 at 516; *Women's Forums* n 36 at (para 15-17); *Basu v State of West Bengal* (1997) AIR SC 610 at 627-628 (In all of these cases, the government was held liable for the acts of police and army officers); See also generally A Begum, 'Disrespecting Constitutional Safeguards for Fundamental Rights in Bangladesh: A Bird's-Eye View from the Indian Context' (2007) *Journal of the Indian Law Institute* at 3-29.

⁹² R J Cook, State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women, in *Human Rights of Women* n 18 at 229 (observing that the state will

'due diligence'. The concept of due diligence signifies some legislative, administrative or judicial initiatives of the government through which its commitment and efforts to fulfill its international obligations towards women or people can be determined or measured.⁹³ It requires states to 'prevent, investigate, and in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons,'⁹⁴ and to provide victims with proper remedies.

Thus, it appears logistic to suggest that the State has avoided the need to rectify its agents attitude to the traditionally underprivileged women against violence, and this failure or inaction on the part of the government at least in part contributes to the sustenance of dowry violence in the society. Pursuant thereto, a recommendation can also be drawn here that the government of Bangladesh should be held accountable under international law for having breached its international obligations.

4. Conclusion

In analysing dowry as a form of domestic violence this article has endeavoured to identify and overcome conceptual constraints prevailing in international rights discourse and to provide dowry and other forms of domestic violence with equivalent legal weight with the fundamental right to freedom from torture. The foregoing demonstrates the weakness and strengths of international law regarding domestic violence by synthesizing a range of international legal instruments and some important evaluations of a number of law academics. Essentially, the overall findings substantiate that the recurrent cruelty involved in dowry satisfies the required standards for constituting 'torture', and therefore should receive proper legal recognition and similar remedies. Drawing upon this insight, this short note concludes that laws dealing with dowry need to be reconceptualised to mitigate the disadvantaged experiences of women in Bangladesh and to provide with them more appropriate remedies in addition to those they are already entitled under the *Dowry Prohibition Act 1980*.

bear responsibility where it tolerates, justifies and excuses private denials of women's rights or where it fails to control, correct or discipline such private actors).

⁹³ Shelton observed that '[due] diligence consists of the reasonable measures of prevention that a well-administered government could be expected to exercise under similar circumstances.'- see Shelton 1989-1990 n 47 at 23.

⁹⁴ See for example, General Recommendation of CEDAW provides that 'States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and to provide compensation.' See General Recommendation 19 U N GAOR, Committee on the Elimination of Discrimination Against Women, 11th Sess, at 1, UN Doc CEDAW/C/1992/L1/Add15 (1992) at 10; see also the *Declaration* n 33 art 4.