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Ensuring Justice towards Victims of Sexual and Domestic Violence through Judicial Activism

Md. Tajul Islam*

Abstract: *Sexual and domestic violence is not new in Bangladesh and there are different laws for checking this type of problem. But the provisions of those laws (Women and Child repression and Prevention Act, 2000 and Dowry Prohibition Act, 2018) are not sufficient for checking modern-day violence. Laws are available, but domestic and sexual violence victims hardly file formal cases due to fear of further humiliation as the trial environment is not victim-friendly. To improve this situation, different writ petitions (Writ Petition No 7758 of 2020, Writ Petition No. 5916 of 2008) have been filed that may be good examples of Judicial Activism, but those cannot check the situation appropriately. Due to the lengthy process (commonly years) of concluding a writ petition and the government's reluctance to implement the court's directives, the situation remains unchanged over the decades. Thus, this present study has provided insightful information about the causes and the impacts of sexual and domestic violation and its solution for ensuring justice through judicial activism to the victims not only in Bangladesh but all over the world.*

Keywords: Justice, Victims, Violence, Judicial Activism

1. Introduction

There are crimes in every society and for that reason, laws and law enforcement agencies are in every country. But some crimes happen within the home, which is difficult to control through laws and law enforcement agencies. Sexual and Domestic Violence falls under that category and checking this type of offense requires special measures. Enacting laws or court orders may stop such crimes to a degree, but those are simply ineffective for completely stopping those type of crime. The situation in countries like Bangladesh is worsening because a good number of people think that wife and children beating or some forms of torture within the home is done for the good of them (victim). But those offenders don't know or don't take cognizance of facts like the suicide of victims of violence or causing mental disorder for a long time. This cannot go on for long, so it is necessary to change this mindset of people that results in doing violence within the home, and

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at the same time, some effective measures should be adopted to stop such crimes permanently. However, this study aims to detect the root cause of sexual and domestic violence and the effectiveness of laws and judicial activism to tackle this violence. Finding ways to stop such violence permanently is also the aim of conducting this study.

2. Literature Review on Sexual and Domestic Violence and Judicial Activism

2.1. The Nature of Sexual and Domestic Violence

Domestic violence means violent behavior within one's home. Sometimes there's a sexual orientation in domestic violence, and sometimes not. It may be with men and women of any age, but women and children often become the worst victims because of their vulnerability. Wives are most vulnerable to abuse, particularly those from low-income families in rural areas. Unmarried sisters and daughters are also commonly subject to abuse. It is important to remember, however, that anyone can be a victim of domestic violence.¹ Domestic violence includes different acts that may be treated as violent towards someone.² There are four types of acts that can be considered domestic violence, and those acts are-

- a) Physical violence which included hitting, punching, kicking, burning, acid throwing, forced abortion.
- b) Psychological violence included threat of physical violence, insult, restricting mobility, abandonment.
- c) Sexual violence included marital rape, forced prostitution, refusal to have sex etc.
- d) Economic violence included stopping food, stopping maintenance for victim, stopping maintenance for children, dowry demand, not permitting to earn income, forcing to earn etc.³

¹ Dr. Kaniz Siddique, 'Domestic Violence against Women', Published by USAID, June 2011, available at www.carebangladesh.org/publication/Publication_5421518.pdf

² N. M Sarker and S. Yesmin, 'Domestic Violence in Bangladesh Analyzing from the Contemporary Peace & Conflict Perspectives', *Peace and Security Review*, Vol. 5(10), Second Quarter, 2013, available at www.researchgate.net/publication/349038995.

³ *Ibid*

For this reason, domestic violence is done that's not important to consider some actions as violent. Even what is done for the good of a family member may be considered domestic violence if it covers the nature of domestic violence.

2.2 Using Technology in Violence: New Dimension

People's capability to harm someone has been changed as technology has been over the years. Most people, especially educated ones, spend a mentionable part of the day on different social media platforms. They know many people will see whatever they post on any popular social media platform. It's now a common phenomenon to use social media to humiliate anyone sexually. Today, barely a day goes by without a news story on yet another incident of revenge pornography, of the circulation of images of sexual assault, of online misogyny, of rape threats directed towards women in both public and private life, of stalking and harassment by ex-partners, or of online abuse directed at victim-survivors of sexual violence.⁴ Such online abuse adds a new dimension as it's effortless to do, but its effect is more harmful than almost anything done offline. Only family members experience domestic violence or sexual abuse within the home, but thousands of people can see it when it turns up online. And that's enough for ruining one's social life permanently in just a day.

2.3 Economic Vulnerability: The Main Cause

The economic factors are related with the cultural and political factors unswervingly as the cultural norms and political societal views have been fixing the role of women in the society for millennia which have shackled the women and made them economically vulnerable. This fact, in turn, has played a significant role in validating domestic violence against women in different societies.⁵ Whenever anyone becomes dependent economically on any other family member it becomes easy to be a victim of domestic violence. Because, in that case,

⁴ A Powell and N Henry, *Sexual Violence in a Digital Age*. ISBN 978-1-137-58047-4 (eBook), Palgrave Macmillan, London, 2017

⁵ M. A. K Chowdhury, 'Domestic Violence Against Women: A Historic and Socio-Cultural Reality in Bangladesh', *European Scientific Journal*, Vol. 11, p. 26, available at www.researchgate.net/publication/282356485.

the dependent person has to obey whatever the earning member of the family says. Even if the earning member assaults or abuses the dependent ones, they will (dependent) have nowhere to go. Over the decades, one of the cultural norms in many rural areas of Bangladesh is that wives will do work only at home and will be financially dependent on their husbands. These norms create power imbalances between men and women and it's the root cause of domestic violence as described by a researcher - one of the root causes of violence against women in Bangladesh is disparity and power imbalances between men and women. This is strengthened due to the stereotypical patriarchal attitudes regarding their roles and responsibilities. More than one-third of men and women in Bangladesh apparently accept wife-beating as the rights of husbands.⁶ All these have been because economically influential people (commonly men) determine the benchmark of right and wrong in every home. Women's economic vulnerability in countries like Bangladesh make them victims of domestic violence, and such violence may make them unable to work in the future. And it's nicely pointed out by another researcher that women often suffer breakdowns in relationships, stigmatization, isolation, and may be unable to work and look after their children.⁷ The simple reason for being unable to work is that when a woman goes through domestic violence, they usually lose their passion for work, and hope for a better future. Such a condition leaves those women economically vulnerable for life.

2.4 Silence of The Victims

Commonly vulnerable groups become the victim of domestic violence and in some worst cases, sexual abuse. They often don't want to protest or file cases against perpetrators as they have none to support. As many domestic violence victims are illiterate, they don't know their rights well. So, they become silent against these injustices and after a long time, such torture seems normal to them. The major reasons

⁶ F Ara, Violence against Women in Bangladesh: An Overview. *Journal of Public Administration*, Vol. 2(1), 2020, available at <https://www.sryahwpublications.com>.

⁷ S Kewley and C Barlow, *Preventing Sexual Violence*, Bristol University Press, Great Britain, 2020, p.1

behind this silence was the fear of tarnishing family honor, the stigma of ruining women's own reputation, securing the children's future, fear of repercussion from the husband, hopelessness, expectation that things would change, threat of murder, and belief that violence was the husband's prerogative.⁸ As these victims become silent, the offenders don't feel that they should change their behavior pattern. That's why the same type of violence continues with the same-type groups for life. But its effect is long-standing and is extremely harmful to each of the victims. Women who are victims of domestic violence do not only suffer from health-related complications, they also suffer from low self-esteem, feeling of isolation and powerlessness, and often suffer from a sense of guilt.⁹

2.5 Judicial Activism to Stop the Cycle of Sexual and Domestic Violence

The offender of domestic & sexual violence doesn't grow suddenly in a day. Violence within the home commonly ruins the normal life of children. They get involved in criminal activities and eventually become violent doers within their home when they become older. Children are often considered the silent victims, as they may see and hear the abuse or otherwise be aware that it is happening that teens often act out, including getting involved in fights and skipping school and girls are more likely to suffer from depression and to engage in self-cutting and have eating disorders. In the long term, child witnesses are more likely to continue the cycle of abuse, as either abusers or victims.¹⁰ This cycle starts in ancient times and continues, but it's a matter of hope that the modern world is now aware of domestic violence and that's why they make laws.

⁸ A Bilkis, *Violence Against Women: Mitigating Role of National Helpline Centre in Bangladesh*, Department of Political Science and Sociology, North South University, Dhaka, 2015, available at www.northsouth.edu/newassets/files/ppg-research.

⁹ K T Hossain and M S R Sumon, 'Violence against Women: Nature, Causes and Dimensions in Contemporary Bangladesh', *Bangladesh e-Journal of Sociology*, Vol. 10(1), 2013, available at www.bangladeshsociology.org.

¹⁰ L L Finley, *Domestic Violence and Abuse*, ABC-CLIO, LLC, Santa Barbara, California, 2020

Laws for preventing domestic and sexual violence are many in Bangladesh. Besides these laws, the scope for judicial activism is available and any aggrieved person may take advantage of that. Judicial activism depicts the pro-active role played by the judiciary in ensuring that rights and liberties of citizens are protected. The court moves beyond its normal role of a mere adjudicator through judicial activism. In Bangladesh, the Supreme Court plays the role of judicial activism through suo moto (by own initiatives) rule and by PIL (Public Interest Litigation).¹¹

3 Research Questions

This research attempts to answer the following unresolved questions:

Firstly, what are the basic problems of causing sexual and domestic violence towards women in Bangladesh?

Secondly, how can we get rid of these menaces to make sure the settlement of sexual and domestic violence disputes through judicial activism?

4. The Aim of the Study

This study aims to examine the provision of sexual and domestic prevention violence laws in Bangladesh and the scope for judicial activism here. The aim also includes finding out the cause of continuing sexual and domestic violence degradation and possible solutions to this problem.

5. Methodology

The study is based on primary as well as secondary sources of data. The primary data will be collected from female respondents through survey questionnaire and face to face interviews whose age lies between 20-45 years old. Secondary data sources were collected from different books, journals, reports, research works, and daily newspapers, e-books and relevant websites. 60 females were selected from two upazillas, Kushtia Sadar and Kumarkhali (30 from Kushtia

¹¹ A H Mollah, 'Judicial activism and human rights in Bangladesh: A Critique', *International Journal of Law and Management*, Vol. 56(6), 2014, available at <https://www.researchgate.net/publication/282611895>.

Sadar Upazilla and 30 from Kumarkhali Upazilla). Questionnaire and in-depth individual interview were used as the instruments for collecting quantitative and qualitative data adopting a mixed method approach (Both quantitative and qualitative). To conduct this study, sexual and domestic violence reports published by well-known NGOs like *Ain O Salish Kendra* (ASK), Odhikar, have been considered to conduct this study. All the relevant laws have been examined, and to show the effectiveness of the domestic violence law, a report of Dhaka Tribune has been mentioned here. Some instances of judicial activism and their effects have been included here to show the ongoing situation.

6. Data Analysis

6.1 Sexual and Domestic Violence Rate and Relevant Laws

According to a legal aid and human rights organization in Bangladesh named *Ain o Salish Kendra* (ASK), in Jan-June (2021) 125 women were murdered by their husbands. And in this time, the total number of domestic violence incidents is 350, though only in 147 incidents cases were filed.¹² ASK prepared this report based on the reports mentioned in some widely circulated newspapers. So, it is easily understandable that the actual number of such incidents is far more as newspapers can't publish all the crimes committed.

According to another Human Rights Organization in Bangladesh named Odhikar, from January to March 2021, 317 women and children were raped, and among them, four committed suicide. And in this period, 40 women became the victim of dowry violence, and among them, 15 were killed. (Three-Month Human Rights Monitoring Report on Bangladesh January – March 2021)

Though Acts like The Prevention of Women and Child Repression Act, 2000 (Act no. 8 of 2000), The Children Act, 2013 (Act no. 24 of 2013), The Dowry Prohibition Act, 2018 (Act no. 39 of 2018), etc. are still in force in Bangladesh. And all the incidents like demanding dowry, domestic and sexual violence, or so are punishable offenses under those Acts. Any victim may file cases under these laws, and trials will

¹² *Violence against Women, Domestic Violence, 2021*

be held like other normal cases. But only in rape cases, the tribunal established under The Prevention of Women and Child Repression Act, 2000 may arrange camera trial, as per section 20(6). Parliament enacted The Domestic Violence (Prevention and Protection) Act in 2010 (Act no. 58 of 2010) to prevent domestic violence. In this Act, there's a provision of appointing Enforcement Officer "in each *upazila, thana*, district or in a metropolitan area," and his responsibilities include "to make an application to the Court, if the victim so desires," and "to take necessary steps so that the victim is provided legal aid." (Section 5, and 6(d) (e), The Domestic Violence (Prevention and Protection) Act, 2010 (Act no. 58 of 2010) The Domestic Violence Act was enacted in 2010, but after ten years, in 2020 Dhaka Tribune published a report where it mentioned that "No cases have been filed under the Domestic Violence (Prevention and Protection) Act in the last ten years in the Chief Judicial Magistrate Court (CJM) in many districts of the country." (No cases filed under the Domestic Violence Act in 10 years.¹³

6.2 Scope of Judicial Activism to Prevent Sexual and Domestic Violence

Besides filing cases under ordinary laws, according to article 102(2) of the Bangladesh Constitution there's scope for filing writ petitions where no equally efficacious remedy is available under any law. Judicial activism is not for ordinarily punishing offenders, existing laws are for that. Mainly people or human rights organizations file writ petitions where there's a lacuna in law or no remedy is available under existing law. This can be treated as judicial activism as here courts may give orders for the benefit of the aggrieved person though there's no specific legal provision. In 2010, the Bangladesh Women lawyers' association (BNWLA) filed a writ for preventing sexual harassment at home and outside. And in the judgment of this writ High Court Division gave 10 directives where there was a proposed definition of sexual harassment and stalking in the light of modern technological advancement. And it was mentioned in directives no. 7 and 8 Government shall, on an urgent basis, complete its initiative to insert a new section in the *Nari O Shishu Nirjatan Daman Ain*, 2000 defining the

¹³ *The Dhaka Tribune*, 2 December 2020.

mischievous of Sexual Harassment in the light of the definition given. Government shall take immediate steps to enact law for introduction of witness and victim protection for effective protection of victim and witness of sexual harassment." (No cases filed under the Domestic Violence Act in 10 years, The Dhaka Tribune, December 2nd, 2020) In this judgment, it was also held that the district law and order committee will organise sessions at least once a month to update the women and children rights activists about sexual offences committed (Directives no. 5).

High Court Division gave this judgment on 26 January 2011, but relevant laws are unchanged and the government hasn't enacted the law for victim protection as directed by the court. Even government didn't amend the laws though some forms of violence like technology-based sexual humiliation, character assassination, preventing participation in outdoor organizational and academic activities, etc are not addressed in the *Nari O Shishu Nirjatan Daman Ain*, 2000. Most of the victims of sexual violence become reluctant to file cases because of the fear of further humiliation. It was shared all over Bangladesh that the unscientific two-finger test of the victim was conducted when a rape case was filed. And commonly, this was done in the presence of the male doctor and ward boys though the procedure required removing wearing apparel, amounting to sexual violence from all perspectives. Following a writ petition (W.P. No. 10663/2013) filed by BLAST, The High court Division issued a rule on 10.10.2013, to show cause as to why the "two-finger test" should not be declared illegal.¹⁴ But it took five years to deliver judgment- On the 12th of April 2018 the High court finally banned this invasive test for rape victims. (High Court Bans the "Two-finger Test" on Rape Survivors (Press Release), 18 April 2018, Published by BLAST). And during this time (till April 2018), the "two-finger test" had been conducted on rape victims in the presence of male personnel. This is one of the incidents of systematic harassment for which victims don't want to file formal cases.

¹⁴ See, <https://www.blast.org.bd/content/court-order/court-order-tft.pdf>.

6.3 Judicial Activism i.e Role of Judges and Advocates in Courts at the Trial Stage

The ultimate goal of ordinary laws and judicial activism is to punish offenders and protect victims. There're laws in Bangladesh, and the scope for judicial activism in the form of writ petitions is available but the rate of domestic and sexual violence is alarming. Data collected from NGOs like Ain o Salish Kendra (ASK) and Odhikar sufficiently prove that. But more alarming is that among 350 incidents of domestic violence (January-June 2021) only 147 cases were filed which is less than half of the number, as published by ASK. This situation is going on because of the economic vulnerability of women and the fear of being humiliated publicly. In the trial, victims and other witnesses give evidence on what has been committed to the victim. It is really humiliating for a sexual violence victim, especially in the presence of a huge number of lawyers and other people in an ordinary courtroom. But, there is provision for camera trial only for the rape victims and that's not mandatory for the court to arrange in every rape case. But in other cases of domestic and sexual violence trial is held in ordinary courtrooms in the presence of a huge number of people, thus this situation isn't victim-friendly. Long run unscientific two-finger test of rape victims in presence of male personnel sufficiently proves how conscious our legal system is towards the dignity of victims. As laws don't include victim-friendly provisions, judicial activism remains the only solution. But the process is really lengthy and the writ filed by BLAST for banning the two-finger test is an excellent example in this regard where judgment came in 5 years.

It is really problematic that the court gives judgments after years of filing writ petitions. More shocking is that government departments don't heed the directives provided in those judgments. Suppose, in the writ petition filed by BNWLA there were ten directives and some of these (like 5, 7 and 8) can revolutionarily improve the ongoing situation. But till now, nothing has been done effectively in the light of this judgment. Relevant laws have not been amended inserting necessary provisions as proposed by the High Court Division. The district law and order committee didn't work vigilantly though directive no-5 in the BNWLA writ petition judgment. Filing a low

number of cases and increasing the rate of domestic and sexual violence proves the inaction of the district law and order committee sufficiently.

7. Findings

- a) The rate of sexual and domestic violence in Bangladesh has been alarming in recent years. But the case filing rate is very low compared to the number of incidents that have happened.
- b) There are different laws for preventing domestic and sexual violence in Bangladesh. But these laws don't ensure a victim-friendly environment after filing cases and in the trial.
- c) There are gaps in defining sexual harassment properly in enacting laws, and there is no specific law for protecting sexual harassment victims and witnesses.
- d) Usually, it takes years to conclude a writ petition, so this system is almost ineffective to check ongoing crises. After such a long time, judgment is given, but the government doesn't implement the court's directives properly.

8. Suggestions and Conclusion

Preventing domestic and sexual violence is not a matter of one day or two, rather it requires time. It also requires changing the mindset of offenders and victims as victims should be aware of their rights. Court directives may impact, but it can't stop this crime completely. As domestic violence is committed within the home, it becomes impossible for law enforcement agencies to tackle it. Implementing the following measures may change the current situation and stop this violence entirely soon.

- a) As a measure to decrease the economic vulnerability of women, government and non-government organizations should prioritize women's appointments.
- b) Parliament should make a law for victim and witness protection and amend existing laws relating to domestic and sexual violence, inserting provisions to combat different forms of violence (based on the directives of HC).

- c) The High Court Division should have a monitoring cell to watch the implementation level of its judgments (HC), especially for the sensitive writ petition judgments.
- d) Writ petitions regarding domestic and sexual violence should be heard on a priority basis, and in no case, more than 6 months should take to provide judgment.
- e) To make the trial environment victim-friendly, all cases of sexual violence (not only rape cases) should mandatorily be heard in camera.
- f) Government and NGOs should arrange different programs to raise mass consciousness against domestic violence. And they should make it clear to the viewers that beating the dependent family members is not the prerogative of bread earners, it's a crime.