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I. Introduction

Every human being is entitled to some inherent and inalienable rights, enjoyment of which is subject to non-discrimination particularly on the ground of sex. Since the inception of human civilization women all over the world have been victims of discrimination and exploitation as their rights and status are denied which result in lack of access in economic, social, educational and other fields; where gender stereotype thinking, unequal status and vulnerable position of women are primary reasons. However, UN Charter proclaimed equal rights for women, seek promotion and respect for rights without distinction particularly on ground of sex. Universal Declaration of Human Rights 1948 (UDHR) also contains equal rights for men and women without discrimination. Moreover, International Covenant on Civil and Political Rights 1966 (ICCPR) obliges States parties to ensure equal rights for women to the enjoyment of civil and political rights;¹ whereas International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) provides that States parties should ensure equality for women to enjoy economic, social and cultural rights.² Despite all these bill of rights for example: UDHR, ICCPR and ICESCR are ensuring women rights without discrimination, women have always been subjected to inequalities, subordination and grave discrimination in all sectors. Subsequently, on 1979 UN General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which came into force in 1981. CEDAW is a comprehensive treaty on the rights of women which establishes legally binding obligations upon State parties to follow the legal standards set by it to end discrimination against women by ensuring equality between men and women. In addition, CEDAW's Optional Protocol establishes procedure enabling complaints on alleged violation of the convention by State parties and an inquiry procedure allowing CEDAW Committee to conduct inquiries into serious and systematic abuses on women's human rights in country concerned. Bangladesh ratified CEDAW in 1984 and Optional Protocol in 2000³ and since then Bangladesh has been regular in submitting periodic reports to CEDAW Committee.

¹ International Covenant on Civil and Political Rights 1966, Art. 3

² International Covenant on Economic, Social and Cultural Rights 1966, Art. 3

³ Sharifa Begum. & Bangladesh Institute of Development Studies 'The CEDAW implementation in Bangladesh : legal perspectives and constraints' (2011) BIDS 2

Bangladesh has reservation in two Articles, as country has declared that it has reserved the right not to abide by these two provisions of the treaty in conformity with Article 2.1(d) of the 1969 Vienna Convention on the Law of Treaties. Bangladesh has taken qualified right of reservation as an absolute right which has been contradicting international obligation to ensure women equality and non-discrimination. Such reservations have also been contradicting fundamental principles stated in Constitution of Bangladesh along with some fundamental rights, which have been hindering in establishing equality of men and women as per obligation laid down by CEDAW as well. Government's justification is that, these Articles are conflicting with Sharia Law and Muslim Personal Laws and also against ideal of secularism. Though, as per the statement of CEDAW Committee on reservation, periodic reports submitted by State and shadow reports prepared by civil-society indicate the existence of potential for withdrawal of reservations.⁴

II. Bangladesh's Reservations on CEDAW & Causes Behind

While ratifying CEDAW Bangladesh did the same with initial reservations on Articles 2, 13(a), 16.1(c), and 16.1(f) ⁵. Later on, reservations from Article 13(a) ⁶ relating to 'the right to family benefits' and 16.1(f) relating to 'equal guardianship' were withdrawn in 1997 ⁷; however, reservations on Articles 2 and 16.1(c) are still in existence.⁸ Article 2 is seen as groundwork of the convention which is central to the objects and as a consequence its importance cannot be mistreated. Article 2 ⁹ mandates that State parties ratifies the convention by declaring their intent to enshrine gender equality into their domestic legislation including Constitution, repeal all discriminatory provisions in their laws, enact new provisions to guard women against discrimination, take legislative and administrative measures to prohibit discrimination along with legal protection for women's right, refrain

⁴Maliha Khan, 'CEDAW at a dead end in Bangladesh?' *The Daily Star* (Bangladesh, March 08, 2019); Citizens' Initiatives on CEDAW, Bangladesh (CIC-BD) 'Eighth CEDAW Shadow Report to the UN CEDAW Committee' (2016); <<http://hrlibrary.umn.edu/iwraw/shadow/bangladeshreport.htm>>

⁵Begum (n 3) 3

⁶ States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to family benefits

⁷ States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount

⁸ Khan, (n 4)

⁹CEDAW, Art.2

from taking discriminatory measures and take policy measures abolishing discrimination against women.¹⁰ Article 16.1(c) provides ‘the same rights and responsibilities during marriage and at its dissolution.’¹¹

The core reason behind such reservations provided by Government is ‘conflicted with Sharia law based on Holy Quran and Sunnah.’ Moreover, another reason cited by Government was the potential movements by the Islamic fundamentalist groups against the withdrawal of the reservations.¹² Therefore, cautious steps are being taken so as not to jeopardize application of the principles of CEDAW. Here, Government has always been cautious about religious sentiment and maintaining neutrality towards the concept of religion and to establish the ideals of secularism rather than protecting women’s human rights more efficiently by ensuring equality between men and women, and by eradicating discrimination against women in different sectors. In this regard, since 2004 lack of governments’ sufficient political will to remove the reservation is being vital cause in this regard; as safeguarding religious sentiment and keeping religious fundamentalist groups contented are indispensable to gain political benefits. Moreover, personal laws are put under light with the religious provisions of different religious faiths, which in some cases have discriminatory provisions relating to marriage and divorce, inheritance, guardianship etc.; modification of which needs agreements by the leaders of all religious faiths, and Government argues that, the society is not yet ready to accept such modification and possible repercussions of the conservative religious groups exist.¹³ Besides, deep rooted wrong conception of its own religious conceptions, practices and Sharia Law is an imperative cause behind Bangladesh’s reservations.

III. What Constitution of Bangladesh Says About Equal Rights of Women and Non-discrimination?

Article 7 of the Constitution of People’s Republic of Bangladesh establishes Constitutional Supremacy, which also refers that all powers shall be exercised in conformity of Constitution which is the solemn expression of People’s will.¹⁴ Such Article has clearly established supremacy of Constitution over Sharia Law and personal laws as well. Constitution also

¹⁰ *ibid*; Citizens' Initiatives on CEDAW, Bangladesh (CIC-BD), ‘INTERNATIONAL CEDAW DAY 2015 Withdrawal of reservation’ (Bangladesh, 3 September 2015); Convention on the Elimination of All Forms of Discrimination Against Women 1979, Art. 2

¹¹ (*ibid*.p.2.)

¹² Khan (n 4)

¹³ The Eighth Periodic Report of The Government of the People’s Republic of Bangladesh on Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), (May 2015)

¹⁴ Constitution of People’s Republic of Bangladesh, Art. 7

states number of fundamental rights which also ensures equality for women and non-discrimination; and explicitly states that any law inconsistent with the fundamental rights shall be void.¹⁵ Article 19(3) obliges State to ensure equal opportunity for women in every sphere;¹⁶ Article 27 promotes equality before law; Article 28(1) prohibits discrimination on the ground of sex; Article 28(2) ensures equal rights of women in every sphere of public life and Article 28(4) make it legal to take special provisions in favor of women. Despite these provisions proclaiming, promoting and ensuring equality for and non-discrimination against women, Bangladesh holds reservations upon Article 2 of the CEDAW¹⁷, which unboundedly crucial provision for the objects and purposes of the convention. Such reservations are also contradictory with Constitutional provisions as well.

IV. Bangladesh's Reservations; Whether Justified or Not?

In 1969 the Vienna Convention on the Law of Treaties was adopted to codify practice and provide legal guidance on the meaning of reservations and a uniform procedure for entering them; which provides that reservations may not be made that are 'incompatible with the object and purpose of the treaty.'¹⁸ Moreover, CEDAW adopts the 'impermissibility principle' contained in Article 19(c) of the Vienna Convention, which states that 'any reservation which is incompatible with the object and purpose of the treaty shall not be permitted.'¹⁹ The CEDAW Committee considers Article 2 as the core provision, as it is central to the objects and purposes of the convention and as a consequence its importance cannot be neglected.²⁰

The ground, as repeatedly claimed by Bangladesh, for such reservation is that these provisions contradict the Sharia law based on Holy Quran and Sunnah, however the contradiction hasn't been specified by Government. Bangladesh is secular in name however isn't governed by Sharia law per se; it is only the private sphere i.e. personal and family issues that are governed by the laws based on religious provisions, only in the absence of a uniform family code; which affect family and personal matters such as inheritance, marriage, and divorce.²¹ In Bangladesh, people from other religions also reside upon to whom Sharia

¹⁵ *ibid*, Art. 26(1)

¹⁶ *ibid*, Art. 19(3)

¹⁷ Khan (n 4)

¹⁸ Vienna Convention on the Law of Treaties 1969, Art. 19(c)

¹⁹ Convention on the Elimination of All Forms of Discrimination Against Women 1979, Art. 28(2)

²⁰ Samarth Trigunayat, 'Validity of Reservations of Bangladesh against Article 2 of CEDAW' (*Modern Diplomacy*, 12 November 2019) <<https://moderndiplomacy.eu/2019/11/12/validity-of-reservations-of-bangladesh-against-article-2-of-cedaw/>> accessed 1st October 2020

²¹ Khan (n 4); Citizen's Initiatives (n 4)

law isn't applicable. Other Muslim majority countries like Turkey, Yemen, Jordan, Lebanon and Kuwait have ratified CEDAW without any reservations.

Constitution of Bangladesh contains a number of provisions for ensuring women equality and eradicating discrimination; State has enacted good number of women friendly laws and policies over the last few decades. Bangladesh has been promising the withdrawal of reservation and in the 5th report during 2004 Bangladeshi representatives asserted their intention to withdraw all the reservations which was appreciated by CEDAW Committee.²² In 8th periodic report submitted in 2015, Bangladesh only portrayed its concern in withdrawal of reservation without mentioning any concrete step in this regard.²³ CEDAW Committee has been expressing its utmost concern regarding Bangladesh's continuous reservation which is indeed affecting the core object and essence of CEDAW in this region.

Though, Bangladesh had ratified the Optional Protocol to the convention, its reservations to Articles 2 and 16.1(c) has been hindering effective application of Protocol to certain rights provided for in the CEDAW. Moreover, while ratifying the Optional Protocol, Bangladesh made declaration to Article 10(1) of the Optional Protocol,²⁴ as for Bangladesh does not recognize the competence of the CEDAW Committee provided for in Articles 8 and 9 for inquiry; where Article 8 provides inquiry procedure upon receiving reliable information indicating grave or systematic violations by a State party of rights set forth in the Convention; and Article 9 provides provisions for including measures taken in response to such an inquiry in annual report. This declaration has been encumbering the inquiry procedure which is to be initiated upon receipt of information regarding grave and systematic violation of rights stated in CEDAW by State party. Women facing systematic suppression and omission of State to ensure equality for women is also regarded as discrimination as per Article 1 of CEDAW²⁵ and defilement of rights set forth in CEDAW. Number of such incidents are going without redresses, however for declaration made by Bangladesh to Optional Protocol it's not being possible for CEDAW Committee to initiate any inquiry to examine the information, pass comments or recommendations and oblige Bangladesh to take necessary measures. Inquiry

²²The Fifth Periodic Report of The Government of the People's Republic of Bangladesh on Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), (9 July 2004)

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwim_bO6r57uAhUrzzgGHWUJDxUQFjAAegQIARAC&url=http%3A%2F%2Fwww2.ohchr.org%2Fenglish%2Fbodies%2Fcedaw%2Fdocs%2Fco%2FBangladeshCO31.pdf&usg=AOvVaw17xMUt_qpFkYerLQz6GCvs>
accessed 1st October 2020

²³ The Eighth Periodic (n 13)

²⁴ https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&clang=_en

²⁵ For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field

procedure is regarded as one of the core provisions of Optional Protocol enabling CEDAW Committee to oversee the activities of State parties and thus safeguards rights of women's enshrined in CEDAW; nonetheless Bangladesh has made declaration here as well. Bangladesh has provided legislative measures of availing remedies as it has national courts e.g. Nari-o-Shishu Nirjatan Daman Tribunal, Magistrate Courts and Family Courts for providing redresses, ²⁶ however importance of inquiry by CEDAW Committee and recommendations provided thereafter which have supervisory value cannot be replaced by national legislative measures, as systematic violation of women's require some special handling.

In light of above mentioned facts, it's quite clear that Bangladesh's reservations don't seem justified, as same is causing irregularities in implementation of CEDAW properly to ensure women's equality free from discrimination. Reservations are also invalid comparing to the Constitutional provisions and other laws and practice as well.

V. Recommendations

Reservation upon Article 16.1(c) can now be removed and adaptation of comprehensive 'Uniform Family Code' can be an operative solution. Years ago, uniform family code was proposed, and even drafted by civil society organizations and such proposed code can either be used as guideline or such code can be given effect of legislation after necessary modifications (if any). Uniform family code can effectively provide scope of legally granting same rights and responsibilities to women during marriage and dissolution like men; as marital rights and responsibilities of women are governed by statutory laws to a very limited extent and in some cases they are more likely to be governed by customs which are patriarchal in nature. For instance, in case of Muslim woman her rights e.g. 'visiting her parents,' 'continuing study or job after marriage' etc. and responsibilities e.g. 'obedience,' 'maintaining fidelity and trustworthiness' etc. during marriage are governed by Sharia, rather than any statutory laws.²⁷ As a result, Muslim women face discrimination while enjoying her rights during marriage for the lack of enforceability, as these rights don't have statutory overtone and there is no Sharia Court in Bangladesh to enforce these rights. In case of responsibilities, some of them are treated as unilateral responsibilities of wife; rather these are multilateral in nature as husband and wife both are equally responsible to maintain fidelity

²⁶ HUMAN RIGHTS-8(b)Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women-New York, 6 October 1999

²⁷ Dr Muhammad Ekramul Haque- Muslim Family Law Sharia and Modern World (First Published June 2015) 96-100

and trustworthiness of their marriage. In case of rights and responsibilities during dissolution, women enjoy fewer rights unlike men despite existence of statutory laws governing the matters. In case of Hindu women, for non-existence of any codified statutory law their rights and responsibilities during marriage and dissolution are being regulated by customs which are more man-centered and thus equality is not being possible to be ensured in this regard. So, here women get deprived of same rights and responsibility, though CEDAW requires State parties to ensure the same under Article 16.1(c). Adaptation of comprehensive 'Uniform Family Code' considering all these inequalities and discriminations faced by women in this regard can provide provisions to maintain equality for women regarding their rights and responsibility during marriage and dissolution; and thus discrimination can possibly be removed.

Withdrawal of reservation from Article 2 remain a hard task for the State as high chances of protest and pressure from different religious groups remain; and such incidents occurred from time to time when attempts were taken for such withdrawal. However, in the past, government has passed laws in the domain of religious laws and these have been accepted as based on the considerations of well-being of people, society and in the larger public interest. As far contradiction with Sharia law concerns, which is the main argument of government against withdrawal, provisions of Sharia law are not immutable and are able to be reinterpreted as per the need of the time. Effective dialogues between Government and member of various religious organizations to achieve consensus on this issue is surely a compulsory pre-requisite step for moving towards withdrawal as tension of anti-withdrawal protests cannot be ignored. To some extents, withdrawal of reservations depends upon the political will of the Government, as such will play crucial role in this regard. Since 2004 State has been promising to withdraw the reservations and periodic reports have also showed the mere intention to withdraw the reservation. Now it's high time that, these promises and intention should be coupled with necessary positive actions towards the withdrawal, which shall demonstrate Government's will to actually withdraw the reservations. Moreover, Bangladesh may follow the example of other Muslims States and seek cooperation (if needed) which have ratified and implemented CEDAW in their territory without any reservation, which shall increase international relation and cooperation as well.

Article 2 of CEDAW has implied systematic obligation upon State parties including variety of measures like law reform, undertaking legal and administrative measures, institutional reform, reform in customs and practices etc. It's true that, for a State like Bangladesh it would be quite unrealistic to introduce reforms in fields of law, administration, institution and custom overnight; as conforming to the provisions of Article 2 and thus implementing the

same also require systematic steps. So far law reform concerns, Bangladesh has long ago incorporated principle of equality of men and women in Constitution along with making legislations to realize this principle in practice. Moreover, State has also passed good number of laws over the years which have prohibited discriminations against women, protected women's rights in certain fields and provided protection through national tribunals- which all are in conformity with obligations stated in Article 2 of CEDAW and such steps can be considered as creditable ones.

However, practical scenario is quite different, as when it comes to the proper implementation of these legislations the rate is poorly low, as enforcement mechanism and administration system to enforce and administer these laws effectively are sterile.

Judicial and executive sectors of country need to undergone modification which will include legal, administrative and structural development, so as to make the system better equipped and competent to ensure equality for women and abolish discrimination towards them by utilizing legislative and administrative tools in proper way. Such footstep shall be creating an environment more favorable towards ensuring equality of men and women, where discrimination against women will not exist.

When it comes to customs and practice, since earliest period our society has always been a male dominated one, where women have vulnerable position facing suppression, violence, inequality and discrimination; and such dominance of men and vulnerability of women became a custom and practice; which still exists in society despite considerable progress of women today in almost all the sectors. Misconception about religion, stereotype thinking, lack of education, dependency of women over men, socio-economic structures etc. are some reasons behind these outdated practices. It's highly necessary to change such disagreeable customs and practices and broad-minded attitude towards women should be contained by people; without which equality of men and women would be challenging to ensure. For reforming such anarchic customs and practices, which indicate women as inferior group to men- family education and practice; proper religious education eradicating misconception and orthodox thinking; institutional education teaching the necessity and way of attaining women empowerment and equality of women are much essential.

Government should focus on women empowerment from practical aspect rather than theoretical approach. Besides Government's undertakings, contribution of society, family and individuals will be much compulsory in this regard. It's necessary to ensure social and economic security for women in Bangladesh as they are rapidly heading towards empowerment; and their participation and contribution in every sphere should inevitably be recognized. In this regard, proper implementation of CEDAW shall work as effective mean to

provide harmonious environment where women's rights would be protected for their progress, along with social and economic security.

As per report of Citizens' Initiatives on CEDAW, Bangladesh (CIC-BD) which is a civil-society organization there remain potential for withdrawal of reservation subject to exclusion of some socio-cultural and economic constraints that severely restrict establishment of equal rights for women in the country.²⁸ These limitations should effectively be removed so as to create environment for such withdrawal; and in doing so appropriate legislative and administrative steps are essential to be taken by the State supplemented by initiatives of NGOs, civil-society organization and society itself.

VI. Concluding Remark

Half of the population in Bangladesh is comprised of women. Bangladesh is speedily heading towards development, however no development may be achieved and sustained keeping half population i.e., women in inequality facing substantial discrimination. Implementing provisions of CEDAW to fullest may result in effectively ensuring equal rights of women and saving them from discrimination to a satisfactory extent. However, for reservations of Bangladesh to some Articles of CEDAW it has referral value until now, resulting in women facing repression, suppression, inequality and gross discrimination in almost every sphere starting from family life to public sectors. It's high time for Government to fulfill its commitment towards women of the country, ensuring substantive equality for women and eliminating discrimination and accepting CEDAW's obligation and withdrawing the remaining reservations shall be imperative steps in this regard.

²⁸ Citizens' Initiatives (n 4)

Community-based Mediation in Bangladesh: A Pathway to Justice for the Impoverished Groups

Abstract

A significant portion of the population of Bangladesh is poverty-stricken and fails to access to the costly and lengthy justice system. Community-based mediation is one of a kind alternative dispute resolution process locally developed by some NGOs in Bangladesh by redesigning the traditional shalish. This paper is an attempt to present how community-based mediation, being supplementary to the formal justice system, is providing access to justice in an efficient manner to the impoverished groups.

Introduction

Bangladesh is one of the least developed countries in the world with approximately 22 million citizens living under the poverty line.¹ Its expensive formal justice system is burdened with about 3.7 million cases in the backlog.² In such socio-economic condition, the right of access to justice is hindered for the disadvantaged groups due to, *inter alia*, complex process, high expense, lengthy procedures, corruption, and backlogs of cases in the court.³ The situation requires an out-court supplementary justice system. To fill up the vacuum, alternative dispute resolution (ADR) is gradually becoming popular in Bangladesh. Among different types of internationally recognized ADR mechanisms, community-based mediation is a locally developed form of ADR. Mediation, as a mode of dispute settlement, has got widespread acceptability in all over the world because of its flexible, confidential, and cost-efficient nature. Despite some challenges and

¹ 'Bangladesh: Reducing Poverty and Sharing Prosperity' (The World Bank, 15 November 2018) <<https://www.worldbank.org/en/results/2018/11/15/bangladesh-reducing-poverty-and-sharing-prosperity>> accessed 7 October 2020

² Mizanur Rahman, '3.7 million cases in backlog in Bangladesh courts' *Dhaka Tribune* (Dhaka, 16 July 2020) <<https://www.dhakatribune.com/bangladesh/court/2020/07/16/bangladesh-s-courts-collectively-have-36-84-728-case-backlogs>> accessed 5 October 2020

³ Mohammad Saidul Islam, 'Efficiency and Effectiveness of Alternative Dispute Resolution Schemes Towards the Promotion of Access to Justice in Bangladesh' (2010) Vol.8 IIUC Studies <https://www.researchgate.net/publication/270116372_Efficiency_and_Effectiveness_of_Alternative_Dispute_Resolution_Schemes_Towards_the_Promotion_of_Access_to_Justice_in_Bangladesh> accessed 4 October 2020

limitations such non-government organizations (NGO) sponsored mediation process has open the door of justice for the backward communities in Bangladesh.

Understanding of Mediation

Mediation, as a mode of dispute settlement, has got widespread acceptability in all over the world because of its flexible, confidential, and cost-efficient nature. It is defined as “*a procedure based on the voluntary participation of the parties, in which an intermediary (or multi intermediaries) with no adjudicatory power systematically facilitate(s) communication between the parties with the aim of enabling the parties themselves take responsibilities for resolving their problems.*”⁴ In simple words, mediation is a dispute settlement process where two disputing parties, with the support of a neutral third party, try to come into a mutual resolution amicably through negotiation.⁵ Here the neutral third party is called a mediator and they facilitates the mediation process i.e. they play the role of a referee.

A mediator commences the discussion process and helps the parties to find reasonable solutions remaining neutral and unbiased throughout the whole process.⁶ Several modes of mediation are prevalent depending on the role of the mediator in the process.⁷ In general, a mediator cannot impose their decision on the disputants i.e. their decision is not binding on the parties but they can step in between the parties with the view to ameliorate the negotiation and to reach a mutually consensual agreement.⁸ Agreement for mediation, pre-mediation preparation and formalities, discussion and framing issues, clarifying the interests, finding of best possible solutions, evaluating the probable options for resolution, mutual agreement and follow up are the

⁴ Klaus J. Hopt and Felix Steffek, *MEDIATION: PRINCIPLE AND REGULATIONS IN COMPARATIVE PERSPECTIVE* (1st Edition, Oxford University Press 2013) 11

⁵ Dr. Jamila A. Chowdhury, *ADR Theories and Practices* (2nd Edition, London College of Legal Studies – South 2018) 83

⁶ Nishanth Maka, ‘Role of a Mediator in the Process of Mediation’ (Legal Service India) <<http://www.legalservicesindia.com/article/1819/Role-of-a-Mediator-in-the-Process-of-Mediation.html>> accessed 4 October 2020

⁷ Katie Shonk, ‘Types of Mediation: Choose the Type Best Suited to Your Conflict’ (Program on Negotiation: Harvard Law School, 7 May 2020) <<https://www.pon.harvard.edu/daily/mediation/types-mediation-choose-type-best-suited-conflict/>> accessed 05 October 2020

⁸ Christopher W. Moore, *The Mediation Process* (4th Edition, Jossey-Bass) 20

steps of a standard mediation process followed by the mediators of developed countries.⁹ However, the process of mediation varies depending on the mediator's outlining and planning.¹⁰

Evolution of Mediation in Bangladesh

The history of formal and quasi-formal mediation is not so long as that of informal mediation in Bangladesh. In Bangladesh, mediation was introduced in 1985 through the Family Court Ordinance to settle the family-related disputes outside of the courts.¹¹ However, the provisions of mediation in family matters were barely applied till 2000 when the erstwhile Chief Justice took initiative to promote mediation through pilot courts.¹² Consequently, optional provision for mediation was asserted in section 89A of the Code of Civil Procedures through an amendment in 2003 and it has been made mandatory by another amendment in 2012.¹³ In the meantime, the provision of mediation has been incorporated in several legislations and such progress has accelerated the use of mediation in civil matters.¹⁴

The usage of informal mediation is quite ancient in the rural areas of Bangladesh in the form of *shalish*.¹⁵ Customarily, *shalish* has been the prime mechanism of settling disputes in the rustic localities of the country. In traditional practice, elders and elites of the villages conduct *shalish* in resolving the disputes among inhabitants of a locality where concerning parties are present and the *shalish* members assist the disputants to reach a mutual agreement.¹⁶ Once the villagers had strong faith in the justice system because of its time and cost efficiency, and easy accessibility. However, biasness, corruption, and political interference annihilated the credibility of *shalish*.¹⁷

⁹ Chowdhury (n 5) 98-106

¹⁰ *ibid*

¹¹ Family Court Ordinance 1985, s.11-13

¹² Khaled Hamid Chowdhury, 'Future of Mediation in Bangladesh' (LCLS – South) <http://lcls-south.com/future-of-mediation-in-bangladesh/#_ftn12> accessed 03 October 2020

¹³ Md. Khairul Islam, 'Critical Review of the Court Based ADR in Bangladesh: Prospects and Challenges' (2015) 21(12) IOSR-JHSS <<http://www.iosrjournals.org/iosr-jhss/papers/Vol20-issue12/Version-4/F0201244555.pdf>> accessed 02 October 2020

¹⁴ *ibid*

¹⁵ Farmanul Islam, 'TOWARDS A BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN RURAL BANGLADESH' (2000) 4 Bangladesh Journal of Law <<http://www.biliabd.org/article%20law/Vol-04/Farmanul%20Islam.pdf>> accessed 06 October 2020

¹⁶ Dr. Sumaiya Khair, 'ALTERNATIVE DISPUTE RESOLUTION: HOW IT WORKS IN BANGLADESH' (2004) XV(!) The Dhaka University Studies <[http://journal.library.du.ac.bd/index.php?journal=DULJ&page=article&op=viewFile&path\[\]=1430&path\[\]=1370](http://journal.library.du.ac.bd/index.php?journal=DULJ&page=article&op=viewFile&path[]=1430&path[]=1370)> accessed 04 October 2020

¹⁷ Chowdhury (n 5) 64

The system has been criticized often for its barbarous and ignominious punishments.¹⁸ In the last few decades, Non-government organizations (NGOs) have redesigned the *shalish* process and turned it into a community-based mediation mechanism, which is popularly known as NGO *shalish*. Such NGO-based *shalish* i.e. community-based mediation is more effective, transparent, and well organized than the traditional *shalish*.¹⁹

Concept of Community-based Mediation and Madaripur Model

The idea of community-based mediation is not completely new in Bangladesh. It is a modified, institutionalized, and refurbished version of the traditional village *shalish* system with a more systematic mechanism. Madaripur Legal Aid Association (MLAA), a non-profit organization established in 1978 with an aim to provide legal aid, reshaped the *shalish* model and initiated community-based mediation, popularly known as Madaripur Model of mediation, with the view to ensure access to justice for the disadvantage groups in 1983.²⁰ MLAA implemented the project by forming a mediation committee at the local level; providing training on mediation, law and, human rights to the committee members; utilizing the experience, problem-solving skill, and knowledge of local influential persons through their *pro bono* service in the mediation committee; arranging mediation sessions in the localities where committee members tried to resolve the local disputes; creating social pressure for the implementation of the mediation agreement.²¹ MLAA operates its services in Madaripur, Shariatpur, and Gopalganj districts. It has mediation committees at the village and union level, and supervisory teams at the upazilla level. Strong monitoring of the mediation processes ensures a fair, standard, and trouble-free justice system for local disputes.²² Such a cost-effective mediation has not only made sure the access to justice for the underprivileged groups but also helped to reduce the backlog of cases in

¹⁸ Chowdhury (n 5) 209-211

¹⁹ Dr. Abdullah Al Faruque, 'Success, Challenges and Best Practices of Local Level Justice System' (Madaripur Legal Aid Association) <<http://mlaabd.org/wp-content/uploads/2018/03/Success-Challengesbest-practices-DR.-FARUQ.pdf>> accessed 05 October 2020

²⁰ Stephen Golub, 'A MEASURE OF CHOICE: A STRATEGIC REVIEW OF THE MADARIPUR LEGAL AID ASSOCIATION'S CURRENT IMPACT AND POSSIBLE FUTURE DIRECTIONS' (Madaripur Legal Aid Association) <<https://mlaabd.org/wp-content/uploads/2018/03/MLAA-evaluation-Report-of-S.Golub-Correction.pdf>> accessed 06 October 2020

²¹ *ibid*

²² 'Community-based mediation as an auxiliary to formal justice in Bangladesh: the Madaripur Model of Mediation (MMM)' (Namati, 2003) <<https://namati.org/wp-content/uploads/2015/12/PRI-ADR-Community-based-mediation-as-auxiliary-to-formal-justice-in-Bangladesh.pdf>> accessed 07 October 2020

the formal courts. It is noteworthy to mention that all the mediation committee members provide service voluntarily.

MLAA has settled more than 50,000 disputes²³ and their success rate is approximately 80 percent.²⁴ Such achievement of MLAA has encouraged several other NGOs to follow the same path as its outcome quite better than providing legal assistance for litigation when the aim is to ensure access to justice. At present, besides MLAA, a number of NGOs are providing community-based mediation service, procedures might vary slightly, under various titles in different regions of Bangladesh.

Generally, after the recording of the complaint, enlisted mediators send notice to the respondent mentioning the details of the complaint and invites him to attend the mediation session in order to resolve the dispute on a particular date and time at a specific place. The plaintiff and mediation committee are also invited correspondingly. The respondents are given second or third chances via a notice to resolve the dispute through mediation in a case where they do not respond on first notice. It is also stated in the notice that if the respondent does not respond even after receiving the final notice, the NGO will file a case in the court on behalf of the complainant. Usually, respondents contact the nearest office of the NGO after getting the notice and all the parties attend the mediation sessions following the procedures. If the parties are succeeded to reach a mutual resolution, mediators write down the agreement and execute it by maintaining formalities.²⁵

The major difference between *shalish* and community-based mediation is that the feature of win-lose outcome in arbitration is prevalent in *shalish* and it imposes the decision on the parties whereas community-based mediation focuses more on a win-win result and let the parties decide the end-result themselves. Therefore, disputants prefer community-based mediation because of its comparatively more egalitarian feature.²⁶

²³ Ibid

²⁴ Golub (n 20)

²⁵ Chowdhury (n 5) 212

²⁶ Khair (n 16)

Status Quo of Community-based mediation in Bangladesh

In the last few decades, several NGOs have started community-based mediation services at the root level in addition to their legal aid projects. At present, Bangladesh Rural Advancement Committee (BRAC), Bangladesh Legal Aid and Services Trust (BLAST), *Ain-o-Shalish Kendro* (ASK), *Bachte Sekha*, *Nagorik Uddyog* are the leading NGOs who are conducting community-based mediation in their own model without altering the basic concept developed by pioneer Madaripur Legal Aid Association (MLAA). BLAST has resolved more than 15,000 disputes all over the country since 2003 and it provides mediation service to the slum dwellers of Dhaka through Gopibagh Legal Aid Clinic project.²⁷ *Ain o Shalish Kendra* is providing mediation service since 2002 through their three legal clinics situated in Dhaka and they basically mediate family and child related matters.²⁸ ASK is also working with BRAC in the Legal Aid Project (LAP) where mediation service is provided at the village level in civil matters.²⁹ MLAA mediates around 800 disputes every year and they have extended their service in 11 more districts.³⁰ Although these services of different NGOs are not recognized by any statute, such initiatives are playing a commendable role in reducing the backlog of cases in the formal courts as well as ensuring access to justice to the common people.

Community-based Mediation & Access to Justice

Cost effective

One of the major barriers for the impoverished groups to access to justice is the high cost to run a suit in the formal court. In the socio-economic perspective of Bangladesh, pleader's remuneration, court fees, travel cost, and other miscellaneous expenditure makes the formal justice system quite expensive and burdensome for the underprivileged people.³¹ On the

²⁷ 'LEGAL AID' (Bangladesh Legal Aid & Services Trust) <<https://www.blast.org.bd/whatwedo/our-programmes/legal>> accessed 06 October 2020

²⁸ 'Mediation and Rapid Response' (Ain o Shalish Kendra)<<http://www.askbd.org/ask/mediation-and-rapid-response/>> accessed 07 October 2020

²⁹ Md. Abdul Alim and Tariq Omar Ali, 'NGO-shalish and Justice-seeking Behaviour in Rural Bangladesh' (BRAC Research Report, November 2007)

³⁰ Activity Report of Madaripur Legal Aid Association (2018)

³¹ Dina Siddiqi, 'Paving the Way to Justice The Experience of Nagorik Uddyog, Bangladesh' (ResearchGate, 2003) <https://www.researchgate.net/publication/237507702_Paving_the_Way_to_Justice_The_Experience_of_Nagorik_Uddyog_Bangladesh> accessed 08 October 2020

contrary, cost effectiveness is one of the prime features of community-based mediation.³² In most of the cases NGOs do not take any fees for mediation and legal assistance in the process. Moreover, it also saves transportation costs as mediation sessions usually take place in the locality of the disputants.

Time efficient

Formal courts are already burdened with backlogs of cases and justice seekers wait for years to get justice.³³ Such a situation increases mental stress, frustration and financial loss of the litigants, and eventually discourages filing a suit in the court.³⁴ Community-based mediation delivers justice quicker as well as contributes to reducing the caseloads of the courts.³⁵ In practice, several sessions are required to settle a dispute through community-based mediation which takes weeks or months, depending on availability of parties and mediators.³⁶

Flexibility in procedures

Formal court procedures in Bangladesh are complex and rigid. Justice seekers struggle to understand the procedure and largely depend on the lawyers to get justice. On the other hand, community-based mediation functions with simple procedures and more participatory.³⁷ Literacy is not a barrier to understand the mediation process. Hence, it lets the parties resolve their own disputes and have control over their own fate.³⁸

Low possibility of corruption and biasness

The community-based mediation process is structured in a way by the NGOs so that accountability and transparency are ensured.³⁹ Moreover, the whole process is documented and parties voluntarily take decision and the mediation committee has no decision making or imposing power.⁴⁰ Therefore, there is the least possibility of corruption or biasness in community-based mediation.

³² Khair (n 16)

³³ Rahman (n 2)

³⁴ Siddiqi (n 31)

³⁵ Khair (n 16)

³⁶ Golub (n 20)

³⁷ Chowdhury (n 5) 212

³⁸ *ibid*

³⁹ Faruque (n 19)

⁴⁰ Chowdhury (n 5) 64-65

Empowering women and securing women justice

The traditional *shalish* used to be male dominated and gender biased.⁴¹ And due to social stigma in rural areas, women hesitated to go into the formal court to seek justice. As a result, women remained silenced to the injustices that happened to them. In such situation, community-based mediation has given them the opportunity to raise their voice and access to justice in a confidential manner.⁴² NGOs are also providing legal advice to them and the presence of women mediators is also emphasized. Therefore, women from disadvantaged groups prefer community-based mediation because of the comfortableness of the process and easy access.⁴³

Ensuring social harmony and peace

The outcome of the formal justice system and traditional *shalish* is a win-lose situation i.e. at the end of the process on party wins the case and another loses. It grows a bitter relation and rivalry between the parties and in some cases, it disrupts harmony in the society when both parties are from same locality. On the contrary, the outcome of mediation is a win-win situation as both parties reach a mutual agreement which secures relations between the parties. As a result, the co-existence of the two parties protects the harmony in the society and keeps the peaceful environment in the locality.⁴⁴

Enhancing awareness about legal rights

As the inhabitants of the locality get the chance to observe the mediation process or they can get the experience of being a disputant party or mediation, they get the firsthand knowledge of legal rights and remedies. Moreover, NGOs are also providing training to the local; mediation committee which gives them the opportunity to know not only about mediation but also about law and human rights. Consequently, these people become aware of their legal rights especially women are most benefited from the knowledge as they used to remain silent to the injustices due to the shortage of legal knowledge about their rights.⁴⁵

⁴¹ *ibid* 214

⁴² Khair (n 16)

⁴³ *Human Security in Bangladesh: In Search of Justice and Dignity* (UNDP, 2002)

⁴⁴ n 30

⁴⁵ Khair (n 16)

Challenges of community-based mediation

Community-based mediation has become quite popular at the root level because of its benefits and easy access to justice. However, the biggest challenge is that the mutual agreement of resolution is not legally binding on the parties.⁴⁶ Though NGOs take proper steps of documentation of the process and the parties voluntarily reach the agreement and signatures are also taken, such agreement is not enforceable under any law. It is a barrier to the effectiveness of community-based mediation. As per the annual report of MLAA, 85 percent agreements made parties abides by and are getting full remedy and 10 percent agreements made parties are not abides by.⁴⁷ Another challenge is maintaining the standard of the mediation process. At present, several NGOs are providing the mediation service but there is no national level coordinating body and raising problem due to non-coordination.⁴⁸ Further, the training curriculum is not uniform for all the NGOs. Therefore, there is room for doubt about maintaining the same standard of the mediation process.

Probable solutions to the challenges

If the challenges of community-based mediation are resolved, it can be an effective manner to ensure access to justice for the impoverished groups of the society. The following are the probable solutions to the challenges. *Firstly*, the main challenge will be resolved if the mediated agreement can be made legally enforceable. The government may create a legal mechanism to make the mediated agreement legally binding on the parties. It would eventually enhance the efficacy and effectiveness of community-based mediation as the parties would be obliged by law to abide by the agreement. *Secondly*, a national level body should be established to monitor and co-ordinate the mediation service of different NGOs. Such initiative would ensure transparency and minimum standard of mediations under different NGOs. Moreover, it would prevent the overlapping of jurisdiction on the same dispute. *Thirdly*, A uniform training curriculum should be prepared in order to maintain the standard of mediation and to assure the equal capacity of the mediators under different NGOs.

⁴⁶ Chowdhury (n 5) 218

⁴⁷ n 30

⁴⁸ A.K. Mohammad Hossain, 'A Mapping of Legal Aid Sector in Bangladesh' (UNDP, 2015)

Conclusion

Community-based mediation is a ray of hope for the justice seekers who are not able to access to the formal justice system due to expensive, lengthy, strenuous procedures. And it is more pro-women, transparent, neutral, formalized, and effective than traditional *shalish*. In this process, the parties voluntarily come to an agreement and there is more chance of the execution of the agreement. However, community-based mediation has a way to go in order to ensure access to justice to all the disadvantaged groups. Funding is a big issue in the expansion and sustainability of the process. And importantly, it has to be remembered that community-based mediation is not the alternative or replacement of the formal justice system, rather it supplements to the mainstream court system. Government and NGOs have to take an integrated approach to reach the service of community-based mediation to every corner of the country with a view to make it a supplementary pathway to justice for the impoverished groups.

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'Forced Prostitution and Human Trafficking in Bangladesh: A Critical Analysis of Legal and Infrastructural Framework'

1. Introduction

Labeled as 'Modern Slavery' human trafficking is a crime against humanity¹ which undermines the rule of law and threatens the political foundation of a nation. It is an organized crime involving different actors and it violates a plethora of basic human rights as enshrined in the universal human rights documents which includes but is not limited to the right to life², right to liberty and security, right to freedom of movement,³ right to be free from gendered violence and right to social security and right to adequate standard of living.⁴ The United Nations Office of the High Commissioner for Human Rights addresses that there must be three key elements present in a situation of a trafficking in person.⁵ The three key elements consist of action, means and purpose.⁶ Actions refer to the recruitment of persons who are intended to be trafficked, means refer to either threatening or coercing the person who will fall victim to the act of trafficking and purpose refers to the exploitation of the victim in question in various form such as forced prostitution, forced labor,

¹Tom Obokata, 'Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System' [2005] 54(2) The International and Comparative Law Quarterly 445-457.

² Kara Abramson, 'Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol' [2003] 44(2) Harvard International Law Journal 473; Antonio Cassese, The Rome Statute of the International Criminal Court: a Commentary, (1st edition, Oxford University Press, 2002) 353-378.

³ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art.3, art.13.

⁴ *ibid* art.25; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁵ UNHCR, United Nation Human Rights Office of the High Commissioner, Human Rights and Human Trafficking Fact Sheet no. 36 UN Doc E/2014.

⁶ *ibid*.

subjugation and removal of organs. According to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, when all of these elements are present in a situation only then trafficking in person occurs.⁷ This protocol notes the difference of trafficking from migrant smuggling and also clarifies that any consent acquired when the three key elements are present does not amount to any consent at all.⁸ In Bangladesh the lion's share of the victims of trafficking are women and mostly underage girls.⁹ According to the recent 2019 report, among these women most of them are sold and forced into prostitution pursuant to internal or external trafficking where the destinations include Southeast Asia, India, Pakistan and Gulf states.¹⁰ The act of human trafficking is marginally a global problem where operations and interests of various nation states are at stake. However, predominantly it is the responsibility of Bangladesh to curb the growing manifestation of forced prostitution and human trafficking which can be subdued by implementing proper actions and by bringing change in terms or endeavors, policies and undertakings.

2. The Magnitude of forced prostitution and human trafficking in Bangladesh

From the different assorted reports from nongovernmental organizations and other international human rights groups the escalation in recent cases of human trafficking for forced prostitution can be distinguished and these reports paint a scenario which needs immediate attention. The 2019 trafficking in persons country report of Bangladesh by the United States department of state puts

⁷ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, UNGA Res 55/25) art. 3(a).

⁸ *ibid* art. 3(b).

⁹ Bangladesh Country Report, 2016 Combating Human Trafficking, Public Security Division Ministry of Home Affairs Government of the People's Republic of Bangladesh Dhaka, Bangladesh.

¹⁰ Dr Fraser Murray and others, 'Study on Modern Slavery in Bangladesh' [2016] 3(5) DFID 3.

Bangladesh in tier two watch list.¹¹ Bangladesh is now housing almost a million of undocumented Rohingya refugee's most of who have arrived here before 2017.¹² The arrival of a large population of 700,000 Rohingya put forth a substantial challenge towards the government of Bangladesh. Undocumented and unsolicited, these people who have escaped near death situations were only looking for a better living situation which cannot be provided in the refugee camps of Chattogram and Cox's Bazar. As a result, they became easy prey of the trafficking rings and actors who lured in a lot of them by manifesting the dream of a better future. Various rackets operating from different countries have been growing in the border areas adjacent to the refugee camp and not only Rohingya girls but also Bangladeshi girls are being trafficked for sex in countries like Malaysia, Kathmandu, India and Thailand.¹³ Sometimes, these girls are even traded for sex online by the criminal rackets. Since 2016 after the arrival of Rohingyas the percentage of trafficking women for forced prostitution has increased to sixty-one percent.¹⁴ The growing number and cluster of people around the border actually created an opportunity for trafficking rackets to operate more efficaciously since the law enforcement authority had their hands full with the waves of refugees coming in. Besides external trafficking, the internal trafficking also saw a rapid increase as Rohingya girls were trafficked to the capital from the refugee camp.¹⁵ The criminal rings often

¹¹ Country Narratives, Trafficking in Persons Report: Bangladesh, 2019, Office to Monitor and Combat Trafficking in Persons, US Department of State, <<https://www.state.gov/reports/2019-trafficking-in-persons-report-2/bangladesh/>> accessed 26 September 2020.

¹² *ibid.*

¹³ Zia Chowdhury, 'How Rohingya girls are trafficked as prostitutes' *The Business Standard* (Dhaka, 12 February 2020) <<https://tbsnews.net/bangladesh/crime/how-rohingya-girls-are-trafficked-prostitutes-44067>> accessed 26 September 2020.

¹⁴ Jahiru Islam and Md Zahir Ahmed, 'Recent Human Trafficking Crisis and Policy Implementation in Bangladesh' [2018] 3 *Journal of Social Advancement* 275-291.

¹⁵ Dr Fraser Murray and others, 'Study on Modern Slavery in Bangladesh' [2016] 3(5) DFID 3.

take the Rohingya women from the refugee camp at night, force them into prostitution and return them in the camp the next morning.¹⁶ The refugees are highly vulnerable to human trafficking since their stateless status acts as a major impediment in securing a standard life and thus they are prone to the deception and deceitfulness of the criminal rackets.¹⁷ According to varied reports, increase in the existent demand has been noted among Bangladeshis and foreigners for child sex tourism which has over the years created a vast market of forcefully sexually exploiting minor Rohingya and Bangladeshi girls in the border areas.¹⁸ This phenomenon is termed as ‘reverse trafficking’ where instead of trafficking children; pedophiles visit the countries which are vulnerable to trafficking.¹⁹ Observing the recent reports and news it is evident that forced prostitution and human trafficking has reached to a magnitude which is alarming to say the least and it is perceptible that there lies problems within the system for it to reach to such an exponential extent.

3. Understanding the problem and the causation

To minimize the problem the initial step is to understand the causation and factors that triggered this situation in the first place. The problem of human trafficking is a response to the multi-tiered mishandle of a wide range of factors which involves the socio-economic dynamics of a region.

¹⁶ Country Narratives, Trafficking in Persons Report: Bangladesh, 2019, Office to Monitor and Combat Trafficking in Persons, US Department of State, <<https://www.state.gov/reports/2019-trafficking-in-persons-report-2/bangladesh/>> accessed 26 September 2020.

¹⁷ Ms Amrita Bishwas, ‘Human Trafficking Scenario in Bangladesh: Some Concerns’ [2015] 1(4) International Journal of Humanities & Social Science Studies 85.

¹⁸Country Narratives, Trafficking in Persons Report: Bangladesh, 2019, Office to Monitor and Combat Trafficking in Persons, US Department of State, <<https://www.state.gov/reports/2019-trafficking-in-persons-report-2/bangladesh/>> accessed 26 September 2020.

¹⁹ Ms Amrita Bishwas, ‘Human Trafficking Scenario in Bangladesh: Some Concerns’ [2015] 1(4) International Journal of Humanities & Social Science Studies 85.

Bangladesh, much like any other country is prey to the mismanagement and colligation of the actors that profit primarily from forced prostitution; predominantly subjected to vulnerable women and children.

3.1 Push and pull and actor-factor nexus

Push and pull factor is one of the main element which makes the victims susceptible to fall prey to the scheme of the traffickers. The push factors consist of the impulse of escaping from economic destitution, dysfunctional family and social exclusion.²⁰ These situations push the victim to believe the false claims that the criminals make which acts as the pull factor. The pull factors in this scenario are incorrect promises for a job, a better life, work environment and the security of a good income which pulls the victims into the trap set by the trafficking rackets.²¹ It shall be noted that the trafficking and forced prostitution of women are not an autonomous occurring rather different actors and factors are closely connected. The global market and demand in the sex industry is one of the vital points for increase of this dynamics.²² The rise of the demand creates the need of the supply and establishes a lucrative business module for the criminals to invest in. From the arrested gang members who have been working with the sex trafficking ring RAB reported that each women and children are sold for at least 22,000 to 25,000 Malaysian Ringgit if they are being

²⁰ Md Muhibur Rahman, 'Human Trafficking: A Security Concern for Bangladesh' [2011] 9 Bangladesh Institute of Peace and Security Studies 1.

²¹ Country Narratives, Trafficking in Persons Report, 2010, Office to Monitor and Combat Trafficking In Persons, US Department of State 75-77 <<http://www.state.gov/g/tip/rls/tiprpt/2010/142759.htm>> accessed 26 September 2020.

²² Sumon Corraya, 'Prostitution and forced labour: trafficking in human beings in Bangladesh' *Asia News* (Dhaka, 26 February 2015) <<http://www.asianews.it/news-en/Prostitution-and-forced-labour:-trafficking-in-human-beings-in-Bangladesh-33572.html>> accessed 26 September 2020.

trafficked to Malaysia.²³ The prospects of this criminal activity have been on the rise creating a market which consists of a large number of actors simultaneously fueling, elevating and augmenting the problem. There are also various macro factors like unemployment, trade policies, migration policies, sex tourism, vulnerability to environmental disasters in coastal areas are at work which contributes to part of the problem.

3.2 Vulnerability of women and children in the face of deceit

The worst form of trafficking in Bangladesh is the exploitation of women and children by integrating them forcefully in the commercial sex industries. The action of trafficking is predominantly a gendered violation because of the supply and demand dynamics and implications of the predicament of women in the society. Women and children are specifically vulnerable to forced prostitution and human trafficking because of the gender dynamics of Bangladesh and the feminization of poverty.²⁴ Since they experience poverty more intensely than men and are systematically placed in a lower tier than men they become vulnerable to the remunerating offers from the trafficking rackets.²⁵ Since particularly women in Bangladesh in essence own far less assets than men and also are struggling in terms of skills development because of inaccessibility to education and resources. Most of the women trafficked consist of adolescent girls since they

²³ Kamil Ahmed, 'Rohingya women, girls being trafficked to Malaysia for marriage' *Al Jazeera* (Kuala Lumpur, 8 May 2019) <<https://www.aljazeera.com/features/2019/05/08/rohingya-women-girls-being-trafficked-to-malaysia-for-marriage/?gb=true>> accessed 26 September 2020.

²⁴ Md. Ruhul Amin and Md. Rashidul Islam Sheikh, 'Trafficking Women and Children in Bangladesh: A Silent Tsunami of Bangladesh' [2011] 2(4) *Journal of Economics and Sustainable Development* 202.

²⁵ Corrine Redfern, 'The living hell of young girls enslaved in Bangladesh's brothels' *The Guardian* (London 6 July 2019) <<https://www.theguardian.com/global-development/2019/jul/06/living-hell-of-bangladesh-brothels-sex-trafficking>> accessed 26 September 2020.

can be manipulated easily and their vulnerability is used by thoughtless criminal who use to procure dividend.²⁶

3.3 The Rohingya Question

Bangladesh has not ratified the 1951 Refugee Convention²⁷ and either has ratified any of the two Statelessness Conventions.²⁸ This implies that Rohingyas living in Bangladesh are deprived of any status and are not protected under any international instrument which binds Bangladesh.²⁹ Moreover, since there are no domestic laws governing the refugees Rohingyas are completely unprotected.³⁰ Despite some protection granted by the Constitution of Bangladesh³¹ Rohingyas are not subjected to other legal protection. Since most of the Rohingyas living in the refugee camp is undocumented it is very hard to identify or track the missing persons who are being subjected to forced prostitution and human trafficking let alone taking actions against these abominations.³² This is one of the primary reasons for rise in the human trafficking and sex exploitation of the Rohingyas who have taken refuge in Bangladesh.³³ As a result the trafficking rings are expanding

²⁶ Hasan Ui Haider, 'Dynamics of Trafficking in Women and Children' [2013] 54(4) The British Journal of Criminology 700.

²⁷ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150.

²⁸ Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117; Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175.

²⁹ Ashraful Azad, 'Legal Status of the Rohingya in Bangladesh: Refugee, Stateless or Status Less' [2016] 13 Equal Rights Trust 57.

³⁰ Carl Grundy-Warr and Elaine Wong, 'Sanctuary under a Plastic Sheet –The Unresolved Problem of Rohingya Refugees' [1997] 5(3) IBRU Boundary and Security Bulletin 81-85; Imtiaz Ahmed, *The Plight of the Stateless Rohingyas: Responses of the State, Society & the International Community* (The University Press Limited, 2010).

³¹ Constitution of Peoples' Republic of Bangladesh art.31, 33-34.

³² United Nation High Commission for Refugees, The UN Refuge Agency, 'Bangladesh: Analysis of Gaps in the Protection of Rohingya Refugees' 2017.

³³ *ibid*

their business and growing their reach and it is directly affecting the citizens of Bangladesh becomes a hub for ‘sex tourism’ and ‘reverse trafficking’.

4. National framework for prevention, protection and punishment

Trafficking is strictly prohibited in Bangladesh. In terms of national framework for persecution Bangladesh has various legislations enacted which contains some tough laws and if implemented properly can help diminish the complication on a national level. However, when it comes to protection and prevention there are implementation complications and along with proper administrative oversight.

4.1 Laws and policies at force in order to tackle the problem

The latest enacted law the Prevention and Suppression of Human Trafficking Act, 2012 is applause worthy action on part of the government to prevent and punish human trafficking. This Act criminalized sex trafficking and other forms of trafficking by introducing harsh punishments such as five years to lifetime imprisonment and a fine not less than 50,000 taka.³⁴ There are provisions for organized crime of human trafficking,³⁵ for importing or transferring for prostitution,³⁶ for keeping brothels,³⁷ for threatening the victim³⁸ and even for filing false complaint against anyone.³⁹ Overall this legislation is very well made and deserves appreciation for its critical

³⁴ The Prevention and Suppression of Human Trafficking Act, 2012, s. 6(2).

³⁵ *ibid* s. 7.

³⁶ *ibid* s. 11.

³⁷ *ibid* s. 12.

³⁸ *ibid* s. 14.

³⁹ *ibid* s. 15.

standpoint. Moreover, the rules under this law were also formulated later by 2017. Before the enactment of the Prevention and Suppression of Human Trafficking Act, 2012 the crimes of human trafficking were persecuted under the Women and Children Repression Prevention Amendment Act, 2003.⁴⁰ Moreover, the Suppression of Immoral Trafficking Act, 1993, was adhered to provide stringent penalties for forcing women into prostitution⁴¹ and the Anti-terrorism Ordinance of 1992 listed the abduction of women and children a punishable offence as a type of terrorism.⁴² Besides these legislations, traffickers could also be punished under the Penal Code, 1860.⁴³ The 2012 prevention Act successfully combined the laws which were disseminated among various legislations and assembled them under the umbrella of one legislation for the betterment of execution. Besides this commendable undertaking, Bangladesh launched a National Action Plan for five years in 2018 ranging to 2022 for combating and preventing the crime of human trafficking.⁴⁴ This exhibits that Bangladesh indeed has commendable amount of legislations and policies to combat forced prostitution and other forms of human trafficking, the question remains as to why the problem still persists discernable and at such an alarming rate. Despite taking up all

⁴⁰ Sourav Madhur Dey, 'Women & Children Trafficking in Bangladesh: Historical Significance & Current Challenges' [2016] 1(9) UPBIL 68.

⁴¹ Dr. Sarasu Esther Thomas, 'Responses to Human Trafficking in Bangladesh, India, Nepal and Sri Lanka' [2011] United Nations Office on Drugs and Crime. <https://www.unodc.org/documents/human-trafficking/2011/Responses_to_Human_Trafficking_in_Bangladesh_India_Nepal_and_Sri_Lanka.pdf> accessed 26 September 29, 2020.

⁴² Ruhi Ruh Afza, 'Human Trafficking in Bangladesh: An Overview' [2003] 25(4) Journal of Asian Affairs 49.

⁴³ The Penal Code, 1860, s. 34, s. 107-120, s. 120A, s. 120B.

⁴⁴ Kamrul Hasan, 'Five year NPA for fighting human trafficking launched' *Dhaka Tribune* (Dhaka, 3 December 2018) <<https://www.dhakatribune.com/bangladesh/event/2018/12/03/five-year-mpa-for-fighting-human-traffickinglaunched>> accessed 26 September 2020; 'Implement the National Plan of Action to prevent human trafficking' *The Business Standard* (Dhaka, 20 September 2020) <<https://tbsnews.net/bangladesh/migration/implement-national-plan-action-prevent-human-trafficking-135445>> accessed 26 September 2020.

these policies questions remain as to why Bangladesh is still at tier two watch list of United State Government for the third consecutive year.⁴⁵

4.2 Lack of implementation and other drawbacks

The complications are embedded in the lack of the implementation of the rules and regulations, not the rules and regulation itself. Firstly, under the 2012 prevention Act there does not exist any tribunal, which is required by law for trying cases under this Act but has not been established till date.⁴⁶ The women and children violence protection tribunal has been hearing cases under the 2012 prevent Act in the interim period which is creating pressure on this special tribunal where presiding judges were not even trained before handling such cases. The government does have training facilities for police and law enforcement agencies in order to tackle human trafficking but no training facilities have been set up for implementation of the rules under the 2012 prevention Act which were disseminated in 2017.⁴⁷ Many law enforcement officials still cannot distinguish between human smuggling and trafficking, creating a gap in the investigation and persecution process.⁴⁸ There have been reports from international organizations about the involvement of some law enforcement officials and local politicians with the trafficking rings and according to the

⁴⁵ Country Narratives, Trafficking in Persons Report: Bangladesh, 2019, Office to Monitor and Combat Trafficking in Persons, US Department of State <<https://www.state.gov/reports/2019-trafficking-in-persons-report-2/bangladesh/>> accessed 26 September 2020.

⁴⁶Mehedi Al Amin, 'Human trafficking cases: No tribunal in six years, conviction rate less than half percent' Dhaka Tribune (Dhaka, 21 April 2019) <<https://www.dhakatribune.com/bangladesh/nation/2019/04/21/human-trafficking-cases-no-tribunal-in-six-years-conviction-rate-less-than-half-percent>> accessed 26 September 2020.

⁴⁷ Country Narratives, Trafficking in Persons Report: Bangladesh, 2019, Office to Monitor and Combat Trafficking in Persons, US Department of State <<https://www.state.gov/reports/2019-trafficking-in-persons-report-2/bangladesh/>> accessed 26 September 2020.

⁴⁸ Tasneem Tayeb, 'Trafficking in Rohingya: Exploiting the desperate' *The Daily Star* (Dhaka, 7 December 2019) <<https://www.thedailystar.net/opinion/closer-look/news/trafficking-rohingya-exploiting-the-desperate-1836772>> accessed 26 September 2020.

United State Government Report police arrested a law enforcement official allegedly recruiting two young girls for trafficking and sex exploitation.⁴⁹ A significant decrease in the victim protection and identification efforts can be seen.⁵⁰ There has been a lack of co-operation with NGOs who work in this particular sector. However some assistance of temporary shelters were given by the police which is a commendable effort but the policies guidelines from the government are lacking and these were only set up on the own accord of the local police departments. Prostitution is a legal profession as per the ruling of the high court case,⁵¹ however, keeping brothels or transferring for prostitution is illegal according to the 2012 prevention Act. This legality is sometimes discernable from the illegality and hard for the police to differentiate between the acts. Hence, the police let the brothels operate apart from occasional raids. This is another problem in regards to the women who are internally trafficked and entered into forced prostitution to be able to seek help while remaining in the hands of the perpetrators.

As discussed before, because of the statelessness and lack of status for the Rohingya women and lack of identification most of these women cannot be protected when they fall victim to the prey of the trafficking rings. Although, government has increased law enforcement officials in the adjacent area of the camp along with the configuration of biometric registration for some of them has been ensured and few international organizations are given access to the infrastructure of the camps but it is still not enough to protect these refuges since reports of Rohingya women being

⁴⁹ Country Narratives, Trafficking in Persons Report: Bangladesh, 2019, Office to Monitor and Combat Trafficking in Persons, US Department of State <<https://www.state.gov/reports/2019-trafficking-in-persons-report-2/bangladesh/>> accessed 26 September 2020.

⁵⁰ SM Nazmus Sakib, 'Bangladesh: 22 Rohingya detained before trafficked' *Anadlou Agency* (Ankara, 21 January 2020) < <https://www.aa.com.tr/en/asia-pacific/bangladesh-22-rohingya-detained-before-trafficked/1708930>> accessed 26 September 2020.

⁵¹ *Bangladesh Society for the Enforcement of Human Rights (BSEHR) and others vs. Government of Bangladesh and others* (2001) 53 DLR (HCD).

trafficked keep on appearing in media. Proper documentation and creation of checklist along with including awareness raising programs may be able to minimize the problem at hand.

In regards to the prevention method the action plan contains various efforts such as inter-ministerial committee for overseeing the implementation of the plan and investigation the increase of trafficking in the refugee camps however, fruition of these policies are yet to be seen and some of these policies heavily rely upon the effort of international organizations and NGOs rather than setting up administrative oversight. Meanwhile reports suggest the lack of funding in terms of awareness raising programs and victims referral to care.⁵²

5. International obligations subjected to Bangladesh and the complications within

The biggest obstacle in terms of international obligations is that Bangladesh is not a party to the Protocol to Prevent, Suppress and Punish Trafficking in Persons,⁵³ Especially Women and Children and UN Convention against Transnational Organized Crime.⁵⁴ However, Bangladesh is a party to Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),⁵⁵ SAARC Convention of Preventing and Combating Trafficking in Women and Children for Prostitution 2002 and SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia. Since Bangladesh is not a part of the protocol several

⁵² Country Narratives, Trafficking in Persons Report: Bangladesh, 2019, Office to Monitor and Combat Trafficking in Persons, US Department of State <<https://www.state.gov/reports/2019-trafficking-in-persons-report-2/bangladesh/>> accessed 26 September 2020.

⁵³ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, UNGA Res 55/25).

⁵⁴ Women and Children and UN Convention against Transnational Organized Crime (adopted 8 January 2001, UNGA A/RES/55/25).

⁵⁵ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981 UNGA A/RES/34/180) 1249 UNTS 13.

objectives of it which could have been able to help Bangladesh combat the forced prostitution and human trafficking are not subjected to obligation. Firstly, the newly enacted domestic laws and rules are able to give proper definitions and are able to persecute the criminals. However, the laws and rules are lacking to some extent in regards to the protection and assistance of the victims. Moreover, the third objective of promoting co-operation among the state parties cannot be fulfilled because of the non-ratification of Bangladesh. The existing domestic legal framework also do not address the repatriation and rehabilitation of the victims of human trafficking and it is one of the aspects which needs much work and would have created an obligation on Bangladesh if it was party to the Protocol to Prevent, Suppress and Punish Trafficking in Persons. Since Bangladesh is surrounded by the borders of Indian territory from three sides and Indian law enforcement agencies stationed in the border treat the victims of trafficking as smuggled individuals, the return of victims become somewhat impossible, co-operation measures detailed in Article 9 are unattainable and taking border measures is unachievable since Bangladesh is not party to the protocol.⁵⁶ Since, forced prostitution and human trafficking is a global problem where various nation states are involved Bangladesh should ratify the relevant important international legal documents if they want to ensure co-operation in order to fight against the obstacle of human trafficking presented in front of them.

6. Suggestions and policy recommendations

There are indeed some impediments when it comes to handling the forced prostitution and human trafficking problem of Bangladesh and there are specific areas which need to be worked on. The

⁵⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, UNGA Res 55/25) art. 9, art. 10, art. 12.

policy recommendations for reducing forced prostitution and human trafficking are suggested below:

- Ratification of Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and UN Convention against Transnational Organized Crime for creating a common blueprint in terms of collaborative effort.
- Setting up the tribunal under the Prevention and Suppression of Human Trafficking Act, 2012 so that, the issues are dealt by judges who are sensitized with gender issues.
- Introduction of training program for the criminal justice system including, law enforcement officials the public prosecutors and the judicial officers in order to ensure the implementation of the Prevention and Suppression of Human Trafficking rules, 2017.
- The state must take back the victims who have been trafficked to other countries and emphasis should be put on the protection of the victims after rescue. This whole process should be gender sensitive and more effort should be put in rehabilitation of the victims.
- Documentation of Rohingya refugees and biometric registration for all of them should be ensures to keep the population in check and increasing the dispatch of law enforcement officials in the adjacent areas of Rohingya camps.
- Strongly persecute and investigate the police and border guards who have been involved in the corruption and implement rule of law so that the officials adhere to their responsibilities properly
- Awareness building from root level of the community and mass education program for disseminating knowledge about forced prostitution and human trafficking.

- Create opportunities and construct resources for women to lift them up from extreme poverty. Train and equip them with knowledge to empower and get rid of their vulnerability.

7. Conclusion

Legislations, policies and regulations only look good on paper but amount to nothing if they are not properly administered and implemented. The effort that Bangladesh is making in tackling the forced prostitution and human trafficking complication is visible but unfortunately is not enough. It needs to be understood that, when a problem like this takes root in the community it spreads like a cancer. It is the duty of the state to make sure that the gremlin is butchered from the root, especially when it can easily heighten its ascendancy. A reform in terms of implementation and execution in addition to some changes in the policy along with a nationwide awareness raising campaign can be triumphant in terms of handling this predicament. Since, Bangladesh has wholeheartedly opened the door for the Rohingya refugees it falls under their solemn duty to protect the life and liberty of these people and the Constitution of Bangladesh indicates such duty to be the responsibility of the state. Therefore, Bangladesh needs to accrete and put its affairs in order for robustly fighting against this circumstance which can easily be compared to modern day slavery.

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Gender Balance in Marital life: Possibilities in Islam

Introduction

Marriage is a contract in Islam; not a pure civil contract, rather a contract of civil nature. One of the basic features of a contract is the insertion of terms and conditions. Therefore, a marriage contract also contains this fundamental feature. Muslim women are more vulnerable than Muslim men in several Muslim or non-Muslim countries. Due to some patriarchal traditions and conservative societal views, women are often suppressed and are less likely to protect their rights in a marital life. Thus, insertion of stipulations is more important for women than men to protect their interests.

The rights and duties of both husband and wife have been determined by *Sharia Law* where it states that, a husband has immense level of power over his wife's movement. On the other hand, a wife is always obligated to be obedient towards her husband. The *Sharia* has also opened up a scope for obtaining gender balance and an option for women to control the excessive power of husband through inserting stipulations in marriage contracts. This paper will be focusing on how gender balance can be established in marital life by inserting stipulations in a marriage contract between spouses to be and examples of several countries ensuring gender equality with the use of stipulations in marriage contracts. Furthermore, it will also be addressing the situation of rights of women and gender balance in marital life in Bangladesh and how it can be improved.

Securing Gender Balance through Inserting Stipulations

Gender balance can be ensured by stipulating some fundamental rights of women in marriage contracts. Power to divorce, restricting husband from polygamy, equal or proportional division of property, right to reside in father's residence after marriage are some of the stipulations that a woman can insert in her marriage contract before marriage and ensure gender balance in marital life.

1. POLYGAMY

Even though Islam permits a man to have four wives,¹ however, it contains certain conditions or special circumstances whereby which one can be able to have four wives. Islam neither promoted polygamy nor introduced it. Rather it restricted unlimited numbers of marriage by a man by limiting the number of having wives to only four. Polygamy interpreted by Islam is an exceptional circumstance whereas, monogamy is the rule.² In specific circumstances polygamy can be performed in Islam. In the Holy Quran it has been mentioned that:

And if ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; But if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess. That will be more suitable, to prevent you from doing injustice.³

However, sometimes the concept of polygamy is used as an excuse by men. Sometimes men treat this power as unconditional and as an absolute privilege. The *Sharia* mentions nothing regarding polygamy for women rather women are bound to stay obedient towards their husbands. And hence, the only option left for them regarding marriage is marrying one man at a time and being obedient. Thus, it creates gender inequality. However, a woman can restrict his husband from having another wife by inserting this clause in her marriage contract. If there is a stipulation in the marriage contract that the husband shall never entertain polygamy, the wife will have the right to repudiate the marriage if he breaches the condition. Furthermore, according to section 6(1) of MFLO, 1961,

No man, during the subsistence of an existing marriage, shall, except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage contracted without such permission be registered under the Muslim Marriages and Divorces (Registration) Act, 1974.⁴

As per Bangladeshi statutory Law, a polygamous marriage shall be entertained after obtaining the permission from the Arbitration Council rather than from the existing wife. The Council can give permission even if the existing wife does not consent to the new marriage.⁵ Therefore, by inserting

¹ The Holy Qur'an Sura 4, Verse 3

² Amira Mashhour, 'Islamic Law and Gender Equality: Could There Be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt' [May, 2005] Vol. 27, No. 2, pp. 562-596

³ The Holy Qur'an Sura 4, Verse 3

⁴ Muslim Family Laws Ordinance, 1961 s.6(1)

⁵ Dr Muhammad Ekramul Haque-Muslim Family Law Sharia and Modern World (June 2015) 222

a stipulation by the woman regarding the restriction of the man having more than one wife and regarding the pre-requisite of obtaining her permission before entertaining second marriage in the marriage contract will definitely ensure gender equality in their marital life.

2. WIFE'S RIGHT TO DIVORCE

The scope for dissolving a marriage by a wife is nearly impossible unless wife sacrifices or compromises her dower or some amount of monetary compensation or seeking help from judiciary.⁶ However, if the husband delegates the power of terminating the marriage to the wife only then the marriage can be terminated by her.

The delegated power of terminating the marriage from a husband to his wife is called Talaq-e-tafwid. The only way of acquiring this power is by inserting a stipulation regarding the delegation of power to divorce in the marriage contract. In *Sainuddin vs. Latifannessa Bibi* case, the husband agreed with the stipulation in their marriage contract of not marrying a second wife without the consent of his first wife. The first wife left her husband since he breached the stipulation of the contract by marrying a second wife. The Court accepted the validity of the dissolution of marriage by the first wife and dismissed the suit of the husband regarding restitution of conjugal rights.⁷ The reason behind the verdict was that the contract was valid and the husband violated a stipulation of a valid contract.

3. RESIDENCE

Another kind of stipulation a wife can insert is the place of residence. The wife can add a clause in the contract that her husband will not make her leave her home. As mentioned above, men have immense power over the movement of his wife. Hence, he has an absolute power of choosing the place of residence according to his will.

Here comes the question of "wife's obedience". However, the **Jordanian Law of Personal Status, 1976** states that the husband can choose the place of residing but also added that as long as there

⁶ Ibid.p,3

⁷ Lucy Carrol, 'Talaq-i-Tafwid and Stipulations in a Muslim Marriage Contract: Important Means of Protecting the Position of the South Asian Muslim Wife' [1982] Vol. 16, No. 2, pp. 277-309

is no stipulation to the contrary in the marriage contract.⁸ Therefore, a woman can refuse to go with her husband by using this stipulation. And if he refuses to give her maintenance due to being disobedient, the wife can use this stipulation as a defense and can even repudiate the marriage contract if the husband does not comply with the stipulation. Therefore, restricting the immense power of men by inserting stipulation regarding place of residence can also secure gender balance in marital life.

4. PROPERTY REGIME

Generally a wife gets 1/4th of property if the deceased leaves no child and 1/8th if there is any child.⁹ However, a wife gets nothing when the marriage is dissolved. Stipulations regarding division of property acquired during the time of marriage period can ensure a better economic life for women. The **Moroccan Law (Mudawanna), 2004** has identified property regime for women where the spouse shall be entitled to get a portion of his whole property which has been acquired during their marriage. Since the property was acquired by the effort of both the husband and the wife hence, the wife is surely entitled to get a portion when the marriage dissolves. Although the wife might not show her effort directly but for the level of support and assistance she accorded during her marital life acquiring those property, she unquestionably deserves a portion of those property. **Iran** has also mentioned about the stipulation regarding wealth acquired during marriage stating that it will be divided in half on divorce.¹⁰ This scope has also been accepted by several other countries. Hence, deciding property regime through inserting stipulation in marriage contract will protect the economic interest of women and keep a balance between both the parties.

How gender balance through stipulation in marriage contract been introduced in different countries

India is one of the countries which had significant reformations and is still trying to reform the existing conservative religious views in the country. Starting from *Mohammad Ahmed Khan vs*

⁸ Lynn Welchman, 'Special Speculations In the Contract Of Marriage :Law And Practice In The Occupied West Bank' [1994] pp. 55-77

⁹ Dr, Muhammad Ekramul Haque, Islamic Law of Inheritance Rules and Calculations (2009) 50-51

¹⁰ Dr Muhammad Ekramul Haque, Muslim Family Law Sharia and Modern World (June 2015) 133

Shah Bano Begum (1985) to several other verdicts the Supreme Court upheld the women's rights and still trying to pursue gender balance in the country. From the ancient period when women interests were not recognized, maintenance was not an absolute right, thus marriage contract used to play a vital role in that regard. In the case of *Muhammad Muin-ud-Din vs Jamal Fatima 1921*, maintenance was given for longer period only if it was stated in the marriage contract.¹¹ In *Muhammad Ali Akbar vs Fatima Begum 1929* the Lahore High Court upheld the agreement between a husband and his wife where the husband accepted the stipulation of not taking second wife and the first wife shall be entitled to utilize the power of Talaq-e-tafwid or reside separately.¹² Contract pursuing gender balance with the help of inserting stipulations is considered to be an evidence regarding dissolution of marriage by the wife, restituting maintenance or any other right of women nowadays in India.

In **Pakistan**, marriage contract and stipulations given by the wife or both the parties have been recognized as a significant document. In *Muhammad Zaman vs Mst Irshad Begum, 1967*, the Lahore Court rejected the argument by the husband that the marriage contract was void because it opposed to public policy. However, rejecting the husband's suit for restitution of conjugal rights, the Lahore Court was clearly enforcing the terms of the contract entered into by the spouses. If there were no agreement between the spouses, the wife would never have been able to successfully obtain maintenance from her husband while living separately.¹³

Sudan has taken many initiatives eradicating conservative perspectives of Islam through reformation in Sudan's Personal Law. For the purpose of improving the condition of women in public sphere or even in military, Sudan is emphasizing on equal rights between men and women.¹⁴ A woman can give her consent to a marriage contract made by her *wali* or guardian. She can even refuse to consummate the marriage through court procedure if any of the condition is violated. However, the **Alternative Family Law (2009-2012)** of Sudan protects the women's interests and for eradicating the ambiguous duty of women being obedient suggested some changes. For

¹¹ Narendra Subramanian, 'Legal Change and Gender Inequality: Changes in Muslim Family Law in India' [2008] Volume 33, Issue 3, 631-672

¹² Lucy Carrol, 'Talaq-i-Tafwid and Stipulations in a Muslim Marriage Contract: Important Means of Protecting the Position of the South Asian Muslim Wife' [1982] Vol. 16, No. 2, pp. 277-309

¹³ Ibid

¹⁴ Chr. Michelsen Institute, *Family law reform in Sudan: Competing claims for gender justice between sharia and women's human rights* (Samia El Nagar and Liv Tønnessen, CMI report, number 5, December 2017)

example, a stipulation to choose her husband and making a contract of marriage without the consent of any male guardian and a stipulation regarding wife's right to divorce on equal terms in judicial method are two most unique practices in Sudan.

In **Egypt**, marriage contract with stipulations was considered to be pessimism or a negative thing. The male-dominated society and the patriarchal customs, traditions influenced the religious aspect of Egypt. But in recent years, marriage contracts including stipulations are considered appropriate unless it is prohibited in Islam.¹⁵ Moreover, the latest format of marriage contract in Egypt included a white piece of paper for inserting stipulations by the spouses in the marriage contract.¹⁶ And thus, the interests of women can be protected easily by adding the necessary terms and conditions in favor of them to ensure gender equality.

The Personal Status Code in **Tunisia** is based on Quran and Sunnah and focused on gender equality. Tunisia has mentioned about marriage contract stating that the spouse can add anything in their marriage contract as stipulations. The marriage can be nulled if any of the stipulation is not implemented.¹⁷

Morocco has also modified their codified law where they inserted stipulations forbidding polygamy and corroborated that the wife has the right to terminate the marriage due to polygamy.¹⁸ Nevertheless, the Moroccan Law has mentioned about a scope where the spouses can decide about the property regime.¹⁹ The women will get a portion of wealth acquired during their marital period.

In **Bangladesh**, there is no specific law regarding insertion of stipulations in marriage contract. However, there is a form recognized as marriage contract named as the Kabinnama²⁰ where the spouses can insert appropriate stipulations. Column 17 contains an immense scope for obtaining gender balance since it mentions about any special conditions if the husband or wife wants to insert as valid terms of marriage. Column 18 talks about the probability of delegated power of divorce to the wife from husband. These columns have options of inserting stipulations in favor of the wife

¹⁵ Amira Mashhour, 'Islamic Law and Gender Equality: Could There Be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt' [May, 2005] Vol. 27, No. 2, pp. 562-596

¹⁶ Dr Muhammad Ekramul Haque, Muslim Family Law Sharia and Modern World (June 2015) 114

¹⁷ Ibid

¹⁸ Moroccan Code of Personal Status, 1958

¹⁹ Dr Muhammad Ekramul Haque, Muslim Family Law Sharia and Modern World (June 2015) 133

²⁰ The Muslim Marriages and Divorces (Registration) Rules, 2009

especially in column 17. However, Bangladesh as a male-dominated country, discourages women from adding stipulations and women are certainly unaware of the column or even the idea of inserting stipulations in marriage contracts in Bangladesh. If the people of Bangladesh utilizes the marriage contract or the Kabinnama appropriately, the possibility of securing gender balance will surely be increased.

Recommendations

Islam always refers to gender equality. The customs, traditions and patriarchal views of several countries tend to demean the position of women in Islam. However with certain necessary steps women can acquire their rights. For instance, stipulation regarding divorce, polygamy, dower, maintenance, study, work, separate residence or any other conditions which are suitable for the wife can be inserted.²¹ Through the binding effect upon these stipulations and the whole contract, gender balance can definitely be ensured in Islamic world. In the context of Bangladesh, some important recommendations can be given for protecting women rights in marital life. Those are:

- Making the female population aware of the column 17²² of Kabinnama²³
- Stipulation can be inserted in column 18²⁴ where delegation of power to divorce by wife is under a condition. The wife can give the condition like,
“If there is any difference of opinion between the spouses, the wife shall have the right to dissolve the marriage”.
- Making people aware of the scope of inserting stipulations regarding the protection of female rights
- Legal definition and specific provisions regarding marriage contract and insertion of stipulations in the contract should be made
- Attaching an annexure regarding the list of stipulations with the marriage contract or Kabinnama

²¹ Dr Muhammad Ekramul Haque, Muslim Family Law Sharia and Modern World (June 2015) 137-138

²² Ibid p. 535

²³ The Muslim Marriages and Divorces (Registration) Rules, 2009

²⁴ Ibid.536

- The Quazi will read out before the marriage that women have the right to insert stipulations, because most women in our country are unaware of this fact

By using the opportunity of insertion of stipulations in marriage contract, Muslim women can effectively ensure gender balance in their marital life.

Conclusion

This paper is to accumulate the important aspects of marriage contract with regard to protecting women interests and to establish a better atmosphere for the women by guaranteeing gender balance in their marital life. Islam has always emphasized on justice. Hence, gender equality by ensuring women's rights, principles and justice is one of the core elements of Islam. Muslim women should utilize the scope of inserting stipulations in marriage contracts for protecting their rights. Bangladesh as a patriarchal country needs to take more initiatives to ensure gender balance in marital life.

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Inheritance Rights of Women in Bangladesh: A comparative analysis between Muslim and Hindu Personal Laws

1. Introduction

People's Republic of Bangladesh, a secular nation¹ as enshrined in the Constitution² adheres to uniform laws when it comes to the aspects of everyday life except, the subject of family matters. Disputes in regards to family matters in Bangladesh are governed under personal laws of the individual;³ which means that the religious laws shall come into play while determining the distribution of property of the deceased or while determining the inheritance rights of an individual. This particular state of affair is largely celebrated since it strengthens the liberty of the citizens to perform their religious duties according to the scriptures that they follow and practice their freedom of choice. However, there remains a substantial grey area in regards to the fact that most of these religious laws are discriminatory in part or as a whole when it comes to the inheritance rights of women.⁴ As a result of difference in the ideology of contrasting religions the women are awarded different proportion in terms of inheritance as per the religious texts. The only common phenomena about these proportions is that most of the time the shares of women are drastically less or virtually non-existent in comparison to the men.⁵ Even while distributing the

¹ *Mohammad Tayeeb and Others v Government of The People's Republic of Bangladesh* 23 BLT (AD) 10; where fatwa was deemed as only an opinion and of no legal value and the court upheld that the citizens are governed under secular laws.

² The Constitution of Peoples' Republic of Bangladesh, art. 12.

³ Issa Khan, Md. Faruk Abdullah, Noor Naemah Abdul Rahman, and Mohd Yakub Zulkifli Bin Mohd Yusoff, 'The right of women in property sharing in Bangladesh: Can the islamic inheritance system eliminate discrimination?' [2016] 5(1) Springer 1695.

⁴ Shah I Mobin Jinnah, "Land and Property Rights of Rural Women in Bangladesh" [2013] 1 CDA 10.

⁵ Md. Raisul Islam Sourav, 'Unjust Land Right of Women in Bangladesh' [2015] 1(3) IRJIMS 5.

little to no amount of share to women; very minimal control is ensured over the property they own because of the patriarchal values, discriminatory attitudes and dominating nature of the society. This in turn creates a butterfly effect in regards to the development and empowerment of women while they remain less influential in the familial and societal premise because of not owning as much property as men and the root of this problem lies in the divergent religious laws which govern the inheritance and property rights in Bangladesh.

2. Inheritance Rights in Islam

Inheritance rights of Muslims⁶ in Bangladesh are governed under the Shariah Law.⁷ Laws like the Muslim Family Law Ordinance, 1961 (MFLO) have been enacted later which slightly revised the Shariah Laws in regards to distribution of the property.⁸ However the core concept of Al-Faraid warranted by the Quran and Sunnah remains unchanged.⁹ According the Faraid concept the shares of the heirs of a deceased are calculated on the basis of the financial responsibilities of the genders and the receivers' relations with the deceased.¹⁰ The Muslim scholars around the world believe and advocate that the Quranic verses do justice to the women in terms of inheritance because men

⁶ Where 89% are Muslims; Nurul Alam and Barkat-e-Khuda, 'Demography of Muslims and Non-Muslims in Bangladesh' [2011] 40(1) Demography India 163.

⁷ The Muslim Personal Law (Shariat) Application Act, 1937, s. 2.

⁸ Muslim Family Law Ordinance, 1961, s. 4.

⁹ Noor Mohammad 'Islamic Law & Women Rights in Bangladesh' [2013] 2(2) Social Sciences 22.

¹⁰ Tafsir Ibn Kathir, *Commentary of the Qur'an*, (2nd Edition, Dar Tayyabahvol, 1999).

have more financial responsibilities than women¹¹ in terms of providing Mahr¹² and Nafaqaah.¹³ However, in the modern times, in context of Bangladesh where this disparity is used against women and whereas in various circumstances women are designated more responsibilities but in the end are treated poorly the justification of awarding them less in terms of inheritance becomes fickle.

2.1 Incongruity and Imbalance

If we look at the Shariah Law in terms of inheritance the disparity between men and women becomes manifest. Shariah law regarding inheritance deals with myriad categories of sharers and complex calculations¹⁴ but if we simply analyse the Quranic verses which directly commands the distribution of the property the imbalance is evident. According to the Shariah Law daughter and son of the deceased get property on a 2:1 ratio which means that, daughter will receive half of the portion of the son.¹⁵ If the deceased does not have any son only then the daughter will receive half of the property and if the daughters are more than one in number then they will receive two-third of the property collectively.¹⁶ In regards to the spouse of the deceased the wife is entitled to quarter of the property of the deceased, if no child is left behind; but if there is a child between the deceased and his wife then the wife is entitled to one-eighth of the property.¹⁷ The husband of the deceased,

¹¹ Basha MQ. Al-Ahkum, Al-shariyyah fi Al-Ahwal Al-Shaqeshiyyah, (Egypt: Daru al-Salamah, 2006) ; Quran 4:34.

¹² Mahr is the obligation, in the form of money or possessions paid by the groom, to the bride at the time of islamic marriage; Jassas A, Ahkamu al-Quaran, (3rd Edition, Beirut: Daru Ihyah al-Turas al-Arabi, 1984).

¹³ Nafaqaah is the financial support a husband must provide for his wife during marriage and for a time after divorce; Imam-Al-Shafi, Fatah al-Qadir (5th Edition, Dar al-kutub al-Ilmiyah, 2003).

¹⁴ Asaf Ali Asghar Fyzee, Outlines of Muhammadan Law, (4th Edition, Oxford University Press, 1974).

¹⁵ *ibid*; Quran 4:11.

¹⁶ *ibid*.

¹⁷ Quran 4:12.

on the other hand, is entitled to one-fourth of the property of the deceased and the husband is entitled to half of the property of the deceased if there is no offspring between them.¹⁸ These are the provisions in regards to the nearest relations of the deceased. However, proportionality of all of the other relations in regards to entitlement of inheritance is similarly polarised.¹⁹ The mother, sisters, granddaughters and grandmothers are all either entitled to an amount of portion which less than their male counterpart or are excluded from inheritance via the ‘Doctrine of Exclusion’.²⁰ The only significant revision in Shariah Law is made through the enactment of Muslim Family Law Ordinance, 1961 Section 4. This particular provision gives rights to the orphaned grandchildren of the deceased to receive the same proportion as their parents would have if they were alive.²¹ This section overrides and violates Shariah Law through introducing the concept of “Doctrine of Representation” by giving the grandchildren the same status as their parents.²² Without this concept the grandchildren of the deceased are completely excluded from the inheritance rights based on the doctrine of exclusion based on the nearness of the degree of relationship with the deceased.²³ It is on one hand a very progressive and equitable step on the part of the legislators for diminishing the disparity in terms of both grandchildren of the deceased. However, on the other

¹⁸ *ibid.*

¹⁹ Issa Khan, Md. Faruk Abdullah, Noor Naemah Abdul Rahman, and Mohd Yakub Zulkifli Bin Mohd Yusoff, ‘The right of women in property sharing in Bangladesh: Can the Islamic inheritance system eliminate discrimination?’ [2016] 5(1) Springer 1695.

²⁰ Mohammad Hossain and Tisdell Clement, ‘Closing the gender gap in Bangladesh: inequality in education, employment, and earnings’ [2005] 32(5) IJSE 439.

²¹ Muslim Family Law Ordinance, 1961, s. 4.

²² A.W.M Abdul Huq, ‘Section 4 of the Muslim Family Laws Ordinance, 1961: A Critic’ [2010] 1 NUJL 7.

²³ Issa Khan, Md. Faruk Abdullah, Noor Naemah Abdul Rahman, and Mohd Yakub Zulkifli Bin Mohd Yusoff, ‘The right of women in property sharing in Bangladesh: Can the Islamic inheritance system eliminate discrimination?’ [2016] 5(1) Springer 1695.

hand, it does not really help the women in getting equitable shares since as grandchildren proportion awarded to women still remain complexly different and less than that of men.²⁴

2.2 Reducing the Gap through other Property Rights

The gap and disparity between the proportion awarded to men and women in regards to the inheritance law in Shariah law does create divergence but that does not mean that only inheritance can give women control over property. There are other property rights which can in fact be used as a tool to bring in a certain level of impartiality in terms of property rights of Muslim women in Bangladesh. Through the provisions of Hiba or gifts and Wasiyat or Wills Muslim women can be given rights over property without infringing any Quranic verses or Shariat.²⁵

2.2.1 Wasiyah

Wasiyah or Wills are normally governed in Bangladesh by the Succession Act, 1925, but Shariah Law also applies in terms of disparity.²⁶ Will is a legal declaration of how a person wants his property to be distributed after death and according to Shariah Law only one-third of the property can give awarded by Will.²⁷ Quranic verses and Sunnah gives complete liberty to the testator or maker of the Will to decide the legatee or the person who is going to receive the Will property.²⁸ Hence, if only the testator is willing women can be awarded property through Wills and by doing

²⁴ Benjamin G. Bishin and Feryal M. Cherif 'Women, Property Rights, and Islam' [2017] 49(4) Comparative Politics 501.

²⁵ Asaf Ali Asghar Fyzee, *Outlines of Muhammadan Law*, (4th Edition, Oxford University Press, 1974).

²⁶ The Succession Act, 1925, s. 4.

²⁷ Aqil Ahmad, *Mohammedan Law*, (26th Edition, Central Law Agency, 2016).

²⁸ *ibid.*

so they can be awarded a similar amount of property as men inheritors. Since there is no provision to direct otherwise, distributing property to women inheritors and reducing the crevice of disparity is not erroneous under the Muslim personal Laws.

2.2.2 Hiba

Similarly like Wasiyah, Hiba or gift can be another alternative to shorten the gaps among the men and women inheritors. Under Muslim personal law a person can make a gift at any point of their life to any person they ought to.²⁹ However, an individual can only gift one third of their whole property and the gift becomes effective right after the registration of this gratuitous transfer.³⁰ Hence, through Hiba if a person is willing to then they can award women some amount of property which can further facilitate to their property rights and put them at par with men. Nonetheless, this depends on the willingness of the distributor of the property.

3. Inheritance Rights in Hindu Law

The Hindu citizens³¹ in Bangladesh are governed under the Dayabhaga school of Hindu law as opposed to the Hindu citizens in India who are governed under the Mitakshara school of Hindu law.³² When it comes to inheritance there is not many circumstances where a women can inherit

²⁹ Dinshah Fardunji Mulla, Principle of Islamic Law, (10th Edition, The Eastern Law House, 2008).

³⁰ *ibid.*

³¹ 9% of the whole population, Moinuddin Haider, Mizanur Rahman and Nahid Kamal, 'Hindu Population Growth in Bangladesh: A Demographic Puzzle' [2019] 6(1) Journal of Regional Demography 123.

³² Mahua Zahur, 'Hindu Women's Property Rights: Bangladesh Perspective' [2016] 11(1) BRAC University Journal 79.

properties from the deceased and even when they can their control over that property can be limited in discrete circumstances.³³

3.1 Disproportionate Ideology of Exclusion

According to the Dayabhaga school of Hindu law a daughter is excluded from inheritance of father's property if the father has a son or grandson or great-grandson or wife.³⁴ If the above relationships do not exist, then the unmarried daughter will be able to inherit the deceased's property.³⁵ However, widow daughter, daughter with no son or if barren then they are completely excluded from inheriting any property from their father.³⁶ In case of the mother of the deceased having a son or grandson or great-grandson or wife excludes her from being entitled to any property whatsoever.³⁷ If the deceased only leaves a widow and a daughter then the daughter will inherit the property only after the passing of the widow, since in the lifetime of the widow, the widow remains entitled to the property of her husband.³⁸ The only woman who is not excluded from inheritance of the deceased's property is the wife or widow of the deceased. The inherited property of the deceased is managed under the "Women's Estate".³⁹ Besides the women's estate, the women in Dayabhaga School of Hindu law may obtain "Stridhana". These systems and ideology of exclusion goes on to speak volumes about the Hindu women's inheritance and overall

³³ Rafiqul Huda and Nilufer Raihan Ahmed, 'Female Status in Bangladesh' [1980] 46 Bangladesh Institute of Development Studies 176.

³⁴ Mahua Zahur, 'Hindu Women's Property Rights: Bangladesh Perspective' [2016] 11(1) BRAC University Journal 79.

³⁵ R. K. Agarwal, Hindu Law, (26th Edition, Central Law Agency, 2019).

³⁶ N. H. Jhabvala, Principles of Hindu Law, (17th Edition, Jamandas and Company, 2016).

³⁷ Shanaz Huda, 'Combating Gender Injustices: Hindu Law in Bangladesh' [2011] 4 SAILS 10.

³⁸ Rameshwar Dayal Agarwal, Hindu Law, (Sri Sai Publications, 2002).

³⁹ *ibid.*

property rights in Bangladesh. The inconsistency and disproportion of the provisions will become much clearer as we further analyse the provisions of Women's Estate and Stridhana.

3.2 Women's Estate

As discussed, only the widow of the deceased or the wife can get a share of the property of the deceased along with the daughter of the deceased.⁴⁰ Before, according to the customary Dayabhaga rules the inherited property was awarded after deducting the Stridhana from the same but after the enactment of The Hindu Women's Right to Property Act, 1937 widows are entitled to property of their husband without deducting Stridhana.⁴¹ If the deceased does not leave any Will, then the widow or widows collectively will receive the same share as a son.⁴² If the deceased leaves only a grandson and their son are predeceased then both of them will get the same share as if the son were alive.⁴³ However, the interest in those properties is limited to a widow's lifetime meaning that there remains a bar on alienation of such property.⁴⁴ Unchastity is a ground for exclusion of widows from inheriting the property of their husband.⁴⁵ Moreover, upon remarrying Hindu women has to cease their claim on their deceased husband's property.⁴⁶ However, in the case of *Nurun Nabi Mondal and others Vs. Joynal Abedin Khondkar & ors*, the court held the opinion that remarrying in the same caste of previous husband and prevalent customary proof of the validity of

⁴⁰ Mahua Zahur, 'Hindu Women's Property Rights: Bangladesh Perspective' [2016] 11(1) BRAC University Journal 79.

⁴¹ Hindu Women's Right to Property Act, 1937, s. 3.

⁴² *ibid.* s. 3(3).

⁴³ *ibid.* s. 3(1).

⁴⁴ *Nurun Nabi Mondal and others Vs. Joynal Abedin Khondkar & ors* 1977 6 CLC (AD).

⁴⁵ R. K. Agarwal, *Hindu Law*, (26th Edition, Central Law Agency, 2019).

⁴⁶ Hindu Widows' Remarriage Act, 1856, s. 2; *Saudamini Roy Malakar vs. Narendra Chandra Barman* 4 DLR 492.

remarriage in the said caste can induce non-forfeiture of the inherited property of the former husband.⁴⁷ This progressive ruling does give women who are re-marrying in the same caste a sense of justice however, does not provide any recourse to women who are marrying out of caste in any case.

3.3 Stridhana

Stridhana is the property designated to Hindu women by their father before the nuptial fire or at the time of her marriage according to the Hindu scriptures.⁴⁸ However, according to Hindu customary laws Stridhana includes property given to the women by their father and other relations before and after marriage.⁴⁹ But, the inherited properties and gifts from strangers do not include in the Stridhana according to the Dayabhaga School.⁵⁰ The rights over Stridhana depend on the status of the women. The women can have absolute rights over Sudayika⁵¹ Stridhana which is obtained in the maidenhood but not over Non-Sudayika⁵² Stridhana which is obtained after marriage. This is the reason a lot of parents of Hindu women tend to give their daughters dowry before her marriage because that is the only property they have absolute rights over.⁵³ Nevertheless gifting

⁴⁷ *Nurun Nabi Mondal and others Vs. Joynal Abedin Khondkar & ors* 1977 6 CLC (AD).

⁴⁸ Manusmriti IX: 194.

⁴⁹ Rameshwar Dayal Agarwal, *Hindu Law*, (Sri Sai Publications, 2002).

⁵⁰ Ferdousi Begum, 'Revisiting Hindu Women's Right to Property in Bangladesh: Absolute Interest v. Limited Interest' [2018] 15 SSRN 23.

⁵¹ Whatever is obtained by a married or unmarried girl, from the husband or parents, at the husband's or father's place, is called saudayika; R. K. Agarwal, *Hindu Law*, (26th Edition, Central Law Agency, 2019).

⁵² All other properties which are not saudayika are called non-saudayika; R. K. Agarwal, *Hindu Law*, (26th Edition, Central Law Agency, 2019).

⁵³ Ferdousi Begum, 'Revisiting Hindu Women's Right to Property in Bangladesh: Absolute Interest v. Limited Interest' [2018] 15 SSRN 23.

women the property before her marriage depends on the outlook and desire of the family, since there is no binding laws the Hindu women in most cases are deprived of any property rights.

4. The Disproportion and the Attempts of Harmony

It is very apparent from the discussion that the amount of property women gets in Bangladesh has polarity because of using personal laws. Muslim women however are entitled to more property and inheritance rights than Hindu women as per their personal laws. Needless to say that both of these factions of women are deprived, but the Hindu women are placed far away from ever receiving equal rights as Hindu men. Although without violating any religious scriptures or laws women of both religions can be awarded equal right for Muslim women through Wasayah and Hiba and for Hindu Women through Stridhana. These provisions of gifts and Wills can be used to facilitate the women of their property rights however since giving women property through these recourses are not mandatory and depends on the individual, most of the society is not ready to give women control over any property. For example, in 2011 the government of Bangladesh wanted to include equal property rights for women through Clause 25(2) of the Women Development Policy, 2011 which did not violate any direct verses of Quran.⁵⁴ However this attempt resulted into a nationwide strike by different powerful religious faction of the society and the government had to abandon the idea.⁵⁵ This particular incident shows how the society itself is not ready to give women equal property rights. Although there are possible ways of closing the gap⁵⁶ because of the patriarchal culture prevailing in Bangladesh women are being deprived. However, some landmark

⁵⁴ Kaberi Gayen, 'Equal Property Right' *The Daily Star* (Dhaka, 8 March 2019) <<https://www.thedailystar.net/star-weekend/news/equal-property-right-1711810>> accessed 15 August 2020.

⁵⁵ *ibid.*

⁵⁶ By using alternative property rights than inheritance; Benjamin G. Bishin and Feryal M. Cherif 'Women, Property Rights, and Islam' [2017] 49(4) *Comparative Politics* 501.

judgements on Fatwa⁵⁷ do give a ray of hope for Muslim women as they desist the misinterpretation of Shariah law to various extents but otherwise the situation remains despairing.⁵⁸

5. Conclusion

The inheritance laws in Bangladesh being based on personal Laws on one hand give the citizens the right to observe their religious obligations but on the other hand go against the spirit of the Constitution which confirms equal right for men and women in every sphere of life.⁵⁹ The personal laws themselves being very different on the basis of religions add in to the polarity and disparity in contrast to the men in the society. In Muslim laws the women are given more opportunity to inherit whereas in Hindu law the opportunity is almost virtually non-existent. However, it is observed that despite of having more rights in terms of inheritance than Hindu women, Muslim women in reality cannot in various cases claim those rights. The reason being the systematic exclusion of women in Bangladesh from controlling properties regardless of the religion they adhere to. Since, as discussed before it is not impossible to give women the equal property rights through Wills and gifts. It can be said that the only tool that is holding the society back from giving our women equal property rights is not religious laws, but the patriarchal belief system that has been fuelling and controlling the modus operandi of this country.

⁵⁷ *Editor, The Daily Banglabazar Patrika v District Magistrate and Deputy Commissioner Naogaon* 21 BLD (HCD) 2001; where fatwa by a mullah was considered illegal about shariah laws; *Mohammad Tayeeb and Others v Government of The People's Republic of Bangladesh* 23 BLT (AD) 10; where fatwa was deemed as only an opinion and of no legal value.

⁵⁸ Shah I Mobin Jinnah, "Land and Property Rights of Rural Women in Bangladesh" [2013] 1 CDA 10.

⁵⁹ The Constitution of Peoples' Republic of Bangladesh, art. 10, 19(1), 19(2), 27, 28, 29.

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Medical Malpractice in Bangladesh

1. Introduction

Doctors act like protector when it comes to medical emergencies and this is why we treat them as saviors next to God. Referred as the father of western medicine, Hippocrates said, “Whenever a doctor cannot do good, he must abstain from doing any harm.”¹ According to the World Medical Association Declaration of Geneva, 1948, the health of the patient is a doctor's first consideration and it is solemnly pledged by every medical professional.² Deviation from such professional conduct may result in medical malpractice or medical negligence, which is spreading in an alarming rate in our country. Medical malpractice, refers to negligence arising when medical or healthcare professionals, while dispensing treatments or services, fall below the accepted medical standard of care, breaching their duty that is owed to the patients admitted under their supervision, resulting the patient to suffer injury or even death.³ The subject matter has been defined by various writers⁴ and it may also include:

1. Holding yourself out as a specialist which you are not;
2. Disregarding a standard procedure of dispensing treatment, i.e. not signing the consent form;
3. Prescribing tests and medicines for personal gain and interest; and
4. Many more.

After heart disease and cancer, medical malpractice is the third leading cause of death in America with at least 250,000 deaths each year.⁵ In case of Bangladesh, according to a report of Ain O Salish Kendra, 504 instances of medical malpractice were listed from June 1995 to September 2008.⁶ To sustain a claim of medical malpractice, the following conditions must

¹ Khandakar Kohinur Akter, ‘A Contextual Analysis of the Medical Negligence in Bangladesh: Laws and Practices’ (2013) 4(67) The Northern University Journal of Law-67.

² World Medical Association Declaration of Geneva (Adopted by the 2nd General Assembly of the World Medical Association on September 1948)

³ Md. Rafiqul Islam Hossaini, ‘Medical Negligence and its Constitutional Protections in Bangladesh’ (2016) Bangladesh Law Digest <<http://bdlawdigest.org/constitutional-protection-and-claims-for-medical-negligence-in-bangladesh.html>> accessed 11 October 2019.

⁴ Faria Ahmad, ‘Medical Negligence and Duty of Care’ The Daily Star (Dhaka, 24 July 2018) <<https://www.thedailystar.net/law-our-rights/medical-negligence-and-duty-care-1609813>> accessed 10 October 2019; Raisul Islam Sourav, ‘Medical Negligence’ The Daily Star (Dhaka, 10 January 2017) <<https://www.thedailystar.net/law-our-rights/medical-negligence-1342753>> accessed 10 October 2019.

⁵ Tasmiah Nuhiya Ahmed, ‘Legal Remedy to Medical Negligence’ *New Age* (Dhaka, 13 August 2018) <<http://www.newagebd.net/article/48258/legal-remedy-to-medical-negligence>> accessed 10 October 2019.

⁶ *ibid.*

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be fulfilled:

1. Duty of care is owed by the health care provider;
2. Failure to fulfil such duty of care;
3. Claimant suffering compensable injury; and
4. Direct proximity between the injury and the conduct of the professional.⁷

In the question of duty of care, Smith LJ in the case *Le Lierve v Gould*⁸ held that a duty of care did arise when a person or property of one was –in such proximity to the person or property of another that damage might have caused if due care was not taken,⁹ Medical malpractice also covers, but not limited to, the lack of preparation for an operation,¹⁰ inadequacy in diagnostic procedures¹¹ or failure to sterilize properly.¹²

2. Causes of Medical Malpractice

Unaccountability of healthcare professionals is the leading cause of medical malpractice. There is no all-inclusive, precise and codified legislation to avert medical malpractice. Most people are unwilling to bring action against medical practitioners and they lack the knowledge about the legal remedies available against medical malpractices. The existing laws are complex and there are further obstacles in punishing professionals who work in private sectors. Moreover, a report of World Health Organization shows that spending on medical sector should be \$34 per head, whereas it is only \$5 in Bangladesh.¹³ The doctor to nurse ratio is 1:0.48 but it was supposed to be 1:3.¹⁴ Medical professionals in public sectors are often negligent about their public service and are more concerned about the income from their private chambers. All of these are the contributing factors behind the widespread medical malpractice in Bangladesh and hence, dissatisfied public are turning towards foreign

⁷ Md. Rafiqul Islam Hossaini, 'Medical Negligence and its Constitutional Protections in Bangladesh' (2016) Bangladesh Law Digest <<http://bdlawdigest.org/constitutional-protection-and-claims-for-medical-negligence-in-bangladesh.html>> accessed 11 October 2019.

⁸ *Le Lierve v. Gould*, [1898] 1 Q.B. 491.

⁹ Md. Zahidul Islam, 'Medical Negligence in Malaysia and Bangladesh: A Comparative Study' (2013) 14(3) IOSR Journal of Humanities and Social Science 82 <https://www.researchgate.net/publication/330737963_Medical_Negligence_in_Malaysia_and_Bangladesh_A_comparative_study> accessed 10 October 2019.

¹⁰ *Dr. Ravishankar v. Jery K. Thomas and Anr*, II (2006) CPJ 138 (NC).

¹¹ *Dr. Kunal Saha v. Dr. Sukumar Mukherjee and Ors.*, III (2006) CPJ 142 (NC).

¹² *Pravat Kumar Mukherjee v. Ruby General Hospital and Ors.*, II (2005) CPJ 35 (NC).

¹³ 'A Study on Medical Negligence and Fraudulent Practice in Private Clinics: Legal Status and Bangladesh Perspective', Ain O Salish Kendra (2013) <<http://www.askbd.org/ask/wp-content/uploads/2014/02/Report-Medical-Negligence.pdf>> accessed 10 October 2019.

¹⁴ *ibid*.

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countries hoping to avail better treatment.¹⁵

3. Existing laws on medical malpractice

3.1. National Strategies to Safeguard From Medical Malpractice

3.1.1 Constitutional Law

Our Constitution significantly governs the protected rights, *inter alia*, to have health and medical care. Medical malpractice is a violation of right to life guaranteed under Article 32 of the Constitution of the People's Republic of Bangladesh. According to Part II of our Constitution, which deals with the Fundamental Principles of State Policy, the State is obligated to ensure the basic necessities of life, including medical care¹⁶ and improve public health.¹⁷ Although these Principles enshrined in Part II of our Constitution are not judicially enforceable,¹⁸ ¹⁹ they cast an obligation upon the government to act on them.²⁰ Articles 15, 18 read along with Articles 31, 32, 44 are the constitutional remedies to medical malpractice. The constitutional right to life includes right to security of life²¹ and protection of health.²² Such rights can be enforced by either filing a writ petition before the Hon'ble High Court Division under Article 102 of the Constitution or in the form of public interest litigation.

3.1.2. Criminal Law

Under the Penal Code, 1860 (hereinafter called the PC), there are multiple remedies available for medical malpractice. Sections 304A and 336 of the PC penalise and define negligence. Provisions of the PC that deals with remedies of medical malpractice are Sections 274 (adulteration of drugs)²³, 276 (sale of drug as a different drug or preparation)²⁴, 284 (negligent

¹⁵ Md. Rafiqul Islam Hossaini, 'Medical Negligence in Bangladesh: Criminal, Civil and Constitutional Remedies' (2017) 59(6) International Journal of Law and Management 1109.

¹⁶ The Constitution of People's Republic of Bangladesh, Adopted November 4, 1972, art 15(a).

¹⁷ *ibid*, art 18(1).

¹⁸ *ibid*, art 8(2).

¹⁹ Kudrat-E-Elahi v. Bangladesh, (1992) 44 DLR (AD) 319.

²⁰ Wahab v. Secretary, Ministry of Land, (1996) 1 MLR 338.

²¹ Bangladesh Jatiyo Mahila Ainjibi Samity v. Ministry of Home Affairs, (2008) BLD 580.

²² Dr. Mohiuddin Farooque v. Bangladesh, (1996) 48 DLR 438.

²³ The Penal Code, 1860, s 274.

²⁴ *ibid*, s 276.

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conduct with respect to poisonous substance)²⁵, 304A (causing death by negligence)²⁶, 312 (causing miscarriage)²⁷, 323 (punishment for voluntarily causing hurt)²⁸, 325 (punishment for voluntarily causing grievous hurt)²⁹, 336 (act endangering life or personal safety to others)³⁰, 416 (cheating by personation)³¹ and 418 (cheating with knowledge that wrongful loss may ensue to person whose interest the offender is bound to protect)³².

However, for criminal offences, mens rea or guilty mind is an essential requirement, which is needed to be proved beyond a reasonable doubt. Even though negligence is a component of a tortious liability which is assessed objectively on the balance of probabilities, setting a criminal standard of proof here narrows its applicability. In the case of *Momin Malitha v. State*³³, the prosecution failed to establish the wrongful intention of the accused due to this high standard of proof. In *Andrews v. Director of Public Prosecution*³⁴, Lord Atkin has observed that, to establish a crime, the level of negligence which has to be proved is very high. Moreover, it is not enough to prove mere carelessness³⁵, and the nature of negligence must be gross to hold a qualified doctor liable of criminal negligence.³⁶ Thus, although negligence is not intentional wrongdoing³⁷, complications arise while prosecuting medical malpractice under criminal law as the higher standard of proof makes it difficult to prove that the medical practitioners intentionally or knowingly caused the harm suffered by the patient.

Another remedy available against medical malpractice is under the Consumer Rights Protection Act, 2009 (hereinafter called the CRP Act) which safeguards from medical malpractice if we consider the patients as consumers and the healthcare professionals as service providers. According to section 2(22) of the CRP Act, 'service' means, *inter alia*, healthcare services which are made available in exchange of price, although free service will not fall under this provision.³⁸ Section 45 of the CRP Act provides punishments for not selling or delivering the promised product or service³⁹ and section 52 prescribes punishments for endangering life or

²⁵ *ibid*, s 284.

²⁶ *ibid*, s 304A.

²⁷ *ibid*, s 312.

²⁸ *ibid*, s 323.

²⁹ *ibid*, s 325.

³⁰ *ibid*, s 336.

³¹ *ibid*, s 416.

³² *ibid*, s 418.

³³ *Momin Malitha v. State*, (1988) 41 DLR 37.

³⁴ *Andrews v. Director of Public Prosecution*, (1937) 2 All ER 552.

³⁵ *Municipal Committee, Jullundur City v. Shri Ramesh Saggi*, (1970) AIR Punj 137.

³⁶ *Dr. Wagh v. State of Maharashtra*, Criminal Appeal No. 607 of 1962.

³⁷ Alexander McCall Smith, 'Criminal or Merely Human?: The Prosecution of Negligent Doctors' (1995) 12(1) *Journal of Contemporary Health Law and Policy* (1985 – 2015) 133.

³⁸ The Consumer Rights Protection Act, 2009, s 2(22).

³⁹ *ibid*, s 45.

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For your information:

For criminal offences, mens rea or guilty mind is an essential requirement, which is needed to be proved beyond a reasonable doubt. Even though negligence is a component of a tortious liability which is assessed objectively on the balance of probabilities, setting a criminal standard of proof here narrows its applicability. In the case of *Momin Malitha*³³ 41 DLR 37, the prosecution failed to establish the wrongful intention of the accused due to this high standard of proof.

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security of the consumer.⁴⁰ The section that can be directly considered as a remedy for medical malpractice is 53 which provides punishments for any service provider causing damage to life, health or money of the consumer by negligence, carelessness or irresponsibility.⁴¹

3.1.3. Civil Law

When tried under civil law, the remedy available against medical malpractices is generally monetary compensation, although it may also extend to refusal of permitting the registration of the accused, removal of the name of the accused from the registrar and some other recourses. Such a civil matters can be tried by a civil court as per Section 9 of the Code of Civil Procedure, 1908.⁴² According to Section 5(a) of the Code of Medical Ethics, gross negligence of dentists and medical professionals in their duties may be considered as misconduct and it is sufficient enough for removal of his/her name from the registrar.⁴³

The Bangladesh Medical and Dental Council Act, 2010 penalises individuals falsely representing themselves to be a medical or dental professional⁴⁴, using any such name, description, designation, or symbol which others could reasonably consider to be true⁴⁵, prescribing medication which has yet to received government approval⁴⁶. Bangladesh Medical and Dental Council may refuse to permit registration of individual who has been found guilty of misconduct in respect of his profession.⁴⁷

The Director General of health services has been given supervisory powers by the Medical Practice and Private Clinics and Labs (Regulation) Ordinance, 1982. He or any officer authorised by him has the authority to inspect any private clinic, pathological laboratory, chamber of registered medical practitioner or private hospital to look for any contravention of any provision of this Ordinance.⁴⁸ These are the various remedies available for medical malpractice litigations under the domestic legal system of our country.

3.2. International Regime on Medical Malpractice

⁴⁰ *ibid*, s 52.

⁴¹ *ibid*, s 53.

⁴² The Code of Civil Procedure, 1908, s 9.

⁴³ The Code of Medical Ethics, s 5(a).

⁴⁴ The Bangladesh Medical and Dental Council Act, 2010, s 28.

⁴⁵ *ibid*, s 29.

⁴⁶ *ibid*, s 30.

⁴⁷ *ibid*, s 23.

⁴⁸ The Medical Practice and Private Clinics and Labs (Regulation) Ordinance, 1982, s 11.

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Bangladesh is a signatory to many international treaties under which the country has obligations to protect and promote the basic rights of its citizens. Those rights include, but not limited to, easy access to health and medical care facilities and to have appropriate and adequate treatment.⁴⁹ These international instruments provide a guideline to the state parties towards ensuring the rights of the citizens for better medical services and other aspects. The major human rights treaties to which Bangladesh is a signatory are, the Universal Declaration of Human Rights, 1948 (hereinafter called the UDHR), the International Covenant on Economic, Social and Cultural Rights, 1966 (hereinafter called the ICESCR) and the International Covenant on Civil and Political Rights, 1966 (hereinafter called the ICCPR). Article 3 of the UDHR states that right to life is a human right.⁵⁰ Moreover, Article 25(1) the UDHR also enunciates that everyone has the right to a standard of living adequate for the health, which includes -medical care⁵¹; and special care and aid have been provided to mothers and children.⁵²

Furthermore, the ICESCR also prioritizes the right to have medical and health care, and directs the states to ensure those rights. Article 12 of The ICESCR states that the state parties to the covenant shall ensure the right to health, which includes reducing infant mortality, ensuring the healthy development of the child and create stipulations to ensure access to health care for all.⁵³ According to Article 7 of The ICCPR, no person shall be subjected to any medical treatment without his free consent.⁵⁴

4. Instances of Medical Malpractice in Bangladesh

Due to the complexity of the law, unwillingness of the people to institute legal actions and the lack of awareness, most instances of medical malpractice never reach the premises of the Court. They mostly remain as unreported imputations and end up in violence and vandalism. In a reported judgement, Justice Jahangir Hossain, directed the Labaid Hospital to pay compensation to the wife of Mridul Chakrabarty who died because of negligence and delayed

⁴⁹ Human Rights Committee (HRC), General Comment No. 36 CCPR/C/GC/36 Article 6: Right to Life, 3 September 2019.

⁵⁰ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR), art 3.

⁵¹ *ibid*, art 25(1).

⁵² *ibid*, art 25(2).

⁵³ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966) UNGA A/RES/2200 (ICESR), art 12.

⁵⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art. 7.

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treatment on the part of the hospital.⁵⁵ In 2016, a bus helper named Arafat was fatally injured in a road accident and was refused admission in three hospitals as he was an emergency patient. The Hon'ble High Court Division called upon the respondents, by a Rule Nisi, to show cause as to why such failure to provide emergency medical services should not be declared to be unlawful and violative of the fundamental rights guaranteed under Articles 27, 31 and 32 of our Constitution.⁵⁶ In another case, Hon'ble High Court Division summoned Dr. Ashis Kumar of Universal Medical College and Hospital to explain the allegation that the hospital continued treatment of a deceased patient to increase the bill.⁵⁷

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5. Recommendations

The inflated rate of medical malpractice is imposing tension in the minds of both, the government and also people. However, there are still rays of hope as the Hon'ble High Court Division is playing active and positive role in remedying the victims of such misconducts. Preventive measures and further improvement of the overall situation can be suggested as follows:

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5.1. The term 'medical profession' is not expressly included in section 2 of the CRP Act. However, India included this term in section 2(1)(o) of the Consumer Rights Protection Act, 1986.⁵⁸ This term should be included in our CRP Act so that victims can go to the consumer court and seek effective remedy.

5.2. In our country, the amount of compensation depends solely in the discretion of the Courts as there is no guiding principles. In United Kingdom, there are instruments such as Ogden tables and Judicial College Guidelines to calculate the amount of compensation for various degrees of injuries. Such instruments can be adopted in our country to ascertain the amount of compensation to be paid.⁵⁹

5.3. In India, medical malpractice is entertained both by the Court and by quasi-judicial bodies like Maharastra Medical Council.⁶⁰ Such quasi-judicial bodies with special powers can

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Human Rights and Peace for Bangladesh (HRPB) v. The Lab Aid Hospital, Writ Petition No. 7574 of 2011.

⁵⁶ Syed Saifuddin Kamal v. Ministry of Health, Writ Petition No. 1509 of 2016.

⁵⁷ Mizanur Rahman, 'HC Summons Universal Medical MD over Malpractice Allegations' Dhaka Tribune (Dhaka, 2 July 2019) <<https://www.dhakatribune.com/bangladesh/court/2019/07/02/hc-summons-universal-medical-md-over-malpractice-allegations>> accessed 10 October 2019.

⁵⁸ Indian Medical Association v. VP Shantha, (1996) AIR 550.

⁵⁹ Faria Ahmad, 'Medical Negligence and Duty of Care' The Daily Star (Dhaka, 24 July 2018) <<https://www.thedailystar.net/law-our-rights/medical-negligence-and-duty-care-1609813>> accessed 10 October 2019.

⁶⁰ ibid.

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also be established in our country to ensure proper regulation and justice.

5.4. There is no codified legislation on medical negligence. The existing laws on Negligence are general and dispersed. The remedies exist in the form of alternate pathways which are too complex for common people to understand. In the UK, instances of medical malpractice are tried under a separate Act called the NHS Redress Act, 2006.^{61 62} We are also in need of the codification of a legislation exclusively to deal with medical malpractice.

5.5. A central statute on tort law should be enacted for efficacious and speedy Compensation process. Punishment under criminal law might not even benefit the injured, but proper compensation under tort law will be really helpful.⁶³

5.6. Hospitals should be vicariously liable for the works of the healthcare professionals. Hence, it is necessary to enact a central statute regarding law of tort.⁶⁴

5.7. Awareness should be spread regarding the existing laws and remedies. In Canada, certain reports indicate that the rate on medical malpractice cases has significantly dropped due to mass awareness programmes.⁶⁵

6. Conclusion

At this point, both preventive and curative measures to fight against medical malpractice have become necessary. Dispersed remedies under various laws and lack of awareness are the biggest setbacks in dealing with this issue. As the Roman lawyer Marcus Cicero once said, “The more laws, the less justice”, instead of offering generalized remedies under multiple legislations, a specialized statute should be enacted and strictly implemented to safeguard our human rights to life and health from the vice of medical malpractice.

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⁶¹ NHS Redress Act, 2006.

⁶² Khandakar Kohinur Akter, ‘A Contextual Analysis of the Medical Negligence in Bangladesh: Laws and Practices’ (2013) 4 The Northern University Journal of Law, 67.

⁶³ S M Hasib Mahmud, ‘Platform for Tort Law’ The Daily Star (Dhaka, 6 February 2018) <<https://www.thedailystar.net/law-our-rights/law-vision/platform-tort-law-1530388>> accessed 10 October 2019.

⁶⁴ A Study on Medical Negligence and Fraudulent Practice in Private Clinics: Legal Status and Bangladesh Perspective, Ain O Salish Kendra (2013) <<http://www.askbd.org/ask/wp-content/uploads/2014/02/Report-Medical-Negligence.pdf>> accessed 10 October 2019.

⁶⁵ Khandakar Kohinur Akter, ‘A Contextual Analysis of the Medical Negligence in Bangladesh: Laws and Practices’ (2013) 4 The Northern University Journal of Law, 67.

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The Effects of Patriarchy on Women's Rights in the Context of Bangladesh: A Socio-legal Analysis

Introduction

When we think of women taking power as Queens or Prime Ministers and having constitutional authority, we imagine a portrayal of women empowerment, emancipation and what not. But is it the actual case? Does some advancement really prove that our female counterparts are not subordinated anymore? The answers are right before our eyes, our maids are working for a bare minimum wage to support their families, their abusive husbands are forcibly expropriating that income, or our mothers are balancing both home-making and child rearing from dawn to dusk, 365 days a year, without even expecting any payment in the first place. This social structure and practices, known as patriarchy, has a substantial base enabling men to exercise dominance, oppression and exploitation¹ over women.² In Bangladeshi context, patriarchy is a dissemination of resources and power within families where men retain power and regulate resources, while women remain reliant on men.³ Patriarchy affects women's rights with the culturally contravening views, absence of good governance as well as with various other socio-economic factors,⁴ paralysing their advancement in the society.⁵ This paper aims to dig deeper into the theory of patriarchy and see how, in practical lives, patriarchy affects women's rights by controlling the legal system of our country.

¹ Sylvia Walby, 'Theorising Patriarchy' (1989) 23 *Sociology* 213.

² Mead Cain, Syeda Rokeya Khanam and Shamsun Nahar, 'Class, Patriarchy, and Women's Work in Bangladesh' (1979) 5 *Population and Development Review* 405.

³ *ibid.*

⁴ Afroza Begum, 'Protection of women's rights in Bangladesh: a legal study in an international and comparative perspective' [2004] University of Wollongong Thesis Collections.

⁵ Abeda Sultana, 'Patriarchy and Women's Subordination: A Theoretical Analysis' [2011] *The Arts Faculty Journal* 1.

Persistence of Patriarchy in Bangladeshi Society

In its literal meaning, the word 'patriarchy' is referred to a male-dominated family, but today the connotation is used to depict a societal system where women are treated as subordinate⁶ and inferior⁷ to men. In our country, manifestation of patriarchy can be seen in division of labour by sex,⁸ market segregation,⁹ capital accumulation,¹⁰ patrilocal marriage,¹¹ restriction on female movement¹² in disguise of ensuring modesty¹³ and misinterpretation of religion to hinder their opportunities.¹⁴ It takes two defining forms.¹⁵ In private patriarchy, individual patriarchs expropriate women's labour while not acknowledging their unpaid work at home.¹⁶ In public patriarchy, women are excluded from political and economic power while being subject to sexual harassment and discrimination.¹⁷

Walby distinguishes six structures that constitute a patriarchal system.¹⁸ Firstly, the patriarch expropriates women's labour within the household and marital relationship.¹⁹ Secondly, occupational segregation in terms of paid work,²⁰ which can be seen in the wage gap²¹ and less skilled²² work of women in the garments sector. Thirdly, lack of women's power in different

⁶ Kamla Bhasin, *Understanding Gender* (10th edn, Women Unlimited 2014) 22.

⁷ Linda Y. C. Lim, *Capitalism, Imperialism and Patriarchy: The Dilemma of Third-World Women Workers in Multinational Factories* (2nd edn, Palgrave Macmillan, Zed Books Ltd) 215-230.

⁸ Mead Cain, Syeda Rokeya Khanam and Shamsun Nahar, 'Class, Patriarchy, and Women's Work in Bangladesh' (1979) 5 *Population and Development Review* 405.

⁹ Heidi I. Hartmann [1981] *The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union* 95-119. Rokeya Khanam and Shamsun Nahar, 'Class, Patriarchy, and Women's Work in Bangladesh' (1979) 5 *Population*

¹⁰ Maria Mies, *Patriarchy and Accumulation on a World Scale Women in the International Division of Labour* (2nd edn, London: Zed Books) 162.

¹¹ Mead T. Cain, 'The household life cycle and economic mobility in rural Bangladesh' (1978) 4 *Population and Development Review* 421.

¹² Tahrunnesa Ahmed Abdullah and Sondra Zeidenstein, *Village Women of Bangladesh--prospects for Change* (1st edn, Elmsford, N.Y.: Pergamon Press) 77.

¹³ Hannah Papanek, 'Purdah: Separate Worlds and Symbolic Shelter' (2009) 15 *Cambridge University Press* 289.

¹⁴ Benazir Bhutto, *Daughter of the East* (1st edn, London: Hamish Hamilton).

¹⁵ Sylvia Walby, 'Theorising Patriarchy' (1989) 23 *Sociology* 213.

¹⁶ Christine Delphy, 'Close to Home: A Materialist Analysis of Women's Oppression' (1st edn, University of Massachusetts Press).

¹⁷ *ibid.*

¹⁸ Sylvia Walby, 'Theorizing Patriarchy' (1989) 23(213) *Sociology* .

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ Linda Y. C. Lim, *Capitalism, Imperialism and Patriarchy: The Dilemma of Third-World Women Workers in Multinational Factories* (2nd edn, Palgrave Macmillan, Zed Books Ltd) 215-230.

²² Anne Phillips and Barbara Taylor, 'Sex and Skill: Notes towards a Feminist Economics' (1980) 6 *Feminist Review* 79.

sectors of the patriarchal state.²³ Moreover, male violence²⁴ as a common²⁵ and normal male behavioural pattern²⁶ and patriarchal control in female sexuality²⁷ by child marriage and tradition of Purdah.²⁸ Last but not the least, patriarchal culture²⁹ comprising of a varied set of practices, including religion and educational system.³⁰

Starting as early as the birth of a daughter where she is considered as a burden of the family,³¹ patriarchy spreads its branches of malice in every aspect of women's lives, where her rights are affected by the discriminatory laws of the country which I will address below.

Civil Law

Whenever we think of law regarding women's rights, the first thing that will come into our mind is citizenship since the domestic laws predominantly deal with the citizens of Bangladesh. A child will be granted Bangladeshi citizenship if his father³² or grandfather³³ is a Bangladeshi citizen. However, a Bangladeshi woman cannot confer citizenship to her children even though this is inconsistent with the Constitutional provisions ensuring equality among sexes.³⁴ Hence, in case of a divorce between a Bangladeshi woman and her foreign husband, the Court will hand-over the children to their father even if they were born in Bangladesh,³⁵ disrupting the children's best interest.³⁶ However, the Supreme Court refused to declare such provisions as invalid or discriminatory.³⁷

²³ Sylvia Walby, 'Theorising Patriarchy' (1989) 23 *Sociology* 213.

²⁴ *ibid.*

²⁵ Jalna Hanmer and Sheila Saunders, *Well-Founded Fear: A Community Study of Violence to Women* (1st edn, London: Hutchinson 1984) 252.

²⁶ Stevi Jackson, 'The social context of rape: Sexual scripts and motivation' (1978) 1 *Women's Studies International Quarterly* 27.

²⁷ Sylvia Walby, 'Theorising Patriarchy' (1989) 23 *Sociology* 213.

²⁸ Sajeda Amin, Ian Diamond, Ruchira T. Naved and Margaret Newby 'Transition to Adulthood of Female Garment-factory Workers in Bangladesh' (1998) 29 *Studies in Family Planning* 185.

²⁹ Sylvia Walby, 'Theorising Patriarchy' (1989) 23 *Sociology* 213.

³⁰ *ibid.*

³¹ Abeda Sultana, 'Patriarchy and Women's Subordination: A Theoretical Analysis' [2011] *The Arts Faculty Journal* 1.

³² The Bangladesh Citizenship Act, 1950, s 5.

³³ The Bangladesh Citizenship (Temporary Provisions) Order, 1972, s 2(1).

³⁴ The Constitution of Bangladesh, art 28(1), 28(2).

³⁵ Sapana Pradhan – Malla and Phanindra Gautam, 'Women's Right to Nationality and Citizenship' [2006] *IWRAW Asia Pacific Occasional Papers Series No. 9*.

³⁶ The UN Convention on the Rights of the Child, 1989, art 9.

³⁷ *Malkani v. Bangladesh*, Application for writ petition No. 3192 of 1992 (decided on 1 September 1997).

In case of property rights and inheritance, Muslim family laws allow daughters only half the share each son receives³⁸ whereas a Hindu woman receives nothing.³⁹ Christian women, however, have equal property rights as their brothers.⁴⁰ In Muslim laws, although son's sons and son's daughters are considered as residuary and sharers respectively, daughter's descendants are considered as distant kindreds,⁴¹ curtailing their property rights. A widow of the predeceased son is perhaps the most discriminated since she will not inherit anything at all.⁴² Only 4 out of 40 women obtain their actual proportions,⁴³ while a majority of them do not get anything at all.⁴⁴ Relinquishing the right of inheritance⁴⁵ is a common tendency to perpetuate favourable relation⁴⁶ with brothers and to gain support in case of widowhood or divorce,⁴⁷ indicating women's dependence on men in the patriarchal society.⁴⁸

Despite being a contract⁴⁹, marriage is treated as a religious ceremony⁵⁰ where the consent of the bride is often obtained through coercion⁵¹ despite the Court ordering otherwise.⁵² In Muslim marriages, a male witness is equivalent to two female witnesses,⁵³ whereas a Hindu woman

³⁸ Mead Cain, Syeda Rokeya Khanam and Shamsun Nahar, 'Class, Patriarchy, and Women's Work in Bangladesh' (1979) 5 *Population and Development Review* 405.

³⁹ Abeda Sultana, 'Patriarchy and Women's Subordination: A Theoretical Analysis' [2011] *The Arts Faculty Journal* 1.

⁴⁰ *ibid.*

⁴¹ Sufia Ahmed and Jahanara Choudhry, 'Women's Legal Status in Bangladesh' [1979] *Situation of Women in Bangladesh, Women for Women* 295.

⁴² Aqil Ahmad, *Mohammedan Law* (26th edn, Central Law Agency 2016) 252.

⁴³ M Sultana Alam, 'Socio-Cultural Dimensions of Women's Discriminations in Rural Communities' (2010) 3(1) *Ocean Journal of Social Sciences* 31.

⁴⁴ Azizah Y. Al-Habri, 'Muslim Women's Rights in the Global Village: Challenges and Opportunities' (2000) <<https://www.semanticscholar.org/paper/Muslim-Women's-Rights-in-the-Global-Village%3A-and-al-Hibri/53f9aede438ff4d302ab4799941e2a3438429022>> accessed 26th July 2020.

⁴⁵ Raisul Islam Sourav, 'Unjust Land Right of Women in Bangladesh, (2015) <<https://www.semanticscholar.org/paper/Unjust-Land-Right-of-Women-in-Bangladesh-Sourav/750564602eab130cb240757d0d1b6ce66c0611cd?p2df>> accessed 26th July 2020.

⁴⁶ Tahrunnesa Ahmed Abdullah and Sondra Zeidenstein, *Village Women of Bangladesh--prospects for Change* (1st edn, Elmsford, N.Y.: Pergamon Press) 77.

⁴⁷ Mead Cain, Syeda Rokeya Khanam and Shamsun Nahar, 'Class, Patriarchy, and Women's Work in Bangladesh' (1979) 5 *Population and Development Review* 405.

⁴⁸ Mead T. Cain, 'The household life cycle and economic mobility in rural Bangladesh' (1978) 4 *Population and Development Review* 421.

⁴⁹ Mohammad Hidayatullah and Arshad Hidayatullah, *Mulla's Principles of Mahomedan Law* (19th edn Lexis Nexis Butterworths Wadhwa Nagpur 2010) 282.

⁵⁰ *Shoharat Singh v. Musammat Jafri Bibi*, (1915) 17 *BOMLR* 13.

⁵¹ Bangladesh Legal Aid Services Trust (BLAST), 'Report on Legislative Initiatives and Reforms in the Family Laws' <https://www.blast.org.bd/content/publications/Legislative_Initiatives_Family_Law.pdf> accessed 26th July 2020.

⁵² *Dr. A.L.M. Abdullah v. Rokeya Khatoon*, (1968) 31 *DLR* 213.

⁵³ Aqil Ahmad, *Mohammedan Law* (26th edn, Central Law Agency 2016) 252.

cannot even be a witness.⁵⁴ Although Muslim men can marry either Muslim, Jewish or Christian women,⁵⁵ Muslim women cannot marry non-Muslim men.⁵⁶ Muslim men can simultaneously have four wives⁵⁷ and a fifth marriage will be rendered irregular but not void.⁵⁸ However, polygamy is not allowed for Muslim women and such marriages will be void.⁵⁹

To rein in the unfettered and unilateral right of Muslim men to divorce, the Court⁶⁰ necessitates the husband to send a notice to the Chairman.⁶¹ Discrimination prevails as Muslim women can have a delegated right to divorce which she can exercise upon establishing the conditions for such delegation.⁶² ⁶³ ⁶⁴ Christian men can seek divorce on ground of adultery alone⁶⁵ and recover damages on his wife's adultery.⁶⁶ However, husband's adultery alone will not allow Christian women to seek divorce.⁶⁷ Hindu law allows unrestricted polygamy while making the brides' consent futile and divorce impossible.⁶⁸ Guardianship of children is also entitled to the father in both Muslim and Hindu law, where the mother would have to go through expensive and lengthy litigation process to have custody.⁶⁹

In the garments sector, 90% of the total workers are underprivileged⁷⁰ women,⁷¹ who are constantly being victims of pay inequity.⁷² A male garment worker's monthly wage is 6,161

⁵⁴ Bangladesh Legal Aid Services Trust (BLAST), 'Report on Legislative Initiatives and Reforms in the Family Laws' <https://www.blast.org.bd/content/publications/Legislative_Initiatives_Family_Law.pdf> accessed 26th July 2020.

⁵⁵ Abdul Razak v. Aga Mahomed Jaffer Bindanim, P.C. 1893.

⁵⁶ Aqil Ahmad, Mohammedan Law (26th edn, Central Law Agency 2016) 124.

⁵⁷ Shahu Lameeda v. Subaida Bebee, (1970) M.L.J. Cr. 562.

⁵⁸ Mohammad Hidayatullah and Arshad Hidayatullah, Mulla's Principles of Mahomedan Law (19th edn Lexis Nexis Butterworths Wadhwa Nagpur 2010) 285.

⁵⁹ Aqil Ahmad, Mohammedan Law (26th edn, Central Law Agency 2016) 123.

⁶⁰ Kazi Rashed Akhter Shahid (Prince) v. Rokshana Choudhury (Sanda), (2006) 58 DLR (HC) 271.

⁶¹ The Muslim Family Law Ordinance, 1961, s 7(1).

⁶² Buffatan Bibi v. Abdul Salim, (1950) AIR Cal 304.

⁶³ Mirjan Ali v. Maimuna Bibi, (1949) AIR Assam 14.

⁶⁴ Manjila Bibi v. Noor Hossain, (1992) AIR Cal 93.

⁶⁵ The Divorce Act, 1869, s 10.

⁶⁶ The Divorce Act, 1869, s 34.

⁶⁷ The Divorce Act, 1869, s 10.

⁶⁸ The Lawyers and Jurists, 'Women's Legal Status in Domestic Law in Bangladesh' <<https://www.lawyersjurists.com/article/womens-legal-status-in-domestic-law-in-bangladesh-part-4/>> accessed 26th July 2020.

⁶⁹ *ibid.*

⁷⁰ Afsana Mustafa, M. Serajul Islam, Saiful Islam and Mahfuja Khatun, 'Impact of RMG Sector on Livelihood Change of Women Employees of Bangladesh' (2016) 2(1) Social and Economic Geography 1.

⁷¹ Tamanna Rubya, 'The Ready-Made Garment Industry: An Analysis of Bangladesh's Labor Law Provisions After the Savar Tragedy' (2015) 40(2) Brooklyn Journal of International Law 7.

⁷² Muhammad Faizul Haque, Md. Atiqur Rahman Sarker and Md. Syfur Rahman, 'Sexual Harassment of Female Workers at Manufacturing Sectors in Bangladesh' (2019) 2(3) Journal of Economics and Business 934.

BDT, whereas a female worker gets 4,264 BDT per month.⁷³ They do not get their wages in time, which violates the labour law governing them.⁷⁴ Apart from being subject to sexual harassment,⁷⁵ female workers only perform the entry level jobs whereas the managerial positions are all occupied by men, prevailing patriarchy in the workplace.

Criminal Law

The most patriarchal aspect of criminal laws of Bangladesh is the inconsistencies of ages regarding marital rape. These ages are 13⁷⁶ and 12⁷⁷ under the provisions of the Penal Code, 1860 and 14⁷⁸ under the Prevention of Oppression against Women and

Children Act, 2000. Since the minimum age for marriage is 18 for female,⁷⁹ the provisions of marital rape are pointless, unless there is the offence of child marriage in the first place. Moreover, the idea of marital rape is not familiar in this sub-continent⁸⁰ as it is treated lightly as a forcible intercourse by the husband against the will of his wife,⁸¹ protecting male interest.⁸²

Speaking of child marriage, almost 50% of all girls marry before turning 18⁸³ and such marriages are not considered as void under the Act.⁸⁴ Moreover, the provision of ‘special circumstances’⁸⁵ legalises marriage of a minor, fuelling the widespread patriarchal practice of child marriage without setting any age limit whatsoever.

⁷³ Muhammad Faizul Haque, Md. Atiqur Rahman Sarker, Md. Syfur Rahman and Mohammad Rakibuddin, ‘Discrimination of Women at RMG Sector in Bangladesh’ (2020) 3 Journal of Social and Political Sciences 112.

⁷⁴ The Labour Act, 2006, s 121.

⁷⁵ Chowdhury Hossain, Md. Atiqur Rahman Sarker and Rumana Afroze, ‘Recent Unrest in the RMG Sector of Bangladesh: Is this an Outcome of Poor Labour Practices?’ (2012) 7(3) International Journal of Business and Management 1833.

⁷⁶ The Penal Code, 1860, s 375.

⁷⁷ The Penal Code, 1860, s 376.

⁷⁸ The Prevention of Oppression against Women and Children Act, 2000, s 9(i).

⁷⁹ The Child Marriage Restraint Act, 2017, s 2(1), 2(4).

⁸⁰ Bavish Gupta and Dr. Meenu Gupta, ‘Marital Rape: Current Legal Framework in India and the Need for Change’ (2013) 1(1) Galgotias Journal of Legal Studies 16.

⁸¹ Tolulope Monisola Ola and Johnson Olusegan Ajayi, ‘Values clarifications in marital rape: a Nigerian situation’ (2013) 1(35) European Scientific Journal 291.

⁸² Sandra L. Ryder and Sheryl A. Kuzmenka, ‘Legal Rape: The Marital Rape Exemption’ (1991) 24(2) The John Marshall Law Review 393.

⁸³ Planning Commission (1998). The Fifth Five-Year Plan 1997–2002. Dhaka, Ministry of Planning.

⁸⁴ The Child Marriage Restraint Act, 2017.

⁸⁵ The Child Marriage Restraint Act, 2017, s 19.

In the Court, the worst cases of exploiting women occurs when their characters are injured under the Evidence Act, 1872.⁸⁶ Section 155(4) does not provide any definition of immoral character and such loophole is being misused in every possible way to undermine rape victims.⁸⁷ Being divorced,⁸⁸ coming of a lower strata^{89 90} and working as a maid⁹¹ are all argued as immoral character and the victims' testimonies were rejected,⁹² resulting in a plethora of miscarriage of justice, including the suicide of the victim in one case.⁹³

Positive Reformatations

Although it is clearly evident by now that a handful provisions of our domestic laws are discriminatory against women due to the constant strive to oppress and exploit them, there are some positive reformatations too. Misusing character evidence of rape victims has been recognized,⁹⁴ asking the Courts to ensure that cross-examinations are not used as modes of harassment and humiliation.⁹⁵ The infamous 'two finger test' has been banned for being not scientific and unreliable.⁹⁶ A detailed definition of sexual harassment and 11 rules as guidelines were given⁹⁷ and 'stalking' was included as a form of sexual harassment.⁹⁸ The practice of hilla marriage⁹⁹ has been annulled to a significant extent.¹⁰⁰

⁸⁶ The Evidence Act, 1872, s. 146(3), s. 155(4).

⁸⁷ Taqbir Huda, 'Between 'Virtue' and 'immorality': Why Character Evidence Must be prohibited in Rape Cases.' (2019) Bangladesh Legal Aid and Services Trust (BLAST).

⁸⁸ *Abdul Majid v. State*, 13 BLC (HCD) (2008) 53.

⁸⁹ *Misti and others v. State*, 6 BLC (HCD) 138.

⁹⁰ *Monowar Mallik v. State*, 59 DLR (HCD) (2007) 301.

⁹¹ *Sree Pinto Pal v. State*, 30 BLD (HCD) 220.

⁹² *Daler Sing v. State*, (1995) Cr. L. J. 614.

⁹³ *Uzzal alias Hossain v. State*, (2007) 59 DLR (HCD) 505.

⁹⁴ *Shibu Pada Acharjee v. State*, (2004) 56 DLR (HCD) 285.

⁹⁵ *Al Amin v. State*, (1999) 19 BLD (HCD) 307.

⁹⁶ *BLAST and Others v. Bangladesh and Others* (Writ Petition No: 10663/2013).

⁹⁷ *BNWLA v. Government of Bangladesh* (Writ Petition No: 5916 of 2008).

⁹⁸ *BNWLA v. Government of Bangladesh* (Writ Petition No. 8769 of 2010).

⁹⁹ Mohammad Hidayatullah and Arshad Hidayatullah, *Mulla's Principles of Mahomedan Law* (19th edn Lexis Nexis Butterworths Wadhwa Nagpur 2010) 257.

¹⁰⁰ The Muslim Family Laws Ordinance, 1961, s 7(6).

Conclusion

From this detailed socio-legal analysis, the picture that we can depict of patriarchal effects on women's right in Bangladesh is grim. Dominance of men has been deeply rooted in the pursuit of material resourced, while being supported by interconnecting elements of societal norms, religious and legal systems.¹⁰¹ The women's rights movements in our country have been negatively empowered by the ideas, investments and influences of donor organisations.¹⁰² Women's rights organisations must perceive their own theories of emancipation and for Bangladeshi women, while not being the puppets of the donor agencies. Only then the women of Bangladesh would be able to resist patriarchy.¹⁰³

¹⁰¹ Mead Cain, Syeda Rokeya Khanam and Shamsun Nahar, 'Class, Patriarchy, and Women's Work in Bangladesh' (1979) 5 Population and Development Review 405.

¹⁰² Roushan Jahan, 'Men in Seclusion, Women in Public: Rokeya's Dream and Women's Struggles in Bangladesh'

¹⁰³ *ibid.*

The State's Legal Right to Impose Death Penalty: Necessity or a Choice?

Introduction

“An eye for an eye and a tooth for a tooth”, the medieval principle of Lex Talionis developed in Babylonian era is often used as a justification to take away a person’s life in retaliation.¹ However, thinking about it rationally would make anyone wonder about the hypocrisy hidden behind it. More so, when the state is the one taking away its citizen’s life. A state usually, commits the act of taking away an individual’s life through pronouncing death sentence for offences committed under its national laws which carry death sentence as a punishment. Generally, death sentence is given in regards to gruesome offences committed, for example, but not limited to, murder. Nonetheless, if it is unlawful to take away someone’s life, why is it that the state has the right to do the same? Whereas, the Constitution of People’s Republic of Bangladesh²³ and the Universal Declaration of Human Rights and various other international instruments clearly protect each individual’s right to life⁴. Even if the laws of a country permit such action the question remains whether it is absolutely necessary to do so rather than conforming to other efficacious penalties.

1. Right to Life Under the Constitution of Bangladesh

According to the Constitution of the Peoples’ Republic of Bangladesh⁵ article 32, “No person shall be deprived of life or personal liberty save in accordance with law.” To begin with, this provision

¹ M. J. Fish (2008) . An Eye for an Eye: Proportionality as a Moral Principle of Punishment . (28) 57-71.

²The Constitution of the People’s Republic of Bangladesh (ACT NO. OF 1972) , art.31.

³ The Constitution of the People’s Republic of Bangladesh (ACT NO. OF 1972) , art.32.

⁴ Universal Declaration of Human Rights (10 December 1948 UNGA Res 217 A(III) (UDHR), art.3.

⁵ The Constitution of Peoples’ Republic of Bangladesh.

clearly protects the right to life and liberty of every individual within the country. However, by adding “save in accordance with law” the provision implies legality of giving death sentences. Impliedly meaning that if any law suggests a person can be deprived of life and personal liberty. Moreover, article 31 of the Constitution of Bangladesh provides "... No action detrimental to life, liberty, body, reputation or property of any person shall be taken except in accordance with law.” Additionally, Article 149⁶ saves the Penal Code 1860⁷ except as modified by law made under the Constitution. Moreover, although not judicially enforceable, article 25 of the Constitution⁸ talks about international solidarity and recognizes the UN Charter⁹. On the other hand, article 47¹⁰ which is judicially enforceable recognizes humanitarian law and does not bar or limit the constitution from the application international treaties and laws of war. These provisions do not expressly conform to all the international laws but somewhat recognizes them impliedly not imposing any limitation to their applicability. However, in the case of BLAST and another vs. Bangladesh and others, commonly known as Shukur Ali case,¹¹ the High Court declared the illegality and the unconstitutionality of the provision of awarding death sentence under the Women and Children Repression Prevention (Special) Act, 1995.¹²In the judgement, the court observed that, regardless of the nature of the crimes, as per the constitutional provisions’ death penalty cannot be the only punishment for the offenders. Therefore, death penalty must not be the only option in front of the

⁶ (ibid.p.1)

⁷ Penal Code, 1860.

⁸ The Constitution of Peoples’ Republic of Bangladesh.

⁹ United Nations, Charter of the United Nations, (adopted 24 October 1945, 1 UNTS XVI).

¹⁰ The Constitution of Peoples’ Republic of Bangladesh.

¹¹ BLAST and another vs. Bangladesh and others, *writ petition filed by BLAST*, 8283 of 2005, (H.C.D).

¹² Oppression of Women and Children (Special) Act, 1996.

court and since the verdict, The Women and Children Repression Prevention (Special) Act, 1995¹³ has been repealed and the Women and Children Repression Prevention Act, 2000¹⁴ came into force which has a provision of life-term imprisonment as an alternative to capital punishment. Therefore, the principle was established that death penalty is legal in Bangladesh but it cannot be the only punishment in regards to any crime through this case.

2. Right to Life Under Human Rights Document

International human rights law emphasises and predominantly protects the inherent right to life by advocating in regards to obligations of states to ensure proper enjoyment of such right. The most general recognition of right to life is enunciated in article 3 of the Universal Declaration of Human Rights.¹⁵ Moreover, article 6 of the International Covenant on Civil and Political Rights¹⁶ recognizes the right to life to be protected by law and bars arbitrary deprivation of life. In addition, gives guidelines to the countries that have yet not abolished death penalty to confer such punishment only in regards to heinous crimes. Furthermore, enunciates that death penalty should not be given to persons who are below eighteen years of old, which is also recognized in the article 6 of the Convention on Rights of the Child¹⁷. In accordance with article 2 of the Universal Declaration of Human Rights¹⁸ and articles 2 and 26 of the International Covenant on Civil and

¹³ (ibid.p.1)

¹⁴ Women and Children Repression Prevention Act, 2000.

¹⁵ Universal Declaration of Human Rights (10 December 1948 UNGA Res 217 A(III) (UDHR).

¹⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

¹⁷ United Nations Convention on the Rights of the Child (20 November 1989 UNGA Res 44/25) (UNCRC).

¹⁸ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

Political Rights¹⁹, and pursuant to several other United Nations declarations and conventions, everyone is entitled to the protection of the right to life without distinction or discrimination of any kind, and all persons shall be guaranteed equal and effective access to remedies for the violation of this right. Several countries have enacted domestic laws to safeguard these human rights. For example, United Kingdom has enacted the Human Rights Act, 1998²⁰ where anyone can seek remedies for arbitrary deprivation of right to life in the domestic courts of the United Kingdom.²¹ It is to be noted that, Bangladesh as a state party has ratified all of these Conventions mentioned above and is obligated to uphold these principles in its national laws and practices.²²

3. Forms in Which the State Takes Away the Lives of Individual

As per the Constitution of the People's Republic of Bangladesh the state can only take away any individual's life under the purview of national law.^{23,24} Despite the fact that death penalties violate the international human rights threshold, it is the only instance where the state may have the legal right to take away anyone's life. However, Bangladesh as a state has been violating the right to life of its citizens by committing extrajudicial killings and enforced disappearances²⁵ which is

¹⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

²⁰ Human Rights Act 1998, (s.2).

²¹ Article 2: Right to life | Equality and Human Rights Commission

²² Death Penalty Bangladesh Perspective- Lawyers & Jurists [Online] <<https://www.lawyersnjurists.com/article/death-penalty-in-bangladesh-perspective/>> accessed 25 October 2019.

²³ The Constitution of Peoples' Republic of Bangladesh, art.31.

²⁴ The Constitution of Peoples' Republic of Bangladesh, art.32.

²⁵ Extrajudicial Killings Soared in 2018 - Bangladesh NGO Reports (*Benar News*, 11 January 2019) <<https://www.benarnews.org/english/news/bengali/deaths-report-01112019170847.html>> accessed 27 October 2019.

completely unconstitutional with regard to article 31, 32 and 33²⁶ violating the right to life, equality before law, rule of law, due process and the principles of natural justice. The state does not have any right to commit such unconstitutional acts and shall be barred from committing such human rights violations.

3.1 By Carrying Out Death Penalty as a Punishment of Offences

Bangladesh has set death penalty for punishment through various laws. Under these laws' the state would have right to take away a person's life who is given death penalty subject to the principle established in Shukur Ali case²⁷, that the death penalty is not the only punishment available in such circumstances. Under the Penal Code, 1860 for various specified offences death sentence is provided which include, for example, waging war against the Government²⁸, abetment of mutiny²⁹, giving or fabricating false evidence leading to procure one's conviction for capital offence³⁰, murder³¹, abetment of suicide by child or insane person³², attempt to murder by a life convict, if hurt is caused³³, dacoit with murder³⁴ kidnapping for ransom³⁵. Moreover, The Anti-terrorism Act,

²⁶ The Constitution of Peoples' Republic of Bangladesh.

²⁷ BLAST and another vs. Bangladesh and others, *writ petition filed by BLAST*, 8283 of 2005, (H.C.D).

²⁸ The Penal Code, 2860 s 121.

²⁹ *ibid* s 132.

³⁰ *ibid* s 194.

³¹ *ibid* s 302.

³² *ibid* s 305.

³³ *ibid* s 307.

³⁴ *ibid* s 396.

³⁵ *ibid* s 364A.

2009³⁶, Nari O Shisu Nirjaton Daman Protirodh Ain, 2000 (2003)³⁷, The Special Powers Act, 1974³⁸ contain death penalty as a punishment. Even the newly enacted Anti Narcotic Act, 2018³⁹ contains death penalty for producing, smuggling, distributing and using more than 5 grams of ‘yaba’.⁴⁰ Instead of rehabilitating a drug abuser, giving capital punishment can mean not giving the person a second chance at life.⁴¹ If we look at the statistics of death penalty given in Bangladesh, according to Odhikar, a total 1741 death sentences were given in the last 10 years, where the most death sentences were given in 2018 which amounts to 319 death sentences.⁴² In a world where all of the countries are trying to, or thinking of abolishing death sentence, the increased amount of death penalty gives us something to be alarmed about and increasing death sentences create questions regarding the fairness of these sentences. However, Bangladesh does not execute individuals for crimes committed while under the age of 18⁴³⁴⁴, that death sentences for such individuals are rarely, if at all, meted out by courts and that Bangladesh is considering

³⁶The Anti-terrorism Act, 2009.

³⁷ Women and Children Repression Prevention Act, 2000.

³⁸ The Special Powers Act, 1974.

³⁹ Anti-Narcotic Act, 2018 s 36(1).

⁴⁰ Ruma Paul-‘Bangladesh sets death penalty for drug offences in draft law’ (8 October 2018) <<https://www.reuters.com/article/us-bangladesh-drugs/bangladesh-sets-death-penalty-for-drug-offences-in-draft-law-idUSKCN1MI1DT>> accessed 23 November 2019.

⁴¹ ‘Revised narcotics control law gets tough with drug traders’ (*Dhaka Tribune*, 21 December 2018) <<https://www.dhakatribune.com/bangladesh/2018/12/21/revised-narcotics-control-law-gets-tough-with-drug-traders>> accessed 24 November 2019.

⁴² ‘Statistics of Death Penalty’ (*Odhikar*) <<http://odhikar.org/wp-content/uploads/2019/03/Death-Penalty-2010-2018.pdf>> accessed 23 October 2019.

⁴³ Children Act, 1974, s 2(f).

⁴⁴ Children Act, 1974, s 51.

amending the 1974 Children Act⁴⁵ to assure a clear legal exclusion and pregnant women are also excluded from execution and the High Court may commute a woman's sentence to life imprisonment after term.⁴⁶⁴⁷ Additionally, the capital punishment is subject to approval of the high court division of the Supreme Court of Bangladesh and the persons given death sentence can petition to the president for clemency⁴⁸.

3.2 By Extra-judicial Killings

Extra judicial killings are done without conforming to the due process of law, without a legal proceeding and delivered without legal authorities by actors working under the state⁴⁹, which is the complete violation of fundamental rights as enunciated in the article 31, 32 and 35 of the Constitution of the People's Republic of Bangladesh and is absolutely illegal. Moreover, in the case of BLAST and others vs. Bangladesh and others⁵⁰ The High Court issued a Rule Nisi on 29.06.2009 calling upon the respondents to explain within four weeks why extra-judicial killings in 'crossfire' or 'encounters' by law enforcement agencies should not be declared illegal and why departmental and criminal proceedings should not be initiated against those responsible for such killings.⁵¹ However, the hearing of this case is still pending. The event of crossfires moreover

⁴⁵ Children Act, 1974.

⁴⁶ Code of Criminal Procedure, 1898, s 382.

⁴⁷ Penal Code, 1860, Act No. XLV of 1860, s 53A (1).

⁴⁸ 'Capital punishment is a legal process of approval of the honourable High Court division of the Supreme Court of Bangladesh' (*Lawyers and Jurists*) <<https://www.lawyersnjurists.com/article/capital-punishment-is-a-legal-process-of-approval-of-the-honorable-high-court-division-of-the-supreme-court-of-bangladesh/>> accessed 24 October 2019.

⁴⁹ 'Extrajudicial Killings Soared in 2018, Bangladesh NGO Reports' (*Benar News*, 11 January 2019) <<https://www.benarnews.org/english/news/bengali/deaths-report-01112019170847.html>> accessed 27 October 2019.

⁵⁰ BLAST and others vs. Bangladesh and others, *writ petition filed by BLAST, 4152/2009*, (H.C.D).

⁵¹ *ibid.*

violates the Convention against Torture and other Cruel, Inhuman, Inhuman or Degrading Treatment or Punishment (CAT),⁵² to which Bangladesh is a signatory. The situation in Bangladesh at the moment in regards to extra-judicial killings very alarming.⁵³ According to Ain-o-Shalish Kendra (ASK) in 2018 alone there were 466 deaths in crossfire and in police custody and in 2017, at least 162 people fell victim to such killings.⁵⁴The recent ‘War on Drugs’ campaign launched by the Sheikh Hasina regime is raising enormous concern as evidence of the several alleged drug dealers being shot to death are surfacing in the reports of the NGOs and other organizations.⁵⁵

3.3 By Enforced Disappearances

Enforced disappearance is the act of making someone disappear against his or her will, referring to arrest, detention or abduction of a person without due process, followed by a refusal to acknowledge the fate of that person.⁵⁶ Enforced disappearances is a violation of the Constitution and regarded as a crime against humanity grossly affecting the fundamental rights of an individual.^{57,58} Although not directly a crime under the penal code but under the Torture and

⁵² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

⁵³ Alifur Rahman, ‘Report on law enforcement: Around 46 people killed per month in 2018’ (Dhaka Tribune, 12 October 2018) <<https://www.dhakatribune.com/bangladesh/2018/10/12/report-on-law-enforcement-around-46-people-killed-per-month-in-2018>> accessed 26 October 2019.

⁵⁴ *ibid.*

⁵⁵ Faisal Mahmud, ‘Bangladesh: Extrajudicial killing fears in drug crackdown’ (*Al Jazeera*, 22 May 2018) <<https://www.aljazeera.com/news/2018/05/bangladesh-extrajudicial-killing-fears-drug-crackdown-180522162713973.html>> accessed 27 October 2019.

⁵⁶ ‘Enforced Disappearances’ <<https://trialinternational.org/topics-post/enforced-disappearance/>> accessed 27 October 2019.

⁵⁷ The Constitution of Peoples’ Republic of Bangladesh, art. 31.

⁵⁸ The Constitution of Peoples’ Republic of Bangladesh, art. 32.

Custodial Death (Prohibition) Act, 2013⁵⁹ torture is an offence punishable by up to five years' imprisonment, and death by torture is punishable by life in prison. In case of Bangladesh the state actors, including military and police, work in co-operation to make people disappear who might be involved in controversial campaigns which goes against the interest of the government. Some of them returned home, some were found dead, supposedly killed in crossfire. Others never came back. According to International Federation of Human Rights there have been at least 500 hundred documented cases of enforced disappearances in the past decade and countless undocumented cases.⁶⁰ An increase can be seen leading up to the general elections in 2014 and 2018 which leads to more human rights violations such as, but not limited to, extrajudicial killings, arbitrary detention, and torture.⁶¹ The lack of political will to investigate these cases leads to the acquittal of the perpetrators.

It is pertinent, subject to controversies, the only instance for the state to take away someone's life is possible under the purview when the constitution gives the right to the state to include death sentence as a punishment. Other instances where state commits arbitrary actions and takes away a person's life through extra judicial killings and enforced disappearances are gross violation of human rights and regarded as crimes against humanity.

⁵⁹ Torture and Custodial Death (Prohibition) Act, 2013.

⁶⁰ 'Vanished Without a Trace: The enforced disappearance of opposition and dissent in Bangladesh' (*International Federation of Human Rights*, April 2019) <https://www.fidh.org/IMG/pdf/bangladesh735a_web.pdf> accessed 27 October 2019.

⁶¹ Meenakshi Ganguly- 'Enforced Disappearances Met with Denials from Bangladesh' (*Human Rights Watch*, 22 August 2019) <<https://www.hrw.org/news/2019/08/22/enforced-disappearances-met-denials-bangladesh>> accessed 27 October 2019.

4. Death Penalty and Human Rights

Death penalty or death sentence is regarded as the ultimate cruel, inhuman and degrading punishment in the sense that it denies the basic principles of human rights under widely accepted Human Rights law which is that the states must recognise every individual's right to life which is enunciated in article 3 of the Universal Declaration of Human Rights (UDHR).⁶²The Drafters of the UDHR thought about the abolition of death penalty eventually but it was only after 1991 the international community decided to abolish the death penalty totally by adopting the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).⁶³ Moreover, protocol No. 6 to the European Convention on Human Rights,⁶⁴ enunciates the abolition of the death penalty, and Protocol No. 13 to the European Convention on Human Rights,⁶⁵ pronounces the abolition of the death penalty in all circumstances. Additionally, the Protocol to the American Convention on Human Rights also abolishes the Death Penalty.⁶⁶ According to international law the use of the death penalty must be restricted to the most serious crimes, meaning intentional killing. However, most of the human rights defenders believe that the death penalty is never the answer and should be completely abolished⁶⁷ as the provisions of death

⁶² Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

⁶³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁶⁴ Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] OJ ETS 5.

⁶⁵ Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] OJ ETS 5.

⁶⁶ Organization of American States (OAS), American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32), 22 January 1969.

⁶⁷ Vincent Warrant, 'The Death Penalty Is a Human Rights Abuse' (*HuffPost*, 25 May 2011) <https://www.huffpost.com/entry/the-death-penalty-is-a-hu_b_757004> accessed 27 October 2019.

penalty is used by the states in various situations, to push their political narratives in a discriminatory manner which results in deaths of innocents creating adverse effect on the society.

5. Death Penalty Around the World

The world is taking a stand against death penalty and is starting to abolish it from their punishment framework one by one. According to, the Death Penalty Information Centre more than 70% of the world's countries have abolished death penalty in law or in practice.⁶⁸ Some countries did not outright abolish it but discontinued its use as alternative punishment can be used instead to capital punishment to obtain similar results. The countries who still have not done so are either authoritarian or pre-dominantly religious. As per Amnesty International four countries were responsible for 84% of executions in 2017, which are Saudi Arabia, Iraq, Pakistan and Iran. That doesn't include China, where the statistics are a state secret.⁶⁹ However, Amnesty estimates that China carries out thousands of executions each year.⁷⁰ On the other hand, in 2018 no execution was detected in Bangladesh and a number of countries despite sentencing a number of people to death.⁷¹

6. Efficiency of Death Penalty

⁶⁸ 'History of Death Penalty' <<https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty>> accessed 27 October 2019.

⁶⁹ 'Death Penalty' <<https://www.amnesty.org/en/what-we-do/death-penalty/>> accessed 27 October 2019.

⁷⁰ 'The Death Penalty' <<https://www.amnesty.org/en/what-we-do/death-penalty/death-penalty-your-questions-answered/>> accessed 27 October 2019.

⁷¹ 'Death Penalty Database' <<http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Bangladesh#f29-3>> accessed 27 October 2019.

The existence of death penalty till now is backed up by the states not abolishing capital punishment through various reasons. The most used reason among them is majority public support.⁷² The public support is based on the desire to be free from crime and in this instance, it does work as an incentive to the Politian's which is why it is still prevalent in a lot of countries around the world. However, the information at disposal of the public does not disclose that death penalty actually is a vicious cycle, which does not combat crimes rather perpetuate the cycle of violence.

6.1 What Death Penalty is Presumed to Achieve

The argument for keeping death penalty is that it is an exemplary punishment and will deter other criminals from committing the same crime and set as an example in the society to stop the would-be criminals deterring them from committing future or further crimes and violations.⁷³ Moreover, death penalty is given to get retribution on behalf of the victims and their families creating the notion among people that justice is being served. In addition to that it is thought that giving death penalty to criminal is cheaper than isolating them or imprisoning them.⁷⁴ Most of the people who advocates on behalf of death penalty thinks that it is fair to treat the criminal the same way they have treated the victims and supports death penalty for harbouring the notion of justice and fairness.

6.2 What Death Penalty Actually Achieves

⁷² 'Pros & Cons of the Death Penalty' <<https://www.thoughtco.com/pros-and-cons-death-penalty-3325230>> accessed 27 October 2019.

⁷³ Paul Goodman, 'The Pros and Cons of the Death Penalty' (*Soapboxie*, 9 February 2019) <<https://soapboxie.com/government/Death-Penalty-Pros-and-Cons>> accessed 27 October 2019.

⁷⁴ *ibid.*

What death penalty actually achieves is a very different scenario. First of all, it is cruel and degrading punishment, which is used in most countries disproportionately against poor and racial, ethnical, religious minorities.⁷⁵ It is also used arbitrarily and inconsistently making the innocent suffer. There are various examples where after the death sentence has been carried out, the accused was alleged to be not guilty but there is no recourse. For example, Texas man Cameron Todd wad executed and later further evidence revealed his innocence.⁷⁶ Most of these cases are alleged because once executed no further investigations are held to prove their innocence. The second argument which was that death penalty prevents criminal activities is also not true as the countries which have death penalties, have higher crime rates than the countries which do not have capital punishment.⁷⁷ On the other hand, since abolishing death penalty countries like Canada has seen a steady drop in murder rates.⁷⁸ Thus, death penalties do not actually deter criminals rather carrying out capital punishment in a public setting like Iran creates gross violations of human rights. Additionally, there is no humane way to kill someone, as the countries supporting death penalty propose. All the death penalties which are carried out are violations of right to life and basic human rights, as the chance of rehabilitation and the chance at life is taken away from a person, making it the most inhumane act in existence. In the perspective of Bangladesh although the execution

⁷⁵ ‘The Death Penalty is a Human Rights Violation’ (*Center for Constitutional Rights*) <<https://ccrjustice.org/sites/default/files/assets/files/CCR%20Death%20Penalty%20Factsheet.pdf>> accessed 27 October 2019.

⁷⁶‘Five Reasons to Abolish Death Penalty’ <<https://www.amnesty.org.au/5-reasons-abolish-death-penalty/>> accessed 27 October 2019.

⁷⁷‘Fact check: No proof the death penalty prevents crime’ (ABC News, 4 May 2015) <<https://www.abc.net.au/news/2015-02-26/fact-check3a-does-the-death-penalty-deter3f/6116030>> accessed 27 October 2019.

⁷⁸‘Canada marks forty years without the death penalty’ (*Amnesty International*, July 14 2016) <<https://www.amnesty.ca/news/canada-marks-forty-years-without-death-penalty>> accessed 27 October 2019.

rates of the criminals in death rows are decreasing day by day,⁷⁹ the fact that they were confined in a cell waiting for their sentence to be carried out is cruel in itself creating psychological pressure on them. Moreover, according to the Death Penalty Information Centre, the overall legal costs of death penalty is much higher than keeping a person in prison.⁸⁰ Therefore, the fact that death penalty is inexpensive is a myth. Therefore, it is safe to state that death penalty is not at all necessary to deter future criminals not is it efficient in its purpose of attaining just rather it is a menace which needs to be prevented.

7. Recommendations and Conclusion

It is comprehensible that, death penalty is the utmost violation of basic human rights, it is irreversible, cruel and does not give the opportunity to the offender to reform himself. If imposed discriminatorily, inconsistently and arbitrarily, execution death penalty can create havoc in a society, resulting in obstruction of justice. Given all the issues and violations, the following recommendations can be made in the perspective of Bangladesh:

- Revisioning the punishments for Special Powers Act, 1974 and amending the punishments of death penalty for offences.
- Revisioning the punishments for Narcotics Control Act, 2018 and reducing the punishment for carrying more than five grams of methamphetamine.
- Amending the laws which do not have any alternative punishment rather that death sentence.

⁷⁹‘Statistics of Death Penalty’-(Odhikar) <<http://odhikar.org/wp-content/uploads/2019/03/Death-Penalty-2010-2018.pdf>> accessed 23 October 2019.

⁸⁰‘History of Death Penalty’ <<https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty>> accessed 27 October 2019.

- Ensuring accountability in cases of trials of heinous, cruel, degrading crimes.
- Creating reasonable restrictions in regards to giving death sentence by the judges.
- Creating more rehabilitation opportunities and ensuring vocational training for prisoners.
- Ratifying international protocols such as ICCPR, Protocol II and adopting conventions without reservations.
- Making sure that the waiting period of the offender is reduced for appealing against death sentence.
- Ratifying International Convention for the Protection of all Persons from Enforced Disappearance and creating a commensurate domestic legal regime.
- Creating a determined political will not to use death sentence arbitrarily.
- Creating awareness and general consensus that death penalty does not create deterrence and does not give closure to the victim's family.
- Filing Public Interest Litigation cases in regards to unnecessary capital punishments to urge the High Court Division to employ guidelines regarding this matter.

As Mahatma Gandhi stated, “An eye for an eye makes the whole world blind”, violence answered with violence will only create havoc and will confiscate us further from peace. Every man deserves a chance at life no matter the weight of crime committed and as Judge Cancado Trindade stated, ‘The execution of death penalty is a violation of human rights. One cannot simply overlook the widespread reaction to the cruelty of death penalty.’⁸¹ Therefore, he still shall be treated as a human being and given the similar chance of reformation. Hence, death penalty should be abolished and the state should not have the right to take away any person's life no matter the context.

⁸¹*Jadhav (India v. Pakistan)* (Separate Opinion) [2019] ICJ Rep 168.

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