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Protection of Women's Rights in Bangladesh: A Legal Study in an International and Comparative Perspective

**A thesis submitted in fulfilment of the requirements for the
award of the degree**

DOCTOR OF PHILOSOPHY

from

UNIVERSITY OF WOLLONGONG

by

Afroza Begum LLM (Western Sydney) LLM (Rajshahi) LLB Hons (Rajshahi)

FACULTY OF LAW

2004

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To

My devoted father who sacrificed the most to our joys

Abstract

Women's legal rights are one of the most significant determinants of their status. In Bangladesh, a series of laws ensuring women's rights have proven largely ineffective in promoting their positions. The prime reasons for this are: the shortcomings and ineffectiveness of laws, women's inability to access legal proceedings, the traditional and cultural negative views about women's rights, the absence of an accountable and transparent government, the expensive and time consuming judicial process, the lack of an efficient judiciary, and other socio-economic reasons. The core theme of the thesis concentrates on the shortcomings and ineffectiveness of laws, although viewing them within the context of those other factors. To signify the 'ineffectiveness of laws', emphasis is basically placed on the administrative and judicial approaches in the country to achieve the underlying objectives of law concerning women's rights in pertinent areas.

This study aims to promote protection of women's rights by recommending remedies to flaws in prevailing laws in Bangladesh in four areas. Recommendations are made by reference to comparative and international practices. The primary arguments developed and maintained throughout the thesis are: (i) the protection of women's rights is imperative to improve their status and law is an essential instrument to ensure these rights; (ii) the legislative, administrative and judicial efforts in Bangladesh are not appropriate and conducive to dealing with women's rights; and (iii) improvements in those efforts can better protect women's rights.

This study critically examines laws regarding women's employment and political participation and the laws on dowry and rape. It also explores the ways laws have been structured and enforced in Bangladesh, and how law can be an effective means of women's

pursuit of rights. In so doing, this thesis analyses and compares a range of legislation and judicial decisions of a number of selected common law jurisdictions. Findings of the research demonstrate that the legal efforts of those countries resulted in significant improvements in traditional laws and enforcement procedures regarding employment, dowry as a form of domestic violence, and rape.

Conversely, in Bangladesh, the age-old common-law grown formalities continue to dominate the legal and judicial proceedings and therefore fail to provide remedies to the contemporary needs of women. The present legal regime also suffers from an important flaw with regard to the scope and extent of liabilities for the violation of laws designed to protect women's equal and special rights. The absence of any independent administrative body to monitor the compliance of laws presents another serious flaw in the current legal regime of the country. Such shortcomings eventually encourage and favour the wrongdoer, worsening the vulnerability of already disadvantaged women in the traditional culture of Bangladesh. In responding to such a situation, the present study recommends the reconceptualisation of laws to accommodate women's unique experiences in Bangladesh. The study ends with a number of specific recommendations for ensuring women's rights through strengthening the legal and enforcement mechanisms in Bangladesh.

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The opinions expressed in this study are entirely mine and I alone take the full responsibility for any shortcomings.

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List of Abbreviations

AD	Appellate Court Division of the Supreme Court of Bangladesh
ADB	Asian Development Bank
ASK	Ain O Salish Kendra
BBC	British Broadcasting Corporation
BLAST	Bangladesh Legal Aid and Services Trust
CAT	Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CPC	Civil Procedure Code
CrPC	Criminal Procedure Code
CSW	Commission on the Status of Women
DAW	Division for the Advancement of Women
EC	European Council
ECOSOC	Economic and Social Council
EEC	European Economic Commission
ESCAP	United Nations Economic and Social Commission for Asia and the Pacific
ETV	Ekushey Television
EU	European Union
GA	General Assembly of the United Nations
GIS	Garment Industries
HCD	High Court Division of the Supreme Court of Bangladesh
ICCPR	International Covenant on the Civil and Political Rights
ICESC	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICPD	International Conference on Population and Development
IPU	Inter-Parliamentary Union
IWAW	International Women's Rights Action Watch
LAT	Labour Appellate Tribunal

LC	Labour Court
MOWCA	Ministry of Women and Children Affairs in Bangladesh
MP	Majority Plurality Electoral System
NAP	National Action Plan of Bangladesh
NCWD	National Council for Women's Development in Bangladesh
NFLS	Nairobi Forward-Looking Strategies
NPWA	National Policy on Women's Development in Bangladesh
OJ	Official Journal
PC	Pakistan Code
PC	Penal Code
PR	Proportional Representation Electoral System
PW	Payment of Wages
RSC	Consolidated Statute of Canada
SC	Supreme Court
SCC	Supreme Court Cases
TIB	Transparency International Bangladesh
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Program
UNICEF	United Nations International Children's Emergency Fund
UNIFEM	United Nations Development Fund for Women
UP	Union Parishad of Bangladesh
US	United States
USCS	United States Code Service
WID	Women in Development
WP	Writ Petition

List of Law Reports

Abbreviation	Title	Jurisdiction
A 2d	Atlantic Reporter, Second Series	USA
AIR	All India Reporter	India
AIR SC	All India Reporter Supreme Court	India
All ER	All England Law Reports	UK
ALD	Administrative Law Decisions	Australia
ALR	Australian Law Reports	Australia
BHRC	Butterworths Human Rights Cases	EU
BLC	Bangladesh Legal Chronicles	Bangladesh
BLD	Bangladesh Legal Decisions	Bangladesh
BLD (HCD)	Bangladesh Legal Decisions (High Court Division)	Bangladesh
Cal App	California Appellate Reports	USA
Cal 3d	California Reports, Third Series	USA
CCA	United States Army Court of Criminal Appeal	USA
CCC 2d	Canadian Criminal Cases, Second Series	Canada
CCC 3d	Canadian Criminal Cases, Third Series	Canada
CLR	Commonwealth Law Reports	Australia
CPR	Canadian Patent Reports	Canada
CR 2d	Criminal Reports, Second Series,	Canada
Cri LJ	Criminal Law Journal	India
CRR 2d	Canadian Rights Reporter, Second Series	Canada
DLR	Dhaka Law Reports	Bangladesh
DLR (AD)	Dhaka Law Reports (Appellate Division)	Bangladesh
ECHR	European Court Reports	EU
ECJ	European Court of Justice Cases	EU
ECR	Reports of Cases before the Court of Justice of the European Communities	EU
EHRR	European Human Rights Reports	EU

EOC	Equal Opportunity Cases	Australia
ER	English Report	UK
Fam LR	Family Law Reports	Australia
FLR	Federal Law Reports	Australia
F Supp	Federal Supplement (District Court Reports)	USA
F 2d	Federal Reporter, Second Series	USA
F 3d	West's Federal Reporter, Third Series	USA
GLR	Gujral Law Report	Pakistan
IRLR	Industrial Relations Law Reports	UK
LRC	Law Reports of Commonwealth (Const)	UK
LRI	Law Reports of India	India
MLR (AD)	The Mainstream Law Report (Appellate Division)	Bangladesh
Neb	Nebraska Reports	USA
NJ	New Jersey Reports	USA
NJ (SCTD)	Newfoundland Judgments, Supreme Court of Newfoundland and Labrador, Trial Division	Canada
NTR	Northern Territory Reports	Australia
NW 2d	North Western Reporter, Second Series	USA
NY 2d	New York Reports, Second Series	USA
OFLR	Ontario Family Law Reports	Canada
OJ (Sup Ct)	Ontario Judgments	Canada
ONCA	Court of Appeal Ontario	Canada
OR 2d	Ontario Reports, Second Series	Canada
P 2d	Pacific Reporter, Second Series	USA
SACLR	South African Constitutional Law Reports (Butt)	SouthAfrica

SCC	Supreme Court Cases	India
SCCDJ	Supreme Court of Canada Decisions and Judgments	Canada
SCR	Supreme Court Reports	India
SCR	Canada Supreme Court Reports	Canada
SW 2d	South Western Reporter , Second Series	USA
US	Reports of Cases in the Supreme Court	USA
US App	United States Court of Appeals Reports	USA
VR	Victorian Reports (Butt)	Australia
Wn App	Washington Appellate Reports	USA
Wn 2d	Washington Reports, Second Series	USA

Chapter 1

General Introduction

1.1. Introduction

Women's rights have become one of the fundamental principles of state law and policies in Bangladesh. They have dominated much of the government's administrative resolutions and various initiatives of non-governmental organisations (NGOs) in recent years. International proliferation of human rights instruments in the last thirty years has extended the concept of 'women's rights' to embrace four generations¹ of human rights beyond legal rights guaranteed under state laws. In response to such proliferation, especially after the Beijing commitment,² Bangladesh ratified altogether fourteen international human rights instruments and undertook a range of formal plans to promote women's rights.³ Despite these facts, subject to a few positive changes, the women of Bangladesh still lag behind many Asian countries, including India, in several respects. The underlying causes of this therefore necessitate an exploration of the background as well as other relevant factors through which women's rights have been evolved, defined, recognised and enforced in

¹ Civil and political rights, and socio-economic-cultural rights contained in the two Covenants of the *Universal Declaration of Human Rights* 1948 are respectively regarded as the 1st and 2nd generations of right. While 3rd and 4th generations of human rights respectively refer to, *inter alia*, the right to development claimed by postcolonial states, and group rights developed by the indigenous people. See for details, D Otto, 'Rethinking the "Universality" of Human Rights Law' (1997) 29 *Columbia Human Rights Law Review* 1 at 5-8.

² Bangladesh was one of the participants to the 4th World Conference on Women 1995 in Beijing. It has endorsed the Platform for Action adopted in the Conference without any reservation and formulated some national policies for women's advancement. See Ministry of Women and Children Affairs, *Review and Appraisal of Implementation of the Beijing Platform for Action: Special Session of the UN General Assembly Meeting Women 2000: Gender Equality, Development and Peace for the Twenty-First Century* (hereinafter Country Paper) (2000) Government of the People's Republic of Bangladesh at 2-3.

³ Considered in detail in Chapter 3.

Bangladesh. The following discussion, and Chapter 3 attempt to identify and explain some of those causes that impair women's rights.

This chapter develops conceptual issues and evaluates the gradual importance of women's rights in a national and international perspective. It aims to explore ways women's rights have emerged, been elaborated and incorporated into the legal framework in Bangladesh, and how law became an essential basis for women's movements. It highlights how women's continued struggles for spreading education and political knowledge have become transformed into legal rights. An effort is also made to canvass women's rights as human rights to show their development and significance in an international context. The discussion begins with the introduction of Bangladesh as a sovereign state.

1.2. Introducing Bangladesh as an Independent State

Bangladesh emerged as a sovereign state in 1971. It had experienced more than 200 years of British domination as a part of undivided India.⁴ The federal government of British India, formed in 1935, recognised Bangladesh as a part of the 'Province of Bengal'.⁵ The Indian subcontinent was partitioned in 1947, separating India and Pakistan as two different states. At the time of separation, the 'Province of Bengal' consisted of two separate provinces, namely: East Bengal and West Bengal.⁶ Following the partition, East Bengal became a province of Pakistan and West Bengal remained with India.⁷ East Bengal was acknowledged as a 'Province of East Pakistan' (the present Bangladesh) in the Constitution

⁴ Since 1757, the East India Company had governed the territory of Bengal for a period of 100 years and thereafter the British government directly ruled it until 1947. Before 1757, the territory was administered for centuries by the Hindu, Buddhist and Muslim administrators. For details see, M S Alam, 'Bangladesh' in H Kritzer (ed), *Legal Systems of the World: A Political, Social, and Cultural Encyclopedia* (2002) Vol-1 California: ABC-CLIO 116 at 116.

⁵ *Government of India Act 1935* s 46.

⁶ *Indian Independence Act 1947* ss 2-3.

⁷ *Ibid.*

of Pakistan adopted in 1956. Pakistan was divided with many unresolved issues and a gulf of inconsistencies about the language, culture and heritage between the West (currently Pakistan) and the East.⁸ The West being the seat of the government had a monopoly of all economic and political power and exercised neo-colonialism on the people of the East (Bengalis). Notwithstanding having a large population and the resources for foreign earnings of the East, its people were systematically discriminated against in relation to all socio-economic and political rights.⁹ This exploitation and cultural disparity eventually led the Bengalis to resist the Pakistani regime. On numerous occasions, ranging from the Language Movement 1952¹⁰ to the struggle for autonomy of the East, the Bengalis started a rebellion against the West. In the 960s, they were united under the leadership of Sheikh Mujibur Rahman, the founder of Awami League (a major political party in Bangladesh) for realising the autonomy of the East through the launching of a six-point formula¹¹ and the People's Upsurge in 1969. The Awami League got the mandate to form the Central Government of Pakistan in the general election held in 1970 but the take-over of state power was denied by the leader of West Pakistan.¹² In protest of this, a non-cooperation movement took place in the East. To confront the situation, Pakistan rulers on the night of 25 March 1971, 'attacked the civilians of Dhaka causing one of the greatest massacres in

⁸ M R Islam, *International Legal Implications: The Bangladesh Liberation Movement* (1987) Dhaka: The University Press Limited at 7-32.

⁹ The people of East Pakistan constituted over 56% of the total population of Pakistan. How the East Pakistan was systematically exploited of all respects—see generally 'Why Language Movement: Topographical, Cultural and Economic Differences of the Two Geographical Units of Pakistan' <http://www.dhaka_bd.com/21feb/htmls/why_lanmov%20.htm>(4 November 2003); see also, http://www.dhaka_bd.com/categories/History_Culture.htm (4 November 2003).

¹⁰ This issue is considered in the following section 1.3 at 8.

¹¹ On the basis of six separate demands for provincial autonomy of the East, the six-point formula was announced on 6 February 1966. The full text of this formula is available on <<http://www.smaajumder.freesevers.com/bangladesh1111.html>> (4 November 2003).

¹² The Awami League won the majority both in the National and Provincial Assemblies but the leader of West Pakistan did not allow it to form the Central Government of Pakistan. See for details, M Ahmed, *Bangladesh: Era of Sheikh Mujibur Rahman* (4th Impression 1991) Dhaka: University Press Limited at 6.

modern history.’¹³ All these unjust events subsequently helped the ‘autonomy’ transform into a struggle for the right to self-determination of the Bengalis.¹⁴ Bangladesh declared its independence on 26 March 1971 and was finally liberated on 16 December 1971 after waging a bloody war of nine months and enduring the Pakistani subjugation of twenty-four years.¹⁵ In this war, three million Bengalis died and ‘two hundred thousand women were raped’.¹⁶ With an estimated population of 130 million and a land area of 144,000 km, it is one of the poorest and most densely populated countries in the world. Women, 90% of whom live in rural areas, constitute 48.5% of the total population.¹⁷ Nearly 40% of the population of Bangladesh lives below the poverty level¹⁸ and in the fiscal year 2001-2002, its per capita Gross Domestic Product (GDP) was US\$362.¹⁹ Muslims account for 88% of the total population, while 11% are Hindus and the remaining are Christians, Buddhists and other religious sects.²⁰

1.3. Emergence of Women’s Rights in Bangladesh

Until the early twentieth century women in undivided India were generally subjugated and segregated from the outside world regardless of their religious beliefs, culture or caste.

¹³ See n 9.

¹⁴ How *Bengalis* had been exploited and were forced to launch a movement for their self determination-see generally Islam 1987 n 8 at 7-32.

¹⁵ S R Khan, *The Socio-Legal Status of Bangali Women in Bangladesh: Implications for Development* (2001) Dhaka: The University Press Limited at 31.

¹⁶ Id at 32.

¹⁷ See A K Goswami, ‘Empowerment of Women in Bangladesh’ (1998) 5 *Empowerment--A Journal of Women for Women* 45 at 68; see also, J Huq et al (ed), *Beijing Process and Follow-Up Bangladesh Perspective* (1997) Dhaka: Women for Women: A Research and Study Group at 5; S Hamid, *Why Women Count: Essays on Women in Development in Bangladesh* (1996) Dhaka: University Press Limited at 67.

¹⁸ Selected World Development Indicators, the World Development Report 2003 at 11 <http://econ.worldbank.org/wdr2003/text-17926/> (19 December 2003).

¹⁹ ‘The Ministry of Finance, Bangladesh Economic Survey 2001-2002’ Dhaka <<http://www.gobfinance.org/economic/index.html>> (9 March 2003).

²⁰ Committee on the Elimination of Discrimination against Women, *Third and fourth periodic reports of States parties Bangladesh* (hereinafter CEDAW Report) CEDAW/C/BGD/3-4, 1 April 1997 at 5; Alam 2002 n 4 at 116.

They were allowed to learn only religious lessons with the objectives of how to be submissive and obedient to their husbands and elders.²¹ A number of social reformers such as Raja Rammohan Roy (1772-1833), Ishwar Chandra Bidyashagar(1820-1891) and Mohishi Debendranathh Thakur (1817-1905) played a significant role in spreading female education and in changing social attitudes towards women. Their pioneering efforts abolished many social and cultural practices including child marriage, prohibition on widow marriage and the *sati*²² through enacting legislation.²³

The British rule made a significant contribution to the improvement of women's status in undivided India. Its influence on the Indians was exemplified in the following passage:

The introduction of market and money economy, modern educational system and the new values of equality, rationality, secularism, respect for personality and others generated a new climate for pressing for a change in the old traditional, feudal, inegalitarian social structure and norms based on inequality....The new juridico-economic framework, however, distorted and limited, at least provided a climate and incentives for Indians to launch new movements-economic, political, social and cultural—for the reconstruction of Indian society on the new principles.²⁴

In this process, several schools were established for female education between the period of 1811 and 1899, where an overwhelming majority of Hindu parents sent their daughters for charity. Nevertheless, the British-sponsored initiatives reflected a more positive impact on Hindu women than those of Muslim women since the latter were yet to escape the *Purdah*.²⁵ Muslim women were taught only the Holy Quran and prohibited from learning

²¹ The discussion concerning 'Emergence of Women's Rights in Bangladesh' largely relies on Khan 2001 n 15 at 33-51.

²² *Sati* was a Hindu practice of burning, requiring a wife to be burnt with the dead husband in a similar funeral pyre to show her love and obedience to the husband. See G Forbes, *The New Cambridge History of India: Women in Modern India* (1996) Cambridge: University Press at 248.

²³ See for example, *Hindu Widow's Remarriage Act* 1856, *Child Marriage Restraint Act* 1929. See also, Research Unit on Women's Studies, *Women in India—A Handbook* (hereinafter *Women in India*) (1975) Bombay: Smt. Nathibai Damodar Thakersey Women's University at 69.

²⁴ *Women in India* id at 9.

²⁵ *Purdah* denotes a veiled situation with the whole body of a woman being covered by a single piece of cloth. Without covering body and face, women were not permitted in the early stage to go outside or in front of other male strangers.

English or other languages and even Bengali, the language of day-to-day affairs. Emphasising education of Muslim women for the first time, the Mohammedan Education Congress was established in 1886 but it took practical effect in 1899 with the introduction of a teacher training school for Muslim women. By that time, Muslim women who were able to come out from the seclusion expanded the women's movement for the cause of education. Faizunnessa Chowdhurani(1834-1903) and Karimunessa Khanam (1855-1926) were among them.

Born in the District of Comilla in East Bengal F Chowdhurani learnt English, Persian Sanskrit and Bengali and established an English medium Faizunnessa Girls' High School in 1873. In 1889, she received the title of 'Nawab' from Queen Victoria. K Khanam was born in the District of Rangpur of East Bengal, learnt Bengali secretly but was married at fourteen and became widowed at twenty-three. However, she remained with the struggle for women's emancipation and encouraged her sister Rokeya Sakhawat Hossain to study other subjects than religion. R S Hossain, heavily influenced by the ideals of her sister, became a famous writer of East Bengal. Her two popular books are 'Oborodh Bashini' (written in Bengali) and 'Sultana's Dream' (English). The former portrays social injustices and discrimination against women and the latter canvasses a sultana's (a woman) desires, dreaming that women ruled the world and men were kept within the domestic walls, caring for children and cooking. In 1910, she established the Sakhawat Memorial Muslim Girls Primary School, the first Bengali school for Muslim girls. In 1921, Dhaka University was established and Sultana Begum, a Muslim, was the first woman to obtain a Masters in Law in 1922.

In the meantime, women's movements shifted their attention from education to political and economic emancipation. With one of the prime objectives to find out ways and means

to abolish polygamy, two Muslim Women's Congresses were formed respectively in 1915 and 1917. From then until the partition, women's movements were basically centered on the issue of liberation from the British rule and on the elimination of discriminatory laws against them. The Khilafat Andolon was one of the most important movements in which a large number of Muslim women were actively involved, to defy the British rule. In 1914, Bi-Amma as the first Muslim woman to attend the Indian congress, visited different parts of East Bengal (Bangladesh) to encourage women to participate in Khilafat Andolon. On the other hand, several women's committees such as Srihatta Women's Committee and Muslim League Women's Council were established during the period of 1930-1940 with a view to focus on issues of women's health and nutrition as well as on unequal laws. Consequently, a number of laws were enacted in favour of women. These include the *Dissolution of Muslim Marriage Act 1939* and the *Bengal Maternity Benefit Act 1939*. The first Act provides a Muslim wife with the right to dissolution of marriage on the eight grounds and the second provides for paid maternity benefits.²⁶

After the partition of India and Pakistan, B R Liaquat Ali Khan, wife of the first Prime Minister of Pakistan, formed the Apwa Society for women. Its East Wing chaired by B N Amin Khan held its annual meeting in Dacca (Dhaka) in 1950. Through this forum women protested, refusing to remain in *purdah* as instructed by the Muslim League, the then ruling party of Pakistan. Another major development was made following the formation of the East Pakistan Women's Society in Mymensingh in 1948 with Begum Sufia Kamal in chair, a famous poet and social worker in Bangladesh. She organised the common and disadvantaged women under this forum and demonstrated with slogans against the government. As a result, the government banned all activities that opposed the Muslim

²⁶ See for example, *Dissolution of Muslim Marriage Act 1939* s 2 and *Bengal Maternity Benefit Act 1939* s 4.

League in 1948 and on 5 July 1948, many women were arrested when they continued the anti-government protests in the streets.

Likewise, women actively took part in the Language Movement 1952 and were arrested. Bangladesh is the only country which had to fight for language. Despite Bengali being the mother tongue of 56% of the total population of Pakistan, the government imposed Urdu on Bengalis. Since the partition from India, 'money order forms, currency notes and postage stamps were printed in *Urdu* and English'.²⁷ The language movement reached its peak in 1948 following a remark of Ali Zinna, the founder of Pakistan when he declared in Dhaka University Convocation that the 'state language of Pakistan is going to be Urdu and no other language. Anyone who tries to mislead you is really an enemy of Pakistan.'²⁸ At one stage, in protest at this imposition, the Muslim League Women's Group blocked the way of the then Minister for Transport and Communication on his visit to Sylhet (now one of the Divisions of Bangladesh). The Language Movement was ended with a victory, leaving a number of Bengali martyrs on 21 February in 1952. Thereafter, the language movement became the principal episode of reference for the People's Upsurge in 1969 and for the Liberation War 1971.²⁹ In 1999, 21 February gained international recognition as an international Mother Language Day.³⁰

Between the period of 1952-1960, a series of issues such as employment and equal pay, freedom of speech, abolition of anti-democratic laws and the need for family courts

²⁷ Khan 2001 n 15 at 45.

²⁸ 'A Brief History of the Bangla Language Movement' <http://www.virtualbangladesh.com/history/ekushe.html> (30 December 2003).

²⁹ See 'Pathway of Bengali Language Movement' <http://www.dhaka_bd.com/21feb/htmls/pathway.htm> (4 November 2003); see also, n 9.

³⁰ The United Nation Education, Scientific and Cultural Organisation (UNESCO) proclaimed February 21 as 'International Mother Language Day' on 17 November 1999. See, 'UNESCO Resolution-Ekushey February International Mother Language Day http://www.bssnews.net/about_language_movement.php (30 December 2003); 'Feb 21st now World Mother Language Day <http://www.mydhaka.com/wml.htm> (30 December 2003).

dominated women's struggles. The *Muslim Family Laws Ordinance* 1961 was the outcome of 20 years of extensive efforts by women.³¹ This Ordinance made a significant change in the provisions of divorce and polygamy.³²

Meanwhile, the atrocities and exploitative practices of the Pakistan government prompted the struggle of the East for its self-determination. In support of the struggle, the Women's Action Council was formed in 1969. The Council renamed itself the East Pakistan Women's Council in 1970 and Sufia Kamal became the chairperson of the Council. It advanced with a number of demands such as the sovereignty of East Pakistan, reserved seats for women in the National Assembly and equal pay for women workers. In liberating Bangladesh, women also contributed to 'joining camps in India to learn guerrilla warfare, first aid and all things necessary to fight a war. Women helped feed and hide freedom fighters and their arms.'³³

Finally, Bangladesh achieved its independence in 1971. A written Constitution was adopted on 4 November 1972, incorporating the right to equality before the law and non-discrimination principles in the public sphere. Subsequently, a series of laws was enacted and inherited from the British India in favour of women, some of which are considered in following chapters.

Thus it is observed here that women in early stages were prevented even from learning Bengali except for religious education and their rights were not automatically conferred on them. Given the negative social attitude, women had to wage continuous struggles to achieve these rights.

³¹ Khan 2001 n 15 at 48.

³² See for example, *Muslim Family Laws Ordinance* 1961 ss 6-8.

1.4. Definition of Women's Rights

‘Women’s rights’ in their literal meaning simply refer to a set of rights which are exclusively enjoyed, or rather enjoyable, by women in particular, to the exclusion of men. A narrow sense of the phrase implies only those rights that are recognised in an individual state. In this regard, the definitional formats of rights are the socio-economic-cultural-religious and legal settings of a particular country in which women stand.³⁴ Accordingly, the scope of rights varies from country to country. In a broader sense, women’s rights signify a wide range of ‘entitlements’ that women are entitled to by virtue of their humanity, and are the same for all. Unlike the narrower approach, it transcends the limitations of legal rights recognised in a specific country. This particular concept captures the essence of human rights such as universality, inalienability and indivisibility.³⁵ Human rights principles originate from, and respond to, the very nature of human being.³⁶ Accordingly, the only qualifying criterion to have these rights is to be a human being. Pursuant to this criterion, ‘universality’ tends to support inclusion of all human rights in the class of ‘women’ without regard to race, colour or place, since the way of becoming a right holder is alike for all humans. ‘Inalienability’ entails the inherent abilities that women possess since their birth as dignified creatures of God instead of being accorded by any

³³ Khan 2001 n 15 at 51.

³⁴ C Bunch, ‘Women’s Rights as Human Rights: Towards a Re-vision of Human Rights’ (1990) 12 *Human Rights Quarterly* 486 at 486.

³⁵ P C Aka, ‘Education, Human Rights, and The Post-cold War Era (1999) 15 *New York Law School Journal of Human Rights* 421 at 422; S Y Lai and R E Ralph, ‘Recent Development: Female Sexual Autonomy and Human Rights’ (1995) 8 *Harvard Human Rights Journal* 201 at 202; S Kaye and R Piotrowicz, *Human Rights in International and Australian Law* (2000) Australia: Butterworths at 3-4.

³⁶ P C Aka, ‘The Military, Globalisation, and Human Rights’ (2002) 18 *New York Law School Journal of Human Rights* 361 at 362; J Donnelly, ‘Cultural Relativism and Universal Human Rights (1987) 6 *Human Rights Quarterly* 400 at 400.

material source of power.³⁷ These abilities entitle them to a number of rights that cannot be dissociated from without impairing their dignity³⁸ and without which it ceases to exist. These rights, being inextricably linked with human nature, cannot be taken away by any force, or be divisible like other possessions. These three qualities have distinguished human rights from other rights.³⁹ The consequence of the broad formulation of human rights also results in the notion of 'secular' and 'equal' natural/ethical claim, justice as well as legal rights guaranteed under the system of law. This ethical and legal significance empowers women to enjoy these rights regardless of nationality, religion, culture or colour.

However, Burrows, beyond the generalised concept, has identified reproductive choice, childbirth and related rights as central to women's rights.⁴⁰ The right to a minimum wage for work, right to literacy and right to freedom from domestic violence are also considered potential women's rights, which most disadvantaged women lack.⁴¹ This approach seemingly intends to divert the international vocabulary of rights to the private domain in order to make rights meaningful to the majority of women.

³⁷ The natural rights theory of British Philosopher John Locke played a profound role in advancing this particular concept of human rights. He observed that individuals derive their inherent rights from nature. These are, therefore, their own and beyond the control of the state. See for details, J Symonides, *Human Rights: Concept and Standards* (2000) Sydney: Ashgate UNESCO Publishing at 35-37; E Kamenka and A E Tay (ed), *Ideas and Ideologies: Human Rights* (1978) Australia: Edward Arnold at 5.

³⁸ M G Chitkara, *Human Rights: Commitment and Betrayal* (1996) New Delhi: APH Publishing Corporation at 12.

³⁹ P Sieghart, *The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights* (1986) New York: Oxford University Press at 43.

⁴⁰ R J Cook (ed), *Human Rights of Women: National and International Perspectives* (1994) Philadelphia: University of Pennsylvania Press at 66.

⁴¹ Ibid.

1.5. Women's Rights as Human Rights

Women's rights gained international recognition for the first time in the United Nations (UN) Charter 1945.⁴² Since then, a series of international covenants, treaties and conferences have been concluded under UN auspices to reaffirm and elaborate women's rights. The International Bill of Rights⁴³ was pioneering in providing a comprehensive list of rights.⁴⁴ To address women's rights exclusively, some specific international treaties were also developed. These are, for example, the *Convention on the Political Rights of Women* 1953, the *Convention on the Nationality of Married Women* 1957, the *Convention against Discrimination in Education* 1960 and more importantly, the *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW) 1979. These instruments provide provisions, aiming to place women in parallel with men in the public sphere.⁴⁵ The CEDAW is the most comprehensive attempt in the international arena to

⁴² Although the concept of 'women's rights as human rights' is largely the product of the 4th World Conference on Human Rights 1993, its basis lies with the UN Charter 1945. Prior to the adoption of the UN Charter, women's rights received significant attention in the writings of a good number of prominent writers, and national and international conferences. However, the UN Charter, for the first time, legally made women's rights international. For details see, A S Fraser, 'Becoming Human: The Origins and Development of Women's Human Rights' (1999) 21 *Human Rights Quarterly* at 853-906.

⁴³ The *Universal Declaration of Human Rights* (UDHR) 1948 together with its two Covenants, *International Covenant on Economic, Social and Cultural Rights* (ICESCR) 1966, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27; *International Covenant on Civil and Political Rights* (ICCPR) 1966, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with article 49 and the two Optional Protocols of the ICCPR constitute the *International Bill of Rights*. ICCPR General Comment 28 also mandates 'State Parties to take all steps necessary, including the prohibition of discrimination on the ground of sex, to put an end to discriminatory actions, both in the public and the private sector, which impair the equal enjoyment of rights.' See generally ICCPR General Comment 28 (Sixty-eighth session, 2000): Article 3: Equality of Rights Between Men and Women, A/55/40 vol 1 (2000) 133 and particularly at paras 2-6.

⁴⁴ All civil-political and socio-economic-cultural rights are enshrined in the International Bill of Rights. The UDHR has been regarded as 'the most authoritative statement', 'the basis of contemporary international law of human rights' and 'the birth certificate of the International Human Rights Movement'. See Aka 1999 n 35 at 428.

⁴⁵ R Wallace, *International Human Rights: Text and Materials* (1997) London: Sweet & Maxwell at 64.

address gender equality,⁴⁶ and is regarded as ‘universal in reach, comprehensive in scope, and legally binding in character.’⁴⁷ CEDAW articulates a broad definition of discrimination and addresses almost all aspects of women’s rights.⁴⁸

The ruling and recommendations of major Committees⁴⁹ established by the international human rights treaties also have positive significance in identifying new aspects and thereby providing suitable remedies for women. The Committee under the *Convention on the Rights of the Child* (CRC) 1989, for example, identified traditional attitudes and stereotypes discriminatory towards girls, and called on the government of Bangladesh to eliminate those.⁵⁰

The World Conferences on Women⁵¹ and the Vienna Declaration affirmed that women’s rights are ‘an inalienable, integral and indivisible part of universal human rights’.⁵² The

⁴⁶ M Etienne, ‘Addressing Gender-Based Violence in an International Context’ (1995) 18 *Harvard Women’s Law Journal* 139 at 171.

⁴⁷ R J Cook, ‘Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women’ (1990) 30 *Virginia Journal of International Law* 643 at 643.

⁴⁸ The Convention urged the governments to eliminate all forms of discrimination in the political and public spheres as well as customary practices that impair the full and equal enjoyment of human rights of women. See *Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter CEDAW) 1979, adopted 18 December 1979, General Assembly, Res 34/180, UN GAOR 34th Session, Supp No 46, UN Doc A/34/36 (1980) (entered into force 3 September 1981) arts 2 and 5; see also, L A Hoq, ‘The Women’s Convention and its Optional Protocol: Empowering Women to Claim Their Internationally Protected Rights’ (2001) 32 *Columbia Human Rights Law Review* 677 at 677-678; B E H- Truyol, ‘Women’s Rights As Human Rights-Rules, Realities and the Role of Culture: A Formula For Reform’ (1996) 21 *Brooklyn Journal of International Law* 605 at [Part IV para 3].

⁴⁹ Six Committees have been established under the major six international human rights treaties under the UN. These are commonly called the ‘treaty-monitoring bodies’ to monitor the implementation of those instruments. For example, Human Rights Committee under article 28 of the ICCPR, and CEDAW Committee under article 17 of CEDAW are responsible for monitoring the states’ compliance with these two Conventions.

⁵⁰ ‘Concluding Observations of the Committee on the Rights of the Child: Bangladesh’ (1997) 18/06/97 CRC/C/15/Add 74, 18 June 1997, <http://www1.umn.edu/humanrts/crc/bangladesh1997.html> (15 September 2004).

⁵¹ Four World Conferences on Women have so far been held under the UN framework. The basic theme of the first two Conferences (one held in the Mexico City in 1975 and the other in Copenhagen in 1980) concentrated on education, development and empowerment of women and on raising awareness to this end. The 3rd World Conference was held in Nairobi, Kenya in 1985 which adopted the ‘Forward-Looking Strategies for the Advancement of Women’. The Strategies called for sexual equality, women’s autonomy and power, recognition of women’s unpaid work and improvement in women’s paid work. See ‘3rd World Conferences on Women, Nairobi 1985, Summarised in: *Youth Sourcebook on Sustainable Development* (1995) Winnipeg: International Institute for Sustainable Development. See also, Fraser 1999 n 42.

result of the World Conference in 1993 demonstrated what Bunch described as ‘the power of women to bring concerns from the grassroots into the public arena.’⁵³ The Vienna commitments were reinforced in the subsequent conferences held between the periods of 1993-1995. The recommendations of the Vienna Declaration led the General Assembly to adopt the *Declaration on the Elimination of Violence against Women* in 1993. This Declaration is much more explicit and clear than prior conferences in defining the nature and scope of violence against women.⁵⁴ Article 3 of the Declaration provides, amongst other things, women’s rights to life, rights to equal protection of law and rights to be free from all forms of discrimination. It seeks to strengthen and complement the process of effective implementation of the CEDAW.

The importance of women’s rights in the linkage of development and population policy was stressed in the *International Conference on Population and Development* (ICPD) 1994. This Conference regarded reproductive health and women’s fertility as the basic requirement for their empowerment.⁵⁵ The Beijing Conference 1995, one of the pivotal conferences on women, further provided opportunity to advance women’s rights globally through developing a ‘Platform for Action’ (PFA). The PFA was primarily designed to expedite the implementation of the ‘Nairobi Forward-Looking Strategies’,⁵⁶ and to remove all barriers, including traditional practices which negate women’s full and equal rights in

⁵² *Vienna Declaration and Programme of Action*, World Conference on Human Rights, Vienna 14-25 June 1993, A/CONF 157/23 12 July 1993 para 18 (1).

⁵³ J Kerr (ed), *Ours By Right: Women’s Rights as Human Rights* (1993) at 146.

⁵⁴ *Declaration on the Elimination of Violence Against Women* 1993, GA res 48/104, 48 UN GAOR Supp (NO 49) at 217, UN Doc A/48/49 (1993) arts 1 & 2; C M Chinkin, ‘Women’s Rights as Human Rights Under International Law’ in C Gearty and A Tomkins (ed), *Understanding Human Rights* (1999) London: Pinter 552 at 553.

⁵⁵ Paragraph 96 of the ICPD has expanded women’s rights to include the right to ‘have control over and decide freely [on matters]... including sexual and reproductive health, free of coercion, discrimination and violence.’ See *International Conference on Population and Development* (ICPD) 1994, A/C 2/49/L 67: Gen Assembly resolutions on the ICPD (9 Dec 94) paragraph 96; See also, N Taub, ‘Population and Development: Cairo: Its Achievement and Challenges’ (1995) *Saint Louis-Warsaw Transatlantic Law Journal* 51 at 51-53.

public and private spheres. It identified 12 areas of concern in relation to promotion and protection of women's rights.⁵⁷ As a follow-up, a five year review of ICPD+5 and Beijing + 5 were also conducted in 2000 to assess the development of women's rights.⁵⁸

Apart from the above treaty-based developments, the charter-based bodies of the UN, especially the General Assembly, the Economic and Social Council (ECOSOC), the Commission on Human Rights and the Commission on the Status of Women (CSW)⁵⁹ contribute to move forward women's human rights by way of formulating numerous resolutions and recommendations. For example, in April 1999, the Commission on Human Rights issued a detailed resolution requiring all countries to criminalise and penalise trafficking in women and girls in all its forms.⁶⁰

Hence, it is seen that international efforts have, to a significant extent, widened the scope of women's rights from what it was in 1940s. Nonetheless, while the institutional development makes women's rights visible and more important worldwide, questions

⁵⁶ See World Conferences on Women n 51.

⁵⁷ The areas are: poverty, education and training, health, violence, armed conflict, economy, power and decision making, institutional mechanism for the advancement, human rights, media, environment and the girl child. See *Beijing Declaration and Platform for Action*, Fourth World Conference on Women, 15 September 1995, A/CONF 1177/20(1995) and A/CONF 177/20/Add 1 (1995).

⁵⁸ The review observed some affirmative outcomes that include: (i) the increasing pressure of women advocacy and various efforts to raising awareness have placed women's rights on the top of the global agenda; (ii) the ratification of CEDAW and the Platform of Action have occasionally been effective in enacting anti-discrimination domestic legislation. See Commission on the Status of Women acting as the preparatory committee for the special session of the General Assembly entitled '*Women 2000: gender equality, development and peace for the twenty-first century*' (2000) March 3-17, 3rd Session, E/CN 6/2000/PC/CRP 1 at 53-55.

⁵⁹ The CSW was established by the Economic and Social Council (ECOSOC) in 1946. The primary functions of the commission include, considering policy decisions on women, monitoring women's rights situation and preparing recommendations for the UN. The CSW in its thirty-seventh session, for example, recommended ECOSOC adopt the seven draft resolutions and two draft decisions made by the CSW. One of the most important was the draft on the *Declaration on the Elimination of Violence against Women*. Accordingly, the *Declaration on the Elimination of Violence against Women* was adopted in 1993. The CSW is also empowered to review communications sent by an individual or organisation in order to assess the situation that 'appear to reveal a consistent pattern of reliably attested injustice and discriminatory practices against women.' See Commission on the Status of Women, Division for the Advancement of Women, United Nations; 'Report of the Commission on the Status of Women on its Thirty-seventh Session' (Vienna 17-26 March 1993) E/1993/27, E/CN6/1993/18 28 May 1993.

remain as to their practical impact on women. It is widely argued that the overall wording of international human rights provisions, especially of CEDAW, is premised on a limited approach towards equality which merely seeks to equate women's rights in the measurement of a male yardstick. That particular approach ensures potential dilemmas as to whether women should be treated equally or differently for their unique reproductive functions and for their cultural or religious membership.⁶¹ As Charlesworth maintains, if rights and freedoms are viewed in a gendered way 'access to them will be unlikely to promote any real form of equality.'⁶²

Beyond the above contradiction, existing literature reveals that large portions of women around the world still lack even basic needs to merely sustain their lives let alone a broad range of rights. The lawful rights of many have been consistently denied or violated by nurturing patriarchal social systems, customary and communitarian values, which authoritatively exist in most Asian countries. One of the major controversies surrounding the formulation of human rights that often hinders the promotion of women's rights has been whether human rights should weight individual autonomy, while ignoring the larger community value. For example, the Western conception on human rights 'rests on a definition of the person as an isolated autonomous individual ...with the inherent rights in the domain of political and civil rights'.⁶³ It regards the individual as a distinct and valued

⁶⁰ Commission on Human Rights, 'Trafficking in Women and Girls' (1999) 26 April, 55th Meeting, reso 1999/40.

⁶¹ Hoq 2001 n 48 at 683.

⁶² H Charlesworth, 'What are "Women's International Human Rights"?' in Cook 1994 n 40 at 64; see also, H Charlesworth, 'Human Rights as Men's Rights' in J Peters and A Wolper (ed), *Women's Rights Human Rights* (1995) New York: Routledge at 103-110.

⁶³ See J Donnelly, *Universal Human Rights in Theory and Practice* (1989) London: Cornell University Press Limited at 88.

creature endowed with certain inalienable rights by birth.⁶⁴ By contrast, the Asian approach towards human rights prioritises the community welfare and family ties over individual rights and shows a great degree of reluctance to recognise the universality of women's human rights.⁶⁵ 'Asian values differ from the Western one by communitarian in spirit, with family and community obligations being the core of social life as opposed to the West individualism'.⁶⁶ It is argued that the liberal concept of human rights is excessively individualistic which tends to create a competitive attitude among individuals, and is not conducive to good community living.⁶⁷ Human rights are conceived in the Asian approach

⁶⁴ Liberals argue that too much weight on the community places individuals in a subordinate and vulnerable position in the face of authoritarian, repressive government. In such a situation, the government becomes the sole authority to assess the feasibility of enjoyment of rights that is 'more objectionable than the allegedly excessive individualism of human rights'. During the period of 1700s and 1800s the increasing penetration of individualistic thinking in the mainstream of political and philosophical discussions made a considerable change in the traditional duty- based society. The individualisation of core aspects of rights such as freedom, equality, happiness and autonomy that resulted from the American and French Revolutions became the central point of liberal philosophy. The natural rights theory of John Locke played a commendable role in advancing this idea forward. The theory is premised on the belief that all human beings are born free and equal in natural rights. 'Individuals are seen [in Locke's theory] as proprietors of their persons and talents, with respect to which they owe nothing to society'. Locke regarded society as an association of individuals based on a social contract whose prime objective is to facilitate the efficient exercise of inalienable rights of human beings. For him, the society becomes illegitimate as soon as it fails to secure those rights. See A Perez-Estevéz, 'Intercultural Dialogue and Human Rights: A Latin American Reading of Rawls *The Law of Peoples*', a paper presented in the 20th World Congress of Philosophy (WCP Paper) Boston, Massachusetts, USA, 10-15 August 1998 <<http://www.bu.edu/wcp/Papers/Huma/HumaPere.htm>> (4 March 2002); Donnelly 1989 id at 28 & 93; Symonides 2000 n 37 at 40 & 72.

⁶⁵ J V Spickard, 'Human Rights, Religious Conflict, and Globalization. Ultimate Values in a New World Order' (1999) 1 *Journal on Multicultural Societies UNESCO* <<http://www.unesco.org/most/v1i1n1spi.htm>> (29 October 2001); H Yamane, 'Approaches to Human Rights in Asia' in R Bernhardt and J A Jolowicz, *International Enforcement of Human Rights* (1985) London: Springer- Verlag Berlin Heidelberg at 100.

⁶⁶ M Jacobsen and O Bruun (ed), *Human Rights and Asian Values: Contesting National Identities and Cultural Representations in Asia* (2000) Richmond Surrey: Curzon Press at 2-3.

⁶⁷ This approach has ruled out any separate place for individuals within a community. Some Asian nations have reasoned that a heavy price has to be paid 'for the over legalisation of entitlements into rights', the adversarial effects of which would undermine the 'economic growth, destablise harmonious social relations and the capacity of individuals to interact on the basis of their responsibilities and duties in the community'. Baum observed that 'the philosophy of liberalism appears as the legitimization of personal egotism, the elevation of the private good over common well-being, and the moral endorsement of a competitive, achievement-oriented, free enterprise business civilization'. See, G Baum 'Catholic Foundations of Human Rights', <<http://www.stthomasu.ca/research/AHRC/BAUM.HTM>> (29 October 2001); S Goonesekere, 'A Rights-Based Approach to Realizing Gender Equality', <<http://www.un.org/womenwatch/daw/news/savitri.htm>> (5 January 2002); C J Dias, 'Culture and Values: Human Rights, Workers, Communities and their Environment', National Foreign Policy Conference Region, Saskatchewan, Canada's Year of the Asia Pacific: 3-5 October 1997,

as 'Eurocentric Western values',⁶⁸ which is unsuited to Asian culture.⁶⁹ This controversy often thwarts international efforts to promote women's human rights.

Thus, it can be said that the overall premise of international human rights instruments and resolutions seem to have little relevance to the reality of most women's lives. In this regard, the former High Commissioner for Human Rights comments:

70% of the 1.3 billion poor are women and they constitute the majority of refugees, ...female illiteracy is invariably higher than male illiteracy, ...[millions] of girls are still subject to genital mutilation. In many countries women lack access to reproductive health care and every day women are targeted in armed conflicts, women's economic, social and cultural rights continue to be neglected.⁷⁰

Notwithstanding, it is not denying the fact that the influence of international initiatives is enormous and far reaching to place women's rights at the center of rights discourse. International instruments and their substantive standards are increasingly integrated into the legislative and judicial practices at domestic levels to further and protect women's rights.⁷¹ Now women are more conscious and equipped with legal sanctions than in the 1940s to raise and ensure their rights. The CEDAW becomes a 'Bill of Rights' which provides women with a legitimate platform for organising, and makes them actual claimants rather than the passive beneficiaries of international human rights law.⁷² As it is claimed, 'CEDAW is undoubtedly a well-structured, viable and far-reaching statement in advancing

<<http://www.ciia.org/dias.htm#traditions>> (5 January 2002); J Donnelly, *The Concept of Human Rights* (1985) London: Croom Helm at 73; Symonides 2000 n 37 at 40 & 72.

⁶⁸ Goonesekere 2002 *ibid*.

⁶⁹ This issue is further considered in Chapter 3.

⁷⁰ Quotation from Mary Robinson, the former High Commissioner for Human Rights in 'Human Rights: Women's Rights are Human Rights, Special Issue on Women's Rights'- Spring 2000, A Review of the Office of the United Nations High Commissioner for Human Rights at 3.

⁷¹ A X Fellmeth, 'Feminism and International Law: Theory, Methodology, and Substantive Reform' (2000) 22 *Human Rights Quarterly* 658 at 730.

⁷² B E Hernandez-Truyol, 'Sex, Culture and Rights: A Re/Conceptualization of Violence for the Twenty- First Century' (1997) 60 *Albany Law Review* 607 at 611.

women's rights',⁷³ and '[without] CEDAW, it is apparent that women's rights would have remained relegated to a third-class issue, beyond the pale of international attention'.⁷⁴

1.6. Administrative Framework and Government Policies on Women

1.6.1. Administrative Framework

The Ministry of Women's and Children's Affairs (MOWCA) established in 1978 has been the principal organ dealing with women's concerns in Bangladesh. Its role includes the formulation of national policies and the implementation of various programs and plans aiming to promote the legal and social rights of women.⁷⁵ The Department of Women's Affairs (DWA) 1990, an implementing arm of the MOWCA, is concerned with raising awareness on women's rights and related issues. This Department is currently conducting various training programs for women to provide, *inter alia*, credit facilities and legal aid services. In 1997, the National Council for Women's Development (NCWD) was formed as the highest policy making body on women under the direct leadership of the Prime Minister.⁷⁶ A 42-member Council comprising ministers and secretaries from several Ministries, members of parliament and public representatives is primarily responsible for monitoring national policies on women's development. It provides guidelines for the formulation and coordination of rules and regulations for the development work of different Ministries, divisions and other agencies of the government. In addition, a national

⁷³ J L Southard, 'Protection of Women's Human Rights under the Convention on the Elimination of All Forms of Discrimination Against Women' (1996) 8 *Pace International Law Review* 1 at 23.

⁷⁴ Cited in J Oloka-Onyango and S Tamale, ' "The Personal is Political," or Why Women's Rights are Indeed Human Rights: An African Perspective on International Feminism' (1995) 17 *Human Rights Quarterly* 691 at 716.

⁷⁵ CEDAW Report n 20 at 13.

⁷⁶ Country Paper n 2 at 12.

organisation of women, the Jatiya Mohila Shangstha (JMS), has been functioning under the MOWCA with the objective of making progress in education and other socio-economic-cultural affairs. It undertook various skill development training programs, including handicrafts, tailoring, family planning, sanitation and micro-credit.⁷⁷ Apart from these, since 1990 Women's Development has been integrated into various projects of all Ministries in Bangladesh.⁷⁸

1.6.2. Government Plans and Policies

Over the last three decades, the government incorporated a Women in Development (WID plan) into different national plans. The plans are; the 1st Five-Year Plan 1973-78, the Two-Year Plan 1978-1980, the 2nd Five-Year Plan 1980-85, the 3rd Five-Year Plan 1985-90, the 4th Five-Year Plan 1990-95, the Draft Participatory Perspective Plan (DPP) 1995-2010 and the 5th Five-Year Plan 1997-2002. Further, the National Policy on Women's Advancement (NPWA) was declared by the Prime Minister in March 1997 to provide a comprehensive framework for women's advancement.⁷⁹

The 1st Five-Year plan and the Two-Year plan were concerned with respectively the 'welfare and rehabilitation' and development programs for women, especially for war affected women.⁸⁰ The 2nd plan was purported to facilitate women's participation in development by generating various skill and credit programs.⁸¹ The 3rd plan sought to close inequalities between men and women and to integrate women's development in various national programs. The 4th plan was based on the goal of accelerating economic growth,

⁷⁷ Planning Commission, 'Mid-Term Review of the Fifth Five Year Plan 1997-2002 (hereinafter Review of 5th Plan) (2000) Ministry of Planning: Government of the People's Republic of Bangladesh at 202.

⁷⁸ Country Paper n 2 at 12.

⁷⁹ For details see, CEDAW Report n 20 at 10-15; id at 7-14.

⁸⁰ CEDAW Report n 20 at 10.

poverty alleviation and self-reliance. The DPP aims to eliminate all forms of discrimination against women and to empower women.⁸² The recognition of women's rights in health, housing, politics, administration and the economic sphere was affirmed in the NPWA. It placed special focus on the elimination of all forms of oppression against women and on the media's role in creating a positive image regarding women's rights.

The 5th plan basically concentrates on the implementation of the NPWA with particular emphasis on equal access to opportunities for, and development of, women.⁸³ In pursuance of international obligations, the government adopted the National Action Plan (NAP) and established the National Committee to follow up the ICPD (International Conference on Population and Development) Action Program for empowering women.⁸⁴ The NAP seeks to implement the recommendations of the Beijing Platform.⁸⁵ Along with the government's plans, a good number of UN agencies such as, the ILO, UNDP, UNICEF, FAO and several International Non-Government Organisations (NGOs) have been engaged in Bangladesh with a variety of projects targeting the promotion of women's rights.

1.6.3. A Brief Evaluation of Government Plans and Policies

The above diversified plans and programs of the government appear to be sound in advancing women's rights in Bangladesh, yet the question then becomes: to what extent can these programs work in the real lives of the majority of women. This is not to deny the fact that the government's intervention helps generate awareness of women in relation to

⁸¹ N A Karim, 'Jobs, Gender and Small Enterprises in Bangladesh: Factors Affecting Women Entrepreneurs in Small and Cottage Industries in Bangladesh' International Labour Office Geneva, Dhaka 2000 at 13.

⁸² CEDAW Report n 20.

⁸³ Review of the 5th Plan n 77 at 201; CEDAW Report n 20 at 11.

⁸⁴ Goswami 1998 n 17 at 68.

⁸⁵ Country Paper n 2 at 3.

education, self-employment and development.⁸⁶ A few positive changes are: the increased proportion of girls' enrolment in primary school, the reduction of maternal mortality and child death rates and the gradual enhancement of women's participation in economic activities, particularly in manufacturing sectors.⁸⁷ In addition, recent years have witnessed an unprecedented involvement of women in the micro-credit program that supports their empowerment,⁸⁸ although the impact of micro-credit on poverty-reduction in Bangladesh remains controversial.⁸⁹ A large number of women became visible in informal, relatively low-paid sectors and as chief economic earners of female-headed households.⁹⁰ In the 1990s, women represented roughly one-quarter of the labour force in the export-oriented manufacturing sector, mostly concentrated on garment production.⁹¹ Nevertheless, the overall achievement remains too far from the desired goal. Bangladesh still falls behind even its neighbouring countries in several social indicators. For example, the female literacy rate is 26.1%, compared to 37.7 % in India, 78% in Indonesia, 78.1% in Malaysia and 83% in Sri Lanka.⁹² Life expectancy for women is 59.91 years, substantially below 63.13 in India and 74 years in Sri Lanka.⁹³ The Infant mortality is still six times higher than

⁸⁶ Country Paper n 2; see also, S I Alam, 'Role of Women in Decision Making and Economic Contribution at Household Level' (1998) 1 *Journal of International Affairs* 13 at 18-33.

⁸⁷ Country Paper n 2.

⁸⁸ 'The Grameen Bank (one of the prominent providers of Micro-credit) has provided an opportunity for women to achieve previously unimaginable goals and to promote change.....' See Etienne 1995 n 46 at 163; see also 'Micro-Credit Benefits the Client: Evidence From Control Group Studies', United States Agency for International Development Micro Enterprise Development: Brief Number 36 January 1997.

⁸⁹ It has been argued that 'the micro-credit programs do little to alter gender relations in favour of females but in fact may contribute to reinforcing existing gender imbalances,' and 'the poverty reduction impact of credit declines with cumulative loan size'. See for details, H Zaman, 'Assessing the Poverty and Vulnerability Impact of Micro-Credit in Bangladesh: A Case Study of Bangladesh Rural Advancement Committee (BRAC)' Office of the Chief Economist and Senior Vice-President (DECVP), The World Bank at 5 & 3.

⁹⁰ Goswami 1998 n 17 at 61-66.

⁹¹ A M Goetz, *Women Development Workers: Implementing Rural Credit Programmes in Bangladesh* (2001) London: Sage Publications at 58.

⁹² The World Factbook 2000 (hereinafter Factbook), <http://www.bartleby.com/151/113.htm#people> (8 October 2001).

⁹³ Ibid.

Sri Lanka and one-third greater than India.⁹⁴ Approximately 70% of married women are afflicted by nutritional deficiency.⁹⁵ Living standards of female-headed households remain below the poverty threshold.⁹⁶ According to the indicators (based on country's achievement in terms of women's life expectancy, literacy, and real income, compared to men) published by the UNDP, Bangladesh ranks 103 on a list of 130 countries, behind all its neighbouring countries.⁹⁷

With regard to the effectiveness of government's plans, the 1st Five-Year plan failed to introduce any separate sector or budget allocation for women-specific development.⁹⁸ Although the Two-year plan visualized women distinctly in the development process, it was limited to vocational training and agriculture-based development and did not address wider aspects. Moreover, that development initiative was ineffective in eradicating poverty and powerlessness of women in the last two decades.⁹⁹ Under the 2nd Five-Year plan, no effort was made to equate or recognise women's rights and roles with men in the public and private sectors. For example, to reduce the gender gap in the public sector, the concerned ministries were required to submit reports on women's recruitment quarterly, but these have not yet been forthcoming.¹⁰⁰ The state report submitted to the CEDAW

⁹⁴ The World Bank and Bangladesh Centre for Advanced Studies, *Bangladesh 2020: A Long Run Perspective Study* (hereinafter Bangladesh 2020) (2000) Dhaka: The University Press limited at xviii.

⁹⁵ Id at xvi.

⁹⁶ Karim 2000 n 81 at 17.

⁹⁷ See for details, Women's Rights in India < <http://dspace.dial.pipex.com/town/square/ev90495/women.htm> > (7 May 2002)

⁹⁸ Karim 2000 n 81 at 13.

⁹⁹ The National Preparatory Committee for the World Conference on Human Rights, 'Development, Democracy and Human Rights in Bangladesh' - A Position Paper for the World Conference on Human Rights, Vienna, Dhaka June 1993 at 9.

¹⁰⁰ Ain O Salish Kendra, *Human Rights in Bangladesh: 1998* (hereinafter ASK Report 1998) (1999) Dhaka: The University Press Limited at 153.

committee acknowledged the much lower status of women, in comparison with that of men.¹⁰¹

Under the 3rd and 4th plan, several Ministries and Departments were obligated to ensure women's equal participation in their respective spheres. The implementation as such failed and suffered grossly from the lack of proper co-ordination.¹⁰² The 5th plan was originally concerned with 12 sectors altogether. Nonetheless, only two of them, the poverty alleviation and rural development, and the population growth, addressed women's roles and participation.¹⁰³ The 5th plan set 24 objectives. 'However no clear mechanism is laid down to achieve those goals nor are there set targets and funding to implement those concerns into reality.'¹⁰⁴ It might suffice, to support the above claim, to note that the 5th plan under the 'Major Physical and Social Targets'; contained 15 items, however, only two items concerning women, female literacy and maternal mortality of women, were included.¹⁰⁵ Further, it was not concerned about how the gender gap in other areas such as in health, education and employment might be redressed.

Similarly, the WID policies remain largely rhetoric since the 5th Plan did not deal with the issue of how the WID were to be implemented by several Ministries and how their roles can be reviewed.¹⁰⁶ Furthermore, despite the government's commitment to mainstreaming WID, women and children are perceived for all practical purposes as a residual category of the Ministry of Social Welfare. To this end, the Ministry of Women and Children Affairs (MOWCA) enjoys a very limited capacity to act as the lead agency. The MOWCA although

¹⁰¹ CEDAW Report n 20 at 21-22.

¹⁰² WEDO, 'Mapping Progress, Assessing Implementation of the Beijing Platform (hereinafter Mapping Progress) (1998) New York 27 at 27; see also, Karim 2000 n 81 at 13.

¹⁰³ ASK Report 1998 n 100 at 134.

¹⁰⁴ R Afsar, 'Mainstreaming Women in Development Plans: A Few Critical Comments on the Fifth Five Year Plan' (1997) 4 *Empowerment-A Journal of Women For Women* 105 at 107.

¹⁰⁵ Review of the 5th Plan n 77 at 13.

having an officially similar status with other ministries, ‘does not have the same power and political clout’.¹⁰⁷ ‘In essence, MOWCA is just a catalyst in the process of changing government policies toward women.’¹⁰⁸ Again, the NAP was designed to eliminate legal-economic and cultural barriers affecting equal rights of women and, accordingly, was required to be implemented by several Ministries and Departments. The government statistics show that such barriers still persist in severe forms¹⁰⁹ and certain Ministries, for example, the Ministry of Planning, Energy, Power and Mineral Resources, failed to chalk up any plan for women.¹¹⁰ Furthermore, many of the sectoral policies do not have any well-organised statements and specific objectives.¹¹¹ Some of the plans experience serious gaps in the allocation of funds and in their implementation strategies. For example, ‘only 7% of the total budget of the women and children affairs ... is allocated to enhance mainstreaming activities...’.¹¹² Moreover, a number of plans are overly optimistic in their future vision without drawing any analytical framework or definite targets. The NAP, for example, merely laid down a goal for the future without fixing any time-limit or concrete responsibility on the sectoral Ministries.¹¹³ The Perspective Plan (1995-2010) was formulated in 1995, but is yet to be approved as a plan document.¹¹⁴ Nonetheless, the plan has foreseen that women’s employment would rise from 8 to 30 percent by the year 2000 both in national and international spheres,¹¹⁵ but that did not rise even by 1%.¹¹⁶

¹⁰⁶ Id at 107.

¹⁰⁷ A Afsharipour, ‘Empowering Ourselves: The Role of Women NGOs in the Enforcement of the Women’s Convention’ (1999) 99 *Columbia Law Review* 129 at 164.

¹⁰⁸ Ibid.

¹⁰⁹ CEDAW Report n 20 at 7, 21 & 34.

¹¹⁰ Mapping Progress n 102 at 27.

¹¹¹ Huq 1997 n 17 at 5; CEDAW Report n 20 at 46.

¹¹² Afsar 1997 n 104 at 111.

¹¹³ CEDAW Report n 20 at 46.

¹¹⁴ Id at 10.

¹¹⁵ Id at 11.

Foreign assistance has been an effective means of improving the overall life-style of many developing countries, including Bangladesh. Nevertheless, such an attempt can best address the particular problem and be sustainable when the recipients are strongly committed and academically able to evaluate or challenge the process.¹¹⁷ The lack of adequate knowledge¹¹⁸ of people and the absence of any independent body make it very difficult to analyse critically or to assess the outcomes of the projects that currently operate for women's development in Bangladesh.¹¹⁹ In addition, the persistent corruption, bureaucracy, non-accountability and the complexity of socio-economic factors often undermine the well-designed programs.¹²⁰ In measuring the role of corruption in Bangladesh, one study found that '[the]... hard-core foreign currency is filtered from top to bottom tiers, leaving a little amount' for any development project.¹²¹ Beyond these factors, in Bangladesh most of the multi-year foreign aid programs have been excessively driven by the donor agencies' perception rather than by the homegrown complexity of understanding the socio-economic-cultural issues. Consequently, these sorts of initiatives can hardly work as per their goals in furthering women's rights or other developments in Bangladesh.

¹¹⁶ *Statistical Pocket Book of Bangladesh 2000* (2002) Bangladesh Bureau of Statistics, Ministry of Planning, Government of the People's Republic of Bangladesh at 162.

¹¹⁷ 'The Role and Effectiveness of Development Assistance: Lessons from World Bank Experience', A Research Paper from the Development Economics Vice Presidency of the World Bank, The World Bank: Washington D C at ix in Executive summary. This paper was presented at the UN International Conference Financing for Development held in Monterrey, Mexico 18-22 March 2002.

¹¹⁸ See Rahman and R Huq, 'Human Rights in Bangladesh: An NGO Perspective' (1997) 14 *The Dhaka University Studies* 1 at 7; Factbook n 92.

¹¹⁹ Huq 1997 n 17 at 5.

¹²⁰ F Zareen and K S Afrin, 'Child Labour in Bangladesh: A Critical Analysis' (1998) 5 *Empowerment-A Journal of Women for Women* 23 at 43.

¹²¹ Id; A K M Enayet Kabir, 'Impact of foreign aid on poverty reduction in Bangladesh' *The Independent*, Dhaka (3 January 2001) Editorial.

1.7. The Legal System of Bangladesh

Bangladesh inherited its present legal system largely from British India. In pursuance of article 149 of the Constitution of Bangladesh 1972, a substantial proportion of its laws have been incorporated into the legal framework of the country.¹²² The origin of the existing court system in Bangladesh also lies with the common law. Legislation, judicial decisions, the divine laws (for example, Muslim personal law) and customs are the basic sources of laws. Notwithstanding its different sources of law, Bangladesh belongs to the common law system.¹²³ It is a unitary state and ‘a uniform law is applied across the country’.¹²⁴

1.8. The Legal Framework of Women’s Rights in Bangladesh

Since independence, a range of legislative measures have been undertaken to safeguard women’s rights in Bangladesh. Among others, *The Constitution of the People’s Republic of Bangladesh* (the Constitution) 1972, the *Penal Code* 1860, the *Criminal Procedure Code* 1898, the *Dowry Prohibition Act* 1980, and the *Women and Children Repression (Special Provisions) Act* 2000 are noteworthy. Part III of the Constitution containing altogether 19 articles (26-47A) provides fundamental rights. The rights include: the right to equal opportunity in the public sphere, non-discrimination, equal protection of law, right to life and personal liberty, safeguards against arrest and detention, freedom of movement, assembly, association, conscience, speech, profession, occupation and religion, rights to

¹²² *The Constitution of the People’s Republic of Bangladesh* (hereinafter The Constitution) 1972 art 149.

¹²³ The legal systems of the world are split into a number of families. For details see, R David and J E C Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (3rd ed 1985) London: Stevens & Sons at 17-31.

¹²⁴ S M Solaiman, *Investor Protection in a Disclosure Regime: An International and Comparative Perspective on Initial Public Offerings in the Bangladesh Securities Market* (2003) (unpublished PhD Thesis, University of Wollongong) at 62. For a detailed discussion on the legal system of Bangladesh with its historical background, see generally A Hoque, *The Legal System of Bangladesh* (1980) Dhaka: Bangladesh Institute of Law and International Affairs; M P Join, *Outlines of Indian Legal History* (5th ed 1990) Nagpur: Wadhwa and

property, protection of privacy, home and correspondence. The socio-economic rights under the *Fundamental Principles of State Policy* are accorded in Part II of the Constitution. The *Penal Code* 1860 defines some crimes such as, rape, abduction and kidnapping, against women and provides stringent punishment for them. To address the multi dimensional forms of dowry, the *Dowry Prohibition Act* was enacted in 1980 and was amended on a number of occasions (considered in detail in Chapter 6).

Having realised the magnitude and pervasive nature of violence against women, the Parliament enacted the *Cruelty to Women (Deterrent Punishment) Act* in 1983. This law outlawed kidnapping, rape, trafficking, acid throwing and attempt to cause death. It imposed a maximum penalty of lifetime imprisonment or the death sentence for these offences. This Act was repealed by the *Women and Children Repression (Special Provision) Act* 1995. The new Act was extended to deal with a new form of crime such as the grievous hurt and death by using damaging poisonous or corrosive substances along with the above crimes.¹²⁵ In 2000, this Act was again repealed by the *Women and Children Repression (Prevention) Act* 2000 (the WCR 2000). The protection of women's rights against the above crimes is reaffirmed in this Act and Special Tribunals are set up in each district to adjudicate cases. In addition, some special laws, which are almost similar in nature and objectives to prevent all kinds of terrorism and violence, harassment and abduction of women and children, were enacted during the period of 1990-2002. These are: *inter alia*, the *Anti-Terrorism Ordinance* 1992, the *Public Safety Act* 2000 and the *Law and Order Disruption Crimes (Speedy Trial Act)* 2002. The *Immoral Trafficking Act* 1993 is another important law on women, penalising, amongst other things, forced prostitution.

Company and V D Kulshreshtha, *Landmarks in Indian Legal and Constitutional History* (7th ed 1995) Lucknow: Eastern Law Book Company.

Apart from these, personal laws, such as the *Shariah* (Muslim personal law) for Muslim and Hindu Law for Hindus, constitute a significant portion of formal rules in providing rights for women. All personal laws are concerned with personal affairs including marriage, divorce, maintenance, inheritance and the like of the relevant communities. Hence, women's rights have been simultaneously dealt with by the two systems and Bangladesh does not have any uniform civil code. While personal affairs, for example, marriage and divorce, have been governed by the personal law, all public relations are regulated by the Constitution as well as other existing municipal laws of the country.

Certain reformatory measures were adopted during the last decades on Muslim personal law. These include; the *Muslim Marriage and Divorce (Registration) Act* 1974, the *Family Courts Ordinance* 1985. Under the 1985 Ordinance, family courts were established in 1986 to deal with marriage, dissolution of marriage, dower, maintenance and guardianship. Nonetheless, no reforms were undertaken in Bangladesh to modify the personal laws of the Hindu or other minority communities; however, women's rights under all personal laws are beyond the scope of the thesis. This study only concentrates on women's rights regarding employment, political participation, dowry and rape, which are regulated by the municipal laws of the country.

The nature of remedies under the prevailing laws in Bangladesh can be categorised into four types. Firstly, the fundamental rights provided by the Constitution are enforced by the Supreme Court of the country. To this end, specific provisions are embodied in articles 44 and 102 of the Constitution. Article 102 empowers the High Court Division (HCD) of the Supreme Court to issue orders and directions to enforce fundamental rights. Such a

¹²⁵ *Women and Children Repression (Special Provision) Act* 1995 ss 4 & 5.

jurisdiction is called the writ jurisdiction of the HCD.¹²⁶ Secondly, the personal laws that provide women with the rights to dower from husbands,¹²⁷ maintenance, dissolution of marriage, and the restitution of conjugal rights are subject matters of the Family Court.¹²⁸ Thirdly, right to inheritance for women invokes civil jurisdiction. Fourthly, rights under the *Dowry Prohibition Act* 1980 and the WCR Act 2000 which provide stringent punishment for some types of violation of women's rights fall within the purview of the Criminal and Penal Codes of the country.

Despite these laws, the overall human rights situation in Bangladesh is very disappointing, and it often reflects disrespect for the rule of law. Particular human rights violations against women have become usual phenomena in the country. Women are frequently denied equal access to, and opportunity in, employment and politics. Torturing women as an alternative to satisfying dowry demand, arbitrary arrest without any charge, violation of women by the community members and police, and their impunity continue to undermine women's human and legal rights. Even if actions are taken against them, these 'rarely [match] the severity of the abuse'.¹²⁹ These factors aside, very often the nature of the law itself and substantial

¹²⁶ The HCD, subject to the non-availability of other equally efficacious remedies under the prevailing laws in Bangladesh, can issue five types of writs. These are writs of habeas corpus, mandamus, quo warranto, certiorari and prohibition. Habeas corpus provides protection against the violation of personal liberty. Under the writ of mandamus, the HCD is empowered to mandate any person or authority or inferior courts to perform particular acts which they are under a statutory obligation to do but failed to do so. The writ of quo warranto requires a person holding or purporting to hold a public office to show under what authority he/she claims to hold that office. Under certiorari, the HCD investigates the records and proceedings of inferior tribunals with a view to examining their validity. The writ of prohibition is issued by the HCD when an inferior body or tribunal performs such acts, which are beyond its authority or jurisdiction. See The Constitution n 122 art 102; M A Zahid, 'Fundamental Rights and their Enforcement in Bangladesh' (1990) 1 *The Islamic University Studies* 191 at 196-200; see also for a detailed discussion about the court's power to issue a writ of Habeas Corpus, I Omar, Rights, Emergencies and Judicial Review (1992) (unpublished PhD Thesis, The Australian National University) at 226-244.

¹²⁷ Dower is a sum of money or other property given by the husband as a token gesture to the wife and it is obligatory under Muslim Law. See for details, J J Nasir, *The Status of Women Under Islamic Law* (1994) London: Graham & Trotman at 46-59.

¹²⁸ See *Family Courts Ordinance* 1985 s 5.

¹²⁹ See 'Women in Bangladesh Reflection, Women and Violence in 2000': Asian Human Rights Commission, Human Rights SOLIDARITY, Vol-II No-5, May 2001; Ain O Salish Kendra (ASK), *Human Rights in*

loopholes therein frustrate women's rights in Bangladesh.¹³⁰ The substantive chapters from 4 to 7 will address in detail those flaws in existing laws regarding employment, dowry and rape, and other problems specific to women that often hinder their rights. The discussion will also demonstrate how other exacerbating factors, such as dishonest police and delays in trial, inhibit the protection of women's rights in Bangladesh.

1.9. The Judicial System in Bangladesh

The judicial system in Bangladesh is constitutionally divided into two categories. These are the Supreme Court (SC) and the Subordinate Courts.¹³¹ The SC stands on the top of the hierarchy of courts comprising the Appellate Division (AD) and the High Court Division (HCD). The AD is the highest court of justice in the country; however, the President of Bangladesh has the prerogative to grant pardon for any sentence passed by any court, tribunal or other authority under article 49 of the Constitution.

Bangladesh 1999 (2000) Dhaka: ASK at 86-87; 'State of Women and Female Children in 2001' *The Daily Star*, Dhaka, (3 March 2002) <<http://www.dailystarnews.com/law/200203/01right.htm>> (3 March 2002); Amnesty International Report 2001.

¹³⁰ For example, a number of provisions of the Constitution have taken away fundamental rights guaranteed under its Part III. These provisions are, *inter alia*, articles 33(3), 47 and 47A. Article 33 of the Constitution is concerned with safeguards against arrest and detention. Article 33(3), however, provides that nothing in clauses (1) and (2) of 33 *shall* apply, *inter alia*, to a person who is arrested or detained under any law providing for preventive detention. Articles 47 and 47A are about saving provisions for certain laws and inapplicability of certain articles of the Constitution. 47A stipulates that '[notwithstanding] anything contained in this constitution, no person ... shall have the right to move the Supreme Court for any of the remedies under this constitution.' Further, the *Special Powers Act* (SPA) 1974 is an internal security law that provides for preventive detention and takes away the constitutional safeguards in relation to arrest and trial under articles 33(1) & 33 (2) of the Constitution. The SPA has become an instrument of successive governments to oppress the people who oppose its autocracy, and is often used to harass women. More than 300,000 persons (a ratio of men/women was not maintained in any published official documents) have been arrested under the SPA during the period of 1971-1997. In 95% (98% according to the US Department Report) of cases, the court found the detention order invalid. Nevertheless, no provision for compensation in favour of the arrested person, even for wrongful or illegal detention is provided in the SPA. See for details, The Constitution n 122 arts 33 (3) b and 47A (2); *Special Powers Act* (SPA) 1974 ss 3 (1) & 11 (4); K A Hamid and M A Zahid, 'Preventive Detention and Liberty: Bangladesh as a Case Study' (1996) 41 *Journal of Asiatic Society of Bangladesh Hum* 221 at 226-229; Ain O Salish Kendra (ASK), *Rights and Realities* (1997) Dhaka: ASK at 47.

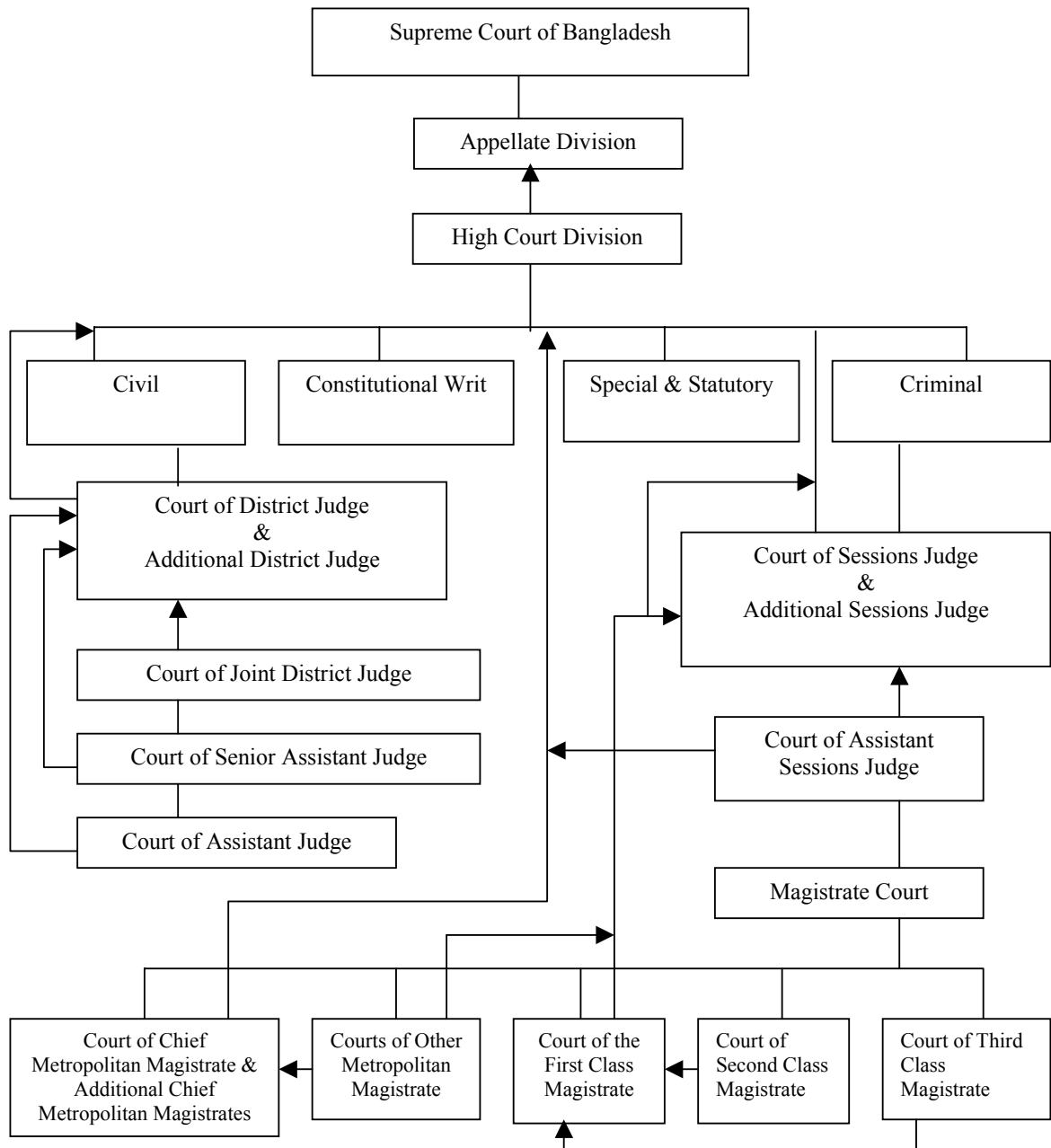
¹³¹ The Constitution n 122 arts 97 & 116.

The subordinate courts are classified into two broad categories, namely: the civil and criminal courts. Beyond these ordinary courts, there are some courts and tribunals of special jurisdiction functioning under particular Acts to deal with specific wrongs and crimes; the Family Courts, the Labour Courts, and the Tribunal under the *Women and Children Repression (Prevention) Act 2000* are the courts of such special nature. The territorial jurisdictions of ordinary courts are determined on the basis of administrative units such as Division, District and Thanas (Police Station). The latter two units have only ordinary courts. Under the *Criminal Procedure Code 1898*, each Division has a court with a special divisional judge empowered to try the cases of a special nature such as corruption cases.

The judicial function of the Supreme Court is constitutionally separated from the executive. However, in the lower judiciary, this function is not entirely separated from the executive. For example, the magistrates who are entitled to act as criminal courts are controlled and disciplined by the executive. In this regard, article 116 of the Constitution provides that ‘[the] control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates’, exercising judicial functions shall vest in the President and shall be exercised by him in consultation with the Supreme Court.’¹³² This issue is further considered in Chapter 3.

¹³² Id art 16.

Diagram I.1: Hierarchy of Courts in Bangladesh



* Arrows indicate appeals

1.10. Conclusion

The foregoing discussion has considered conceptual issues relevant to women's rights in Bangladesh. Following the emergence of Bangladesh as a sovereign state, the chapter has examined the evolution of women's rights since the mid-1800s. The discussion demonstrates that the law provided a powerful basis for the abolition of evil social practices which were detrimental to women and offered a strong voice to their campaign for conceptual changes in 'women's rights'. It is also evident that, while women used law as a last resort to challenge discriminatory practices, all governments from the British India to Bangladesh responded to their movements through enacting legislation.

The discussion then proceeds to examine ways that the concept of women's rights has been defined and elaborated and became an important issue of national and international concern. It reveals that women's activism is noticeable in developing an ever-growing set of provisions under the UN framework to recognise their fundamental rights and freedoms. In line with this development, women's rights in Bangladesh have been promoted in various administrative plans and achieved some positive results in a few areas. Nonetheless, it is found that most of the government's plans lack forceful implementation and are devoid of practical reality in designing future goals. A short assessment indicates that the government plans cannot work in advancing women's rights largely due to their ambiguous aims and the absence of an evaluation process in Bangladesh.

As regards the legislative initiatives in independent Bangladesh, it is noted that some provisions of laws are, by their nature, contrary to the spirit of fundamental rights and are harmful to women.¹³³ It also implies that the enactment of law is not the end itself for

¹³³ See n 130.

protecting women's rights. To ensure rights, law must be made available, practicable and accessible to women in Bangladesh, hence there is a need to assess the scope and impact of law on women. To this end, the following Chapter 2 concentrates on justifying the importance, aims and scope of the present research.

Chapter 2

Objectives and Methods of the Study

2.1. Introduction

Following the development of the conceptual framework regarding women's rights in Bangladesh in Chapter 1, this chapter considers some methodological and relevant issues concerning the research. It explains the aims, scope, limits and importance of the study. This chapter proceeds with a discussion of the prime objectives of the thesis and then justifies the rationale for the research. It also elaborates the research methods through which all information and data are collected and treated. After a brief overview of chapters, the discussion concludes that, despite limitations, law remains as the authoritative means of advancing women's rights and therefore it is necessary to examine and pursue the law in searching for the promotion of women's rights in Bangladesh.

2.2. Aims of the Study

This study primarily aims to promote the protection of women's rights through examining critically the prevailing laws of Bangladesh in an international and comparative perspective. Towards this end, all legal issues are explored in the thesis from the viewpoint of women's rights. It evaluates, analyses and compares the domestic legislation that relates to women's rights, and their enforcement, with the laws and court practices of a number of common law countries, as required. This study also attempts to identify major impediments to, and their impact on, women's rights in Bangladesh. Special attention is given to the shortcomings in prevailing laws and their unsatisfactory enforcement mechanism regarding women's rights in a comparative perspective. It also seeks to focus on new devices

developed by the legal feminist theories which advocate the restructuring of laws to accommodate women's differences.¹ The complete transformation of this development may not be feasible for revising laws in Bangladesh, but it can provide an encouraging insight into remedying women's discriminatory positions in law.

While women's rights are generalised in the discussion of conceptual and methodological issues, and in Chapter 3, the substantive four chapters aim to promote women's rights in four particular areas. To attain this goal, the following specific objectives are formulated. These are to:

- (i) identify major constraints in Bangladesh that impair women's rights;
- (ii) critically examine and review the prevailing laws and judicial decisions of Bangladesh;
- (iii) identify flaws in the legislative, administrative and judicial initiatives in Bangladesh and to assess their impact on women's rights;
- (iv) evaluate a range of legislation and court practices of other jurisdictions and remedy the above flaws in reference to proper practices;
- (v) provide particular suggestions to strengthen the legal regime concerning women's rights.

2.3. Scope and Limitation of the Study

This study only examines laws in four areas of women's rights. The first two substantive chapters deal with laws on women's employment and political participation. The subsequent two chapters are concerned with the laws on dowry and rape. In addressing crimes of dowry and rape, the discussion endeavours to draw a linkage between two fundamental rights and women's experiences in dowry and rape crimes. These fundamental

¹ To have a clear understanding of how feminist legal scholars stimulate the legal thinking and change the

rights are respectively: the right to freedom from torture and the right to life. The exclusive reasons for this linkage are twofold: (i) the Constitution of Bangladesh does not recognise cruelty and sufferings involved in dowry and rape as the deprivation of fundamental rights; and (ii) to develop and substantiate the argument that the severity of crime attached to dowry and rape should invoke an equivalent national and international legal attention/treatment in a similar way as the fundamental right to freedom from torture and right to life do. However, the discussion is not concerned with these two rights in every detail. In exploring dowry as a form of domestic violence, the study only focuses on the development in laws under the UN framework and particularly on US legislation for two reasons. Firstly, there is no law in Bangladesh to address domestic violence despite its serious persistence and the *Dowry Act* 1980 largely fails to curb dowry because of, *inter alia*, its weak enforcement measures. Secondly, a consolidated effort has been dedicated in the international arena to acknowledge the gravity of crime inherent in domestic violence through providing it with similar legal weight of the right to freedom from torture as considered in Chapter 6. To this end, progressive laws also exist in several foreign jurisdictions including the US. Needless to mention, drawing such a linkage in this study is designed to provide instructive guidelines for reformulating and developing laws in Bangladesh to cope with increasing crimes of domestic nature.

In addressing rape, Chapter 7 attempts to establish one of the arguments that the physical and emotional assault attached to rape deserve to be treated with equal value and legal gravity of the deprivation of the right to life. Some of the fundamental rights such as freedom from movement and right to protect bodily integrity can also be suited to develop a

language of law-see generally J St Joan and A B McElhiney, *Beyond Portia: Women, Law and Literature in the United States* (1997) Boston: Northeastern University Press.

similar nature of argument. However, the right to life is chosen for two reasons. Firstly, it is the foremost and essential right for human existence. Secondly, to provide a favourable remedy to rape victims, a series of judicial decisions of international tribunal and foreign jurisdictions compare rape with the deprivation of the right to life. Thereafter, the rest of the discussion of this chapter remains exclusively with the examination of rape laws and trial proceedings.

Women's rights in Bangladesh are regulated simultaneously by the municipal laws of the country as well as the personal laws of the Muslim and other communities as referred to in Chapter 1. Women's rights under all personal laws are beyond the scope of the thesis. Nevertheless, in addressing dowry and other laws, indication of some rights under the personal law becomes inevitable to portray the practical situation of women in Bangladesh. In this case, only Muslim personal law is taken into account since 88% of the population of Bangladesh is Muslim. Other reasons for the exclusion of women's rights under Hindu or other personal laws are the lack of data and documentation and the limitation of the scope of the thesis.

Another important limitation of the thesis is that, in expanding and protecting women's rights it does not comprehensively deal with the role of the judiciary in Bangladesh. In analysing several decisions, the discussion primarily highlights the restrictive approach in dealing with women's rights and the delay in trial of the judiciary. It is undisputed in the country that the courts of law, especially the lower courts of Bangladesh, are often improperly influenced in delivering their decisions.² The unethical issues that cause the

² See for example, Amnesty International Report 2000 on Bangladesh which discloses that the criminals are not being punished due to, *inter alia*, corruption of judges of lower courts. The US Department of State Report released on 4 March 2002 reveals that the 'lower judiciary is subject to executive influence and suffers from corruption'. This report is available on <http://www.state.gov/g/drl/rls/hrrpt/2001/sa/8224.htm> (3 May 2002). Further, a survey conducted by Transparency International demonstrates that 97% of the households

gradual erosion of women's confidence in the judiciary are outside the scope of the thesis to avoid contempt of court.

Before advancing with a discussion justifying the rationale for the research in the following section, this thesis duly acknowledges that strengthening the legal regime is not the only appropriate solution for ensuring women's rights in Bangladesh. Rather, problems largely remain with making those laws accessible and enforceable through developing women's capacities and with removing other barriers to rights. Nevertheless, law has been, and is still regarded as one of the most important instruments for legitimising women's claims. As Esq argues that laws 'can be a blessing to those it serves by addressing their needs and priorities.'³ Numerous studies have found that women's rights are better ensured in those areas that are strictly regulated by the law.⁴ Moreover, it is impracticable to address all aspects of women's rights in Bangladesh in a single study. Likewise, the overwhelming importance of law should not be obscured by raising an argument about all prevalent impediments that hinder women's rights in Bangladesh. However, the substantive chapters briefly and relevantly explain the ways legal measures can be useful to, or supportive of,

are not satisfied with the judicial system. They regard that that it is impossible to 'get quick and fair justice without money and influence; and 63% of the involved households in court cases had to pay bribes.' See 'Corruption in Bangladesh: An Overview' <http://www.ti-bangladesh.org/docs/survey/overview.htm>; and 'Corruption in Bangladesh: An Overview' <http://www.ca/Readings/TI-FO1.htm> (28 May 2002). In another incident, on 8 September 2002, lawyers of Chittagong boycotted the first labour court 'in protest of joining of the new judge... [they]declared him as persona non grata on allegation of corruption.' See <<http://independent-bangladesh.com/news/sep/09/09092002mt.htm#A9>> (9 September 2002). In this regard, Mr N Ahmed, a retired judge of the High Court Division of Bangladesh comments that 'like many other fields, values of the judges have also eroded...the newspaper published about a conversation between a judge and a convict and there were indications that money played a role in changing the verdict. But despite such a serious allegation, the court did not issue any suo motu rule...' - see 'Rule on retired judge' *The New Nation*, Dhaka (28 November 2002). The 'higher judiciary is not itself free from allegation of corruption'-for a detailed discussion regarding this issue see, M R Islam and S M Solaiman, 'Public confidence crisis in the judiciary and judicial accountability in Bangladesh' (2003) 13 *Journal of Judicial Administration* 29 at 29-50.

³ S P M Esq, 'Hawthorne and the Handmaid: An Examination of the Law's Use as a Tool of Oppression' (1998) 13 *Wisconsin Women's Law Journal* 45 at 73.

⁴ See for example, L Kanowitz, *Women and the Law: The Unfinished Revolution* (reprinted 1975) Albuquerque: University of New Mexico Press at 197.

women and how they can be made capable of exploiting the benefits of all initiatives aiming to improve their rights.

2.4. Rationale and Importance of the Study

Protection of women's rights has become an important aspect of national and international rights discourse. The achievement of this broad goal warrants a scholarly inquiry into the legal framework of the country. To the best of knowledge of the writer, there has been a serious dearth of legal analytical research on the core theme of the thesis.

Although there are some socio-legal studies on women in Bangladesh, their central focus is neither concern with the recent development of law in women's rights in a comparative context nor with an in-depth assessment into the impact of prevailing laws on women.

Legal development in rights has emerged as a key issue for the women's movement over the past three decades. Women's continued engagement with law has been able worldwide to shift the attention of law from its apparent objectives to its diverse and discriminatory effect on women. Pursuant to this development, a very sophisticated legal literature has evolved to meet the traditional, unequal and particular experiences of women in employment and political participation and in violence and rape trials. Recent modification of laws in those areas in other jurisdictions is totally absent in the legal framework of Bangladesh (as is observed in substantive chapters) and such changes should have been incorporated much earlier to assist in achieving the real equality of women, and for their protection from violence and indignity. Existing laws of Bangladesh also suffer from the lack of determination of the liability for the violation of, or non-compliance with, laws ensuring women's equal and other rights. All of these factors indicate that there is a need and scope for undertaking legal research on this issue. Such a study is also necessary for the

assessment of the impact of prevailing laws on women. The present study is devoted to filling this gap in legal literature with the central objective of ensuring women's rights.

2.5. Research Methodology

An assessment of the limits and effectiveness of laws regarding women in Bangladesh in a comparative and international perspective is the prime concern of the thesis, as mentioned. This study draws on published primary and secondary materials. Laws and judicial decisions dealing with employment, political participation, dowry and rape of different jurisdictions are taken into account to compare and improve the corresponding laws in Bangladesh. To undertake a comparative review of laws in Bangladesh, a number of research methods are adopted. These are to:

- (i) collect and review the relevant primary and secondary literature on women's rights;
- (ii) analyse statutes and Acts of national and international jurisdictions;
- (iii) evaluate judicial decisions in their proper perspective;
- (iv) consider initial State Reports to the CEDAW Committee and to other UN bodies;
- (v) examine the relevant public records, available statistical data and several reports of the government of Bangladesh;
- (vi) seek opinion on political participation from 27 Women Commissioners of local government of Bangladesh by sending them specific questionnaires;
- (vii) study the press and media reports, and the annual and evaluation reports of national and international NGOs in pertinent aspects.

For materials on Bangladesh, reliance is primarily placed on national books, journals, electronic materials and the government's official documents, due to the scarcity of authoritative or scholarly journals on women's rights in Bangladesh. Reliance is also

heavily placed on domestic and international NGO and media reports, especially for recent incidents that occurred after the political changeover in Bangladesh in October 2001. Some information was directly collected from the National Parliament and the Ministry of Women and Children's Affairs of Bangladesh. Regarding women's political participation, opinions of 27 Women Commissioners of local governance of the Rajshahi Division were sought through sending them particular questionnaires.

In an international perspective, women's particular rights referred to in the thesis are briefly addressed under the UN framework to assess their significance in the domestic sphere. A series of international instruments, including the UN Charter, the *Universal Declaration of Human Rights* 1948 along with its two Covenants, the *Convention on the Political Rights of Women* 1953 and, especially, the *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW) 1979 and the *Declaration on the Elimination of Violence against Women* 1993, set out basic standards for women's rights. Bangladesh and all the countries referred to in the study are parties to almost all those instruments. Among these human rights treaties, CEDAW is the most important international instrument to deal with all aspects of women's rights.⁵ Despite its several weaknesses and having not very satisfying achievements, CEDAW is increasingly referred to in judicial decisions in interpreting domestic legislation and has gained constitutional status in a number of

⁵ M Etienne, 'Addressing Gender-Based Violence in an International Context' (1995) 18 *Harvard Women's Law Journal* 139 at 171. CEDAW was adopted by the General Assembly under the resolution 34/180 in 1979. It came into force in 1981, and as of April 2003 it has 174 Member States. Bangladesh ratified CEDAW on 6 November 1984 with reservation to articles 2, 13 (a), 16 (1)(c) and 16 (1) (f). However, Bangladesh has withdrawn its reservations from articles 13 (a) and 16 (1) (f) in 1997. See State Parties to CEDAW, Division for the Advancement of Women <http://www.org/womenwatch/daw/cedaw/state.htm> (27 August 2003); A Afsharipour, 'Empowering Ourselves: The Role of Women's NGOs in the Enforcement of the Women's Convention' (1999) 99 *Columbia Law Review* 129 at 163.

countries.⁶ The significance of these makes it possible ‘to mandate proactive, pro-women policies and to dismantle discrimination.’⁷ The positive experiences of CEDAW can provide strong impetus to the legal and judicial attempts in Bangladesh to support and further women’s rights.

To invoke the benefits of positive experiences of international provisions, this study evaluates a number of initial State Reports to the CEDAW Committee, the CEDAW Impact Study,⁸ the report of the Commission on the Status of Women, the report of the Special Rapporteur, the review of the reports of the Office of the United Nations High Commissioners for Human Rights and of the data provided by Women’s Human Rights Resources.⁹ In addition, an Assessment of the Beijing Platform for Action, the Human Rights Watch World Reports,¹⁰ the publications of the United Nations Development Fund for Women (UNIFEM), the Division for the Advancement of Women¹¹ and the International Women’s Rights Action Watch are consulted.¹² Nevertheless, not all the provisions and experiences of CEDAW or other international instruments are used in each chapter. Only the relevant provisions are taken into account in examining women’s rights in Bangladesh.

⁶ ‘Bringing Equality Home-Implementing the Convention on the Elimination of All Forms of Discrimination Against Women-CEDAW’ <http://www.unifem.undp.org/cedawen4.htm> (2 May 2002).

⁷ Ibid; the First CEDAW Impact Study reveals that ‘[its] legally binding and internationally accepted character renders the Convention the basic legal framework for a strategy to protect and promote the fundamental human rights of women and to eradicate inequality and discrimination.’ See *The First CEDAW Impact Study: Final Report--Released During the Twenty-Third Session of the CEDAW Committee, New York, June 2000*, The Centre for Feminist Research, York University and the International Women’s Rights Project at 12.

⁸ For example, see the First CEDAW Impact Study, id; *Occasional Papers from the Sex Discrimination Commissioner-Number 4: Ten Years of the Convention on the Elimination of All Forms of Discrimination Against Women*, Human Rights and Equal Opportunity Commission.

⁹ See ‘Women’s Human Rights Resources’ <http://eir.library.utoronto.ca/whrr/cf...ctid=14&type=documents&searchstring=14> (9 March 2003).

¹⁰ See for example, Women’s Human Rights < <http://www.hrw.org/worldreport99/women/women2.html> > (26 October 2001).

¹¹ <http://www.un.org/womenwatch/daw/> (18 January 2003).

In a comparative perspective, the laws and judicial decisions of some selected common law countries are considered due to their similar legal systems. The reference to India is made invariably throughout chapters for a number of reasons. Firstly, both Bangladesh and India share a common experience of British colonialism and inherited major laws from a similar source. Secondly, there are similarities in socio-economic and cultural issues. Despite these similarities, India, in contrast to Bangladesh, has made noticeable progress in employment, dowry and rape laws and in their enforcement methods. A considerable difference is also evidenced in some institutional development such as the establishment of the National Human Rights Commission and the National Women's Commission. The Supreme Court (SC) of India has emerged as one of the most powerful judicial institutions in the world. Although some have argued 'that activist judges cause a decline in independence by exceeding their role in interpreting laws',¹³ its expanding role has gained wider acceptability 'not only by the people but by other wings of the State as well.'¹⁴ The SC has become well known for its innovative and liberal approaches in granting remedies in favour of the underprivileged group. A range of laws and amendments have been adopted in India following the rulings of the SC over the last decades. This legal development and judicial activism may pave the way for furthering women's rights in Bangladesh.

The references of the European Union (EU), the United Kingdom (UK), the United States (US), Australia and Canada are used selectively depending on the developments in laws in pertinent rights. The EU and the European Court of Justice (ECJ) have been playing major

¹² IWRAW: Publications: The Women's Watch: December 1998' <<http://iwwraw.igc.org/publications/ww/9812.html>> (18 January 2003).

¹³ M Dakolias and K Thachuk, 'The Problem of Eradicating Corruption from the Judiciary: Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform' (2000) 18 *Wisconsin International Law Journal* 353 at 363.

¹⁴ Justice A S Anand, 'Justice N.D. Krishna Rao Memorial Lecture Protection of Human Rights-Judicial Obligation or Judicial Activism' (1997) 7 *Supreme Court Cases Journal* 11 at (para 20).

roles in expanding and enforcing numerous directives and case law in areas of women's employment. There have been significant efforts in the US and Canada to enact dynamic laws on domestic violence and rape. Australia is referred to, *inter alia*, in terms of giving effect to the CEDAW in its domestic legislation. In addition, there have been enormous attempts by judges of all those countries to provide due regard to, and to interpret international human rights laws in national courts. Quite to the contrary, there has been a dearth of judicial decisions on women's rights, particularly on employment and political participation in Bangladesh. The conservative approach of the judiciary will be seen in substantive chapters as one of the reasons for the underenforcement of rights. Despite a gulf of inconsistencies between Bangladesh and the countries referred to, the style and mode of enacting, interpreting and enforcing laws of the latter can produce valuable lessons for Bangladesh. Moreover, a minimum standard should be maintained by the state in relation to developing and ensuring women's rights since it agreed to do so under national and international instruments. The recommendations of the thesis are largely advanced from the viewpoint of this consideration.

To obtain particular information on women, the Parliament of Bangladesh, Ain Q Salish Kendra (ASK) and Bangladesh Legal Aid and Services Trust (BLAST)—two leading NGOs working for developing women's rights in Bangladesh, the Department of Women and Child Development, India, and the Offices of Statistics Canada and Elections Canada were contacted. It may be relevant to mention here that pinpoint references, subject to a few exceptions, are provided throughout the discussion of the thesis. *The Daily Star*, *The Observer* and *The New Nation* are leading and widely-circulated newspapers in Bangladesh. The features and commentaries of those dailies, which are surveyed for the

purpose of the study, do not provide page numbers. Similarly, the Internet materials and a few articles and judicial decisions downloaded from the *LEXIS* web site do not have page numbers. For all Internet materials other than *LEXIS*, the date accessed is mentioned.

2.6. Treatment of the Data

In addressing laws on four major areas of women's rights in Bangladesh, no consistent pattern is maintained throughout the study. For example, the first two substantive chapters begin with the exploration of the problems attached to women's equal rights to employment and to political participation in Bangladesh, while the subsequent chapters six and seven proceed with a survey of the development in laws in the international perspective. However, uniformity is maintained across a number of issues. All relevant data is used to raise and analyse the problems in Bangladesh at first and then, to overcome those by reference to an international and comparative perspective. Consistency is also maintained in reaffirming and substantiating the prime arguments of the thesis in all chapters and in summarising their findings and recommendations at the end of each chapter.

2.7. Chapters Overview

This thesis is divided into eight chapters.

Chapter 3 draws a link between the law and socio-economic-cultural and other factors, which are important to enjoy legal rights. It identifies the major constraints in Bangladesh and their impact on women. The discussion demonstrates that each of the factors represents a serious threat to women's rights. It examines how the prevailing socio-cultural norms justify women's unequal rights and how the arbitrary exercise of state power, the inefficient law enforcing agencies, and the lack of an independent judiciary and a Human Rights Commission serve to undermine the exercise of lawful rights.

Chapter 4 critically examines the provision of equality as enshrined in the Constitution and other employment legislation regarding women in Bangladesh. In measuring the ability of domestic legislation, it looks at the legal development and enforcement mechanism of foreign jurisdictions. Then the findings of the discussion reaffirm the central argument of the thesis that the existing laws in Bangladesh are inadequate and inept in dealing with women's employment rights. The provisions regarding liability of the employer and monitoring laws are also flawed in several respects. This chapter proposes a substantive mode of equality and an independent Equality Commission as complementary to judicial enforcement of employment rights.

Chapter 5 deals with women's political participation. It analyses the impact of the constitutional mandates and the recently enacted legislation on ensuring women's equal rights in legislative offices. The discussion places special focus on the Proportional Representation (PR) electoral system, highlighting its contribution to enhancing women's participation in National Parliaments and recommends its adoption in Bangladesh. It also

evaluates some important elements of political empowerment to judge and improve women's status in politics in Bangladesh. In so doing, a survey of existing literature suggests that women are deprived of equal status and rights due to the discriminatory attitudes of the government and their male colleagues, and sometimes of the law designed to protect their parallel participation (with men) in legislative offices.

Chapter 6 critically reviews dowry laws with special comparative reference to India. To this end, it also attempts to establish a link between cruelty involved in dowry and the deprivation of the right to freedom from torture. The discussion shows that India adopted a number of amendments to the *Dowry Act* and the trial proceedings in a different way notwithstanding the prevalence of similar problems in the two countries. Emphasis is also given to laws on domestic violence of other countries, especially the US, for improving the law and remedying the underenforcement of laws in Bangladesh. Apart from substantial drawbacks in the *Dowry Act*, the discussion shows that the trial proceedings also suffer from incompetent investigating officers and prosecutors and therefore is ineffective in remedying dowry. The lack of efficacy of judicial enforcement, particularly the narrow/static approach of the judiciary, is paramount in the discussion.

Chapter 7 critically examines the rape laws and trial procedures of Bangladesh. It considers that the legal development of other countries made a significant shift from the traditional concept to modern rape shield legislation and to other appropriate amendments to suit women's unique experiences in a rape trial. Conversely, the discussion reveals how traditional laws in Bangladesh are working to the disadvantage of women. In addition, the analysis canvasses very insensitive and unfavourable attitudes of all officials concerned in a rape prosecution towards women. The discussion also emphasises how the existing law enforcement agencies suffer from a serious lack of integrity and efficiency originating from

widespread allegations of corruption in investigation and from other illegal sexual advances.

Finally, Chapter 8 concludes with a number of recommendations formulated on the basis of the findings and summary of chapters.

2.8. Conclusion

Notwithstanding limitations, law remains an efficient and proven tool for realising women's rights. For a long time, law reform has been sought as a strong basis for the women's movements across nations. Throughout the ages, in all cultures, the women's movement ended with the enactment of laws which legitimised their rights. This mere fact is enough to spell out the significance of the role of law for women.

In response to contemporary problems that women face in employment, political participation and in the dowry and rape trials, a number of countries mentioned in the thesis are embarking on legal reforms and have enacted dynamic legislation. A survey of prevailing legal literature in Bangladesh reveals that many issues in those four areas are yet to be addressed by the law. On the other hand, the existing law lacks proper implementation due to its weak enforcement measures. Hence there is a dire need to strengthen the legal and enforcement machinery in Bangladesh for protecting women's rights.

The present study intends to explore ways to improve this machinery and to offer encouraging insights into women's activism in Bangladesh that has been searching for practicable and anti-discriminatory laws to meet women's particular experiences in the traditional society. The findings of the research may persuade legal scholars to be involved in the campaign for, and investigation into, laws to promote women's rights. It is also expected that this study will provide important guidelines for the government to enact and

revise laws to suit women's practical needs and add to the way in which women activists are currently striving for integrating international provisions into domestic legislation.

Before turning to a legal analysis of women's rights in substantive chapters, it is necessary at the outset to provide a foundation for understanding the socio-economic-cultural and political environment in Bangladesh through which rights are developed and enforced. Therefore the following chapter examines the overall situation of Bangladesh relevant to the enjoyment of legal rights, with an objective to determine whether it is supportive of women's rights.

Chapter 3

Impediments to Women's Rights in Bangladesh

3.1. Introduction

The enjoyment of legal rights is closely linked with the socio-economic-cultural and religious situation of the country.¹ Further, effective implementation of rights inevitably depends on the due process of law, good governance, an independent and strong judiciary, efficient law enforcing agencies, and above all, on the honest commitment of the government.² Transparent and accountable administration by state organs with a delicate balance of power is widely believed to afford and preserve rights.³ Having regard to this contention and to avoid excessive concentration of power on a single branch of the government, the original Constitution of Bangladesh 1972 was premised on the principle of separation of powers between the three organs of the state: the Parliament, the Judiciary and the Executive.

Nevertheless, the Constitution was manipulated through numerous amendments soon after its adoption, with a far-reaching negative impact on fundamental rights. It was frequently amended to grant preventive detention, to proclaim States of Emergency to suspend fundamental rights, to provide a stamp of validity to unconstitutional access to state power,

¹ 'Legislating may not be the answer to the 'problem' of culture', 'women's rights legislation exist, they often are not enforced because of cultural isolation', see E G Mountis, 'Cultural Relativity and Universalism: Reevaluating Gender Rights in a Multicultural Context' (1996) 15 *Dickinson Journal of International Law* 113 at 142 & 148.

² 'Legal rights do not operate in a vacuum where only law rules... rights are dependent upon and influenced by the wider political... context'. See R Romkins, 'Law as a Trojan Horse: Unintended Consequences of Rights-based Interventions to Support Battered Women' (2001) 13 *Yale Journal of Law and Feminism* 265 at 266; N J Udombana, 'Toward the African Court on Human and People's Rights: Better Late than Never' (2000) 3 *Yale Human Rights and Development Law Journal* 45 at 47-49.

³ Ibid.

to protect the perpetrators of genocide, and so on. The desperate desire for power and the political intolerance that ensued over time in the wake of mutual disregard and confrontational behaviour of the political parties⁴ resulted in a single-person centric strong Executive in Bangladesh. The arbitrary exercise of Executive power has undermined the democratic and independent entities of the Parliament and Judiciary. The parliamentary majority of the Executive has often been misused to achieve its single-minded goal. Some enactments of the Parliament erode constitutional safeguards of fundamental rights enjoyed previously by women.

On the other hand, all attempts to grant legal separation to the Judiciary from the Executive have been restrained recently in a coercive manner and judicial appointment has become amalgamated with other civil services. In addition, the lower judiciary and the law enforcing agencies have created a very damaging image of their roles in implementing rights. The enactment and enforcement of laws are outweighed by the political necessity or monetary consideration. The power of the police is often exercised beyond the lawful authority and, even then, has been unaccountable since the government itself condones their misuse to ensure its position. Further, Bangladesh quite contrary to its Asian counterparts, has failed to develop any national institution to oversee its human rights situation.

This chapter argues that the socio-economic-cultural-religious environment of the country, and the government's attitude, are not appropriate to women's rights. It seeks to explore in

⁴ The political scene of Bangladesh has been excessively 'opportunistic' in nature where self-interest, corruption, and abuse of power remain dominant factors. Political opponents have usually been treated as personal enemies and became the target of harmful revenge of the government following changes of power. The political culture in the country pursues irrational debate and the hostile and destructive modes of opposing each other's (political parties) stand, irrespective of merits or demerits of any national issues. The major political parties have been maintaining and patronising even students to satisfy their narrow interests. See The US State Department Country Report on Human Rights Practices in Bangladesh 2002 (hereinafter the US Dept Report) 31 March 2002 at 3 & 7-8

brief the prevailing socio-economic-cultural situation of Bangladesh along with the government's behaviour to determine whether these are actually operating to the advantage of women and to what extent the political process of the country impacts on the meaningful exercise of legal rights. It also identifies unlawful decisions of the Muslim Clerics and inquires about the government's role in developing and protecting rights.

Given the scope and central concern of the thesis, the discussion of the chapter however, does not comprehensively deal with these issues. The relevance of this discussion is that the socio-economic-cultural norms of the country, an effective implementation process and the government's strong will largely shape legal rights and create the scope for the enjoyment of rights. The protection of rights requires that the state functionaries which bear a direct relationship with enforcing rights 'are not bent to accommodate extra-legal and especially political concerns.'⁵ By contrast, a subservient and conservative judiciary, inefficient law enforcing agencies and the absence of an independent national institution present causes for concern for ensuring rights.⁶ The concern becomes magnified and exaggerated when these are dealt with by traditionally underprivileged women in terms of their socio-economic powerlessness. Without consideration of these factors, it is difficult to understand why women in Bangladesh fail to keep up with many Asian countries and legal rights lack proper implementation.

Although the socio-economic-cultural constraints in enjoying legitimate rights of women are not very unusual in many parts of the world, the styles of successive governments of Bangladesh in administering the country have been qualitatively different from

file:///KARL/CLIENT_DATA/Asylum%20Law/dw%20work%20in.. (2 April 2003); S J Haider, 'Politics, national crisis and the goal of emancipation' *The Independent* (10 August 2000) Editorial.

⁵ E J Barton, 'Pricing Judicial Independence: An Empirical Study of Post-1997 Court of Final Appeal Decisions in Hong Kong' (2002) 43 *Harvard International Law Journal* 361at 363.

international standards, and even tragically divorced from the constitutional provisions of the country itself. This chapter concludes that, despite progress in a few areas, repressive socio-cultural values still persist as influential factors to undermine women's rights. Women are harshly sentenced by the unlawful exercise of *fatwa* (decision of the Muslim Leader) in the face of fundamental rights to freedom from torture and degrading treatment. Alternatively, constitutional guarantees for fundamental rights lack lawful or impartial implementation, and have often been suspended and even distorted by the undue exercise of the state power.

The following section 3.2 begins with a survey of the socio-economic status of women in Bangladesh. The religious attitudes of Muslim Clerics to women are briefly explored in 3.3. Section 3.4 demonstrates good governance and the government's behaviour towards justice and the protection of rights. The discussion of this section more or less generalises the government's attitude towards justice and the overall protection of rights in Bangladesh, since no ratio of men/women has been made public in published sources that show to what extent the oppressive laws and the unfair intervention of the government affect women separately. Section 3.5 draws a summary and conclusion.

3.2. Socio-economic-cultural Situation of Women in Bangladesh

The life-styles of women in Bangladesh, subject to a few exceptions,⁷ have been strictly shaped and governed by the socio-cultural and religious values. Excessive allegiance to those values, combined with poverty, ignorance and the lack of education, engendered

⁶ W Sadurski, 'Judicial Review and the Protection of Constitutional Rights' (2002) 22 *Oxford Journal of Legal Studies* 275 at 275-276.

⁷ The urban women comparatively enjoy better access to education, health care and other areas due to their improved socio-economic status. They can escape some of negative traditional values that tend to deny their rights. Nevertheless, most of the rural women (who form 90% of the total number) are more vulnerable

women's subordination over the decades. Traditionally, Bangladesh has been running through a patriarchal,⁸ patrilineal and patrilocal⁹ social system. All social institutions ranging from the household, the community to the state in Bangladesh uphold the traditional standards for patriarchy, which operates to the detriment of women's interests.¹⁰ The social systems recognise a rigid division of labour and separate roles for women. Family, being the basic unit, largely measures women's roles within 'motherhood', which should encompass householding, all relevant activities thereto and keeping the family sound, yet such works go unpaid, unrecognised as 'economic activity' and unaccounted for in any official statistics.¹¹ Against this backdrop, all authority in relation to the economy and decision-making, and the controlling power over women's mobility remain with the male members of the family. Customarily, the word 'woman' has been best suited to roles of a 'docile daughter, a compliant wife and a dependent mother.'¹² In various capacities, women are subject to the control of men. For example, marriage transfers the controlling authority of women from fathers or brothers to their husbands. After marriage, women are required to seek prior permission from the husbands for performing any activity outside conjugal duties or residence such as normal mobility outside the home, further education

targets to those social norms and practices. See A K Goswami, 'Empowerment of Women in Bangladesh' (1998) 5 *Empowerment-A Journal of Women for Women* 45 at 68.

⁸ Patriarchy is a concept, a socially established process through which men in general gain control over women. Walby sees patriarchy 'as a system of social structure and practices in which men dominate, oppress, and exploit women', see S Walby, *Theorising Patriarchy* (1990) Oxford: Blackwell at 20; D W Carbado, 'Motherhood and Work in Cultural Context: One Woman's Patriarchal Bargain' (1998) 21 *Harvard Women's Law Journal* 1 at 11-14. See also, A E Taslitz, 'Patriarchal Stories 1: Cultural Rape Narratives in the Court Room' (1996) 5 *Southern California Review of Law and Women's Studies* 387 at 393-395.

⁹ These two systems regard the son as the potential supporter and successor of the parents in old age and as a symbol of the family prestige and heredity.

¹⁰ R Jahan, 'Hidden Wounds, Visible Scars: Violence Against Women in Bangladesh' in B Agarwal (ed), *Structures of Patriarchy: State, Community and Household in Modernising Asia* (1988) London: Zed Books LTD at 199-226.

¹¹ N A Karim, 'Jobs, Gender and Small Enterprises in Bangladesh: Factors Affecting Women Entrepreneurs in Small and Cottage Industries in Bangladesh' (2000) International Labour Office Geneva & Dhaka, Bangladesh at 5; *Third and Fourth Periodic Reports of Bangladesh submitted to the CEDAW Committee* (hereinafter CEDAW Report) (1997) CEDAW/C/BGD/3-4, 1 April 1997 at 7 & 22.

and employment and for all related activities.¹³ This social construction debars women from being visible in public life.

The patrilineal kinship carries very negative and prolonged effects on the socialisation of children as well. As a future breadwinner and parental provider, a son always receives high value and preferential treatment with regard to access to education, better health care and nutrition. From early childhood, a girl has to accept a sex-bias in the allocation of intra-family food and access to resources and opportunities. Formal education and care for a daughter is regarded as ‘watering a neighbouring tree’, since a girl becomes a member of another family after being married.¹⁴ Alternatively, non-formal education within the home, emphasising the acquisition of ‘domestic skills and virtues relevant to her position, for example, obedience, docility, modesty,’ are encouraged.¹⁵ With this social trend, women’s subordination begins from birth and discriminatory family behavioural patterns make them mentally prepared to accept this unequal status throughout their life cycles. This outlook in turn, has also contributed to the emergence of social evils such as dowry, violence and rape in the community.

The son-preference attitude is observed to be quite acute in Bangladesh,¹⁶ especially in rural areas where 90%¹⁷ of women reside. Empirical data shows that the family allocation of food and health care which discriminates against female children has caused higher

¹² N Begum, ‘Dowry and Position of Women in Bangladesh’ (1993-1994) *Women and Development* 1 at 24.

¹³ ‘*The Situation of Women in Bangladesh*’, *Country Briefing Paper*, (hereinafter Briefing Paper) at 4. http://www.abd.org/Documents/Books/Country_Briefing_Papers/Women_in_Bangladesh/default.asp (5 November 2001).

¹⁴ Begum 1993-1994 n 12 at 25.

¹⁵ Agarwal 1988 n 10 at 215.

¹⁶ T Monsoor, *From Patriarchy to Gender Equity: Family Law and Its Impact on Women in Bangladesh* (1999) Dhaka: The University Press Limited at 32.

¹⁷ Goswami 1998 n 7 at 68.

childhood mortality in girls.¹⁸ Women's disadvantaged positions are also evident in access to health care facilities affordable within the family. Traditional and cheap methods of health care, instead of modern medical facilities, are very likely to be arranged for women family members.¹⁹ According to the indicators used by the Asian Development Bank, the 'maternal mortality rate of 444 per 100,000 live births [which] is one of the highest in the world.'²⁰ The United Nations International Children's Emergency Fund (UNICEF) has revealed that pregnancy related complications account for approximately 23,000 women's deaths every year, while 600,000 suffer from various neo-natal complications.²¹ The Nutrition experts of the International Centre for Diarrhoeal Disease Research, Bangladesh disclosed that '...50 per cent of pregnant women in the country are underweight.'²² The patriarchal system also exposes a profound and discriminatory impact on women's economic rights: the right to own or inherit and control property.²³ Economic power is always considered a major determinant of one's position, a power which 76% of women in Bangladesh severely lack.²⁴ By contrast, men own and control almost all lands of the household.²⁵ This landlessness further escalates women's subsidiary status in the community and makes them economically impotent or dependent on men. Even in the event of waiving or inheriting a father's property, women have to pass control of properties to their brothers or husbands.²⁶ In both cases, women are given protection in return for

¹⁸ Id at 56

¹⁹ Briefing Paper n 13 at 7.

²⁰ Id at 3.

²¹ Goswami 1998 n 7 at 56.

²² Express report, 'Country's 50pc pregnant women 'underweight', 45pc children 'stunned' *The Financial Express* (11 June 2002).

²³ D Begg, 'Poverty and Human Rights in Bangladesh' (2000) 1 *Melbourne Journal of International Law* 149 at 151.

²⁴ CEDAW Report n 11 at 7.

²⁵ Monsoor 1999 n 16 at 7 & 52.

²⁶ Briefing Paper n 13 at 4.

control over their properties.²⁷ The state report of Bangladesh to the CEDAW Committee recognised that poverty, landlessness and unemployment disproportionately affect women, where 76% of women fall under the category of ‘poor’ in terms of income and resource endowments.²⁸

Hence, it is observed here that the socio-economic and cultural values in Bangladesh support and nurture the unequal power relations between men and women.

3.3. Cultural Relativism, CEDAW and their Impact on the Socio-Cultural Status of Women

‘Cultural relativism’²⁹ is nowhere more obvious than in the area of women’s rights. This particular notion claims that the application of human rights should conform to socio-economic and cultural realities of a particular country. Although as one of the fundamental challenges to the liberal and universal concepts of human rights this argument has been dominant since the mid-1940s, it gained a sharp focus in the *World Conference on Human Rights* 1993 under the banner of ‘Asian Values’.³⁰ Asian views are premised on two basic arguments. These are: (i) the universal human rights predominantly represent Western culture and ideology that are unsuited to Asian societies which have distinct historical

²⁷ Id at 4.

²⁸ CEDAW Report n 11 at 7.

²⁹ ‘Cultural relativism’ refers to the fact that the concept of right or wrong should be relative to the tradition and cultural values of a particular country. This approach does not recognise any generalised or universalised concept as an accepted model or a ‘standard’ for all countries. As one of the strong arguments against universal human rights it places importance on the uniqueness of cultural values and the styles of life of diverse communities. In this regard, Tilley maintains, ‘... “morality is relative to culture” and that “right or wrong vary with cultural norms”. These are rough formulations of *cultural relativism*, a theory with multiple charms, appearing rigorously scientific to some, fashionably postmodern to others.’ See J J Tilley, ‘Cultural Relativism’ (2000) 22.2 *Human Rights Quarterly* 501 at 501; R Klein, ‘Cultural Relativism, Economic Development and International Human Rights in the Asian Context’ (2001) 9 *Touro International Law Review* 1 at 6.

³⁰ L Thio, ‘Implementing Human Rights in ASEAN Countries: “Promises to keep and miles to go before I sleep”’ (1999) 2 *Yale Human Rights & Development Law Journal* 1 at 1-3; H J Steiner and P Alston, *International Human Rights in Context* (1996) Oxford: Clarendon Press at 193.

heritage and cultural identities;³¹ and (ii) Western countries have been using human rights as a tool for achieving their political ends – what the Asian nations call ‘the imposition of western imperialism’.³² Conversely, the Western countries lay blame saying the Asian governments ‘exploit the language of cultural relativism’ to justify the gross violations of human rights.³³ They argue that Asian values have been clustered around the traditional notions of states’ sovereignty, internal affairs and autonomy that should not be accepted in this age of globalisation.³⁴

These conflicting arguments obviously raise some important issues. The issues are: (i) how should ‘cultural relativism’ be balanced with universal human rights; (ii) who judges the proper combination of universalism and culturalism; and (iii) what about the relative weight of the two.³⁵ However, these issues are not the points of discussion in this context. This section only briefly outlines how these arguments impede the promotion of women’s rights. Given a gulf of inconsistency between Asian and Western countries in terms of socio-economic conditions and cultural values, it is true that a genuine coherence of all provisions of human rights instruments is not always possible or practicable, for the government. For example, article 1 of the *Universal Declaration of Human Rights* 1948 provides that ‘[everyone] is entitled to all the rights and freedoms set forth in this Declaration’.

³¹ See generally M C Davis, ‘Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values’ (1998) 11 *Harvard Human Rights Journal* 109 at 109-119 & 146; K Engle, ‘Culture and Human Rights: The Asian Values Debate in Context’ (2000) 32 *Journal of International Law Politics* at 291-333; M J Perry, ‘Are Human Rights Universal? The Relativist Challenge and Related Matter’ (1997) 19.3 *Human Rights Quarterly* at 461-509; M Monshipouri, ‘Promoting Universal Human Rights: Dilemmas of Integrating Developing Countries’ (2001) 4 *Yale Human Rights & Development Law Journal* at 25-61.

³² C J Dias, ‘Culture and Values: Human Rights, Workers, Communities and their Environment’, National Foreign Policy Conference Region, Saskatchewan, Canada’s Year of the Asia Pacific: 3-5 October 1997, <<http://www.cjia.org/dias.htm#traditions>> (5 January 2002); J Symonides, *Human Rights: Concept and Standards* (2000) Sydney: Ashgate, UNESCO Publishing at 57.

³³ Davis recommends that ‘...local values do not provide a justification for harsh authoritarian practices....’. See Davis 1998 n 31 at 147 & 111-146; M Jacobsen and O Bruun (ed), *Human Rights and Asian Values: Contesting National Identities and Cultural Representations in Asia* (2000) Richmond: Curzon Press at 6.

³⁴ Steiner 1996 n 30 at 192.

Regrettably, on the basis of such a broad conception, very few women can afford the equal realisation of their basic rights. Again, it will be unjust to support the failure on the part of the government to implement basic human rights under the pretext of an ‘underdeveloped economy’.

For example, in response to the disadvantaged situation of women in Bangladesh, the constraint of economic resources has often been put forward by the government as a rationale for denying them socio-economic rights,³⁶ while, at the same time, numerous reports reveal that ‘the corruption of the first class government officials caused a loss of more than 11,000 crore taka [US\$1.8 billion] or 4.7 percent GDP to the country in 2001.’³⁷ During the period between 1994 and 2000, 17 Ministries and government officials misappropriated a total of 6,6375 crore TK (US\$110.6 billion) as detected by the Comptroller and Auditor General’s Office.³⁸ One report further reveals:

[relations] of power have been cemented between narrow groups within the political leadership, bureaucracy, business and military. These are often reinforced by local or kinship ties. Even after the institution of a parliamentary system, political patronage and bureaucratic power has nurtured crony capitalism through distribution of bank loans, lucrative contracts, real estate and similar handouts.³⁹

All of these reports make the contradiction clear that the socio-economic rights of underprivileged groups are undermined by the unfair and grossly unequal ownership of wealth of those who are legally and morally responsible for ensuring those rights. Hence, the reality of Bangladesh does not suggest that the underprivileged status of women is an inevitable consequence of the poor economy of the country; neither does it suggest that the

³⁵ Jacobson 2000 n 33 at 60.

³⁶ S R Rahman, ‘Realisation of human rights: Bangladesh perspective’ *The Daily Star* (29 December 2002).

³⁷ Ibid; see also, ‘Annual Report-2001 of Bangladesh Chapter of Berlin based Transparency International’ *The Daily Star* (10 July 2002).

³⁸ Ibid.

government is sincerely committed to improve women's socio-economic status. The above reports also make it clear that providing women with special benefits such as free education and various training programs at national and local levels to cope with contemporary competitive public jobs and politics and so on, is quite possible for the government. For similar reasons, these reports should also go at least some way forward to establish the government's accountability for ensuring women's lawful claims and basic necessities.

Apart from socio-economic issues, the universal appeal for eliminating inequality in family relations⁴⁰ as one of the core aspects of women's human rights, has raised a strong controversy among nations, especially within Muslim nations. Opponents argue that such an appeal unfortunately holds no regard for Muslim culture and the way of life of women within that culture (which does not support equality in private life) and therefore is inappropriate.⁴¹ For example, A al-Hibri argued that the majority of Muslim women who are closely attached to a particular religion cannot be liberated 'through the use of a secular approach imposed from the outside....'⁴² The following discussion shows how this issue is dealt with in improving women's socio-economic status in Bangladesh.

As part of the initiatives to improve women's economic condition, the Women's Organisations (WOs) in Bangladesh have made significant efforts in the last decade to

³⁹ Ain O Salish Kendro (ASK), *Human Rights in Bangladesh 1998* (hereinafter ASK Report 1998) (1999) Dhaka: University Press Limited at 4.

⁴⁰ For example, General Comment 21 of the CEDAW urged state parties to ensure the equality of rights for women and men in the family. See, *Convention on the Elimination of All Forms of Discrimination against Women*, General Comment N0 21 (Thirteenth Session 1994) <http://www.hku.hk/ccpl/research_projects_issues/cedaw/wgr21.htm> (10 October 2004).

⁴¹ For example, Pollis argues, '[elements] of the Western doctrine of human rights can be incorporated in non-Western thought, but such a task necessitates a reinterpretation and a recasting that must take place within the specific culture context of the Middle East or Asia.' See A Pollis, 'Cultural Relativism Revisited: Through a State Prism' (1996) 18.2 *Human Rights Quarterly* 316 at 318; for a more detailed discussion about the issue see generally A E Mayer, 'Universal versus Islamic Human Rights: A Clash of Culture or a Clash with a Construct' (1994) 15 *Michigan Journal of International Law* 307 at 307-403.

⁴² A al-Hibri, 'Islam, Law and Custom: Redefining Muslim Women's Rights' (1997) 12 *American University Journal of International Law & Policy* 1 at 2-3.

implement the CEDAW as it is considered a benchmark for realising women's equal rights in public and private lives.⁴³ Women's equal rights to inheritance have predominantly led to the movement of WOs but the government cited a religious bar to the implementation of equality in the private sphere.⁴⁴ The CEDAW obligates states parties to ensure equal rights in family relations,⁴⁵ however the religion of Islam does not allow an equal inheritance right to women. In all capacities women receive one half of men's share.⁴⁶ From a religious point of view, the reduced share is justified as women inherit properties without any commitment to their families; by contrast, men are exclusively responsible for all concomitant obligations towards their families.⁴⁷ There has been a growing body of academic debate as to whether Islam perpetuates women's subordination or grants equal rights to them;⁴⁸ however, this controversy is beyond the scope of this thesis. Nevertheless, even without going into depth on the controversy, for a number of reasons, it is hard to concede in the context of Bangladesh that providing equal inheritance right would bring a significant change to women's economic lives. Firstly, as the discussion of Chapter 4 will demonstrate, existing equality rights to employment cannot be ensured in the public sphere.

⁴³ See for example, 'Mahila Parishad demands adoption of CEDAW' <<http://independent-bangladesh.com/news/sep/03/03092003mt.htm#A6> (3 August 2003); T Islam, 'Rights-Bangladesh: Women Demand Equality, Gov't Cites Religious Bar', *The World News*, (14 June 1999); '[CEDAW] Women in Bangladesh demand equal rights to property' <http://www.sdn.org/ww/lists/cedaw/msg00095.html> (1 October 2001).

⁴⁴ Ibid.

⁴⁵ Article 16 of the CEDAW provides that 'State Parties shall take all appropriate measures to eliminate discrimination against women in ...family relations and in particular shall ensure, on a basis of equality of men and women.'. See *Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter CEDAW) GA Resolution 34/180 of 18 December 1979 art 16.

⁴⁶ See the Holy Quran 4: 11-12; 4: 176.

⁴⁷ A woman after being married is entitled to be thoroughly maintained by her husband even though she may have means of maintaining herself. The sacred Quran provides that '[men] are the protectors and maintainers of women...'. With a particular share of properties as heirs women are also entitled to dower (amount of money as a consideration of marriage). See the Holy Quran 4:34; 4:34; See also, A Begum, 'Rights of Women under Muslim Law: Principles and Practices in Bangladesh' (1999) 1 *Islamic University Studies* at 26; B A Venkatraman, 'Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Comparable?' (1995) 44 *American University Law Review* 1949 at 2003.

Secondly, if equal rights to inheritance are given, it may bring an immediate benefit to unmarried women, but in the long run it may produce an undesirable result for them.⁴⁹ For example, having such rights for women could obstruct the path of seeking shelter and support that they may need from their natal families following their marital breakdown.⁵⁰ This is because giving equal share to women will proportionately reduce the share of their paternal kin. This will subsequently work against the women since most of the people in Bangladesh lack sufficient economic funds to live on. Moreover, traditionally the men in Bangladesh are not mentally prepared to accept an equal share, in contrast to western culture. Therefore such a demand is very unlikely to gain support from relatives and even from the community in the conservative culture of Bangladesh, as happened in a few instances in India.⁵¹ Thirdly, after the death of parental relations, very little property may remain for distribution among heirs as 40% of the people of Bangladesh are living below the poverty level.⁵² In that case, equal inheritance right cannot be a 'protective shelter' for women since nearly 80% of them belong to those families.⁵³ Fourthly, CEDAW is often viewed by the Muslim countries as culturally biased and sensitive to western values.⁵⁴ The CEDAW, when it seeks to equalise inheritance rights, overlooks the fact that such an attempt will frustrate the goal of equality since the religious dictates are deeply entrenched

⁴⁸ A al-Hibri 1997 n 42 at 2-3.

⁴⁹ C I Nyamu, 'How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?' (2000) 41 *Harvard International Law Journal* 381 at 416.

⁵⁰ Ibid.

⁵¹ In this regard, a socially accepted perception is that a woman's interests in paternal properties should be contingent upon the financial support and shelter that she may need from the family following her marital breakdown. In order to retain that support she is expected to surrender her inherited properties in favour of her paternal relations. She has to often lose this support when she inherits property. See S Sobhan, 'Women Issues in Bangladesh' (1982-83) 2 *LAWASIA* 254 at 258; *ibid*.

⁵² World Development Report 2003 at 11 <<http://www.Adobe.com>> (19 December 2003).

⁵³ CEDAW Report n 11 at 7.

⁵⁴ J Dimauro, 'Towards a More Effective Guarantee of Women's Human Rights: A Multicultural Dialogue in International Law' (1996) 17 *Women's Rights Law Reporter* 333 at 343.

in the social fabric of Bangladesh which regards equal rights as destructive to family ties.⁵⁵ Without any proper understanding of the specific situation or any attempt to create a congenial atmosphere, particularly at local levels, the prompt adoption of ‘alien’ strategies does not appear likely to bring any social change.⁵⁶ As An-Na’im contends: women who live in very ‘traditional’ communities

cannot and should not be invited to subscribe to a supposedly “international” feminist vision without enabling them, at the same time, to live in harmony with their immediate environment. It is irresponsible and inhumane to encourage these women to move too fast...without due regard to the full implications of such action.⁵⁷

Moreover, achieving equality as per the prescription of the CEDAW does not always mean to enact laws or abolish the authentic values of a specific religion.⁵⁸ Rather, a viable route might be to introduce a dialogue⁵⁹ at national and local levels to, *inter alia*, separate the traditional patriarchal concept from the core values of Islam.⁶⁰ International and western women’s organisations can help the process be effective for women through providing financial support and proper monitoring.⁶¹ More importantly, both national and international efforts must be advanced to put pressure on the government to ensure women’s other rights such as right to dower and maintenance, which already exist under

⁵⁵ Monsoor 1999 n 16 at 4.

⁵⁶ Mountis 1996 n 1 at 141-142.

⁵⁷ A An-Na’im, ‘The Rights of Women and International Law in the Muslim Context’ (1987) 9 *Whittier Law Review* 491 at 516.

⁵⁸ Nyamu 2000 n 49 at 415.

⁵⁹ A An-Na’im recommends both an internal and cross-cultural dialogue what he thinks ‘... might bring about a reformulation of some Western notions of rights through the incorporation of experiences and values of non-Western societies’, mentioned in Pollis 1996 n 41 at 318.

⁶⁰ For example, the traditional patriarchal concepts are: ‘Islam prohibits secular education and encourages only religious education’ for women; ‘A woman’s paradise is under the feet of her husband’, which have no relevance to Islam and are detrimental to women. See the following section 3.4.; Al-Hibri 1997 n 42 at 44; V Narain, ‘Women’s Rights and the Accommodation of “Difference”: Muslim Women in India’ (1998) 8 *Southern California Review of Law and Women’s Studies* 43 at 71-72; Dimauro 1996 n 54 at 340-341.

⁶¹ Mountis 1996 n 1 at 144-146

the state laws. Most of the disadvantaged women (90% of the total) cannot enjoy these rights in cases of a divorce or separation.⁶²

3.4. Religious Attitudes towards Women

Bangladesh is a predominantly Muslim country (88% Muslim) with a rigid attitude towards women. State Shariah law (Muslim personal law) is based on the Quran (divine revelation), the Sunnah⁶³ and the consensus of opinion of learned expertise on Islam.⁶⁴ To solve some of the issues which were left unsettled by the primary two sources, the Quran and Sunnah, expert opinions have been resorted to since the early stage of Islam.⁶⁵ As already referred to in the preceding section that there has been a growing academic debate as to whether Shariah (based on Islam) has discriminated against women or treated them equally. However, the debate is not within the ambit of this section, rather it explores the negative attitude of Muslim Leaders who interpret the provisions of Shariah in relation to women's rights. It has been broadly argued that the interpretation of Muslim leaders sometime suffers from misconception and is not supported by the divine text of Islam.⁶⁶ Some of the religious dictates (*fatwa*) developed through the unrestricted exercise of personal opinion and have become customary in nature. For example, some myths prevail in rural areas in Bangladesh that 'Islam prohibits secular education and encourages only religious

⁶² Sobhan observed that '[there] has been no case of the dower debt being paid on divorce nor any wife receiving any maintenance...' See Sobhan 1982-83 n 51 at 256. Even in a metropolitan city of Dhaka, 88% of women did not receive any dower. See Monsoor 1999 n 16 at 10.

⁶³ Sunnah denotes primarily personal conducts, acts, saying of Prophet Hazrat Mohammed (SM), and other activities and customs prevalent in the Arabian community which had been approved by the Prophet. See N P Aghnides, *Mohammedan Theories of Finance* (1916) New York at 35-36.

⁶⁴ See K Cragg, *The House of Islam* (1975) California: Dickenson Publishing Company, INC at 44; see also, id at 30, 36, 60, 65, 67& 94; Venkatraman 1995 n 47 at 1965-1970.

⁶⁵ Aghnides 1916 n 63 at 60-88

⁶⁶ M S H Mahmud and M P Mimi, 'Oppression of Muslim Women: The Text and Bangladesh Context' (1998) 5 *Empowerment-A Journal of Women for Women* 75 at 89.

education' for women⁶⁷, 'a woman's paradise is under the feet of her husband' and so on. Subsequently, many women (being illiterate and ignorant)⁶⁸ sacredly accept these myths and bear all sorts of violence to gain the paradise.

In the last three decades, a significant portion of misinterpretation of religious norms has been made by the Shalish Council (the lowest unit of the Local Administration). The Shalish Council usually mediates marital and other personal disputes in rural areas. The local influential (in terms of political affiliation or wealth) persons or religious leaders, who are believed to be learned in Islam, lead the Council. Arguably, these leaders do not have proper understanding of Islamic jurisprudence or of domestic legislation,⁶⁹ and their decisions are commonly detrimental to women.⁷⁰ There is much evidence in Bangladesh to suggest that the Shalish unjustifiably violates women's dignity and security through the execution of *fatwa* (decisions or opinions of Muslim leaders).⁷¹ It often interprets religion in such a manner that the entire civility is undermined, let alone issuing Islamic rights to which women are entitled. Such humiliating trends were exemplified in the worst form⁷² in

⁶⁷ Id at 87.

⁶⁸ The overall literacy rate of Bangladesh is 38.1%, and the rural literacy rate, for example, for females is about 10% only. See Rahman and R Huq, 'Human Rights in Bangladesh: An NGO Perspective' (1997) 14 *The Dhaka University Studies* 1 at 7; see also, Goswami 1998 n 7 at 59

⁶⁹ ASK Report 1998 n 39 at 153.

⁷⁰ K Siddiqui, 'In Quest of Justice at the Grass Roots' (1998) 43 *Journal of Asiatic Society of Bangladesh Hum* 1 at 9.

⁷¹ S Jabin, Violence Against Women in Bangladesh, a paper was presented in the Eliminating Violence: Asia Regional Workshop on the Elimination of Violence Against women, New Delhi, 3-7 April 1995.

⁷² For example, a 21-year old Noorjahan was buried in the ground up to her chest, and stoned to death by villagers for second time marriage by ending her first traumatic marriage. 'A *fatwa* for 101 lashes was pronounced even after the death of Shanti Khatun (50 years) ... Her only crime was that she had a ligation almost 20 years earlier.... the self-pronounced leaders issued a *fatwa* to whip her grave 101 times'. Since 1997 Ain O Salish Kendra (ASK), a leading human rights organisation, has recorded 136 cases of which 26 cases in 1999 alone. In the last four years 17 women died following the issue of *fatwa*, while hundreds of *fatwas* go unreported by the media. Further, on 27 July 2002, it is reported that in a similar incident, 'a 15-year-old girl named Rushni was publicly abused by a village 'Shalish' for having relations with a 22-year-old man. Latter, in protest against the medieval punishment ... she committed suicide'. See 'Bangladesh: Landmark High Court ruling against fatwas' on-AL Index ASA 13/001/2001 <http://web.amnesty.org/ai.nsf/Index/> (17 August 2001); 'The Fatwa in Question is Wrong', *The Daily Star* (7 January 2001); Ain O Salish Kendra (ASK), *Human Rights in Bangladesh:1999* (hereinafter ASK Report 1999), (2000) Dhaka: Ain O Salish Kendra at

a series of instances in which women had been convicted and punished in an indigenous way⁷³ on the basis of Islamic extremist and fanatic approaches. To execute the decisions, various punishments ranging from lashing, whipping, social boycott and stoning to death are inflicted on women. The punishments are usually imposed for ‘immoral behaviour’ such as premarital rape, pregnancy, and allegations of extra marital relationships, family planning and verbal divorce.⁷⁴

On numerous occasions, the decisions of the Muslim Leaders signal their ignorance about the law of the country. For example, their ignorance of law has been observed in executing frequent ‘hilla’ (interim marriage) practices that require a wife who has been verbally divorced by her husband to marry another man, before restarting her marital life with her former husband.⁷⁵ Under the Shariah, a husband is not allowed to continue his marital life (with the same wife) if he verbally pronounces thrice *talaq* (word of divorce) towards his wife. Accordingly, the marital relationship could only be restored under the Shariah after satisfying specific conditions. The conditions are: (i) the wife has to be duly married⁷⁶ to some other person; (ii) a genuine consummation has to take place; (iii) that marriage could not be arranged by the former husband; (iv) that second marriage has to be duly dissolved⁷⁷

88; Rights-Bangladesh: “Fatwa” Ban to Help Rural Women (hereinafter Rights-Bangladesh), http://www.google.com/search?q=cache:E_lwXF5siVo:globalinfo.org/eng/ and ‘Justice cost a life’ *The Independent* (27 July 2002) Editorial.

⁷³ Amnesty International, ‘Bangladesh: Taking the law in their own hands; the village Salish’, AI Index: ASA/3/12/93; Mahmud 1998 n 66 at 79.

⁷⁴ ASK Report 1999 n 72 at 89-90.

⁷⁵ Rights-Bangladesh; ASK Report 1999 n 72 at 90.

⁷⁶ Under Shariah a marriage has to satisfy two basic essentials. These are: offer and acceptance respectively by the groom and bride or by their proxies of the marriage. Accordingly, the offer and acceptance must be occurred at the same meeting before either 2 male or 1 male and 2 females sane and sound Muslim witnesses. See D Pearl, *A Textbook on Muslim Personal Law* (1987) London: Croom Helm at 41-42; In addition, Bangladesh as in other Muslim countries has introduced the *Muslim Marriage and Divorce (Registration) Act* 1974 under which every marriage is required to be registered. See section 3 of the Act.

⁷⁷ Under Shariah, a marriage can be dissolved in three ways, namely: (i) by the act of the husband or wife (where husband delegates the power of *talaq* which denotes a form of dissolution of marriage usually enjoyed by the husband); (ii) by mutual agreement of the husband and wife; and (iii) by a judicial decree. Each form

and; (v) the wife has to observe *iddat*.⁷⁸ However, this practice of interim marriage under Shariah as such has not been valid under the existing laws of Bangladesh since 1961. In pursuance of section 7 (6) of the *Muslim Family Laws Ordinance* 1961, a wife whose marriage has been terminated by *talaq* can remarry the same husband without an interim marriage, unless such termination is so effected for the third time.

Thus it is revealed from the above discourse, that the religious practice of Bangladesh is neither supportive of, nor conducive to, women's rights.

3.5. Good Governance and the Government's Commitment Towards Rights and Justice

The quest for good governance has become an important concern for Bangladesh. The necessity to improve governance has long been expressed in academic writings and been endorsed as a pre-condition to many foreign assistance programs in Bangladesh. The United Nations Development Program (UNDP) has set in place some operational strategies in favour of good governance. According to UNDP, governance refers to a set of mechanisms, processes and institutions through which people 'can articulate their interests, exercise their legal rights, meet their obligations and mediate their differences'.⁷⁹ 'Good governance accomplishes these objectives in a manner that is essentially free of abuse and

of dissolution has a distinct and lengthy procedure to be followed. See for details, J J Nasir, *The Status of Women Under Islamic Law* (1994) London: Graham & Trotman at 74-106.

⁷⁸ Iddat is a period of waiting. It imposes a temporary prohibition on a woman to marry another man after the dissolution of her marriage by divorce or by the death of the husband or by any form of dissolution of marriage. The objective is to, *inter alia*, determine the pregnancy of woman and the paternity of the child, and 'to mourn the dead husband', in the case of the widow'. The period of waiting varies with the forms of dissolution of marriage. For example, if the marriage is dissolved by the death of the husband and the wife is not pregnant then the period of waiting is four months and ten days. See Nasir 1994 id at 107-110.

⁷⁹ 'Good governance and sustainable human development- UNDP Governance policy paper', <http://magnet.undp.org/policy/chapter1.htm> (6 June 2002).

corruption, and with due regard for the rule of law’.⁸⁰ However, in this context, good governance for Bangladesh denotes a system where the three organs of the government – the Executive, the Parliament and the Judiciary – function independently and transparently, and where their responsibilities are ultimately directed to the people.⁸¹ It is one of the essentials for democracy as well as for the sound and effective exercise of legal rights. Unfortunately, Bangladesh, unlike India,⁸² has maintained an unhappy culture of governance since its inception as an independent state. Corruption, political violence, non-accountability of the government, incompetent exercise of law and the inept bureaucracy⁸³ have been chronic obstacles to good governance. ‘Continued defiance of rule of law and [government] immunity have promoted a non-accountable, non-transparent administration in nearly all spheres of national life’.⁸⁴ The autonomy and independent functions of the other two organs of the government have frequently been hindered by the unfair pursuits of

⁸⁰ C R Kumar, ‘Corruption and Human Rights: The Hong Kong Experience of Promoting Transparency in Governance’, this paper was presented at the 20th Annual Law and Society Conference on “Opening Law: Making Links—Crossing Boundaries”, organised by the Faculty of Law and the Legal Intersections Research Centre, University of Wollongong, Australia, 9-11 December 2002 at 2.

⁸¹ Rule of law, the level of political institutionalisation, participation, transparency, consent of the governed, accountability and openness of all administrative activities of the government have been regarded as objective criteria of good governance. See for details, W P Nagon and L Atkins, ‘The International Law of Torture: From Universal Prescription to Effective Application and Enforcement’ (2001) 14 *Harvard Human Rights Journal* 87 at 89; A Rahman, ‘Challenges of Governance in Bangladesh’ (1993) 14 *Bangladesh Institute of International and Strategic Studies Journal* 461 at 461.

⁸² See D Choudhury, *Constitutional Development in Bangladesh* (1995) Dhaka: The University Press Limited at 197-198; M Rashiduzzaman, ‘Bangladesh: An Overpoliticised Democracy?’ *The Daily Star* (16 May 1999); Z Haider, ‘Parliamentary Democracy in Bangladesh from Crisis to Crisis’ (1997) 42 *Journal of Asiatic Society of Bangladesh Hum* 69 at 74.

⁸³ See M R Islam, ‘The Separation of Powers and the Checks and Balances Between the President and Parliament of Bangladesh’ (1987) *LAWASIA* at 177-189; G Quader, ‘The Challenges of Security and Development: A View from Bangladesh’ (1994) 15 *Bangladesh Institute of International and Strategic Studies Journal* at 205- 214; A K M Enayet Kabir, ‘Institutionalising democracy: case for good governance’ *The Independent* Dhaka (19 December 2000) Editorial; M H Khan, ‘Bangladesh experience of Parliamentary democracy’ *The Independent* (7 August 2000) Editorial.

⁸⁴ M R Islam, ‘Good Governance and the Rule of Law in Bangladesh: Challenges and Prospects in the New Millennium’-this paper was presented in a conference hosted by the Department of Economics, University of Queensland on January 2002; A M Q Islam, ‘The Nature of the Bangladesh State in the Post-1975 Period’ (1993) 2.3 *Contemporary South Asia* 311 at 316.

the Executive.⁸⁵ In addition, the law enforcing agencies of Bangladesh are randomly used in the same spirit.⁸⁶ The Executive's inaction, sometimes outright to oversee their failure, encourages police to routinely inflict physical and mental torture on people or to engage in other legal rights abuses in contravention of laws. The overall effect ultimately blocks the way of exercising or promoting rights.

Given the scope of this section, the discussion primarily focuses on the inefficient and corrupt practices of the government in administering state affairs which contribute to the denial of fundamental rights. The abusive exercise of state power along with the government's attitude towards the enactment and implementation of laws, justice and the overall protection of rights can be partly understood from the following discussion:

- i) Executive and Parliament
- ii) Independence of the Judiciary
- iii) The role of law enforcing agencies
- iv) Institutional mechanism for protection of human rights

3.5.1. Executive and Parliament

3.5.1.1. The Position of the Executive under the Constitution

Bangladesh has a parliamentary form of government. The President is the constitutional head of the state and exercises all of his functions, subject to two exceptions,⁸⁷ in

⁸⁵ H Ahmed, 'Governance Vis-a-vis South Asian Perspective' *The Independent* (16 September 2000).

⁸⁶ Rahman 1993 n 81 at 464; see also, 'Bangladesh: Institutional failures protect alleged rapists', Amnesty International, <http://www.amnesty.org/ai.nsf/COUNTRIES/BANGLADESH?OpenView&expandall> (8 October 2000).

⁸⁷ Article 48 (3) of the Constitution empowers the President to appoint the Prime Minister pursuant to clause (3) of article 56 and the Chief Justice pursuant to clause (1) of article 95. See *The Constitution of the People's Republic of Bangladesh* 1972 (hereinafter *The Constitution*) art 48(3).

accordance with the advice of the Prime Minister.⁸⁸ The President is elected by the members of the Parliament.⁸⁹ There is a Cabinet for Bangladesh comprising the Prime Minister at its head and such other ministers as the Prime Minister may from time to time designate.⁹⁰ The Prime Minister, who has the support of the majority of the members of Parliament, is appointed by the President.⁹¹ Under article 55 of the Constitution the Prime Minister is the chief executive of the country. Accordingly, the executive power of the Republic is exercised by or on the authority of the Prime Minister.

3.5.1.2. The Constitution and its Amendment Process

The Constitution of Bangladesh is the supreme law of the Republic. Article 7 provides that ‘... if any other law is inconsistent with this Constitution that other law *shall*, to the extent of the inconsistency, be void [italic added]’.⁹² A two-thirds-majority vote in the Parliament is required to amend the Constitution.⁹³

Given the necessity of ensuring proper checks and balances of state power, the Constitution of Bangladesh 1972 has vividly described the separate functions and limits of the three organs of government. It clearly prohibits the Parliament from making any law inconsistent with the Constitution and explains the extent of its legislative power.⁹⁴ Similarly, a range of provisions enshrined in Part IV of the Constitution confine the Executive’s authority in exercising its power. The central spirit of the Constitution essentially stands for the people, providing that ‘[all] powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected *only* under, and by the authority of, this Constitution

⁸⁸ Id art 48 (2) & (3).

⁸⁹ Id art 48 (1).

⁹⁰ Id art 55 (1).

⁹¹ Id art 56 (3).

⁹² Id art 7 (2).

⁹³ Ibid.

[italic added]’.⁹⁵ Further, article 26 has provided that ‘all existing laws inconsistent with the fundamental rights shall... to the extent of inconsistency become void, and the state shall not make any law inconsistent with the fundamental rights, if made void.’ Nevertheless, the basic structure of the Constitution has been frequently amended for the cause of political gains.⁹⁶ Despite the requirement for a two-thirds majority in the Parliament to amend the Constitution, the political culture of the country in the last three decades has created circumstances permitting constitutional amendments. As the following discussion will demonstrate Bangladesh experienced 15 years of military rule and a presidential form of governance. During that period general elections were held under martial law decrees and ordinances. Military dictators became the all powerful executive through ‘rigged elections, purged turncoat politicians and pliable parliaments....’⁹⁷ ‘Parliaments functioned without any effective opposition, as opposition parties boycotted elections.’⁹⁸ In these processes individual ministers showed their utmost loyalty as their existence was perceived as contingent upon the Executive.⁹⁹ In this regard Islam contends:

[the] concentration of power of the Chief Martial Law Administrator and that of the highest executive, the president, in one office created a situation whereby a single person usurped and exercised the powers and functions of all three organs of the Republic.¹⁰⁰

Notwithstanding the change in the form of government in 1991, ‘the legacy of lopsided power relationship continues unabated’.¹⁰¹ The following account of a few amendments to the Constitution and recent incidents that occurred after the 2001 election, portray only a

⁹⁴ Id & art 80-81.

⁹⁵ Id 142.

⁹⁶ M R Islam, ‘Constitutionalism and Governance in Bangladesh’ in M Alauddin *et al* (ed), *Development, Governance and the Environment in South Asia* (1999) London: MACMILLAN at 161-180.

⁹⁷ Islam 2002 n 84 at 8.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

minimal picture of the Executive's autocratic manner in handling state affairs in Bangladesh.

The amendment process of the Constitution began soon after its entering into force. The Constitution came into effect on 16 December 1972. The 1st amendment was made in 1973. The 2nd amendment on 22 September 1973 provided the government with special powers to arrest and detain any person without trial and introduced provisions for the proclamation of an emergency with the effect of suspending fundamental rights. Accordingly, a State Emergency was proclaimed on 28 December 1974 halting certain fundamental rights from the review of the High Court.¹⁰² This state of affairs continued until 27 November 1979.¹⁰³ The 4th amendment in 1974, established one-party politics in place of the original multi-party democracy and made a significant change to the structure of the Judiciary by bringing it under the direct control of the Executive.¹⁰⁴ Two Army Generals captured state power twice through military coups and ruled Bangladesh for one and a half decades (1975-1990). The Parliament was suspended from August 1975 to February 1979 and again from March 1982 to November 1986.¹⁰⁵ The special courts and tribunals set up under martial law¹⁰⁶

¹⁰² See M Kamal, *Bangladesh Constitution: Trends and Issues* (1994) Dhaka: University of Dhaka at vii.

¹⁰³ Although a proclamation of emergency is not unusual in other countries, the provision and practices in Bangladesh deviate considerably from that required under the international standard. For example, article 4A of the ICCPR stands for the declaration of public emergency on grounds that threaten the life of the whole nation up 'to the extent strictly required by the exigencies of the situation'. Under the original provisions of the Constitution of India, 'internal disturbance' was necessary to proclaim emergency. However, in an attempt to restrict the power to declare emergency "internal disturbance" [was] replaced by the term "armed rebellion". While in Bangladesh, such a proclamation may happen, even if it affects 'any part' of the security or economic life of the country. For a detailed discussion about emergency powers and judicial review under the Constitution of India see generally I Omar, *Emergency Powers and the Courts in India and Pakistan* (2002) London: Kluwer Law International and particularly at 19. For Bangladesh see The Constitution n 87 arts 141A, 141B & 141C; I Omar, *Rights, Emergencies and Judicial Review* (1992) (unpublished PhD Thesis, The Australian National University) at 219-226; M H Joarder, 'Emergency Provisions in Bangladesh Constitution and International Standard' (1993) 1 *The Islamic University Studies* at 67-80, especially at 70-73 & 79.

¹⁰⁴ *The Constitution (Fourth Amendment) Act 1975* (Act II of 1974) arts 117A, 115 & 19.

¹⁰⁵ M Islam, *Constitutional Law of Bangladesh* (1995) Dhaka: Bangladesh Institute of Law and International Affairs at 18-20.

¹⁰⁶ Islam 2002 n 84 at 8.

exercised judicial powers, and the Judiciary became subordinated to martial law.¹⁰⁷ To escape legislative scrutiny, ‘law-making’ proceeded through the proclamation of President’s Ordinances, bypassing the ordinary course of enacting state laws.¹⁰⁸ This is because the Ordinance, compared to the Bill, can easily take effect without going through the long and complex legislative procedures.¹⁰⁹ This process diminished the Parliament’s authority to examine laws and diluted the core concept of separation of power incorporated in the Constitution.

The 5th amendment validated the *Indemnity Ordinance* 1975, indemnifying the self-confessed killers of the then President, Sheikh Mujibur Rahman and his 21 family members (all were assassinated in a military coup on 15 August 1975) by inserting a new article 3A under the Fourth Schedule to the Constitution on 6 April 1979.¹¹⁰ The *Indemnity Ordinance* 1975 was proclaimed in the wake of a military coup on 26 September 1975, aiming to prohibit all legal proceedings against, and scrutiny of, those killers. Thus, the 5th amendment provided security to the killers at the expense of fundamental rights to legal protection (art 31 of the Constitution) and the right to life (art 32). Such a trend of using state power is not only a blatant violation of legal rights of the aggrieved relatives, but all the civilised norms for administration of justice.¹¹¹ Moreover, both the 5th and 7th amendments legitimised, beyond constitutional authority¹¹² the two army generals’ unconstitutional access to state power by means of saving clauses, providing that all acts

¹⁰⁷ Q R Hoque, *Preventive Detention Legislation and Judicial Intervention in Bangladesh* (1999) Dhaka: Bishwa Shahittya Bhavan at 301-307.

¹⁰⁸ K M Subhan, ‘Human Rights: Bangladesh Perspective’ (1995) 2 *Journal of International Affairs* 1 at 4.

¹⁰⁹ See for details, The Constitution n 87 arts 93 & 80-81.

¹¹⁰ *Constitution (Fifth Amendment) Act* 1979 (Act of 1979) Paragraph 18; *Fourth Schedule of the Constitution* art 3A.

¹¹¹ Islam 2002 n 84 at 3.

¹¹² There exists no provision in the Constitution of Bangladesh through which state power can be captured by an army general and/or thereby validated in any form or under any circumstances. The Constitution requires

and orders during the military period ‘*shall* be deemed to have been validly made and, *shall not* be called in question in or before any Court or Tribunal on any ground whatsoever [italic added]’.¹¹³

Hence, the above amendments, which were made in deviation of the constitutional authority of the Parliament, cannot survive the test of the Constitution, especially under its articles 7 and 26, and in clear disregard of a number of judicial decisions.¹¹⁴ In *Nurul Islam v Bangladesh* the Court held that ‘the Government or the Legislature cannot by framing a Rule or by enacting a law, evade the guarantees provided under the Fundamental Rights and the Protections provided under article 135 of the Constitution.’¹¹⁵

The parliamentary system was revived in 1990. A caretaker government (to conduct a national election) was established in 1991. Since then, government power has been transferred thrice. In a recent parliamentary election held on 1 October 2001, the Bangladesh Nationalist Party (BNP)-led coalition with Jamaat-i-Islami formed the government. Nevertheless, the overall rights situation of the country remains unchanged. Rather, in the backdrop of the election, systematic violations of legal rights in severe forms such as killing, severing body parts, gang-rape, minority torture, police arrest without any charge and custodial torture increased to an unprecedented scale that generated international concern.¹¹⁶ A clear picture of violation of legal rights in the country can be

the change of government power only in pursuance of Part IV of the Constitution. See The Constitution n 87 at Part IV, especially art 48; see also, Alauddin 1999 n 96 at 170.

¹¹³ Appendix-X, *Constitution (Seventh Amendment) Act* 1986 (Act 1 of 1986) para 19 (2) in The Constitution n 87 at 115.

¹¹⁴ *Khan v Bangladesh* (1982) 34 DLR (AD) 321; *Islam v Bangladesh* (1981) 33 DLR (AD) 201; *Kudrati-i-Elahi Panir v Bangladesh* (1992) 44 DLR (AD) 319; *Rahman v Bangladesh* (1992) 44 DLR (AD) 111. All of these cases pointed out the limitations of exercising legislative power of the Parliament to enact laws.

¹¹⁵ (1981) 33 DLR (AD) 201.

¹¹⁶ Islam 2002 n 84 at 13; Amnesty International Report on Bangladesh 2002, the US Dept Report n 4 at 11; *The Daily Star* (16 November 2001, 6 January 2002, 26 May 2002); *The Daily Janakantha* (National Bengali Daily) Dhaka (26 May 2002); *The Daily Jugantar* (Bengali) Dhaka (26 May 2002); see also, Far Eastern Economic Review, ‘Bangladesh: A Cocoon of Terror’, <http://www.feer.com/articles/2002/0204->

learned from the incidents in only one month following the election. By the end of October 2001, a total of 122 people had been killed, 2430 injured, 505 arrested for political reasons, four people killed in police custody, 27 women became victims of acid attacks and 61 were raped, nine housewives were killed and two injured for dowry.¹¹⁷

In an alleged effort to restore peace and stability, the government once again undermined the Constitution and judicial decisions by enacting a law on 9 April 2002 entitled the *Law and Order Disruption Crimes (Speedy Trial) Act 2002*. There is a broad perception that the new Act is devoid of honest intention on the part of the government and is being used to harass the opposition.¹¹⁸ In addition to its destructive effects on fundamental rights, the Act is repugnant to the Constitution because Parliament treated the Act as a Money Bill to evade presidential authority.¹¹⁹ The Act shows disrespect for a number of judicial decisions as well.¹²⁰

This new Act which authorises four Metropolitan Magistrates to adjudicate cases, also suffers from the same legal flaws and is unprecedented and/or against the conventional practice of the country. For example, since independence, successive Parliaments of Bangladesh have enacted the *Special Powers Act 1974*, *The Suppression of Terrorist*

[04/p014region.html](http://www.dailystar.com/200111/01/n1110110.htm#BODY1) (1 April 2002); 'Persecution of Hindu Minorities in Bangladesh A Critical Review' *The Daily Star* (21 January 2002).

¹¹⁷ *The Daily Star* < <http://www.dailystarnews.com/200111/01/n1110110.htm#BODY1> > (1 November 2001).

¹¹⁸ *The Jugantar*, Dhaka (25 April 2002).

¹¹⁹ Under article 80 (3) of the Constitution, the President is bound to consent to a money bill. However, the Act, in no way can be considered under article 81(1) & (2) as Money Bill since it does not deal with any of the listed matters (mentioned therein) essential to qualify to be a money bill.

¹²⁰ The preceding government enacted a law titled the *Public Safety (Special Provision) Act (PSA) 2000* of almost similar nature. Nearly 500 writ petitions were lodged with the High Court Division (HCD). A split HC verdict was delivered on 12 July 2001. The presiding judge held that the PSA was entirely *ultra vires* to the Constitution, while the other judge declared it partially unconstitutional. See for details, 'Split High Court Verdict on PSA' *The New Nation*, Dhaka (13 July 2001); *The New Nation* (25 July 2001). In a landmark judgement in the constitutional history of Bangladesh, the Court held that the basic structure of the Constitution can not be altered by the legislature and any legislation beyond the purview of constitutional limitation will be regarded as unconstitutional. See *Chowdhury and Others v Bangladesh* (1989) IX (A) BLD 1 at 3-5.

Offences Act (STOA) 1992 and the *Public Safety (Special Provisions) Act* (PSA) 2000. However, the Sessions Judge, the District Sessions Judges or Additional District Sessions Judges other than Magistrates were appointed under those Acts to decide cases.¹²¹ Apart from legal flaws in appointing Magistrates,¹²² the two major concerns of the inherent aim of the Act raised confusion about the credibility of this law. One is the direct supervision by the government of Magistrates¹²³ and the other is the alleged involvement of Magistrates in corruption.¹²⁴

Thus, it is seen that the enactment of laws and their implementation have been driven to meet almost a single goal of the Executive, rather than accommodating public needs and aspirations. The Parliament has been forced to become a ‘rubber stamp’, which has eventually paralyzed its ability to exert any control upon this goal. Further, the role of the members of the Parliament has added to the Executive’s unlawful authority.¹²⁵ In the last three decades, the political culture of Bangladesh has created ‘turncoat politicians’. ‘Their ideas, ideologies, even party affiliations vary with and are dependent upon the incumbent government’.¹²⁶ After getting elected as members of the Parliament, politicians become excessively moved by their self-interest and demonstrate very little interest in any proposed

¹²¹ See for details, ss 2 & 8 of the STOA 1992; ss 4-8 & 10 of PSA 2000; and ss 2 & 8 of the *Law and Order Disruption Crimes (Speedy Trial) Act* 2002.

¹²² The following section considers this issue.

¹²³ Magistrates are appointed from administrative cadres, and their job related benefits are directly under the control of the Executive according to the 4th amendment (art 115) of the Constitution. See also for a detailed discussion about the issue, M R Islam and S M Solaiman, ‘The New Speedy Trial Law to Maintain Order in Bangladesh: Its Constitutional and Human Rights Implications’ *Indian Journal of Law Institute* (forthcoming).

¹²⁴ See Amnesty International Report 2002; the US Dept Report 2002 n 4; ‘Corruption in Bangladesh: An Overview’ <http://www.ti-bangladesh.org/docs/survey/overview.htm>; and ‘Corruption in Bangladesh: An Overview’ <http://www.ca/Readings/TI-FOI.htm> (28 May 2002); M Hasan, ‘Making Anti- Corruption actions Work: Enlisting Media, NGOs and Aid’ at 4 <<http://www.ti-bangladesh.org>> (8 May 2002).

¹²⁵ See for details, Islam 2002 n 84 at 4.

¹²⁶ M R Islam, ‘The seventh Amendment to the Constitution of Bangladesh: A Constitutional Appraisal’ (1987) 58 *Political Quarterly* 312 at 328-329.

legislation.¹²⁷ Successive governments have used them as a ‘convenient tool’ for running state’s affairs. Moreover, the frequent boycott of the opposition parties¹²⁸ from the Session (Parliament) and the lack of their commitment to public mandate further erode the Parliament’s accountability.

Lastly, the financial misappropriation of public money has been another unfair facet of the Executive in Bangladesh. Most Parliamentary Committees (PCs), especially financial committees, are chaired by the ruling parties and their procedures display a serious neglect of transparency. For example, the *Rules of Procedure* for PCs require meetings to be held in camera and much of the functions of the PCs remain unknown and unnoticed by the public.¹²⁹ Despite a series of legislative rules and the constitutional provision,¹³⁰ an Ombudsman’s office is yet to be functional in Bangladesh to oversee the issue. Rather, the government has become the ultimate authority to decide financial policies and ways of expending by virtue of some amendments to the Constitution.¹³¹ At present, the country is run by a government comprising 60 ministers, the largest in the world. Media reports observed that many ministers did not find any portfolios after their assumption of office. This sort of power-sharing strategy, aside from its resource implication,¹³² is unusual in the global context.

¹²⁷ ASK Report 1999 n 72 at 3.

¹²⁸ The present government party while in opposition was absent in Parliament from 1999 to 2001 and the present opposition parties after 9-months abstention went back to the Parliament in June 2002. See ‘Opposition boycott renders parliament less effective’ *The Independent* (25 February 2000); the US State Dept Report n 4.

¹²⁹ The World Bank, *Bangladesh: Financial Accountability for Good Governance* (2002) Washington DC: The World Bank at 67-69.

¹³⁰ Article 77 of the Constitution provides provisions for the establishment of the office of Ombudsman.

¹³¹ Islam 2002 n 84 at 12.

¹³² The necessity of ministers in administering the country cannot be gainsaid, if the practical situation warrants that. According to several reports, the number of ministers reached a stage that exceeded the number of portfolios. Bangladesh is not a welfare state. People’s tax money is expended to serve the official status and privileges of ministers. Hence, such a power-sharing strategy could be considered a heinous assault on the lives of the poor people of the country who constitute 40% of the population. See generally Islam 2002 n 84.

3.5.2. The Independence of the Judiciary

The independence of the Judiciary is one of the essential components of ensuring legal rights.¹³³ It broadly reflects an ideal encompassing two distinct qualities: decisional independence and institutional independence.¹³⁴ The former entails the ability of judges to render justice exclusively based on relevant laws and free from all extra-legal factors.¹³⁵ The latter signifies a thorough separation of the Judiciary from the Executive or Legislature.¹³⁶ The achievement of these two qualities warrants a fair mode and manner through which the appointment, promotion and removal of the judges are conducted.¹³⁷ Although there is no uniform standard for assessing the independence of the Judiciary, certain well accepted criteria are found in a number of judicial decisions and international documents. The Supreme Court of Canada in *Walter Valente v Her Majesty the Queen* regarded security of tenure as ‘the first of the essential conditions of judicial independence’.¹³⁸ The Supreme Court of New South Wales, Australia, recommends the ‘freedom from executive control and all appearance thereof, and reasonable security of

¹³³ M Dakolias and K Thachuk, ‘The Problem of Eradicating Corruption from the Judiciary: Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform’ (2000) 18 *Wisconsin International Law Journal* 353 at 353.

¹³⁴ J C Wallace, ‘Resolving Judicial Corruption while Preserving Judicial Independence: Comparative Perspectives’ (1998) 28 *California Western International Law Journal* 341 at 342-344.

¹³⁵ M P Singh, ‘Securing the Independence of the Judiciary-The Indian Experience’ (2000) 10 *Indiana International and Comparative Law Review* 245 at 245- 249. It is observed that ‘...a judiciary that gives greater weight to the political consequences of a case than to a fair application of the law “will soon become another political body, which will mark the end of the rule of law.” See Barton 2002 n 5 at 363.

¹³⁶ Barton 2002 n 5 at 367.

¹³⁷ See for example, *North Australian Aboriginal Legal Aid Service Inc v Bradley* [2002] D 28 of 2001 BC200205677 (unreported case) at 7 & 8; S A Akkas, ‘Appointment of Supreme Court Judges in Bangladesh: A Study of Law and Practice’ (2002) 11 *Journal of Judicial Administration* 146 at 146.

¹³⁸ (1985)2SCR673[4.27] http://www.lexum.umontreal.ca/csc-scc/en/pub/1985/vol2/html/1985scr2_0673.html (24 March 2002).

tenure.’¹³⁹ The UN has formulated 20 basic principles, the foremost of which requires the state to grant, respect and observe the independence of the Judiciary.¹⁴⁰ The underlying goal of such independence had been well manifested in a landmark ruling back in the 1800s in the US case *Marbery v Madison* (1803) that was intended to enable the Judiciary to make impartial decisions, and to generate a check on the illegitimate exercise of the Executive power.

An independent Judiciary free of all forms of interference and unfairness is an imperative for ensuring the fair administration of justice.¹⁴¹ Considering the importance of the issue, the Constitution of Bangladesh set in place a number of provisions to ensure the independence and the separation of the Judiciary. Yet the Executive, in contravention of the Constitution, enjoys an unfettered control over the lower Judiciary. In several recent cases, the existing procedures for appointments, controls and discipline of the judges of the lower courts have been held to be unconstitutional by the Supreme Court (considered in following sections). The higher courts, although they display a significant degree of independence in delivering verdicts, have often had their processes interfered with by the Executive. Notwithstanding constitutional imperatives and recurring election pledges, the Judiciary is not separate from the Executive, rather it is integrated into the civil administration in terms of appointing judges.¹⁴² The following discussion examines briefly the Executive’s role in ensuring or rather, undermining judicial independence.

¹³⁹ *Macrae and Others v Attorney-General for State of New South Wales* 7 ALD 97.

¹⁴⁰ *Seventh National Congress on the Prevention of Crime and the Treatment of Offenders* 1985, UN Doc A/CONF121/22/Rev 1 at 59 (1985).

¹⁴¹ S N Sanker, ‘Disciplining the Professional Judge’ (2000) 88 *California Law Review* 1233 at 1275-76.

¹⁴² *Bangladesh Civil Service (Re-organisation) Order* 1980, para 2 (X) has amalgamated judicial service with the other 13 cadre services.

3.5.2.1. The Executive's Influence on the Highest Court

Article 95 (1) of the original Constitution authorised the President to appoint the Chief Justice (CJ), but for the appointment of other judges the President was required to consult with the CJ. Regrettably, the 4th amendment omitted the consultation requirement and made the President an exclusive authority to appoint and remove the judges of the Judiciary. The restoration of parliamentary democracy in 1990 did not make any difference. The President being the 'titular head' of the government has to act on the advice of the Prime Minister. Nevertheless, given the competence and views of the CJ as most relevant and appropriate in determining the suitability of the judges, this practice has been followed since the British rule in India, even beyond formal laws.¹⁴³ Despite this, the government has contravened the conventional requirement in a series of instances.¹⁴⁴

In contrast, consultation with the CJ is a constitutional imperative in neighbouring countries, India and Pakistan. Both countries have developed authoritative precedents in this regard. For example, in the *Gupta Case*¹⁴⁵ the Supreme Court of India, beyond mere consultation, placed significant importance on the opinion of the CJ. The decision clearly upheld that in the event of conflict between opinions, the opinions of the CJ shall prevail, and no appointments can be made without the initiation process by the CJ, or, non-

¹⁴³ A Ahmed, *Theory & Practice of Bangladesh Constitution* (1998) Dhaka: H A Publisher at 137; see also, M Islam 'Constitutional Law of Bangladesh' (1996) *Journal of Bangladesh Institute of Law and International Affairs* at 361.

¹⁴⁴ For example, in February 1994, the government, for the first time, appointed nine additional judges to the HCD without consultation with the CJ. In subsequent case, the President neither consulted with, nor followed the recommendation of, the CJ in appointing two additional judges to the HC. In 2001, the recommendation of CJ was again turned down in relation to regularising the appointment of additional judges by the President as permanent judges of the HCD. The President confirmed only one out of four, while others had to relinquish the job. See for details, M R Islam and S M Solaiman, 'The Enforcement of Rulings of the Supreme Court on Judicial Independence in Bangladesh: When Enforcer Becomes Violator' (2002) 4 *Australian Journal of Asian Law* 108 at 111-112; M R Islam and S M Solaiman, 'Public confidence crisis in the judiciary and judicial accountability in Bangladesh' (2003) 13 *Journal of Judicial Administration* 29 at 33-34; *The Daily Star*, Dhaka (22 May 2002).

compliance with the opinion of the CJ.¹⁴⁶ In Pakistan, the verdict of *Al-Jehad Trust v Federation of Pakistan* underscored the importance of the CJ's view in almost a similar manner, observing '[recommendations] made by the Chief Justice ... are to be accepted by the President.'¹⁴⁷

Security of tenure of judges represents a basic strength for exercising independent decisions. Nonetheless, this security has been threatened by the Executive on a number of occasions in Bangladesh. In 1982, the seat of the CJ was declared vacant with retrospective effect and three senior judges of the HCD were removed by Executive Orders without prior notice or assigning any reason.¹⁴⁸ The incumbent government, immediately after assuming power, ignored the recommendation of the CJ and extended the term, for one year, of three additional judges of the HCD instead of confirming their appointments.¹⁴⁹ Moreover, a good number of judges were waiting for confirmation (all judges are regularised after completing their two-year service as additional judges). To remedy the logjam of cases, the preceding government appointed 39 additional judges.¹⁵⁰ The media reveals that the current government is planning to appoint more judges by relieving the in-service judges, since 39 judges, being appointed by the opposition party, might not serve the purposes of the present Executive.¹⁵¹ Needless to say, such an approach essentially illustrates a serious and destructive threat for the fair administration of justice. This approach not only impairs judicial independence, but inevitably inserts an extra-legal element into judicial

¹⁴⁵ (1994) AIR SC 268.

¹⁴⁶ Ibid.

¹⁴⁷ (1997) PLD SC 84.

¹⁴⁸ M R Islam 2002 n 144 at 114.

¹⁴⁹ Ibid.

¹⁵⁰ UNB, 'Moudud Tells JS: Steps for Separation of Judiciary Soon' *The Daily Star*, Dhaka (2 April 2002).

¹⁵¹ *The Daily Star* (30 April 2002).

consideration. Judges may not perform their duty independently, particularly when the government or its allies are one party of the suit.

3.5.2.2. The Executive's Influence on the Lower Courts

Article 115 of the Constitution, as substituted by the 4th amendment, requires the President to make rules for the appointment of the judges of lower courts, and their independence in exercising judicial powers is unequivocally recognised in articles 109, 116 and 116A of the Constitution. In relation to the control (including posting, promotion and grant of leave) and discipline of the lower court judges, the President is obliged under article 116 to consult the CJ. Nonetheless, no rule has so far been made in this regard¹⁵² and the government, in violation of the Constitution, has continued to appoint judges. The validity of such an appointment was first challenged in the case of *Aftabuddin v Bangladesh*¹⁵³ in which the consultation with the CJ was declared mandatory for posting and promotion of Magistrates. The issue was again dealt with in *Rahman v Ahmed*¹⁵⁴ when the government appointed a Metropolitan Magistrate without consultation. In this case, the HCD observed that the President is under a legal obligation to consult with the CJ and declared the appointment of the Magistrate illegal and without jurisdiction.¹⁵⁵ Identical disregard of judicial decisions once again is seen in recent appointments of four Metropolitan Magistrates by the President under the *Speedy Trial Act* 2002. A writ challenging the legality of that posting has already been lodged with the HCD.¹⁵⁶ The government's undue influence over judicial functioning of the lower court was further exposed in public

¹⁵² *Secretary, Ministry of Finance v Masdar Hossain (hereinafter Mazdar Case)* (2000) 52 DLR (AD) 82 at 113.

¹⁵³ (1996) 48 DLR 1.

¹⁵⁴ (1999) 19 BLD 291 at 295-296.

¹⁵⁵ *Id* at 295-296 & 298.

¹⁵⁶ *The Daily Star* (28 April 2002); *The Daily Janakantha* (28 April 2002).

recently. The State Minister for Law, Justice and Parliamentary Affairs has instructed the public prosecutor urging that ‘if any judge does any wrong, inform the ministry...[do] whatever you need to convince the judges to bring the verdicts in favour in the cases against the government or ruling party. Go to the judge’s rooms if needed’.¹⁵⁷ The mere statement clearly exhibits the *mala fides* of the Executive. No sense of fairness can support the idea of convincing judges in their office rooms instead of the open courts. Further, in another incident, an attempt to forcefully transfer a district judge (the highest position of the lower judiciary) from the capital city within 24 hours after delivering a verdict which did not favour the Executive, is one of the prominent examples of judicial interference in Bangladesh.¹⁵⁸

Adjournment of pending cases by Executive Orders has been another mode of interference with the judicial function. Legally, only the concerned court is empowered to issue an adjournment, not the Executive. In April 2002, the home ministry took a decision to withdraw 38 criminal cases exempting over 500 people from legal charges of killing, bombing and terrorism, since all belonged to the ruling party.¹⁵⁹ The Bureau of Anti-corruption Department lodged well over 100 cases against the incumbent Prime Minister (PM), Home Minister (HM) and other MPs for their official malfeasance when they were in power (1991-1996).¹⁶⁰ In 2002, soon after the coming to power of the incumbent government, all cases against PM and HM were withdrawn.¹⁶¹ Transparency International

¹⁵⁷ *The Daily Sangbad*, Dhaka (28 April 2002).

¹⁵⁸ N Ahmed, ‘The Problem of Independence of the Judiciary in Bangladesh’ (1998) 2 *Bangladesh Journal of Law* at 147.

¹⁵⁹ ‘38 cases against BNP: Jamaat men to be withdrawn’ *The Daily Star* (13 April 2002).

¹⁶⁰ ‘Corruption Cases against Khaleda Zia [Prime Minister]’ *The Dawn*, Pakistan (24 July 2002); see also, Islam 2003 n 144 at 36.

¹⁶¹ *The Daily Star* (19 April 2002).

has expressed serious concern regarding the fairness of this withdrawal without any investigations and proper hearing.¹⁶²

3.5.2.3. Separation of the Judiciary from the Executive

The separation of the Judiciary lies at the heart of judicial independence. Article 22 of the Constitution imposed an obligation upon the state to ensure the separation of the Judiciary from the Executive. Successive governments in Bangladesh have recurrently made public pledges before elections to effect the constitutional requirements but did not fulfil their pledges throughout their tenures. Amid such government passivity and after some unsuccessful attempts,¹⁶³ the issue of the separation of the Judiciary received strong recognition in *Mazdar Case*.¹⁶⁴ In May 1997, the HCD issued a unanimous verdict (as a part of its judgment) outlining specific guidelines for the separation of the Judiciary. The decision was upheld on appeal (AD) in December 1999 and reconfirmed upon review in June 2001. The Appellate Division took a strong stand on the separation issue, formulating a 12-point directive for judicial independence to be enforced forthwith that would result in effective separation from the Executive. The caretaker government, after completing all formalities, at the last moment left the issue open for the Executive.¹⁶⁵ Unbelievably, the Executive, until 26 April 2003, had sought and received extensions of time on 15 occasions

¹⁶² *The Daily Jugantar*, Dhaka (19 April 2002); *The Daily Star* (19 April 2002).

¹⁶³ For example, the first attempt to separate the Judiciary was made by an opposition MP in 1991 by submitting a Bill to the Parliament. The Bill was scrutinized duly by a special committee, but in the end failed to secure the Parliament's approval due to the unwillingness of the ruling party. See Ahmed 1998 n 158 at 140.

¹⁶⁴ A good number of judges of the subordinate Judiciary filed a writ with the HCD in 1995. The issue of amalgamation of judicial service with other cadre services was challenged in this case. The Court held that the judicial service is a functionally and structurally distinct and separate service from the civil executive and administrative services and cannot be amalgamated or tied together with the civil services. See *Mazdar Case* n 152 at 82-84.

¹⁶⁵ 'Asia Human Rights News' <<http://www.ahrchk.net/news/mainfile.php/ahrnews-200201/2307>> (January 2002).

without any plausible reasons, instead of complying with the decision.¹⁶⁶ Conversely, the government of India in a similar situation constituted the First National Judicial Pay Commission, and is going to establish a separate Judicial Service Commission for subordinate Judiciary all over the country in accordance with the decision of the Supreme Court in the case of *All India Judges' Association v Union of India*.¹⁶⁷

However, the Executive government of Bangladesh is bound under articles 102 and 112 of the Constitution to implement the verdict of the Supreme Court. In such a situation, whether the Executive's behaviour would amount to contempt of court is another issue yet to be addressed. The essence of the *Contempt of Court Act 1926* (as adopted in Bangladesh) is to uphold the dignity of the Court and to preserve public confidence. This obligation is primarily upon the Executive.¹⁶⁸ A number of cases¹⁶⁹ have supported the view. The Executive's 15th time extension without any reasonable ground for its non-compliance with the judgment can be termed as intentional. Such behaviour has been held as contempt of court in *Sikder v Sikder* and *Edward Snelson v Judges, High Court of Lahore*,¹⁷⁰ nonetheless, it is clear that the government 'has much to lose by the creation of an independent judiciary'¹⁷¹ and this is the exclusive and only reason behind its reluctance to separate the Judiciary from the Executive.

Thus, the above discussion supports that political considerations, rather than merit and competence, have persuaded the Executive to appoint judges in disregard of the

¹⁶⁶ Islam 2003 n 144 at 35.

¹⁶⁷ (1992) AIR SC 165; see also, 'Report of the National Judicial Pay Commission' (1999) paragraph 1.8, <http://www.kar.nic.in/fnjpc/introduc.html> (20 June 2001); 'National commission to review the working of the Constitution: A consultation Paper on All Judicial Service Commission' (2001) Vigyan Bhavan Annexe, New Delhi, ncrwc@nic.in (1 October 2002).

¹⁶⁸ *State v Abdur Rashid* (1964) PLD 241 (DB).

¹⁶⁹ *Hossain v State* (1983) 35 DLR 290; *Southern Fisheries Ranong Coprs v Kingfisheries Ind Ltd* (1982) 34 DLR 23, *Sarkar v the State* (1986) 38 DLR (AD) 188.

¹⁷⁰ (1983) 35 DLR (AD) 203; (1964) 16 DLR SC 535.

constitutional provisions and judicial decisions and of its impact on the administration of justice. It can be reasonably claimed here that all the above Executive's actions are detrimental to the fair exercise of lawful rights.

3.5.3. The Role of Law Enforcing Agencies

In this context, the law enforcing agencies in Bangladesh primarily refer to the police forces. Legally, police enjoy qualified powers under a number of state laws¹⁷² to maintain law and order, yet the reality stands in sharp contrast with that of legal provisions. Widespread abuse of the process of law in arresting persons, and custodial torture in barbarous forms are pervasive phenomena in Bangladesh. For example, during 1996-2001, a total of 63 women have reportedly been raped by members of the enforcing agencies and 286 people have died in jail and thana (police station) custody.¹⁷³ The government's inaction and partisan behaviour are largely believed to contribute to the unchecked power and impunity of the police. During the last twenty years, there has been only one successful criminal prosecution for custodial death, in which an OC (Officer in Charge) was sentenced to ten years imprisonment. Nevertheless, the period of imprisonment was later reduced to five years and after serving only about two years, he was pardoned and released.¹⁷⁴

¹⁷¹ Islam 2002 n 144 at 108.

¹⁷² The police administration is regulated by the *Police Regulations* 1861, *Police Act* 1861, *Police Metropolitan Ordinances for Dhaka* 1976, Chittagong 1978 and Khulna 1985, and *Code of Criminal Procedure* 1898. Section 33 (b) of the *Police Regulations* 1861 empowers senior officers to take action against subordinates who are deemed to have acted with rudeness, cruelty or anger towards the general public. Section 190 empowers a Magistrate to take legal action if an officer performed in an inappropriate manner as defined under section 33 (b). Regarding arrest, section 23 of the *Police Act* permits a police officer to apprehend all persons whom he is legally authorised to apprehend, and for whose apprehension sufficient grounds exist. Similarly, section 53 of the *Dhaka Metropolitan Ordinance* 1976 imposes penalty with imprisonment, or with fine or both for 'personal violence... threat or promise not warranted by law'. Section 163 of the *Criminal Procedure Code* 1898 prohibits the police from making any inducement, threat or promise during the period of investigation.

¹⁷³ See 'Human Rights Violation' *The Daily Star* (29 July 2001).

¹⁷⁴ *Islam v Bangladesh* (1991) 43 DLR 336; S Malik, 'Towards a Framework for Balancing Individual Liberty and the Security Needs of the State (hereinafter Balancing Liberty)' A Report prepared for USIS (United States Information Service) (1998) Dhaka at 73.

Between the October 2001 election and May 2002, 105 persons were reportedly tortured by the law enforcing agencies, of whom 54 have died in police custody, but no police have been prosecuted so far.¹⁷⁵ *Human Rights in Bangladesh 1998*, a report published by the Ain O Salish Kendra, revealed: '[since] the country became independent, 18,911 deaths have been reported in police custody. Cases were filed against police officers for only 321 deaths, and only three of these cases went to trial.'¹⁷⁶ These mere facts can be enough to substantiate the government's culpable passivity regarding the issue.

Sections 54 and 164-167 of the *Criminal Procedure Code* (CrPC) 1898 and the *Special Powers Act* (SPA) 1974 are the most misused laws by the police. These are addressed below.

- (i) Arrest under section 54 of the CrPC;
- (ii) Remand under section 167 of the CrPC and;
- (iii) Prejudicial Act under the SPA.

3.5.3.1. Arrest under section 54 of the Criminal Procedure Code (CrPC)

Section 54 of the CrPC empowers police to arrest any person without a warrant on nine specific grounds. It provides for arresting a person against whom a reasonable complaint has been made or reasonable suspicion exists.¹⁷⁷ Accordingly, credible information is required to establish the rationale before arresting a person. However, in practice, the provision has often been misused by political influence and as a means of making money for the police. It is an open secret in Bangladesh that the government frequently uses

¹⁷⁵ S K Dey, 'Murder after arrest of innocents under s 54: tortures exceed all records' *The Daily Janakantha* (23 May 2002).

¹⁷⁶ ASK Report 1998 n 39 at 60.

section 54 to harass and intimidate members of its political opposition.¹⁷⁸ Arguably, terrorists belonging to the ruling party have been guarded and, on some occasions, asked by the police to leave their home before taking any supposed move to arrest them.¹⁷⁹ Alternatively, innocents, who constitute 70% of the arrested persons, become victims and are forced to pay bribes for release.¹⁸⁰ The failure to comply with the bribe-demand of the police very often invites a false criminal charge¹⁸¹ or horrifying torture using third-degree methods in repeated remands. Examples of taking bribes from innocents by police are too numerous to detail.¹⁸² Blanchet argues that in order to understand how the police work in Bangladesh ‘it is essential to grasp the extent to which thanas (administrative unit) are money-making enterprises.’¹⁸³ Given the way the law is implemented, she remarked that local criminals and strongmen meet regularly with police to negotiate the cut to be given to the police for ensuring non-disturbance of their illegal activities.¹⁸⁴ Amnesty International has observed that police claimed a large bribe before taking action to investigate the gang rape of a 12-year old girl.¹⁸⁵ On 4 February 2002, a 14-year boy was arrested without any charge while he was playing cricket. On the following day, the father of the minor was given two options: to either pay TK 20,000 (US\$333.3) for his release, or to accept his

¹⁷⁷ *Criminal Procedure Code* 1898 s 54 (1).

¹⁷⁸ The US Dept Report n 4 at 4; see also, K A Hamid and M A Zahid, ‘Preventive Detention and Liberty: Bangladesh as a Case Study’ (1996) 41 *Journal of Asiatic Society of Bangladesh Hum* 221 at 226.

¹⁷⁹ See for example, *The Prothom Alo* (National Bengali Daily) Dhaka (26 April 2002) Editorial; T Blanchet, *Lost Innocence, Stolen Childhoods* (1996) Dhaka: University Press Limited at 188.

¹⁸⁰ M A Rahman, ‘Frustrating Joint Special Drive’ *The Daily Star* (26 May 2002).

¹⁸¹ For example, Mr Noor Hossain was released on bail in a case of mistaken identity after 10 months of his detention. After that the police charged his brother in a case and demanded a bribe to settle the case. As he declined to pay the bribe, police arrested Hossain on June 2000, for details see the US Dept Report n 4 at 4.

¹⁸² See ‘Corruption in Bangladesh: An Overview’- A survey on corruption in Bangladesh conducted by the Transparency International; Hasan 2002 n 124.

¹⁸³ Blanchet 1996 n 179 at 188.

¹⁸⁴ Id at 189; see also, ‘Bangladesh -State Protection’, Immigration and Refugee Board of Canada, September 1998 (hereinafter State Protection) at 8

<http://www.cisr.gc.ca/research/publications/bgd10_e.stm#bgd8e_appendix (26 May 2002).

¹⁸⁵ Amnesty International Annual Report 2000.

remand. The poor father failed to pay off the police and then received the dead body of his son on 14 February 2002.¹⁸⁶

Section 54 of CrPC was introduced by the British more than a century ago to establish a peaceful colony; however, in England, in order to limit the power of the police and to effect the object¹⁸⁷ of arrest without warrant, a new section was inserted in the *Police and Criminal Evidence Act* 1984.¹⁸⁸ Emphasising the magnitude of the problem, the Supreme Court of India in *Kumar v State of UP* has issued a rule prohibiting any arrest ‘without reasonable satisfaction reached after some investigation as to the genuineness and bonafides of a complaint.’¹⁸⁹ The National Police Commission (NPC) of India has been monitoring arrest, detention in custody, interrogation of women and delays in investigation that lead to undue detention in custody.¹⁹⁰ The NPC recommended (3rd Report) specified grounds¹⁹¹ for the justification of arrest during the investigation of a cognizable case. The recommendation includes a broad range of suggestions for amendments to the law and procedure, and periodic visits to inspect and report on police lock-ups. Nonetheless, in Bangladesh, no independent body exists with the authority to monitor or prevent detention. Given the situation, police routinely practise arbitrary arrest with virtually no accountability

¹⁸⁶ Odhikar (one of leading human rights organisations in Bangladesh) Report, ‘From Playground to Morgue’ (2002) Dhaka.

¹⁸⁷ The objectives are to prevent the suspect from destroying evidence, or influencing a witness or warning accomplices who have not yet been arrested, see the Report of the Royal Commission on Criminal Procedure, command papers 8092 of 1981 as mentioned in *Basu v State of West Bengal* (hereinafter *Basu Case*) (1997) AIR SC 610 at 616.

¹⁸⁸ Section 46A of the *Police and Criminal Evidence Act* 1984 (UK) provides, *inter alia*, that (i) ‘[a] constable may arrest without a warrant any person who, having been released on bail under this part of this Act subject to a duty to attend at a police station, fails to attend at the police station at the time appointed for him to do so’. (ii) ‘A person who has been released on bail...may be arrested without warrant by a constable if the constable has reasonable grounds for suspecting that the person has broken any of the conditions of bail.’

¹⁸⁹ (1994) AIR SC1349 at 1349.

¹⁹⁰ ‘Behind Prison Walls: Police, Prisons and Human Rights (hereinafter Behind Prison wall)’ A Report on a workshop held by the non-governmental Commonwealth Human Rights Initiative, 1995, New Delhi at 6.

¹⁹¹ The grounds are: among others, an arrest may be made where the accused: (i) is involved in a grave offence such as murder, rape, dacoity and it is necessary to restrain his/her movement; (ii) appears likely to

to anybody.¹⁹² In only one month (13 May–12 June) a total of 10,077 people have reportedly been arrested, 7305 merely on suspicion.¹⁹³ It is also reported that the majority of the suspects were from a very poor economic background,¹⁹⁴ and among them women were more vulnerable. Women, including sex workers, who are left destitute either by desertion, death or migration of husbands, are often randomly picked off the streets and charged under section 54. For example, on 29 March 2002, pursuant to the death of a man following a land dispute, police arrested altogether eight women. One of the victims, Nurjahan Begum, comments that, '[we] are not responsible for the murder. The man died in a mass beating. As the police found no men on the scene, they picked us up and later showed us arrested in the murder case taking bribe from the victims family members.'¹⁹⁵ In jail, they experienced further abuse by the jailer and police.¹⁹⁶ This issue is further considered in Chapter 7.¹⁹⁷

3.5.3.2. Remand under section 167 of the Criminal Procedure Code (CrPC)

Section 167 of the CrPC provides for remand of an arrested person. The Magistrate empowered to give the remand order is required under this section to examine a copy of the police diary in order to ascertain the justification for the order, and also to record his

abscond and evade the process of law; (iii) demonstrates a violent behaviour that help apprehend commit further offences if his/her behaviour is not brought under control.

¹⁹² 'The Ministers argue that police are out of control' *The Holiday*, Dhaka (17 March 2002).

¹⁹³ *The Ittefaq*, (National Bengali Daily) Dhaka (13 June 2002).

¹⁹⁴ An investigation conducted during the period between July 2000 and December 2001 by Odhikar (NGO), Bangladesh, reveals that most of the persons arrested on suspicion 'are either homeless persons, rickshaw pullers striving to make ends meet, small-scale vegetable and fruit vendors, street children, destitute women who, being abandoned by their husbands, turn to the streets to try and support their children and also professional sex workers'- Odhikar Report, 'Reasonable suspicion Vs unreasonable impunity' *The Daily Star* (8 December 2001).

¹⁹⁵ M Rahman, 'Female prisoners are maltreated in country's jail' *The Daily Star* (25 August 2002).

¹⁹⁶ 'The condition of women in Bangladesh prisons'-An investigation report (from December 2000 to November 2001) prepared by Odhikar.

reasons therefor. There is no law in Bangladesh supporting torture or coerced confession, rather the Constitution and other statutes are, subject to a few exceptions,¹⁹⁸ very clear and supportive in favour of a detainee. The Constitution prohibits torture and cruelty, and entitles arrested persons to be informed as soon as possible about the grounds of arrest, provided access to a lawyer and appearance before a magistrate within 24 hours from the arrest.¹⁹⁹ Sections 324-331, 335, 339, 352, 355 and 358 of the Penal Code are concerned with the protection of all persons from torture and other cruel, inhuman or degrading treatment. Section 164 of the CrPC obligates a Magistrate, before recording a confession, to make the detainee aware that he/she is not bound to make any confession, and that only a voluntary confession may be regarded as evidence. In line with domestic safeguards, a number of international human rights instruments such as the *Universal Declaration of Human Rights* 1948 (UDHR), the *International Covenant on Civil and Political Rights* (ICCPR) 1966 and the *Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT)* 1984 to which Bangladesh is a party, guarantee persons freedom from torture and arbitrary arrest, and the rights to a fair trial.

Nevertheless, the practice of Bangladesh falls far behind the legal safeguards. Several studies²⁰⁰ and judicial decisions²⁰¹ have found that Magistrates (being well aware of police torture) randomly allow remand without checking the police diary or assigning any reason. Subsequently, in remand, the police indiscriminately torture the detainee in defiance of law

¹⁹⁷ Ibid.

¹⁹⁸ Torture and coerced confession are prohibited under all prevailing laws in Bangladesh. Nevertheless, the arrested person under the *Special Powers Act* 1974 can not enjoy the constitutional safeguards with regard to arrest and related trial. See ss 3 & 11 of the SPA and arts 33 (3), 47A (1) & (2) of the Constitution n 87.

¹⁹⁹ The Constitution n 87 arts 35 (5), 33 (1) and 33 (2).

²⁰⁰ A H M Kabir, 'Police remand and the need for judicial activism' *The Daily Star* (7 April 2002).

²⁰¹ *Ali v The State* (1999) 19 BLD (HCD) 268. In *Khatun v State* the Court observed that 'the Magistrate in taking cognisance should be extremely careful before being satisfied that there is a prima facie case', see (1986) 38 DLR 348 at 349. In *Pathan and Others v The State* the Court found that the Magistrate recorded a

and also on some occasions, of the order of the court,²⁰² in heinous ways in the name of extracting a confession. ‘The various techniques of brutalities²⁰³ [employed] by the law enforcing agencies go beyond the imagination of any sound human being’.²⁰⁴ On some occasions, the victim has been forewarned in the 1st round of remand that a 2nd round would be sought if she/he discloses the fact of torture to the Magistrate or refutes the confession.

The Criminal Law of India prohibits Magistrates from passing any order of remand where the victim is not willing to make a confession.²⁰⁵ In a similar situation, the Supreme Court of USA in the 1960s, introduced the *Miranda* principle in a landmark ruling in *Miranda v Arizona*.²⁰⁶ This principle requires law-enforcing officials to warn suspects of their constitutional right to remain silent and consult a lawyer prior to making any self-confession. The implication of the failure of police to maintain this formality automatically

confessional statement in white sheets of paper without observing of, or complying with, the legal formalities as enjoined by section 164. See (1999) 19 BLD (HCD) 74.

²⁰² Dr M K Alamgir, a former minister and a university teacher was arrested on 15 March 2002 without any charge. In defiance of the remand order of the Magistrate he was taken to an unidentified place for seven-days remand and tortured inhumanly but no police have been held accountable for this. See Z Ahsan, ‘Arrested people being denied fundamental rights’ *The Daily Star* (6 April 2002).

²⁰³ Mr S Kabir, a writer and freedom fighter of the liberation war of Bangladesh in 1971 was arrested on his way back from India. During his stay in jail he conducted interviews with a number of prisoners awaiting trial. The interview conveys that the modes of torture includes, *inter alia*, inserting boiled egg, hot-water filled bottles into the anal passage, forcing to drink urine, non-allowance to respond to nature’s call on time and electric shock on different sensitive parts (breast nipple, ear lobe, and other private parts). The other forms include suspending the detainee from a ceiling fan or tree up side down, pokers or bicycle spokes into the fingers and toe nails, pulling nails from the root as enumerated by recent victims; see Kabir, ‘Torture in Remand: Gross Violation of Human Rights’ *The Daily Janakantha* (24 May 2002); see also ASK Report 1998 n 39 at 58; ‘The Decomposed DB and the Demoralised Police’ *The Daily Star* (4 April 1999).

²⁰⁴ Ibid; see also, S M Solaiman, ‘Confession During Police Remand in Bangladesh: A Legal Appraisal (1997) 2 *The Chittagong University Journal of Law* 45 at 45-58.

²⁰⁵ Despite that fact, India’s practice of taking people (who have failed to confess) in remand may be continued, but the point here is that the law recognised the situation and was amended to prohibit such a practice. See B B Mitra, *Code of Criminal Procedure* (1987) 6th edition Vol-1, Calcutta at 828.

²⁰⁶ The *Miranda* case was about the admissibility of statements obtained from the defendant who was subjected to custodial police interrogation. The Court observed that the statements made by the defendant were constitutionally inadmissible as the police denied his request to speak to his attorney. It was decided that the person must be warned before any questioning by police that he has a right to remain silent and right to the presence of an attorney, either retained or appointed. The Court further held that ‘...[at] any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.’ See *Miranda v Arizona* 384 US 436 (1966) at 440 & 444-445.

bars the Court from using a confession as evidence in trial.²⁰⁷ It has become a part of national culture in USA.²⁰⁸

Quite contrary to these provisions and practices, in Bangladesh Mrs Nipu Rani, among many, was arrested on April 2002 without any legal basis following the murder of her husband's brother, an internationally reputed Buddhist priest. He was allegedly killed by terrorists under the influence of the ruling party as a part of minority cleansing after the October 2001 election.²⁰⁹ However, Nipu Rani was taken on remand and mercilessly beaten by stick by the officer-in charge. In a room of the office of Superintendent of Police she was given an electric shock to her private parts after having her hands tied and her eyes covered.²¹⁰ Nevertheless, any confession taken under remand is not to be conducted using such a process and is supposed to be carried out in the police station by police wearing an official uniform and badge. Moreover, many victims in Bangladesh have been taken into the 'Joint Interrogation Cell' (comprising persons of three intelligence agencies) and frequently subjected to various methods of torture by persons wearing masks. The Supreme Court of India in a landmark verdict in the *Basu*²¹¹ addressed this issue by issuing specific directives to be followed by the police/judge during the investigation of a case, and held the state liable for the breach of public trust. The decision makes police or the concerned

²⁰⁷ Ibid.

²⁰⁸ Although in *Charl T Dickerson* a controversy arose as to whether the confession could be used against the accused despite the absence of a *Miranda* warning. See '1966 Miranda rule serves cause of American justice', <http://www.masslive.com/news/pcommunity/editmira.html-online> (11 July 2002); 'Miranda Warning Survives', <http://www.esmonitor.com/durable/200/06/27/p1s2.htm> (11 July 2002).

²⁰⁹ *The Prothom Alo* (30 April 2002).

²¹⁰ *The Daily Janakantha* (12 June 2002).

²¹¹ In *Basu* the Court treated a letter addressed to the Chief Justice as a writ petition and provided significant insights into the issue of police arrest and custodial torture. The Court issued 11 directives to be followed in all cases of arrest or detention until legal provisions are made. These are, among others: (i) the police personnel carrying out the arrest and interrogation must bear accurate, visible and clear identification and name tag; (ii) the police should prepare a memo of arrest at the time of arrest and that shall be attested by at least one witness who may be either a family-member of arrestee or a respectable person of the locality. See for details, *Basu Case* n 187 at 610-628 and especially at 611.

person liable for the departmental action as well as for the contempt of Court when they fail to comply with the instructions of the Court. The Court also maintained that the proceedings for contempt of Court may be instituted in any High Court of the country, and the citizen tortured is entitled to receive compensation from the state.²¹² However, in Bangladesh the practice of suing for compensation for custodial torture is yet to develop.

3.5.3.3. Prejudicial Acts under the Special Powers Act (SPA)

Unlike the ordinary process of law, a person can be arrested under the *Special Powers Act* 1974 (SPA) without committing an offence if the government suspects that he may have committed a 'prejudicial act'. The initial period of detention is one month and may extend to such period as the government wishes.²¹³ The prejudicial acts, dealing with eight varieties of issues as enumerated in section 2(f) of the SPA, signify activities which are detrimental to the State. In reality, the prejudicial acts encompass too many interpretations and provide scope for abuse of the process of law. For example, in *Mrs Islam v Secretary, Ministry of Home Affairs*²¹⁴ the non-payment of a loan was regarded as a prejudicial act. Over the course of time, the 'broad formulation enables government to construe a wide variety of activities, particularly criticism of the government or its policies, as prejudicial acts and to use the SPA to detain critics'.²¹⁵ In most cases, the grounds of police-arrest have been observed to be vague, frivolous and petty in nature such as the allegation of cattle-theft, or unsubstantiated allegation of minor offences that, if even true, can not be considered a threat to the security of the state.²¹⁶ The report of the US Department of State reveals that 98.8% of the 69,010 SPA detainees during the last 26 years were released (for

²¹² *Basu Case* id at 611.

²¹³ *Special Powers Act* 1974 ss 3 & 12.

²¹⁴ (1988) BLD 262.

²¹⁵ *Balancing Liberty* n 174 at 17; *Hossain v State* (1976) 28 DLR .

want of proper reasons) on orders from the High Court.²¹⁷ An interview by the Bangladesh Bar Council, Dhaka, with Mr Justice H R Khan, the chairman of the one member Enquiry Commission, contends that in one month (January 1998) 88% of the arrests were found to be unjustified.²¹⁸ Numerous judicial decisions²¹⁹ of the High Court Division (HCD) also exist which have declared SPA detentions illegal for either being vague or for the lack of sufficient and concrete grounds necessary for detention. Conversely, police have frequently failed to arrest alleged criminals against whom specific charges for serious offences have already been lodged.²²⁰

3.5.3.3.1. The Impact of SPA on Pre-trial Detainees in Bangladesh

The detainees who have been arrested through the abuse of power of police under the SPA, the undue breach of their fundamental rights aside, face at least two severe consequences in Bangladesh. Firstly, in order to get release from the jail he/she has to access the High Court Division (HCD) situated in the capital city through engaging a solicitor. A detainee under the SPA can not seek bail as a remedy since no criminal charge applies to him/her; the only possible remedy is a writ under the HCD. In Bangladesh, most arrested victims are poor and lack the financial ability to initiate the process after coming to Dhaka (if he/she resides

²¹⁶ Balancing Liberty n 174 at 15; see also, Subhan 1995 n 108 at 5.

²¹⁷ The US Dept Report n 4 at 4.

²¹⁸ 'Human Rights and Role of Lawyers' (2000) Bangladesh Bar Council: Dhaka.

²¹⁹ In the following cases, the Court set aside detention orders due to vague and insufficient grounds, and found nothing specific about the detainee's prejudicial activities. It has been maintained that the Court has to balance between the state's need to prevent prejudicial activities and the citizen's right to enjoy personal liberty, see *Mahmud v Bangladesh* (1993) 45 DLR (AD) 89 at 90 & 93; in another case, *Siddiqui v Bangladesh* the Court observed that the detainee had not been treated in accordance with law that the Constitution guarantees, and declared the detention order of the District Magistrate fully illegal and without jurisdiction, see (1992) 44 DLR (AD) 16 at 17. In *Begum v Bangladesh* the Court mandates for a rational nexus between the satisfaction of the detaining authority and the order of the detention, see (1988) BLD 288. See also, *Sen v Government of Bangladesh* (1975) 27 DLR (HCD); *Basak v Bangladesh* (1988) 40 DLR (HCD); *Hoque v Government of Bangladesh* (1990) 42 DLR (HCD).

in a remote area, economically disadvantaged people usually can not afford city life) and engage a lawyer to go to the highest court of the country. Secondly, such arrests often result in prolonged confinement and innumerable sufferings for the detainees in the jail. One study found that most prison inmates never have been convicted and are awaiting trial.²²¹ According to the government's official statistics, the period between detention and trial has been, on average, 6 months but according to the press and NGO reports, it is several years.²²² Beyond NGO reports, a range of judicial decisions²²³ refute the government's above assertion. For example, in *Mrs Wahed v Bangladesh*²²⁴ the Court found that the detaining authority took more than two and half years to grant a detention order. On some occasions, the period of such confinement has extended to over 12 and even 23 years.²²⁵ In some instances, the awaiting trial period had been longer than the maximum sentence applicable if he/she were convicted.²²⁶

In this regard, some positive precedents are found in India. The Supreme Court of India in *Rudul Sha v State of Bihar*, in relation to the illegal detention, advised the High Court to release prisoners who are in unlawful detention in jails and, to ask the State Government to take steps for their rehabilitation by payment of adequate compensation wherever necessary.²²⁷ In this case, the Court granted the victim a sum of RS 35,000 (US\$768.72) as

²²⁰ Balancing Liberty n 174 at 15 & 62.

²²¹ State Protection n 184 at 8.

²²² The US Dept Report n 4 at 4.

²²³ *Nurunnahar Begum v Government of Bangladesh* (1977) 29 DLR; *Mariam v State* (1987) 39 DLR (HCD); *Wahed v Bangladesh* (1990) BLD 19.

²²⁴ (1990) BLD 19.

²²⁵ One Falu Mia was arrested under section 54 of the CrPC, but the authorities forgot to proceed with his case. For 23 years Falu Mia had to live in the jail. However, he could not know why he had to stay in the jail for such a long period of time. When he came out of the jail, he wanted his youth back. See Behind Prison Wall n 190 at 5; see also, 'The Daily Star Dialogue on Arrest and Police Remand' (23 June 2002).

²²⁶ For example, one bank officer spent altogether 15 years in prison on a corruption charge. The maximum period of penalty for the charge would have been 10 years if he had been convicted. See the US Dept Report n 4 at 4.

²²⁷ (1983) AIR SC 1086 at 1086, 1088–1089.

compensation.²²⁸ In another case, *Saheli v Commissioner of Police, Delhi* the Court held that it is well settled now that the State is responsible for the torturous acts of its employees and ordered the State to pay RS 75,000 (US\$1647.27) to the mother of deceased victim Naresh within a period of four weeks from the date of judgement.²²⁹

Apart from the above, there is no separate place for pre-trial detainees under the SPA in Bangladesh. Various provisions under the international treaties such as article 10 of the ICCPR, requires States to keep the pre-trial person in a separate place with an acceptable level of physical care in respect of accommodation, food and medical care. The departure from this minimum standard has been regarded as a criminal offence under international law.²³⁰ By contrast, pre-trial detainees under the SPA in Bangladesh are to share food and other facilities with the convicted and hardcore criminals, and in some cases, are even denied life-saving drugs.²³¹ In the absence of any separate prison, they are also forced to remain in general prisons. At present, 75,000 people are staying in 81 prisons throughout the country with accommodation facilities for only about 25,000.²³² This figure alone is enough to present the obvious subhuman and marginal condition of detainees in general and pre-trial detainees in particular in Bangladesh.

3.5.4. National Institution for Human Rights

Unlike many Asian countries, Bangladesh is yet to develop any national institution to protect and promote human rights. National Human Rights Commissions (NHRCs) have

²²⁸ Id at 1089.

²²⁹ (1990) AIR SC 513 at 516.

²³⁰ C M Upadhyay, *Human Rights in Pre-Trial Detention* (1999) New Delhi: APH Publishing Corporation at 162.

²³¹ Dr Alamgir, a university teacher as mentioned before, after the expiry of his remand period told before the Court that he, being a diabetic and a patient of high blood pressure was not supplied any medicine despite doctor's advice and his repeated request. After getting bail, he had to admit into the hospital. See *The Janakhanta* (23 September 2002).

²³² Rahman 2002 n 180; 'Prisons and Prisoners' *The New Nation* (23 May 2002) Editorial.

become an essential institution around the world to promote human rights concerns beyond judicial and legislative measures.²³³ The United Nations, for the first time, launched a program in the 1980s which was designed to encourage the creation of national institutions with a mandate to oversee the human rights situation. It drafted basic principles on the issue in an International Workshop held in Paris in 1991, which are commonly known as the 'Paris Principles'.²³⁴ These principles were approved by the UN Commission on Human Rights in 1992 and endorsed by the *World Conference on Human Rights in Vienna* in 1993.²³⁵

NHRCs are considered necessary for several reasons. Firstly, institutionalising human rights through such a national measure is regarded as a realistic step towards achieving these rights. International human rights instruments, despite their moral appeal, do not ensure the full implementation of rights. Secondly, the legislative framework of a country may not ensure all aspects of human rights. This type of institution is essential to match the growing scope and meaning of human rights. Thirdly, NHRCs can provide easy access for disadvantaged groups of the community, in contrast with costly and complex judicial procedures.²³⁶ In practice, courts might not always be able to address particular situations, or legal remedies may not be adequate in cases of human rights violations. Fourthly, NHRCs can actively interact with the people through a number of ways such as inquiry, investigation, raising awareness and direct dialogue.²³⁷ For similar reasons, it can provide advice and recommendations, and can influence the people as well as the government to

²³³ L C Reif, 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) 13 *Harvard Human Rights Journal* 1 at 2.

²³⁴ International Workshop on National Institutions for the Promotion and Protection of Human Rights, Paris 7-9, October 1991, U N Doc E/CN.4/1992/43 (1991).

²³⁵ The *World Conference on Human Rights, Vienna*, 1993 paragraph 36.

²³⁶ Reif 2000 n 233 at 5.

²³⁷ Id at 19.

promote human rights practices and contribute to formulate administrative policies in compliance with international standards.²³⁸

In response to those necessities, a number of Asian nations have established NHRCs with specific power and authority to monitor the national human rights situation. Indonesia and Malaysia established their NHRCs respectively in 1993 and 1999. Despite the government's influence on it, the NHRC of Indonesia conducted several investigations with successful results in relation to human rights abuses in East Timor and released unexpected findings in a few cases.²³⁹ The NHRC of India, established in 1993, has made noticeable achievements in advancing human rights through monitoring, investigating and taking *suo moto* cognizance of numerous violations of human rights.²⁴⁰ The NHRC of India is empowered to act as a civil court in issuing warrants and examining documents²⁴¹ in human rights-related disputes and there is a provision for establishing human rights courts in each district in order to provide speedy trials.²⁴² The National Commission for Women of India has also been involved in reviewing state legislation that affects women and in recommending remedial measures to meet any lacunae or inadequacies in legislation.²⁴³ In pursuance of article 10 of the *National Commission for Women Act 1990*, the Commission

²³⁸ K A Annan, 'Strengthening United Nations Action in the Field of Human Rights: Prospects and Priorities', (1997) 10 *Harvard Human Rights Journal* 1 at 8; see also, Reif 2000 n 233 at 19 & 23.

²³⁹ 'Indonesia's National Human Rights Commission: A Step in the Right Direction', <http://www.wcl.american.edu/pup/humright/brief/v4i2/indo42.htm> (24 October 2001).

²⁴⁰ Every year the NHRC of India disposes of numerous cases of human rights violations and orders the government or concerned authority to pay compensation or other suitable remedies in favour of victims. See 'National Human Rights Commission Cases' <<http://nhrc.nic.in/vsnhrc/cases.htm>> (16 October 2001); See also, Amnesty International, 'Bangladesh proposed standards for a national human rights commission' ASA 13/003/1997.

²⁴¹ *Protection of Human Rights Act 1993* s 13.

²⁴² *Id* s 30.

²⁴³ National Commission for Women 1990, Legal Unit. The Commission has proposed a number of amendments to laws including *Criminal Procedure Code* (CPC) 1973, see for example, ss 198 & 320 of CPC; *Indian Penal Code* 1960, *Dowry Prohibition Act* 1961, *Hindu Marriage Act* 1955 5. For details see, 'National Commission for Women-Reaching Out-Legal amendments Proposed'. http://www.nationalcommissionforwomen.org/reaching_out/complaints_counselling_unit.html (16 October 2001).

can take *suo moto* notice of matters relating to deprivation of women's rights such as the non-implementation of laws or non-compliance of policy decisions which aim to protect and improve their (women's) rights. The two separate institutions of India have taken a series of human rights cases before the highest court of the country.²⁴⁴

By contrast, despite much seeming effort over eight years Bangladesh has failed to establish a NHRC. In April 1995, the then BNP (Bangladesh Nationalist Party) for the first time approved TK two crore (US\$ 330,000) to assess the necessity of such an institution and make recommendations to the government for its establishment. In July 1995, the process formally began under the project of 'Action Research Study on the Institutional Development of Human Rights in Bangladesh' (IDHRB) but was reportedly delayed due to a prolonged political crisis engulfing Bangladesh at that time.²⁴⁵ In 1996, the Awami League came to power. Following an agreement between the Ministry of Law Justice and Parliamentary Affairs and the United Nations Development Program (UNDP), the project was revived in March 1996. Within a period of two years, a Draft Bill titled '*Bangladesh National Human Rights Commission Act*' was formulated with the financial support of UNDP and submitted to the government in early 1998.²⁴⁶ The draft was also scrutinised by the UN Office of the High Commissioner for Human Rights which made a number of critical observations. The Bill was made public and the government's readiness to place the Bill before the Parliament was repeatedly assured to the media.²⁴⁷ Surprisingly, after the completion of a series of formalities such as study tours in foreign countries, consultative

²⁴⁴ See for example, Illustrative cases 1993-94, National Human Rights Commission, India http://nhrc.nic.in/vsnhrc/cases_93_94.htm#no22 (16 October 2001); Complaints and Counselling Unit, National Commission for Women http://www.nationalcommissionforwomen.org/reaching_out/complaints_counselling_unit.html (16 October 2001).

²⁴⁵ A H M Kabir, 'Do we need a puppet Commission' *The Daily Star* (27 January 2002).

²⁴⁶ Amnesty International n 240.

meetings with local and foreign experts, cabinet approval, the formation of a 'high-profile committee' at the cost of much time and money, the then Awami government did not pass the Bill as law to establish the Human Rights Commission within its 5-year term. The apprehension of certain top-ranking bureaucrats that such a Commission would interfere with 'normal' activities of the Home Ministry, that is the police department, has allegedly caused the government's 'turn-back' decision at the last stage.²⁴⁸

The incumbent government of 4-party alliance led by the BNP made public promises in their election manifesto, as did their opponent parties, that they would install an independent NHRC if voted to power. Nevertheless, within the three years, the government has failed to approve the ready-made Bill as law; rather, the Cabinet Committee chose to enact a new law titled the '*Protection of Human Rights Act*' on 16 February 2002.²⁴⁹ Accordingly, the prepared bill was re-written by the Ministry of Law to make some significant changes. The new draft is yet to be available in public; however, the media has reported some of its crucial changes. The earlier bill, for example, required the president to consult, *inter alia*, the leader of the opposition to appoint the chairman and members of the proposed Commission; the changed draft deleted that requirement. The earlier bill proposed the Commission's own investigation agency; the changed draft reportedly emphasises the utilisation of services of existing dilapidated investigating agencies instead of the Commission's agency and has taken away its power to act as a civil court.²⁵⁰ Article 10 of the former bill empowered the Commission to inquire, investigate and intervene whenever necessary and the executive authorities of Bangladesh were under a mandatory obligation

²⁴⁷ 'National Human Rights Commission-Torpedoed by the Bureaucracy?' *The Daily Star* (12 August 2001).

²⁴⁸ Ibid.

²⁴⁹ A H M Kabir, 'The Proposed National Human Rights Commission-Abandoned again?' *The Daily Star* (16 June 2002).

²⁵⁰ Ibid.

to assist the Commission. Reportedly, that provision has been dropped from the present draft and there has no provision for establishing a human rights court.²⁵¹ Moreover, one of the leading ministers, a member of the standing Committee of the ruling party, now raises questions about the relevancy of the proposed human rights commission by branding it as a ‘western institution’.²⁵²

Nevertheless, as soon as the government officially undertook international human rights obligations it became morally, politically and legally responsible to establish some institutional mechanism to make the rights meaningful to its citizens. The moral obligation is: to provide recognition of the inherent dignity of the people as human beings. The political obligation is: to fulfil the social contract with the governed. The legal commitment is: to ensure effective compliance with human rights obligation under international instruments. These responsibilities do not seem to be taken seriously in Bangladesh, as proved by the government’s insincerity centring around the much overdue and costly Bill to establish the NHRC.

3.6. Summary and Conclusion

The effective enforcement of legal rights requires some basic elements to be prevalent in the country. A favourable socio-economic and cultural atmosphere of the country, a transparent and accountable government, an independent Judiciary, effective law enforcing agencies and a National Institution to oversee the legal and human rights situation have been identified as primary components of enjoying legal rights. The above discussion conveys that none of these components exist in Bangladesh; rather, each existing factor erodes the respect for law, leaving a detrimental impact on legal rights. The consequences

²⁵¹ Ibid.

of these make it more difficult for women to develop the potential required for the enjoyment of all fundamental rights. The patriarchal socio-cultural institutions and their outlook towards women and religious values remain as powerful forces in the country to negate their rights, and the glaring discriminatory access to economic opportunities ensures their subsidiary status over the course of time. The 'son-preference' concept discriminatorily obstructs a girl's mobility and ability to flourish, which in the long run makes her incompetent to enjoy some of the basic rights. In addition, certain religious interpretations and their manifestation are seen to have enormous significance in distorting legal rights. Women, especially in rural areas, are frequently sentenced by the Shalish beyond its legitimate authority. Several reports prove its unlawful authority in imposing *fatwa* to undermine women's dignity and legal rights.

The need for good governance is one of the few issues that enjoys national and international consensus. It stands for, among others, adherence to the primacy of law and the respect for legal rights. The situation of Bangladesh presents a serious lack of these two essentials. With regard to the transparency, in an international survey 'Bangladesh was ranked as the most corrupt country among 133 nations' for the third successive year.²⁵³ The World Bank (WB) and the UNDP, in a joint venture 2002 on '*Bangladesh Financial*

²⁵² The Minister expressed his views at a program on Japanese Grant Aid Project held in Dhaka on 21 April 2002; see *ibid*.

²⁵³ Transparency International (TI) has used 15 surveys from nine independent institutions and at least 3 surveys from the concerned country. The number of countries surveyed by the TI was 91, 102 and 133 respectively in 2001, 2002 and 2003. 'In its corruption perception index (CPI) 2003, Bangladesh was rated 1.3 on a scale of 10'. See Staff Correspondent, TI corruption index; Bangladesh hits the bottom for third time' *The Daily Star* (10 August 2003); see also, *Transparency International, corruption Perceptions Index* 2002, Berlin <<http://www.transparency.org/cpi/2002.en.html>> (30 Aug 2002); 'TIB Report: Bangladesh Stays Most Corrupt Country for Second year' *The Bangladesh Observer*, Dhaka (29 Aug 2002).

Accountability for Good Governance', disclosed that the country's financial management 'seriously lacks international transparency and accountability standards.'²⁵⁴

The state functionaries concerned with the protection and promotion of legal rights do not work in favour of women either. The foregoing discourse observes that the political culture of the country unduly promotes an all-powerful Executive and provides very little scope for challenging its unrestricted authority. Given the situation, successive governments of Bangladesh have been prone to exercise state power with impunity and immune from legal scrutiny. Constitutional obligations have frequently been compromised to suit political expediency. In this process, the enactment and implementation of laws have very often been diminished by the autocratic pursuit of the Executive. With a similar purpose, the objectives of the Acts and Ordinances have also been ignored. Since independence, a number of repressive laws and special tribunals have been established, often at the cost of the fundamental rights of the governed. The one-party dominated Parliament has become transformed into a dependent and subservient institution of the Executive. Further, despite the constitutional mandate and a series of judicial decisions, the Judiciary is yet to be separated from the Executive. The recent ruling of the Court regarding the separation of Judiciary was ignored on 15 occasions by the Executive and is still pending without any reasonable ground. All of these factors in turn, impede the growth of democratic culture in the country and, on some occasions, create an artificial legal impasse in dealing with even fundamental rights. In contrast, the situation of India, being a country of almost similar socio-economic background, has been different in a number of ways as already referred to. The prevailing situation in Bangladesh could have been largely escaped should the two branches of the government strive to gain their independent strength and individuality to

²⁵⁴ 'WB, UNDP Report on Bangladesh: Corruption Eats 40 pc of Public Fund' *The New Nation* (4 June 2002).

discipline the abusive power of the Executive. As it is maintained that ‘limitations on government can be preserved in practice to no other way than through the medium of courts of justice.... Without this, all the reservations of particular rights or privileges would amount to nothing.’²⁵⁵

Furthermore, no law exists in Bangladesh to allow arbitrary arrest or torture in remand. Nevertheless, an unjust nexus between the law enforcing agencies and Magistrates has resulted in numerous deaths and gross violations of fundamental rights. Nearly 98% of detentions made under the *Special Powers Act* 1974 and under section 54 of the *Criminal Procedure Code* 1898 have failed to survive judicial scrutiny. Alternatively, legal rights suffer from improper and partial implementation, and their enjoyment is often obstructed by the local socio-cultural practice.²⁵⁶

Nationally, an independent Human Rights Commission (NHRC) is regarded as an essential institution to oversee and institutionalise human rights concerns. To produce, *inter alia*, a check on the Executive powers in realising human and legal rights, significant efforts have been made worldwide to create NHRCs. Unfortunately, Bangladesh, unlike many of its Asian neighbours, is yet to establish such an institution. The current situation thus frustrates the constitutionally guaranteed rights, let alone any development or promotion of human rights for women. Beyond these factors, the following chapters demonstrate how far the shortcoming of the law itself obscures women’s access to the benefits of law, even when they have the requisite capacity to use the law. To this end, the next chapter explores women’s equal right to employment in Bangladesh.

²⁵⁵ Wallace 1998 n 134 at 343.

²⁵⁶ CEDAW Report n 11 at 16.

Chapter 4

Equal Right to Employment

4.1. Introduction

The Constitution and a range of labour laws of Bangladesh recognise women's equal right to employment. In addition, a quota system has been in place in the country since 1985 to improve women's positions in employment. It helped women gain 9% more jobs in the second grade of the Secretariat in 1991.¹ In the 1980s, the significant growth of the Garment Industries (GIS) generated an unprecedented level of waged employment for women.² The rapid influx of women into low-scale jobs has contributed a substantial increase to foreign earnings of Bangladesh in recent years. Despite that fact, the percentage of women in high-ranking services is still below 9% and gross discrimination exists in nearly all stages of employment, especially in the GIS where women constitute 90% of the total employees.³

The globalisation of trade promotes privatisation and export competitiveness in which employers search for higher productivity while expending less. In this process, women are the worst targets. The less skilled and uneducated women, particularly the city-bound rural migrants, are forced to accept any conditions of employment due to their vulnerable socio-

¹ J Mertus et al, *Local Action Global Change* (1999) UNIFEM and the Center for Women's Global Leadership at 114.

² P P Majumder, 'Violence and Hazards Suffered by Women in Wage Employment: A Case of Women Working in the Export-Oriented Garment Industry of Bangladesh' (2000) 7 *Empowerment-A Journal of Women for Women* 1 at 1.

³ A K M Nuruzzaman, Human Rights and Women in the Garments Industry in Bangladesh, Sixth Women in Asia Conference 2001 in Australia, the Australian National University, Canberra, 23-26 Sep 2001.

economic status.⁴ The existing provisions of ‘equality of employment’ fail to respond to this practical situation. Equality of employment entails an identical and fair treatment of all equally qualified individuals in the access to, and the enjoyment of, all rights in public jobs.⁵ The constitutional *de jure* equality, when it seeks to equate the equals in public service, ignores the unequal educational and economic opportunities of men and women. In this regard, the Supreme Court of India maintained that ‘[equality] of opportunity for unequals can only mean aggravation of inequality’.⁶ Women’s unique experiences such as their primary roles of household and childcare, and pregnancy are also overlooked by, or ‘veiled’ under, that equal approach.⁷ In contrast, the protective legislation⁸ which purports to accommodate women’s different needs, proves counterproductive and has a damaging effect on women in Bangladesh since it imposes extra costs on the employer.

This chapter argues that the legal approach to equality in Bangladesh is incomplete and even inept in dealing with women’s employment. It also argues that the protective legislation produces an additional barrier to women’s work instead of remedying their specific problems in employment and on some occasions, creates a ‘trap’ which reinforces their traditional subordination and domesticity. This chapter seeks to uncover flaws in employment laws that relate to women in Bangladesh and to remedy those in reference to contrasting laws and court practices of a number of countries. It examines issues as to

⁴ S R Khan, *The Socio-Legal Status of Bangali Women in Bangladesh-Implications for Development* (2001) Dhaka: The University Press Limited at 251-258.

⁵ Federal Court of Australia, *Equal Employment Opportunity Program 1993-1996* (1994) Canberra: Australian Government Publishing Service at 1.

⁶ *Kerala v Thomas* (1976) 1 SCR 906 at 933.

⁷ K Mahoney, ‘Theoretical Perspective on Women’s Human Rights and Strategies for their Implementation’ (1996) 21 *Brooklyn Journal of International Law* 799 at part D (2).

⁸ Protective legislation refers to those laws which regulate the terms and condition of labour for women. These laws aim to, *inter alia*, facilitate women’s parental responsibilities and protect their motherhood capacity. See for details, Mertus 1999 n 1 at 8; J L Southard, ‘Protection of Women’s Human Rights under the Convention on the Elimination of All Forms of Discrimination Against Women’ (1996) 8 *Pace*

whether existing employment laws reflect women's practical experiences, whether these are compatible with international standards, and whether any significant gap exists between the theory and practice. Then it suggests the reconceptualisation of the 'equality of employment' to redress women's meagre status in employment. This reconceptualisation must recognise women's special needs and their traditional disadvantaged positions through searching for changes in laws and in the societal attitude, and for a pro-active role by the government. The chapter concludes that the equal placement of women in the legal framework alone will not entitle them to employment unless they are enabled to overcome their real inequalities. In order to achieve the outcome of equality, a substantive approach is necessary which will opt for not only *de jure* equality but also for *de facto* equality.

Section 4.2 begins with a brief exploration of the concept of 'equality' as it occupies the central position in women's struggles for their rights,⁹ and has a significant influence on the following discussion of the chapter. Section 4.3 examines women's equal rights to employment under the Constitution of Bangladesh. Section 4.4 concentrates on other statutes that provide women with equal and special rights. Section 4.5 presents the substantive approach to equality. The roles of the Administration and the Judiciary in dealing with employment rights are considered in section 4.6, while section 4.7 draws a summary and conclusion.

International Law Review 1at 55-56; see also, B A Babcock et al, *Sex Discrimination and The Law -Causes and Remedies* (1975) Boston: Little, Brown and Company at 19.

4.2. Defining Equality

‘Equality’ is a recurring and dominant theme in women’s rights discourse, though its universal or unique definition has yet to develop.¹⁰ At a similar time or in a similar situation equality may require different treatment for different individuals to produce an equal result.¹¹ Equality, as sharply opposed to discrimination and unfair adversaries, in its simplest expression signifies an equal access to all benefits and opportunities guaranteed by law.¹² In another sense, equality might refer to the relationship of men and women and to the ‘ways their roles are socially constructed’.¹³ Its broader expression is explained by Justice R Abella as ‘[equality] is evolutionary, in process as well as in substance, it is cumulative, it is contextual, and it is persistent. Equality is, at the very least, freedom from adverse discrimination.’¹⁴ In *Bliss v Attorney General of Canada* equality before the law is defined ‘as the right of an individual to be treated as well by the legislation as others who, if only relevant facts were taken into consideration, would be judged to be in the same situation.’¹⁵ Given its diversities, a number of feminist theories have been developed worldwide to explore equality. Two central approaches to equality are sameness and difference.¹⁶ They are based on the notions that respectively, likes should be treated alike

⁹ A Afsharipour, ‘Empowering Ourselves: The Role of Women’s NGOs in the Enforcement of the Women’s Convention’ (1999) 99 *Columbia Law Review* 129 at 132.

¹⁰ A F Bayefsky, ‘The Principle of Equality or Non-Discrimination in International Law: Implications for Equality Rights in the Charter’ in L Smith et al (ed), *Righting the Balance Canada’s New Equality Rights* (1986) The Canadian Human Rights Reporter Inc at 119.

¹¹ M S Kende, ‘Stereotypes in South African and American Constitutional Law: Achieving Gender Equality and Transformation’ (2000) 10 *Southern California Review of Law and Women’s Studies* 3 at 11-13.

¹² M Cavanagh, *Against Equality of Opportunity* (2002) Oxford: Clarendon Press at 99-91.

¹³ The Federal Plan for Gender Equality, *Status of Women Canada* (1995) at executive summary.

¹⁴ R S Abella, Report of the Commission on Equality in Employment 1984; see also, K E Mahoney, ‘Canadian Approaches to Equality Rights and Gender Equity in the Courts’ in R J Cook (ed), *Human Rights of Women: National and International Perspectives* (hereinafter *Human Rights of Women*) (1994) Philadelphia: University of Pennsylvania Press at 437.

¹⁵ [1979] 1 SCR 183 at 192.

¹⁶ C A MacKinnon, *Toward a Feminist Theory of the State* (1991) Cambridge: Harvard University Press, London at 216.

and unlikes unlike. Sameness is predominantly focused on the formal approach to equality.¹⁷ It presupposes the equal ability of men and women and claims for their identical treatment in enjoying all rights.¹⁸ This approach, however, does not recognise the same rights for all individuals but only for equals, ‘similarly situated individuals’. For example, this equality analysis can preclude a person with mental disability from being treated equally with a person without mental disability. Thus, the focus is not on their different status but on the different impact of law on each of them with an effect that is very unlikely to promote the already disadvantaged groups in society.¹⁹ Consequently, it ignores the socio-economic and political reality in a particular country that disfavors women.²⁰ The Supreme Court of Canada observed that every differential treatment might not result in inequality; rather, identical treatment may produce a serious inequality.²¹ For example, if a woman is required to undertake a similar strength test with a man to obtain a job, it will be very unlikely to bring an equal result for women as was the issue raised in *Travail*.²² An analogous situation was also demonstrated in *Lavell* in which the Canadian Court failed to provide an equal remedy to a woman because of her marital status.²³

The ‘difference’ theory opposes the sex-blind notion of equality and represents women as a ‘unique’ class, demanding different treatment to achieve equality.²⁴ This theory argues that

¹⁷ Mahoney 1996 n 7 at para (11).

¹⁸ M J Frug, ‘A Symposium on Feminist Critical Legal Studies and Postmodernism: Part One: A Diversity of Influence’ (1992) 26 *New England Law Review* 665 at 667.

¹⁹ R Kapur and B Cossman, *Subversive Sites: Feminist Engagements with Law in India* (1996) London: SAGE Publications at 177.

²⁰ *Id* at 178.

²¹ *Andrew v Law Society of British Columbia* [1989] 1 SCR 143 at 164.

²² *Action Travail des Femmes v Canadian National Railway* [1987] 1 SCR 1114 at 1124-26, 1143-46.

²³ Ms Lavell was registered in the Indian Register after her birth. Subsequently her name was deleted from the Indian Register when she married a non-Indian. However, this provision was not applicable to male Indian. She ‘failed in an appeal from the decision of the Registrar deleting her name from the Register’. See *The Attorney General of Canada v Lavell-Isaac v Bedard* [1974] SCR 1349 at 1350, 1364, 1366.

²⁴ C Gilligan, *In a Difference Voice: Psychological Theory and Women’s Development* 1982, mentioned in G Binion, ‘Human Rights: A Feminist Perspective’ (1995) 17 *Human Rights Quarterly* 509 at 509 & 523-524;

the formal approach does not provide any remedy in special situations, such as in motherhood and pregnancy, that women alone experience. Applying this model, the US Supreme Court held that, because of women's reproductive characteristics and responsibilities, they should be accorded preferential treatment as long as it is consistent with the goal of achieving equality of employment opportunities.²⁵ In *Hoj Pederson v Kvickly* the European Court of Justice (ECJ), even ruled for the employer to compensate the incapacity and a loss of work of a woman which resulted from a pathological condition connected with her pregnancy.²⁶ Nevertheless, this approach does not work always in favour of women. Maternity benefits legislation, for example, very often contributes to widespread discrimination against women in accessing and remaining in employment instead of eradicating it, since the legislation provides for 'non-wage cost' (payment without service) to be paid by the employer.²⁷

Radical feminist theory is another approach to equality. It argues that the sameness/difference models neither address the impact of law on women nor allow any examination of the way law is maintained or constructed.²⁸ This approach represents substantive equality by requiring laws to consider systematic and deeply rooted sex subordination and to develop a qualitatively different approach to address women's equality. It seeks to examine the impact, not the object, of law and the particular context of women instead of using the male yardstick to measure their equality.²⁹ MacKinnon, a

see also, A C Scales, 'The Emergence of Feminist Jurisprudence: An Essay' (1986) 95 *Yale Law Journal* 1373 at 1387-1389, 1380-1384.

²⁵ *California Federal Savings & Loan Assn. et al v Guerra* 479 US 272 (1987).

²⁶ [1999] All ER (EC) 138 para (1); see also *Boyle and Others v Equal Opportunities Commission* [1998] All ER (EC) 879; *Hofman v Barmer* (1984) ECJ CELEX LEXIS 5223; *Mary Brown v Rentokil* [1998] All ER (EC) 791.

²⁷ J C Williams, 'Deconstructing Gender' (1989) 87 *Michigan Law Review* 797 at 801-2 & 805-11.

²⁸ *Human Rights of Women* n 14 at 442.

²⁹ Mahoney 1996 n 7 at para (48).

principal proponent of this theory, contends that the ‘difference approach misses the fact that the hierarchy of power produces real as well as fantasised differences, differences that are also inequalities.’³⁰ Mahoney regarded this approach to equality as focusing on a real ‘disadvantage’, requiring judges to look into women’s practical positions in a society that confronts their legal rights.³¹ She proposes that ‘...this approach has a much greater chance of achieving real equality and is consistent with the norms set out in the women’s convention.’³²

The postmodern theory is another approach to equality. It refuses to give consideration to a single category of ‘female’ or of relationship (men-women) in determining equality. It articulates the need to account for multiple images of women, ‘resulting, for example, from the intersection of gender, race and class.’³³ This theory attempts to address the different realities of each individual or a group, rather than the totality of womanhood, and it solicits for special rules to analyse the ‘complex social practices’ of a particular state.³⁴ Supporting this approach, the Supreme Court of Canada in *Moge v Moge*³⁵ placed special emphasis on the personal background and physical and psychological conditions of an old separated woman in her own marriage context. The Court compensated her for her contributions as a homemaker and a mother during the course of marriage, and for the particular disadvantages that she suffered as a consequence of marriage.

³⁰ To quote her, ‘[if] differentiation is discrimination, affirmative action, and any legal change in social inequality, is discrimination--but the existing social differentiations which constitute the inequality are not?’ see C A MacKinnon, *Feminism Unmodified* (1987) Cambridge: Harvard University Press at 37 & 42.

³¹ *Human Rights of Women* n 14 at 445.

³² *Ibid.*

³³ C G Bowman and E M Schneider, ‘Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession’ (1998) 67 *Fordham Law Review* 249 at 251-253.

³⁴ Mahoney 1996 n 7 at para (77).

³⁵ [1992] 3 SCR 813 at 861, 876, 880 & 882.

Beyond the above four theories, ‘equality’ is further reconstructed as an ‘acceptance’. It sees differences among women as diversity instead of division, and differences between women and men as opportunity rather than as danger.³⁶

Thus, it is observed here that no single approach to equality seems to capture the reality of women’s experiences with regard to equal rights, therefore the exploration of the diversity of approaches to equality is not only valuable but also essential to obtain equality.³⁷ However, the following discussion only concentrates on the first three approaches to equality in addressing women’s employment rights in Bangladesh. The reason is that the substantive approach is yet to develop in administrative and judicial practices of Bangladesh. Therefore the final two modes are far too remote to be considered in the present context.

4.3. Women’s Employment Rights under the Constitution of Bangladesh

Article 29 of the Constitution of Bangladesh guarantees equal opportunities for women in the service of the Republic.³⁸ Discrimination on the grounds of sex is prohibited under article 28. The constitutional approach to equality is overwhelmingly influenced by the formal theory of equality, meaning equal treatment between the members of the same class of employees.³⁹ Upholding this formal approach, the Supreme Court of Bangladesh in *Parveen v Bangladesh Biman* endeavoured to equate the age limit of the petitioner in the

³⁶ Littleton, an exponent of this model argues that ‘ “Acceptance” would reduce inequality not by eliminating women’s differences, but by reassessing the value society accords to traditionally “female” occupations and lifestyles, and revaluing so as to render such value no less than that accorded to equivalent “male” activities.’ See C A Littleton, ‘Reconstructing Sexual Equality’ (1987) 75 *California Law Review* 1279 at 1279 & 1312-1338.

³⁷ H Charlesworth, C Chinkin and S Wright, ‘Feminist Approaches to International Law’ (1991) 85 *American Journal International Law* 613 at 613.

³⁸ *The Constitution of the People’s Republic of Bangladesh* 1972 (hereinafter The Constitution).

service of Bangladesh Biman for retirement with her male colleague.⁴⁰ In so doing, the legal enforcement usually concentrates on the elimination of discrimination, rather than on achieving equality.⁴¹ Emphasis solely on equal rights to employment by the law ignores the fact that in order to enjoy that right at least one basic criterion needs to be met. This is the educational qualification which demands an equal access to economic opportunity and equal attention from the family as well. The traditional outlook of the community in Bangladesh largely prefers to see women in their biological roles and is reluctant to invest in girls' education (as referred to Chapter 3). Thus, the guarantees offered in article 29 are meaningless in those situations where most women experience these sorts of disadvantages. Women's unequal status debars them from competing with men in the very entry stages of the public service. The 'constitutional equality' fails to recognise this unequal status of women and therefore has failed to advance women's employment in the last 33 years. Figure 4.1 demonstrates that women occupy only 8.6% of the 1st grade (class) public jobs compared to 91.4% of men, but their proportion in the 3rd grade is comparatively high.

³⁹ *Parveen v Bangladesh Biman* (1996) 48 DLR at 132-136.

⁴⁰ *Ibid.*

⁴¹ C McCrudden, 'The Effectiveness of European Equality Law: National Mechanisms for Enforcing Gender Equality Law in the Light of European Requirements' (1993) 13 *Oxford Journal of Legal Studies* 321 at 328.

Figure 4.1: Male and Female Ratio in the Civil Service⁴²

An empirical study on some selected autonomous bodies reveals that women occupy 36 posts (14.67 %) out of 218 in managerial positions, and among the executives, the number is 72 (4.23%) in comparison with 1628 positions for men.⁴³ In upper ranks of policy-making, women constitute merely 1.35% of the total employees.⁴⁴ Women's employment ratio in the 3rd grade in Figure 4.1 signifies that they are more 'suited' to non-skilled and low-paid jobs because of their lack of education. Formal equality regards this concentration

⁴² The public service of Bangladesh is categorised as 1st, 2nd, 3rd and 4th grades, basing on varying responsibilities, educational qualifications and pay ranges. The four cadres are maintained in all the public offices, including ministries, departments and autonomous bodies. The ministries are the principal organs of the government for formulating policies on various issues. The departments are responsible for the implementation of those policies. The autonomous bodies function in special aspects which are commercial, developmental or promotional in nature. In the 2nd, 3rd and 4th Grades, women occupy respectively 7.8%, 12.5% and 6.8% positions of the total. See *Statistical Pocketbook of Bangladesh 2000* (2002) Bangladesh Bureau of Statistics, Ministry of Planning, Government of the People's Republic of Bangladesh at 162; see also, M M Khan, 'Women in Public Administration and Management: Bangladesh Experience' (1995) 2 *Empowerment-A Journal of Women for Women* 63 at 69.

⁴³ See Khan 1995 id at 74. In the public service, there are 29 cadres in Bangladesh. Except for two cadre services, namely, Bangladesh Civil Service (BCS) Education and BCS Health, women's positions in the other 27 cadres are insignificant. See also, H Hossain et al, *No Better Option? Industrial Women Workers in Bangladesh* (1990) Dhaka: University Press Limited at 44.

⁴⁴ Khan 2001 n 4 at 13.

on low-paid as individual choice, instead of as ‘structural employment inequality to be redressed by the law’.⁴⁵

In addition, the Constitution and other state laws regarding employment do not provide any definition of equality or discrimination. Neither do those laws require any statutory action to be undertaken by the employer to comply with this provision. Given the legal flaws, employers adopt divergent recruitment policies sensitive to their needs and goals. Some of these policies are apparently neutral but discriminatory in effect. Figure 4.2 shows that women are grossly underrepresented in major establishments.

Figure 4.2A: Male and Female Ratio in Major Establishments.⁴⁶

⁴⁵ H Fenwick, ‘From Formal to Substantive Equality: the Place of Affirmative Action in the European Union Sex Equality Law’ (1998) 4 *European Public Law* 507 at 508.

Figure 4.2B: Male and Female Ratio in Major Establishments.⁴⁷

This underrepresentation is partly due to recruitment policies of the concerned establishments.⁴⁶ The defence services, for example, require special training to be undertaken by all eligible candidates, where women are very unlikely to compete equally with men because of their personal characteristics. This policy is facially neutral but has the capacity to disproportionately exclude women. In the contemporary complex practices of the workplace, such a policy is regarded as indirect discrimination which has yet to be incorporated into the legal framework of Bangladesh. Such a practice is not legally challenged because of the low level of education and the lack of awareness of women and of their economic powerlessness. Women's positions in public jobs in Bangladesh thus suggest that formal equality does not work to realise their equal employment rights.

⁴⁶ In the last 3 industries women occupy only 12.5%, 1.5% and 7.6% of total positions. See for details, *Statistical Yearbook of Bangladesh 1998* (1999) Bangladesh Bureau of Statistics at 59.

⁴⁷ Ibid.

⁴⁸ B Agarwal (ed), *Structures of Patriarchy: State, Community and Household in Modernising Asia* (1988) London: Zed Books Ltd at 217.

In several foreign jurisdictions, formal equality had been ineffective as well in providing remedies in favour of women.⁴⁹ Nevertheless, to address the deficiency of formal equality and to achieve an effective remedy for women, numerous international and national instruments introduced different approaches where discrimination is split into two groups such as direct discrimination and indirect discrimination. Direct discrimination is defined as any action, decision, condition or requirement of the employers which treat an individual or a group on the ground of sex less favourably than others.⁵⁰ Indirect discrimination refers to those situations where ‘an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex...’⁵¹ Article 1 of the *Convention on the Elimination of All Forms of Discrimination against Women* 1979 (CEDAW) includes both modes of discrimination, defining discrimination as:

...any discrimination, 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.⁵²

The concept of indirect discrimination also received strong recognition and expression in many judicial decisions across nations. In 1971, the Supreme Court of US in *Griggs* examined the adverse impact of neutral policies of the Duke Power Company. In this case,

⁴⁹ For example, the Supreme Court of the United States (US) in *Wimberly v Labor and Industrial Relations Commission of Missolieri* denied the claimant unemployment compensation. The Court reasoned that the *Federal Unemployment Tax Act* was designed to prohibit the state from ‘singling out pregnancy for disadvantageous treatment, but was not intended to compel a state to afford preferential treatment for women on account of pregnancy.’ See 479 US 511 (1987) at 511. In *Bliss v Attorney General of Canada* the claimant was refused an unemployment insurance benefit during and after the pregnancy, ‘...to which she would have been entitled had she not been pregnant’. The Supreme Court held that ‘[any] inequality between the sexes in this area is not created by legislation but by nature.’ See, [1979] 1 SCR 183 at 186. In UK, in *Larsson v Dansk* a woman failed to get a remedy for her illness attributable to pregnancy. See, [1997] ECR I-2757 at 3.

⁵⁰ See for example, *Sex Discrimination Act* 1975 (UK) s 1 (1) (a).

⁵¹ *Id* s 1 (2) (b); see also, *Sex Discrimination Amendment Bill* 1995 (Australia) ss 5 (2) and (3).

⁵² *Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter CEDAW) GA Resolution 34/180 of 18 December 1979.

African American employees were required to have a high school education or to pass a general intelligence test as a condition of employment with Duke.⁵³ The Court held that the requirements may fairly measure the skills but operated to ‘disqualify Negroes at a substantially higher rate than white...’since they have traditionally a lower level of education.⁵⁴ It favoured the employees, finding that both requirements ‘were not shown to bear a demonstrable relationship to the successful performance of the jobs for which the standards were used’⁵⁵ In Australia, two women were denied permanent appointments in the Australian Postal Commission due to the lack of medical fitness as required for the appointment sought. The Court of Appeal held that the Commission had engaged in discrimination by requiring the complainants to attain a specified body-weight measured by height and sex.⁵⁶ In another case, eight female ironworkers were retrenched by the Australian Iron and Steel Pty Ltd (AIS).⁵⁷ The AIS had been giving preference to male employees. In 1982, for commercial reasons, it adopted the ‘last on, first off’ principle (to retrench staff) that adversely affected women since they belonged to the ‘last’ category. The Court compensated the women, maintaining that the principle itself was unobjectionable but had exposed women ‘to threats of retrenchment and retrenchment more severely than men’.⁵⁸

In Bangladesh, the constitution requires the public office to treat men and women equally when they are ‘similarly situated’. However, ‘[one] can only be equal (in benefits or in

⁵³ *Griggs v Duke Power Company* 401 US 424 (1971) at 424-426

⁵⁴ *Ibid.*

⁵⁵ *Id* at 424.

⁵⁶ *Dao v Australian Postal Commission* (1987) 162 CLR 317 at 318.

⁵⁷ *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165 at 166.

⁵⁸ *Id* at 205-208.

privileges) if one is the same, or at least comparable,⁵⁹ therefore it cannot benefit most women because of their practical inequalities in socio-economic lives. To adjust those inequalities, the legal focus thus should be shifted from entitlements to practical opportunities.⁶⁰ At this stage, the law must address women's underprivileged status in society through providing them with better education and economic facilities. Accordingly, the government should be under a legal compulsion to develop different institutions and policies exclusively for women to promote their real equality (this issue is elaborated in section 4.5.). Given the grossly underrepresented status of women in major industries of Bangladesh, it is necessary to enact an anti-discrimination law. It will define and clarify 'discrimination' and describe the duties and liabilities of employers to eliminate discrimination. Under this law, employers shall be prohibited from adopting recruitment policies which have the effect of unfairly excluding women from employment.

4.4. Employment Rights under Labour Legislation

A number of laws are in force in Bangladesh to provide women with equal rights to employment. The prominent laws are: the *Factories Act* 1965, the *Shops and Establishment Act* 1965, the *Employment of Labour (Standing Orders) Act* 1965, the *Industrial Relations Ordinance* 1969, the *Workman's Compensation Act* 1923 and the *Minimum Wages Ordinance* 1961. These laws regulate working terms and conditions including women's equal rights to-wage, leave, promotion and equal rights to get remedies for dismissal or

⁵⁹ S J Kenny, 'Pregnancy Discrimination: Toward Substantive Equality' (1995) 10 *Wisconsin Women's Law Journal* 351 at 356.

⁶⁰ M A Freeman, 'Measuring Equality: A Comparative Perspective on Women's Legal Capacity and Constitutional Rights in Five Commonwealth Countries' (1990) 5 *Berkeley Women's Law Journal* 110 at 116.

termination of jobs.⁶¹ This section primarily focuses on the protective legislation, as these are exclusively applicable to women. However, in order to determine the impact of the provisions of equality on women, the following section briefly considers the practices of the Garment Industries (GIS). The reasons for selecting GIS are that 90% of their employees are women⁶² and are subject to all labour laws.

4.4.1. Employment Rights under the Garment Industries of Bangladesh

Since the emergence of the micro-credit program in the 1980s, the Garment industries (GIS) are the second most effective initiative for empowering women in Bangladesh.⁶³ Currently, 1.36 million women (93% of whom are rural migrants⁶⁴) are employed in the 2963 GIS, – a number more than 5 times higher than in 1984/1985.⁶⁵ The GIS have become one of the leading export industries in Bangladesh contributing nearly 75% to the foreign earnings of the country in 2000/2001, up from 12.5% in 1984/85.⁶⁶ In 1996, the GIS exported garments worth US\$2.5 billion to the US and other export markets.⁶⁷ Women's

⁶¹ See for example, *Factories Act* 1965 ss12-26; *Minimum Wages Ordinance* 1961 s 9; *Employment of Labour (Standing Orders) Act* 1965 s 9 and *Employment of Labour (Standing Orders) (Amendment) Ordinance* 1978 s 6.

⁶² Nuruzzaman 2001 n 3 at 1.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ P P Majumder and S C Zohir, 'Empowering Women: Wage Employment in the Garment Industry' (1995) 2 *Empowerment: A Journal of Women for Women* 83 at 109.

⁶⁶ See Ain-O-Salish Kendra, UNDP, 'Community Empowerment Program Garments Workers, a Project Document, Ain-O-Salish Kendra, UNDP (hereinafter ASK and UNDP) 1997; see also, Nuruzzaman 2001 n 3 at 2.

⁶⁷ M K Shefali, 'Women: Impact of international trade regime on female garment workers in Bangladesh' *The New Nation* (14 November 2002); M M Hossain and M A Rahman, 'Job Satisfaction of Garment Workers: A Case Study on Selected Factories in Narayanganj' (1995) 4 *Islamic University Studies* 43 at 43; see also, ASK and UNDP id at 1.

⁶⁸ H Zaman, 'Paid Work and Socio-Political Consciousness of Garment Workers in Bangladesh' (2001) 31 *Journal of Contemporary Asia* 145 at 145.

cheap labour is believed to have had an immense influence over this growth.⁶⁸ This waged employment undoubtedly accords women economic identity, improved social status and access to civic facilities.⁶⁹ Yet the socio-economic gains of women are overshadowed by the exploitative practices of the GIS in contravention of laws. Almost a total deviation from laws has been noted in all stages of the GIS ranging from low wages and unscheduled work without payment, to practising widespread discrimination in granting leave and promotion.⁷⁰ A UNDP report observed that the disciplined and docile female workers in Bangladesh meet the requirements for industrialization and foreign exchange earnings in an area of low return and low form of manual labour with little scope for acquisition of training or skills.⁷¹

Informal appointment processes, as opposed to legitimate processes, and the temporary nature of jobs have led to the worst forms of exploitation of mostly rural migrant and illiterate women.⁷² More than 80% of women acquired jobs orally by the employer of the GIS⁷³ which has been one of the basic impediments to initiate any legal proceeding in cases of a dismissal of women workers as observed by an NGO providing legal aid to poor women.⁷⁴

⁶⁸ Ibid.

⁶⁹ Majumder 1995 n 64 at 83.

⁷⁰ P P Majumder has conducted extensive research on garment women workers of Bangladesh in the last two decades. In a series of research articles, she analysed the cause of wide disparity between male and female workers in garment jobs and their negative effect on physical and mental health of women workers. See P P Majumder, 'Health Status of the Garment Workers in Bangladesh: Findings from a Survey of Employers and Employees' (1998) *Bangladesh Institute of Development Studies*; P P Majumder, 'Impact of Working Conditions and Terms of Employment on the Women's Labour Force Participation and their Labour Productivity' (2001) 8 *Empowerment- A Journal of Women for Women* 1 at 1-36; Majumder 1995 n 64; Majumder 2000 n 2. See also K Mahmud, 'Rights of Female Workers' (2000) 2 *Labour* 28 at 29; Hossain 1990 n 43 at 73-74, 87-88; Zaman 2001 n 67.

⁷¹ ASK and UNDP n 65 at 1.

⁷² Ibid; see also, Mahmud 2000 n 70 at 29.

⁷³ Majumder 2001 n 70 at 3.

⁷⁴ S Malik (ed), *Lacunae in Labour Laws Towards Timely Disposal of Labour Cases* (hereinafter *Lacunae*) Dhaka: BLAST at 53-62.

With regard to wages and payment, the government of Bangladesh declared a monthly minimum wage at the rate of TK 930 (US\$15.5). With this nominal income it is extremely difficult to live for 30 days in the capital city (most of the GIS are located in Dhaka) where the cost of living is very high. Nevertheless, the payment provided by the GIS very often does not comply with that fixed rate and is irregular.⁷⁵ One study found that 35% of women workers received less than TK 930 (US\$15.5) as a wage and for several reasons such as low skill, the unequal distribution of work and for family responsibility a woman receives nearly half of a working man's wage.⁷⁶

Under section 50(1) of the *Factories Act* 1965, a worker is allowed to work 9 hours including a one-hour break in a day or 48 hours in a week; however, where the number of female workers is disproportionately high, the daily working hours are about 12 hours (without overtime payment).⁷⁷ By contrast, for men the working period is less than 8 hours.⁷⁸ Although women are entitled to a variety of types of leave, namely: weekend rests and medical and festival leaves, these are seldom granted to women as per the law.⁷⁹ Moreover, if a woman cannot be present in the office '...for any serious reason without any information, there is a chance to lose her job immediately.'⁸⁰

In upper-ranking positions such as quality controllers, production managers and supervisors of the GIS, women occupy only 17% of the total posts.⁸¹ Notwithstanding women's higher ratio in lower level jobs, they are less likely to receive promotion than men having similar

⁷⁵ Nuruzzaman 2001 n 3 at 4.

⁷⁶ Majumder 1995 n 64 at 10.

⁷⁷ Id at 5.

⁷⁸ Ibid.

⁷⁹ Nuruzzaman 2001 n 3 at 1-11; Lacunae n 74 at 61-64.

⁸⁰ Id n 3 at 5.

⁸¹ Majumder 1995 n 64 at 9.

qualifications.⁸² This discriminatory treatment by the GIS eventually diminishes women's ability to move upwards in social status and employment.

In addition, the working environment of the GIS affects the physical and mental health of women more adversely than those of men workers. This is because 90% of women are employed in low-scaled jobs where hazards are very high.⁸³ The situation of women workers further worsens due to the non-availability of transportation and childcare facilities to which they are entitled.⁸⁴ More than 60% of women walk more than 5 km every day to work.⁸⁵ Further, more than 120 people died and several hundred were injured in nearly 45 fire-related incidents since 1990.⁸⁶ Many women died in a stampede while running down from the multi-storied buildings since most of the buildings did not have the fire or emergency exits required by laws.⁸⁷ Nevertheless, the government did not take any action to maintain a minimum standard in the workplace.

Thus, women workers of the GIS gain their improved socio-economic status at the cost of suffering a wide range of discrimination in every stage of work and from exploitation of their labour. The situation becomes critical as the GIS are currently going through an export crisis.⁸⁸ Following the incident of 11 September 2001 in US, more than 1000 GIS were closed down, 'leaving 31,609 employees unemployed, of whom 23,107 were women.'⁸⁹

⁸² S C Zohir and P P Majumder, 'Garment Workers in Bangladesh: Economic, Social and Health Condition' (1996) 18 *Bangladesh Institute of Development Studies*; see also, Majumder 1995 n 64 at 9 & 13.

⁸³ P P Majumder, 'Health Impact of Women's Wage Employment: A Case Study of the Garment Industry of Bangladesh' (1996) 24 *The Bangladesh Development Studies* at 59-96.

⁸⁴ *Factory Rules* 1979 requires an employer to provide child care facilities where 50% of total employees are women.

⁸⁵ Majumder 1996 n 83 at 82

⁸⁶ Nuruzzaman 2001 n 3 at 8.

⁸⁷ Majumder 1996 n 83 at 86.

⁸⁸ PIB UNICEF feature, 'Maternity Leave for garment workers (hereinafter Maternity Leave)' *The New Nation* (28 May 2002).

⁸⁹ M K Shefali 2002 n 66.

The structural adjustment policies⁹⁰ imposed by the International Monetary Fund (IMF) and the World Bank contribute further to worsening the situation through liberalising the employment market. Their lending conditions force the reduction of the government budget by abolishing public industries and other programs that are supportive of women.⁹¹ Apart from these, sexual harassment which is still unaddressed by the law, has been a growing problem for women workers in Bangladesh. In the GIS alone, 30% of women employees suffer from sexual abuse or harassment.⁹² In most cases, such an incident goes unreported because of the apprehension of losing jobs and of the social stigma attached to it.⁹³

There exist no laws or administrative guidelines in Bangladesh that obligate employers to give effect to equal rights of women in the workplace or to comply with the law through submitting annual reports.⁹⁴ As the titles of the relevant Acts suggest, these were enacted during the period of British India, more than a half-century back. Since then no significant amendment has been made.⁹⁵ A number of provisions of laws become unrealistic with time. For example, section 4 of the *Workers Compensation Act* 1923 provides a worker with a compensation for an accident or death due to an accident, in the amount of TK 21,000 (US\$ 350).⁹⁶ Needless to say that the sanctioned compensation is insignificant considering the

⁹⁰ Structural adjustment refers 'to the process by which many developing nations are reshaping their economies to be more free market oriented. They are acting upon the premise that less government intervention in the economy is better'-see for details, P Sparr, *Mortgaging Women's Lives-Feminist Critiques of Structural Adjustment* (1994) London: Zed Books Ltd at 1-11.

⁹¹ How the SAP impacts on women- see A M Titumir, Bangladesh Experience Structural Adjustment: Learning from a Participatory Exercise, Dhaka, Centre for Policy Dialogue 2001 at 107; Khan 2001 n 4 at 241-258; see also United Nations, Commission on the Status of Women, 39th Session, 1995, E/CN.6/1995/3/ADD 6; B Sadasivam, 'The Impact of Structural Adjustment on Women: A Governance and Human Rights Agenda' (1997) 19 *Human Rights Quarterly* at 630-664.

⁹² F Hossain, 'Harassment of women at workplace' *The Daily Star* (4 May 2003)

⁹³ Majumder 2000 n 2 at 5; M Rahman, 'Harassment and hazards of working women in Bangladesh' *The Daily Star* (3 February 2002).

⁹⁴ Bangladesh Legal Aid and Services Trust, *Labour Code for Bangladesh: Perspective and Necessities* (written in Bengali) (1999) Dhaka: BLAST at 41.

⁹⁵ See Lacunae n 74 at 28.

⁹⁶ See the Schedule 4, which was annexed to the *Workers Compensation Act* 1923 in 1980 to enhance the compensation.

value of a life. Further, there is no uniform labour code to regulate the employer-employee relationship. The labour laws of Bangladesh are scattered among nearly 50 different statutes. The need for a unified labour code necessitated the creation of the National Labour Commission in 1992. The Commission adopted a Draft Labour Code combining major laws on labour and submitted it to the Ministry in 1994. However, the Code is yet to be approved by successive governments of Bangladesh. A judge of the labour court observed that, ‘...it cannot be denied that labour laws have not attracted as much attention of the legislature as it should and even a private member’s bill may suffice to usher many of these amendments, benefiting hundreds of thousands of our working fellow citizens.’⁹⁷

The following discussion shows how international initiatives have recognised the dynamics of discrimination in employment and made significant improvements in law to cope with women’s specific experiences in the workplace. These initiatives can be an important reference for addressing discrimination in employment against women in Bangladesh.

4.4.1.1. International Initiatives for Eliminating Discrimination against Women in Employment

In international law, the right to be free from discrimination on the ground of sex, has begun to achieve the status of *jus cogens*.⁹⁸ Since 1919, the International Labour Organisation (ILO) has been formulating ever-expansive rules and regulations in the forms of Conventions and Recommendations, setting minimum standards for prohibiting

⁹⁷ Id at 23.

⁹⁸ ‘Jus cogens represent those rules of international law that are of “fundamental importance” to the international community’, and are usually considered synonymous to customary international law. Race discrimination, genocide, torture and war crime have been recognised as the violations of jus cogens. See for

discrimination in employment.⁹⁹ The *Universal Declaration of Human Rights* 1948 and its two Covenants adopted in 1966, along with the CEDAW, repeatedly affirmed women's equal rights to employment.¹⁰⁰ In this regard, the uniqueness of CEDAW lies with its recognition of elimination of discrimination in the private sphere and of achieving *de facto* equality.¹⁰¹ Despite that fact, it is often argued that the structures and contents of international treaties aim to measure women's equality with the male-standard, and are based on a flawed assumption of equality.¹⁰² Overlapping mandates, excessive use of reservations and the lack of authority make most of the international efforts merely aspirational.¹⁰³ However, the international instruments and their substantive standards, their shortcomings notwithstanding, remain an important means of advancing women's goal of equality.¹⁰⁴ For example, under international law, states are increasingly held accountable for the violation of women's employment or other rights.¹⁰⁵ Even state accountability for

details, L Askari, 'Girls' Rights Under International Law: An Argument for Establishing Gender Equality As a Jus Cogens' (1998) 8 *Southern California Review of Law and Women's Studies* 3 at 4-8.

⁹⁹ Article 1 (1a) of the Discrimination Convention 1958 defines discrimination as any distinction, exclusion or preference made on the basis of, *inter alia*, sex which has the effect of impairing equality of opportunity or treatment in employment. See *Discrimination (Employment and Occupation) Convention* 1958 (No 111) and its accompanying Recommendation (No 111) *Maternity Protection Convention* 1919 (No 3), including the revised one (No 103, 1952) and *Night Work Convention* 1990 (No 171), <http://www.hfhrpol.waw.pl/EN-RTF/en-10-4.htm> (22 February 2004);

<http://www.ilo.org/public/english/protection/safework/cis/oshworld...> (22 February 2004); <http://www.itcilot.it/english/actrav/telearn/osh/wc/c171.htm> (22 February 2004).

¹⁰⁰ See for example, *International Covenant on Economic, Social and Cultural Rights* (ICESC) 1966, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976 art 7; CEDAW n 52 arts 7 & 11.

¹⁰¹ Article 4 of the CEDAW obligates state to abolish social and cultural practices that are detrimental to women's equality rights. For details see, CEDAW n 52 arts 2, 5 & 16.

¹⁰² Charlesworth 1991 n 37 at 621-630.

¹⁰³ B Stark, 'International Human Rights Law, Feminist Jurisprudence, and Nietzsche's "Eternal Return": Turning the Wheel' (1996) 19 *Harvard Women's Law Journal* 169 at 171-173.

¹⁰⁴ A X Fellmeth, 'Feminism and International Law: Theory, Methodology, and Substantive Reform' (2000) 22 *Human Rights Quarterly* 658 at 729.

¹⁰⁵ J Bol, 'Using the Inter-American System to Pursue International Labour Rights: A Case Study of the Guatemalan Maquiladoras' (1997) 55 *University of Toronto Faculty of Law Review* 351 at 361-363. In a communication, the Human Rights Committee (established under article 28 of the ICCPR to monitor the implementation of the ICCPR) declared the social security legislation of Netherlands discriminatory as it placed women in a disadvantaged position, compared to men, and granted compensation in favour of *Broeks*. She was employed as a nurse and dismissed on the ground of her disability and then denied social security for

the violation of employment rights by private actors is gradually expanded in national and international laws.¹⁰⁶

In order to give effect to international provisions and to regulate the dynamics of discrimination in employment, many countries worldwide have developed new legislation and administrative measures. For example, in Australia, the CEDAW provides the basis of a series of laws which are designed to promote women's employment.¹⁰⁷ These laws include the *Sex Discrimination Act* 1984 and its Amendment in 1995, the *Affirmative Action (Equal Employment Opportunity for Women) Act* 1986 and the *Equal Opportunity for Women in the Workplace Act* 1999 (Workplace Act 1999). These Acts deal with a wide range of issues including an eight-step compliance guidelines to be followed by the employer to gradually close the gender gap in employment and with remedial measures for discriminatory practices.¹⁰⁸ Under the Workplace Act 1999, all employers with 100 or more employees are required to develop and implement workplace programs by submitting annual reports on the progress of women employees.¹⁰⁹

For a similar purpose, Canada enacted the *Employment Equity Act* in 1986. It was amended in 1995, requiring all employers with more than 100 employees to submit the annual report

her marital status. See for details, *SWM Broeks v the Netherlands*, communication No 172/1984 (9 April 1987), UN Doc Supp No 40 (A/42/40) at 139 (1987). In another communication of similar nature, submitted by *Zwaan-de Vries*, the Committee granted an identical remedy, see *F H Zwaan-de Vries v the Netherlands*, Communication No 182/1984 (9 April 1987).

¹⁰⁶ See for example, *Swedish Engine Drivers' Union v Sweed* (the ECJ supported the extension of state responsibility to include the labour rights violation by the private interference) see, [1976] ECHR 5614/72 para (50). For India, see *Labourers Working on Salal Hydro Project v State of Jammu and Kashmir* (1983) Writ Petition (Criminal) No 1179. See also, T Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) Oxford: Clarendon Press at 162-165 & 215-217; K Roth, 'Domestic Violence as an International Human Rights Issue' in *Human Rights of Women* n 14 at 330-331

¹⁰⁷ See for example, *Sex Discrimination Act* 1984 s 3(a).

¹⁰⁸ See for example, *Affirmative Action (Equal Employment Opportunity for Women) Act* 1986 s 3. This Act was replaced by the Workplace Act 1999.

¹⁰⁹ *Equal Opportunity for Women in the Workplace Act* 1999 ss 3,6,8,13 & 13A.

on the representation of women with the concerned Ministry.¹¹⁰ The objectives are to oversee whether employers facilitate women's participation and whether their statements are consistent with the prescribed instructions of the Act. In the UK, the *Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001*, among other things, places the onus of proof of non-discrimination on the employer.¹¹¹ In a similar situation, the European Union (EU) developed 5 basic Directives and numerous Recommendations to achieve the end of equality through providing women with vocational training and with special measures to attain basic qualification for employment.¹¹² India can be another example in enacting special laws to deal with women's employment rights. The *Equal Remuneration Act 1976* of India aims to, *inter alia*, monitor the representation of women and the nature and hours of work in the concerned establishments.¹¹³

Hence, the practices of other jurisdictions provide evidence that a new legislation aiming to make employers accountable for practising discrimination against women in the workplace becomes an urgent necessity to Bangladesh. To this end, an Equal Employment Opportunity (EEO) policy should be adopted under which all public and private sectors will be obligated to ensure women's equal access to, and opportunities in, employment, and to comply with this policy by submitting annual reports. These reports have to provide a detailed description, stating what initiatives employers have undertaken to promote women's positions, and to eliminate discrimination in work. It must also include future plans of how they intend to achieve women's equality of employment. Considering the

¹¹⁰ *Employment Equity Act 1995* c 44 ss 3,5, 9, 10 & 21.

¹¹¹ *Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001* s 5.

¹¹² See for example, Directive 75/117, Council Directive of 10 Feb. 1975 on Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women, 1975 OJ (L 45) 19; 84/635/EEC: Council recommendation of 13 December 1984 on the promotion of positive action for women.

¹¹³ *Equal Remuneration Act 1976* ss 4 & 6.

devaluation of currency¹¹⁴ and the trend of non-compliance with the law by employers in Bangladesh (as revealed in the above discussion), a penalty for the failure should be fixed at TK 50,000 (US\$833).

Women's equal rights to employment include the right to freedom from gender-based harassment.¹¹⁵ Law should address this particular problem by requiring employers to educate and train all employees about sexual harassment and its legal consequences. In this regard, legal guidelines for all establishments could help employees understand the gravity and consequences of the problem. In addition, different training programs reflecting international practices and the dissemination of a compulsory manual on sexual harassment may produce positive results.¹¹⁶ Further, a single labour code explaining the diverse effects of discrimination in the workplace can contribute to strengthening the legal system of Bangladesh. The adoption of a single code would also provide lawyers and judges with comfortable access to, and clear understanding of, the complex laws.

4.4.2. Employment Rights under the Protective Legislation in Bangladesh

4.4.2.1. The Maternity Benefit Act 1939

In recognition of the reproductive capacities of women and as an exception to a formal mode of equality, the *Maternity Benefit Act* (the Act) was enacted in 1939 by the British Colonial Government. Bangladesh inherited this law through its incorporation into the

¹¹⁴ For example, the Bangladeshi currency was devalued on 13 occasions between the period of 1996-1998. See 'Bangladesh devalues taka by 1.73% to aid exports' www.indian_express.com/ie/daily/19980704/18555404.html (10 May 2003).

¹¹⁵ Mertus 1999 n 1 at 166.

¹¹⁶ How different initiatives including training sessions, student handbooks, leaflets and posturing serve to prohibit sexual harassment, see 'Arrangements for Dealing with Sex-Based Harassment' in James Cook University, Report to the Equal Opportunity for Women in the Workplace Agency 2002 at 17-18.

legislative framework in the country, soon after independence in 1972. The Act purports to regulate women's employment during certain periods before and after pregnancy and to provide paid maternity benefits. Section 3 of the Act prohibits an employer from employing a woman 'during the six weeks, immediately following the day of her delivery'. Under section 3(2), women are also not allowed to work within that period. Section 4 provides women with 12 weeks paid maternity leave but to claim the benefits, nine months continued previous service is required.¹¹⁷ The Act, however, does not provide any provision stating at what point/stages of pregnancy women employees should quit work or claim their 12 weeks maternity leave. The important point here is that women are not allowed to work for six weeks commencing from the date of giving birth, and maternity leave stops at 12 weeks from the date of birth. Due to this restriction, women employees in Bangladesh usually take maternity leave at the last stage of their pregnancy.

Section 7(1) of the Act prevents employers from dismissing a woman from the job on the grounds of pregnancy. The rest of the provisions of the Act are concerned with the procedures for claiming maternity leave and benefits.

Before examining its implementation in Bangladesh, a number of flaws in the Act can be outlined. Firstly, the legal requirement of nine months continued service unjustifiably excludes a woman from claiming the benefits of the Act when she manages to find a job¹¹⁸ immediately after conception. This provision is unjustified because a woman who commenced work after conception will not be benefited by the provision since she could not provide the required nine months service in such a situation. In that case a woman has

¹¹⁷ *Maternity Benefit Act 1939* s 4 (2).

¹¹⁸ For several reasons such as the low level of education and the negative attitudes of the community towards women's work, it becomes very difficult for a woman to obtain a job. In most cases, a woman is required to reveal her marital status as a condition to employment. It may be relevant to mention here that in

to suffer double ‘injuries’: physical pain and additional economic loss merely for carrying the child. Moreover, these sufferings are not only for herself but for the ‘child’ from whom the community at large has some benefits to achieve.¹¹⁹ Any cost thus imposed exclusively upon a woman in this way is unfair. The same is applicable to those situations where a woman experienced abortion or delivered a premature baby. She could have qualified for the benefit had the abortion or premature delivery not occurred, and the prevention of which might have been beyond her own control.

Secondly, since 1939 the Act has remained mostly unmodified,¹²⁰ except for once when it restricted the maternity benefit for up to two children. The ILO raised objection to this limitation but the provision is still in operation to deny women benefits for more than two children.¹²¹ Thirdly, employer’s liability for non-compliance with the Act is a fine of only TK 500 (US\$8.3). This minimal amount seems to encourage employers to violate the law because the fine can easily be afforded, in comparison with the provision of 12 weeks paid benefits. Fourthly, the procedures for recovering maternity benefits are very complicated and not easily accessed, especially for those women who are uneducated and unaware of them.¹²² In order to get benefits, a woman has to give prior notice to her employer, stating that she expects to be confined within the six weeks following and has nominated a person to receive the benefit, in case she were to die in child delivery.¹²³ After the expiry of six weeks, she has to prove that she has given birth by further notification and then the

neighbouring country India, the requirement for claiming maternity benefits is 80 days- see *Maternity Benefit Act* 1961 (India) s 5(2).

¹¹⁹ *Brooks v Canada Safeway Ltd* [1989] 1 SCR 1219 at (part VII).

¹²⁰ The Act was amended in 1975 to incorporate the existing section 4.

¹²¹ Comments of the International Labour Office, Draft Labour Code of Bangladesh, 1994, comment no-23 (a).

¹²² F Islam, ‘Aspects of Women’s Work and Employment in Bangladesh: International Vis a Vis Domestic Legal framework’ (1994) 5 *The Dhaka University Studies* 159 at 178.

¹²³ *Maternity Benefit Act* 1939 s 5(a) (b).

payment becomes due within 48 hours.¹²⁴ This means that a woman is prevented from claiming benefits before childbirth, which can be seen as a ‘penalty’ rather than as getting legal dues.

Given the disadvantaged socio-economic condition of women in Bangladesh, the nine months service should be abolished. Women cannot reasonably be disentitled to their salaries on such grounds that exclusively result from carrying children. As the Supreme Court of Canada observed, a woman who bears the children and benefits the society should not be unfairly disadvantaged. ‘Such an unfair disadvantage may result when the costs of an activity from which all of society benefits are placed upon a single group of persons.’¹²⁵ Rather, this restriction, if removed, will value women’s unique sufferings and contribute to improve their economic independence in which they have traditionally lagged behind. Moreover, in recent foreign judicial practices, pregnancy is regarded as an equivalent of a disability for which the preceding service is not necessary to claim employment benefits.¹²⁶ From this point of view, recommendations for abolition of nine months service can also be sustained.

For similar reasons, the limitation on maternity benefits for more than two children must be removed. However, in abortion cases, the paid maternity leave should be granted only for six weeks since women do not have to provide care for a child in that situation. To support this recommendation, provisions under the *Maternity Benefit Act* 1961 (Act 1961) of India may be a relevant reference. Section 9 of the Act 1961 provides that ‘[in] case of miscarriage or medical termination of pregnancy, a woman shall...be entitled to leave with

¹²⁴ Id s 5 (3) (ii).

¹²⁵ *Brooks* n 119.

¹²⁶ See for example, US cases, *California Federal Savings et al v Guerra* 479 US 272 (1987); *International Union, United Automobile et al v Johnson Controls, INC* 499 US 187 (1991).

wages at the rate of maternity benefit, for a period of six weeks...’ Section 10 further states that a woman who suffers from illness arising out of pregnancy, delivery and premature death of the child or like-problems shall be granted a maximum period of one month maternity leave in addition to that six weeks leave.¹²⁷

Having regard to the economic constraint of women in Bangladesh and to the non-availability of social support, it is submitted that regular payment be continued during the maternity leave. It is necessary for livelihood as well as for health reasons that result from pregnancy. In order to ensure the enjoyment of maternity benefits, the liability of the employers should be increased to at TK 50,000 (US\$833). The employers of Bangladesh, particularly in the GIS, in most cases refuse, or are reluctant, to pay the benefits as reveals in the following section. The reason might be that they are well aware of the nominal consequences of the violation of the Act. Such an extension of the penalty would help women realise the maternity benefits, and can make employers conscious that non-compliance with the Act is a serious offence.

4.4.2.1.1. The Implementation of the Maternity Act in Bangladesh

There has been a national consensus that in public employment women usually enjoy maternity benefit for the birth of up to two children. Nevertheless, one study claims that government organisations have frequently violated the law and denied women paid maternity leave.¹²⁸ The situation is worse in the private sector, especially in the GIS where availability of maternity benefits works to reduce women’s possibility of getting jobs. Even

¹²⁷ *Maternity Benefit Act* 1961(India) s 10.

¹²⁸ Khan 1995 n 42.

after getting jobs ‘...[becoming] pregnant means losing job’.¹²⁹ In the absence of any monitoring body to oversee the implementation of the Act, employers take advantage to randomly sack pregnant women to avoid paid maternity leave.¹³⁰ One empirical study found twofold negative results. One result suggests that nearly 60% of the employers believe that women are less capable, in terms of job-related skills and physical strength.¹³¹ Paid maternity leave, and provisions for separate sitting arrangements for women, discourage employers from recruiting women.¹³² Another finding shows that 40% of the employers give preference to women as they are considered docile, ignorant and unaware of trade union and other laws,¹³³ and are therefore, supposed to be more ‘safe’ than men. However, in the latter case, employers compensated their ‘non-wage cost’ by providing women with lower wages and less benefits.¹³⁴ In other words, the employers’ cost is compensated at the expense of practising discrimination in wages and other service conditions against women. Hence, neither of the two attitudes are conducive to women’s work, but are rather degrading and exploitative in nature. One survey shows that 13 employers out of 37 provided maternity leave.¹³⁵ Nevertheless, only three among 13 employers provided paid leave.¹³⁶ An interview with the British Broadcasting Corporation (BBC) Radio reveals an identical result.¹³⁷

¹²⁹ Maternity Leave n 88.

¹³⁰ Ibid.

¹³¹ R S Rahman, ‘Determinants of the Gender Composition of Employment in Manufacturing Enterprises’ (1996) 24 *The Bangladesh Development Studies* 25-58.

¹³² Id at 53.

¹³³ Id at 43.

¹³⁴ Id at 38-40.

¹³⁵ Id at 38; See also Zohir 1996 n 82.

¹³⁶ Rahman 1996 n 131 at 39.

¹³⁷ Ms S Akhtar, chairman of an NGO in an interview with the BBC on 29 Sep 2002, observed that, no Garment Industry employer complies with either the state laws or the ILO Conventions in providing legal benefits to the women workers.

One of the long-standing demands of the Garment Workers Federation for maternity leave did not materialise.¹³⁸ Conversely, there are numerous incidents in Bangladesh where women were forced to quit the job because of pregnancy. For example, a news article was published in May 2002, reporting that Mrs Norjahan was sacked by a Garment Industry employer due to her pregnancy. She had been working there with severe sickness. Norjahan kept her pregnancy hidden since she was aware it might lead to her dismissal. Subsequently, she was asked to quit the job when her physical change was noticed by the organisation. However, she requested the concerned authority to retain her in that job. One month after giving birth, she came to know that a new worker had replaced her. In responding about maternity leave she said that ‘women have so many problems. I have worked in the factory after doing a lot of household chores, but there are no rules and regulations.’¹³⁹ Another woman opined that ‘we do not get holidays even on Friday [weekly holiday in Bangladesh], so getting maternity leave is a far cry.’¹⁴⁰ In such a situation, most women cannot resort to any judicial remedy partly due to the lack of formal recruitment letters for their jobs and partly due to their economic and educational incapability.

Thus, a conclusion can be reached, that the Maternity Act contributes further to women’s vulnerability instead of remedying their different and disadvantaged situations in employment. A stringent punishment for non-compliance with the Act and the EEO policy along with their proper monitoring can remedy the situation. In addition, an alternative measure¹⁴¹ seeking to change the attitude of employers through balancing women’s

¹³⁸ Maternity Leave n 88.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ An alternative measure in this context refers to the shared parental responsibility and reconciliation policy which are considered in section 4.5.

outsider roles with household responsibilities, could be an effective means of getting maternity benefits.

4.4.2.2. Other Protective Legislation in Bangladesh

Women in Bangladesh are prevented by a number of laws from doing work in certain places such as in mining, hills and underground areas. Article 29 of the Constitution reserves some appointments relating to any religious or denominational institution and to particular offices only for men on the grounds that these are considered by their nature to be unsuited to women.¹⁴² Under the *Mines Acts 1923 and Mines and Mineral (Regulation and Development) Act 1967* women are not allowed to carry weights over 20 kg. The *Factories Act 1965* obligates all organisations working in Bangladesh to provide separate canteens, rest rooms, toilets and special sitting arrangements for women. Section 23 of the *Shops and Establishment Act 1965* does not allow any establishment to employ a woman for work beyond the hours from 7 am to 8 pm. The *Factories Act 1965* also requires a factory to provide and maintain adequate accommodation for the use of children, including suitable arrangements for feeding, washing and changing their clothing.¹⁴³ The *Factory Rules 1979* set out provisions regarding child care facilities for women workers. The aims of this protective legislation sound favourable in recognising women's different needs but the objective appears to stereotype women.¹⁴⁴ The protective legislation, while allowing exceptions for working women, support patriarchal division of labour and reinforce the notion that mother is the exclusive child-carer,¹⁴⁵ and therefore is counterproductive. The

¹⁴² The Constitution n 38 art 29 (3b) & (3c).

¹⁴³ *Factories Act 1965* s 47.

¹⁴⁴ C J Ogletree and R de Silva-de Alwis, 'When Gender Differences Become a Trap: The Impact of China's Labor Law on Women' (2002) 14 *Yale Journal of Law and Feminism* 69 at 73.

¹⁴⁵ J Mertus, 'Human Rights of Women in Central and Eastern Europe' (1998) 6 *American University Journal of Gender, Social Policy and the Law* 369 at 372.

effect is counterproductive because the parental responsibility results in reducing working hours. This responsibility, along with women's exclusion from certain jobs, in turn limits their employability. The consequence is damaging not only to their economic solvency but contributes to negative ideas of employers in recruiting women. Employers feel discouraged to recruit women due to special costs as prescribed by protective legislation.¹⁴⁶ In support of this negative trend, numerous academics of other countries also claim that protective legislation has been marginalising women and contributing to employers' stereotyping. William, for example, contends that the different treatment 'is inaccurate and potentially destructive.'¹⁴⁷ Franklin maintained that providing special rights is not a suitable way to promote women, rather it creates 'competitive advantage among employers, who escape their cost by simply not hiring women'.¹⁴⁸ As Mertus observed:

These deeply ingrained social practices had long-term consequence on women's images as workers, limiting their chances of being hired for posts that are more prestigious and reducing their opportunities for promotions...Managers came to view women as less "reliable" and more "expensive".¹⁴⁹

Aside from the issue, all of the above provisions appear to be discriminatorily structured to represent only women's reproductive capacity,¹⁵⁰ and assume that the child-care responsibilities are exclusive for women.¹⁵¹ By contrast, these provisions largely relieve men from their family responsibilities.¹⁵² Again, similar concern for family affairs and

¹⁴⁶ Rahman 1996 n 131 at 53.

¹⁴⁷ William 1989 n 27 at 801.

¹⁴⁸ R J Franklin, 'Jefferson's Daughters: America's Ambiguity Towards Equal Pay for Women' (2001) 11 *Southern California Review of Law and Women's Studies* 233 at 247

¹⁴⁹ Mertus 1998 n 145 at 374.

¹⁵⁰ Ogletree analysed China's protective legislation in a similar situation as in Bangladesh and found gender bias in enacting and applying labour laws. See generally Ogletree 2002 n 144 at 69-97.

¹⁵¹ M J Frug, 'A Postmodern Feminist Legal Manifesto (An Unfinished Draft)' (1992) 105 *Harvard Law Review* 1045 at 1050.

¹⁵² Ogletree 2002 n 144 at 79.

child-rearing are not reflected in other state laws applied to male employees. This legal trend works in favour of men by excluding women from jobs available for both of them.

Hence, it is observed that both the formal and difference approaches to equality have failed to ensure equal rights or to eliminate discrimination in employment in favour of women in Bangladesh, so a substantive approach is necessary to produce a real outcome of equality for women in Bangladesh.

4.5. Substantive Approach to Equality

The substantive approach denotes some special measures to improve the abilities of women to enjoy the benefits of formal/difference modes of equality. In this context, special measures signify some socio-economic advantages exclusively for women granted by the government to overcome their traditional unequal status in employment, and preferential treatment and shared parental responsibility. It recommends something more than the two modes of equality such as the formal and difference modes to compensate for women's unequal positions and to promote their equal opportunities in employment. This approach urges activist reforms of social practices and the pro-active role of the state to eliminate socio-economic and educational inequalities and to develop women's skills to compete in the job market.¹⁵³ As part of this approach, for example, some countries such as UK and Africa placed the onus of achieving women's equality in employment on the government. In Germany, the Constitution was amended in 1994, which requires the State and the Judiciary to eliminate unequal social structures and institutions to enhance women's participation in employment.¹⁵⁴

¹⁵³ M Bhattacharyya, 'From Non differentiation to Factual Equality: Gender Equality Jurisprudence Under the German Basic Law' (1996) 21 *Brooklyn Journal of International Law* 915 at 915-16; see also, Kapur 1996 n 19 at 175-177.

¹⁵⁴ See *Constitution of the Republic of South Africa* 1996 s 44; Bhattacharyya 1996 id at para (50-54).

This substantive approach also requires the flexible and dynamic role of the Judiciary in interpreting equality laws to provide broader remedies to adjust with the reality of women.¹⁵⁵ The equality law of the European Council (EC), for example, displays adherence to the concept of formal equality, however some of its notions reflect the substantive approach.¹⁵⁶ To this end, section 15 of the *Canadian Charter of Rights and Freedoms* 1982 was expanded to include additional rights [with the right to equality before the law] as developed under a number of Human Rights Codes in Canada since 1960. These are: the right to equality under the law, the right to equal protection of law and the right to equal benefit of the law.¹⁵⁷ The Constitution of South Africa, beyond formal equality and affirmative action, places an onus on the government to support equal achievement of the rights for women.¹⁵⁸ It also places the burden of proof on the government, providing that prima facie proof of discrimination (whether direct or indirect) shall be presumed to be sufficient proof of unfair discrimination unless the contrary is established.¹⁵⁹ Substantive equality can be achieved through two basic ways: affirmative action and shared parental responsibility.

4.5.1. Affirmative Action

An affirmative action is defined as ‘a systematic means, determined by each employer in consultation with management, employees and unions, of achieving equal employment opportunities for women...’¹⁶⁰ It requires states to adopt different strategies and positive

¹⁵⁵ A Abanulo, ‘Equal Pay for Work of Equal Value: The ‘Results-Oriented’ Approach that Never Was’ (1999) 28 *Industrial Law Journal* 365 at 370.

¹⁵⁶ Fenwick 1998 n 45 at 509.

¹⁵⁷ *Canadian Charter of Rights and Freedoms* 1982 s 15.

¹⁵⁸ *Constitution of the Republic of South Africa* 1996 s 44.

¹⁵⁹ *Id.* ss 44 8(4).

¹⁶⁰ *Affirmative Action Implementation Manual* (1985) Affirmative Action Resource Unit, Office of the Status of Women, Commonwealth of Australia at 1.

action¹⁶¹ suitable to a particular context to balance women's ratio in various sectors where they are under-represented.¹⁶² As one of the parts of an affirmative measure, Bangladesh incorporated a provision for special measures for women in its constitutional framework.¹⁶³

4.5.5.1. Women's Quota in Bangladesh

In pursuance of constitutional mandates for special measures, the Ministry of Establishment of Bangladesh reserved 10% of the 1st grade jobs and 15% for other grade jobs in public services for women since 1985. This initiative has increased women's chances of getting more employment in Bangladesh.¹⁶⁴ Nevertheless, educated women fail to obtain jobs as per quota.¹⁶⁵ According to the Bangladesh Bureau of Statistics, 'a total of 116,915 posts remain vacant, including 31,219 posts of 1st and 2nd grade officers and 85,696 posts for 3rd and 4th grade employees'.¹⁶⁶ Women have so far been selected only for 8.4% of the 1st grade and 8.54% for other grades.¹⁶⁷ The government report to the CEDAW Committee acknowledged these vacancies.¹⁶⁸ A large number of government jobs remain vacant because the quota is not realised.¹⁶⁹

Thus, on the one hand, women fail to get jobs due to their inabilities, while on the other, the quota remains unfilled. This indicates that some other actions, including the strong political will of the government to implement the quota and create a balance between men and

¹⁶¹ Positive action embraces all measures aiming to counter the effects of past discrimination and to promote equal opportunity for women. See for details, *Kalanke v Bremen* [1996] All ER (EC) 66 para (9).

¹⁶² K Cox, 'Positive Action in the European Union: From Kalanke to Marschall' (1998) 8 *Columbia Journal of Gender and Law* 101 at 105.

¹⁶³ Art 28(4) of the Constitution supports for making special provision in favour of women for their advancement.

¹⁶⁴ Commission on the Status of Women, 'Monitoring the Implementation of the Nairobi-Forward Looking Strategies for the Advancement of Women' -39th session, New York, E/CN.6/1995/3 Add 6 at para 51.

¹⁶⁵ M K Akter, 'Bangladesh has offered higher education for women but not for jobs' *The Daily Star* (22 Dec 2002).

¹⁶⁶ Ibid.

¹⁶⁷ Ain O Salish Kendra (ASK), *Human Rights in Bangladesh 1999* (2000) Dhaka: ASK at 94.

women in employment, are required to achieve the result.¹⁷⁰ This action should also purport to raise awareness among women so that they can make rights enforceable.

In this regard, the ‘Promotion of Positive Action for Women’ adopted by the EC in 1984 may be worthy of mention. It requires governments to undertake, *inter alia*, ‘qualitative and quantitative studies and analyses of the position of women on the labour market’.¹⁷¹ The ECJ in *Kalanke* developed three core concepts of affirmative action. The first model aims to provide career guidance and to improve vocational training. The second model seeks to combine and create a favourable balance between the family and professional life and better distribution of those responsibilities. The third action takes on a compensatory nature by providing preferential treatment to the disadvantaged group.¹⁷² An affirmative action was well explained in *Marschall v Land Nordrhein-Westfalen* where a female teacher was preferred in getting a job to a male teacher of equal qualification. Referring to the EEC Directive on equal treatment (76/207), the Court held that:

... it appears that even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt the careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding. For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances.¹⁷³

¹⁶⁸ *Third and Forth Periodic Reports of Bangladesh to the CEDAW Committee* (Hereinafter CEDAW Report) CEDAW/C/BGD/3-4, 1 April 1997 at 28- 29.

¹⁶⁹ Akter 2002 n 165.

¹⁷⁰ Justice Goal Ribbon, retired judge of the HCD of Bangladesh observed that ‘[quota] system is not enough, the government should formulate a long-term policy and implement it properly.’ Guathakurta suggests that women’s opportunities should not be limited to a quota system, rather a congenial environment needs to be created for changing the attitudes of the community in general about women’s capability, efficiency and skills, see *ibid*.

¹⁷¹ See Council Recommendation (84/635/EEC) of 13 December 1984.

¹⁷² *Kalake* n 161 at para (9).

¹⁷³ [1997] All ER (EC) 865 para (29- 30).

Similarly, the Supreme Court of Canada developed an employment equity program. It is designed to work in three ways.¹⁷⁴ The first mode imposes mandatory employment equity on the employer to recruit women and minimise the possibility of future discrimination. The second mode aims to change the negative attitudes of employers regarding women's ability to work and to consider that women are capable of performing modern jobs beyond their traditional roles. The third mode suggests creating a 'critical mass' through recruiting more women. The last mode 'will eliminate the problems of "tokenism"; it is no longer the case that one or two women, for example, will be seen to "represent" all women'.¹⁷⁵

4.5.2. Shared Parental Responsibility

Shared parental responsibility assumes that inequalities in family life are one of the basic causes for women's under-representation in employment.¹⁷⁶ 'As long as there is no understanding of sharing household work between men and women', women cannot escape the potential adversaries in the workplace.¹⁷⁷ This concept has been regarded as an effective means of improving women's equality in employment.¹⁷⁸ It aims to restructure the workplace in a way that must not see 'mothering' in conflict with that of women's employment.¹⁷⁹ It also requires employers to provide parental leave and encourage male employees to share parenting and household responsibilities by conducting appropriate education and training programs. In this regard, the CEDAW emphasises balancing and combining family obligations with public work.¹⁸⁰

¹⁷⁴ See for example, *Action Travail* n 22.

¹⁷⁵ *Id* at 1143-44.

¹⁷⁶ C McGlynn, 'Reclaiming a Feminist Vision: The Reconciliation of Paid Work and Family Life in European Union Law and Policy' (2001) 7 *Columbia Journal of European Law* 241 at 247-248.

¹⁷⁷ S R Babu, 'Third Shri Akella Satyanarayana Memorial Endowment Lecture on Gender Justice-Indian Perspective' (2002) 5 *Supreme Court Cases Journal* 1 at 5.

¹⁷⁸ McGlynn 2001 n 176 at 241.

¹⁷⁹ Ogletree 2002 n 144 at 93.

¹⁸⁰ CEDAW n 52 art 11(2c).

In Bangladesh, parental leave and shared responsibility for household work are still new concepts and have yet to be applied in public and private sectors. In many respects, the situation of women employees in Bangladesh often justifies the negative ideas of employers about their ability to work. Firstly, due to the non-availability of a proper childcare system in Bangladesh, working women are to leave their children to someone's informal custody early in the morning.¹⁸¹ The absence of formal child-care facilities increases women's anxiety for their children since they cannot insist on certain levels of care and safety with this sort of informal custody compared to a formal one; the worst unsafe situation being abduction. Further, sex segregation of jobs and discriminatory treatment of women are very common, particularly in the GIS as mentioned. 'Subsequently, [in jobs] they face the problem of physical strain that is aggravated by low earnings/low profit margins ...despite their hard work.'¹⁸² The depressing impacts of that, together with the anxiety for children, lead to Majumder's discovery that women perform less satisfactorily than men at work.¹⁸³ Secondly, women are debarred from performing certain types of jobs as referred to. The reduced appointments for work combined with their primary responsibilities for household work result in lower annual hours, lower pay and lower skill.¹⁸⁴ Alternatively, men can learn more skills and earn increased salaries by investing more time in jobs without the anxiety for family or child care. All of these factors subsequently restrict women's chances (to a significant extent) of acquiring efficiency, and intensify the resolve of employers not to recruit women. By contrast, for similar reasons, employers favour recruiting men over women.

¹⁸¹ Majumder 1996 n 83 at 92.

¹⁸² 'The Situation of Women in Bangladesh', *Country Briefing Paper* at 13.

http://www.abd.org/Documents/Books/Country_Briefing_Papers/Women_in_Bangladesh/default.asp (5 November 2001).

¹⁸³ Majumder 1996 n 83 at 92.

To address the problem, the EC adopted a resolution on reconciliation policy between the family and work in 2000.¹⁸⁵ This policy has been playing a positive role in encouraging male employees to share parenting and household work, and gaining a solid basis in the interpretation of the ECJ.¹⁸⁶ In support of this policy, Okin suggests, paternity leave on the same terms as maternity leave during the post birth period can facilitate the shared parenting, and at the same time can work to reduce employer's hostile image about women's work.¹⁸⁷ In India, some industries have begun to grant father's leave as an alternative to maternity leave.¹⁸⁸ In Finland, the *Contracts of Employment Act* was amended in 1988. The Amendment obligates employers to provide parents with partial leave of absence to care for children who are under four years of age and live with them.¹⁸⁹ Apart from these examples, the following discussion shows how numerous judicial decisions have expanded the use of the substantive approach to equality in several foreign jurisdictions.

4.5.3. Comparative Judicial Decisions Reflecting Substantive Approach

The substantive equality approach increasingly dominates judicial decisions across nations to accommodate women's practical needs. In *Enderby v Frenchay Health Authority and Another* the ECJ applied this mode in considering the difference in pay between two jobs of

¹⁸⁴ Franklin 2001 n 148 at 245.

¹⁸⁵ McGlynn 200 n 176 at 254-260.

¹⁸⁶ Ibid.

¹⁸⁷ Cited in Ogletree 2002 n 144 at 94.

¹⁸⁸ Babu maintains, '[in] fact in certain industries, paternity leave is granted to the husband apart from maternity leave granted to the wife.' However, the article did not mention when paternity leave started. See Babu 2002 n 177 at 5.

¹⁸⁹ Initial Report of Finland to the CEDAW Committee, CEDAW/C/Sadd.56, 1989 at 1.

equal value, one was performed mostly by women and another predominantly by men. The Court favoured women, observing that:

[it] was accepted that the pay negotiations had not been conducted with the deliberate intention of treating women less favourably, but it was argued that the salaries of speech therapists were artificially depressed because of the profession's predominantly female composition. It was submitted that the employer's pay policy indirectly discriminated against women in that the outcome to pay negotiations had an adverse effect upon women and was not justifiable.¹⁹⁰

In *Badeck and Others* the European Court of Justice made an objective assessment of the personal situations of women candidates. It held that in the instant case, giving priority to women among equally qualified candidates was compatible with the particular legislation which was 'intended to eliminate the causes of women's reduced opportunities of access to employment and careers.'¹⁹¹ The US Supreme Court, in a series of decisions, treated pregnancy as any other disability or condition that can result in a loss for the employer and granted women qualified rights to reinstatement following childbirth.¹⁹² Australia may be another example in applying this mode of equality in numerous decisions. For example, in the *Australian Journalists Association (AJA)* the Equal Opportunity Commission observed that the under-representation of women in the AJA itself suggests that something more than the mere equal opportunity is required to attain the equal result of participation in its affairs.¹⁹³

¹⁹⁰ [1993] IRLR 591 para (5); see also, *Commission of the European Communities v Kingdom of Denmark* (EU) (1985) ECJ CELEX LEXIS 6633; *Commission of the European Communities v French Republic* (EU) (1988) ECJ CELEX LEXIS 6958.

¹⁹¹ [2000] All ER (EC) 289 at 289.

¹⁹² See for example, *California Federal Savings et al v Guerra* 479 US 272 (1987); *International Union, United Automobile et al v Johnson Controls, INC* 499 US 187 (1991).

¹⁹³ (1988) EOC (92-224) 77,124 at 77,126; see also, *Municipal Officers' Association of Australia & Anor* (1991) EOC (92-344) 78,399. The Commission upheld that '[formal] equality before the law is an engine of oppression destructive of human dignity if the law entrenches inequalities in the political, economic, social, cultural or any other field of public life'-see at 78,404.

In Canada, one of the leading cases in this regard is *Action Travail des Femmes v Canadian National Railway* (CNR). The Court found that the recruitment policy of the CNA was discriminatory in effect since it required all employees to undertake a strength test, of which women fell short. It directed the CNR to introduce a special employment program to enhance women's positions in blue-collar jobs until their representation reaches the target level.¹⁹⁴ To provide the benefit of a particular law, the Court in *Andrews v Law Society of British Columbia* considered a variety of factors, including personal characteristics, capacity and entitlements and merits of the claimant, stating that '... there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens...'¹⁹⁵

Similarly, in a number of cases, the Supreme Court of India, has made a significant move away from the traditional formal approach to equality. In *Indra Sawhney v Union of India* the Court compensated a woman through obligating the State to undertake a practical measure such as developing educational institutions to overcome the unequal position of the handicapped women in employment.¹⁹⁶ In another decision, the Court urged the government to resort to compensatory state action aiming to make people equal in real life, who are 'unequal in their wealth, education or social environment'.¹⁹⁷

In Bangladesh, the constitutional approach to equality, as observed, is inadequate and on some occasions is inefficient in dealing with women's unequal positions in employment. On the other hand, protective legislation fails to address the negative beliefs/apprehension of employers about women's work and lacks proper implementation. Again, even when

¹⁹⁴ See *Travail* n 22 at 1124-26 & 1143-46.

¹⁹⁵ *Andrew* (Canada) n 21 at 165.

¹⁹⁶ See para 396 & 39, cited in Kapur 1996 n 19 at 180.

¹⁹⁷ *Kerala* n 6 at 514.

women have the requisite qualification to avail themselves of jobs as per quota, the quotas remain unfilled. In other words, women's right to employment fails to be implemented when it is formally available. The situation is essentially a complex one and difficult to resolve overnight. However, some of the problems can be remedied through enacting legislation which seeks to promote equal opportunity for women in employment by outlining the duties and liabilities of employers (as mentioned) and of the government. Under this law, the onus should be placed on the government to accelerate women's *de facto* equality through developing academic programs and employment institutional reform as in other jurisdictions. Having regard to the constitutional mandate about special measures for women, it should become a legal imperative for employers to give preference to female applicants where the qualification of male/female is equal and females are under represented.¹⁹⁸ Given the negative trend of compliance with laws, a higher penalty should be imposed on the employers for the violation of laws. In addition, an alternative arrangement such as creating jobs exclusively for women can remedy those situations where women on the grounds of sex are excluded by laws from certain types of jobs.¹⁹⁹ Further, the introduction of paternity leave with the reconciliation policy in Bangladesh can help reduce adverse attitudes of the employers in recruiting women. It is well recognised that men in western culture, compared to the Asian, share more in household work. It has become possible because of women's empowerment as well as the countries' cultures. The government in Bangladesh should shoulder the prime responsibility of developing such a culture by, *inter alia*, displaying audio-visual programs in electronic and other media. It

¹⁹⁸ Examples of such types of preferences are found in, *inter alia*, Germany. See Cox 1998 n 162 at 115-116.

¹⁹⁹ Cook observed that the 'modern approach tolerates women's exclusion from [employment on health reasons] only when equally remunerative alternatives are available'. See R J Cook, 'Reservations of the Convention on the Elimination of All Forms of Discrimination Against Women', (1990) 30 *Virginia Journal of International Law* 643 at 698.

seems reasonable to expect that when employers see men in caretaking roles, they may not consider them alone as cost-effective. This may increase the chance of women to be recruited in employment. Paternity leave can also ease the burden of the domestic workload of working women and increase their leisure time and working hours. Consequently, it will enhance their work-efficiencies and skills for which they often suffer discrimination in the workplace. As Ogletree recommends, shared parenting ‘...will equalise the burdens of domestic work and enable both parents engaged in caretaking tasks to return to the workplace with minimum loss of job opportunities.’²⁰⁰ However, given the socio-cultural background of the country one may be suspicious about the practicability of parental leave in Bangladesh. Nevertheless, for at least two reasons, the introduction of paternity leave should not be considered an idealistic or impracticable recommendation for Bangladesh. These are: (i) the gradual involvement of women in employment, especially in private sectors in Bangladesh and; (ii) taking into account the practices of India.

Indeed, to make those provisions meaningful to women, an improved socio-economic and educational atmosphere is essential for the country. Nonetheless, some initiatives designed to improve women’s employment do not essentially relate to the socio-economic resources of the country rather than to proper policies and real commitments of the government. For example, monitoring the compliance of laws with employment practices is more concerned with the commitment of the government than with economic issues.²⁰¹

²⁰⁰ Ogletree 2002 n 144 at 95.

²⁰¹ Numerous studies found that widespread discrimination, unexpected casualties and even frequent deaths in Garment Industries (GIS) resulted from the sheer violation of laws. Despite being well aware of this, the government of Bangladesh did not take any noticeable measure to stop the unlawful practices of the GIS. The loss of lives in the fire incidents of the GIS, for example, could have been avoided if regular inspections were carried out. Since the ‘paid inspectors’ were already under legal duty to oversee the safety of the GIS, only the government’s attention to this end could have avoided the recurring accidents. Conversely, in a communication to the ILO in 1995, the government condoned the anti-union discrimination and physical assault of a woman worker in the trade union premises, arguing that ‘...[it] could not detect any violation of

In a similar way, the issue of resource constraint should not be a central factor for the filling of quotas or providing preferential treatment to educated women where they are underrepresented in jobs. This is because the government fixed the women's quota more than 18 years back after measuring its economic capacity and men have been recruited against those reserved positions (10% of the 1st grade jobs and 15% for other grade jobs in public services for women). At present, the government claims that Bangladesh is witnessing significant economic development. In such a situation, National and International Organisations have an important role to play to provide women with special attention through their active influence on enacting and enforcing laws. In many ways, as suggested by the substantive mode of equality, they can help women acquire their necessary ability to exploit the benefits of existing legislation.

4.6. Enforcement of Employment Rights in Bangladesh

4.6.1. Administrative Measures for Monitoring Equal Employment Rights

The enforcement of employment rights depends, amongst other things, on the capacity of the claimant, the level of sophistication of legal norms and the judicial and administrative mechanism of the country. Capacity entails the ability of the claimant to exploit the benefit of law and judicial remedies.²⁰² The majority of women in Bangladesh do not have this capacity, due to socio-economic reasons. In relation to the sophistication of law, the above discussion observed that the legal framework of Bangladesh is inadequate in dealing with

trade union rights...the allegations are [allegedly] promoted from outside so as to damage the business prospect of the garment industry which is entirely export-oriented.' See 'Complaint against the Government of Bangladesh presented by the International Confederation of Free Trade Unions and the International Textile, Garment and Leather Worker's Federation, Report No 304, case(s) No(s)1862.

²⁰² Freeman 1990 n 60 at 111-116.

contemporary employment. In addition, there is no administrative mechanism in the country to monitor the constitutional guarantees of equal employment rights or other state legislation in the workplace. Although there is a provision for inspection of the factory under the *Factories Act* 1965, it is more concerned with the safety and cleaning than monitoring equal opportunities for women,²⁰³ and even that inspection miserably lacks proper implementation.²⁰⁴

By contrast, such an administrative mechanism exists in several jurisdictions. In Australia, the Human Rights and Equal Opportunity Commission was established under the *Sex Discrimination* and *Affirmative Action Acts* to examine, *inter alia*, the consistency of the objects and compliance of the Acts with the employment practices, and to investigate complaints of discrimination.²⁰⁵ The *Employment Equity Act* (EEA) 1995 of Canada empowered the Canadian Human Rights Commission to investigate compliance audits of employers of both public and private sectors.²⁰⁶ Under the EEA, the failure to file annual reports imposes a \$50,000 fine on the employer.²⁰⁷ The *Fair Employment Act* 1989 of Northern Ireland has given a wide power to the Fair Employment Commission to monitor the compulsory compliance of all public and private sectors. Under the basic Directives and Recommendations of the EU several Advisory Committees have been advising the EU in formulating and implementing its policies to ensure equal rights and to promote women's employment in the Member States.²⁰⁸ With a similar objective, the Advisory Committee of India, half of the members are women, is empowered to monitor the compliance of

²⁰³ *Factories Act* 1965 s 10.

²⁰⁴ See for details, Hossain 1990 n 43 at 87-88.

²⁰⁵ *Sex Discrimination Act* 1984 s 48.

²⁰⁶ *Employment Equity Act* 1995 ss 22-24.

²⁰⁷ *Employment Equity Act* 1985 ss 7-8 .

‘equality-provisions’ in all establishments.²⁰⁹ South Africa also established the Commission for Gender Equality entrusted with the power ‘to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.’²¹⁰

All of these efforts have a particular significance for the enhancement of women’s employment. For example, in Australia, an evaluation report on a particular academic institution, under the Workplace Act 1999, subject to the varying degrees of results on women at different levels, shows that the percentage of women has increased by up to 7% in 2002.²¹¹ According to the report, the percentage of academic women located at Level B increased from 48% in 1999 to 54% in 2002.²¹² The Australian Bureau of Statistics 2003 reveals that women’s participation in employment increased by nearly 6% from 1987 and they constituted 55.5% of the total labour force in 2002.²¹³ Although this percentage increase is small considering the timeframe (1987-2002), the ratio reflects almost an equal distribution of employment which can be regarded as an important achievement for women compared to other countries including Bangladesh. The statistics of Canada from 2003 show that women’s participation increased by 15% (from 1976) in employment and by 8% (from 1987) in the senior management in 2002.²¹⁴ In India, women’s ratio also increased from 8% in 1971 to 13.8% in public employment in 1997.²¹⁵

²⁰⁸ See for example, 82/43/EEC: Commission Decision of 9 December 1981 relating to the setting up of an Advisory Committee on Equal Opportunities for Women and Men; Official Journal L 020, 28/01/1982 at 0035-0037.

²⁰⁹ *Equal Remuneration Act* 1976 s 6.

²¹⁰ *Constitution of the Republic of South Africa* 1996 s 187.

²¹¹ See generally, James Cook University, Report to Equal Opportunity For Women in the Workplace Agency 1 April 2001-31 March 2002 n 116 at 1-60.

²¹² *Id* at 31-32.

²¹³ Australian Bureau of Statistics, 6104.0 Labour Statistics in Brief, Australia 2003 at 2 <<http://80-www.abs.gov.au.uzproxy.uow.edu.au/lookup/B8005CE4A21A70CFCA256888002052D9>> (3 September 2003).

²¹⁴ Statistics Canada, Women in Canada: Work Chapter updates 2003 at 6, 112 & 21 <[wysiwyg://15/http://www.statcan.ca:80/english/freepub/89F0133XIE/free.htm](http://www.statcan.ca:80/english/freepub/89F0133XIE/free.htm)> (23 September 2003).

²¹⁵ *Platform for Action Five Years After- An Assessment* (2000) Department of Women and Children Development, Government of India, June 2000 at 40.

Thus, the above examples clearly suggest that Bangladesh should have an independent national administrative body with the proper authority and ability to monitor the compliance of prevailing laws with employment practices. To this end, a ten-member Equality Commission, of which one-half shall be women, as in India, should be established. Along with monitoring roles its prime responsibilities may include: (i) analyse and study the situation of women in employment; (ii) detect the areas of discrimination; (iii) improve women's skills through conducting suitable education and employment programs at national and local levels; (iv) raise awareness among all employers and employees about the legal consequences of all sorts of discrimination, including sexual harassment, by launching seminars and by disseminating information; (v) remove barriers to women's participation in employment through developing a culture where males feel encouraged to regard the domestic and child care responsibilities as also for them; (vi) take cognizance of complaints; and (vii) change social attitudes about women's work through undertaking different programs and policies.

4.6.2. Judicial Enforcement of Employment Rights

4.6.2.1. Courts Dealing with Employment Rights

The High Court Division (HCD) of the Supreme Court (SC) under its writ jurisdiction is empowered to enforce equal rights to employment guaranteed by the Constitution. As far as public services are concerned, women can seek a remedy from the civil courts of the country. For industrial disputes and employment rights under the labour legislation, the Labour Courts are empowered to hear and decide cases.

For two reasons, this section primarily examines the role of the Labour Court (LC), highlighting its shortcomings in dealing with employment cases. Firstly, the LC deals with

cases in those sectors which provide 90% of the employment for women.²¹⁶ Secondly, women occupy insignificant positions in the public service and the decisions of the civil courts are not reported. Nevertheless, in developing equal employment rights for women, the role of the Supreme Court of Bangladesh is considered in reference to foreign jurisdictions.

4.6.2.2. The Labour Court (LC) of Bangladesh

The LC is neither a civil nor a criminal court but a court of special jurisdiction, established under the *Industrial Relations Ordinance* 1969 (the Ordinance 1969). The LC consists of a Chairman, usually of the rank of District Judge, or an Additional District Judge and two Members, one representing the employer and other representing the worker.²¹⁷ At present, there are seven LCs in Bangladesh. Three of these are functioning in Dhaka and the remaining four are in the three divisional headquarters of the country. The LC has both civil and criminal jurisdiction. In adjudicating criminal cases such as unfair labour practices and illegal strikes under the Ordinance 1969, the LC enjoys the same powers of the Court of the Magistrate of the First Class and follows the summary proceedings prescribed by the *Criminal Procedure Code* (CrPC) 1898. Appeal against the decisions of criminal cases lies with the HCD. Under civil jurisdiction, the LC tries industrial disputes such as dismissal, suspension and compensation under a number of labour laws in accordance with the *Civil Procedure Code* 1908 (CPC). The decision of the LC is exclusive in those cases which are settled under the *Employment of Labour (Standing Orders) Act* 1969 and are under section 34 of the Ordinance 1969. The cases decided under the *Payment of Wages Act* 1936 and the *Workmen's Compensation Act* 1923 are appellable to the Labour Appellate Tribunal. Thus,

²¹⁶ The LC is empowered to decide those cases which arise from, *inter alia*, the malpractice of the GIS.

it is seen here that, within dual jurisdictions, the procedures of the LC are very complex and vary from law to law.

A grave concern over the lacunae in current procedures and methods of the LC in Bangladesh has been expressed in recent years. A crucial issue faced by the LC in disposing of a suit is the membership system. According to the Ordinance 1969, both members of the LC are required to be present at the time of constituting a court-panel to initiate the trial proceedings of a labour case. As a consequence, no case can be taken up for hearing if one member is absent or unable to attend the court. The non-attendance of the members very often caused major problems in dealing with a significant number of cases as observed by a judge of the LC.²¹⁷ One survey conducted on the LC in Dhaka, found that either of the two members was absent on 17 working days out of 21.²¹⁸ To overcome this problem, the LC of Bangladesh can be constituted by a Chairman only, as in India.²¹⁹ Both members can assist the Chairman without their compulsory attendance to the court. Their compulsory attendance may not be essential in trials since the relevant law does not require members of the LC to be institutional lawyers or experts in law.²²⁰ Another major impediment has been the backlog of labour cases. Available statistics show that 232 cases were filed in 1998 but only 31 were disposed of.²²¹ A temporary LC constituted for the time being can resolve the log-jam of old cases.²²²

The inadequate power of the LC in deciding cases of a civil nature is another flaw in the legal procedures. According to a series of decisions of the SC of Bangladesh, the LC has

²¹⁷ *Industrial Relations Ordinance* 1969 s 35.

²¹⁸ Lacunae n 74 at 14 & 57.

²¹⁹ Ibid.

²²⁰ *Industrial Disputes Act* 1947 (India) s 7.

²²¹ See *Industrial Relations Ordinance* 1969 ss 35(2) &(4).

²²² See Lacunae n 74 at 16.

very limited jurisdiction in applying provisions of the CPC 1908.²²⁴ It has no power to grant injunctions or stays of order against the decision of an employer. Thus, in practice, the LC cannot be of immediate help for those hapless women who are often sacked by a verbal order of the employer. In addition, for the same limitation, an *ex-parte* decision or dismissal order for default cannot be granted by the LC. This problem can easily be solved through providing LC with the powers of a civil court in deciding cases of a civil nature. The absence of an effective system in scrutinizing decisions of the LC is another shortcoming in getting a proper remedy. The decision of the LC is conclusive in respect of cases decided under the two major pieces of labour legislation as mentioned before. The number of such cases constitutes 80% of the total number.²²⁵ In these cases, the victim has only one option and that is to seek a writ remedy before the HCD, but it remains inaccessible to most of the disadvantaged women. In India, there is a provision for appeal against all decisions passed by the LC to the Labour Appellate Tribunal (LAT).²²⁶ Since a LAT is already in place in Bangladesh, all decisions of the LCs should be made appellable to the LAT for their qualitative assessments.

The lack of an experienced judge in the LC is another problem for timely disposition of a labour case. The Chairman of the LC, before having been appointed to the LC, had no opportunity to be familiarised with labour laws since the qualifying criteria for the position does not require him/her to complete any training or special course.²²⁷ Nevertheless, the LC has to try a variety of cases under divergent statutes and to provide different remedies. For

²²³ Chairman of the Dhaka LC solicits for the establishment of an extra labour court, to decide the cases while the pending figure exceeds 400/500 in a year, see Lacunae n 74 at 19.

²²⁴ In *Rupali Bank Ltd. & Others v Tofazzal Hossain & Others* the court held that if a legal remedy is available both under the ordinary and special courts, the ordinary court 'must be sought in exclusion of the one available under' the ordinary court, see (1992) 44 DLR (AD) 260.

²²⁵ Lacunae n 74 at 130.

²²⁶ In India, the appeal against all civil cases lies with the LAT. See *Industrial Disputes Act* 1947.

example, complaint cases and unfair practices are subject to the civil and criminal jurisdictions respectively. The procedural complexities often cause undue delay and ‘create a deadlock in dispensation of justice’.²²⁸ Thus, providing remedies through the LC demands proper understanding and application of labour laws by the judges. At present, the Judicial Administration Training Institute (JATI) is in operation in Bangladesh to impart training for magistrates and other judicial cadres. This training program should be extended to the judges of the LC. All of the above procedural shortcomings can easily be removed by a slight amendment to relevant laws.

Access to the decisions of the LC has been another problem in undertaking an in-depth study of the issue. After conducting a three-month personal investigation to collect the decisions of the LC in Rajshahi (a Division), only two cases were found on women. The claimants of the two cases were illegally dismissed and re-appointed to lower posts. The LC of Rajshahi granted a favourable remedy by reinstating the two women in their former jobs.²²⁹ A slightly improved situation prevails in Dhaka where a number of NGOs began to lodge public interest litigation in favour of women workers. Nonetheless, the number of cases filed by women is relatively insignificant, compared to the informal hire and fire practices of the GIS.²³⁰ The *Bangladesh Legal Aid and Services Trust* (BLAST), a leading NGO, has filed altogether 71 cases with regard to women’s illegal dismissal, payment of wages and maternity benefits.²³¹ Despite this, only two decided cases of a similar nature on women employees were collected from the LC of Dhaka. The two cases were about the

²²⁷ *Industrial Relations Ordinance* 1969 s 35.

²²⁸ Lacunae n 74 at 30.

²²⁹ See *Mrs Rouhson Akhtar v Director, Bangladesh Sericulture Research and Training Institute, Rajshahi* (1991) IRO No 74/91 Labour Court, Rajshahi, and *Ms Maloti Khatun v Electricity Development Board* (1999) ELA No 12/99, Labour Court, Rajshahi (unreported).

²³⁰ Nuruzzaman 2001 n 3 at 4.

illegal dismissal of two women. They were retrenched from their jobs without any prior notice. The LC of Dhaka granted partial compensation in regard to their payment of wages but did not reinstate them in their jobs.²³² Thus, apart from issues that relate to women's ability to invoke judicial remedies, the LC, due to its procedural limitations and to its narrow approach, is inadequate to ensure women's employment rights.

4.6.2.3. The Supreme Court (SC) of Bangladesh and Women's Employment

In order to interpret and apply laws, the Judiciary should hold two basic objectives. Firstly, it should interpret the law in a way that reflects its object and to be cautious about the adverse impact of the law on a particular group.²³³ Secondly, it should deliver justice to accommodate the needs of different groups, and especially the target group for whom the particular law (if any) has been made.²³⁴ The realisation of these objectives may require the court to develop a new approach through judicial activism beyond formal provisions to suit the particular situation. Nevertheless, the judiciary of Bangladesh prefers to adhere to judicial restraint, unlike India.²³⁵ On the other hand, there is a dearth of judicial decisions of

²³¹ This information was collected by telephonic communication with Ms R Sultana, the Legal Director of the BLAST on October 2002.

²³² See *Nazma Ferdous v National Laboratories Ltd* (1999) PW (Payment of Wages Act 1936) Case No-102/99, 2nd Labour Court, Dhaka and *Ms Ruba v National Laboratories Ltd* (1999) PW Case No-101/99, 2nd Labour Court, Dhaka (unreported cases).

²³³ *R v Turpin* [1989] 1 SCR 1296 at 13330-34.

²³⁴ *Andrew* (Canada) n 21 at 166-70.

²³⁵ The restrictive approach of the SC can be better understood from a verdict on nationality and citizenship. In *Bangladesh v Malkani* two children of a woman who was married to an Indian national were denied the citizenship of Bangladesh. Section 5 of the *Bangladesh Citizenship Act* 1952 provides that citizenship can be acquired by descent from a father. The petitioner challenged the Act as incompatible with the equality provision of the Constitution. Nonetheless, the Court did not consider that the Act was violative of constitutional provision. See for details, Writ Petition No 3192 of 1992, HCD, the Supreme Court of Bangladesh. See also, *State v Rahman* (1989) 41 DLR 1 in which the complainant failed to obtain judgement due to the trial court's failure to maintain nominal formality. This issue is considered in Chapter 6 at 285-286. The conservative outlook of the Court is further observed in a number of recent decisions, notwithstanding their irrelevancy with women's rights. For example, in 2002, it closed down the first private TV channel

equal employment rights of women in Bangladesh. Two main reasons for this trend are: (i) most women lack the ability to enforce their rights without the aid of others; and (ii) the frustrating role of the Judiciary in disposing of suits. The chronic delays in the trial proceeding and huge cost involved discourage women going to the court for recourse.²³⁶ For example, as of 2002, in the SC a total of 132,190 cases were pending and the number was 440,207 in ordinary civil and criminal courts.²³⁷

One of the few cases on employment rights of women before the SC of Bangladesh is *Parveen v Bangladesh Biman Corporation*. The formal approach to equality excessively influenced the SC's decision in this case.²³⁸ The facts of the case suggest, Parveen joined the Bangladesh Biman Corporation as a stewardess in 1981. In 1995, a new Regulation 11 substituted the *Biman Corporation Employees (Service) Regulation* 1979. Regulation 11 reduced the age of retirement of the flight stewardess to 35 from 57 but for stewards the retirement age was fixed at 45 years. The SC held that the Regulation 11 'has made a sharp discrimination between the persons rendering the similar service in violation of Article 28 [and deprived the petitioner from remaining] in service till expiry of age of 57 years.'²³⁹

(ETV) in Bangladesh. The Court reasoned that that the licence of the ETV was granted without any lawful authority. Starting from the 1999 (the period of previous government), the ETV soon became very popular due to its objective news coverage and innovative programs. In response to the judgement, it has been widely argued that if there was any irregularity in granting licence, then the Court could direct the concerned authority to rectify it, and the ETV should not in any way suffered the consequence. The viewers expressed, 'the verdict is frustrative', 'ETV left a vacuum in electronic journalism'. See 'ETV switched off- judicial decisions shuts up an independent voice'; 'A sad day for independent electronic media' *The Daily Star* (30 August 2002). See also, *Ekushey Television Ltd & Others v Chowdhury Mahmood Hasan & Others* (2002) 7 MLR (AD) at 193-212. For judicial activism of Indian Supreme Court, see R Moog, 'Activism on the Indian Supreme Court' (1998) 82 *JUDICATURE* at 124-127; M N Rao, 'Judicial Activism' (1997) 8 *Supreme Court Cases Journal* 1 at 1-8; A M Ahmadi, 'Judicial Process: Social Legitimacy and Institutional Viability' (1996) 4 *Supreme Court Cases Journal* 1 at 3-6; A S Anand, 'Justice N.D. Krishna Rao Memorial Lecture Protection of Human Rights--Judicial Obligation or Judicial Activism' (1997) 7 *Supreme Court Cases Journal* 1 at 1-8; S P Sathe, *Judicial Activism in India* (2002) Oxford: University Press at 63-100 & 195-249.

²³⁶ A K F Huq, 'Judiciary Is the Last Pillar of Our Hope' *The Independent* (20 December 2001).

²³⁷ 'Pending Cases Now Stand at 9,68,305: Settlement Will Need 86 Years' *The Independent* (1 November 2002).

²³⁸ *Parveen* n 39 at 133-36.

²³⁹ *Id* at 136.

Nevertheless, the decision suffered from apparent lack on several counts. For example, the SC's approach was limited to only two issues. These were: (i) whether Regulations 11 that reduced the age limit from 57 to 35 years had been made without lawful authority; and (ii) whether it violated article 28 of the Constitution, which is about the right to freedom from discrimination on the grounds of, *inter alia*, sex. Upon examination of these two issues, the SC endeavoured to treat Parveen equally with her male colleagues of similar ranks in the Biman Corporation and granted remedy in her favour. Beyond these, the SC did not address any broader issues such as the dynamics of discrimination and its adverse impact on women so that future discrimination against women could be eliminated from the workplace.²⁴⁰ In addition, the Court failed to recognise women's special characteristics and to uphold any strong stand by referring to international precedents (except for one case from India) in favour of women, as did the following judicial decisions of foreign jurisdictions.

This decision aside, in the last 33 years the SC of Bangladesh neither developed any concept of a substantive approach to redress the dilemmas of the 'equality provision' of the Constitution nor imposed any compensatory obligation on the government or employers to overcome women's meagre status and other problems such as sexual harassment in employment.

In contrast, the role of the Supreme Court of the neighbouring country India, in many respects can be regarded as productive and dynamic in providing the benefits of laws in favour of women. Back in the 1950s, the Court in *Budhan Choudhry v State of Bihar* held that equal guarantees, subject to the rational relation to the object of law, may invoke

²⁴⁰ *Parveen* n 39 at 133-136.

different standards for different classes of peoples.²⁴¹ A leading case on women's employment was *Air India v Nargeesh Mirza* in which the Court declared a service regulation of Air India that made pregnancy a bar to the continuance in service of the Airhostess, unconstitutional.²⁴² The Court held that such a bar is tantamount to obstructing the ordinary course of human nature and is 'not only a callous and cruel act but an open insult to Indian Womanhood, the most sacrosanct and cherished institution.'²⁴³ In *Bombay Labour Union v International Franchies Pvt* the Court observed that '...it is too late in the day now to stress the absolute freedom of an employer to impose any condition which he likes on labour.'²⁴⁴ In another landmark judgement,²⁴⁵ the Court, in absence of domestic legislation, relied on the provisions of CEDAW in remedying sexual harassment in the workplace. It provided a set of guidelines emphasising employers' duties to eliminate harassment including the ruling for a Complainants Committee headed by a woman. To avoid an undue influence of employers, the Court also recommended involving a third party, an NGO or other body who is familiar with the issue, in the Committee.²⁴⁶ In Australia, the provisions of CEDAW have also been applied to numerous judicial decisions to compensate women for sexual harassment in the workplace.²⁴⁷

The Supreme Court of Canada developed the two-fold standard and bona fide occupational requirement (BFOR) under the Charter and a range of Human Rights Codes.²⁴⁸ The two-

²⁴¹ (1955) AIR SC 191, cited in M C Nussbaum, 'International Human Rights Law in Practice: India: Implementing Sex Equality Through Law' (2001) 2 *Chicago Journal of International Law* 35 at 47.

²⁴² See generally (1981) AIR SC 1829 at 1829-1840.

²⁴³ Id at 1831; see also, *Mackinon Macenzie v Audrey D' Costa* (India) (1987) SC 1281 at 1281-1289.

²⁴⁴ (1966) AIR SC 942 at 944.

²⁴⁵ *Vishaka & Other v State of Rajasthan* (1997) AIR SC 3011-3017.

²⁴⁶ Id at 3015-17.

²⁴⁷ See for example, *Aldridge v Booth* (1988) 80 ALR 1; *Southern v Dept of Education Employment & Training* (1993) EOC (92-491) 79,534 at 79534-36.

²⁴⁸ See Generally J Hucker, 'Antidiscrimination Laws in Canada: Human Rights Commissions and the Search for Equality' (1997) 19.3 *Human Rights Quarterly* 547-570.

fold standard requires the court, in applying legislation in the workplace ‘to decide at the outset into which of two categories the case falls: (i) “direct discrimination”, where the standard is discriminatory on its face; or (ii) “adverse effect discrimination”, where the facially neutral stand discriminates in effect’ and accordingly grant remedies.²⁴⁹

The BFOR places the burden of proof of discrimination in employment on the employer. The three-step test of BFOR requires an employer to prove his/her prima facie discriminatory practice by showing that: (i) the adopted measure is rationally connected with the purpose/performance of the job; (ii) the particular measure was taken with honest and good faith and was necessary for the fulfillment of the legitimate purpose of the work; (iii) without such measure it was impossible to accommodate individual employees, and to avoid the undue hardship of the employer.²⁵⁰

Hence, the findings of the Courts in other jurisdictions indicate that the efficiency of the judiciary is imperative to realise women’s rights. The dearth of employment cases on women in Bangladesh, despite the violation of laws, therefore warrants a strong judicial intervention to develop an anti-discrimination culture in employment. However, having regard to socio-economic differences between developed and developing countries, one may doubt whether the standard of the former can be applied to the latter. Nonetheless, this argument may not be relevant to the liberal interpretation of laws which inherently aim to protect a vulnerable group in the community.²⁵¹ Moreover, this argument can reasonably be countered by reference to judicial decisions of the neighbouring country India, where a largely similar situation prevails. The SC of India, in a series of decisions, directed the

²⁴⁹ *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] SCCDJ LEXIS 67 at 16; see also, Hucker 1997 id at 553.

²⁵⁰ Ibid.

²⁵¹ *Andrew* n 21 at 178.

central government to take immediate steps to provide the benefit and advantages of law in favour of employees.²⁵² In addition, the SC, on numerous occasions, granted socio-economic rights which are not enforceable under the Constitution of India by elaborating the *Directive of State Principles*.²⁵³

Thus it is practicable to suggest that in applying and interpreting laws and employment policies, the judiciary of Bangladesh should consider the stated and inherent objectives as well as their impact on women, and be aware of the feminist legal approach. In pursuance of constitutional mandates for special measures for women, the Court should issue directives, obligating the government to establish educational and other relevant institutions exclusively for women to promote their legal capacity to exploit jobs. For a similar objective, *suo moto* guidelines for employers can also help eliminate, or at least reduce, discrimination and all unwelcome sexual advances towards women in the workplace.²⁵⁴

4.7. Summary and Conclusion

The preceding sections have examined the legal, administrative and judicial efforts in Bangladesh regarding women's rights to employment. The discussion demonstrates that the constitutional formal equality exposes a short-sighted goal and therefore has not been effective in accelerating women's *de facto* equality. Women cannot enjoy the benefits of equality because of their lack of capacity and of their subordinate status in practical lives.

²⁵² For example, in *Labourers Working on Salal Hydro Project v State of Jammu and Kashmir*, the Court went on to conclude that, '[we] would therefore direct the Central Government to tight up its enforcement machinery and to ensure that thorough and careful inspections are carried out by fairly senior officers at short intervals with a view to investigating whether the labour laws are being properly observed, particularly in relation to workmen employed....' See [1983] Writ Petition (Criminal) No-1179.

²⁵³ See for example, *Unnikrishnan v State of A P* [1993] 1 SCC 645; *Iyer v Justice A M Bhattacharjee* [1995] 5 SCC 457 (observing that '...the role of the judge is not merely to interpret the law but also to lay new norms of law and to mould the law to suit the changing social and economic scenario...')

²⁵⁴ Only in the GIS, 30% of women employees suffer from sexual abuse or harassment. In most cases, such an incident goes unnoticed because of the apprehension of losing jobs and of social stigma attached to it. See Hossain 2003 n 92; Majumder 2000 n 2 at 5; Rahman 2002 n 93.

On the other hand, to provide due regard to women's special needs, the protective legislation transforms into a disadvantage and becomes a means of reinforcing their traditional 'home-maker' roles. Even where the protective legislation is implemented, employers' non-wage costs are adjusted with the lower pay and a broad range of discrimination is generated against women, especially in the GIS. Nevertheless, the repeated prohibition of sex discrimination in numerous international treaties, national legislation and court practices implies that 'there is a strong [necessity] to end discrimination on the basis of gender.'²⁵⁵ Taking into account this necessity and worldwide practices, this chapter submits that there is no alternative to strengthening laws on employment and making those laws enforceable to deal with women's equality in the contemporary workplace. Appropriate laws addressing relevant issues of employment such as the dynamics of discrimination, an EEO policy, the preferential treatment and the right to freedom from sexual harassment and stringent punishment for the violation of laws, can promote women's positions in employment. An amendment to the Constitution should seek women's *de facto* equality, requiring the government to develop educational and employment opportunities exclusive to women, as in South Africa. In this process, equality needs to be measured by the actual ability of women, rather than only by their legal entitlements. In addition, the concepts of a reconciliation policy and shared parent responsibility aiming to balance household and paid work must be reflected in legal policies and programs. These policies may obligate employers to provide parental leave and to develop a culture where male employees will be accountable to take those responsibilities as their own. However, the enactment of laws may not be the solution to all problems associated with women employees in Bangladesh. To oversee the compliance of

²⁵⁵ Mertus 1999 n 1 at 42.

laws with the employment practices and to ensure their implementation, a joint venture of the administration and the judiciary is imperative. An independent Equality Commission entrusted with the proper power to monitor and investigate and to *suo moto* take cognizance of discriminatory treatment against women can remedy the sufferings of the underprivileged women workers. Complementary to this initiative, an efficient judiciary can further contribute to strengthening women's ability to face the arbitrary practices of the employers. To make these initiatives more effective for women, the national and international women's rights organisations have also a profound role to play as suggested by the substantive approach to equality. Such an attempt can be the last resort for those disadvantaged women who receive little or no national attention.

To show further deficiencies and the impact of the provision of equality, the following chapter considers women's right to participate in politics.

Chapter 5

Equal Right to Participate in Politics

5.1. Introduction

Women's right to participate in politics is guaranteed under the Constitution and Local Government Ordinances of Bangladesh. Since 1971, an affirmative measure has been set in place in the country to strengthen women's roles in decision-making in all elected offices. The introduction of the *Dhaka City Corporation Ordinance* 1983 and the *Local Government (Union Parishads) Ordinance* 1983 resulted in a substantial increase of women in local politics.¹ Currently, two women lead the ruling and opposition parties. Despite these facts, women's present positions in elected offices do not correspond to their proportionate percentage of the total population. Women constitute half of the population of Bangladesh, but they represent only 2% of parliamentary seats.² Notwithstanding legal safeguards for equal participation, informal inequalities such as traditional negative perceptions about the legislative and governance roles of women, overburdened marital responsibilities and uneven distribution of opportunities in running for office continue to constrain women's effective participation in politics. This unequal situation is preventing women from demanding other socio-economic rights as well.³ Apart from these, the costly electoral process, the adversarial nature of politics and the absence of any legal provision to acknowledge the situation, and sometimes the electoral system itself of the country, impede

¹ The 1997 Union Parishad (UP) Election resulted in nearly 14,030 women in the UP from 1135 in the 1992 election. See Women for Women, *Sthanio Sarkar O Nari Sadhasha Union Parishad* (written in Bengali) (1999) Dhaka: Women for Women-A Research and Study Group at 25

² S A Hossain, 'Women's Participation in Electoral Politics' (2000) 7 *Empowerment- A Journal of Women for Women* 67 at 69.

the meaningful exercise of this right. In addition, the current system of reserved seats for women in the Parliament raises a number of concerns.⁴ The process of nomination for reserved seats produces an inferior status of women MPs and makes them politically dependent on leaders of the ruling party. On the other hand, elected women members are constantly deprived of important responsibilities and financial facilities in local governance because of the non-cooperation of the government and of their male colleagues.⁵

This chapter argues that women's rights to engage fully in politics will only be ensured when the whole political process is made compatible with the different realities of women. To make politics meaningful to women, they need to be provided with at least equitable access to the relevant opportunities of politics and be freed from the discriminatory treatment by men. Although women have gained an increased number of positions in local bodies in Bangladesh in recent times, that cannot be considered an alternative to national participation.⁶

This chapter seeks to find out deficiencies in the legislative approach in dealing with women's participation in politics and evaluates the impact of statutory changes on women in Bangladesh. It also concentrates on a number of issues and constraints that women face before and after their involvement in politics. It concludes that a significant change in the electoral system and structures of political parties and in the political environment of the

³ B E Hernandez-Truyol, 'Sex, Culture, and Rights: A Re/Conceptualization of Violence for the Twenty- First Century' (1997) *Albany Law Review* 607 at 615.

⁴ See *Affirmative Action and Article 4 of the Women's Convention*, International Women's Rights Action Watch Consultation Reports 1997 (hereinafter The IWAW Reports 1997), <http://iwwaw.igc.org/publications/ww/9703.html> (18 January 2003).

⁵ Although two women occupy the leading positions in the two main political parties, male views are predominantly reflected in all state affairs since their advisors are mostly men, and women's ratio in all legislative bodies is insignificant. For details, see the Report of Asian Development Bank 2001, Women in Politics (hereinafter the Report of ADB) <http://www.onlinewomeninpolitics.org/bangla/bangmain.htm> (19 December 2003).

⁶ A United Nations Study, *Women in Politics and Decision-Making in the Late Twentieth Century* (hereinafter The UN Study)(1992) London: Martinus Nijhoff Publishers at XIV.

country is essential to promote women's participation in politics. An attitudinal change in men, politicians, the community and, especially in the government towards women is also imperative to women's political empowerment.

For materials, access to the sessions and recordings of the Parliament and its Standing Committees in Bangladesh is extremely difficult, since these are not public documents. The same is applicable to all proceedings of the local government. Therefore it is not possible to assess the impact of women's opinions on decision-making from the original resolutions of legislative bodies. However, to gain some insight into this situation, questionnaires were sent to 27 women commissioners and members of the local government in Rajshahi Division. Although this number is insignificant compared to the total number of women legislators, some indications can be found of how the legal provisions work in forwarding women's engagement in politics. The information regarding women's political participation in foreign jurisdictions was collected primarily from the studies and statistics of the United Nations (UN) and from various national reports submitted to different international organisations under the UN. However, statistics on the position of women in local governments were not available for a comparative analysis of that sector. In this regard, reliance is heavily placed on a series of studies conducted by the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) and on various national and international reports and journals.

The following section 5.2 begins with a brief description of the political system of Bangladesh. Section 5.3 considers women's status in the politics of Bangladesh. Section 5.4 examines the causes of women's under-representation in politics and attempts to improve their placement in politics in view of a comparative perspective. The international commitment and the Parliamentary–Quota of Bangladesh are demonstrated in section 5.5.

5.6 concentrates on local governance in Bangladesh, while section 5.7 presents a summary and conclusion.

5.2. The Political System of Bangladesh

Bangladesh is a unitary parliamentary form of government, based on the Westminster model of governance. The Parliament is formally called Jatiyo Sangshad (House of the Nation), comprising 300 members. Representation in the Parliament is determined on the geographical divisions known as constituencies. Members of the Parliament are directly elected from 300 single territorial constituencies. In addition to these, there are 45 reserved seats for women.⁷ Under the Constitution of Bangladesh, elections of the National Parliament are held every five years.

The country is split into six administrative Divisions. In hierarchical order, the Division stands at the top of the administration under which 68 Districts are currently functioning. The third tier of administration is Thana (Police Station). As of March 2003, there are 496 Thanas throughout Bangladesh. A Thana is divided into a number of administrative units known as Unions.⁸ A Union again consists of nine Wards. There are roughly 80,000 Villages under Wards. The headquarters of Thanas are mostly in urban areas of the country. Local government bodies in urban areas are called Municipalities and Corporations. Currently, 225 Municipalities for major cities and four City Corporations for metropolitan cities exist in Bangladesh.⁹ In July 2000, the *Zilla (District) Council Law* was enacted to provide a lower level representation in the District through indirect election, however this

⁷ See *The Constitution (Fourteenth Amendment Act) 2004* art 65 (3).

⁸ *State of Women in Urban Local Government, Bangladesh* (hereinafter Bangladesh Report), United Nations Economic and Social Commission for Asia and the Pacific 2002 at 3.
<http://www.unescap.org/huset/women/index.html> (28 January 2003).

⁹ Ibid.

election has yet to be conducted.¹⁰ The Upazila is another administrative unit ranking above the Union. It is not operational at the present time, and thus is excluded from the discussion of the chapter.

5.3. Women's Right to Participate in Politics and Legal Provisions in Bangladesh

A range of constitutional provision ensures women's rights to vote and stand for national elections in Bangladesh.¹¹ As one of the fundamental rights, the equal participation of women in all spheres of public life is guaranteed under article 28(2) of the Constitution. Article 10 recognises that the promotion of equal power of women in decision-making is a fundamental principle of State Policy. Article 9 stresses the significance of political empowerment of women and obligates the State to encourage special representation of women in local governance. The local government Ordinances further add to the process by providing women with reserved seats at local levels. Beyond these national measures, international human rights instruments underscore the priorities of women's involvement in politics¹² under which the government of Bangladesh owes affirmative obligations to give

¹⁰ US Department of State, Bangladesh- Country Reports on Human Rights Practices (hereinafter US State Report) 2001 at 11.

¹¹ *The Constitution of the People's Republic of Bangladesh* 1972 (hereinafter the Constitution of Bangladesh) arts 27, 37-39, 50, 60 & 122.

¹² The United Nations (UN) Charter for the first time, accorded international recognition to the organised struggle for women's rights to politics. Since then, the commitment of the UN to this end has been reflected in a series of international conventions and numerous resolutions and recommendations of its major Organs and Human Rights Committees. 'The world chronology of women's suffrage reveals that it took women almost a whole century to gain recognition of their right to vote and their right to stand for elections.' Article 25 of the *International Covenant on the Civil and Political Rights* (ICCPR) 1966 reaffirmed this right stating that '[every] citizen has the right...to be elected at genuine periodic elections which shall be by universal and equal suffrage...' The Recommendation of the Human Rights Committee (which monitors the ICCPR) required States to put an end to discriminatory practices in public life. Again, women's demands for an equal share in the political power received an important focus during the UN Decade (1976-1985) for Women. The Nairobi Forward-Looking Strategies (NFLS) (adopted in that conference) emphasised on women's equal participation in a number of affirmations. For example, paragraph 86 reiterates that governments should intensify efforts to ensure equal participation of women in the '... high posts in executive, legislative and judicial branches...'

effect to those commitments. For example, the importance and relevance of women's participation in politics led to the creation of a separate convention, namely the *Convention on the Political Rights of Women* 1952. Women's rights to vote and to contest for positions in elected bodies received the exclusive attention of that Convention.¹³ The CEDAW goes one step further by requiring the government to undertake special and positive measures including the preferential treatment or a quota system, to ensure women's equal integration into decision making at national and international levels.¹⁴

Notwithstanding these safeguards, the following Figure 5.1 and Table 5.1 show that women are grossly underrepresented in the Parliament.

5.3.1. Women in the Parliament

Since the independence of Bangladesh in 1971, national elections have been held eight times. In the first and second parliamentary elections held in 1973 and 1979 respectively, no woman was elected.¹⁵ In the third and fourth elections of 1986 and 1988, women won only five and four seats respectively, constituting 1.6% and 1.3% of the total seats. In the

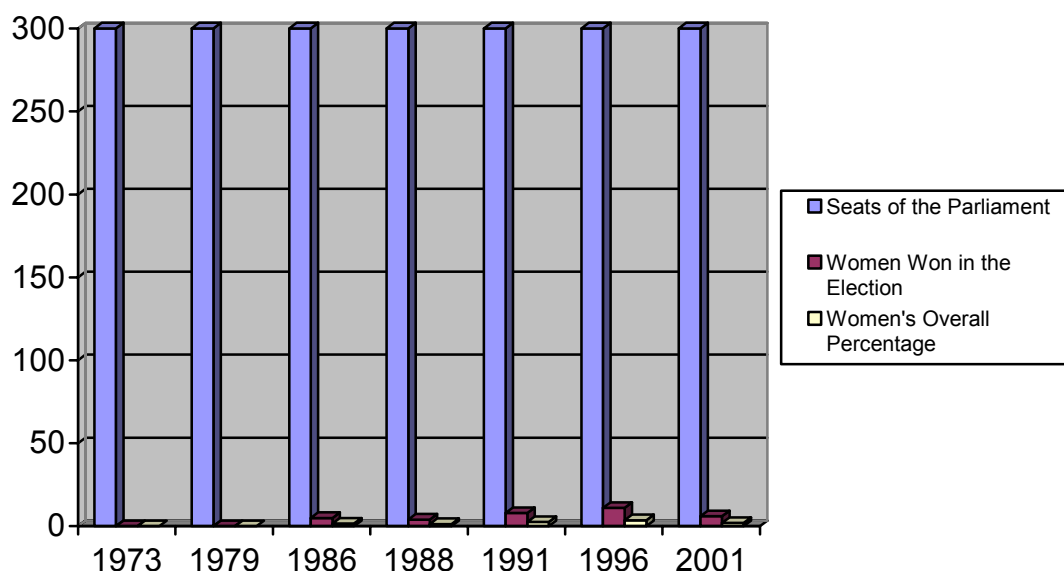
Women across the world organised in the Nairobi Conference in 1985 to formulate strategies and goals to achieve, *inter alia*, equal access to political opportunities. In 1990, the need for implementing NFLS called on the Commission on the Status of Women (CSW) to reconsider improved ways and means to give effect to the equal opportunities of women in politics. See for details, The Charter of the United Nations 1945 arts 1(3) & 8; S C Poe, D Wendel-Blunt and Karl Ho, 'Global Patterns in the Achievement of Women's Human Rights to Equality' (1997) 19 *Human Rights Quarterly* 813 at 816; C Pintat, Democracy Through Partnership: The Experience of the Inter-Parliamentary Union, in International Institute for Democracy and Electoral Assistance (IDEA), *Women in Parliament Beyond Numbers* (hereinafter International IDEA's Handbook) (1998) Stockholm: International IDEA < <http://www.idea.int> > (4 March 2003); The UN Study n 6 at XIII; see also, International Covenant on Civil and Political Rights, 'Equality of rights between men and women' 29/03/2000 CCPR/C/21/Rev1/Add 10, CCPR General Comment 28 (General Comments); A Winslow (ed), *Women, Politics, and the United Nations* (1995) London: Greenwood Press at 1 and Recommendations of the World Conference to the UN Decade for Women, Copenhagen (1980) Clause 86.

¹³ See *Convention on the Political Rights of Women* 1952, opened for signature and ratification by General Assembly resolution 640 (VII) of 20 December 1952, entry into force 7 July 1954, in accordance with article VI, arts 1-11.

¹⁴ *Convention on the Elimination of all Forms of Discrimination against Women*, General Assembly resolution 34/180 of 18 December 1979 arts 7- 8 & 4-5 (requiring State parties to eliminate all discrimination and socio-cultural practices that hinder women's equal participation in politics through undertaking

elections of 1991 and 1996, the elected positions of women were eight (2.6%)¹⁶ and 11 (3.6%) respectively. The election result of 2001 demonstrated a lower representation of women compared to 1996. They obtained only 6 (2%) seats in the Parliament.¹⁷

Figure 5.1: Women's Positions (excluding reserved seats) in the Bangladesh Parliament.¹⁸



A similar trend is also observed at ministerial levels. In holding ministries, women's positions never exceed 3%. The first cabinet of 1972 had only two women state ministers and more than two decades later (in 1996) the number was increased to four.¹⁹ Before 1996, no women MPs were appointed to serve in the top rank in the Parliament, nor entrusted

appropriate measures). See also, General Recommendation No 5 of the CEDAW Committee <http://www.un.org/womenwatch/daw/cedaw/recomm.htm> (2 May 2002).

¹⁵ Hossain 2000 n 2 at 67.

¹⁶ N Chowdhury, Bangladesh: Gender Issues and Politics in a Patriarchy, in B J Nelson & N Chowdhury (ed), *Women and Politics Worldwide* (1994) London: Yale University Press at 99.

¹⁷ See Election 2001, Bangladesh Election Commission < <http://www.bd-ec.org> > (21 February 2003).

¹⁸ N Chowdhury, 'Women in Politics (hereinafter Women in Politics)' (1994) 1 *Empowerment-A Journal of Women for Women* at 42.

¹⁹ Ain O Salish Kendra (ASK), *Human Rights in Bangladesh 1999* (hereinafter Human Rights 1999) (2000) Dhaka: ASK at 93.

with the full responsibility of a ministry.²⁰ Except for one, women MPs were provided with traditional responsibilities such as culture, social welfare and women's affairs.²¹ At present, in a 60-member Council of Ministers, except for the Prime Minister, only two women are holding the portfolios of Women and Children Affairs, and Cultural Affairs.²² In the Fifth Parliament (1991-1995), there were 49 Parliamentary Standing Committees (PSCs). Women held only 9.1% positions and 46.80% PSCs had no women. In the Seventh Parliament (1996-2001), there were 9.4% women in PSCs and 53.19% Committees had no women. Under the present government, only 9 Committees among 39 PSCs have women members. Except for the Women and Children Ministry, each of the eight Committees has only one woman member.²³

Table 5.1: Participation of Women in the Ministerial Levels²⁴

Periods	Full Ministers		State/Deputy Ministers	
	Men	Women	Men	Women
1972-75	33(100%)	-- 0	17(89%)	-- 2(11%)
1975-82	63 (97%)	--- 2 (3%)	38 (90%)	-- 4(10%)
1982-90	85 (97%)	--- 3 (3%)	48 (98%)	--- 1(2%)

The Twelfth Amendment of the Constitution in 1991 created scope for the ruling party to choose one-tenth of its members from technocrats and professionals or other qualified persons in the Council of Ministers. Nevertheless, this provision has hardly been used in

²⁰ 'Between 1992-1995 there were only two women in the cabinet both below the rank of a full minister of the government.' See S Hamid, *Why Women Count* (1996) Dhaka: University Press Limited at 93.

²¹ In the erstwhile government, only one woman MP held the portfolio of Agriculture who was an elected member in the consecutive two terms of the government, see, *Women in Politics* n 18 at 48.

²² In the present Cabinet, Prime Minister Begum Zia is holding the portfolios of Establishment, Defense, Energy and Mineral Resources, Armed Forces Division etc.

²³ Collected from the Bangladesh Parliament through a personal communication with Mr Jasim Uddin, Officer, Legislative Section, Bangladesh Parliament.

²⁴ *Women in Politics* n 18 at 47.

the last ten years to appoint a woman from those criteria.²⁵ In addition, women MPs admitted that the Party Whips debarred them from raising any issue of gender discrimination, concerned that it may negatively affect the images of parties in traditional society.²⁶ Therefore in the last three decades, women MPs, due to their weak positions in the Parliament, neither developed their own power nor initiated any separate discussion for empowerment of women.²⁷ On some occasions the unfamiliarity with the proceedings of the parliament also hampers their contribution.²⁸

The status of women in the Parliament thus implies that constitutional guarantees cannot offer much help to them.²⁹ Chowdhury argued that the ‘equal participation in national life is more ideal than real. Socio-cultural factors shape and limit the nature of women’s political engagement...’³⁰ Apart from socio-cultural factors, a number of reasons related to the politics in Bangladesh and the organisation of political parties contribute to women’s under-representation in elected offices. The following section outlines those reasons and provides a number of recommendations to achieve women’s better representation in legislative offices in Bangladesh.

5.4. Causes of Women’s Under-representation

As a part of the process of the UN commitment to advance women’s participation worldwide in decision-making, the Expert-Group Meeting was held in Vienna in 1989.³¹ Delegates from 16 countries identified a number of common reasons for women’s under-

²⁵ Id at 47-48.

²⁶ Human Rights 1999 n 19 at 93.

²⁷ F D Chowdhury, ‘Politics and Women’s Development: Opinion of Women MPs of the Fifth Parliament in Bangladesh’ (1994) 1 *Empowerment-A Journal of Women for Women* 23 at 32 & 35.

²⁸ N Chowdhury et al (ed), *Women and Politics* (1994) Dhaka: Women for Women: A Research and Study Group at 3; see also, *ibid*.

²⁹ The constitutional equality due to its inherent flaws, as considered in the preceding chapter, cannot work in achieving women’s *de facto* equality. To avoid repetition, this issue is not further discussed in the chapter.

³⁰ Chowdhury 1994 n 16 at 98.

representation in politics. The prominent reasons are: the membership systems of political parties, the ‘male-modeled politics’, unfavourable selection process, the lack of resources, socio-cultural negative attitudes and the marginal level of development and structural barriers.³² Education, professional skill and occupational status, *inter alia*, were regarded as structural barriers.³³ Nonetheless, the above factors do not appear always to be exclusive reasons for unequal participation of women in the Parliament. For example, despite having developed economies the average percentage of women in Parliaments in Western Europe and the Group of developed countries is only 16.4%³⁴ and under-representation of women in legislative bodies is a worldwide phenomenon.³⁵ Although women account for 50% of the voters in the world, they hold less than 12% of seats in national legislatures.³⁶ However, some countries, through using international provisions in the domestic sphere, made noticeable progress in enhancing women’s positions in National Parliaments.³⁷ The experiences of a number of countries, including Nordic ones, provide lessons where women have an average equitable share in politics. The following discussion proceeds by

³¹ The UN Study n 6 at XIV.

³² The UN Study n 6 at 27-23.

³³ Id at 33–34.

³⁴ Commission on the Status of Women, ‘Monitoring the Implementation of the Nairobi Forward-Looking Strategies for the Advancement of Women’, Thirty-ninth session, New York, E/CN.6/1995/3/Add 6 at (para 24).

³⁵ ‘*The World’s Women 2000: Trends and Statistics 2000*’, Social and Demographic Statistics Branch, Statistics Division: United Nations; see also, J L Southard, ‘Protection of Women’s Human Rights Under the Convention on the Elimination of all Forms of Discrimination Against Women’ (1996) 8 *Pace International Law Review* 1 at 17; Expert Group Meeting, ‘Political Decision-Making and Conflict Resolution: The Impact of Gender Difference’ Santo Domingo, 7-11 October 1996 <http://www.un.org/documents/ecosoc/cn6/1997/conflict/Aidemdg.htm> (28 January 2003).

³⁶ Press release of the Inter-Parliamentary Union, Washington (13 February 1997); see also, K Mahoney, ‘Theoretical Perspectives on Women’s Human Rights and Strategies for their Implementation’ (1996) 21 *Brooklyn Journal of International Law* 799 at (para 112)] (observing that in many countries, customary and family constraints continue to deny women effective participation in politics).

³⁷ Twenty-third special session of the General Assembly entitled ‘*Women 2000: gender equality, development and peace for the twenty-first century*’ 2000 at (para 16) <<http://wcd.nic.in/bej5plus.htm> (10 September 2002).

examining those experiences with the objective of promoting women's under-privileged status in politics in Bangladesh.

5.4.1. Electoral System

An electoral system has a profound impact on representative democracy.³⁸ The two major electoral systems worldwide are the Majority-Plurality (MP) and the Proportional Representation (PR).³⁹ Bangladesh adheres to the MP electoral system. In all elections votes are cast and counted for an individual candidate. To gain a seat in elected bodies, a candidate is required to earn the most votes. The electorate can use only a single-non-transferable vote.⁴⁰ No other options such as preferences or alternative votes⁴¹ are provided under electoral laws in Bangladesh. Despite it being simple to understand and use for the electorate, this system experiences criticism across nations for a number of reasons. The central criticisms are: (i) this pattern of voting does not reflect adequate and fair representation of a disadvantaged or minority group in legislative bodies; (ii) a large number of 'wasted votes' are left by the system. The votes that small parties or individuals obtained become useless when they fail to win the election; and (iii) it is susceptible to the manipulation of electoral constituencies. The dominant parties are more likely to gain seats

³⁸ See W Rule, 'Electoral Systems, Contextual Factors and Women's Opportunity for Election to Parliament in Twenty-Three Democracies' (1987) 40 *Western Political Quarterly* 477 at 483-487 and 494-495.

³⁹ Each system has a number of different forms. For example, the MP has, *inter alia*, First Past the Post (FPTP), Block Vote. In the FPTP (prevails in Bangladesh) 'contests are held in single-member districts and the winner is the candidate with the most votes.' See for details, R E Matland, 'Enhancing Women's Political Participation: Legislative Recruitment and Electoral Systems' (hereinafter *Enhancing Political Participation*) in International IDEA's Handbook n 12. In the context of Bangladesh, only the MP is used to refer FPTP. The PR is discussed below.

⁴⁰ The Constitution of Bangladesh n 11 art 121.

⁴¹ In some democracies, the MP is used in the forms of preference or alternative votes. It provides electorates with more options in choosing candidates by marking in order of their preferences in the ballots as 1st, 2nd, 3rd and so on. Under this system, if any candidate fails to earn the majority votes, the 'lowest-placed candidate' is eliminated from the list and its votes are transferred to the remaining candidates according to the preferences. Australia has this system. See Electoral System Index (hereinafter *Electoral Index*) <http://www.aceproject.org/main/english/es/esdo3.htm> (21 February 2003).

in the Parliament from votes of a comparatively bigger constituency with a great number of electorates.⁴²

The lack of relevant qualities such as the non-availability of resources and family supports for contesting elections in Bangladesh discourage women from participating in politics. After getting a party nomination women are less likely to influence the majority votes in a traditionally male-dominated culture.⁴³ The pattern of campaign and voter-mobilisation in Bangladesh further reduces their possibility of winning, since it demands extra ‘muscle’ and monetary power.⁴⁴ Support from voluntary organisations or the business community is also a lesser possibility for women in Bangladesh. This is because women in a conservative culture, and with their overburdened household responsibilities compared to men, cannot maintain relations with them.⁴⁵ In addition, the low level of literacy and the lack of political knowledge influence the electorate to run after the symbol of a party instead of an individual candidate under the party. This trend also works against women due to their limited mobility and therefore limited familiarity with the general public.⁴⁶ In such a situation, the following discussion argues that women’s share in politics can be better ensured under the PR system.

Under PR, political parties make national lists of electorates. The electorates vote for the list rather than for an individual candidate. The relative strength and popularity of the parties instead of personal appeal or qualities of a candidate influence the electorate. The

⁴² Rule 1987 n 38.

⁴³ S C Bourque and J Grossholz, ‘Politics an Unnatural Practice: Political Science Looks at Female Participation’ (1974) 4 *Politics and Society* 225 at 225.

⁴⁴ ‘Elections of Bangladesh become the monopoly of the money and muscle power.’ See for details, M R Islam, ‘Good Governance and the Rule of Law in Bangladesh: Challenges and Prospects in the New Millennium’, this paper was presented in a conference hosted by the Department of Economics, University of Queensland on January 2002 at 15; see also, Chowdhury 1994 n 16.

⁴⁵ Rule 1987 n 38 at 486; Women in Politics n 18 at 49.

⁴⁶ Women in Politics n 18 at 43 & 45.

real competition thus takes place within parties after the election. Parties obtain seats in the Parliament in proportion to their overall share of votes.⁴⁷ PR aims to curb an exclusive dominance of major parties and to make the Parliament more participatory.⁴⁸ Unlike MP, nearly all casting votes become useful to gain a parliamentary seat. Therefore this system is more likely to favour a minority group to maximise its votes with the parliamentary seats.⁴⁹ However, a strong criticism that is often raised against the PR system is that it leaves much discretion with political parties. It is ultimately the party, not the electorate, that determines the seat of a candidate in the Parliament. PR does not facilitate a geographical linkage between the electorate and the MP.⁵⁰ Nevertheless, in regard to women's enhanced representation in National Parliament, empirical findings across the world suggest that PR offers greater access to women than MP does. The annual reports of the Inter-Parliamentary Union revealed that women held 11% of seats in the Parliament in those democracies using MP. The figure was nearly doubled to 20% of those countries adhering to PR.⁵¹ In a cross-national study covering 23 countries, Rule found that PR resulted 'in the greatest proportion of women MPs among 21 countries tested'.⁵² Except for a few instances,⁵³ the transformation from MP to PR led to 'a 15.6% jump in the female proportion of the national legislature'.⁵⁴ The following table displays a clearer picture in favour of PR.

⁴⁷ J C Hickman, 'The Candidacy and Election of Women in Japanese SNTV Electoral Systems' (1997) 18 *Women & Politics* 1 at 4.

⁴⁸ Ibid.

⁴⁹ Id at 2-3.

⁵⁰ Rule 1987 n 38.

⁵¹ Inter-Parliamentary Union, *Men and women in Politics: Democracy still in the Making: A World Comparative Study* (hereinafter IPU Reports 1997) (1997) Series Reports and Documents, No 28 Geneva, Switzerland: IPU.

⁵² Rule 1987 n 38 at 477-495; Hickman 1997 n 47 at 4.

⁵³ Greece introduced PR in 1985. The subsequent election held in 1985 did not favour women. See for details, The UN Study n 6 at 41-42.

⁵⁴ R E Matland, 'Women's Representation in National Legislatures: Developed and Developing Countries' (1998) 23 *Legislative Studies Quarterly* 109 at 115.

Table 5.2: Percentage of Women MPs Across 23 National Legislatures, 1945-1997, and 1998 (covering 24 democracies)⁵⁵

Year/ System	1945	1950	1960	1970	1980	1990	1993	1998
MP	3.05	2.13	2.51	2.23	3.37	8.16	9.47	11.64
PR	3.16	5.05	5.86	6.03	11.79	18.43	20.16	23.03

South Africa switched to PR in 1994 in order to avoid a single party-dominated Parliament. The election results of 1994 demonstrated a significant diversity in the National Assembly. With 52% black, 32% white, 8% Indian and 7% coloured, the Assembly was highly proportional.⁵⁶ Women won 25% of the total parliamentary seats. Although this election result was largely the consequence of the abolition of the apartheid system that previously prevailed in South Africa, it is believed (in South Africa) that women's positions would have been far fewer if MP had been used.⁵⁷ In New Zealand, MP prevailed for more than a century.⁵⁸ In the 1978 and 1981 elections, the Labour Party obtained 16% and more than 20% of votes respectively.⁵⁹ With these large shares it gained only one and two seats respectively in the Parliament.⁶⁰ The Labour Party came to power in 1984 and introduced the Mixed PR system.⁶¹ In the 1996 election, the representation of women rose to 29%

⁵⁵ R E Matland and D T Studlar, 'The Contagion of Women Candidates in Single-Member District and Proportional Representation Electoral system: Canada and Norway' (1996) 58 *The Journal of Politics* 707 at 710 and for statistics on 1998 (covering 24 democracies) see Rule 1987 n 38 and International IDEA' Handbook n 12.

⁵⁶ Electoral Index n 41 at 35-36.

⁵⁷ Ibid.

⁵⁸ 'New Zealand: A Westminster Democracy Switches to PR' in the Electoral Index n 41.

⁵⁹ http://www.aceproject.org/main/english/es/esy_nz.htm (21 February 2003).

⁶⁰ Ibid.

⁶¹ Ibid.

from 21% in 1993.⁶² The Nordic countries with PR achieved the highest score of women MPs, ranging up to 40%.⁶³

Hence, a recommendation can be made that the introduction of PR in Bangladesh can enhance women's ratio in elected bodies. The introduction of PR will be desirable for women in Bangladesh for at least two basic reasons. Firstly, the election results of Bangladesh constantly show that earning votes of parties does not match with the gaining of parliamentary seats. For example, in the 2001 Election, the Awami League with 41% vote obtained only 62 seats (out of 300) in the Parliament.⁶⁴ In the 1991 election, women secured more than 30% and 50% of the votes in constituencies 16 and 5 respectively, but they gained only eight seats.⁶⁵ In 1996, women obtained 82% of the votes in 18 constituencies, and in two other constituencies, women earned 92% and 72% of the total votes; however, they won only 11 seats.⁶⁶ On many occasions, women lost their seats by marginal votes.⁶⁷ The same is applicable to a minor party. In such a situation, PR will reduce this disparity and maximise the total casting votes with parliamentary seats. Secondly, political parties in Bangladesh suffer from fear of losing seats if nomination is given to women.⁶⁸ PR could make this apprehension irrelevant.

Perhaps an argument can be advanced that PR may not be suitable to Bangladesh because it has followed MP for the last three decades. That should be refuted in reference to practices of several democracies. For example, in New Zealand, in a similar situation, the shift to PR

⁶² Ibid.

⁶³ See for details, R E Matland 'Putting Scandinavian Equality to the Test: An Experimental Evaluation of Gender Stereotyping of Political Candidates in a Sample of Norwegian Voters' (1994) 24 *British Journal of Political Science* 66 at 66-85.

⁶⁴ See Election 2001, Bangladesh Election Commission < <http://www.bd-ec.org> > (9 February 2003).

⁶⁵ Hossain 2000 n 2 at 76.

⁶⁶ Ibid.

⁶⁷ See Election 2001 n 64.

from MP (prevalent for more than a century) in 1996 was effective in enhancing women's placement in Parliament. Even in Asia, PR proved to be a suitable system. In the Philippines, the introduction of PR markedly changed the outcome of the election in favour of women.⁶⁹

The increase in constituencies from 300 to 400 in Bangladesh may further make PR more beneficial for women. It will be more obvious for women to be included in the party list when the number of constituencies increases.⁷⁰ As Matland recommends, an increased number of constituencies creates more scope for accommodating candidates of divergent backgrounds to contest elections. The constitutional provision regarding inclusion of technocrats in the Council of Ministers should also be utilized in favour of women. As already noted, 'money and muscle power' play a major role in elections in Bangladesh for which it is often difficult for women to contest the election.⁷¹ Since the assumption of this position does not require direct election, qualified women, if selected under this criterion, may contribute to promote women's political empowerment without being concerned about the costly election process.⁷²

⁶⁸ See for details, Women For Women, *Women and Politics: Orientation of Four Political Parties on Women's Empowerment Issues (Orientation of Four Political Parties)* (1995) Dhaka: Women For Women—A Research and Study Group at 24.

⁶⁹ See *Women in Local Government in Asia and the Pacific—A comparative analysis of thirteen countries* (hereinafter A Comparative Analysis) (2001) United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) at 34 <http://www.unescap.org/huset/women/index.html> (28 January 2003).

⁷⁰ R E Matland, 'Institutional Variables Affecting Female Representation in National Legislatures: The Case of Norway' (1993) 55 *The Journal of Politics* 737 at 738.

⁷¹ See Islam 2002 n 44 at 15; M R Islam, 'Free and Fair General Elections in Bangladesh Under the Thirteenth Amendment: A Political-Legal Post-Mortem' (1996) 26 *Political Administration and Change* 17 at 19.

⁷² Given a series of problems that women politicians presently experience in Bangladeshi politics, such inclusion may not be the end result of ensuring women's full and effective participation. As will be seen in following discussions women often fail to take effective participation in decision making due to, *inter alia*: (i) their limited involvement in all tiers of legislative offices; (ii) male-modeled politics and restrictive views of political parties about their governance role and; (iii) the nature and mode of selection process of reserved seats for women. Nevertheless, such a mode of women's participation in the Parliament at least could help their group interest realise by reducing the number of male MPs.

5.4.2. Difficulties in Obtaining Party-Tickets and Insignificant Positions of Women in the Party Organisation

The level of women's representation in National Parliament largely depends on their placement within political parties.⁷³ In Bangladesh, information varies regarding the exact number of political parties. The number is close to 100.⁷⁴ However, in the last three tenures of the government, five major parties represented the Parliament. The parties are: the Awami League (AL); Bangladesh Nationalist Party (BNP); Jatyio Party; Jamaat-i-Islami; and the Workers Party. As in most foreign jurisdictions, the political parties in Bangladesh enjoy exclusive power in selecting their candidates for national elections. A long party career is considered a prerequisite for getting such a selection. Obtaining a party-ticket again relates to those variables that are crucial for standing in any elections. The primary requirements are academic qualification, financial support and a family background of politics.⁷⁵ The Parliamentary experience of Bangladesh shows that very few women who have sophisticated status in education and finance can obtain a party nomination for election.⁷⁶ The significance therefore does not encourage wider and grassroots representation of women in party politics.

A nomination from a party also depends on the organisational strength of women within the party.⁷⁷ Despite the gradual involvement of women in politics (this issue is addressed in the following section), their numbers in top ranking positions are still minimal. For example, in the BNP, Begum Zia (present Prime Minister) is the only woman in the 13-member

⁷³ B Steininger, 'Representation of Women in the Austrian Political System 1945-1998: From a Token Female Politician Towards an Equal Ratio' (2000) 21 *Women and Politics* 81 at 81.

⁷⁴ The Report of ADB n 5

⁷⁵ Chowdhury 1994 n 16.

⁷⁶ See *Women in Politics* n 18 at 41 & 46; Hossain 2000 n 2 at 67-68.

national standing committee. Only 25 women out of the total 251 are represented in its National Executive Committee.⁷⁸ In the 15-member Presidium of AL, there are two women⁷⁹ and its Working Committee consists of 27 men.⁸⁰ The Worker's Party has an 8-member Standing Committee and a 21-member Polit Bureau with no woman.⁸¹ The Majlis-e-Surah is the highest body of the Jamaat-e-Islami comprising only 31 men.⁸² In the 1991 election, a list of 41 women was proposed to the AL for general seats of Parliament but only six got nominations.⁸³ The leading men of parties are very reluctant to nominate women in anticipation of losing seats.⁸⁴

Two women are presently leading two main political parties as noted earlier. Even though 'their close and inner circle of advisors mostly consists of men',⁸⁵ the unusual phenomenon of women leading both main parties in Bangladesh cannot be ignored. Nevertheless, their political involvement was linked to male kinship ties and was possible only in the absence of the capable male members of their families to lead parties.⁸⁶ As a consequence, gender issues receive very little attention in policies and strategies of parties. In most cases, women are subsumed under the categories of the 'poor' and 'general public' (indicating no special attention/preference for women is provided by political parties despite their

⁷⁷ Matland 1993 n 70.

⁷⁸ See BNP's National Executive Committee, <BNP.Stand.http://www.bnp-bd.org/BNP's%20StandingCommittee.htm> (10 January 2004) ; M Guhathakurta, 'The Women's Agenda and the Role of Political Parties', in N Chowdhury et al (ed) *Women and Politics* (1994) Dhaka: Women for Women—A Research and Study Group at 56.

⁷⁹ Women in Politics n 18 at 46.

⁸⁰ Guhathakurta 1994 n 78 at 56.

⁸¹ *Orientation of Four Political Parties* n 68 at 27.

⁸² Id at 31.

⁸³ Id at 24.

⁸⁴ 15 women members from each of the four parties participated in a dialogue with 'Women for Women'-A Research and Study Group. They were all (except for women belonging to Jamaat-i-Islami) of similar views that their party has '...fear of losing seats if nomination is given to women.' See *Orientation of Four Political Parties* n 68 at 24.

⁸⁵ The Report of ADB n 5.

⁸⁶ See Women in Politics n 18 at 41 & 46; Hossain 2000 n 2 at 67-68.

underrepresentative status in politics).⁸⁷ As the Task Force Report 1991 observed, the political parties in Bangladesh bypassed by and large the larger issue of women and their paths for political emancipation.⁸⁸ It has also been evidenced that parties nominate women to those seats where the possibility of winning is relatively low.⁸⁹

In their manifesto, three major parties recognise a broad participation of women in politics through their support of reserving seats in the Parliament. However, none provides a clear or definite view about the issue.⁹⁰ The concept of women-quota within parties is not presented either.

By contrast, fixing a minimum quota (for women) for general seats of Parliament and for all internal bodies of political parties is regarded as ‘essential to accelerate women’s advancement in politics.’⁹¹ The practices of political parties across nations provide ample evidence for this direction. According to the annual report of the Inter-Parliamentary Union, Austria ranks ninth of the 177 countries with 26.5% female representation.⁹² It is a rule for most of the Austrian parties to provide a quota for women. In this regard, the Social Democratic Party of Austria enacted a rule in 1993 which requires the party to reserve a 40% share of nominations for women for all elected offices.⁹³ The manifesto of the Greens of Austria provides that ‘... in all elected functions at least 50% women must be represented. A woman majority is quite desirable.’⁹⁴ As a result, women’s ratio in the party

⁸⁷ Chowdhury 1994 n 16 at 99-101.

⁸⁸ Hamid 1996 n 20 at 93.

⁸⁹ Guhathakurta 1994 n 78 at 28-29.

⁹⁰ For example, the BNP does not have any definite stand on the issue. Some other political parties opposed the idea of keeping seats reserved for women. See ‘Ensure Equitable JS Seats Distribution’ *The Daily Star* (11 Aug 2000).

⁹¹ The UN Study n 6 at 44.

⁹² Steininger 2000 n 73 at 81.

⁹³ Id at 85.

⁹⁴ Id at 97.

list increased '40.3% in the 1995 general election.'⁹⁵ In the United States, women represent 34% of the membership of the American City Parties.⁹⁶ The Conservative and Labor Parties of the United Kingdom provide women with 49% and 40% membership of parties respectively.⁹⁷

The setting of a quota by a number of political parties in the Nordic countries has also proven successful in according women an improved access to elected bodies.⁹⁸ In 1983, the Norwegian Labour Party endorsed an affirmative measure for its internal bodies and public elections. Consequently, by 1989 women formed a majority, '51% of the parliamentary delegation'.⁹⁹ In 1997, women accounted for 39.4% seats in the National Parliament.¹⁰⁰

In other jurisdictions, the use of a quota within the party is also a common means of enhancing women's representation. For example, most major parties of Germany introduced women's quotas for all levels of decision-making. Among them, the Green Party has the highest number of women in its party-membership and executive committees at the federal level, which comprise 37.5% and 54.5% of the total respectively.¹⁰¹ It helped women achieve nearly double the positions in the party hierarchy.¹⁰² In Australia and Sweden, there is no law to place a certain proportion of women in the lists of parties.¹⁰³ Nevertheless, most of the parties have internal rules and practices to nominate women. The Labor Party of Australia, for example, set a target to endorse women in 35% of winnable

⁹⁵ Id at 89.

⁹⁶ J Lovenduski and J Hills, *The Politics of the Second Electorate* (1981) London: Routledge & Kegan Paul at 42.

⁹⁷ J Lovenduski, 'Sex, Gender, and British Politics' (1996) 49 *Parliamentary Affairs* at (para 17).

⁹⁸ L Karvonen and P Selle, *Women in Nordic Politics- Closing the Gap* (1995) Sydney: Dartmouth at 6-14.

⁹⁹ Matland 1993 n 70 at 749.

¹⁰⁰ Inter-Parliamentary Union, 'Women in National Parliaments, Lower or Single House as of January 1, 1997 World Classification- Selected Countries Only' Geneva: IPU 1997.

¹⁰¹ Chowdhury 1994 n 16 at 277-278.

¹⁰² Ibid.

¹⁰³ H J Steiner and P Alston, *International Human Rights in Context-Law, Politics, Morals- Text and Materials* (1996) Oxford: Clarendon Press at 966.

seats in 1994.¹⁰⁴ In Canada, the Federal New Democrats adopted affirmative action resolutions that resulted in a 38% nomination for women in parliamentary elections.¹⁰⁵ Women in major party organisations in Canada constitute on average, 25% of party executive members, 20% of campaign managers and 5% of the cabinet members.¹⁰⁶ In the general election of 2001, women gained 16.62% of the seats in Parliament, substantially up from 11.13% in 1993.¹⁰⁷ In India, the Congress (I) and Janata Dal each fixed a 30% quota for women in their manifesto. In the Parliament of 1991-1996, the Congress had 20 women MPs out of 795 members and the total number of women MPs was 39.¹⁰⁸

The worldwide practices and consequences thus support that in Bangladesh, given the grossly uneven positions of women in the party hierarchy, it becomes essential to fix such a target. Political parties should set a women-quota of 30-35% for all internal organisations of parties and elected offices. Such a provision may pressurise parties on a competitive basis to pay special attention to organising training and raising funds for women.¹⁰⁹ The consequence would ultimately work for women acquiring political knowledge and skill. This practice can influence other parties too which are traditional and restrictive towards women's politics to follow in order to avoid the risk of losing women's votes. This practice is observed in Canadian politics.¹¹⁰

Apart from a quota, a decentralised mode of selection can create more opportunities for local women to be engaged in politics. This should be done by shifting some of the

¹⁰⁴ 'State of Women in Urban Local Government Australia' (hereinafter Local Government of Australia), (2001) United Nations Economic and Social Commission for Asia and the Pacific at 13 <http://www.unescap.org/huset/women/index.html> (28 January 2003).

¹⁰⁵ Matland 1994 n 63 at 718.

¹⁰⁶ Chowdhury 1994 n 16 at 150.

¹⁰⁷ See 'Elections Canada'

<http://www.parl.gc.ca/information/about/e/asp/WomenElect.asp?lang=E&source=hoc> (1 December 2003).

¹⁰⁸ See International IDEA's Handbook n 12.

¹⁰⁹ Matland 1994 n 63 at 718-720.

authorities of national parties to local party organisations. The current nomination process (resting upon the national parties) primarily concentrates on urban women who have a sound background of educational and ‘family-politics’. Therefore rural women, who constitute 90%¹¹¹ of the total number, are outside the circle of power. These disadvantaged women are very likely to be better represented by local women (if selected under this mode) who share their common experience. For example, ‘only a labourer can understand what the workers want’.¹¹² As a legitimate principle of representation and as one of the suitable methods of integrating various groups in politics, this concept is ‘strongly embedded in Norwegian parties’.¹¹³ In this process, local organisations are more capable of assessing the suitability of those local women.¹¹⁴

5.4.3. Unfavourable Political Environment

The struggle for a democratic government in Bangladesh in 1990 made some qualitative changes in women’s under-representative situation in politics.¹¹⁵ In 1991, a parliamentary form of government was established by ending eight years of military rule. Since then, a noticeable enthusiasm has been observed among women in exercising their voting rights. A number of NGOs carry out programs to raise awareness among women electorates.¹¹⁶ Women began to take part in political discourse, meetings, rallies and processions in favour of their parties.¹¹⁷

¹¹⁰ Ibid.

¹¹¹ A K Goswami, ‘Empowerment of Women in Bangladesh’ (1998) 5 *Empowerment-A Journal of Women for Women* 45 at 68.

¹¹² Karvonen 1995 n 98 at 291.

¹¹³ Id at 292-293.

¹¹⁴ Ibid.

¹¹⁵ See for details, Hossain 2000 n 2 at 69-71.

¹¹⁶ Ibid.

¹¹⁷ The Report of ADB n 5.

Nevertheless, women's participation is still symbolic and politics remains the domain of men.¹¹⁸ The political corruption of Bangladesh has an obvious link with this lower trend of women in politics.¹¹⁹ Violence, killing, booth capturing, buying of votes, proxy vote, vote riggings and election fraud are common manifestations in the elections of Bangladesh.¹²⁰ Political parties often adopt strategies to bring the outcome of elections in their favour at any cost.¹²¹ Criminals are usually employed in the 'aggressive electioneering tactics' and are given political shield.¹²² This has necessitated the monitoring of elections in Bangladesh in recent years by international observers. The electoral law of Bangladesh sets a limit of TK 0.3 million (US\$5000) on election spending.¹²³ However, its compliance has not been monitored.¹²⁴ In the last elections, the Election Commission frequently failed to take effective steps to control election expenditure.¹²⁵ Transparency International observed that '[decentralization] of decision-making..., merely distributes for corruption opportunity in the absence of an independent monitoring and prosecutorial system and promotes status quo.'¹²⁶ The proper disclosure of election expenditure and the code of conduct and ethics for politicians do not receive due weight in the administrative and legislative frameworks of the country. In addition, women's rights to vote are often frustrated due to the lack of

¹¹⁸ The exact number of women in party organisations cannot be determined since statistics on this issue are not maintained by the political parties.

¹¹⁹ Islam 2002 n 44.

¹²⁰ For example, in one UP Election held in 1997, more than 30 persons were killed in election violence. In national Parliamentary Elections, this number of killing and the scale of violence have been much higher and severe. See 'Union Parishad Election--An Analysis' <wysiwyg://7/http://groups.yahoo.com/group/Shetubondhon/message/5411> (11 December 2003); the US State Report n 6; Islam 1996 n 71 at 19.

¹²¹ Islam 1996 n 71 at 20.

¹²² A Ziauddin, 'Hartal: Reflections on Law' *The Daily Star* (28 Feb 1999).

¹²³ The elections of Bangladesh are regulated by, *inter alia*, *Ordinance No. XV of 1976, Electoral Roll Ordinance (Ordinance NO. LXI of 1982), Seats for Women Members-Order 1973 and Code of Conduct 1996*.

¹²⁴ Transparency International Bangladesh, 'Governance, Structural Adjustment & the State of Corruption in Bangladesh' 2002 at 4 <http://www.ti-bangladesh.org/olddocs/muzaffer/muzaffer.htm> (25 June 2002).

¹²⁵ See 'EC failed to control poll expense: WP (Workers Party)'; 'Violation of poll code' *The New Nation Dhaka* (25 November 2001).

¹²⁶ Transparency International 2002 n 124 at 4.

security and to the deterioration of law and order in the country. The pre- and post-electoral violence in 2001 ‘exceeded all records of atrocities in previous elections’.¹²⁷ Notwithstanding some special measures undertaken by the Election Commissioner to ensure women’s access to polling booths, a group of women was warned by a particular political party threatening that, ‘if they go to the polling centres they would be killed or their houses looted...[ignoring] all these threats and fears, those who did dare to go ... they were replied by shocking brutalities on them.’¹²⁸ In some Unions, women are still prohibited from exercising their voting rights by the execution of *fatwa* (religious dictate).¹²⁹ Thus, the overall atmosphere is not friendly to women’s participation in politics.

Numerous countries worldwide have stringent regulations and proper implementation of monitoring election expenditure. For example, in Australia, disclosure rules apply to donors, parties and other persons, rather than only candidates involved in the election. Under sections 305-306 of the *Commonwealth Electoral Act* 1918, political parties are obligated to make returns to the Electoral Commission at the end of the financial year showing all receipts of subscriptions or donations received from different sources. The same is applicable to persons who made gifts totaling \$1,500 or more to political parties.¹³⁰ In India, in contrast to Bangladesh, a more suitable practice prevails; to ensure the accuracy of the electoral roll and prevent proxy and fraud voting, the Election Commissioner

¹²⁷ N Matin, ‘Women’s Rights: Freedom of Participation and Freedom from Violence’ in Ain O Salish Kendra (ASK), *Human Rights in Bangladesh 2001* (2002) Dhaka: ASK at 231.

¹²⁸ Id at 230-23. In the 2001 election, women, especially from Hindu and minority communities, were prevented (believing that they were supporters of one particular political party) by another leading political party from going to the vote centres.

¹²⁹ For example, in the Choiani and Durgapur Unions under Noakhali District, approximately 16,000 women were prohibited from exercising their voting rights during the last three decades following a *fatwa* issued by *Alem* (religious leader) and the community elders, believing that women should not have voting rights. Women from a number of Unions were also subjected to same *fatwa*. In 2001, the Bangladesh Women Lawyer’s Association filed two public interest litigations on behalf of women electorates of Surat and Chandra Dighalia Unions. For details see, id at 230.

recently introduced ID cards for the electorate.¹³¹ Unauthorised expenditure was made a criminal offence under section 117H of the *Indian Penal Code* 1860. Under article 324 of the Constitution of India, the display of banners, posturing and rally for election purposes are subject to strict scrutiny. On several occasions, the issue of excess expenditure in elections has come before the Supreme Court of India.¹³² The Court held that the expenditure incurred by any institution or individual shall be presumed to be of the candidate ‘unless a political party can specifically account for money spent during the campaign.’¹³³ Since then, ‘parties have curtailed some of the more extravagant campaigning that was previously a part of Indian elections’.¹³⁴ All of these factors, in turn, help develop a non-corrupt practice in politics.

In Bangladesh, strong regulatory control, with its proper implementation, could only lessen corrupt practices in politics to which the administration has the most important role to play. Corruption and irregularities involved in politics can largely be removed if the existing election laws are allowed to work.¹³⁵ It is widely recognised in the country that laws cannot be properly implemented due to, *inter alia*, the government’s undue favouritism of its own party.¹³⁶ Instead, laws are frequently violated for narrow political objectives. Consequently, one violation of law encourages another violation and this has become the main barrier to

¹³⁰ *Commonwealth Electoral Act* 1918 s 305B. For similar provision see also, *Canada Elections Act* 1977 (amended in 1996).

¹³¹ See Election Commission of India <<http://www.eci.gov.in>> (21 February 2003).

¹³² See *Singh v Singh Jassi* [1999] 956 LRI 4 and *D Ramachandran v RB Janakiraman & Ors* [1999] 589 LRI 1.

¹³³ *Common Cause v Union of India and Others* [2000] 817 LRI 1.

¹³⁴ See ‘Limit on poll expenses’ in The Electoral System of India, <<http://www.eci.in>> (9 February 2003).

¹³⁵ Under section 92B of the *Representation of the People Order* 1972, political parties and contesting candidates are required to comply with, *inter alia*, rules regarding election campaign, subscription and donation.

¹³⁶ M A Rahman, ‘Frustrating Joint Special Drive’ *The Daily Star* (26 May 2002).

developing a democratic political culture in Bangladesh.¹³⁷ Although the cooperation of government is essential to overcome the situation, the honesty and impartiality of the Election Commissioner (EC) is also crucial in maintaining a sound political culture. The Constitution requires the EC to monitor the compliance of electoral rules and regulations beyond political fear or favour.¹³⁸ Recently, a controversy stemmed about the role of the EC of Bangladesh in controlling election expenditure in the last Parliamentary election held in 2001.¹³⁹ The EC should meet a minimum standard of compliance with the constitutional provisions and owes its accountability to the legitimate expectation of the people. The people of Bangladesh have a long 'bitter experience' in an undemocratic and non-transparent political system where virtually nobody is accountable to anybody.¹⁴⁰ A strong supervision of the EC in regulating election expenditure and all sorts of irregularities can create public support and stabilise the political order. The introduction of ID cards for electorates may reduce the chances of false and fraudulent voting. As in India and Australia, the responsibility for maintaining a legal limit on election expenditure should be bestowed on the political parties and other concerned persons in Bangladesh, instead of individual candidates only. In addition, to restrain election expenditure, it should be mandatory for political parties and individual candidates to make wealth and other financial statements public. These statements must be properly audited before making them public.

¹³⁷ US State Report n 6; S J Haider, 'Politics, national crisis and the goal of emancipation' *The Independent* (10 August 2000) Editorial.

¹³⁸ 'The Election Commission is an independent body in the exercise of its functions and subject only to the Constitution...'. See the Constitution of Bangladesh n 11 arts 118(4) & 126.

¹³⁹ The Workers Party, a major political party in Bangladesh claimed that the EC failed to control the election expenditure incurred by the present ruling party in the election 2001 because of his bias towards this party. See 'EC failed to control poll expense: WP (Workers Party)'; 'Violation of poll code' *The New Nation*, Dhaka (25 November 2001).

¹⁴⁰ See generally Islam 2002 n 44 at 1-16.

Finally, in order to restrict corruption in politics and to encourage a democratic political culture, a code of conduct for politicians is indispensable in Bangladesh.¹⁴¹ A politician has the right to freedom of association and assembly but this is qualified by reasonable restrictions imposed by laws in the interest of public order.¹⁴² As potential representatives of the people, their political behaviour must reflect their morality and their obedience to law, and their accountability to the people. In a traditional society such as Bangladesh, women will feel encouraged to participate in politics when they realise that, *inter alia*, the electoral process is less expensive but highly secured.

5.4.4. Low Level of Education

Education is the single most important essential to political empowerment of women.¹⁴³ Only education can create scope for paid employment and for the acquisition of skill and knowledge that is imperative for entering into politics. A strong correlation between education and political empowerment of women is observed in nearly all jurisdictions. For example, in Japan, improved access of women to higher education is said to be a prime reason for their recent and wider participation in the Parliament.¹⁴⁴ In Venezuela and Tanzania ‘educational background, experience, and certain skills’ work as an advantage for an appointment to elected office.¹⁴⁵ In Kenya, four women candidates out of five

¹⁴¹ See the Constitution of Bangladesh n 11 arts 37-38; M R Islam, ‘Constitutionalism and Governance in Bangladesh’ in M Allauddin and S Hassan (ed), *Development, Governance and the Environment in south Asia* (1999) London: Macmillan at 179.

¹⁴² M R Islam, ‘The Seventh Amendment to the Constitution of Bangladesh: A Constitutional Appraisal (1987) 58 *Political Quarterly* 312 at 329.

¹⁴³ ‘In this highly technologized global economy, educational [opportunities]... are a necessity, not an option’. See B Reagan, ‘The Impact of Cutbacks in Affirmative Action on Community Lawyering’ (1999) 14 *Berkeley Women’s Law Journal* 6 at 8.

¹⁴⁴ The UN Study n 6 at 35.

¹⁴⁵ Id at 36.

maintained that formal education ‘very strongly’ contributed to their current political outlook.¹⁴⁶

As a part of the government’s commitments to international obligations, ‘girls’-education’ received due attention in the formal plans and programs of Bangladesh. The Fourth Five Year Plan (1990-95) made girls’ education free up to class VIII for rural areas.¹⁴⁷ The extensive involvement of UN agencies and NGOs helps increase their enrolment in primary schools to 77.1%,¹⁴⁸ but the drop-out rate in the secondary level is significant, in comparison with boys.¹⁴⁹ Bangladesh ranks ‘115th out of 131 countries in its literacy status’,¹⁵⁰ and nearly 90% of rural women are still illiterate.¹⁵¹ In terms of the illiteracy rate, Bangladesh stands second from the lower end among the South Asian Association for Regional Cooperation Countries (SAARC) and some other developing and Islamic countries.¹⁵²

¹⁴⁶ See J Lawless, ‘Women Candidates in Kenya: Political Socialization and Representation’ (1999) 20 *Women & Politics* 49 at 64.

¹⁴⁷ J Huq, ‘History of Literacy Efforts for Women in Bangladesh: Various Issues and Dimensions’ (1997) 4 *Empowerment-A Journal of Women for Women* 79 at 98.

¹⁴⁸ *Statistical Pocketbook Bangladesh 2000* (2002) Bangladesh Bureau of Statistics: Government of the People’s Republic of Bangladesh at 351.

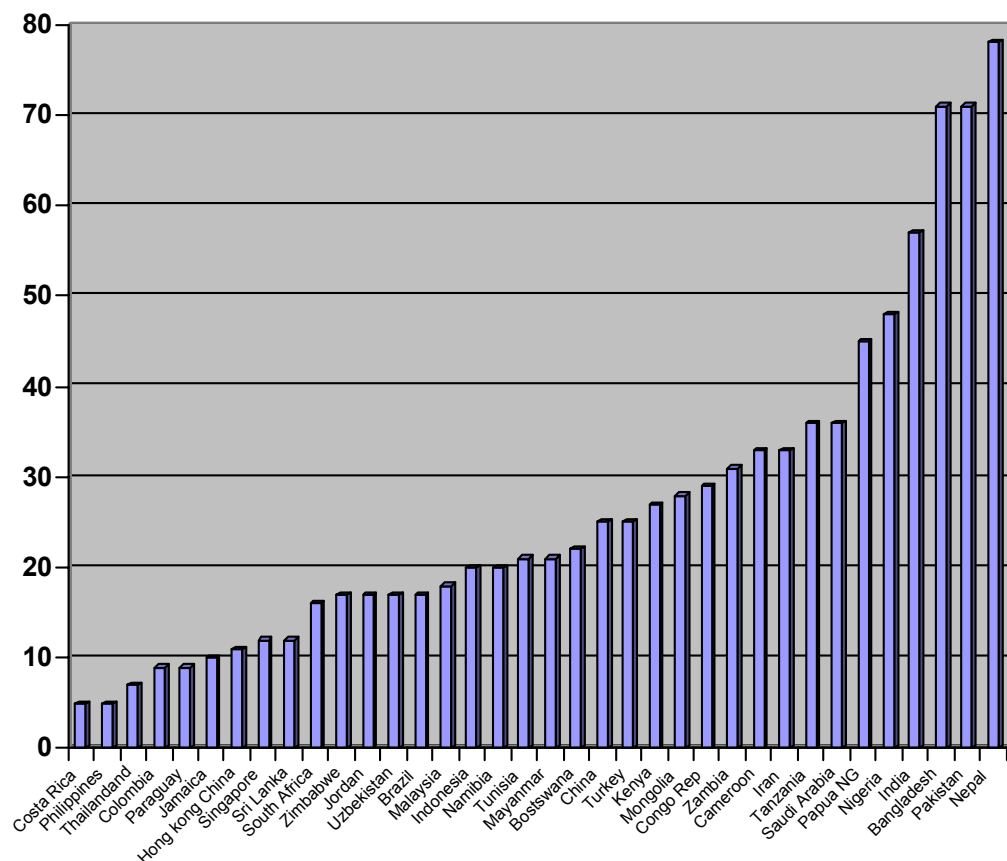
¹⁴⁹ The Report of ADB n 5; Huq 1997 n 147 at 89.

¹⁵⁰ Huq 1997 n 147.

¹⁵¹ M H Rahman and R Huq, ‘Human Rights in Bangladesh: An NGO Perspective’ (1997) 14 *The Dhaka University Studies* 1 at 7.

¹⁵² Huq 1997 n 147 at 80.

Figure 5.2: Women's Illiteracy Rate in some Developing and Islamic Countries¹⁵³



Although the Fourth Five-Year Plan had a pragmatic outlook regarding women's education, it largely failed to reach its goal due to 'ill-designed' programs and uncoordinated efforts of the government.¹⁵⁴ On 11 December 2003, a UNICEF report revealed that about 1.5 m girls in Bangladesh still remained out of school.¹⁵⁵ The government plans, while recognising the need for girls' better education, failed to take the socio-economic-traditional outlook of the family into account. For several reasons, parents desire to give their school-age daughters in marriage in preference to continuing their education. The primary reasons are: the long

¹⁵³See 'Selected World Development Indicator' The World Development Report 2001 <http://www.worldbank.org/poverty/wdrpoverty/report/index.htm> (10 January 2004).

¹⁵⁴ Id at 97; see also, J Huq at el (ed), *Beijing Process and Follow- Up Bangladesh Perspective* (1997) Dhaka: Women For Women at 5.

distance between the residence and school, the lack of transport, the adverse environment of school and the deterioration of law and order.¹⁵⁵ Moreover, successive governments of Bangladesh have not developed any administrative machinery to assess the impact of national and foreign programs in this regard.

In addition, the lack of availability of educational institutions, especially at the tertiary level, is a crucial problem in Bangladesh. The number of institutions is far fewer in proportion to the total number of students. For example, a student is required to undertake a written and a *viva-voci* examination to gain admission into a public university. Admission tests for public universities are called through advertisements in *National Dailies*. In these cases, 6-10,000 applications are lodged for only 60-100 seats. The remaining candidates have to rely on other modes such as seeking admission into a public college which has a postgraduate program with a limited student capacity, or to drop out. In the wake of such a situation, numerous private institutions have been established in the country, especially in urban areas. The tuition and relevant fees of these institutions are beyond the reach of disadvantaged women.

Another destructive aspect of the education system in Bangladesh is that a significant number of institutions adopt unethical modes in their admission procedures. According to a survey conducted by Transparency International, 74% of the households in Bangladesh

¹⁵⁵ UNB, Dhaka, '1.5 m girl children still out of school, says Unicef's 'State of World's Children 2004' report' *The Daily Star* (12 December 2003).

¹⁵⁶ Eveteasing (lewd comments, obscene gestures or remarks and physical contact) and unwelcome 'love-offer' and threats of sexual violence in the streets and schools by the local *Mastans* (criminal and influential males in terms of economic or political status) are common phenomena in Bangladesh. See 'Option for a Girl Child', in Ain O Salish Kendra (ASK), *Rights and Realities* (1997) Dhaka: ASK at 123.

used irregular methods such as the payment of a donation and the use of political influence for admission of their children into school.¹⁵⁷

Statistics on the political participation of women in India are not encouraging. However, in regard to educational opportunities and awareness of this end, India is far ahead of Bangladesh, even though women have yet to achieve a high level of education. The Supreme Court of India in *Jain v State of Karnataka* extended the right to life to include education, as human dignity cannot be assured without it.¹⁵⁸ In this case, a woman was denied admission into a private medical college since the tuition fee for the course was beyond her means to pay. The Court recognised the ‘right to education’ as a fundamental right and mandated the State to ‘establish educational institutions to enable the citizens to enjoy’ that right.¹⁵⁹ The Court further observed that the ‘State’s action in permitting tuition fees to be charged by State organised educational institutions is wholly arbitrary and as such violative of Art. 14 of the Constitution of India.’¹⁶⁰ The validity of the rules of admission of another institution was raised in *Ahmedabad Municipal Corp and Anor v Nilaybhai R Thakore and Anor*.¹⁶¹ The consequences resulted in the 93rd Amendment to the Indian Constitution. It entitles all citizens of India aged between six and 14 the right to education. Under this Amendment, the State is bound to develop sufficient educational institutions to ensure free and compulsory education. An insertion of article 21-A in the Constitution also provides scope for judicial intervention when the government fails to ensure that fundamental right.¹⁶² This sort of practice makes the private institution cautious

¹⁵⁷ Transparency International Bangladesh, ‘Corruption in Bangladesh’ Surveys: An Overview’ <http://www.ti-bangladesh.org/olddocs/survey/overview.htm> (25 June 2002).

¹⁵⁸ (1992) AIR SC 1858 at 1864.

¹⁵⁹ Id at 1866.

¹⁶⁰ Ibid.

¹⁶¹ [2000] 89 LRI 1.

¹⁶² *Constitution (Ninety-third Amendment) Act 2001* art 21A.

about its malpractice on the one hand, and pressurises governments to provide more educational opportunity for their citizens, on the other.

Likewise, the government of Ghana developed an affirmative action in admission in tertiary institutions. According to this policy, if a girl and a boy have the same qualifying marks for admission, the girl should be preferred. In order to train girls, the Education Ministry of Ghana introduced science clinics during holidays. Successful women scientists regularly join the program and it proves useful. The publications of the International Women's Rights Action Watch reveal that many countries are now sending their girls to Ghana to participate in the science clinics.¹⁶³

In Bangladesh, education that suffers from the lack of insight and future guidelines¹⁶⁴ needs to be addressed with a strong political will and judiciousness. To this end, the government's attention should concentrate more on the proper implementation of several programs which are designed to uplift women's education, rather than on their placement on paper. In collaboration with UN agencies and other foreign NGOs that are working in Bangladesh to promote women's rights, the government should find new ways and strategies to make 'education-programs' more responsive to women. Women trainers could be appointed on a local basis to impart education to girls and to raise awareness among family members, individuals and the community. Some incentives such as the introduction of annual awards or monetary help for parents might be effective where their daughters successfully pass the secondary level. There seems to be no alternative to a careful analysis, and a follow-up program by the government. Regular monitoring will identify problems concerned with a particular program of education and thereby appropriate methods can be employed at least

¹⁶³ The IRAW Reports 1997 n 4.

to minimise these. At the university level, a quota of 25% seats for women could make up for their unequal educational status. Some education centres of technical institutes should also be introduced exclusively for women as in India.¹⁶⁵ It would help immensely to increase the number of women in those fields in which they are traditionally far behind men.

5.4.5. Other Variables and the Role of Women's Organisation

The socio-economic and occupational status, positive cultural outlook and family supports are significant determinants of women's political empowerment.¹⁶⁶ Women in Bangladesh have a traditional disadvantage in access to socio-economic resources,¹⁶⁷ as considered in Chapter 3. The cultural attitudes that negate women's public roles are still dominant in Bangladesh. As Chapter 4 suggests, in respect of employment, women hold only 8.6% of the 1st grade public sector jobs. In private industries, particularly in the garment industries, women account for 90%¹⁶⁸ of the total positions. Nevertheless, this high occupational status of women does not work in furthering their political awareness, particularly at the national level, because private industries provide low-skilled jobs mostly for less educated women.¹⁶⁹

¹⁶⁴ See generally S Begum, 'The Issue of Literacy and Women's Role in the Development Process' (1994) 1 *Empowerment-A Journal of Women for Women* 13 at 13-22; see also, Huq 1997 n 147 at 104.

¹⁶⁵ 'Presently there are 189 Women's ITIs [Indian Technical Institute] and 211 Women's Wings in general ITIs...' and 45 Polytechnics exclusively for women. For details see, Initial reports of State parties, India, CEDAW/C/IND/1 10 March 1999 at 46 (para 173-174).

¹⁶⁶ Matland 1994 n 63 at 113.

¹⁶⁷ T Monsoor, *From Patriarchy to Gender Equity Family Law and Its Impact on Women in Bangladesh* (1999) Dhaka: The University Press Limited at 51-58.

¹⁶⁸ A K M Nuruzzaman, 'Human Rights and Women in the Garments Industry in Bangladesh' - this paper was presented in the Sixth Women in Asia Conference 2001 in the Australian National University, Canberra, 23-26 Sep 2001 at 1.

¹⁶⁹ See P P Majumder, 'Impact of Working Conditions and Terms of Employment on the Women's Labour Force Participation and their Labour Productivity' (2001) 8 *Empowerment-A Journal of Women for Women* at 1-36.

Leaving aside the above factors, traditionally, the political background of families bears a direct link with women politics in Bangladesh.¹⁷⁰ Nonetheless, the political history in Bangladesh suggests that very few female relations of politicians, compared to male, have been able to be involved in politics. The very nature of politics makes family members unwilling to provide support for women.¹⁷¹ For example, Sheikh Hasina and Begum Zia, the two leading women politicians of Bangladesh, entered into politics through their kinship linkages to male authorities. They are representing the places of their father and husband respectively, but in the absence of capable male members of their families to lead the parties.¹⁷² In this regard, Khan comments:

They had been elected not for what they stood for, but the political parties they led and the sympathy and support their followers had for their brutally assassinated husband and father, the founders of those political parties. The country is run by their political advisors and the beaurucracry-all male-and they have little say and understanding in the region of politics and decision-making.¹⁷³

All of these problems involved in politics in Bangladesh cannot be remedied instantly, however Women's Organisations (WOs) can play a significant role in overcoming some of the difficulties faced by women legislators in the country.¹⁷⁴

In Bangladesh, the declaration of International Women's Decade (1975-85) gave the WOs the strength to raise their voices in advocating for women.¹⁷⁵ Following the Beijing Conference, a number of WOs, specialising in political empowerment of women, are

¹⁷⁰ J Huq et al (ed), *Women in Politics and Bureaucracy* (1995) Dhaka: Women For Women-A Research and Study Group at 16.

¹⁷¹ US State Report n 6.

¹⁷² Huq 1995 n 170.

¹⁷³ S R Khan, *The Socio-Legal Status of Bangali Women in Bangladesh: Implications for Development* (2001) Dhaka: The University Press Limited at 32.

¹⁷⁴ W Rule, 'Why More Women are State Legislators- A Research Note' (1990) 43 *The Western Political Quarterly* 437 at 445.

¹⁷⁵ T Siddiqui, 'Effective participation of women in Local Government' *The New Nation* Dhaka (28 December 2002).

operational at the national and local levels.¹⁷⁶ The WOs successfully lobbied successive governments to introduce reserved seats for women and direct election for those seats at local levels. They participated in the preparation of the State Report to the CEDAW Committee and influenced the government to withdraw its reservations pertaining to articles 13(a) and 16(1)(f) of the CEDAW.¹⁷⁷ Nevertheless, the WOs within the political party cannot succeed in advancing women's political awareness and empowerment because of their limited involvement in parties' hierarchical positions. Consequently, they could not exert greater pressure on political parties to accede to their demands. For similar reasons, women's issues are not getting priority in the activities of political parties.¹⁷⁸

Many countries provide examples of how WOs use their political wisdom successfully within the party platform to promote gender issues. In South Africa, the WOs effectively influenced the African National Congress to nominate women in one-third of the seats of all elected bodies. 'Largely as a result of this provision, 111 out of the 400 National Assembly seats, or 27% of the total, are currently held by women.'¹⁷⁹ In the 1994 election, women, on average, won 25% of seats in the federal and provincial legislatures.¹⁸⁰ The CEDAW Committee has acclaimed the roles of WOs in drafting the Constitution of South Africa in a gender-neutral language.¹⁸¹ With two prime objectives they work in three groups in the Parliament. The objectives are: (i) to strengthen the role of women MPs; and

¹⁷⁶ For example, '... Khan Foundation is one of the pioneer organisations that train women members to strengthen their positions in Local Government', see *ibid*.

¹⁷⁷ A Afsharipour, 'Empowering Ourselves: The Role of Women's NGOs in the Enforcement of the Women's Convention' (1999) 99 *Columbia Law Review* 129 at 157 & 163.

¹⁷⁸ F D Chowdhury, 'Women and Election – Issues in Bangladesh' (2000) 8 *Rajshahi University Studies* 121 at 123.

¹⁷⁹ Initial Report of State Parties, South Africa, CEDAW/C/ZAF/1, 25 February 1998 at 44-45. http://www.bayefsky.com/...ilename/southafrica_cedaw_c_zaf_1_1998 (13 August 2003).

¹⁸⁰ S Khan, 'The Convention on the Elimination of All Forms of Discrimination against Women and its Impact on Establishing Substantive Equality of Women in Politic and Public Life' (2000) 7 *Empowerment-A Journal of Women for Women* 43 at 56.

¹⁸¹ Initial Report of State Parties, South Africa n 179.

(ii) to ensure that women's concerns are properly reflected in all legislation.¹⁸² The WOs also influenced the Parliament to ratify CEDAW without any reservation and to form, *inter alia*, the Commission of Gender Equality and Parliamentary Women's Group.

With a similar objective, the WOs of Sweden efficiently transformed women's issues into party issues. In 1969, they forced political parties to adopt an all party document titled 'Towards Equality'. It placed 'equality' at the top of the political agenda and recommended that 'each sex should have representation amounting to at least 40 per cent'.¹⁸³ As a result, parties have to honour the 'recommended guideline' at all levels, despite the absence of any formal quota for women.¹⁸⁴ The WOs also have enormous influence on nominating women candidates. Their activism and frequent campaigns within the party and communities helped women gain positive responses from parties.

Similarly, the WOs of Austria and Tanzania have been using international standards as a part of their efforts to advance women's political strength.¹⁸⁵ More than a decade before, the WOs of Austria forced the Social Democratic Party to accept a 25% women's-quota for all elected offices.¹⁸⁶ A rapid change in attitudes of men and women was noted in Tanzania after the Nairobi Conference in 1985.¹⁸⁷ Further, the experience of other European countries also influenced the Scottish WOs' claims for a 'gender-balance' in the Parliament.¹⁸⁸ Furthermore, in Germany, a strong claim by WOs led to the enactment of the

¹⁸² Khan 2000 n 180 at 56.

¹⁸³ J Lovenduski and P Norris (ed), *Gender and Party Politics* (1993) London: SAGE Publications at 280 & 289.

¹⁸⁴ For example, the Liberals adopted the 'recommended guideline' in 1972. See for detail, *id* at 279-281.

¹⁸⁵ The UN Study n 6 at 52.

¹⁸⁶ Steininger 2000 n 73 at 85.

¹⁸⁷ See generally J L Rakstad, C E Kaiser and K T Pribadi, 'The Progress of Tanzanian Women in the Law: Women in Legal Education, Legal Employment and Legal Reform' (2000) 10 *Southern California Review of Law and Women's Studies* 35.

¹⁸⁸ '...despite their relatively few numbers... [the WOs] are prominent in the coalition for constitution change, advocating equal representation and gender equality for a Scottish Parliament'. See A Brown, 'Women and Politics in Scotland' (1996) 49 *Parliamentary Affairs* 26 at (paras 1 & 8).

Second Equal Rights Acts 1994. It requires all institutions of the State to forward double nominations, one for a man and another for a woman of ‘equal suitability for the seat in the body’.¹⁸⁹ The WOs of Australia have their own policies to improve women’s status. They employed ‘bureaucratic means’ of monitoring and evaluating outcomes of government activities towards women.¹⁹⁰

The above instances therefore, support that, in order to promote women’s ‘grossly-uneven’ status in politics, the WOs in Bangladesh should devote their efforts to motivating women and political parties and, especially, the community at large, to encourage their (women’s) engagement in politics. They can help women overcome ‘entry-barriers’ to politics by providing training, pre-election assistance, and networking within the community.¹⁹¹ As in foreign jurisdictions, the WOs within the party should also take a leading role in creating positive images among families and communities. Their interactions with leading NGOs would help develop appropriate abilities and skills to facilitate women’s access to politics. This interaction may also help WOs to formulate their own policies for women and reduce their reliance on men. In addition, the careful investigation and analysis of party-activities can make those policies more meaningful to women.¹⁹² Further, the citation of international obligations of the government may strengthen their demands for achieving a definite

¹⁸⁹ *Second and third periodic reports of Germany*, CEDAW/C/DEU/2-3, 4 November 1996 at (paras 154-155).

¹⁹⁰ Chowdhury 1994 n 16 at 83.

¹⁹¹ The Scottish Constitutional Commission advocated certain measures such as, ‘changing parliamentary working hours and meeting times, facilities for caring, attendance and career allowances and... [to establish] a Parliamentary Equal Opportunities Commission’ for overcoming socio-economic and other barriers. See for details, Brown 1996 n 188 at (para 33).

¹⁹² The watchdog activities and ‘recurring analysis of WOs, and their threats for imposing quota’ always put pressure on parties to make equitable nomination. It was recommended by a WO that ‘if women could not be recruited and nominated through regular party channels, guarantees must be created in the form of quotas.’ See Lovenduski 1993 n 183 at 281.

goal.¹⁹³ Strong criticism against the parties, which discriminates against women, could also be an effective tactic to this end.¹⁹⁴ Media coverage displaying different kinds of discussions and films on gender issues would be of valuable assistance in this regard.

5.5. International Commitment and the Parliamentary-Quota of Bangladesh

The international community pressured governments of Bangladesh to recognise the need for enhanced women's participation in politics.¹⁹⁵ The governments' commitment to this end has been reflected in a number of laws and constitutional amendments. Following the enactment of the *Local Government Ordinance* 1976, the Constitution was amended in 1976. It required the government to provide special representation for women. Consistent with affirmative measures set out in international instruments, another amendment to the Constitution was made in 1978; it increased reserved seats for women from 15 to 30 for a period of 15 years that lapsed in 1987.¹⁹⁶ The 10th Amendment of the Constitution in 1990 extended those seats for another 10 years, but that period expired on 4 April 2001. A further extension called for an Amendment to the Constitution (a two-thirds majority is required for an Amendment). The erstwhile government introduced a Bill on this issue but failed to pass the Bill since it did not have the two-third majority in the Parliament. The present

¹⁹³ For example, the WOs of Japan started their movement for politico-socio-economic emancipation following a declaration of the International Women's Year in 1975 and was able to overcome the last legal barrier to employment through the ratification of CEDAW in 1985, see The UN Study n 6 at 52.

¹⁹⁴ How the criticism of WOs in Norwegian politics has influenced parties to pay special attention to women—see Lovenduski 1993 n 183 at 280-89.

¹⁹⁵ Afsharipour 1999 n 177 at 162.

¹⁹⁶ The 15 reserved seats for a period of ten years were first introduced in 1973, which expired in 1987. In the Parliament of 1988, there were no reserved seats for women. The country was then under a military rule. After the fall of military rule, 30 reserved seats were again provided for 10 years. See Hossain 2000 n 2 at 73-74; Women in Politics n 18 at 44.

government has recently passed the bill and extended women's reserved seats from 30 to 45 for a period of ten years.¹⁹⁷

The provision for reserved seats has been effective in increasing women MPs in the Parliament of Bangladesh; however, a strong controversy has arisen about the nature of the representation (through reservation) itself and the mode of nomination of women MPs. In several respects, women MPs from reserved seats are treated less than equally with those of general MPs in the Parliament. At present, the Constitution provides for 45 overall reserved seats for women through indirect election by the members of the Parliament. As a result, the ruling party which has the majority in the Parliament exclusively gains these seats. This also makes these women MPs very loyal to the leaders of the party. Unlike general MPs, they lack geographical, organisational and grassroots support.¹⁹⁸ The ruling party uses the constitutional provision for two purposes: (i) to exploit those 'controllable' women MPs in favour of the government; and (ii) to create a positive image of the government within and outside the country that it favours women's political empowerment.¹⁹⁹ The effect of this thus cannot develop women's independent political careers, but rather reinforces their subordination in politics.²⁰⁰ This practice does not encourage other political parties to nominate women candidates for general seats in the Parliamentary election. As Chowdhury comments:

'[indirect] election to the reserved seats by simple majority vote ensures the control of these seats by the party obtaining a numerical majority in the legislature. This has, on the one hand, dissuaded other political parties from putting forward candidates for the reserved seats... On the other hand, this system has encouraged excessive political dependence of the aspiring candidates on party leadership, predominantly male, ...so called elite contract....'²⁰¹

¹⁹⁷ See *The Constitution (Fourteenth Amendment) Act* 2004 art 65 (3).

¹⁹⁸ Women in Politics n 18 at 44.

¹⁹⁹ International IDEA's Handbook n 12.

²⁰⁰ Chowdhury 2000 n 178 at 123.

Significant disparities also exist in distribution of responsibilities. The country is divided into 300 constituencies for general seats (each MP represents one constituency), but for reserved seats the number of electoral zones is only 30. It means that a woman selected from the reserved quota has to represent an area ten times larger than those of the general seats. Conversely, they are not given important and specific portfolios in the government.²⁰² It implies that they are to represent a wider area without having an equal status. Having realised the importance of the problem, the ‘Two Task Forces on Women in Development and Role of Political Parties’ (formed by the Caretaker Government in 1991) and the Election Commission categorically recommended a method for direct election for reserved seats.²⁰³ In addition, a number of Women’s Organisations and NGOs have been demanding the extension of reserved seats through direct election.²⁰⁴ The present government made an election pledge that it will introduce election for those seats if voted to power, but the provision is yet to be introduced. Instead, the Minister of Law, Justice and Parliamentary Affairs recently said that ‘it’s very expensive to allow women to participate in direct election and it would be difficult for the government to bear the cost.’²⁰⁵ Furthermore, as noted, there is no mandatory provision for political parties to reserve a certain percentage of nominations for women in the parliamentary elections.

The review of the CEDAW Committee reveals that numerous countries have adopted divergent measures under articles 4-5 of the CEDAW to promote women’s positions in

²⁰¹ Chowdhury 1994 n 16 at 98.

²⁰² Id at 98-99.

²⁰³ The CPD Task Force Report, ‘Policy Brief on ‘Inequality Between Women and Men and Women’s Empowerment’ 2001.

²⁰⁴ In 1990, a Private Bill was submitted to the Parliament by a woman MP of the Jatiyo Party seeking one-third reserved seats for women in the Parliament.

²⁰⁵ N Akter, ‘Women’s participation in Bangladesh parliament’ *The Independent Dhaka* (28 February 2003).

politics.²⁰⁶ The measures include a mandatory provision for political parties to guarantee a certain percentage of seats for women and positive action undertaken by the government. For example, in Argentina, a constitutional amendment was made in 1993 that reserved one-third of winnable seats for women.²⁰⁷ All Nordic countries extensively used article 4.1 of the CEDAW to close the gender gap in politics.²⁰⁸ As of 1997, they had the highest number of women in legislatures.²⁰⁹ ‘The quantitative increases in women’s share of political post’ began to affect the traditional division of labour. Currently, women are holding important portfolios in place of only traditional ones.²¹⁰ In 1997, Tanzania enacted a law, guaranteeing 15% of the total seats in Parliament to women.²¹¹ In Costa Rica, the Electoral Code Reforms of 1996 ensured 40% of positions in all levels of political parties for women.²¹² A Standing Order of the government of India provides that 30% of seats should be contested by women at local and district levels. The State of Maharashtra achieved this target.²¹³ The *Constitution Eighty-Fifth Amendment Bill* seeking to reserve one third of parliamentary and State Assembly seats for women is awaiting consideration in the Parliament.²¹⁴

Worldwide practice thus suggests that in Bangladesh, through direct election, one-third of the seats of the Parliament should be reserved for women to remedy their meagre status in politics. The introduction of direct election may not be the solution for all difficulties that female politicians face in Bangladesh. Nevertheless, if women MPs are required to come

²⁰⁶ The IAW Reports 1997 n 4.

²⁰⁷ Matland 1998 n 54 at 110.

²⁰⁸ Khan 2000 n 180 at 55.

²⁰⁹ IPU Reports 1997 n 51.

²¹⁰ Karvonen 1995 n 98 at 5.

²¹¹ Rakstad 2000 n 187 at 108.

²¹² Annual Report of the Inter-American Commission on Human Rights 1997 Part III B.

²¹³ Guhathakurta 1994 n 78 at 56-57.

through a competitive process under direct election, their opinions are more likely to be valued in the Parliament and party-organisations. Moreover, should direct election be introduced, it will create their independent strength and *vis-a-vis* remove their reliance on the ruling party for their nominations. It will also obligate all parties to nominate at least four to five times the present numbers (45) of women and help establish a link between those women MPs and the community. Such a method would be an important addition to women's political engagement in Bangladesh.

5.6. Women in Local Government

At present, the local government in Bangladesh runs through the Corporations, Municipalities and the Union Parishads (UP). This section considers only women's participation in Corporations and UP. Municipalities are excluded from the discussion since there is not sufficient information on women's representation in Municipalities to conduct a research study. However, the provisions and practices in Municipalities are similar to the other two levels of local government in relation to women's participation.²¹⁵ Therefore the political status of women in Municipalities may largely be understood from practices that prevail under the other two tiers of local governance. The discussion shows that women politicians in Bangladesh face similar problems and discrimination in exercising their official powers and functions in Corporations and UPs. Thus, to avoid repetition, recommendations to attain a better women's participation in local governance are provided altogether at the last part of the section.

²¹⁴*Platform For Action Five Years After-An Assessment* (2000) Department of Women and Child Development, Ministry of Human Resource Development, Government of India at 49.

²¹⁵ Ibid.

5.6.1. Women in the City Corporations

The *Dhaka City Corporation Ordinance* was enacted in 1983 to enhance women's participation in urban local governance. It provided reserved seats for women in non-elected positions of the Corporation. Under this provision, elected commissioners nominated 19 Women Ward Commissioners (WCs) for the Dhaka City Corporation in 1994. In 1997, the government introduced direct election for those reserved seats, when the nomination process resulted in some difficulties in enjoying women's official status.²¹⁶ The *City Corporation Amendment Bill for Dhaka, Chittagong, Khulna and Rajshahi* 1999 further provided WCs with one-third reserved seats of four City Corporations in Bangladesh. At present, the numbers of elected WCs are 30 for Dhaka, 13 for Chittagong and 10 for each Khulna and Rajshahi.²¹⁷ The functions of WCs are primarily concentrated on issues related to 'poor women', which include family disputes, social welfare, micro-credit and handicrafts. The Amendment Bill of 1999 is one of the prominent steps towards political empowerment of WCs in several respects.²¹⁸ The integration with disadvantaged poor women helps WCs develop a better understanding about the causes and nature of gender discrimination and other problems that engulf women's practical lives.²¹⁹ This practical experience of WCs works to make women aware, organised and active in urban and local politics.²²⁰

The provision for reserved seats for elected positions was also acclaimed at home and abroad as it was assumed that WCs could participate in the governance of Corporations

²¹⁶ S Rahman, 'Female Ward Commissioners denied due role' *The New Nation*, Dhaka (23 January 2003).

²¹⁷ See the City Corporation Election, Election Commission of Bangladesh <<http://www.bd-ec.org>> (7 September 2002).

²¹⁸ See for details, Bangladesh Report n 8 at 9 & 17-18.

²¹⁹ Bangladesh Report n 8 at 9.

²²⁰ Id at 18.

more confidently than before and obtain their legal status.²²¹ Despite this fact, it was soon evident that WCs are not allowed to participate fully in activities in the Corporation. Discriminatory administrative decisions, particularly the lack of sincerity of the government in determining official functions and responsibilities of WCs, remains the major problem.²²² The government gazette contains elaborate provisions regarding responsibilities of the Mayor (administrative head of the Corporation) and the male commissioners. These are, *inter alia*, the functions and power with regard to the nature of meetings and panel chairpersons, but there is no definite responsibility for WCs.²²³ In addition to these, a government notification barred WCs from performing four major functions. These are: (i) birth and death registration and the issuance of certificates for nationality and character; (ii) examining the designs of buildings; (iii) assisting in census and all other demographic surveys; and (iv) monitoring law and order.²²⁴

The decision to keep WCs out of important responsibilities was allegedly taken by the Ministry of Local Government under political pressure.²²⁵ Regarding government actions as ‘totally discriminatory’, Ms Dipty, a WC of Dhaka City Corporation contends that ‘[WCs] are elected from areas three times the size of an area from where male commissioners are elected. But while distributing duties and responsibilities women are considered less important.’²²⁶ Ms Begum, another WC of Dhaka maintained that ‘people voted her to represent them, but she could not play her due role due to the non-cooperation of general

²²¹ Staff Reporter, ‘No role for DCC female WCs’ *The New Nation* (10 January 2003).

²²² Ibid.

²²³ Bangladesh Report n 8 at 6.

²²⁴ Cited in Staff Reporter 2003 n 221.

²²⁵ S Rahman, ‘Elected women members of local governments face discrimination’ *The Daily Star* (29 December 2002); see also, A Arzu, ‘Female ward commissioners are looked down on!’ *The Daily Star* (19 October 2003).

²²⁶ Ibid.

ward commissioners.²²⁷ Some of the discrimination emanates from political biases, where the concerned WC is not a supporter of the party to which the Mayor belongs.²²⁸ To respond to the situation, the Nari Udyog Kendra (an NGO) recently organised a workshop and a press conference in Dhaka. A total of 55 WCs of four Cities attended and complained about discriminatory attitudes of the administration and of their male counterparts and submitted a memorandum to the Ministry.²²⁹ The government is yet to provide WCs with specific offices, transportation and other facilities. Recently, the Dhaka City Corporation decided that WCs will receive TK 3,000 (US\$50 per month) as office rent, but the same is not applicable to WCs in the other three Corporations.²³⁰

To have a more clear understanding about WCs' status in City Corporations in Bangladesh, questionnaires were sent to ten WCs in Rajshahi in November 2002.²³¹

In responding on community and family attitudes, nine WCs said that they did not face such difficulties before or after their involvement in politics. One replied that she faced very little criticism on being elected as a commissioner. In respect of their roles in decision-making, eight WCs said that their opinions were not reflected in all decisions of the Corporation. Instead, one among eight viewed that any initiative undertaken by WC was

²²⁷ 'Female commissioners virtually ornamental posts' *The New Nation* (18 February 2003).

²²⁸ Bangladesh Report n 8 at 17.

²²⁹ 'Women ward commissioner sidelined' *The Daily Star* (6 Sep 2002) Editorial.

²³⁰ Staff Correspondent, 'Women commissioners hamstrung by policy inadequacies' *The Daily Star* (5 Sep 2002).

²³¹ Ten Women Commissioners interviewed of the Rajshahi City Corporation were: R S Bijly, R Zaman, B Banu, S.Parvin, Nazma Begum, Anzu Ahmed, Rajina Begum, M Nurunnahar, S Shikha and Nazma Khatun. Six questions were set as follows:

- (i) did you face any problems from the community or family before taking part in the City Corporation election?
- (ii) does your opinion receive due weight to all decision-making in the corporation?
- (iii) whether your opinion is sought in adopting and realising various financial projects under the corporation;
- (iv) whether you enjoy official facilities according to law;
- (v) whether you get proper co-operation from your male colleagues and how are their attitudes to you;
- (vi) whether you are required to take the full responsibility of domestic work and whether any help from family members is extended to you.

required to be passed by three men. One was more critical about a male colleague, quoting him saying that ‘we can conduct meeting without the presence of women.’ The remaining two said that on a few insignificant issues their opinions were sought with appropriate manners.

Regarding financial aspects of the Corporation, four WCs replied that they did not even know about different development projects and therefore questions did not arise about their implementation. One said that after a decision was taken, it was sent to her home for her signature. Three commented that they were not included in any financial committee of the Corporation. One said that she did not take part in any decisions regarding the development of the Corporation as she was not informed of the meeting before. One opined that she was given responsibility for education and other matters but not for financial issues.

In responding about their legal facilities, ten WCs were of the same opinion that they were not getting benefits in accordance with the law. Among them, one said that she only received her salary and one is yet to get even her office. In replying about the attitudes and behaviour of their male colleagues (MCs), six out of ten said that their behaviour was overall good to them, while four responded that their MCs thought themselves superior and never treated them as equals.

In regard to domestic responsibilities, ten WCs were of the same opinion that they had enjoyed family support. Among them, two expressed that people always came to their residences since they did not get to the office and it hampered their family lives. One said that she did not have to cook, as she was unmarried.

5.6.2. Women in the Union Parishad

The *Local Government (Union Parishads) Ordinance* 1983 acknowledges the special significance of women's participation in local governance. Under section 5 of the Ordinance, a Union Parishad (UP) consists of a Chairman and 12 members. Among 12 seats, three are reserved for women. Until 1997, the government nominated women in these seats. The *Union Parishad (Amendment) Act* 1997 introduced direct election to reserved seats, under which women can contest general seats as well. Six UP elections have so far been held in Bangladesh. In the first election held in 1973, only one woman was elected in 4352 UPs.²³² In the 1977 and 1984 elections, women won four and six seats (including two Chairmen) respectively. The elected positions of women in the 1988 and 1992 elections were 863 (out of 114,699 posts) and 1135 (out of 169,643) respectively, constituting only 7% of positions in both cases.²³³ The 1997 Act had a rapid impact on the subsequent election. In the 1997 election, nearly 14,030 women were elected in the UP.²³⁴ This number demonstrates a significant shift from their under-representation to a broader share in the power of UP. In recent instances, women contested positions against their husbands and sons.²³⁵ This political identity undoubtedly accords women special status and power within the community.²³⁶

Despite this, a number of impediments are still powerful factors in Bangladesh to undermine their participation in a similar way as faced by women MPs in the Parliament. In addition, reports of NGOs and the daily media revealed numerous incidents ranging from

²³² S R Qadir, 'Participation of Women at the Local Level Politics Problems and Prospects' in *Women and Politics* n 78 at 6.

²³³ Ibid.

²³⁴ Human Rights 1999 n 19 at 94.

²³⁵ Qadir in *Women and Politics* n 78 at 8.

²³⁶ The Report of ADB n 5.

discriminatory practices to harassment and sexual assault against Women Members (WMs) of the UP. In performing official duties, women face discrimination and '[reserved seats] are not seen as having same value as general ones.'²³⁷ For women, the assignments are largely concentrated on family planning and social welfare. Even in conducting these functions they are expected to deal with only women.²³⁸ Some of the discriminatory practices are: (i) nearly all development and financial projects of the UP are exclusively controlled by the Chairman along with male members;²³⁹ and (ii) under clause 38(1) of the *Local Government (Union Parishad) Ordinance 1986 (Amendment)*, an elected WM is entitled to act as Chairperson in at least three Standing Committees (SCs) of the UP. Nonetheless, many of the UPs are yet to form any committee.²⁴⁰ To address the situation, the *Local Government Ordinance (Amendment)* was enacted in 2001. It increases the numbers of SCs of the UP from seven to 12 but provides that WM shall have to chair at least one committee. Under another proposal in the Parliament, a Social Welfare Committee was formed in each Ward. It provides that a WM of the UP shall chair the committee.²⁴¹ Nonetheless, until the end of 2002, WMs were not given any specific power and responsibility.²⁴² According to a survey of the World Food Program, more than half of the interviewed WMs are not given any membership of any SCs of the UP.²⁴³ Male

²³⁷ Bangladesh Report n 8.

²³⁸ S R Qadir and M Islam, *Women Representatives at the Union Level as Change Agent of Development*, (1987) Dhaka: Women For Women- A Research and Study Group at 36.

²³⁹ Ibid.

²⁴⁰ Human Rights 1999 n 19 at 94.

²⁴¹ Human Rights 2001 n 127 at 226.

²⁴² Professor Unus, the founder of the Grameen Bank in Bangladesh commented that in an interview conducted by the BBC Radio on 18 September 2002.

²⁴³ Siddiqui 2002 n 175.

members still dominate meetings and WMs are sidelined in the process of decision making in the UP.²⁴⁴

In addition, the *Human Rights in Bangladesh 1998* reported a series of cases which were filed against Chairmen and members of the six UPs on charges of rape, kidnapping and attempted rape and gang rape. Amongst them, a number of victims are WMs of the UP.²⁴⁵

The similar report in 2000 further revealed that in one month, two WMs were allegedly raped by the Chairman and members of a UP.²⁴⁶ However, the police in both cases took no legal action. The enactment of 1997 thus fails to provide adequate protection against these situations.

To determine the effects of legislative changes on WMs in the UP, questionnaires were sent to 17 WMs in Nawabganj District under Rajshahi Division on November 2002.²⁴⁷ Their opinions were sought in five issues. These were: (i) the compliance of the Manual (UP Charter) with the formal activities of UP; (ii) the co-operation and behaviour of male colleagues; (iii) the participation in finance and development of UP; (iv) the community-attitude and (v) domestic responsibility.

Regarding the first issue, 13 WMs replied that in terms of their responsibilities, official functions of the UP did not comply with the Manual (which describes the powers and functions of the UP). Among the 13, one said that her objection to this issue did not bring

²⁴⁴ Ibid.

²⁴⁵ Ain O Salish Kendra (ASK), *Human Rights in Bangladesh 1998* (1999) Dhaka: The University Press limited at 141.

²⁴⁶ Human Rights 1999 n 19 at 94.

²⁴⁷ Under the Nowabganj District, 17 Women Members interviewed were: 1. Tajenur Begum (Ward No-2, Sundarpur Union); 2. Irin Begum (Ward No-1, Sundarpur Union); 3. Fatima Begum (Ward No-3, Sundarpur Union); 4. Pramila Rani (Ward No-2, Nezampur Union); 5. Beraful Begum (Ward No-3, Nezampur Union); 6. Joybunnesa (Ward No- 1, Nezampur Union); 7. Hajera Begum (Ward No-1, Koshba Union); 8. Rafina Khatun (Ward No-2, Koshba Union); 9. Aleya Begum (Ward No-3 Koshba Union); 10. Sazeda Begum (Ward No-1, Fatepur Union); 11. Sohagi Begum (Ward No- 2 Fatepur Union); 12. Gulbanu (Ward No-3, Fatepur Union); 13. Armani Khatun (Ward No-1, Nachol Union); 14. Rupna Bala (Ward No-2, Nachol Union); 15.

any positive result. Out of the remaining four, two responded that the Manual was complied with on a few occasions. One of the two WMs said that her consent was obtained for particular issues through ‘good behaviour’ when her opinion was in conflict with her male colleagues. One of the remaining two said that she was yet to understand the issue, while the other expressed that she only received her salary in pursuance of the Manual.

In regard to the second issue, four responded that the attitudes of their male colleagues (MCs) were very negative towards them. The MCs even raised objections about WMs ‘sitting on a chair’ in their early days in office. One said that MCs were not cooperative and were very reluctant to accept her as their colleague. Three WMs were yet to understand their attitudes to them but they could realise that their functions were very limited, compared to MCs. Four were of the same views that their (MCs) behaviour were totally discriminatory to them. Among four, one WM said that her MCs thought that she would not be able to do any work without the help of MCs. Two responded that MCs were not good in their behaviour but they are gradually improving.

In responding about financial issues, eight WMs replied that they knew very little but their opinions were not taken into account in decision making. Five did not have any participation in this regard. One WM had to marry a Chairman (administrative head of the UP) when she kept raising complaints about her subordinate status regarding finance to the higher authority. Two responded that they did not get any opportunity to take part in financial aspects of the UP but they were aware of some development projects. One reported that she tried to be involved in this issue but failed.

Nashima Bibi (Ward No-3, Nachol Union); 16. Shakina Begum (Ward No-2, Kalma Union); and 17. Tahura Begum (Ward No-2, Kalma Union).

In replying about community-attitudes towards women, ten WMs expressed that, leaders of the community were generally very traditional in their attitudes and opposed women's standing for election as their representatives. Among ten, one told that some leaders raised *fatwa* (religious dictate) to prevent her from participating in politics with men and five opined that family encouragement helped them contest the election and overcome these difficulties. Out of the remaining seven, one WM said that in the initial stage, community attitudes were very strict and negative towards her. One did not face such a problem and one responded that the community and family both were against her. Four WMs did not respond to this issue.

About the domestic tasks, 12 WMs responded that they shoulder the prime responsibility because male family members expected that women do household work. One took the full responsibility for fear of breaking her marital bond. The remaining four were to perform similarly but their husband helped them in doing some of the household work.

Thus, it is revealed from the above discussion that the new legislation, while placing a significant number of women in formal positions in local governance, failed to recognise discriminatory practices against them and to ensure their equal access to important responsibilities. It is also observed from opinions of women members (WMs) that the community and male attitudes are more acute and negative in the UP than that of the City Corporation. In addition, WMs, in comparison with women commissioners, are to bear the full responsibility for domestic chores after performing their official duties. The comparatively high level of socio-economic and educational status of women commissioners appears to make this difference.²⁴⁸

²⁴⁸ Qudir 1987 n 238 at 36.

The level of women's representation in local legislative bodies of a number of foreign countries does not reflect their equitable participation either. However, discrimination in sharing political and financial power against women members is more noticeable and severe in Bangladesh, compared to other countries.²⁴⁹ In a comparative study covering 13 countries,²⁵⁰ including Bangladesh, the deprivation of women of their legal responsibilities is not found in several countries, even in India. Incidents of sexual harassment have also occasionally occurred. For example, findings of the same study show only one incident of harassment and intimidation of one chief executive in Australia that led to a public inquiry and 'subsequent dismissal of the council.'²⁵¹

A number of administrative and legislative strategies have been developed across nations to ensure effective participation of women in local government. Despite limitations,²⁵² some of these have been successful in achieving their objectives. For example, the Department of Women and Child Development in India is maintaining sex-desegregated data to evaluate and monitor the development of women at all levels of government services. Local governments of India are obligated to pay due regard to gender issues in formulating their policies and programs. To this end, municipal governments are required 'to collect, compile and maintain vital statistics in their city limits.'²⁵³ Special attention is given to the training and capacity-developing skills of all elected representatives in local government. The *All India Institute of Local Self Government* (established in 1929) including 58 other

²⁴⁹ United Nations Economic and Social Commission for Asia and the Pacific, *Women in Local Government in Asia and the Pacific-A comparative analysis of thirteen countries* (hereinafter *Reports of 13 Countries*) 2001 at 22-35 <http://www.unescap.org/huset/women/index.html> (28 January 2003).

²⁵⁰ Ibid.

²⁵¹ Id at 41.

²⁵² See S Rai, 'Class, Caste and Gender-Women in Parliament in India' in *Women in Parliament: Beyond Numbers*, International IDEA's Handbook n 12.

institutions are imparting training to elected women members.²⁵⁴ The *Constitution (74th Amendment) Act* 1992 provided a reservation of one-third of posts of Chairman for women along with a provision for reservation of one-third of general seats of the local government for women members.

In Australia, the *Local Government Act* 1990 requires every local government to give effect to the Equal Employment Opportunities (EEO) policy to employees and elected representatives in carrying out official duties.²⁵⁵ The EEO aims to ensure that women are treated fairly in the workplace and to remove practices that are discriminatory to women.²⁵⁶ Under this legislation, local governments are obliged to produce draft annual management plans ‘which are advertised for public comment’.²⁵⁷ The public also has access to meetings in some local bodies. In New Zealand, all council meetings are required to be open to the public and the press under the *Local Government Official Information and Meeting Act* 1987.²⁵⁸ ‘The *Local Government Act* 1974 obligates all Councils to prepare annual plans, detailing its policies, activities, performance targets and cost... [and to] publish an annual report which matches these policies and activities against the annual plan and be subject to independent audit.’²⁵⁹

In Bangladesh, nearly all interviewed women legislators highlighted two basic problems that impaired their lawful participation. These are: (i) negative attitudes of men in sharing financial power and (ii) government’s inaction to this end. There are two prime ways the

²⁵³ United Nations Economic and Social Commission for Asia and the Pacific, State of Women in Urban Local Government India (hereinafter Reports of India) 2001 at 16, <http://www.unescap.org/huset/women/index.html> (28 January 2003).

²⁵⁴ Id at 9.

²⁵⁵ Local Government of Australia Reports n 104 at 10.

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Reports of 13 Countries n 249 at 37.

²⁵⁹ Id at 37.

first issue can be addressed. Firstly, to create a ‘critical mass’ in local governance.²⁶⁰ Secondly, to organise and monitor a regular training program. The ‘critical mass’ can be achieved in local governance in Bangladesh through undertaking two basic strategies. Firstly, to activate local women to seize the opportunity of the local government. Local elections, in contrast to the national level, provide some incentives to women. These are: (i) an easy and comfortable access to UP elections; (ii) the elections are less expensive and less competitive; and (iii) the advantage of more attachment with, and direct support from, the community.²⁶¹ The political and Women’s Organisations have a pivotal role to play in making these women capable of taking this advantage.²⁶² Secondly, a provision should be incorporated in the Local Government Ordinances to provide a quota of 30-35% seats (of local bodies) and a reservation of one-third positions of Chairman (of UP) for women.²⁶³ Such provisions can create scope for increased participation of women in local politics. Subsequently, it will be more difficult to deprive women of their legal responsibilities when they achieve a ‘critical mass’ within the respective bodies. Alternatively, women’s involvement in decision-making becomes obvious when their number increases in legislative offices.²⁶⁴ The absence of women in the top rank seems to be one of the basic causes of discrimination in the allocation of power and responsibilities in UPs in Bangladesh. The reservation of one-third of the positions of Chairman (of UP) for women,

²⁶⁰ The IWAW Reports n 4.

²⁶¹ Committee on the Elimination of Discrimination Against Women, Analysis of articles 7 & 8 of the Convention, Thirteen Session CEDAW W/C/1994 at (para 18); Reports of 13 Countries n 249 at 1.

²⁶² For example, in Australia and New Zealand, the Women’s Electoral Lobby (WEL) has been playing a major role in promoting and supporting women’s participation in local levels ‘by providing training, information and fundraising’. The Office for the Status of Women in Australia currently produces a booklet entitled ‘Every woman’s guide to getting into politics’ to encourage women in politics. See Id at 39; Local Government of Australia n 104 at 14.

²⁶³ The local government legislation of Nepal requires that ‘...a minimum 20 percent of all elected positions be reserved for women’. See Reports of 13 Countries n 249 at 24.

as in India, can redress or at least reduce unfair practices in local governance and can help women attain a 'critical mass'. The 'critical mass' could also be useful to place a check on the government's improper actions or inaction against women.

Training is a vital component to changing the attitudes of a person.²⁶⁵ Stringent laws and policies have been developed worldwide to train and educate male employees.²⁶⁶ Some of these have managed to alter their behaviour towards women. In Bangladesh, gender issues and development get priority in several programs of the government. The National Institute for Local Government is functioning to this end. Notwithstanding, there is no government policy or specific training program which will sensitise men about 'how to behave and work with female colleagues.'²⁶⁷ There is no regular event either for the ward commissioners of being aware of the issue.²⁶⁸ A mandatory training program reflecting constitutional provisions and international practices with proper monitoring can bring some changes in attitudes of men. The training method must include teaching the men about legal consequences of discriminatory practices or sexual harassment against women. The introduction of an EEO policy and its regular reporting to the higher authority can make that program more effective. To oversee the process of decision-making in UPs and Corporations, Local Women Organisations should have infrequent access to meetings. This practice may add to the process of furthering women's participation in decision-making.

²⁶⁴ Peace: Full Participation of Women in the Construction of their Countries and in the Creation of Just and Political System E/CN.6/1987/7;The IWAW Reports 1997 n 4. <http://www.intlmgt.com/publicmanagement/chaptreight.htm> (18 January 2003).

²⁶⁵ M M Khan, 'Women in Public Administration and Management: Bangladesh Experience' (1995) 2 *Empowerment- A Journal of Women for Women* 63 at 79.

²⁶⁶ D Zalense, 'Sexual Harassment Law in the United States and South Africa: Facilitating the Transition from Legal Standards to Social Norms' (2002) 25 *Harvard Women's Law Journal* 143 at 216-217.

²⁶⁷ Khan 1995 n 265.

²⁶⁸ Bangladesh Report n 8 at 7.

Finally and more importantly, the government's positive commitment is an imperative to activate all the programs and policies designed to uplift women's strength and ability in politics. In the present realities of women commissioners, the government should issue a further notification clarifying women's equal status and facilities, and restore their four prime responsibilities to which they are not entitled at present.

5.7. Summary and Conclusion

The above discourse reveals that the electoral system, candidates' selection process, and the level of occupational and educational status are important factors affecting women's representation in legislative bodies. In regard to women's placement in elected offices, a noticeable gap exists between the two major electoral systems. It is well recognised that the Proportional Representation (PR) system in numerous countries resulted in a substantial increase of women in the National Parliaments. In Bangladesh, where the Majority-Plurality (MP) System prevails, the results of the successive elections demonstrate a great amount of difference between total votes and parliamentary seats earned by women. Consequently, this situation leaves a significant number of 'wasted votes', for which the opinions of those electorates are not reflected in governance. To reduce this disparity, and for a number of important reasons as stipulated in section 5.3.4.1, this chapter recommends the adoption of PR in Bangladesh.

The 'party-nomination' process is observed to have an enormous influence on women's increasing participation in politics. As is evident in the discussion, grassroots women are almost excluded from the political process in Bangladesh due to the centralised mode of selection. Alternatively, a decentralised mode has proved effective in foreign countries in integrating local women into national politics. Given the significance of grassroots

representation in power politics, the introduction of a decentralised selection process is likely to be beneficial for women in Bangladesh. In this process, some authorities of nomination are required to be transferred from national parties to local organisations. Disadvantaged women are likely to be better represented if local women are selected under this mode.

In order to improve women's educational status, different initiatives of the government and foreign aid agencies are in place in the country. Despite these, women in Bangladesh are far behind nearly all Asian countries. The discussion also shows that the gradual emergence of the private institution and its relevant cost puts the availability of education beyond the reach of the underprivileged women who constitute 76% of the total number of women.²⁶⁹ Given the situation and the need for proper utilisation of the program designed to enhance women's education, it is submitted that some measures be adopted on an urgent basis. Firstly, to initiate a proper monitoring and evaluation system to assess the benefits of national programs and foreign aid on women's education. Secondly, the introduction of an affirmative measure offering 25% of reserved seats for women in public universities. It is also suggested that some technical institutes be developed exclusively for women, as in India, to compensate for their traditional unequal positions in this regard.

Evidence across nation supports that women's positions in legislative bodies largely depend on the strength and consolidated effort of the Women's Organisations (WOs).²⁷⁰ In Bangladesh, available literature indicates that the WO's are not succeeding in developing their strength within the party due to their limited access to the parties' hierarchical

²⁶⁹ *Third and Fourth Periodic Reports of Bangladesh submitted to the CEDAW Committee* (1997) CEDAW/C/BGD/3-4, 1 April 1997 at 7.

²⁷⁰ In addition to the roles of WO's in promoting women's political claims as considered in 5.3.5., the WO's of Argentina and Africa were successful in their efforts to enact new laws to enhance women's shares in

positions. As a consequence, instead of women's concerns, the party-ideology and decisions of the male leaders influence their opinions. The higher positions of the two leading women do not represent either 'the gender composition or decision-making at the highest policy level'.²⁷¹ The WOs of Bangladesh, as representatives of the vulnerable women, should strive to acquire more skills and efficiency to take advantage of international provisions and practices, and to activate women in politics. This can be gained through continued lobbying for structural and legal changes as has been observed in a comparative perspective²⁷² and through the interaction with leading NGOs at national and international levels.

One of the major findings of this chapter is that reserved seats (now 45) for women in the Parliament in Bangladesh fail to ensure their meaningful participation. Rather, it results in a lower status for women MPs and diminishes their independent voice. To solve the problem and to increase women's participation, one-third of reserved seats of the Parliament in favour of women and the direct election to this end must be granted. In order to give effect to this issue, a new provision, in replace of the interim one²⁷³ for reserved seats, needs to be incorporated into the Constitution, which will provide a permanent measure until the objectives are met. Direct election, in many ways, has been an effective means of providing women with a better position in the Parliament.²⁷⁴ Such a process will create scope for the involvement of more women in politics under the banner of different parties. It is also

legislative offices. Argentina has a law that requires political parties to place women in "winnable" positions and not just at the bottom of a party's list.' See, Electoral System Index n 41 at 21.

²⁷¹ The Report of ADB n 5.

²⁷² See section 5.3.4.5.

²⁷³ The reserved seats for women were extended thrice through amendments to the Constitution of Bangladesh. The amendment requires majority votes of the Parliament. The erstwhile government failed to extend these seats for another term as it had no majority in the Parliament. In order to have a permanent system and to avoid this difficulty, a new law should be enacted.

²⁷⁴ See section 5.3.5.

imperative to counter the influence of men on women and to allow them achieve their legal status and independent voice.

As the review of the existing literature and the opinions of women interviewed convey, while the legislative enactment created opportunities for women to participate in local governance, it did not and cannot guarantee women's lawful participation.²⁷⁵ Women are unduly deprived of equal 'access to the resources and sources of power'²⁷⁶ because of the insincerity of the government and discriminatory attitudes of men in running for office. In order to serve the law in its proper perspective and in empowering women commissioners, the four major responsibilities of the corporation that they are not entitled to perform at present, must be restored. Taking into account the insignificant participation of women and the prevailing discriminatory practices against them in local government, the *Local Government Ordinance* 1983 should be amended to provide one-third of reserved seats of Chairman of the Union Parishad (UP) and 35% of the total nomination of political parties for women. The one-third reserved seats of Chairman for women will ensure at least their minimum participation in the financial aspect of the UP of which they have long been deprived. The 35% nomination will further help develop a 'critical mass' through integrating more women in legislative offices; that also can be a useful strategy to oppose men's domination. As their number in the office increases, it would be reasonably difficult to practise discrimination and to keep them away from important responsibilities.

Apart from these affirmative measures aiming to promote women's participation in national politics, this chapter stresses the need for attitudinal changes of the government as well as of men, which have become a grave concern for women in enjoying legal rights and

²⁷⁵ Bangladesh Report n 8 at 17.

²⁷⁶ Ibid.

privileges in local governance. A code of conduct and a mandatory training program with special focus on women's rights and the provision for strict penalties for practising discrimination can be the possible solution to lessen the negative attitudes of men. The restrictive attitudes of the government could be remedied through continuous lobbying by leading NGOs, WOs and the 'critical mass', and through the strong commitments of all concerned, who have been struggling for the cause of women's rights.

Finally, a sense of accountability and liberal attitudes of the politician towards women may also, to a large extent, contribute to the removal of corrupt practices and other difficulties that they (women) experience in the politics of Bangladesh. A code of conduct can help gain these positive virtues.

Chapter 6

Right to Freedom from Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment

6.1. Introduction

The right to freedom from torture and other forms of cruel, inhuman or degrading treatment is recognised as a fundamental right under the Constitution of Bangladesh.¹ Further, the safeguard from torture is repeatedly guaranteed in a series of legislation.² Bangladesh also assumes international obligations to respect and ensure this right through ratifying, *inter alia*, the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) 1979 and the *Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* 1984. Despite this, domestic violence, in its serious manifestation with dowry,³ is one of the leading causes of torture to women in Bangladesh. Although freedom from domestic violence is not categorically addressed under the right to freedom from torture, a range of legislative reforms were made during the last two decades to criminalise and penalise violence against women, including dowry.⁴ Notwithstanding,

¹ *The Constitution of the People's Republic of Bangladesh* 1972 art 35 (5).

² *Penal Code* 1860 ss 324-331, 335, 339, 352, 355 and 358 are concerned with the protection of all persons from torture and inhumane or degrading treatment; section 163 of the *Code of Criminal Procedure* 1898 prohibits police from making any threat or inducement during investigation; see also, *Police Regulations* 1978 ss 33 (b) & 190; *Police Act* 1861 s 29 that relate to the punishment of police for committing violence against people.

³ Dowry refers to money or valuable properties which are unduly demanded by the husband or in-laws from a bride's family as a consideration of marriage. The failure or denial to meet this demand contributes to 'almost 50% of all murders of women in Bangladesh'. A number of laws in Bangladesh outlaw 'giving and taking dowry' and all cruel modes such as attempts to cause death or grievous hurt for recovering dowry. See T Monsoor, *From Patriarchy to Gender Equity-Family Law and Its Impact on Women in Bangladesh* (1999) Dhaka: The University Press Limited at 223-227; T Monsoor, 'Dower and Dowry: Its affect on the empowerment of Muslim women' *The Daily Star* (27 July 2003). See also for details, section 6.3 of this chapter.

⁴ The central law of Bangladesh on dowry is the *Dowry Prohibition Act* 1980. This Act was amended in 1982, 1984, 1986 and 1986 to address the pervasive nature of dowry.

dowry-related cruelty has become endemic in the country.⁵ In 2002, dowry claimed 169 lives of women by their husbands and in-laws.⁶ This number presumably represents only a fraction of the total dowry victims since women are very reluctant to reveal their ‘hidden wounds’ before the public for several reasons. The prominent reasons are: the loss of family honour and privacy, the reasonable apprehension of retaliation by their in-laws and the unresponsive legal remedies.⁷ Further, in a substantial number of cases, the perpetrators enjoy political impunity and victims are left with virtually no legal recourse.⁸

This chapter presents two primary arguments. These are: (i) dowry generates a common experience of ‘torture’ and constitutes a gross violation of women’s fundamental rights to freedom from torture; and (ii) the inherent flaws in the Dowry Act and the ‘softness’ of the current enforcement procedures have a negative impact on the multidimensional forms of dowry. It also claims that the government, through its inaction, tolerates dowry and such a tolerance undermines the country’s international obligations. This chapter critically examines the legal approach in Bangladesh to address dowry with special reference to the *Dowry Prohibition Act* 1980 as compared with India. It also measures the adequacy and enforceability of domestic legislation and articulates the way law needs to be reconstructed for dealing with dowry in Bangladesh.

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

⁶ Staff Reporter, ‘Violence against women on the rise’ *The Independent* <http://independent-bangladesh.com/news/apr/01/01042003cr.htm#A3> (1 April 2003); see also, Staff Reporter, ‘Police alone can’t improve situation: IGP, Violence against women on rise’ *The New Nation* <http://www.nation-online.com/200210/07/n2100701.htm#BODY7> (7 October 2002).

⁷ R Jahan, ‘Hidden Wounds, Visible Scars: Violence Against Women in Bangladesh’ in B Agarwal (ed), *Structures of Patriarchy, State, Community and Household in Modernising Asia* (1988) London: Zed Books Ltd at 217-220.

⁸ Ain O Salish Kendra (ASK), *Human Rights in Bangladesh 2001* (2002) Dhaka: ASK at 237-238.

This chapter concludes that a comprehensive effort of integrating appropriate dowry laws, the mandatory arrest and pro-prosecution⁹ legislation into the legal framework of the country, a compulsory training program for the police, and the imposition of ‘higher cost’ for practising and condoning dowry can place a better check on chronic problem of dowries in Bangladesh.

Domestic violence encompasses many other forms of repression against women,¹⁰ however this chapter only deals with dowry as it contributes to 66.7% of the total number of violent incidents against women in Bangladesh.¹¹ Other forms of violence against women, such as rape, are addressed in chapter seven. Other social practices such as sex-selective abortion and genital mutilation are not prevalent in Bangladesh.

A recent international debate concentrates on the issue of whether and how domestic violence should be regarded as a matter of legal concern and should thereby invoke affirmative obligations of the government.¹² Since law is the object of analysis of this study, it is important to address this controversy and the conceptual constraints of domestic violence that have plagued the international rights discourse. Towards this end, the following section 6.2 aims to set out an international legal framework to govern domestic violence. The discussion begins with the exploration of the limits of international laws and examines the issues of how domestic violence shares a common characteristic with the right to freedom from torture. The recent development of domestic violence under the

⁹ In the present context, the ‘pro-prosecution’ denotes a legal provision which obligates the prosecutor to complete the prosecution of cases regardless of the willingness or unwillingness of the complainant. See for details, section 6.3.6.1 of this chapter.

¹⁰ R Coomaraswamy and L M Kois, ‘Violence Against Women’ in K D Askin and D M Koenig (ed), *Women International Human Rights Law* Vol-1 (1999) New York: Transnational Publishers, INC at 186.

¹¹ A K Goswami, ‘Empowerment of Women in Bangladesh’ (1996) 5 *Empowerment- A Journal of Women for Women* 45 at 67.

¹² R Romkens, ‘Law as a Trojan Horse: Unintended Consequences of Rights-based Interventions to Support Battered Women’ (2001) 13 *Yale Journal of Law and Feminism* 265 at 266.

framework of the United Nations (UN) is also outlined in this section to show its importance in the international human rights law. Section 6.3 analyses the provisions and practices in Bangladesh with regard to dowry, while section 6.4 draws a summary and conclusion.

6.2. Limits of International Law and Domestic Violence

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

¹³ H Charlesworth, ‘Human Rights as Men’s Rights’ in J Peters & A Wolper (ed), *Women’s Rights Human Rights* (1995) New York: Routledge at 108; also see generally C Romany, ‘Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law’ (1993) 6 *The Harvard Human Rights Journal* 87 at 89-106.

¹⁴ K Engle, ‘A Symposium on Feminist Critical Legal Studies and Postmodernism: Part Two: The Politics of Gender Identity’ (1992) 26 *New England Law Review* 1509 at 1520.

¹⁵ M Etienne, ‘Addressing Gender-Based Violence in an International Context’ (1995) 18 *Harvard Women’s Law Journal* 139 at 157-159.

¹⁶ D Q Thomas and M E Beasley, ‘Symposium on Re-conceptualizing Violence Against Women by Intimate Partners: Critical Issues: Domestic Violence as a Human Rights Issue’ (1995) 58 *Albany Law Review* 1119 at 1122-1123.

¹⁷ See P Goldberg and N Kelly, ‘Recent Developments: International Human Rights and Violence Against Women’ (1993) 6 *Harvard Human Rights Journal* 195 at 195.

to women's experience of domestic violence.¹⁸ However, some scholars have attempted to resolve this controversy through a creative interpretation of existing international provisions. As Copelon argues, 'when stripped of privatisation, sexism and sentimentality, private gender-based violence is no less grave than other forms of inhumane and subordinating official violence that have been prohibited by treaty or customary law...'¹⁹ Thus, domestic violence should invoke similar treatment in international law. To oppose this view that the 'private sphere' is related to state actions, counter arguments have been advanced in a number of judicial decisions.²⁰ In *DeShaney v Winnebago County Dep't of Social Servs* the Supreme Court of the United States (US) observed that a state's failure to protect the petitioner from domestic violence 'does not constitute a violation of the Due Process Clause because the Clause imposes no duty on the state to provide members of the general public with adequate protective services.'²¹ In *Doe v Board of Commissioners of Toronto* the Supreme Court of Canada held that the *Canadian Charter of Rights and Freedom* placed no obligation on the state to ensure the right to life, liberty, or property from violent actions through means other than the state.²² Nevertheless, the public/private distinction becomes artificial when the government acknowledges some of the private

¹⁸ In a number of ways the intensity of domestic violence and its continuation in a particular society are closely linked to the socio-economic status of women. For example, in Bangladesh, traditionally women have very limited access to resources. Due to their economic subordination and its strong embeddedness in society, after marriage women are to depend on the husbands for their survival. This dependency often forces them to tolerate domestic abuses and to prevent them from seeking judicial remedies even in the worst situation such as an attempt to kill. Another apprehension about their future lives is that their natal relations may not accept them if they leave their husbands for domestic violence. All of these factors serve to perpetuate abuses against women. International law does not take into account this particular experience of women.

¹⁹ R Copelon, 'Intimate Terror: Understanding Domestic Violence as Torture' in R J Cook (ed), *Human Rights of Women- National and International Perspectives* (hereinafter *Human Rights of Women*) (1995) Philadelphia: University of Pennsylvania Press at 117.

²⁰ *Semple v City of Moundsville* (US) 963 F Supp 1416 (1997) at 1429-30; *DeShaney v Winnebago County Dep't of Social Servs* 489 US 189 (1989) at 194-203; in *Reed v Gardner* the Court held that 'the purpose of the Due Process Clause was to protect the people from the State, not to ensure that the State protected them from each other' and inaction by the state to face a known danger is not enough to impose an affirmative obligation, see 986 F 2d 1122 (1993) at 1124- 1125.

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

violence through enacting and enforcing criminal laws.²³ On many occasions, violent acts against women outside the home, committed by domestic partners invite state actions. This process, in turn, renders private matters public.²⁴ As Schneider contends, no separate realm of family life exists totally beyond the reach of the state and both the family, the so-called private sphere and the market, the so-called public sphere are defined by the state. ‘Public’ and ‘private’ exist on a continuum.²⁵ The following discussion therefore attempts to set out a legal framework for domestic violence.

6.2.1. International Legal Framework for Domestic Violence

A contemporary liberal interpretation can be applied to numerous articles of the major international human rights treaties to argue that the prohibition of domestic violence is implied in those instruments and its violation will constitute the breach of the right to freedom from torture.²⁶ For example, article 3 of the *Universal Declaration of Human Rights* 1948 provides for right to life, liberty and security. A vivid violation of this article occurs when women experience domestic violence. This is because in that situation they suffer from an arbitrary deprivation of life, lose their liberty and lack security.²⁷ Article 5 states that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’ Further, article 7 of the *International Covenant on the Civil and Political*

²² (1990) 74 OR (2d) 225.

²³ K Roth, ‘Domestic Violence as an International Human Rights Issue’ in *Human Rights of Women* n 19 at 326 & 329.

²⁴ K S Barnes, ‘The Economics of Violence: Why Freedom from Domestic Violence must be Treated as a Developmental Right in International Law’ (1998) 6 *Yearbook of International Law* 97 at 104.

²⁵ See E M Schneider, ‘The Violence of Privacy’ (1991) 23 *Connecticut Law Review* 973 at 977.

²⁶ K M Culliton, ‘Finding a Mechanism to Enforce Women’s Rights to State Protection from Domestic Violence in the Americas’ (1993) 34 *Harvard International Law Journal* 507 at 513 (observing that ‘the right to state protection from violation of a persons fundamental human rights is inherent in every international human rights legal instruments’).

²⁷ A K Carlson-Whitley, ‘Dowry Death: A Violation of the Right to Life Under Article Six of the International Covenant on Civil and Political Rights’ (1994) 17 *Puget Sound Law Review* 637 at 653-657 (explaining how dowry violence and death caused the deprivation of the right to life).

Rights (ICCPR) 1966 requires State Parties to protect an individual from these forms of violence.²⁸ Read together, these provisions announce a legal framework for the prohibition of domestic violence.²⁹ The implied sense and a close examination of objectives of these provisions essentially uphold the protection of women against violence regardless of the public or the private.³⁰ ‘[No one] shall be subjected to torture...’ as specified in article 5 of the UDHR neither belongs exclusively to any gender nor indicates any private or public. The core thrust is to prevent this sort of practice and to provide individuals with adequate relief. In this regard, Liebeskind maintains that it ‘is clear that the freedom from torture and degrading treatment is a customary norm, and insofar as gender-based violence violates that norm, State can be bound to prevent it under customary law.’³¹

Beyond these, domestic violence has dominated numerous resolutions, reports and recommendations of the Convention and Conferences respectively under the UN system that unequivocally recognise that it causes deprivation of women’s rights, and move the issue from the ‘private’ to public responsibility.³² Furthermore, section 6.2.3 demonstrates

²⁸ ICCPR General Comment 28 obligates state parties to provide special protection against ‘domestic and other types of violence against women, including rape.’ It also urges state parties to provide information on national laws and practices in relation to domestic violence, and on legal remedies for women to the ICCPR Committee. See ICCPR General Comment 28 (Sixty-eighth session, 2000): Article 3: Equality of Rights Between Men and Women, A/55/40 vol 1 (2000) 133 at (paras 11 & 5).

²⁹ *Human Rights of Women* n 19 at 181.

³⁰ M L Liebeskind, ‘Preventing Gender- Based Violence: From Marginalization to Mainstream in International Human Rights’ (1994) 63 *Revista Juridica Universidad de Puerto Rico* 645 at 669.

³¹ *Id* at 668-669.

³² The first effort to implicitly address domestic violence began in the 1st International Women’s Conference in Mexico City in 1975 under the theme of ‘conflict within the family’. Its serious consequences on women were further acknowledged at the 2nd World Conference. Then the issue was placed on the agendas of two different forums such as the Commission on the Status of Women (CSW) within the ECOSOC and in the quinquennial Congress on the Prevention of Crime and the Treatment of Offenders, and the Commission on Crime Prevention and Control. Accordingly, two resolutions of the ECOSOC adopted respectively in 1982 and 1984 urged the CSW to label domestic violence as an offence against the dignity of the person and called for appropriate measures to combat this practice. Thereafter, ‘the year 1985 through convening the 3rd International World Conference on Women held in Nairobi, Kenya marks the beginning of the development in substantive international law, especially designed to protect women’s rights to be free from domestic violence.’ It recommended that domestic violence against women ‘was a major barrier to achieving the Decade’s goal of equality, peace and development’, and adopted preventive measures to eliminate it and to

some important efforts of international law to provide a definite theoretical paradigm for addressing domestic violence with a variety of legal sanctions. The following discussion explains how domestic violence shares a common experience with ‘torture’ and why it should thereby warrant similar legal weight and remedies as the officially recognised ‘torture’ does.

6.2.2. Domestic Violence as ‘Torture’

Although a number of statutes in Bangladesh recognise dowry as a crime, they fail to accord it the similar legal weight of the fundamental right to freedom from torture. The *Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (CAT) 1984 is the most relevant international instrument, setting a definite criterion of torture. Under article 1 of the CAT, four elements are necessary to constitute torture. These are: (i) an act that causes physical or mental severe pain or suffering; (ii) that act must be intentionally inflicted; (iii) there should be a specific reason; and (iv) that act involves some form of active or passive involvement of the government.³³ In order to determine whether a particular form of deprivation should qualify as a breach of the right to freedom from torture, regard should be given to the effect of the deprivation.³⁴ In the

assist the victims of domestic violence. Thereafter, until 1990 three major social science studies under the auspices of the UN stressed the importance of violence as the priority theme in the area of peace. See the *Report of the World Conference on the International Women's Year*, Mexico City, 19 June-2 July 1975, (para 124 & 131); *Report of the World Conference of the United Nations Decade for Women, Equality, Development and Peace, Copenhagen*, 14-30 July 1980 s A, (para 14 (f)); *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace*, Nairobi, 15-26 July 1985, Chapter 1 s A & *Nairobi Forward –Looking Strategies* (para 3-5); see also, *Human Rights of Women* n 19 at 536-537.

³³ *Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (CAT) 1984, G A res 39/46, [annex, 39 UN GAOR Supp (No 51) at 197, U N Doc A/39/51 (1984)], entered into force 26 June 1987, art 1.

³⁴ In *The Prosecutor v Akayesu* the International Criminal Tribunal for Rwanda provided sexual crime with similar remedies of genocide as the former produced the same effects of the latter on the victim. See (1998) Case No-ICTR-96-4-T at (para 731-732).

following ways, an application of the elements of torture to the dowry-related repression in Bangladesh can substantiate that domestic violence should be treated as torture.³⁵

Firstly, in most cases, verbal or physical assault ranging from beating, kicking and the infliction of pain (through various objects such as rod, sticks and knives) to death are repeatedly practised on women in Bangladesh who fail to meet the dowry-demand of their in-laws.³⁶ Such violence can reasonably be characterized as having the required severe physical or psychological pain and having similar effects on the victims of dowry.³⁷ Forcing women to satisfy dowry in this manner creates a 'panic state' of mind. This 'panic-state' keeps those women under constant mental pressure and in vulnerable situations coupled with a fear of further physical assault. This particular state constitutes mental suffering.³⁸ In a similar situation to dowry violence, Walker found that 'battering' produced a state of depression, anxiety, dependency and passivity among victims when they felt helpless to leave abusive relationships.³⁹ The repeated violence of domestic abuse gradually destroys the victim's mental capability to function independently and to resist; that, in turn, increases their further vulnerability.⁴⁰ This type of conduct produces the manipulation of 'stress' of mind in much the same way as torture.⁴¹

³⁵ See N S Ravikant, 'Dowry Deaths: Proposing a Standard for Implementation of Domestic Legislation in Accordance with Human Rights Obligation' (2000) 6 *Michigan Journal of Gender & Law* 449 at (part IV B).

³⁶ See *Khatoon v State* (1986) 38 DLR 48 at 50.

³⁷ M A Dutton, 'Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome' (1993) 21 *Hofstra Law Review* 119 at 1238-1240 (explaining of how the emotional, mental and physical pain impact on the victim of domestic abuse).

³⁸ L Askari, 'Girls' Rights Under International Law: An Argument for Establishing Gender Equality as a Jus Cogens' (1998) 8 *Southern California Review of Law and Women's Studies* 3 at 37.

³⁹ R Copelon, 'Understanding Domestic Violence as Torture', in *Human Rights of Women* n 19 at 125.

⁴⁰ See R Copelon, 'Recognising the Egregious in the Everyday: Domestic Violence as Torture' (1994) 25 *Columbia Human Rights Law Review* 269 at 335-339.

⁴¹ *Human Rights of Women* n 19 at 124.

Secondly, with the husband's explicit desire to earn dowry money, threats and physical assault are recurrently committed on the unwilling women.⁴² Cruel treatment appears to be unnecessary where women deliberately want to help their domestic partners. Mental or physical assault thus implies the presence of some sort of undue force and that force exhibits an explicit intentional *mala fides*. Thirdly, the dowry-related repression originates with a specific purpose. The purpose is to obtain money or valuables, and the inability of the woman to satisfy this purpose results in cruel treatment or death. Fourthly, in the present case, the state is actively involved through enacting, *inter alia*, the *Dowry Prohibition Act* 1980 to protect women against dowry violence. The state's passivity results from its failure to implement the dowry law or to remove the flaws in the law as required, especially by the articles 4-5 of the CEDAW.⁴³ It fulfils the requirement of the fourth element of 'torture'.

Furthermore, Culliton concludes that 'even if a particular domestic violence case does not reach the level of 'torture', international legal instruments prohibit cruel, inhuman or degrading treatment or punishment. This prohibition is also part of fundamental human rights and customary international human rights law'.⁴⁴ Thus, it can be summed up that the physical and emotional assaults involved in a dowry satisfy the standard of abuse required by 'torture'. The following section further emphasises the issue to provide domestic violence with the explicit recognition of torture.

⁴² See *Karim v Begum* (1988) 40 DLR 360 at 361.

⁴³ Arts 4-5 are concerned with the special and appropriate measures to accelerate *de facto* equality and to eliminate, *inter alia*, social practices that deny women's equal rights. See *Convention on the Elimination of All Forms of Discrimination against Women*, GA Reso 34/180 of 18 December 1979 arts 4-5.

⁴⁴ Culliton 1993 n 26 at 554-555.

6.2.3. Recent Development of Domestic Violence

Since the preceding section 6.2.1. highlighted some of the important provisions of international law that relate to domestic violence, this section briefly considers its recent development after the adoption of the CEDAW. Although domestic violence by its name is not central to the CEDAW, a range of its provisions spell out the significance of private life and impose obligations on State parties to ensure rights within the family. For example, article 1 prohibits gender-based discrimination, restriction or exclusion that undermines women's fundamental rights and freedoms. These three elements are inherent in 'domestic violence' as it has the obvious effect of depriving women of their equal rights to security and liberty and freedom from family abuse.⁴⁵ Article 5 (a) requires states to modify social and cultural practices based on the idea of inferiority which deny women's equal enjoyment of rights. Family violence and dowry death occur from traditional thinking of women's subordination⁴⁶ and thus qualify to have remedies under this provision. More importantly, article 16 calls for the elimination of discrimination within the family that undermines women's dignity. The emotional and physical abuse attached to a dowry incident undoubtedly violates that dignity and therefore is contrary to the spirit of article 16.⁴⁷

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

⁴⁵ R Carrillo, *Battered Dreams: Violence Against Women as an Obstacle to Development* (1992) New York: United Nations Development Fund for Women.

⁴⁶ E Evatt, 'Eliminating Discrimination Against Women: The Impact of the UN Convention' (1991) 18 *Melbourne University Law Review* 435 at 438. It is well recognised that the patriarchal society in Bangladesh has established men's supremacy over women. This concept has profound influence on earning dowry. See for details, Monsoor 1999 n 3 at 222-225.

⁴⁷ Copelon 1994 n 40 at 339-341; see also, *Human Rights of Women* n 19 at 135 (observing that domestic abuses destroy self-esteem, the sense of wholeness and self-confidence in life and involve degradation and humiliation. Thus, the effects of domestic violence clearly meet the standard of art 16).

rights and freedoms and confirms that domestic violence constitutes the violation of the right to freedom from, *inter alia*, torture.⁴⁸ This Recommendation issued guidelines to interpret CEDAW in a manner that can give adequate protection against domestic abuse. Under this Recommendation, article 2 of the CEDAW extends the state's responsibility when it fails to intervene in private acts including dowry violence.⁴⁹ This responsibility is also upon the government if it fails to take proper action against its agents who ignored 'due diligence'⁵⁰ as required to investigate and punish acts of violence, or to compensate the victim with proper remedy.⁵¹ An interpretation of article 6 further obligates the state to impose criminal and civil penalties for domestic violence.⁵²

After 1992, domestic violence was once again an issue of priority concern of the 4th World Conference on Human Rights held in Vienna in 1993. It called for, among other things, the promulgation of a specific Declaration and the creation of a position of Special Rapporteur to deal exclusively with the issue of domestic violence. Within six months, the General Assembly adopted the *Declaration on the Elimination of Violence against Women* in 1993. The declaration defines violence against women as 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women'.⁵³ It seeks to redress domestic violence through administrative and legislative

⁴⁸ See *General Recommendation No 19, Convention on the Elimination of all forms of Discrimination Against Women*, 11th Session 1992, CEDAW/A/47/38 at (para 1,7(b) and 10).

⁴⁹ *Id* at (para10-12).

⁵⁰ 'Due diligence' refers to government's action or inaction through which its roles towards its citizens and commitment to fulfil international obligations can be measured. See generally D Shelton, 'Private Violence, Public Wrongs, and the Responsibility of the State' (1989-1990) 13 *Fordham International Law Journal* 1 at 20- 23.

⁵¹ *Id* at (para 9).

⁵² For example, under paragraphs 2 and 9 of the General Recommendation 19, states are obligated to protect women from violence through proper investigation and punishment of acts of violence, regardless of whether these acts of violence are committed by its public officials or private actors. See General Recommendation No 19 n 48.

⁵³ *Declaration on the Elimination of Violence Against Women* GA res 48/104, 48 UN GAOR Supp (No49) at 217, UN Doc A/48/49 (1993) art 1.

reforms, including ‘restructuring and sensitizing the criminal justice system.’⁵⁴ To evaluate and assess the conduct of states regarding domestic violence, a Special Rapporteur was appointed by the UN Commission on Human Rights in 1994.⁵⁵

The Beijing Conference on Women held in 1995 marked an important advance for the issue. Its ‘Platform for Action’ identified violence against women as one of the critical areas set under the agenda of 12 major issues for urgent action. It provided means and ways that violence needs to be addressed by the states.⁵⁶ In addition, the enforcement, reporting and monitoring of domestic violence are conducted by other major Human Rights Committees.⁵⁷

Despite the above development in international law, women’s rights to freedom from torture or abuse are not always respected. Women worldwide still witness different forms of violence, and socio-cultural practices such as dowry continue to reinforce their vulnerability.⁵⁸ General Recommendation 19 and Declaration of Violence lack binding authority and their compliance largely relies on a state’s discretionary desire.⁵⁹ Notwithstanding, the Declaration ‘strengthens the voices of victims who have been

⁵⁴ Id art 4 (d) & (i); see also, Hel ne Combrinck, ‘Positive State Duties to Protect Women from Violence: Recent South African Developments’ (1998) 20 *Human Rights Quarterly* 666 at 673-677.

⁵⁵ See ‘*The Special Rapporteur on Violence Against Women, Its Causes and Consequences*’ <http://www.unifem.undp.org/bk_pro15.htm>; see also, Culliton 1993 n 26 at 530.

⁵⁶ See generally *Beijing Declaration and Platform for Action, Fourth World Conference on Women*, 15 Sep. 1995, A/CONF177/20 (1995) and A/CONF177/20 Add 1 (1995).

⁵⁷ For example, Human Rights Committee under article 28 of the ICCPR, and CAT Committee under article 17 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984 monitor the compliance of states’ obligations with the provisions of these two Conventions.

⁵⁸ Twenty-third Special Session of the General Assembly entitled ‘*Women 2000: gender equality, development and peace for the twenty-first century*’ 10 June 2000 (para 11).

⁵⁹ B Stark, ‘International Human Rights Law, Feminist Jurisprudence and Nietzsche’s “Eternal Return”: Turning the Wheel’ (1996) 19 *Harvard Women’s Law Journal* 169 at 171-173; see also, Culliton 1993 n 26 at 528.

historically silenced, out of shame or fear of punishment,⁶⁰ and the overall impact of international strategies works as a useful critical tool for bringing a broader social change.⁶¹

6.3. The Provisions and Practices of Dowry in Bangladesh

In response to the growing incidence of dowry violence in Bangladesh, the government enacted the *Dowry Prohibition Act* in 1980. This section examines whether this Act is effective to curb dowry and whether it subjugates or favours women to invoke judicial remedies. Then it considers the administrative and judicial efforts of the country to address dowry. It also provides suggestions as to how some of the legal flaws in the dowry legislation and prosecution policies can be overcome. Given the scope of the chapter, the discussion of this section primarily looks at the practices of India and the US for two reasons: (i) India experiences the similar problem of dowry; and (ii) although the US largely overlooked the gender-based violence until recently, it has made appreciable advancement in law towards the protection of victims against domestic abuse.⁶² The discussion begins with a survey of the socio-cultural context under which the recent concept of dowry has been evolved and widely accepted in Bangladesh.

6.3.1. Meaning, Origins and Development of Dowry

Dowry refers to property, cash or goods given to the bridegroom as a consideration of marriage.⁶³ The *Dowry Prohibition Act* 1980 defines dowry as any property or valuable security given or agreed to be given either directly or indirectly by one party to a marriage

⁶⁰ Libieskind 1994 n 30 at 651.

⁶¹ M L McConnell, 'Violence Against Women: Beyond the Limits of the Law' (1996) 21 *Brooklyn Journal of International Law* 899 at (para 10).

⁶² L M Martinson, 'Comment: An Analysis of Racism and Resources for African- American Female Victims of Domestic Violence in Wisconsin' (2001) 16 *Wisconsin Women's Law Journal* 259 at 259; Liebeskind 1994 n 30 at 645.

⁶³ Ravikant 2000 n 35 at (para 10).

by another party at any time before or after the marriage as a consideration of marriage.⁶⁴ Originally, dowry is a concept of Hindu law.⁶⁵ In Hindu law, unlike Muslim law, marriage is a sacrament instead of a civil contract. Under this law, women were not entitled to inherit property from their parents' families. To compensate for this discrimination, at the time of marriage, women were voluntarily given some properties in kind or cash by their parents within their financial capacity.⁶⁶ These properties constituted women's 'Stridhan' (women's property) and reverted back to them in the event of termination of the marriage. Among the lower caste, the 'bride price', a small amount of money, was given to the bride's family by the groom's family as a compensation for the loss of their daughter.⁶⁷ However, the contemporary perception of dowry as practised in Bangladesh has no resemblance to the original concept. Over the course of time, its voluntary nature has been transformed into a 'compulsion' on the family of the bride. In recent years, dowry has become an essential part of nearly every marriage and is obtained through applying constant coercion or pressure on the newly wedded women.⁶⁸ A number of factors such as traditional culture, an unequal power relation between men and women, the growing unemployment problem among young men and commercialisation of marriage contribute to the persistence of dowry despite legislative initiatives to eliminate it.⁶⁹ The patriarchal society in Bangladesh acknowledges men's superiority over women. To establish this superiority, men preferably receive family supports and attention in favour of developing

⁶⁴ *Dowry Prohibition Act* 1980 art 2.

⁶⁵ See for details, R Jethmalani and P K Dey, 'Dowry Deaths and Access to Justice' in R Jethmalani (ed), *KALI'S YUG- Empowerment, Law and Dowry Deaths* (hereinafter Kali's Yug) (1995) New Delhi: Har-Anand Publications at 38-39.

⁶⁶ Id at 38- 39.

⁶⁷ Ravikant 2000 n 35 at (para 12).

⁶⁸ Monsoor 1999 n 3 at 224; 'approximately 80% of marriage in northern district required dowries. More than 20,000 marriages were terminated during the last five years-main reason is dowry'-- see Ain O Salish Kendra (ASK), *Rights and Realities* (1997) Dhaka: ASK at 130.

their independent and productive careers. Consequently, the bargaining power and rating of dowry depend on the level of educational and occupational status of the groom.⁷⁰ This social practice eventually creates economic dependence and powerlessness of women that began to portray them as an ‘unproductive burden’⁷¹ for the family. Thus, women’s staying in the parental home at the marriageable age or after, is not welcome. Another concern is about the ‘virginity’ of women before their marrying. Parents have to face a severe consequence with their adult daughters when scandal regarding their chastity ensues within the community. It becomes highly unlikely to find suitable grooms for those women. Within this social organisation, parents try desperately to arrange a marriage at any cost, even beyond their means, and to provide some sort of incentives to have a qualified son-in-law so that the daughter’s life is better provided for.⁷²

The special attention from both sides develops the ‘superfluous ego’, a feeling of ‘power’ among grooms’ families that help dowry transform into a demand. Apart from this, the decline in moral values and greed for the improved life make marriage a commercial transaction. In recent times, ‘marriage began to lose its sanctity’⁷³ and is used as a means of making money, in which more value is given to property and cash money than that of the bride herself. As one of the potential means to change fate, even a poor uneducated man may exploit a bride’s family.⁷⁴ In numerous instances, the groom’s dowry demand does not match with the annual income and wealth of the bride’s father. On some occasions, a ticket

⁶⁹ Monsoor 1999 n 3 at 224.

⁷⁰ A Nangia, ‘The Tragedy of Bride Burning in India: How Should the Law Address It?’ (1997) 22 *Brooklyn Journal of International Law* 637 at 644.

⁷¹ M N Begum, ‘Dowry and Position of Women in Bangladesh’, a Research Paper, Women and Development, Dhaka 1993-1994 at 3. Here, the ‘unproductive burden’ refers to women’s underprivileged status in terms of earning money. As Chapter 4 suggests, although women constitute 90% of the total employees in the Garment Industries, they occupy insignificant positions in public and other sectors.

⁷² Id at 80.

⁷³ Nangia 1997 n 70 at 643.

to the Middle East to find a job is demanded as ‘dowry’.⁷⁵ The richer section of the country has also made a significant contribution to the present dimension of dowry. It offers luxury items ranging from ornaments to land properties through arranging a grand formal gathering. It serves to display their wealth and status in the society on the one hand, and to encourage young men to nurture dowry, on the other. In this way, the socio-economic and cultural factors encourage the continuation of dowry in Bangladesh.

6.3.2. The Dowry Prohibition Act 1980

The *Dowry Prohibition Act* 1980 (the Act 1980) is the primary law of the country to deal with dowry. It makes dowry a criminal offence punishable with a maximum penalty of one year imprisonment or with a fine of TK 500 (US\$8.3) or with both.⁷⁶ The Act is concerned with a series of issues including punishment for demanding or taking and giving dowry and its investigation and trial proceedings. Under section 7 of the Act, a Magistrate of the first class is empowered to try the dowry offence.

The Act 1980 was amended on a number of occasions in attempts to redress certain deficiencies. For example, the *Dowry Prohibition (Amendment) Ordinance* 1982 enables an individual to file a dowry suit directly to the court.⁷⁷ The amendment of 1986 extended the penalty for claiming dowry in any form after or before marriage up to a maximum of 5 years imprisonment, and made dowry a non-cognizable and non-bailable offence.⁷⁸ The 1988 amendment broadens the scope of dowry by providing that: dowry ‘at the time of

⁷⁴ Monsoor 1999 n 3 at 224-225.

⁷⁵ S R Khan, *The Socio-Legal Status of Bangali Women in Bangladesh- Implications for Development* (2001) Dhaka: The University Press Limited at 124.

⁷⁶ *Dowry Prohibition Act* 1980 s 3.

⁷⁷ Under section 4 of the Act 1980, a previous permission of an authorised government officer was required to lodge a complaint of dowry. The section was omitted by the *Ordinance 44 of 1982*.

⁷⁸ Amended by the *Ordinance 36 of 1986*.

marriage or any time' is illegal.⁷⁹ Dowry is also a subject matter of other laws such as the *Cruelty to Women (Deterrent Punishment) Ordinance* 1983 (Ordinance 1983) and the *Women and Children Repression (Prevention) Act* 2000 (the WCR Act 2000). Section 6 of the Ordinance 1983 provided that:

[whoever], being a husband or...relation of the husband ... causes or attempts to cause death or grievous hurt to that women for dowry shall be punishable with death or with imprisonment for life or with rigorous imprisonment for a term which may extend to fourteen years and shall also be liable to fine.⁸⁰

However, the Ordinance 1983 was repealed and section 11 of the WCR Act 2000 replaced the above provision.⁸¹ Under the WCR Act 2000, a Special Tribunal is entrusted with responsibility to try all cruel and criminal acts, including dowry, against women. Therefore dowry cases can simultaneously be registered with the Magistrates Court and with the Special Tribunal, depending on their nature.

Despite the above, the following section shows that the legislative enactment has largely proved ineffective in eliminating dowry in Bangladesh.

6.3.3. Legislative Impact on Women

Notwithstanding the fact that dowry received substantial attention in a series of amendments to the Act and in other legislation, Figure 6.1 demonstrates a gradual upward trend of dowry in Bangladesh. In 1997, a total of 177 women were reportedly subjected to dowry violence and the number was 239 (85% of which resulted in the murder of wives) in 1998.⁸² By 1999, the figure of murder reportedly reached 246. In 2000, it slightly decreased

⁷⁹ See *Ordinance LXIV of 1988*.

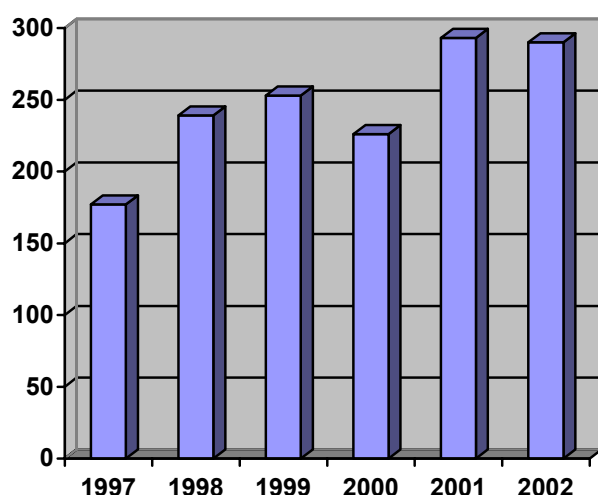
⁸⁰ *Cruelty to Women (Deterrent Punishment) Ordinance* 1983 s 6.

⁸¹ *Women and Children Repression (Prevention) Act* 2000 s 11.

⁸² Ain O Salish Kendra, '*Human Rights in Bangladesh 1998*' (1999) Dhaka: The University Press Limited at 146-147.

to 226.⁸³ In 2001, dowry reportedly claimed altogether 293 violent incidents,⁸⁴ while in 2002, 169 women were reportedly murdered and 121 suffered torture in connection with dowry.⁸⁵

Figure 6.1: Reported Incidents of Dowry Violence 1997-2002



The reality thus suggests that the legal approach in Bangladesh has failed to have even a minimal impact on women against dowry. Instead, dowry creates multi-dimensional social problems to which the law has ineptly responded. The problem is acute for the middle class and disadvantaged women who are the majority of the women in the country.⁸⁶

In Bangladesh, marriage is considered to be the only feasible option in life for women.⁸⁷ Despite gradual awareness about women's empowerment, particularly in rural areas, an early marriage is still perceived as the best strategy to provide 'safe shelters' to young girls,

⁸³ UNB, '8,710 women, Girls violated in '99' *The New Nation* (7 September 2002).

⁸⁴ 'Dowry menace still on despite govt. action' *The Independent* (21 July 2002).

⁸⁵ Staff Reporter 2003 n 6.

⁸⁶ The *third and fourth periodic reports of state parties- Bangladesh* (hereinafter the CEDAW Report), CEDAW/C/BGD/3-4, 1 April 1997 at 39-40.

⁸⁷ S Huda, ' "Untying the Knot"- Muslim Women's Right to Divorce and other Incidental Rights in Bangladesh' (1994) 5 *The Dhaka University Studies* 133 at 133.

regardless of their parent's socio-economic status in the community.⁸⁸ Therefore most of the women lack opportunities to attain basic education, a prerequisite for economic power. After marriage, aside from the love and concern for the children and husbands, a number of crucial factors push women to preserve the marital bonds at the expense of their physical or emotional abuse. These are: (i) the economic dependence on husbands for their survival. This dependency becomes magnified when they have children; (ii) a huge financial cost expended by the parents with regard to their marriages; and (iii) broken marriage is regarded as disgrace on their honour and on their families. Even when they have the financial ability and courage, parents and relatives do not allow or welcome their return to parental homes. All of these concerns put them at a great risk of having no alternative place to turn. On the other side, grooms' families are well aware of the social stigma attached to married women and use this as a bargaining tool to extort undue dowry. Within this dilemma, only two options for failure to meet dowry are virtually open for women: bear all forms of abuse until in-laws kill them, or commit suicide if abuse becomes unbearable.⁸⁹ The law fails to recognise this unique experience of women in Bangladesh. The law also has failed to adequately address some other issues such as divorce and polygamy that provide incentives for the husband to practise dowry. The following discussion shows how divorce, the non-payment of dower and polygamy are interlinked to render women vulnerable to dowry.

⁸⁸ Agarwal 1988 n 7 at 214.

⁸⁹ Nangia 1997 n 70 at 651.

6.3.3.1. Divorce, the Non-payment of dower and Polygamy and their Impact on Dowry

The most damaging but overlooked consequence of dowry is that nearly all dowry-related disputes result in divorce or polygamous marriage⁹⁰ with little or no redress for women. Empirical research on 50 divorced women in Borguna District, (conducted by the ‘*Jago Nari*’, a Women’s Organization) reveals that ‘40 out of them were divorced because their families could not pay dowry money to their husbands.’⁹¹ A Muslim husband enjoys an unfettered power to divorce his wife at any time without showing any reason.⁹² A Muslim wife has the similar right only when the husband delegates it to her by writing in the marriage document. A wife can also seek a judicial decree for the dissolution of her marriage on the eight grounds under the *Dissolution of Muslim Marriage Act* 1939 (The Act 1939). However, there are few instances of this, especially for poor or uneducated women who cannot initiate legal proceedings. This is because the Act 1939 requires a wife, in contrast to a husband, to provide strong reasons such as the production of a document in relation to her husband’s illness or his whereabouts or his failure to provide maintenance, and she is required to prove these before the court.⁹³

⁹⁰ Agarwal 1988 n 7 at 217.

⁹¹ R S Montu, ‘Divorced and distressed women need state protection for survival’ *The Daily Star* (24 January 2003).

⁹² Bangladesh is predominantly a Muslim (88%) country. See CEDAW Reports n 86; see also, D Pearl, *A Text Book on Muslim Personal Law* (1987) London: Croom Helm at 100

⁹³ The reasons under which a wife is entitled to seek judicial decree for the dissolution of her marriage are, *inter alia*, the whereabouts of the husband have not been known for a period of four years; where the husband was impotent at the time of the marriage and continues to be so and where the husband is suffering from leprosy or a virulent venereal disease. For divorce initiated by the husband, he requires nothing to prove before the court, only his desire to dissolve the marriage under the Muslim Personal Law. For details see, *Dissolution of Muslim Marriage Act* 1939 s 2 (viii); A Begum, ‘Rights of Women Under Muslim Law: Principles and Practices in Bangladesh’ (1999) 1 *Islamic University Studies* 19 at 23-25; see also, Pearl 1987 *ibid*.

Divorce initiated by the husband results in some legal rights such as dower and maintenance in favour of the wife. Dower is an inevitable part of a Muslim marriage.⁹⁴ Underlying the prestige of a marriage contract and as a mark of honour to the wife, Muslim law obligates a husband to pay the dower.⁹⁵ Nevertheless, in Bangladesh, '[there] has been no case of the dower debt being paid on divorce nor of any wife receiving any maintenance for the *iddat*⁹⁶ period.'⁹⁷ This non-payment of dower has at least two negative consequences for women. Firstly, if dower is properly paid, it could, to some extent, improve women's socio-economic status which in turn may enable them to achieve power within their in-laws family. It would also be an important factor in bringing dowry cases before the court. Secondly, the responsibility for providing dower is very likely to restrain husbands from polygamous marriages since these also involve additional dowers for new wives.

Further, due to the non-registration of marriage and the faulty Nikhanama (marriage document) prepared by the marriage registrars, women cannot claim dower or their share of their husbands' properties on many occasions.⁹⁸ Despite the fact that registration is an essential element of a marriage, compliance with this requirement is often ignored in rural areas and the penalty for non-compliance is three months jail or only TK 500 (US\$8.3) fine. By contrast, it has become a common practice in Bangladesh to reduce the amount of dower by deducting the value of ornaments given to the wife by the husband at the time of

⁹⁴ The Holy Quran, 4.4 (*Sura Nisaa*) and 2.236 (*Sura Baqara*)

⁹⁵ Dower is neither a synonym to dowry nor to the 'bride-price'. It is a sum of money or other property given by the husband as a token gesture to the wife and it is obligatory under Muslim Law. See for details, J J Nasir, *The Status of Women Under Islamic Law* (1994) London: Graham & Trotman at 46-59; see also, A Begum, 'Dower Under Muslim Law: Principles and Practices in Bangladesh (1996) 1 *Chittagong University Studies* 114 at 114-124.

⁹⁶ Iddat is a period of waiting. During this period, a woman whose marriage has been dissolved is prohibited from marrying an other person. The objective is to determine the paternity and legitimacy of the child which the woman might be carrying before the dissolution of her marriage, See for details, Nasir 1994 id at 107-113.

⁹⁷ S Sobhan, 'Women Issues in Bangladesh' (1982-83) 2 *LAWASIA* 254 at 256.

⁹⁸ S H Ria, 'Laws dealing with marriage and divorce are not friendly to women' *The Daily Star* (9 February 2003).

marriage. This process, called ‘Usul’, has no relevance or significance to the Muslim law.⁹⁹

In some instances, such issues are settled by the village elders in the ‘Salish’ (Arbitration Council in Village) where divorced women seldom get proper justice due to the Councils’ gender-biased attitudes towards women.¹⁰⁰

Polygamy is not prohibited in Bangladesh, however the *Muslim Family Laws Ordinance* 1961 imposes some restrictions on husbands. Section 6 of the Ordinance requires a husband to obtain prior permission from the Arbitration Council¹⁰¹ to contract another marriage during the subsistence of an existing marriage. This section primarily aims to examine whether the subsequent marriage is just and necessary for the husband. The contravention of this provision provides for imprisonment that may extend to one year or a fine which of up to TK 10,000 (US\$166.7), or both.¹⁰² However, polygamy, without the permission of the Council, remains valid in Bangladesh.¹⁰³ As the punishment for violation is minimal,¹⁰⁴ in most cases husbands ‘do not feel the necessity to seek permission from the council and even if they do so they threaten the existing wife with consequences like divorce or other

⁹⁹ ‘Gifts to the wife by the husband during their marriage will not be held to be in satisfaction of the dower debt without proof that the husband intended them as such and the wife accepted them as such’. See for details, K Hodkinson, *Muslim Family Law: A Sourcebook* (1984) London & Canberra: Croom Helm at 133; see also, S Quader, ‘Women: Divorced and Deprived’ *The Independent* (19 July 2002).

¹⁰⁰ See Amnesty International Bangladesh: Fundamental rights of women violated with virtual impunity’, 1994, AI INDEX: ASA13/09/94; see also, K Siddiqui, ‘In Quest of Justice at the Grass Roots’ (1998) Hum. 43 *Journal of Asiatic Society of Bangladesh* 1 at 8-9.

¹⁰¹ The Arbitration Council means a body comprising Chairman and representatives from both parties (husband and existing wife) to a matter dealt with in the Ordinance. After receiving the application from the husband, the Council considers, among other things, whether the husband sought and obtained the permission from the existing wife for his second marriage. See for details, *Muslim Family Laws Ordinance* 1961 s 2(a) & 6(2).

¹⁰² Id s 6(5)b.

¹⁰³ S Hossain, ‘Equality in the Home: Women’s Rights and Personal Laws in South Asia’ in *Human Rights of Women* n 19 at 476; A Khan, ‘Cruelty against women and some suggested measures’ *The Daily Star* (8 March 1999).

¹⁰⁴ In this context, ‘minimal’ refers to TK 10,000 (US\$166.7), as the husband may very likely avoid one year imprisonment because the court has the discretion in pursuance of section 6(5) b of the *Muslim Family Laws Ordinance* 1961 to impose imprisonment or a fine of TK 10,000(US\$166.7).

punishments.’¹⁰⁵ One manifestation of this minimal penalty is that it often induces the husband to divorce a wife and ‘obtain a new one with another dowry.’¹⁰⁶ As Sobhan maintains, ‘...marrying for the dowry a girl might bring, and then divorcing her and marrying someone else had become, for some men, a profession.’¹⁰⁷

Further, in the event of non-compliance with the provision that relates to polygamy, the remedy for the existing wife is less likely since the law requires the wife to produce a copy of the ‘Nikhanama’ of the second marriage.¹⁰⁸ In many cases, identities of the parties to the second marriage are forged to escape punishment.¹⁰⁹ This tactic bars the way for the existing wife to getting legal remedies, while the law is silent about forged documents of marriage. Furthermore, the law does not provide any remedy when women are apprehensive of domestic abuse. More importantly, Bangladesh does not have any law to deal with domestic violence *per se*. The following discussion shows how different countries have made significant changes in law for dealing with domestic violence. As an implicit link is noted between dowry and domestic violence in terms of generating similar experience for women, these changes could provide useful guidelines for addressing dowry in Bangladesh.

¹⁰⁵ Khan 1999 n 103.

¹⁰⁶ Nangia n 70 at 678.

¹⁰⁷ Sobhan 1984 n 97 at 256.

¹⁰⁸ In *Begum v Sarkar* the High Court of Bangladesh held that the Nikhanama is essential to prove a marriage. ‘No amount of oral evidence can cure the deficiency and no amount of oral evidence is sufficient to prove marriage when the plaintiff fails to prove the [Nikhanama] according to law.’ See (1998) 50 DLR 181 at 183.

6.3.3.2. Legislative Initiatives of Foreign Jurisdictions for Dealing with Domestic Violence

Numerous countries have attempted to change their systematic response to domestic violence through legislative changes and special measures.¹¹⁰ Criminal justice systems worldwide have begun to acknowledge that the state's protection for the victim should be placed before the traditional need to preserve family relations.¹¹¹ Many countries, including the US, Australia, Canada and India have enacted Domestic Violence Acts to deal with domestic abuse exclusively. These Acts allow the victim to obtain a protective order against the abuser when there is a probable cause of an abuse.¹¹² The protective order is an injunctive relief guaranteed by the court which restrains the abuser from further threatening or interfering with the personal liberty of the victim.¹¹³ Remedies under a protective order vary from jurisdiction to jurisdiction. In some jurisdictions, victims are entitled to have temporary custody of their children and to exclude the abusers from the family.¹¹⁴ The *Violence Against Women Act* 1993 of the US represents a comprehensive response designed to 'deter, punish and rehabilitate' abusers to prevent domestic violence. The Act aims to

¹⁰⁹ Khan 1999 n 105.

¹¹⁰ See generally United Nations Centre for Social Development and Humanitarian Affairs, *Violence Against Women in the Family* (1989) New York: United Nations at 51-65 & 75-80; on how domestic violence transforms from social acceptance into an issue of social sanctions- see E M Schneider 'Symposium on Reconceptualising Violence Against Women by Intimate Partners: Critical Issue: Epilogue: Making Reconceptualisation of Violence Against Women Real' (1995) 58 *Albany Law Review* 1245 at 1245-1252.

¹¹¹ United Nations Centre for Social development and Humanitarian Affairs, *Strategies for Confronting Domestic Violence: A Resource Manual* (hereinafter Resource Manual) (1993) New York: United Nations at 14. How an early justification for interspousal tort immunity and liability began to erode in the liberal concept of rights-see J Wriggins, 'Interspousal Tort Immunity and Insurance "Family Member Exclusions": Shared Assumptions Relational and Liberal Feminist Challenges' (2002) 17 *Wisconsin Women's Law Journal* 251 at 252.

¹¹² See for example, *Alaska Statutes* 2003 (USA) s 12.30.025.

¹¹³ S M Cook, 'Domestic Abuse Legislation in Illinois and Other States: A Survey and Suggestions for Reform' (1983) *University of Illinois Law Review* 261 at 277; see also, *Domestic Violence Act* 1994 (Malaysia) ss 4-6.

¹¹⁴ See for example, *Protection from Domestic Violence Act* 1997 (India) s 3.

create civil remedies for victims of domestic violence and to increase welfare funds and child support for them.¹¹⁵ It also prohibits an abuser from crossing state lines to violate a protective order.¹¹⁶ In some jurisdictions, violation of a protective order is a criminal offence¹¹⁷ and judges are mandated to direct the abuser to pay financial support, shelter expense and all damages for ‘losses suffered as a direct result of abuse.’¹¹⁸ Given the particularities involved in domestic abuse cases, some legislation provides guidelines requiring courts, *inter alia*, not to dismiss the case of domestic violence.¹¹⁹

However, the protective order has been criticised as it prescribes only the future conduct of the abuser without effective enforcement and sanctions for violations.¹²⁰ Nonetheless, the introduction of protective orders in dowry legislation or in a separate new Act aiming to deal with domestic violence exclusively as in other jurisdictions, is essential to Bangladesh for at least two basic reasons: (i) it will provide the potential victims with a legal right when they live in apprehension of abuse by their in-laws¹²¹; and (ii) it could prevent matters going from bad to worse. Frequently, failure to meet continued demands for dowry leads to death for the women.

The only meaningful way to eliminate dowry is to acknowledge the fundamental causes of dowry and to restructure the law to address them. Polygamy and the husband’s impunity from the responsibility of providing dower, in most cases provoke dowry violence as

¹¹⁵ 42 *United States Code Service* (USCS) 2003 s 13981(providing that the victim shall be entitled to recovery of compensatory and punitive damages, injunctive and declaratory relief); see also, *Wisconsin Statutes* (US) 2002 s 813.12; J M Fontuna, ‘Cooperation and Good Cause: Gender Sanctions and the Failure to Account for Domestic Violence’ (2000) 15 *Wisconsin Women’s Law Journal* 367 at 367-389.

¹¹⁶ See 42 *USCS* 2003 s 10409; ‘Developments in the Law –Legal Responses to Domestic Violence: III. New State and Federal Responses to Domestic Violence (hereinafter Development in Law)’ (1993) 106 *Harvard Law Review* 1528 at 1544.

¹¹⁷ See for example, ALM (*Annotated Laws of Massachusetts*) GL ch 209A 2003 (US) s 7.

¹¹⁸ Development in Law n 116 Part III at 1549.

¹¹⁹ *Utah Code Annotated* 2003 (US) s 77-36-3; see also, *Rhode Island Domestic Violence Prevention Act* 2002 (US) s 4.

¹²⁰ See for details, Development in Law n 116 Part II, 1505 at 1510-1511.

mentioned earlier. To restrict polygamy, the statutory provision for producing ‘Nikhanama’ before the court to prove the second marriage of the husband, must be removed. Alternatively, witness should be accepted as proof of the second marriage since marriages in many such cases are often performed with forged identities of the parties. It will ease the burden of proof of the victims and facilitate their getting remedies. However, in some cases, the parties to the second marriage may make the Nikhanama since it is an essential element of marriage. In such a case, if the victim voluntarily presents the Nikhanama to the court, the husband should not be allowed to have ‘bail’. In short, it only recommends the abolition of the requirement for the victim to produce Nikhanama to the court as it operates to her detriment.

Failure to comply with legal provisions in relation to polygamy should impose more penalties on the husband. The jail term for the second marriage without the permission of the first wife should be extended to five years. The amount of the fine must be doubled at TK 20,000 (US\$333.3).¹²² The legal consequences will make husbands refrain from polygamous marriages or from dowry demands when they realise that their threats are not ‘cost-effective’.

Finally, a more severe penalty for the failure to register a marriage or for intentional suppression or misrepresentation of important facts that relate to women’s rights, such as the absence of dower or where the dower is identified but deducted without the consent of the bride in the ‘Nikhanama’, should be introduced. It will encourage the registrar and the

¹²¹ United Nations 1989 n 110 at 60.

¹²² Khan 1999 n 105.

grooms' families to regard the violation of the registration requirement as a serious offence.¹²³

Apart from the above, the Act 1980 itself suffers from certain shortcomings. Although a series of amendments to the Act 1980 and other laws such as the WCR Act 2000 extended the scope and punishment of dowry, certain options are still open for the complainant to lodge a dowry suit. Irrespective of the nature and severity of cruelty, a complaint of 'giving and taking' dowry can be registered with the Magistrates Court under the Act 1980. Therefore the shortcomings of the Act 1980 need to be addressed and remedied.

6.3.4. Major Flaws in the Dowry Prohibition Act 1980

6.3.4.1. Scope of Dowry

Section 2 of the Act 1980 prohibits any form of dowry which is given 'as a consideration of marriage'. It implies that a close link between dowry and a consideration of marriage is essential to establish an offence under this section. Therefore a post-marriage gift or present does not appear to be regarded as dowry unless it is made as a consideration of marriage.¹²⁴

This creates scope for both families to label dowry as a gift and escape punishment under the law.¹²⁵ For example, a rigid application of this provision in *Poddar v Shah* failed to provide a legal recognition of 'taking dowry'. In this case the High Court considered two prime issues: (i) what constitutes dowry and (ii) whether dowry was taken as a consideration of marriage. The Court reasoned that any money or property must satisfy the definition of dowry as under the Act 1980 in order to call it a 'dowry'.¹²⁶ It maintained that

¹²³ S H Ria 2003 n 98.

¹²⁴ L Carroll, 'Anti- Dowry Legislation in Pakistan and Bangladesh' (1983) 3 *Islamic and Comparative Law Quarterly* 249 at 257.

¹²⁵ Ravikant 2000 n 35 at (Part III B).

¹²⁶ (1985) 37 DLR 227 at 227-228.

what ‘stands out prominently [from the definition] is that the property or valuable security is to be given as consideration for the marriage of the parties which then becomes a ‘dowry’’.¹²⁷ Finally, the Court held that the demanded dowry in this case was not ‘as a consideration of marriage’ and thus it did not constitute dowry.

In a similar situation, India widened the scope of dowry through an amendment to the *Dowry Prohibition Act* 1961 (the Dowry Act) in 1984. It endorsed ‘in connection with marriage’ in place of ‘as a consideration of marriage’. To prevent diverse demands or gifts under the guise of ‘dowry’ that phrase should be incorporated in the Act 1980 in Bangladesh.

6.3.4.2. Penalty for Taking Dowry

As regards the punishments of dowry, section 3 of the Act 1980 places less emphasis on penalties. It provides that any person giving or taking dowry ‘...shall be punishable with imprisonment which may extend to five years and shall not be less than one year, or with fine or with both.’ This wording clearly leaves much discretion with the court to reduce the sentence, and imprisonment is equated with a fine, even though a fine is not fixed or properly clarified. Thus, sanctions under section 3 seem to be vulnerable to the bias of the judge and to the improved socio-economic status of the husband.¹²⁸ Given the alarming increase of dowry incidents, this discretionary power of the judge should be removed.

¹²⁷ Id at 228.

¹²⁸ Such an apprehension might not seem valid but can be true in Bangladesh. For example, in this regard Badruddoza recommends, in repression cases against women ‘[usually] the offender is more powerful. ...The perpetrators usually remain at large on bail and persecute the victims and their family to withdraw the case. Sometimes they burn their houses or even kill or injure other members of the family....As if all these are not enough. It is a shameful thing to say that even many judicial members are corrupt and sometimes the judgement can be bought.’ See A S M Badruddoza, ‘Plight of Women in Bangladesh’, PUCL Bulletin, December 2002. See also, ‘US Department of State, Bangladesh: Country Reports on Human Rights Practices 2002’ (released on March 2003); Transparency International Bangladesh ‘Bangladesh, Structural Adjustment and the State of Corruption in Bangladesh’ <http://www.ti-bangladesh.org/olddocs/muzaffer/muzaffer.htm> (25

Rather, provisions may be made that the specified penalty can be increased when the taking of dowry exceeds the financial ability of the socially underprivileged father of the bride.

6.3.4.3. Similar Liability for Giving and Taking Dowry

In assessing criminal liability, section 3 of the Act 1980 puts the dowry-giver and dowry-taker in an equal place. In so doing, it fails to recognise the gravity of criminality and immorality involved in taking dowry is more severe and more blameworthy. This is because in nearly all cases, dowry is motivated by greed through the manipulation of the superior bargaining power of the groom's family.¹²⁹ Quite to the contrary, the deeply entrenched socio-cultural values attached to the marriage ceremony in Bangladesh, a smooth completion of marriage and concern for the daughter's happiness influences the parents to provide dowry as mentioned. On numerous occasions, parents have to incur huge financial liability to satisfy the demand of the in-laws. Certainly, this liability does not represent their voluntary choices for offering dowries in favour of in-laws. The Act disregards this particular situation of the bride's parents.

In Bangladesh, marriage is viewed as fulfilling a social obligation rather than a personal choice.¹³⁰ Traditionally, this responsibility is bestowed on the father. Regardless of his socio-economic status, concern about a marriageable daughter often keeps a father under a constant pressure that his daughter will remain unmarried if he fails to arrange a marriage within her proper age. This is because more advanced age reduces the desirability of a woman in the 'marriage market'. Therefore the reality of Bangladesh sometimes might

June 2002); Nangia 1997 n 70 at 667. Nevertheless, here the 'improved socio-economic status' largely refers to the status of the husband compared to his wife rather than to his real economic background.

¹²⁹ See generally Nangia n 70 at 637-674.

¹³⁰ Goswami 1996 n 11 at 54.

compel the father or guardian to offer money or valuables to entice a groom into marriage to escape such a burden and to relieve mental worry.¹³¹

Several factors such as unusual delay in disposing of suits, the financial incapability and family prestige, an undue influence or threat by the in-laws and the non-cooperation of law enforcing agencies discourage women or their parents from bringing dowry cases to the court.¹³² Compounding these factors, the ‘giving dowry’ offence may keep women away from seeking justice in the face of further harsh dowry demand. The Joint Committee of Parliament in India rightly observed that the dowry-givers ‘... do not give dowry out of their free will but are compelled to do so. Further, when both the giver and taker are punishable, no giver can be expected to come forward to make a complaint.’¹³³ Therefore taking the reality of Bangladesh into account, the dowry-giver and taker should not be regarded as parallel, ‘even though [givers’] actions produce undesirable results.’¹³⁴ In order to make the Act 1980 beneficial to women, section 3 thus should be amended to penalise only the takers or abettors of dowry.

6.3.4.4. Transfer of Voluntary Property to the Bride

Section 3 of the *Dowry Prohibition Act* 1961 of India considers all voluntary presents (given in the event of marriage) exclusive properties of the bride. It requires all gifts which ‘are of a customary nature and the value thereof is not excessive’ to the financial capacity of the bride’s family, to be listed in accordance with the rules under the Dowry Act.¹³⁵ The Act 1980 of Bangladesh does not contain such a provision, rather section 6 was repealed

¹³¹ CEDAW Report n 86 at 39-40.

¹³² Monsoor 1999 n 3 at 249-250, CEDAW Report n 86 at 38.

¹³³ Cited in Nangia 1997 n 70.

¹³⁴ Id at 666.

¹³⁵ *Dowry Prohibition Act* 1961 s 3.

through an amendment to the Act 1980¹³⁶ which dealt with the similar issue. To avoid the possibility of manipulating the list and conflicting claims of the parties, it is further suggested in India that such a list needs to be registered with the court.¹³⁷ In order to ensure women's exclusive control over the property, it is also recommended that the listed property cannot be transferred, or disposed of, within five years of marriage without the permission of the Family Court on an application made by the bride.¹³⁸ Although this listing requirement is still susceptible to abuse by in-laws, because the defiance of the bride to use such properties against their will may result in undesirable incidents. Nevertheless, the formal listing and registration requirement helps women establish a legal control over the property and makes it more difficult for the in-laws to extort that property.¹³⁹ To strengthen women's positions in matrimonial homes in Bangladesh, this provision should be incorporated in section 3 of the Act 1980.

6.3.4.5. Penalty for Demanding Dowry

Section 4 of the Act 1980 makes 'direct and indirect demand' for dowry an offence. It is an appropriate step in recognising the magnitude of dowry by making merely 'indirect demand' an offence. However, the Act does not define the term 'indirect demand', while the burden of proof is entrusted with the bride under the adversarial trial system in Bangladesh. There are no guidelines developed by the judiciary in the country to this direction. In the absence of such clarification, many undue expectations of the in-laws and their fulfillment might remain beyond the scope of 'indirect demand'.¹⁴⁰ For example, limited access to food and clothing may be granted to the bride when she is not provided

¹³⁶ The *Dowry Prohibition (Amendment) Ordinance* 1984.

¹³⁷ Nangia 1997 n 70 at 662-663.

¹³⁸ P Diwan and P Diwan, *Women and Legal Protection* (1995) at 461-462.

¹³⁹ Nangia 1997 n 70 at 663-664.

with suitable gifts by her parents. This sort of implicit tactic of earning dowry also tends to physically or emotionally abuse a newly wedded woman within the four walls of the matrimonial home when she deserves to be treated well. Moreover, such a situation leaves no scope to assess in-laws' treatment towards her, or to differentiate between undue expectation and 'indirect demand' by an independent witness.¹⁴¹ Therefore certain categories of actions and inactions, especially linked with the treatment and behaviour of the in-laws towards women, should be determined under the 'indirect demand', as has the term 'cruelty against women' under the *Dissolution of Muslim Marriages Act 1939* (the Act 1939). In order to determine 'cruelty against women', the Act 1939 provides eight specific grounds. These are, *inter alia*, if the husband 'disposes of [the wife's] property or prevents her exercising her legal rights over it', it shall be deemed to be 'cruelty' within the meaning of section 2 (viii) of the Act 1939.¹⁴²

6.3.4.6. Voluntary Gifts to be for the Benefit of the Wife or her Heirs

As referred to in section 6.3.4.5., the *Dowry Prohibition (Amendment) Ordinance 1984* in Bangladesh repealed the original section 6 of the Act 1980.¹⁴³ This section was concerned about the transfer of dowry properties in favour of a bride within one year after the date of marriage. Its contravention was punishable under section 6(2) with one-year imprisonment or with a fine of TK 500 (US\$8.3) or both. The current forms of marital disputes in Bangladesh do not allow the suggestion that dowry is no longer practised due to the enactment of the Act 1980. Conversely, frustrated demands for dowry frequently cause

¹⁴⁰ Nangia 1997 n 70 at 668-669.

¹⁴¹ *State of Punjab v Singh* (1991) AIR SC 1532 at 1537.

¹⁴² See *Dissolution of Muslim Marriages Act 1939* s2 (viii) (d).

deaths and physical-mental disabilities of women. Having taken away an important right of women (section 6) the law continues to fail to arrest the problem. By contrast, India did not repeal its equivalent of section 6, despite a number of amendments made to the *Dowry Act*. Given the traditional economic dependence and powerlessness of women in Bangladesh, section 6 should be restored since gifts worth TK 500 (US\$8.3) or less are still allowed under the Act 1980. However, section 6, if restored, should not deal with the ‘dowry property’, as it will be contrary to the objectives of the Act 1980. It may contain provisions for voluntary gifts in a similar manner as in a traditional Hindu marriage to accord women’s economic security at matrimonial places. There should also be a provision under section 6, that all voluntary presents in connection with marriage need to be registered in the name of the bride and in the event of the dissolution of the marriage, should be reverted back to the women. Such a provision, if introduced in the Act 1980, is likely to make a difference to women’s economic status and improve their marital power and status.¹⁴⁴

In addition, after the restoration of section 6, some of its provisions need to be amended since these provisions seem to be impracticable in reality. Firstly, section 6 set a time-limit of one year from the marriage to transfer the property. A bride being an entrant to the groom’s family, a totally different atmosphere, is supposed to be busy with adjusting to her new life instead of claiming property.¹⁴⁵ Nor would it appear praiseworthy to initiate a criminal proceeding for recovering property soon after the marriage. Therefore the stipulated time-limit should be extended to two years. Secondly, the penalty (one-year imprisonment or fine TK 500 (US\$8.3) for non-compliance of the provision was nominal in proportion to the property delivered in a marriage in recent times. Again, many of the

¹⁴³ Omitted by the *Ordinance 64 of 1984*.

¹⁴⁴ Kali’s Yug n 65 at 92.

properties transferred to the groom's family may be unrecorded.¹⁴⁶ Hence, it might be very convenient for in-laws to exploit properties and pay the fine of TK 500 (US\$8.3). Although section 6(2) of the Act 1980 provided that '... such punishment shall not absolve the person from his obligation to transfer the property as required by sub-section (1)', after disposing of all properties nothing may remain to pay off. Furthermore, in practice, this one-year penalty may be equated with a monetary fine since section 6 provided the court with discretion in this regard. Thus, given the reasonable amount of property involved in a modern marriage, and its current financial value, the penalty under this section must be strengthened. An increased penalty would make in-laws concerned about the consequences before engaging in exploitative practices in relation to a bride's property.

Beyond the above shortcomings, some of the procedural and informal factors in Bangladesh further limit women's rights to getting legal remedies under the Act 1980. Under these factors, the next sections examine the administrative and judicial endeavours to combat dowry. The discussion demonstrates that some of the legal reforms in other countries, along with some evidentiary provisions of India, can be a valuable assistance to addressing dowry in Bangladesh.

6.3.5. Administrative Intervention

6.3.5.1. The Role of the Police

Most of the dowry violence is committed in the secrecy of the in-laws' house.¹⁴⁷ There is usually no witnesses or direct evidence left in such a situation to prove the crime.¹⁴⁸ Consequently, the fate of any such case largely depends on the honesty and objective

¹⁴⁵ Nangia 1997 n 70 at 672.

¹⁴⁶ Id at 673.

¹⁴⁷ *Singh Case* n 141 at 1537.

investigations of the police.¹⁴⁹ The *Dowry Prohibition (Amendment) Act* 1986 allows police to arrest the accused of dowry violence without a warrant. However, police seldom enforce arrests in proportion to the total number of incidents and are very reluctant to recognise dowry as a crime.¹⁵⁰ In numerous instances, police refused to arrest the criminals and even denied registering the case brought by women, believing that victims provoked the violent incidents.¹⁵¹ Likewise, the manipulation of the investigating process by the police has been one of the serious barriers to getting a favourable remedy in dowry cases. There is ample evidence in Bangladesh that dowry deaths are frequently labeled as accidental or suicidal.¹⁵² On some occasions, no action is taken, even after years, ‘until evidence disappears’.¹⁵³ The failure of the police to investigate and to take proper action helps many offenders to go legally unchallenged,¹⁵⁴ while the state places arrest at the discretion of the police. Without any legal compulsion to arrest, police are often improperly occupied with their self-interest in arresting abusers, especially those who are influential in terms of economic and political power.¹⁵⁵ Such an approach ignores not only the ‘vulnerable

¹⁴⁸ *Prakash v State of Punjab* (1992) SCC 212.

¹⁴⁹ G L Pierce and S Spaar, ‘Identifying Housholds at Risk of Domestic Violence’ in E S Buzawa and C G Buzawa (ed), *Domestic Violence-The Changing Criminal Justice Response* (1992) London: Auburn House at 67 & 75.

¹⁵⁰ Khan 2001 n 75; Monsoor 1999 n 3 at 243-250.

¹⁵¹ See for example, R Jahan and M Islam (ed), *Violence Against Women in Bangladesh Analysis and Action* (1997) Dhaka: Women for Women and South Asian Association for Women Studies at 69.

¹⁵² L Carroll, ‘Recent Bangladeshi Legislation Affecting Women: Child Marriage, Dowry and Cruelty to Women’ (1985) 5 *Islamic and Comparative Law Quarterly* 255 at 263; see also, Agarwal 1988 n 8 at 223.

¹⁵³ Jahan 1997 n 151 at 68-69; Ravikant 2000 n 35.

¹⁵⁴ See for example, *Akbar v State* [9999] 51 DLR 268 (explaining how ‘faulty investigations of the case by the police’ help the accused escape punishment); see also, *Amnesty International Annual Report-2000 Bangladesh*.

¹⁵⁵ Transparency International (TI) viewed the law enforcing agency as the ‘most corrupt service sector committing 20.76 percent of total corruption’. A survey conducted by TI also reveals that ‘96.3% of the total households expressed the view by way of complete agreement or general agreement with the assertion that it was almost impossible to get help from the police without money or influence.’ To have a clear understanding how police work in enforcing law in Bangladesh, see TI-Bangladesh Documents, ‘Corruption in Bangladesh’ Surveys: An Overview’ <http://www.ti-bangladesh.org/docs/survey/overview.htm> (22 December 2003); M Hasan, ‘Making Anti-Corruption Actions Work: Enlisting media, NGOs and Aid’ <<http://www.ti-bangladesh.org>> (8 May 2002); T Blanchet, *Lost Innocence, Stolen Childhood* (1996) Dhaka: University

position' of a female victim in an unequal abusive relationship but also presents serious flaws in the criminal laws of the country.¹⁵⁶ Conversely, there is hardly any precedent in Bangladesh where police were held responsible for their failure to perform their legal duties.¹⁵⁷ This leads to the conclusion that the government condones and perpetuates dowry by failing to take punitive actions against its perpetrators.¹⁵⁸ In other respects, such as in collecting and producing evidence and treating dowry victims, police lack proper training, sensitivity and expertise.

No accurate official statistics exist to provide a full account of registered cases against dowry throughout Bangladesh as each administrative area has a court to deal with dowry. Nevertheless, it is reported that in 2001, a total of 2761 cases of dowry were registered with the courts of the country.¹⁵⁹ The reported figure, however, is far below the actual incidents of dowry violence.¹⁶⁰ According to the *Human Rights Report of Bangladesh 1998*, only 10.5% of the total dowry-related violence were filed against the perpetrator.¹⁶¹ The record of the Women's Affairs Division suggests that only 5 to 10 percent of the reported incidents to the Violence-Cell (this is considered in 6.3.5.2) could be taken to the court.¹⁶² In addition, Figure 6.2 reveals that 40% of the reported dowry violence incidents were not lodged with the court.¹⁶³

Press limited at 188 & 189; see also, 'Bangladesh -State Protection', Immigration and Refugee Board of Canada, September 1998 at 8 http://www.cisr.gc.ca/research/publications/bgd10_e.stm#bgd8e_appendix (26 May 2002); the US State Department Report n 128 and the Amnesty International Annual Report 2000.

¹⁵⁶ K E Suarez, 'Teenage Dating Violence: The Need for Expanded Awareness and Legislation' (1994) 82 *California Law Review* 423 at 459.

¹⁵⁷ See section 3.4.3. of chapter 3.

¹⁵⁸ Agarwal 1988 n 7 at 223.

¹⁵⁹ 'Dowry menace still on despite govt action' *The Independent* (21 July 2002).

¹⁶⁰ Monsoor 1999 n 3 at 243-250.

¹⁶¹ ASK 1999 n 82 at 147.

¹⁶² Jahan 1997 n 151 at 43.

¹⁶³ Ain O Salish Kendra (ASK), 'Human Rights in Bangladesh 1999' (2000) Dhaka: ASK at 83.

Figure 6.2: Ratio of Reported Cases Filed for Dowry Related Violence¹⁵⁰

Aside from corruption issues involved in arrest for dowry that contribute to the low rate of arrest in Bangladesh, in other jurisdictions it is also found that the rate of arrest can be as low as three percent where the decision to arrest is left to the police's discretion.¹⁶⁴ The following discussion shows how other jurisdictions have reformed the arrest policy in an attempt to combat the situation.

Recent efforts worldwide to improve the state's response to domestic violence cases largely concentrate on arrest policies and on police training.¹⁶⁵ The US, Australia and Canada provide some positive examples in this respect. Several states of the US have enacted mandatory arrest legislation that requires police to mandatorily arrest the abuser if there is a

¹⁶⁴ Suarez 1994 n 156 at 459.

¹⁶⁵ D G Atkins et al, 'Striving for Justice with the Violence Against Women-Act and Civil Tort Action' (1999) 14 *Wisconsin Women's Law Journal* 69 at 104.

probable cause of domestic violence.¹⁶⁶ The failure to comply with this legislation leads to the departmental or legal action including tort liability against police.¹⁶⁷ In addition, police's inaction in domestic abuse cases places an affirmative obligation on the state, where its failure contributes to create or enhance the danger faced by a victim.¹⁶⁸ Such liabilities are justified to achieve the objectives of the mandatory arrest statute and the due process and equal protection clause.¹⁶⁹ Some legislation has narrowed the police's immunity clause and placed emphasis on the early intervention in domestic abuse cases.¹⁷⁰

An empirical field study found that the national arrest rate, most of which were related to domestic violence, rose by 70% from 1985 to 1989 due to the mandatory legislation.¹⁷¹ Nonetheless, a number of studies on mandatory arrest produced conflicting and two-fold findings. One finding concentrated on three cities showed evidence of a deterrent effect of mandatory arrest, while in three other cities the study produced evidence of increased violence.¹⁷² The second finding indicates that arrest has different impacts on different kinds

¹⁶⁶ For example, *Wisconsin Statutes* 2002 (US) s 968.075; in 1994, the West Virginia legislature enacted the probable cause warrantless arrest statute. See for details, T L Harvey, 'Batterers Beware: West Virginia Responds to Domestic Violence with the Probable Cause Warrantless Arrest Statute' (1994) 97 *West Virginia Law Review* 181 at 184-193; see also, 42 *USCS* 2003 s 3796hh (a)1.

¹⁶⁷ In *Donaldson v City of Seattle* the Court of Appeal of Washington held that 'if the legislation evidences a clear intent to identify a particular and circumscribed class or persons, such persons may bring an action in tort for violation of the statute.' See 65 Wn App 661 (1992) at 662.

¹⁶⁸ S M Browne, 'Due Process and Equal Protection Challenges to the Inadequate Response of the Police in Domestic Violence Situations' (1995) 68 *Southern California Law Review* 1295 at 1308-1309. After the *DeShaney* 489 US 189 (1989), (where a woman was denied a remedy under the due process clause), in numerous judicial decisions the equal protection clause of the *Fourteenth Amendment* 1868 to the Constitution of the US (stating that '...[no] state shall ... deprive any person... within its jurisdiction the equal protection of the laws.') evolved as an important means of providing women with remedies in domestic violence cases. See for example, US cases, *Goldberg v Kelly* 397 US 254 (1970); *Board of Regents of state Colleges et al v Roth* 408 US 564 (1972); *Hynson v City of Chester* 731 F Supp 1236 (1990);

¹⁶⁹ S E Schuerman, 'Establishing a Tort Duty for Police Failure to Respond to Domestic Violence' (1992) 34 *Arizona Law Review* 355 at 373.

¹⁷⁰ See for example, *Annotated Revised Code of Washington* 2003 (US) s 10.99.070; *Roy v City of Everett* (US) 118 Wn 2d 352 (1992) at 352.

¹⁷¹ L W Sherman, 'The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence' (1992) 83 *Journal of Criminal Law and Criminology* 1 at 24.

¹⁷² *Id* at 25.

of people. Employed suspects are less likely ‘to have any incident of repeated violence’.¹⁷³ ‘While unemployed suspects tend to become more frequently violent following arrest’.¹⁷⁴ However, the second finding of mandatory arrest has generated some controversies. Opponents claim that using arrest in this fashion fails to control the repeated violence of unemployed persons and infringes their civil liberties.¹⁷⁵ To negate this view, proponents of mandatory arrest argue that ‘when batterers assault their victims subsequent to an arrest it is a misconception to assume that the assault is a direct result of the arrest rather ... a pattern of controlling behaviour that escalates in frequency and severity over time’.¹⁷⁶ Nevertheless, mandatory arrest is still regarded as the most effective deterrent to repeat incidents of domestic abuse in many states of the US.¹⁷⁷ The study of arrest on domestic violence incidents ‘found a substantial specific deterrent effect in a sample of 314 cases’.¹⁷⁸ Following its positive effects, the US Attorney General recommended ‘arrest as the standard police response to domestic violence.’¹⁷⁹

Mandatory Guidelines and training programs for the police are another important initiative to deal with domestic abuse cases. In some jurisdictions, a ‘Crisis Team’ equipped with special training is formed within the law enforcement agencies under special laws.¹⁸⁰ It helps police understand the dynamics of domestic violence and educates them about how

¹⁷³ L W Sherman, ‘The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment’ (1992) 83 *Journal of Criminal Law & Criminology* 137 at 168.

¹⁷⁴ Sherman 1992 n 171 at 25.

¹⁷⁵ D M Welch, ‘Symposium: Vital Issues in National Health Care Reform: Comment: Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse’ (1994) *DePaul Law Review* 1133 at 1154; see also, Resource Manual n 111 at 29.

¹⁷⁶ Harvey 1994 n 166 at 213.

¹⁷⁷ See for example, M M Hocror, ‘Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California’ (1997) 85 *California Law Review* 643 at 676-682, 686-688 & 700; Welch 1994 n 175 at 1152.

¹⁷⁸ Sherman 1992 n 173 at 138.

¹⁷⁹ Development in Law Part III n 116, 1528 at 1530.

statutory instructions are to be applied in practice. The Domestic Violence Crisis Service of Australia integrates volunteers and social workers of the community with police intervention. Police usually inform the crisis worker after receiving a call of domestic violence. This coordinated effort provides victims with extensive support including assistance in obtaining protective orders and immediate shelter.¹⁸¹ Similarly, some states of Canada have developed the Wife/Partner Assault Protocol. It provides descriptions of each step of the investigation of a domestic abuse case and the areas of responsibilities of the practitioners of the criminal justice system.¹⁸²

Some states of the US require police to inform the victim about available remedies and ‘to remain on the scene until the victim is safe and to help her obtain medical treatments, shelter or a restraining order.’¹⁸³ In India, the National and State Police Academies carry out training programs for gender sensitisation at all levels of administration, and police are mandated to investigate every death of women under suspicious circumstances that occurs within seven years of marriage.¹⁸⁴

Given the systematic reluctance of police to intervene in ‘private affairs’ and their involvement in unfair transactions with the in-laws of the victim, and to ensure their proactive role, this chapter proposes the introduction of a mandatory arrest provision for domestic violence in Bangladesh. The advantages of mandatory arrest are: (i) it provides

¹⁸⁰ For example, the *Revised Statutes of the Missouri* 2003 (US) s 455.080 recognised the need for an immediate response – the establishment of crisis team-transportation of abused party- the medical treatment and shelter; see also, 42 *USCS* 2003 s 3796gg.

¹⁸¹ Resource Manual n 111 at 32-33.

¹⁸² See for example, Renfrew County Crown Attorney, Wife/Partner Assault Protocol: A Coordinated Response in Renfrew County (cited in Resource Manual n 111 at 37).

¹⁸³ Development in Law Part IV n 116, 1551 at 1554; see also, *California Penal Code* 2003 (US) s 273.82.

¹⁸⁴ ‘Platform for Action Five Years after- An Assessment’ (2000) Department of Women and Child Development, Government of India at 33.

the victim with immediate protection from the violent attack of the abuser;¹⁸⁵ (ii) the in-laws are more likely to be cautioned about their indecent behaviour when the arrest becomes mandatory for the police; and (iii) it places police under a legal compulsion to arrest, and might cause unwilling police officials to enforce the new statute with more vigour.¹⁸⁶ In this connection, it is important to note that this recommendation should not be in conflict with one of the findings of Chapter 3 which relates to the police abuse of power of arrest under section 54 of the CrPC 1898 against the innocent person. In the present context, the perpetrators are often strong in terms of financial capacity and political influence. There are plenty of precedents in Bangladesh, some of which are referred to in this thesis, to support the assertion that police often lack integrity and honesty in investigating cases against the influential accused. Conversely, the role of police in Bangladesh has been proved very insensitive towards women. This has caused the police to be reluctant to be involved in the women's legitimate claims.¹⁸⁷ It may be further noted that in some special circumstances under the CrPC 1898, police are already entitled to arrest, and investigate, without the supervision of Magistrates.¹⁸⁸ From this point of view, the necessity and recommendation for such a mandatory policy can also be sustained.

In recent years, public interest litigation has become a promising means of realising legal rights in Bangladesh. Such an attempt by voluntary organisations could be an effective form of intervention to address police's failure to perform their legal duties.¹⁸⁹ Lawsuits

¹⁸⁵ See generally Hoor 1997 n 177.

¹⁸⁶ Development in Law, Part IV n 116 at 1573.

¹⁸⁷ To avoid repetition, this issue is considered in section 7.4.3. and 7.4.9 of Chapter 7.

¹⁸⁸ *Criminal Procedure Code* 1898 s 54.

¹⁸⁹ The effects of legal actions directly taken by battered women and voluntary organisations against law enforcement agencies recently produced San Diego, *inter alia*, as a model approach for effective intervention in domestic abuse cases, see Hoor 1997 n 177 at 697 & 700; see also, C G Gwinn and S A O'Dell, 'Domestic Violence and Child Abuse: Stopping the Violence: The Role of the Police Officer and the Prosecutor' (1993) 20 *Western State University Law Review* 297 at 298.

and criminal prosecution may also create public awareness and intense pressure on the government to enforce laws with due regard. 'With more exigent enforcement, bribes by husbands and their families may look less attractive'.¹⁹⁰ Only the initiation of the process can establish the precedent for the future. Further, until a level of sophistication in terms of law and public awareness is reached in the domestic sphere, stronger monitoring and lobbying roles by the international community might provide a positive result regarding the combating of domestic abuse. As Liebeskind maintained:

...[by] increasing the cut of shame with respect to gender-based violence, states may be forced to accede to international scrutiny if they condone such behaviour... thus by simultaneously strengthening women's voices and by imposing a code of embarrassment on States which fail to listen to those voices,... will be forced to acknowledge the egregious violations¹⁹¹

At present the Police Training Academy is in place in Bangladesh. To improve the situation regarding the treatment of victims of dowry or other violence, the Academy should conduct a compulsory special training program to educate and sensitise police.¹⁹² The training curriculum must contain contemporary legal guidelines, as developed in India and other jurisdictions, detailing how to approach dowry victims in lodging suits, to conduct interviews with them, and to collect physical evidence. It should also convey the consequences for inadequate and inappropriate responses by police towards victims. Police reports should also include the description and documentation of all persons including children present at the time of the incident, and other materials such as broken furniture and other relevant descriptions of the crime-scene.¹⁹³ Photographs will capture the emotional state of the victim and children (if any) and the atmosphere of the scene. All of these should

¹⁹⁰ Nangia 1997 n 70 at 692.

¹⁹¹ Liebeskind 1994 n 30 at 677.

¹⁹² Gwinn 1993 n 189 at 297-314.

help judges visualise the actual incident and make it more difficult for the accused in a case to deny the allegation or to compromise the case.¹⁹⁴

6.3.5.2. Prevention of Violence against Women Cell

There is no specific government program to address dowry violence exclusively in Bangladesh. However, at the national level, the Prevention of Violence against Women Cell (Cell) was established to deal with complaints of violence against women. A 15-member inter-ministerial Committee was formed in 1994 under the Ministry of Women and Children Affairs to monitor and review the activities of the Cell.¹⁹⁵

This Cell is a counseling body comprising magistrates, lawyers, police officers, social welfare officers and legal assistants. After receiving a complaint, it issues notice to both parties and tries to amicably resolve the dispute through a face-to face discussion. When such a discussion fails to resolve any dispute, lawyers of the Cell file cases on behalf of the victim. The current programs under the Cell are extended to six Divisional Headquarters of the country.¹⁹⁶ Every District and Thana (police station) administration has committees to settle complaints of violence under the Chairmanship of the Deputy Commissioner and the Thana Nirbahi Officer respectively. Their prime functions include the collection of statistics on violence against women and the prevention of violence through adopting appropriate measures and an anti-dowry campaign. The Deputy Commissioner is required to furnish a monthly report within its jurisdiction to the Women's Affairs Division. Apart

¹⁹³ M Wanless, 'Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?' (1996) *University of Illinois Law Review* 533 at 572

¹⁹⁴ C Hanna, 'No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions', (1996) 109 *Harvard Law Review* 1849 at 1902.

¹⁹⁵ S Hamid, *Why Women Count- Essays on Women in Development in Bangladesh* (1996) Dhaka: The University Press Limited at 94-95.

¹⁹⁶ 'Torture on Women for Dowry Money' *The Financial Express*, Dhaka (16 July 2002).

from dealing with this report, the Cell collects information on violence from daily newspapers and receives direct applications from victims.

There is also a Legal Aid Cell under the Ministry of Women's Affairs that provides victims with legal help and counseling to conduct cases. In addition, the Department of Women's Affairs is currently administering two other projects. One Project aims to raise awareness among women about violence and to grant legal aid. The other project is concerned with the support services towards abused women and to impart to them vocational training so that they can build up their independent careers.¹⁹⁷ In 1995, to provide shelter for the victims of violence, the 'Mirpur Home' was established in the capital city with the accommodation capacity for 50 women.¹⁹⁸

Despite these initiatives, in practice the issue of violence against women receives little attention in the day to day affairs of the government. 'Deputy Commissioners having many functions to perform set priority according to the priorities of the government',¹⁹⁹ and thus fail to report properly to the Cell. The Cell at the national level, being an arbitration body has no authority to order punishment. In most cases, police fail to arrest the accused and unduly delay producing investigation reports.²⁰⁰ The Anti-Violence Cell at the Thana level also lacks proper co-operation from the police. As a consequence, the defendants often ignore notices issued by the Cell to appear at the hearing.²⁰¹

Further, the Anti-Violence Cell and shelters are insignificant in proportion to victims of dowry and other violence. Therefore the majority of the victims remain beyond the reach of

¹⁹⁷ N Matin et al, 'Violence against Women and the Legal System: A Bangladesh Study' Dhaka, Ain O Salish Kendra (ASK), 2000 at 18-19; see also, Jahan 1997 n 151 at 31.

¹⁹⁸ Jahan 1997 n 151 at 44.

¹⁹⁹ Id at 38.

²⁰⁰ See Torture on Women n 196.

²⁰¹ Jahan 1997 n 151 at 38.

the existing system. Furthermore, initiatives regarding raising awareness and self-employment are scarce with few linkages with rural grassroots women.²⁰²

Having recognised the superior power of the abuser in domestic violence, government policies in foreign jurisdictions have begun to focus on the abuser.²⁰³ These policies aim to create a long-term accountability and to alter the motivation of the abuser. In some states of the US, abusers are placed on probation for a term of 3-5 years according to the severity of the violence. Some laws require abusers' compulsory enrolment in counseling programs. These programs help offenders to develop interpersonal skills and other positive virtues of human conduct to rectify their attitudes. It also teaches respectful and non-abusive ways to interact with women.²⁰⁴ If any abuser fails to enrol in or attend the program, the court is empowered to issue a warrant of arrest on information from the counselor. Probation officers are required to maintain regular contact with the counselor to ensure the abusers' attendance.²⁰⁵ In some states, probation officers also provide monitoring and supervision of the compliance of the offenders with the court order to oversee, *inter alia*, whether they violate protective orders and contact with victims.²⁰⁶ Many public schools and attorney offices of the US have introduced courses on domestic violence to educate and raise awareness among students and the public.²⁰⁷

The government response of Bangladesh to dowry violence suffers from a number of deficiencies as mentioned. A full account of dowry laws should address these deficiencies and pursue a different approach that will seek their immediate protection and

²⁰² Id at 44.

²⁰³ Gwinn 1993 n 189 at 298.

²⁰⁴ E Salzman, 'The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention' (1994) 74 *Boston University Law Review* 329 at 352.

²⁰⁵ Id at 352.

²⁰⁶ Hoctor 1997 n 177.

²⁰⁷ Development in Law Part III n 116 at 1550.

empowerment. This approach must seek the extension of the state's responsibility by requiring the government to establish at least a number of 'Shelter-Homes' across the country exclusively for dowry victims.²⁰⁸ For numerous reasons, domestic abuse, especially dowry, should deserve priority and resources of the government. This is most crucial as it produces negative consequences for not only the victims but also for children, family and the whole community.²⁰⁹ Victims of domestic violence become unable to participate in any economic activity and that further intensifies their vulnerability. Children who witness domestic violence suffer from numerous emotional and developmental difficulties.²¹⁰

Furthermore, the government, as a State Party to the CEDAW, has pledged to remove social and cultural practices that undermine women's dignity and to undertake special or preventive measures to overcome those practices. Where the state laws and practices fail to effectively respond to particular situations, the government owes obligations to provide an alternative forum to redress those situations, 'even where the underlying conduct might also be barred by state law.'²¹¹ Pursuant to this obligation, some such measures should be: (i) the establishment of more shelters and Cells with proper financial capacity in the major Districts instead of only in the capital city so that victims have an alternative place to go when the severity of violence becomes unbearable;²¹²(ii) undertaking some special

²⁰⁸ Although such an arrangement exists in the capital city with extremely limited capacity, there is no government welfare fund or shelter for divorced and distressed women, most of who are the victims of dowry. See Montu 2003 n 91.

²⁰⁹ M Hester et al, *Making an Impact, Children and Domestic Violence* (2000) London: Jessica Kingsley Publishers at 30-39 & 44-48.

²¹⁰ See *L v V* [2000] 4 All ER 609 (this case analysed various aspects of domestic violence which had negative impacts on children); see also, *Re R* (Australia) (1994) 18 Fam LR 370 (recognizing the severe consequence of violence on the child, the Court denied the father contact with the child; *Re L* (Australia) [2002] 1 FLR 621 (in this case, the Court being aware of marked emotional harm to the child, prevented a father from contacting the child); see also, Hester 2000 *ibid*.

²¹¹ V F Nourse, 'Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy' (2000) 15 *Wisconsin Women's Law Journal* 257 at 259.

²¹² India established 80 protective and juvenile homes to impart vocational training and education. A number of states have *help-line services* for distressed women, see Platform for Action, India 2000 n 184 at 34.

measures in seeking to provide legal support and vocational training all over the country to make dowry victims economically independent.²¹³ A legal training program targeting women advocates can provide an important aid to the local victims of dowry in this regard;²¹⁴ (iii) developing proper counseling and rehabilitation programs for the socially disadvantaged offenders of dowry violence²¹⁵; and (iv) introducing a legal provision for summary trial. In this regard, a magistrate working with the Cell should be provided with the authority to try the cases. Such a process could avoid time-consuming and costly trial proceedings. The Cell should also have provisions for establishing special courts, depending on the number of reported incidents (to the Cell) for quick disposal of cases.²¹⁶

6.3.6. Dowry Cases and the Judiciary in Bangladesh

6.3.6.1. Prosecution of Dowry Cases

In Bangladesh, the prosecution of dowry cases largely depends on the will of the victim or her family.²¹⁷ There is no legal provision in the country to make prosecutors liable for the completion of a case.²¹⁸ Even after filing a case, prosecutors can do nothing in the face of the unwillingness of the victim to testify against the accused or in a decision to drop the case. Some special factors such as the undue influence or threat of the accused, informal compromise with the accused and the concern for family prestige and security very often

²¹³ See K Scrivner, 'Domestic Violence Victims After Welfare Reform: Looking Beyond the Family Violence Option' (2001) 16 *Wisconsin Women's Law Journal* 241 at 250-253, 256-257 (prescribing the ways of improving services for domestic violence victims).

²¹⁴ D Post, 'Women's Rights in Russia: Training Non-Lawyers to Represent Victims of Domestic Violence' (2001) 4 *Yale Human Rights & Development Law Journal* 135 at 140.

²¹⁵ One survey conducted in Duluth in Minnesota (US) found that 81% of the abusers, two years after their attending the domestic abuse intervention program, reported that it had helped them to end abuse. See M E Asmus, T Ritmeester and E L Pence, 'Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships' (1991) 15 *Hamline Law Review* 115 at 149-150.

²¹⁶ See Torture on Women n 196.

compel the complainants of dowry to withdraw cases.²¹⁹ Such a practice undermines the inherent spirit of prosecution which suggests that ‘prosecutors’ duties are not only to convict but to seek justice’.²²⁰ This approach also overlooks that it ‘gives an abuser too much control over the decision to prosecute’ or to continue prosecution.²²¹ In the same way, the accused is in a position to use threats or to intimidate the victim to drop the case.²²² In Bangladesh, there are instances of a bride not being taken to the bridal chamber due to the failure of her father to satisfy dowry. After experiencing physical torture when she was returning to her parental place, she was ‘forced to sign on a blank stamp paper, pledging not to take the matter to court or arbitration.’²²³

On the other hand, dowry due to its private nature, hardly generates any possibility of getting an independent witness. The situation is exacerbated by the evidentiary requirements of law. Bangladesh follows the adversarial system of trial procedure prevailing in the common law system. This system is founded on the presumption of innocence of the accused until the court finds him/her guilty beyond any reasonable doubt. Under this system victims are to bear the burden of proof. For a number of reasons, such as the faulty and inefficient investigations of police, the benefit of doubt and the lack of direct evidence,²²⁴ victims of dowry or other repression often fail to prove the case. The combined

²¹⁷ Dowry and other criminal cases in Bangladesh are allowed to be prosecuted among individuals. In such cases, dowry victims can register with, and withdraw from, a case from the competent court.

²¹⁸ See *Code of Criminal Procedure* 1898 Part VI and s 494.

²¹⁹ See Monsoor n 3 at 238.

²²⁰ Wanless 1996 n 193 at 567; Asmus 1991 n 215 at 136.

²²¹ Wanless id at 533.

²²² Id at 567.

²²³ ‘Victims of dowry hits back’ *The Independent* (17 March 2002).

²²⁴ For example, in *State v Pramanik* the Court held that ‘when a wife is killed in the house of her husband at the dead of night, at times it becomes very difficult for the prosecution to lead direct evidence...’ see (19991) 43 DLR (AD) 64 at 76.

effect eventually leads to the acquittal of the accused.²²⁵ The UNDP study 2002 reveals that among the total 511 reported dowry cases in Bangladesh, 241 were charge-sheeted. The accused were acquitted in 7 cases and only 2 cases ended in conviction.²²⁶

To address the problem, numerous countries including the US, Australia and Canada have adopted the pro-prosecution policy. Accordingly, a complainant is not allowed to withdraw a case after filing it and the prosecutor is entitled to continue the case without the cooperation of him/her using only police reports and other indirect evidence.²²⁷ With this prosecution policy, San Diego found 'greater success in obtaining convictions'.²²⁸ Many states of the US have laws that place emphasis on the specialisation and definite responsibilities of the prosecutor in domestic cases. For example, the legislation of Florida requires each state attorney to develop and train special units to train and specialist prosecutors for the prosecution of domestic violence.²²⁹ Under the General Laws of Rhode Island, the court 'shall not dismiss any charge' of domestic violence and is required to make it clear to the victim and the accused that the prosecution of the case will be 'determined by the prosecutor and not by the victim.'²³⁰ In California, there are 'spousal abuser prosecution units' having only limited members experienced and trained in domestic violence. The objective is to receive a reduced caseload and to handle each case carefully from the initial to the final stage.²³¹ 'Such provisions ensure that the prosecuting attorney will have the understanding and time necessary to build a successful case despite a

²²⁵ See for example, *Akbar v State* (1999) 51 DLR 264 (explaining how the benefit of complete silence allows offenders to escape punishment).

²²⁶ For details see, United Nations Development Programme (UNDP), *'Human Security in Bangladesh- In Search of Justice and Dignity'* (2002) Dhaka: UNDP Bangladesh at 107.

²²⁷ P B Bracher, 'Securities Regulation: Comment: Mandatory Arrest for Domestic Violence: The City of Cincinnati's Simple Solution to a Complex Problem' (1996) 65 *University of Cincinnati Law Review* 155 at 161.

²²⁸ Gwinn 1993 n 189 at 311.

²²⁹ See *Florida Annotated Statutes* 2002 (US) s741.2901.

potentially reluctant victim.²³² In addition, many attorney's offices in the US and Canada have special services and 'Witness Programs' for adult women victims. These are designed to create self-confidence among victims and to accord them legal and physiological support. The effects help them overcome undue pressure from their abusers to drop cases or, not to testify against them before the court.²³³

Most of the states of Australia and Canada have legislation 'making wives compellable witness in trials where their husbands are the accused.'²³⁴ Further, in order to gain positive remedies in domestic violence cases, prosecutors of these countries were successful in introducing the expert testimony of 'battered women's syndrome' to explain their inability or tolerance while experiencing physical abuse.²³⁵ Nonetheless, the pro-prosecution policy is criticised for having the potential to re-victimise the victim. Under this policy a victim (woman) is regarded as a hostile witness when she refuses to testify. In a US case, a woman who refused to testify against her abuser was jailed for contempt.²³⁶ A woman was also imprisoned in Canada for refusing to testify against her husband in a criminal trial.²³⁷ Notwithstanding its occasional discouraging effects (as outlined above), a number of states

²³⁰ See *General Laws of Rhode Island* 2002 (US) s 12-29-4 (b) (1) & (4).

²³¹ See *California Penal Code* 2003 (US) s 273.81(b).

²³² Development in Law Part VI n 116 at 1556.

²³³ Suarez 1994 n 156 at 460- 461; see also, Resource Manual n 111 at 41. .

²³⁴ Resource Manual n 111 at 18.

²³⁵ See J P Esq, 'Trend Analysis: Expert Testimony on Battering and its Effects in Criminal Cases' (1996) 11 *Wisconsin Women's Law Journal* 75 at 81-82; see also, Hanna 1996 n 194 at 1904, (explaining why victims of violence cases desire to return to the relationship after suffering the abuse); see also for details, J Stubbs and J Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome' (1999) 23 *Melbourne University Law Review* 709 at 709-730 (authors discussed the development of 'Battered Woman Syndrome' in the context of the US, Canada and Australia through their legal development and judicial activism).

²³⁶ Development in Law Part III n 116 at 1541.

²³⁷ Resource Manual n 111 at 18.

have recognised the benefits of the pro-prosecution policy and enacted legislation to implement it.²³⁸

India has also been striving to address evidentiary difficulties in proving dowry violence through a significant number of legislative amendments to the *Dowry Act*. The *Dowry Prohibition (Amendment) Acts* (respectively of 1983 and 1986) of India inserted sections 113-A and 113-B in the Indian *Evidence Act* 1872. Section 113-A creates a presumption, providing that if a woman commits suicide within seven years of her marriage, and if it is shown that her husband or in-laws subjected her to cruelty or harassment, the court may presume that the husband or in-laws has abetted the suicide. Section 113-B makes the presumption of dowry death mandatory. It provides that if it is shown that the accused subjected the deceased woman to cruelty in respect of any demand for dowry, ‘the court shall presume that such person had caused the dowry death.’²³⁹ The *Dowry Prohibition (Amendment) Act* 1986 also introduced section 8A to the *Dowry Act* that shifted the burden of proof onto the person alleged to have abetted the taking of dowry.²⁴⁰ In order to define a dowry death and to make it more clear for the court to apply the provision, the amendment of 1986 also inserted section 304-B in the Indian *Penal Code*.²⁴¹ Furthermore, sections 174 (3) and 176 of the *Criminal Procedure Code* 1973 of India were amended in 1983. Section 174 (3) makes a ‘post-mortem’ mandatory in cases involving suicide by a woman within seven years of her marriage. Section 176 requires a magistrate to conduct a compulsory

²³⁸ Suarez 1994 n 156 at 462.

²³⁹ The provision was inserted in the Indian *Evidence Act* by the *Act of 46 of 1986*.

²⁴⁰ Section 8A of the *Dowry Act* of India states that ‘where any person is prosecuted for taking or abetting the taking of any dowry under section 3, or the demanding of dowry under section 4, the burden of proving that he had not committed an offence under those sections shall be on him’, inserted by the *Act 43 of 1986*.

²⁴¹ Section 304-B defines dowry death stating that ‘[where] the death of a woman is caused by burns or bodily injury, or occurs otherwise that under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of

inquiry into cases where the cause of the death falls under sections, *inter alia*, 174 (3) of the Code.

Hence, given the pervasive nature of dowry violence and the commensurate acquittal trend of the accused in Bangladesh, there should be room in the domestic legislation that will place the responsibility of prosecution on the prosecutor. Such a provision can make in-laws aware of that their undue demands for dowry will be taken up by the prosecutors themselves; that can help alleviate the offenders' pressure on the victim to manipulate or drop the case. On the other hand, prosecutors will be legally accountable to take a dowry case more seriously.²⁴² To this end, prosecutors should also have duties to provide legal and mental supports to the vulnerable victims to develop their self-confidence. In addition, they should cooperate with the police in collecting physical evidence so that an arrest 'leads [to] the prosecution and not to case dismissal.'²⁴³ The victims of dowry violence often require emergency medical treatment. To reach a successful decision in such a case, the prosecutor should request all medical records. These will demonstrate the physical and mental state of the victim that might be important proof in challenging the acquittal order of the accused. Such a record will also show the economic cost to the victim.²⁴⁴

Since similar dowry violence and death and associated difficulties in proving these crimes prevail in Bangladesh, as in India, it is submitted that the *Dowry Prohibition Act* 1980 needs to be amended further to incorporate the above Indian provisions. Should these provisions be incorporated, they will facilitate judicial remedies of dowry victims by providing courts with clear legal guidelines for their application. Such provisions could also

her husband for, or in connection with, any demand for dowry, such a death shall be called "dowry death", and such husband or relative shall be deemed to have caused such death.'

²⁴² Welch 1994 n 175 at 1162.

²⁴³ Hanna 1996 n 194 at 1901.

²⁴⁴ Id at 1904.

send a strong message to in-laws before advancing their undue demands. In addition, similar evidentiary presumptions should be legislated in cases where there is evidence of cruelty or grievous hurt to women in connection with dowry. To experience repeated cruelty is much more severe than a single shot or attempt at murder. It will make it easier for women to seek criminal remedies for abuse at all levels of severity ‘not just in cases where it led to deaths’.²⁴⁵ This recommendation could be substantiated by referring to numerous foreign judicial decisions where remedies were guaranteed in favour of women for their emotional or physical abuse.²⁴⁶ Such a penal provision will also prevent husbands from inflicting frequent ‘beating’ on wives for dowry or other insignificant reasons that are very common phenomena in Bangladesh.

The *Dowry Prohibition Act* 1980 of Bangladesh also needs to be amended to shift the onus of proof in certain aspects, as in India, from the prosecution to the defence. However, it is important to acknowledge here that such a shift may unduly limit the accused’s right to a fair trial. There are also strong academic arguments on issues: (i) whether a reverse onus infringes the accused’s right to be presumed innocent until proved guilty according to law; (ii) whether evidentiary or legal burden²⁴⁷ should be transferred to the accused in such

²⁴⁵ Nangia 1997 n 70 at 693.

²⁴⁶ See for example, *Nearing et al v Weaver et al* (US) 670 P 2d 137 (1983); *G and G Marando* (Australia) (1997) 21 Fam LR 841.

²⁴⁷ Evidential burden and legal burden are defined as follows:

‘a) evidential burden: the first of these processes ...is the burden a party bears to adduce enough evidence for the judge to be satisfied that the issue should left to trier of fact...b) legal burden: simply adducing enough evidence to raise an issue must be distinguished from the burden placed on a party to persuade the trier of fact to find for him or her on any particular issue. This latter stage is the burden of proof in a strict sense and is also known as the persuasive or probative burden.’ See ‘Burden and Standard of Proof’ < <http://www.kent.ac.uk/law/undergraduate/modules/evidence/burd...> > (8 October 2004); see also, The Continuing Legal Education Society of British Columbia, ‘ “Evidential Burden” is not a burden of proof: SCC CLE staff ’ < <http://www.cle.bc.ca/CLE/Stay+Current/Collection/2004/5/04-scc-f...> > (8 October 2004).

instances.²⁴⁸ However, a reasonable limit to this right has been recognised in a series of laws and judicial decisions; this discussion now turns to these issues.

The common law's approach to the presumption of innocence in the criminal justice system was authoritatively explained in *Woolmington v DPP* in 1935 in which Lord Viscount Sankey recommended:

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt....No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of common law of England and no attempt to whittle it down can be entertained.²⁴⁹

Nevertheless, Lord Sankey specified two exceptions to the 'golden thread' rule such as the defence of insanity and express statutory exceptions where the burden of proof could be placed on the accused.²⁵⁰ Express statutory exceptions to this rule are found in a number of laws.²⁵¹ This statutory exception has also gone further to include 'those which did it by implication,'²⁵² and these exceptions are rarely restrictive in use. In this regard, in *R v Edwards* the Court of Appeal observed:

I have a little doubt that the occasions on which a statute will be construed as imposing a burden of proof on [the accused] which do not fall within this formulation are likely to be exceedingly rare. But ...I would prefer to adopt the formula as an excellent guide to construction rather than as an exception to a rule.²⁵³

²⁴⁸ See for example, *R v Hunt* [1987] 1 All ER 1 at 11-12; *R v Director of Public Prosecutions, ex parte Kebeline and Others* [1999] 4 All ER 801 at 803.

²⁴⁹ Cited in *Hunt* id at 6.

²⁵⁰ Ibid.

²⁵¹ For example, section 101 of the *Magistrates' Courts Act* 1980 (UK) provides that '[where] the defendant... relies for his defence on any exception, exemption... the burden of proving the exception...shall be on him...' Section 5 (4) of the *Misuse of Drugs Act* 1971(UK) states if '...it is proved that the accused had a controlled drug in his possession, it shall be a defence for him to prove...'; see also, section 139 of the *Criminal Justice Act* 1988 (UK) which provides that it 'shall be a defence for a person charged with an offence under this section to prove ...' –cited in *L v Director of Public Prosecutor* [2002] 2 All ER 854 at 856. Section 8A of the *Dowry Act* 1961 of India could be another example in this regard. It provides that where a person has been charged with a dowry crime, 'the burden of proving that he had not committed [that] offence ... shall be on him' - see n 240.

²⁵² See n 247.

Lord Steyn in *Lambert* also cited a study by Ashworth and Balke which ‘found 219 examples, among 540 offences triable in the Crown Court, of legal burdens or presumptions operating against the defendant.’²⁵⁴ In *Kebeline* one of the important issues was whether section 16A of the *Prevention of Terrorism (Temporary provisions) Act* 1989 that provided for a reverse onus contravened the presumption of innocence as enshrined in article 6(2) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (the Convention).²⁵⁵ The House of Lords held that article 6(2) of the Convention did not impose ‘an absolute prohibition on statutory provisions’ that placed the onus of proof on the accused, and ‘... a fair balance must be struck between the demands of the general interest of the community and the protection of the fundamental rights of the individual’.²⁵⁶ In a similar situation, in *Lambert* it was observed that ‘...the imposition of a persuasive burden ...resulted in no injustice and accordingly, ...no breach of article 6(2).’²⁵⁷ In a leading judgement Lord Woolf observed:

In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislature’s attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime.²⁵⁸

²⁵³ Cited in *Hunt* n 248 at 11.

²⁵⁴ ‘They observed that no fewer than 40% of the offences triable in the Crown Court appear to violate the presumption’. See *R v Lambert* [2001] 3 All ER 577 at 588.

²⁵⁵ See generally *ex parte Kebeline* n 248 at 801-859.

²⁵⁶ *Id* at 846-847. In this case it is also recommended that ‘...[what] is the nature of the threat faced by society which the provision is designed to combat? It seems to me that these questions provide a convenient way of breaking down the broad issue of balance into its essential components, and I would adopt them for the purpose of pursuing the argument as far as it is proper to go in the present case.’ See *id* at 848-849.

²⁵⁷ *Lambert* n 254 at 643; see also *Hunt* in which the House of Lords held that ‘[it] is accepted that, when Parliament by express words provides that the proof of the excuse shall lie on the accused, the legal burden of proof, that is to say the ultimate burden of proof, is placed on the defendant, and that is discharged ‘on the balance of probabilities’ - n 248 at 19; in *L v Director of Public Prosecutor* it was further recommended that [it] was not obviously offensive to the rights of the individual that it was for him to prove a good reason on a balance of probabilities. Respect should be given to the way in which a democratically-elected legislature had sought to strike the rights balance. See *L v DPP* n 251 at 854 & 863.

²⁵⁸ *A-G of Hong Kong v Lo Chak-man* [1993] 3 All ER 939, cited in *L v DPP* n 251 at 857-858; The European Court of Human Rights in *Salabiaku v France* also held that ‘[presumptions] of fact or law operate in every legal system. Clearly, the Convention does not prohibit such presumptions. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law...It requires States to

Hence, the above discussion provides precedents that a limited qualification of the presumption of innocence should be recognised in the *Dowry Act* 1980 to accommodate the specific experiences of dowry victims in Bangladesh. Nevertheless, in such a case evidentiary burden would still be on the prosecution. For example, if the accused's claim is proved in his/her favour, the prosecution is required to adduce sufficient evidence to the court if it wants to disprove that claim.

6.3.6.2. Dowry and the Role of the Judiciary

In a significant number of cases, the courts of Bangladesh appeared to be sympathetic and tried to provide remedy in favour of women. For example, in *Khatoon v State* the victim was severely beaten by her husband and in-laws when she expressed her inability to bring dowry from her brother and was left in the courtyard in an unconscious state. She lost her hearing capacity due to inhuman beating and torture by the accused.²⁵⁹ The X-ray report also showed a traumatic collapse of her spine and dislocation of her bones.²⁶⁰ The court held:

...when a prima facie case has been disclosed and cognisance taken, this court would not embark upon an enquiry into whether the allegation is reliable or not and would not stifle the proceedings before the prosecution got an opportunity to bring evidence in support of the accusation.²⁶¹

In *Howlader v State* the Supreme Court reaffirmed the verdict of the lower court, observing that merely a demand of dowry constituted an offence and found the accused guilty.²⁶²

define them with reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.' See (1991) 13 EHRR 379, cited in *L V DPP* n 251 at 857.

²⁵⁹ (1986) 38 DLR 348 at 350-351.

²⁶⁰ Id at 356.

²⁶¹ Id at 354.

²⁶² (1994) 46 DLR (AD) 169-174; see also, *Karim v Begum* (1988) 40 DLR 360-363; *Saha v State* (1996) 1 BLC 97-102; *Pramanic v Rani Pramanik* (1994) 46 DLR 290-291; *State v Pramanik* (1991) 43 DLR (AD) 64-76.

However, in numerous cases, the Court upheld a very restrictive approach and placed much emphasis on the formal wording of law, instead of its intent. For example, in *Begum v Ali* the High Court observed that the mere allegation of the wife that her husband (accused) had beaten her while demanding dowry and ousted her from the house will not come within the mischief of section 6 of the Ordinance 1983.²⁶³ In order to obtain a remedy, there must be an allegation that the accused husband caused or attempted to cause death or grievous hurt to her.²⁶⁴ To put it another way, women are required to be severely beaten or be grievously hurt or be subject to an attempted death before seeking remedy for dowry-demand and mere demand without these will not be enough to have a remedy. Apart from these, a series of factors such as the dual and confusing jurisdictions of the court, faulty investigations and the huge backlog of cases frustrate women's access to judicial remedies.

6.3.6.2.1. The Dual and Confusing Jurisdictions

All dowry and cruelty cases against women are criminal offences under the jurisdictions of the Criminal Courts and the Special Tribunals in Bangladesh. In dealing with a similar nature of offence, the jurisdictions of the above very often create confusion among victims and 'their pleaders and even the judges'.²⁶⁵ There are instances where at the final stage of cases (appeal), after expending time and money women failed to obtain judgment and the cases were sent back to the trial court (court of the first instance) for a nominal technicality. For example, in *State v Rahman* the wife was killed by the husband for TK 600 (US\$10) as

²⁶³ This case was lodged under the *Cruelty to Women (Deterrent Punishment) Ordinance* 1983. See (1988) 40 DLR at 161.

²⁶⁴ Ibid; See also, *Ali v State* (1999) 51 DLR 121-124. In this case, the petitioner unlawfully attempted to abduct a woman and later she was rescued by the police. The Court failed to recognise this (under the *Women and Children Repression (Special Provisions) Act* 1995) as an offence, instead held that 'continuation of the proceedings [of the case] ...would amount to harassment to the petitioners and that also would amount to an abuse of the process of court.' see at 124.

²⁶⁵ Monsoor 1999 n 3 at 239-240.

dowry. The Sessions judge, as a Criminal Court but not as a Special Tribunal, convicted the accused and sentenced him to death under section 302 of the *Penal Code* 1860. The High Court held that this was an offence under the *Cruelty to Women (Deterrent Punishment) Ordinance* 1983, and offences under this Ordinance are exclusively triable by a Special Tribunal.²⁶⁶ The Court therefore set aside the order of conviction and sentence against the accused husband, arguing that ‘the case needs to be sent back to the Sessions Judge, Barguna for the purpose of trial of the case as Special Tribunal... as a Special Tribunal Case.’²⁶⁷ However, the Sessions Judge who tried the case had the authority to act as a Special Tribunal under the Ordinance 1983 but a minor omission was that the court did not take the case as a Special Tribunal case.

6.3.6.2.2. Back Log of Dowry Cases, Faulty Investigations and Benefit of Doubt

It is difficult to provide a total number of pending cases on dowry throughout Bangladesh as there are no government-sponsored statistics in this regard. However, it was reported three years ago that 22,000 dowry cases were pending in different courts in the country.²⁶⁸ Nevertheless, the High Court Division heard only six cases of dowry between the period of 1991-1996.²⁶⁹ Faulty investigations, the police’s failure to submit the charge sheet to the court and to produce prosecution witnesses have facilitated granting bail in favour of the

²⁶⁶ (1989) 41 DLR 1 at 3. A Special Tribunal is entitled to try all cases under the *Cruelty to Women (Deterrent Punishment) Ordinance* 1983. Section 26 of the (*Special Powers Act*) provides that every Sessions Judge... shall... be a Special Tribunal for the trial of offences triable under this Act.’ See at 2.

²⁶⁷ Id at 3.

²⁶⁸ Monsoor 1999 n 3 at 232-233.

²⁶⁹ Khan 2001 n 75 at 268.

accused under section 339C of the *Criminal Procedure Code* 1898.²⁷⁰ In *Akbar v State* the Court held that the acquittal order has become an end result of many cases, despite strong witnesses testifying as to the involvement of the accused in committing the crime in broad daylight. This is ‘due to the faulty investigation of the case by the police or absolute right to silence of the accused during investigations or trial.’²⁷¹ In *Begum v Haque* the wife obtained judgment for a dowry demand against her husband. However, the Sessions Court on appeal acquitted the husband on grounds of the slightest benefit of doubt.²⁷² In another unreported case, the complainant was severely tortured by the husband and by his second wife for dowry but she failed to get a remedy. The daughters of the petitioner in the first instance acknowledged that their father used to torture their mother but later denied the allegation. The court finally ruled that ‘since there was insufficient evidence of torture, the accused could be released, and the case withdrawn.’²⁷³

Again, it is important to acknowledge here that the accused should not be deprived of the right to the benefit of doubt, even if that benefit is the slightest. It is one of the fundamental principles of national and international law that every person should be entitled to a fair trial.²⁷⁴ Thus, it might be an unfair recommendation for eliminating dowry in Bangladesh by abolishing ‘the slightest benefit of doubt’. Nevertheless, given the grave concern for eliminating dowry and evidentiary difficulties in proving the ‘domestic nature’ of dowry

²⁷⁰ Section 339C of the *Criminal Procedure Code* 1898 deals with the time limit for disposing of cases depending on the gravity of crimes. Section 339C(4) provides that ‘[if] a trial cannot be concluded within the specified time, the accused in the case, if he is accused of a non-bailable offence, may be released on bail...’

²⁷¹ (1999) 51 DLR 268.

²⁷² See Complaint case no 639 of 1982 under the *Dowry Prohibition Act* 1980, unreported case, (cited in Agarwal 1988 n 7 at 220).

²⁷³ UNDP Bangladesh 2002 n 226 at 108.

²⁷⁴ See for example, *The Constitution of the People’s Republic of Bangladesh* 1972 art 35, *International Covenant on Civil and Political Rights* (ICCPR) 1966, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, arts 14 (2) & 14 (3)(g). Article 14 (2) provides that ‘[everyone] charged with a criminal offence shall

that often frustrates women's judicial remedies in Bangladesh, 'the slightest benefit of doubt', but not the benefit of doubt itself, should be reviewed. This review is necessary not because of limiting the accused's right to 'the slightest benefit of doubt' but to limit the way this is used against dowry victims in Bangladesh. For similar reasons, the scope of this benefit should not be extended to such 'fanciful and remote possibilities' that 'deflect the course of justice.'²⁷⁵ The judicial precedent of India also recognised the need for such a review.²⁷⁶ This issue is further considered in the following chapter.

Apart from the above, 'the judiciary of Bangladesh has recently been at the centre of controversy in relation to its transparency, impartiality and accountability.'²⁷⁷ The huge number of pending cases in proportion to the resolved cases, the excessive allegiance to power politics, and the subservient roles of the judiciary have raised serious concerns regarding its accountability.²⁷⁸

6.3.6.3. Judicial Decisions of other Jurisdictions

The Supreme Court (SC) of India, subject to few exceptions,²⁷⁹ adopted expansive and strong approaches in numerous judicial decisions to remedying dowry violence.²⁸⁰ In a case of an unnatural death of a woman the Court put emphasis on whether the deceased was

have the right to be presumed innocent until proved guilty according to law.' Article 14 (3) (g) runs that everyone shall be entitled to '[not] to be compelled to testify against himself or to confess guilt.'

²⁷⁵ See n 247; *State of U P v Srivastava* (1992) AIR SC 840 at 845-846.

²⁷⁶ See for example, *Srivastava* id at 840-847 (is considered in the following section).

²⁷⁷ M R Islam and S M Solaiman, 'Public confidence crisis in the judiciary and judicial accountability in Bangladesh' (2003) 13 *Journal of Judicial Administration* 29 at 30.

²⁷⁸ How the corruption, chronic delays in dispensing justice and the subservient role of judiciary in Bangladesh cause the erosion of public confidence-see Id at 31-37.

²⁷⁹ See for example, *Singh v State of Bihar* [2001] 2 LRI 751.

²⁸⁰ The Court while reversing the decision of the High Court, observed that 'sentimentalism has no place in the judicial process and yet sensitivity to a social problem and commitment to a constitutional mission is a virtue it has sustained so far.' See *Gupta v State of Madhya Pradesh* (1990) CrL LJ 2163; see also, *Sing v Singh* (1990) AIR SC 209; *Andra Pradesh High Court v T Punniiah* (1989) CrL LJ 2330; *Asokan v State* [2001] 3 LRI 1032; *Raj v State of Punjab & Ors* [2000] 3 LRI 556; *Anor v State of Hayana* (1991) SC 1226.

subjected to cruelty in connection with dowry.²⁸¹ It held that if such cruelty is proved, ‘irrespective of the fact whether the accused has any direct connection or not, he shall be presumed to have committed the dowry death’.²⁸² According to the facts of the case, the victim S Bala was married to the accused on 24 May 1982. After staying two months in the matrimonial place she came back to her parents with a claim that ‘the accused was wanting more dowry in the form of a television and a fridge.’²⁸³ Her parents sent her back to the accused with Rs 600 (US\$13.18). ‘The accused again demanded another sum of Rs 25,000 (US\$549.08) for purchasing a plot’, and forced her to go back to her parents and stay there until the demand was met.²⁸⁴ Finally she came back to the accused with Rs 15,000 (US\$329.45) ‘with a promise that the balance would be remitted by her father soon.’²⁸⁵ On 16 June 1987 the victim died of strangulation. The Court observed:

...[a] reading of Section 304-B[²⁸⁶] would show that when a question arises whether a person has committed the offence of dowry death of a woman what all that is necessary is it should be shown that soon before her unnatural death, which took place within 7 years of marriage the deceased had been subjected, by such person, to cruelty or harassment for or in connection with demand for dowry.²⁸⁷

The prosecution proved that the victim was subjected to harassment for dowry and died due to strangulation but failed to provide direct evidence regarding the involvement of the accused in that death. The Court, however, reduced the sentence of imprisonment for life passed by the High Court to ten years imprisonment as there was no direct evidence connecting the accused.²⁸⁸ In two other cases the accused were not directly involved in the suicidal deaths of two women, which occurred within seven years of their marriages.

²⁸¹ See *Hemchand v State of Haryana* (1994) 6 SCC 727 at 727-731.

²⁸² *Id* at 730.

²⁸³ *Id* at 729

²⁸⁴ *Ibid*.

²⁸⁵ *Ibid*.

²⁸⁶ Section 304-B of the *Indian Penal Code* 1890, see n 241.

²⁸⁷ *Hemchand* n 281 at 730.

However, it was proved that these two women were subjected to frequent torture and harassment by the accused for dowry before committing suicide. The accused were convicted ‘for creating circumstances that provoked or forced [them] to commit suicide.’²⁸⁹ Although such a punishment is aggressive and a bad precedent considering the accused’s right to a fair trial, a broader social consideration and the practical necessity to prevent the commission of frequent suicides by dowry victims, and the obligation to comply with legal provisions to this end appeared to influence the Court to reach these decisions.

Beyond the above, in *Paniben v State of Gujrat* the accused of a dowry case was in jail for more than a decade. The SC did not show any leniency, rather observing that it would be a travesty of justice if sympathy is shown for a cruel act and that can even distort the ‘confidence of the efficiency of law.’²⁹⁰ In a recent case of suicide the Court extended the sentence of the accused passed by the trial court, observing that:

[the] legislature has by amending the Penal Code and Evidence Act made Penal Law more strident for dealing with and punishing offences against married women. Such strident laws would have a deterrent effect on the offenders only if they are so stridently implemented by the law courts to achieve the legislative intent.²⁹¹

Although these decisions are largely the consequence of legal reforms in India, the SC is recognised as interpreting and expanding the meaning and intent of laws beyond their formal wording. For example, in *Rani v Kumar* the SC of India extended section 6 of the *Dowry Act* 1961 by way of interpreting ‘Trust’ to provide a maximum remedy to a dowry

²⁸⁸ Ibid.

²⁸⁹ See *Singh* n 141 at 1537-1538; *Rao & Anor v Rao & Ors* [2002] 4 LRI 918 (para 22).

²⁹⁰ (1992) AIR SC 1817 at 1822. In another suicide case the Court convicted the husband of the deceased, observing that pressure for dowry stepped up by the husband provoked or forced wife to commit suicide; see *Singh* n 141 at 1537-1538.

²⁹¹ *Rao* n 289 (para 27).

victim.²⁹² In this case, a husband deprived his wife of her personal property and jewellery. The Court maintained that by refusing to return her personal jewellery the husband committed a criminal breach of trust and a husband can only hold a bride's property in trust until it is transferred to her.²⁹³ Further, in a similar situation as in Bangladesh, the SC refused to place excessive reliance on the 'slightest benefit of doubt' in *State of U P v Srivastava*.²⁹⁴ As the facts of this case suggest, M Srivastava, a young woman, 'died of burns on the night between 20th and 21th July, 1974', within less than a year of marital life. In brief, the prosecution case was that 'immediately after the marriage there was some bickering in regard to the quantum of dowry paid by the brides father.'²⁹⁵ Her husband and his family were not satisfied with the dowry provided by her father. On account of this feeling they very often tormented and tortured her when she tried to defend her father.²⁹⁶ At one stage '...in the dead of night at about 2.30 or 2.45 a.m. they sprinkled kerosene on her and set her ablaze...No effort whatsoever was made by any of them to extinguish the flames or to rescue her.'²⁹⁷ On hearing shouts, prosecution witnesses came out of their house and took her to the hospital where the doctor declared her dead.²⁹⁸ The trial court convicted three accused and sentenced each of them to imprisonment for life. On appeal, the High Court set aside this order and acquitted all of the three accused. The High Court was, *inter-alia*, suspicious about the trustworthiness of two witnesses and held that the prosecution

²⁹² See *Rani v Kumar* (1985) AIR SC 628 at 639- 641. In this case the Court further held that the 'mere factum of the husband and wife living together does not entitle...to commit a breach of criminal law and if one does then ...will be liable for all of the consequences of such breach.' See at 629.

²⁹³ Ibid.

²⁹⁴ (1992) AIR SC 840 at 840-847.

²⁹⁵ Id at 842.

²⁹⁶ Ibid.

²⁹⁷ Ibid.

²⁹⁸ Id at 842-843.

failed to prove the case beyond reasonable doubt.²⁹⁹ However, the SC restored the order of the trial court. In setting aside the order of the High Court, the SC reasoned, *inter alia*:

...[the] circumstance relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt. But this is not to say that the prosecution must meet any and every hypothesis put forward by the accused however farfetched and fanciful it might be.³⁰⁰

The court practices in the US display a two-pronged effort in response to domestic abuse. Under the equal protection clause, the court obligates states to apply neutral laws with equal vigour in order to provide victims with appropriate remedies. Under the due process clause, the court mandates state actors to treat the victims with a substantive approach to suit their unique experiences. An application of this approach becomes imperative when the state acknowledges an obligation through enacting special laws to deal with domestic violence.³⁰¹ In numerous cases US courts restricted police impunity and held the government accountable for the police failure.³⁰² In *Thurman v Torrington* a battered woman sued police officers under the equal protection clause, alleging that they repeatedly ignored her reports until her husband stabbed her. The court favoured the woman, maintaining that police officials have an affirmative duty to take reasonable measures to protect the personal safety where they are aware of the possibility of attacks on women in domestic relations. 'Failure to perform this duty would constitute a denial of equal protection of the laws',³⁰³

In Australia, the Queensland Court of Appeal in *R v Kina*, in allowing a woman's appeal, recommended that the provisions of legal representation do not work in complex factors

²⁹⁹ Id at 842.

³⁰⁰ Id at 845-846.

³⁰¹ Development in Law Part IV n 116 at 1557-1558.

³⁰² See for example, US cases: *Coffman v Wilson Police Dept* 739 F Supp 257 (1990); *Sorichetti v City of New York* 65 N Y 2d 461 (1985); *Siddle v The City of Cambridge* 761 F Supp 503 (1991).

³⁰³ (Us Case) 595 F Supp 1521 (1984) at 1527.

involved in a case of domestic violence. In this case Kina was convicted of murder and was unable to present the evidence of her life marked by ‘physical and sexual violence and humiliation.’ The Court maintained that the appellant faced exceptional difficulties in interacting with legal representatives. These difficulties were:

(i) her aboriginality; (ii) the battered woman syndrome; and (iii) the shameful (to her) nature of the events which characterised her relationship with the deceased. These cultural, psychological and personal factors...effectively denied her satisfactory representation or the capacity to make informed decisions on the basis of proper advice. In the exceptional events which occurred, the appellant’s trial involved a miscarriage of justice. Accordingly, the appeal should be allowed.³⁰⁴

In *T v S* the appellant suffered from a histrionic personality disorder and a post-traumatic stress disorder due to domestic violence. The Court relied on a number of articles of CEDAW and ordered a new trial. The Court reasoned that the appellant, being a victim of domestic violence, lost her capacity to effectively represent the case and thus was denied a fair trial.³⁰⁵

The SC of Canada in *Lavallee* accepted ‘battered woman syndrome’ in support of the defence of an accused woman who was convicted of killing her partner. To provide an explanation as to why the accused did not escape the relationship despite frequent torture inflicted on her by her partner, the court relied on the expert testimony and held that:

...[each] of the specific facts underlying the expert’s opinion need not be proven in evidence before any weight could be given to it. As long as there is some admissible evidence to establish the foundation for the expert’s opinion, the trial judge cannot subsequently instruct the jury to completely ignore the testimony.³⁰⁶

The court further indicated that the shame and dishonour manifested with the victimisation of battered women make them reluctant to disclose the extent of the severity to others.

³⁰⁴ *R v Kina* (1993) Queensland Court of Appeal (Australia) CA No 221 of 1993 1 at 35-36.

³⁰⁵ (2001) 28 Fam LR 342 (Australia).

³⁰⁶ *R. v Lavallee* [1990] 1 SCR 852 at 854.

Expert evidence can assist in dispelling these myths and can be used to explain why a woman would remain in a battering relationship.³⁰⁷

In summing up, the above foreign cases demonstrate that the judiciary recognises an obligation to further the inherent objectives of the national and international instruments to accommodate women's exceptional experiences in domestic abuse. Despite positive decisions in dealing with dowry incidents, the judicial practice in Bangladesh still reflects the conservative approach. The strict and excessive reliance on the formal language of law, and on the common-law-grown formalities such as the 'burden of proof' and the 'slightest benefit of doubt' in trial proceedings have undermined the legislative intent in many instances. Given the upward trend of dowry violence, the judiciary of Bangladesh should adopt a broader approach even, on some occasions, moving beyond the official instruction of law to suit women's specific realities with the intent of law.³⁰⁸

It has become a common judicial practice in other jurisdictions to redress psychological injuries of victims of domestic violence through tort and criminal remedies.³⁰⁹ Nonetheless, the court in Bangladesh has failed to make the government accountable for the gross failure and misconduct of police in handling violence cases against women. Neither has any sanction against psychological injury developed in the judicial culture of the country. Should such a remedy be provided by the court in Bangladesh, it will help the *Dowry Act* 1980 serve its proper purpose for the benefits of dowry victims.

Further, in most dowry cases in Bangladesh the court has failed to punish the accused due to the lack of evidence and the victim's inability to testify or to answer questions as

³⁰⁷ Ibid at 853; see also, *Griffith v Canada* (1999) 13 OFLR 40.

³⁰⁸ This is because the apparent text or statement of law may not always be able to cope with the particular problems experienced by women; see *Kina* n 304.

³⁰⁹ See for example, US cases, *Marcia v Wilferd* 214 Neb 154 (1983); *Henry v Gayle* 807 SW 2d 391 (1991).

required by the particular cases. Numerous factors such as mental distress, concern for personal safety and the overall consequences of the case make victims unable to produce evidence properly. The court must take these accounts of dowry victims with due sensitivity and acknowledge the ‘battered women’s syndrome’ to ease their obtaining justice.

Lastly, in order to avoid dual and conflicting jurisdictions, all family-related offences including dowry should be transferred to the domain of the Family Court. It may be relevant to mention here that Family Courts are already in place in Bangladesh to deal with issues of domestic relations including dower, maintenance and custody of children.

6.4. Summary and Conclusion

The discussion in the first part of this chapter demonstrates that the physical and emotional assault involved in dowry meet the standards of abuse required for constituting ‘torture’ and thus should deserve similar national or international legal treatment. Law is bound to be ineffective/meaningless if it is structured and enforced in ways that ignore the reality in a particular society. The same is true when the proper enforcement machinery does not accompany it. International human rights law sets a basic standard for prohibiting torture. The recognition of the issue at the domestic level warrants that due regard be provided to the overt and covert aspects of dowry as well as to the restructuring of economic and legal systems that are oppressive and discriminatory to women.

The discussion conveys that despite a series of amendments, the *Dowry Prohibition Act* 1980 (the Act 1980) in particular and the penal laws in general suffer from a substantial number of flaws and lack proper implementation. Given the pervasive and ‘domestic’ nature of dowry, this chapter suggests that in dealing with the dowry prosecution, similar

provisions of dowry laws of India, including the shifting of the burden of proof from the victim to the accused in some circumstances and the rules that relate to the presumption of a suicide or a dowry death, should be introduced in Bangladesh. In addition, similar provisions should be incorporated in the Act 1980 for the psychological and physical abuse of women in connection with dowry.

In order to combat dowry, its hidden aspects, such as polygamous marriage and divorce initiated by the husband, must be properly addressed. To this end, *inter alia*, the penal provision for non-compliance with legal requirements regarding these two aspects of dowry needs to be reviewed. The increased ‘cost’, as suggested earlier, coupled with stiffer punishment for polygamous marriage³¹⁰ and for the failure of the husband to pay dower and maintenance in the event of divorce, could provide some relief. It can reasonably be expected that this means of ‘earning dowry’ will be less attractive to in-laws when the means itself involves huge cost and penalty.

In order to provide dowry victims with immediate protection and safety and to address other types of domestic abuse, new legislation should be enacted. It should entitle victims to protective orders and relevant remedies such as safe shelter and custody for children.

Apart from a number of flaws in the Act 1980, the above discourse has identified some problems in getting dowry remedies. Some of the prominent problems are: (i) the large discretionary powers of police in arresting the accused; (ii) the absence of a statutory obligation for the prosecutor to deal with domestic abuse cases with more care and sensitivity; and (iii) the conflicting jurisdictions of the courts in adjudicating dowry cases. Despite some limitations, pro-prosecution and mandatory arrest policies are widely viewed

³¹⁰ Penalty for second marriage without the permission of the existing wife pursuant to section 6(2) of the *Muslim Family Laws Ordinance* 1961 or where the permission was obtained by force.

as effective criminal sanctions and have proved effective in preventing domestic violence in some jurisdictions. These policies can serve at least three major objectives in Bangladesh. Firstly, the ‘social and reputational consequences of mandatory arrest’ may have a deterrent effect on educated people and reduce the possibility of the accused’s pressure on the victim when the responsibility of prosecution will be entrusted to the prosecutor. Secondly, legal sanctions would encourage the police and prosecutors to take abusive cases more seriously. Thirdly, and more importantly, the traditional role of the court, unresponsive police and, finally, the acquittal of offenders in a large number of cases push the frustrated women of Bangladesh to believe that they will not get remedies for their misery over dowries. The overall consequence of these reforms should provide women with light in gloom and successful suits might remedy those situations which could not be dealt with earlier due to the absence of mandatory arrest and prosecution policies in Bangladesh.³¹¹

Once again, an argument might be canvassed here as to how the policies of a developed country can be applied to a developing country. Nevertheless, that should be countered by the potential benefits of mandatory and prosecution policies in view of the cost involved in the process. Since the police and prosecutors are already engaged in dealing with dowry in Bangladesh, the initiation of these policies will take less effort and money. Alternatively, these can strengthen the legal and mental power of the traditionally disadvantaged victims of dowry.

However, the law alone may not be able to remedy the dowry unless the administration intervenes in the process through the impartial and efficient application of laws. In addition, to enable women to take advantage of the law, the government’s efforts must be advanced

³¹¹ Development in Law Part IV n 116 at 1573.

to offset the power imbalance.³¹² That can be done through providing women with opportunities for education, legal support, counseling and vocational training. Law will remain in theory only, if victims do not have access to legal proceedings with resources.

Given the limits and ineffectiveness of legislative and administrative measures, the judiciary appears to be the last resort of women to have their legal dues. In regard to the role of the judiciary in Bangladesh, the discussion reflects a frustrating reality. It observes that the judiciary in the last three decades has failed to advance any different approach to address the disadvantaged situation of women in the traditional trial. As in other jurisdictions, the judiciary in Bangladesh must invent a progressive approach to cope with the contemporary needs of women. The proliferation of progressive laws and commensurate judicial practices in a comparative perspective provide ample evidence of using this positive experience to lessen the sufferings of under privileged groups in Bangladesh. Further, notwithstanding its limited institutional independence as revealed in Chapter 3, the judiciary in Bangladesh should endeavour to promote their integrity and public confidence. In this connection, it is notable that the Judiciary of India has also been experiencing similar problems to Bangladesh, and only in 1999 was there an attempt to establish a separate Judicial Pay Commission and Judicial Service Commission. Yet it is renowned for its authoritative guidelines and dynamic approaches to preserving and developing rights.

Finally, legislative, administrative and judicial efforts will only be effective when the beneficiary and public become aware of those. 'Even the best law cannot play a more important role if the level of legal consciousness in a society is low, both in regard to the

³¹² R Goel, 'No Women at the Center: The Use of the Canadian Sentencing Circle' (2000) 15 *Wisconsin Women's Law Journal* 293 at 334.

understanding of law and to the relevant legal estimations and attitudes.’³¹³ Women should be informed about a range of legal options and be provided with necessary equipment for exploiting those options. The media and Women’s Organisations along with the government’s positive actions can play a significant role in this regard.

To show further shortcomings of law dealing with women’s rights in Bangladesh, the next chapter analyses how the rape laws and trial proceedings work to the disadvantage of women.

³¹³ Cited in Carlson-Whitley 1994 n 27 at 662.

Chapter 7

Rape Laws and Trial Proceedings in Bangladesh

7.1. Introduction

A number of positive statutes are in place in Bangladesh to deter rape, with stringent punishments such as imprisonment for life and the death sentence. Women's dignity as a core value of human rights law is deeply embedded in numerous international instruments under which Bangladesh assumes positive obligations to ensure this right.¹ Despite this, every day 10 women, on average, are violated, some of them as young as six years of age.² According to a recent study, in one Union (Lower Administrative Unit) under the Chittagong Division around 500 women were raped in one month.³ It is further disturbing to observe that the offenders photographed and videotaped victims while they were being gang raped and later marketed these.⁴ To escape disgrace and social humiliation many of the young victims committed suicide.⁵

¹ M R Islam, 'Protecting Human Rights in an Era of Globalization' in M Rahman (ed), *Human Rights and Globalization* (2002) Elcop: Dhaka at 15.

² Staff Reporter, 'Violence against women on the rise' *The Independent* (1 April 2003).

³ A study conducted by the Bangladesh *Mahila Parishad* (Women's Association) reveals that information. See Staff Reporter, Chittagong Office, '500 women raped and assaulted in one month in Bashkhali' *The Janakanta*, Dhaka (29 May 2002); see also, Staff Reporter, 'Women sound the alarm over sharp rise in rape cases' *The Independent* <http://independent-bangladesh.com/news/jul/22/22072002cr.htm#A1> (22 July 2002).

⁴ UNB, 'Tough law ineffective: 4,517 women, children assaulted in 2001' *The New Nation*, Dhaka (17 August 2002); M Hussain, 'Rape victims often get raw deal' *The New Nation* <http://www.nation-online.com/200208/29/n2082909.htm> (29 August 2002).

⁵ See for example, UNB Kushtia, 'Rape Victim commits suicide' *The New Nation* <<http://www.nation-online.com/200208/28/n2082806.htm>> (28 August 2002); 'Rape victim kills herself' *The Financial Express*, Dhaka (30 May 2002); UNB, 'College girl raped, commits suicide in Rajbari' *The Daily Star* (31 July 2002); 'Rape victims commit suicide for social harassment, but NGOs don't help' *The New Nation* <http://www.nation-online.com/200205/05/n2050501.htm> (5 May 2002); S S Islam, '4 to die for Mohima rape and suicide' *The Independent* <http://independent-bangladesh.com/news/oct/10/10102002ts.htm#A1> (10 October 2002); 'Father commits suicide for not getting judicial remedies (Bengali)' *The Janakantha* (Bengali National Daily) (31 May 2002).

The age-old, lengthy and expensive criminal justice system prevents women from bringing cases to the court.⁶ If somehow they manage to lodge cases, 95% of the accused in rape cases are acquitted due to faulty investigations and the lack of evidence.⁷ Some other factors further undermine women's pursuit of justice. The prime factors are: (i) the indecent way of cross-examining rape victims by defence lawyers; (ii) the excessive focus on the conduct of victims by the trial; (iii) the endemic corruption, irresponsibility and insensitive attitudes of police towards women; and (iv) the fear of reprisals to the families of victims and to witnesses of the case by rapists with superior social and political connections.

Recent legislative efforts across nations mark a significant departure from the traditional concept of rape and restrict the way law has been used to impair women's dignity. Current judicial decisions of foreign jurisdictions also recognise the cruelty and sufferings involved in rape as a breach of the fundamental right to life. By contrast, the rape laws and trial proceedings (RLTP) in Bangladesh remain unchanged. The traditional RLTP place women at a disadvantage in the conservative society of Bangladesh.

Against this background, this chapter argues that rape laws in Bangladesh, and the manner of their applications, are in many respects not only unfairly prejudicial and discriminatory to women, but have contributed to the upward trend of rape. The combined effect of developments in international law and judicial activism in a comparative perspective also provide a powerful basis for claiming that such prejudicial and discriminatory practices violate women's fundamental right to life. More broadly, it argues that the responsibility for public/private acts and omissions should be imposed on the government.

⁶ United Nations Development Program (UNDP), *Human Security in Bangladesh-In Search of Justice and Dignity* (hereinafter UNDP Human Security) (2002) Dhaka: UNDP Bangladesh at 41-42 & 106-106.

This chapter critically examines the RLTP in Bangladesh, highlighting their adverse impact on women's access to justice and on the possibility of effective redress. It illustrates ways the concept of rape and laws need to be reconceptualised and reviewed for addressing women's discriminatory positions in the traditional trial. The discussion concludes that a substantial number of changes in the RLTP and an accountable government are the only palatable options to minimise the systematic suffering of rape victims in Bangladesh.

The way in which international provisions have been developed under the UN framework in regard to the crime of rape is more or less similar to those relevant to the domestic violence as discussed in Chapter 6.⁸ Therefore, to avoid repetition, this issue is not considered in this chapter.

Nevertheless, the following two sections 7.2 and 7.3 address briefly two important issues regarding rape. Firstly, the recent development in international law acknowledges the severity of rape by way of providing it with the equivalent legal weight of genocide and war crimes. Secondly, as mentioned, significant efforts have been made in foreign judicial practices to recognise the violence and sufferings attached to rape as a breach of the fundamental right to life. These practices have also begun to link the right to life with human dignity, moving well beyond a mere existence.⁹ Although these issues in detail are not central to the arguments of the chapter, a brief exploration is necessary for the sake of understanding the nature of rape and for reflecting its significance in legal rights discourse. The relevant laws and practices of rape in Bangladesh are examined in

⁷ UNB 2002 n 4.

⁸ *Convention on the Elimination of All Forms of Discrimination Against Women* (hereinafter CEDAW) 1979, *Declaration of Violence Against Women* 1993 (G A Res 48/104, UN GAOR, 48th Sess, Agenda Item 111, U N Doc A/RES/48/104 (1994) and the World Conferences such as the Vienna Conference on Human Rights 1993; the Beijing Declaration 1995 which calls for elimination of rape and other systematic violence that impede the enjoyment of women's equal rights. Some of the provisions of those instruments have particular references to rape. See for example, *World Conference on Human Rights: Vienna Declaration and Program of Action*, 12 July 1993, UN Doc A/CONF 157/23 at para 28-30.

⁹ See for example, *Olge Tellis v Bombay Municipal Corporation* (1986) 73 AIR SC 180 at 193.

section 7.4. Section 7.5 then develops the due diligence test to impose responsibilities on the government for public and private acts or failures that infringe women's rights and dignity. Section 7.6 presents a summary and conclusion.

7.2. Rape as a War Crime

Although rape was outlawed during armed conflicts for centuries by national laws, states were reluctant to prosecute rape as a war crime in wartime.¹⁰ Until the 1990s, international initiatives were largely concentrated on the social aspects of rape such as the dignity and family honour of a rape victim,¹¹ and 'rape in war' was considered a 'sad inevitable byproduct of war' rather than a war crime.¹² In the 1990s, the international community, for the first time, acknowledged the violent aspect of rape in wartime through categorising it as a war crime. This recognition paved the way for developing a theoretical standard in international law for addressing rape in war, and spelt out the significance of rape in international human rights discourse.

In the mid 1990s, two International Criminal Tribunals were established separately under the resolutions of the UN Security Council to prosecute serious violations of

¹⁰ S A Healey, 'Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia' (1995) 21 *Brooklyn Journal of International Law* 327 at 330.

¹¹ For example, the *Geneva Convention* 1949 states that 'women shall be especially protected against any attack of their honour, in particular against rape...'. However, it did not regard rape as 'grave breach' of laws of war subject to the universal jurisdiction. The *Protocols to the Geneva Convention* 1977 addressed this shortcoming by incorporating rape under the list of crimes against humanity. The *Control Council Law No 10*, 1946 adopted by the Allied powers in Germany also included rape within the definition of crime against humanity but 'rape was never actually charged'. Rape was not addressed either in the post World War II Nuremberg Charter or prosecuted as a war crime by the International Military Tribunal. However, the International Military Tribunal established in Tokyo prosecuted some Japanese military and civilian officials for war crimes including rape. See *Convention Relative to Protection of Civilian Persons in Time of War*, Aug 12, 1947, 75 UNTS 287 (Geneva Convention No IV) art 27 (2); *Protocol I Additional to the Geneva Conventions of 12 Aug 1949, and Relating to the Protection of Victims of International Armed Conflicts*, opened for signature 12 Dec 1977, 1125 UNTS 3 (entered into force 7 Dec 1978); *Protocol II Additional to Geneva Conventions of 12 Aug 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 12 Dec 1977, 1125 UNTS 609 (entered into force 7 Dec 1978); see also, R Copelon, 'International Conference: Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000) 46 *McGill Law Review* 217 at 221; T Meron, 'Rape as a Crime Under the International Humanitarian Law' (1993) 87 *The American Journal International Law* 424 at 424-428.

¹² J Peters and A Wolper (ed), *Women's Rights Human Rights-International Feminist Perspectives* (1995) New York: Routledge at 197; Healey 1995 n 10 at 330.

humanitarian law committed in the former Yugoslavia and Rwanda.¹³ The Statutes of the Tribunals recognise rape while committed during wartime, as a war crime and seek to bring an end to the impunity of war crimes through establishing individual criminal responsibility.¹⁴ The Rules of Procedure of the Tribunal also ease the burden of testifying rape victims in many respects.¹⁵

Thereafter, the Rome Statute of the International Criminal Court, to a great extent, has contributed to the development of rape as a war crime through codifying all sexual crimes as part of the subject matter jurisdiction of the Court.¹⁶ The Statute accords rape a similar legal sanction to other crimes subject to universal jurisdiction.¹⁷ In addressing different forms of sexual violence, the Statute in many ways departed from the traditional concept of a trial.¹⁸ Further, a broad construction of existing laws of war by the International Committee of the Red Cross and by the states, considerably help establish rape as ‘both a war crime and a grave breach under customary international law.’¹⁹

¹³ See SC Res 808, UN SCOR, 48th Sess, UN Doc S/RES/808 (1993); SC Res 955, UN SCOR, 49th Sess, UN Doc S/RES/955 (1994).

¹⁴ See for example, the Statute of the Tribunal for Yugoslavia, SC Res 827, 2 UN Doc S/Res/827 (1993); see also, P N Strapatsas, ‘The European Union and its Contribution to the Development of the International Criminal Court’ (2003) 33 *Revue de Droit de l’Universite Sherbrooke* 399 at 403-5410-25.

¹⁵ See *International Criminal Tribunal for the Former Yugoslavia, Rules and Procedure and Evidence*, UN Doc IT/32/Rev 3 (1996), entered into force 14 March 1994, amendments adopted 8 January 1996 r 96; see also, F Ni Aolain, ‘Radical Rules: The Effects of Evidential and Procedural Rules on the Regulation of Sexual Violence in War’ (1997) 60 *Albany Law Review* 883 at 891-892.

¹⁶ *Rome Statute of the International Criminal Court*, UN Doc A/CONF 183/9, 17 July 1998 (as corrected of Nov 1998 and 12 July 1999) (hereinafter the Rome Statute); see also, M C Bassiouni, ‘From Versailles to Rwanda in Seventy- Five Years: The Need to Establish a Permanent International Criminal Court’ (1997) 10 *Harvard Human Rights Journal* 11 at 11-62.

¹⁷ The Rome Statute id arts 68-69.

¹⁸ For example, the Statute requires prosecutors to properly investigate sexual crimes with particular emphasis on the victim. It borrowed an important provision from the civil law system. Pursuant to this provision, victims have a right to participate in proceedings directly or through a legal representative insofar as their interests are affected. See The *Rome Statute* n 16 arts 54 & 68; see also, Copelon 2000 n 11 at 238-239.

¹⁹ Healey 1995 n 10 at 334.

The *Akayesu* was the first international judgment to recognise rape as an act of genocide.²⁰ In this case, the Criminal Tribunal for Rwanda observed that rape and sexual violence ‘constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such’.²¹ Similarly, the *Kadic* was the first civil action in domestic jurisdiction holding a foreign private citizen accountable for his crimes against women.²² R Karadzic, a foreign national and Bosnian-Serb leader, was sued before a US District Court in 1993 for committing atrocities including rape against women in the former Yugoslavia. The trial court dismissed the allegation due to the lack of subject-matter-jurisdiction and the lack of personal jurisdiction.²³ However, the Court of Appeal for the 2nd Circuit, on the basis of relevant sources of US law including international human rights provisions, observed that the torture, genocide and war crimes ‘when committed under the color of state law, have been held to be actionable’.²⁴ This decision has marked an important improvement towards international recognition of rape as a war crime.²⁵

While these theoretical and practical developments represent a progressive attempt to advance women’s rights, their continuity and future success ultimately depend on the financial and political commitments of the international community. As Akhavan observed:

In view of the present deliberations on the establishment of a permanent international penal court, the stakes of this experiment are very high. Here is a unique opportunity to

²⁰ Copelon 2000 n 11 at 227; *The Prosecutor v Akayesu* [1998] Case No-ICTR-96-4-T at (para 731-732 & 468-487).

²¹ *Akayesu* id at (para 731).

²² See generally R Chowdhury, ‘Kadic v Karadzic-Rape as a Crime Against Women as a Class’ (2002) 20 *Law and Inequality* 91 at 91-124.

²³ *Kadic v Karadzic* 866 F Supp 734 (1994) at 734 & 736.

²⁴ *Id* at 739.

²⁵ Chowdhury 2002 n 22 at 121.

exploit the success of ad hoc justice born of political expedience for the realization of an international order in which the rule of law shall prevail for all peoples.²⁶

7.3. How Rape Causes Deprivation of Right to Life

Article 32 of the Constitution of Bangladesh provides that no person shall be deprived of life and personal liberty save in accordance with law.²⁷ In order to assess whether a particular form of violation should be regarded as a breach of right to life, emphasis should be placed on the effects of violation.²⁸ The significance of right to life as inherent in the constitutional provision does not mean only that life cannot be taken away by the imposition of death sentence or by other means except according to the procedure established by the law.²⁹ This is one important aspect of right to life but equally important are other aspects through which life becomes enjoyable, or which help life to exist.³⁰ Therefore the prohibition against the unlawful deprivation of life ‘extends to all those limbs and faculties’ that have contribution to the enjoyment of right to life.³¹ An obvious deprivation of life occurs when a woman is raped because it causes her not only physical sufferings but also on some occasions incurable emotional difficulties (if she survives the attack). As the European Court of Human Rights observed, ‘rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence.’³² In addition, a rape victim runs the risk of, *inter alia*, sexually transmitted disease and pregnancy.³³ Apart from the painful experience of disease, rape can produce much worse and life-long consequences for the victim when it results in pregnancy. The

²⁶ P Akhavan, ‘Current Developments: The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment’ (1996) 90 *American Journal International Law* 501 at 510.

²⁷ *The Constitution of the People’s Republic of Bangladesh* (hereinafter the Constitution) 1972 art 32.

²⁸ In *Prosecutor v Akayesu* the Tribunal provided sexual crime with similar remedies to genocide as the former produced similar effects of the latter on the victim, see *Akayesu* n 20 at (paras 731-732).

²⁹ *Olge* n 9 at 193.

³⁰ *Ibid*.

³¹ *Coralie v Administration, Union Territory of Delhi* (India) (1981) 68 AIR SC 746 at 750.

situation further worsens, where abortion is restricted by religion or by the law of the country. Even forced pregnancy and commensurate labour pain constitute a distinct crime.³⁴ In that case, rape may leave the victim unmarried³⁵ and her child might be regarded by the community as ‘proof of her immoral behaviour’. The enjoyment of life is bound to suffer in all of those circumstances.³⁶ In this regard, the International Criminal Tribunal in *Akayesu* strongly recommended that rape is one of the worst ways to inflict harm on the victim and is ‘a step in the process of destruction of the will to live and of life itself.’³⁷

In many Indian judicial decisions, the liberal interpretation of constitutional provisions with regard to the right to life began to include the concept of human dignity and recognise that the right to live with human dignity is a fundamental right of the citizen.³⁸ The Supreme Court of India maintained that ‘life’ means something more than mere animal existence³⁹ and the right to life implies ‘the right to live with human dignity and all that goes along with it, namely, ...freely moving about and mixing and commingling with fellow human beings.’⁴⁰ In *Coralie v Administration* the Court observed that in expounding the scope and ambit of the right to life, the court should take account of the changing conditions of lives and the purpose of law so that human dignity can be enhanced and properly valued.⁴¹ The particular shame, degradation and social humiliation attached to rape and its overall consequences certainly undermine the

³² *Aydin v Turkey* (1997) 3 BHR 300 at (para 83).

³³ Chowdhury 2002 n 22 at 101.

³⁴ L Fletcher et al, ‘Human Rights Violations Against Women’ (1994) 15 *Whittier Law Review* 319 at 323.

³⁵ Chowdhury 2002 n 22 at 101.

³⁶ See generally *Delhi Domestic Working Women’s Forum v Union of India* (1994) Writ Petition (Crl) No 362 of 1993. Explaining the effects of rape, the Court held that ‘[rape] is an experience which shakes the foundations of the lives of the victims. For many, its effect is a long-term one, impairing their capacity for personal relationships, altering their behaviour and values and generating endless fear.’ Id at (para 13).

³⁷ *Akayesu* n 20 at (para 732).

³⁸ See for example, *Tomar v State of Bihar* (1988) AIR SC 1782 at 1783.

³⁹ *Olge* n 9 at 193.

⁴⁰ *Coralie* n 31 at 747.

⁴¹ Id at 750.

victim's dignity.⁴² In support of this view, the Supreme Court of Canada also asserts that the physical and emotional assaults involved in an incident of rape clearly violate human dignity.⁴³ Hence, taking the life-long suffering and dignity of a rape victim as explored in judicial decisions into account, it can be said that rape violates the right to life.

7.4. Provisions and Practices in Bangladesh

7.4.1. Rape under the Penal Laws of Bangladesh

Rape is a criminal offence punishable with 7 years imprisonment under the *Penal Code of Bangladesh* 1860 (PC 1860). Having recognised the extent and serious nature of rape, the *Women and Children Repression (Prevention) Act* 2000 (the WCR Act 2000) has increased the punishment of rape up to the death penalty and life-long imprisonment. It also provides for a special tribunal to adjudicate cases involving rape and other repressive offences against women. Despite the introduction of stringent penalties, the WCR Act 2000 failed to have any apparent impact on deterring rape in Bangladesh with an increase of 88% in 2001, the subsequent year.⁴⁴ The number of rape incidents reportedly reached 4517 in 2001, compared to 753 in 1997 and a major portion of reported rape went legally unchallenged. Although the incidents that took place in 2002 were considerably below those in 2001, they were still high in comparison with previous years.⁴⁵ In 2003, between January and July, 2600 women were reportedly victims of rape.⁴⁶

⁴² *Osolin v The Queen* 86 CCC (3d) 481; (1993) CCC LEXIS 3135 at 32.

⁴³ Ibid.

⁴⁴ UNDP Human Security n 6 at 107.

⁴⁵ In 2002, according to a single report, 1350 women were reportedly subjected to rape. See 'Violation of human rights in 2002' *The Daily Star* <http://dailystarnews.com/law/200301/01/week.htm> (5 January 2003).

⁴⁶ R Nahar, 'Police should take cognizance of eve teasing' *The Daily Star* (19 September 2003).

Figure 7.1: Reported Rape Incidents in Consecutive Five Years⁴⁷

Figure 7.2: Ratio of Cases Filed on Rape Charges.⁴⁸

⁴⁷ In 1997, 753 women were reportedly subjected to rape. Although this number appears insignificant compared to the 130 million population of Bangladesh, the important point here is that the incidence of rape has been increasing year by year, and remains 'one of the most intractable violations of women's human rights'. In the following year, 1998, rape incidents reportedly reached 1925, nearly three times greater than in 1997. Despite a low number of 1238 reported incidents in 1999, the year 2000 witnessed a significantly high number of rape incidents. According to a study conducted by the News Network reveals that 3140 women and children were reportedly violated in 2000. The number was 4517 in 2001. See Ain O Salish Kendro (ASK), *Human Rights in Bangladesh 1998* (1999) Dhaka: The University Press Limited at 147; Ain O Salish Kendro (ASK), *Human Rights in Bangladesh 1999* (2000) Dhaka: ASK at 86; UNB, 'Tough law ineffective, 4,517 women, children assaulted in 2001' *The New Nation* (17 August 2002).

⁴⁸ According to a human rights study in Bangladesh that was published in 2000, nearly 48% of reported rape incidents were not filed. Among the rest 52% of rape charges (which were filed), the rape and gang rape constituted respectively, 22% and 24%. The remaining 6% formed other groups such as attempted rape and where the perpetrators were not known. See *Human Rights in Bangladesh 1999* id at 87.

The situation is further exacerbated when the accused is not punished. For a number of reasons, the rape trial in Bangladesh in a large number of cases results in acquittal. The following discussion explains these reasons and endeavours to overcome those in the light of relevant practices of foreign jurisdictions.

7.4.2. Definition of Rape

Section 375 of the PC 1860 of Bangladesh provides that a man is said to have committed rape if he has sexual intercourse with a woman under the following circumstances:

- (i) against her will;
- (ii) without her consent;
- (iii) with her consent, when her consent was obtained by threat or coercion;
- (iv) with her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married;
- (v) with or without her consent when she is under fourteen years of age.

An explanation of this section signifies that penetration will be sufficient to commit a rape. It also provides that the sexual intercourse by a man with his own wife will not constitute rape if she is above the age of fifteen years.⁴⁹

As the definition suggests, sexual intercourse is the conclusive element constituting an offence of rape under section 375 of the PC 1860. This provision does not account for other aspects of sexual assault that degrade and distress the victim even more severely than an act of statutory rape, for example, the vaginal penetration otherwise than with

⁴⁹ *Penal Code 1860 s 375.*

the penis.⁵⁰ Section 375 does not address either any lesser form of sexual conduct. Recently, a suicide case in Bangladesh exemplifies this sort of conduct, which could not be properly dealt with by the law. According to the facts of the case, Ms Simi, a final year student of Narayanganj Art Institute, committed suicide on 23 December 2001 to escape routine teasing and harassment by a number of young men in her locality. Before committing suicide, she expressed her protest stating the above cause of her death in writing that was posthumously recovered.⁵¹ The Court of Metropolitan Magistrate awarded a light punishment, only one-year imprisonment of the convict under the *Dhaka Metropolitan Police Act*, as the incident was not covered by the PC 1860.⁵²

However, available sources did not mention whether the above Simi incident was a sexual harassment. Nevertheless, in Bangladesh there has been an occasional practice in media reporting to use some terms such as ‘assault’ to refer to ‘rape’. For example, in 2002, one leading national daily revealed that 4517 women and children were raped in 2001 under the heading ‘...4,517 women, children assaulted in 2001’.⁵³ Nonetheless, in this regard it is important to acknowledge that harassment, regardless of its nature and gravity, should not be regarded as an equivalent to rape. Here, the main focus is that there is no provision under the PC 1860 of Bangladesh to deal with harassment and sexual assault or any other lesser form of sexual conduct other than rape.

In recent years, significant efforts have been made across nations to improve rape laws through legislative changes. This modern approach focuses on an expansive definition of rape and on the violent aspect of rape over its sexual context.⁵⁴ For example, almost all jurisdictions in the US revised their laws to criminalise a wide range of sexual

⁵⁰ For details see, J Temkin, ‘Towards a Modern Law of Rape’ (1982) 45 *The Modern Law Review* 399 at 412.

⁵¹ ‘Simi suicide case’ *The Independent* <http://independent-bangladesh.com/news/sep/30/30092002ed.htm#A1> (30 September 2002).

⁵² Court Correspondent, ‘Cop, four others get one-year jail term’ *The Daily Star* <http://dailystarnews.com/200209/29/n2092901.htm#BODY5> (29 November 2002).

assaults including all types of penetration by any objects other than the penis.⁵⁵ In this regard, the Supreme Court of New Jersey held that the offence of rape as referred by the Criminal Code now:

...requires “penetration”, not “sexual intercourse”. It requires “force” or “coercion” not “submission” or “resistance”. It makes no reference to the victim’s state of mind or attitude, or conduct in response to the assault. ...It emphasizes the assaultive character of the offence by defining sexual penetration to encompass a wide range of sexual contacts...⁵⁶

In Canada, rape was defined under section 143 of the Criminal Code⁵⁷ as sexual intercourse committed by a man with a female person without her consent or where the consent was obtained through, *inter alia*, false and fraudulent representation as to the nature and quality of the act. In 1983, the Canadian Parliament passed the Bill C-127 and replaced rape with the term of ‘sexual assault’.⁵⁸ The Supreme Court of Canada defined ‘sexual assault as an assault committed in circumstances of a sexual nature as to violate the sexual integrity of the complainant.’⁵⁹ In Australia, sexual penetration refers to ‘penetrate (to any extent) the genitalia or anus’ or mouth by any part of the body of a person or any object manipulated by that person.⁶⁰ India also enacted legislation on ‘eve-teasing’ and on sexual and physical harassment of women in the public sphere.⁶¹

In order to address all sexual violence under a single scope of legal sanction, the word ‘rape’ under section 375 of the PC 1860 in Bangladesh should be replaced with the term of ‘sexual assault’. It will include all types of penetration by any other objects rather

⁵³ UNB, ‘Tough law ineffective, 4,517 women, children assaulted in 2001’ *The New Nation* (17 August 2002).

⁵⁴ C Spohn and J Horney, *Rape Law Reform- A Grassroots Revolution and its Impact* (1992) New York: Plenum Press at 21-22.

⁵⁵ See generally S Futter et al, ‘The Effects of Rape Law Reform on Rape Case Processing’ (2001) 16 *Berkeley Women’s Law Journal* 72 at 78 & 86-95.

⁵⁶ *State of New Jersey in the Interest of MTS* 129 N J 422 (1992) at 440-441.

⁵⁷ RSC (Consolidated Statutes of Canada) 1970 c C-34 s 143.

⁵⁸ RSC 1985 c C-46 s 265.

⁵⁹ See *Regina v Chase* (1987) 37 CCC (3d) 97; *R v Litchfield* [1993] 4 SCR 333.

⁶⁰ See *Criminal Code Act* 1995 s 268.14; see also, for an extended definition of rape, the *Crimes (Amendment) Act* 2000 s 4 with *Crimes Act* 1958 of Victoria s 38.

than only vaginal-penile penetration and other sexual contact such as sexual touching. One of the positive effects might be that, as the definition becomes wider, it will be more likely to enhance the possibility of improving the rate of arrest and conviction.⁶² As a result, the accused of lesser forms of indecent conduct such as sexual touching may feel discouraged from being involved in more severe crimes as rape. Further, the focus on sexual assault can provide a legal recognition of the violent aspect of rape instead of only its sexual contact, which is as harmful to women as penetration.⁶³ However, to deal with different forms of assault, the penalty provision for rape as stipulated in section 376 of the PC 1860 in Bangladesh should introduce varying degrees of punishment depending on the severity of the crime.

7.4.3. Filing and Investigation of Rape Case

The perpetrators of rape in most cases in Bangladesh, compared to victims, enjoy stronger socio-economic and political support.⁶⁴ Where strong evidence exists to file a suit, the accused is often able to manipulate the whole process through bribing police or through other modes at his disposal.⁶⁵ In this process, police either refuse to register cases initiated by women or identify/mistreat victims as ‘bad women’⁶⁶; that is precisely

⁶¹ See for example, *Sexual Harassment of Women at their Workplace (Prevention) Act 2000*; *Domestic Violence Act 1999*; *Tamil Nadu Prohibition of Eve-Teasing Act 1998*.

⁶² For example, in the US, an examination of the Uniform Crime Reports data collected by the Federal Bureau of Investigation, suggests, ‘the broader definition may reduce the number of “actual rapes”’. This is because, as Futter recommends, if ‘the definition becomes broader, more assaults will likely be filed and prosecuted under the new crimes created by the definition.’ In this way, the number of actual rapes will statistically be reduced. See Futter 2001 n 55 at 86.

⁶³ R Mandhane, ‘Efficiency or Autonomy?: Economic and Feminist Legal Theory in the Context of Sexual Assault’ (2001) 59 *University of Toronto Faculty of Law Review* 173 at 208.

⁶⁴ R Jahan and M Islam, *Violence Against Women in Bangladesh Analysis and Action* (1997) Dhaka: Women for Women and South Asian Association for Women Studies at 29.

⁶⁵ See Amnesty International Annual Report 2001- Bangladesh <http://www.amnesty.org/web/ar20001.nsf/webasacountries/BANGLADESH?OpenDocument> (1 September 2002); S R Khan, *The Socio-Legal Status of Bangali Women in Bangladesh- Implications for Development* (2001) Dhaka: The University Press Limited at 128.

⁶⁶ To have a detailed discussion about the issue see *Shima* (unreported case which is considered in section 7.4.9.) and *Yasmin* (still pending before the High Court). In both cases Police called victims ‘prostitutes’ and attempted to establish that they provoked the incidents. There has been a judicial precedent in Bangladesh that if the complainant is of immoral character, the punishment should not be severe as such as specified in Penal Code or other statutes. See for example, M M Ali, ‘*Women and Children Repression*

what happened to the *Simi Suicide*. One police officer to whom she reported the matter ‘overtly took the side of the criminals and went so far as to insult her and her family’.⁶⁷ The magistrate, while imposing a one-year imprisonment on the accused, observed that ‘there were defects in filing the case. Instead of the police, the victim’s family should have filed the case’.⁶⁸ The systematic corruption of police in filing suit is illustrated by the following testimony of a woman who attempted to register a complaint.

The duty officer was not willing at first to take up our case. My daughter and I were pleading since 2 p.m to convince them of the brutality of the situation and finally at 8.30 p.m the Munshi agreed to write up the FIR [first information report]. However, before doing this he asked for a ‘service charge’. Then another police officer came with a sheet of paper and said, ‘tell the truth. I believe you have ... hurt yourself ...’ He went to visit the area for investigation and came back after a while. Before finalising the FIR, he asked for money. I gave him the money... and [when] I wanted to know what they had written in the FIR, he referred me to the Officer-in- Charge (OC) who had the paper by now. When I saw the OC and asked him to read the FIR, he asked for more money. By that time I was tired and wanted to have an end to this. So, I gave him the money [what] he wanted hoping that this would help to complete the formalities of the FIR. Instead, he advised me to go for a settlement ... ‘If that does not help, then come back to us’. So finally we came back after midnight. The local member kept on giving dates for a *salish* [Arbitration Council] but for a month nothing happened, either he would not be there, or the another party would not come. So again, after a month, I went to the police station hoping to revive the case and get some justice. But there they told us that there was no evidence of any case filed by me and that I would have to file it all over again. Frustrated and in despair, I came to know my boundaries. There is no hope for a woman like me in the outside world.⁶⁹

In another incident, Ms Asma, a fifteen-year-old garment worker, was gang raped. When she came to the police to take up her case, police commented; ‘why do you come here? I do not believe that this happens without your enticing the men.’⁷⁰ Further, if any case is lodged properly, the accused can often manage ‘easy-bail’ by using their economic or political strength. Consequently, they feel licensed to intimidate the

(*Special Provision Act 1995 & Dowry Prohibition Act 1980*) (1995) Dhaka: Provhati Procasoni at 32-33; see also, s 155 (4) of the *Evidence Act 1892*; 15 DLR 115.

⁶⁷ ‘Simi suicide case’ *The Independent* (30 September 2002).

⁶⁸ Court Correspondent 2002 n 52.

⁶⁹ N Matin et al, ‘Violence against Women and the Legal System: A Bangladesh Study’ *Ain O Salish Kendra (ASK) Dhaka* 17 April 2000 at 28-29.

⁷⁰ *Id* at 29.

families of the victim.⁷¹ There are instances in Bangladesh where a father was murdered for suing his daughter's rapist.⁷² This sort of incident makes witnesses vulnerable and frightened to give evidence against the criminals.⁷³

There has been no precedent in Bangladesh to suggest that the Ministry of Home Affairs has issued any specific policy or guidelines for the police to investigate sensitive cases of gender-based violence. Under section 18 of the WCR Act 2000, different police, irrespective of their ranks, carry out investigations of cases. Accordingly, 'the quality of investigations and the seriousness with which investigations are carried out varies considerably.'⁷⁴ Over the last three decades, the Police Training Academy in Bangladesh also has failed to address the issue. Given the situation, police enjoy wide discretion in investigating cases and adopt different attitudes depending on the socio-political influence of the persons who approach them.⁷⁵ In dealing with cases as sensitive as rape, they lack the necessary competence and commitment. As the Supreme Court of Bangladesh in *Mohammad v State* observed that '...they simply discharge...by submitting a charge sheet... and the judges have to helplessly look on and suffer uneasiness of conscience for presiding over the acquittal ceremony of culprits.'⁷⁶

Section 18 of the WCR Act 2000 requires the investigation of a case to be completed within a maximum period of 120 days. This long period works as a further advantage for the accused to manipulate the investigation process that ultimately contributes to the

⁷¹ 'Rape, Trafficking' *The Independent* <http://independent-bangladesh.com/news/mar/31/31032003ed.htm#A1> (31 March 2003).

⁷² 'Father murdered for suing daughter's rapist' *The Daily Star* (22 August 2002).

⁷³ See generally S M Solaiman and A Begum, 'Public Safety Versus Suppression of Terrorist, (2000)1 *The Islamic University Studies* 81 at 95- 99 (discussing how the criminals after obtaining bail commit more grievous offences).

⁷⁴ UNDP Human Security n 6 at 21.

⁷⁵ N R M Menon, 'The Imperative for Efficiency in Criminal Justice' *The Observer Dhaka* (1 September 2002).

⁷⁶ Cited in Matin 2000 n 69 at 28.

low rate of conviction.⁷⁷ A UNDP study 2002 on Bangladesh revealed that among 1363 reported cases of rape in 1996, only 692 were charge-sheeted. Among the completed cases, in 28 cases the accused were acquitted and only 9 cases ended in conviction.⁷⁸ All of these practices in turn, permit offenders to commit the offence and expose the victim to the risk of revictimisation by the accused and undermine the ‘general deterrent effect’ of law.⁷⁹

To address problems associated with the filing of sexual assault cases, many countries have developed Women-Only Police Stations. For example, in Sao Paulo, after the introduction of these stations, the reported rape cases reached 841 in 1990 compared to 67 in 1985.⁸⁰ It suggests that the rate of reported cases could be increased if this arrangement is made widely available in Bangladesh.⁸¹ However, given the socio-economic condition of Bangladesh as a developing country, an argument might be raised once again over how the government will comply with this standard. Nonetheless, a minimum standard should be maintained in tackling the intensity and pervasive nature of rape in Bangladesh since the government agreed to undertake various legislative and administrative special measures and to restructure and sensitise the criminal justice system to protect women’s dignity.⁸² Moreover, in this regard, a similar nature of arrangement for women is in progress in the country. To provide ‘a safe and confidential environment for women to report incidents of violence’, a Women’s Investigation Cell staffed by women police officials has been set in place (in

⁷⁷ M Khan and S Zaman, ‘Reform of Rape Related Laws of Bangladesh’ (1997) 2 *The Chittagong University Journal of Law* 31 at 39.

⁷⁸ UNDP Human Security n 6 at 107.

⁷⁹ S Bronitt and B McSherry, ‘The Use and Abuse of Counseling Records in Sexual Assault Trials: Reconstructing the “Rape Shield”’ (1997) 8 *Criminal Law Forum* 259 at 287-288.

⁸⁰ L L Heise et al, *World Bank Discussion Papers- Violence against Women –The Hidden Health Burden*, Washington DC: The World Bank at 32.

⁸¹ *Id* at 32-33.

⁸² See CEDAW n 8 arts 4-5; the *third and fourth periodic reports of state parties- Bangladesh* (hereinafter the CEDAW Report), CEDAW/C/BGD/3-4, 1 April 1997.

Dhaka) since 1995.⁸³ Further, as women police officials are already engaged in maintaining law and order in Bangladesh, similar Cells can easily be operated on an initial basis at least within police stations at District levels to reduce difficulties faced by women in lodging cases.

Another important reform could be a 'Coordinated Program' integrating Women's Organisations, policymakers, police personnel and other relevant groups to provide emotional and necessary support for rape victims.⁸⁴ A 'Special Unit' designed to train police, medical officers and prosecutors can be another effective means to investigate and prosecute rape cases.

To restrict the malpractice between police and the influential accused, the period of investigation needs to be shortened. A provision must be in place requiring complainants to report the incident to the local representative such as Chairmen of the Union Councils (lower tier of administration) and Mayor of the City Corporations before moving to the police station. It seems justifiable to expect that police carry on their jobs with greater sincerity when such a person, in contrast to underprivileged victims, becomes involved in the process. Towards this end, the representative will be responsible for reporting the incident to the Violence Cell⁸⁵ under the Ministry of Women's and Children Affairs within 24 hours of occurrence since there is no independent body, such as the National Women's Commission in India, to deal with this issue. In addition, the identity and relevant information of the victims and witnesses of rape cases must not be disclosed to ensure their safety during the investigation since

⁸³ Matin 2000 n 69 at 19.

⁸⁴ See generally S L McCombie (ed) *The Rape Crisis Intervention Handbook- A Guide for Victim Care* (1980) London: Plenum Press at 69-173. The Rules of Procedure and Evidence of the International Tribunal for Yugoslavia also acknowledged the need for a *Witness Unit* to provide support and counseling to rape victims. See n 15 r 34 (B).

⁸⁵ The Prevention of Violence against Women Cell was established in 1994 under the Ministry of Women and Children Affairs to deal with complaints of violence against women. The Cell provides limited shelter and legal aid to victims of different crimes. For details, see Jahan 1997 n 62 at 30-31; see also, S

they often suffer retaliation by the accused and his family because of their participation in the suit.

Low income has been commonly raised by the police as one of the significant reasons for their corruption. The Amnesty International Report reveals that police invariably admit that they cannot bring their families to the city due to their low income.⁸⁶ This particular problem not only encourages police to indulge in financial corruption, but also opens the way for other indecent conduct including forced rape in custody since they cannot have regular marital relations with their wives.⁸⁷ The government should therefore ensure their basic requirements such as housing and other facilities that assist them to maintain their family life. The extra cost to the government would be compensated for, and outweighed by, the reduction of the violence-rate and other social costs that result from the crime. For example, rapes committed by the members of law enforcing agencies and unwanted pregnancy (if it results from the rape) will generate a high cost for the victim as well as for the community at large.

7.4.4. Prosecution of Rape Case and Sexual History of the Complainant

Conviction in a sexual violence or a rape case largely depends on the efficiency of the prosecutor.⁸⁸ The growing rate of acquittals in proportion to the number of rape incidents in Bangladesh suggests that the prosecution either suffers from a lack of

Hamid, *Why Women Count-Essays on Women in Development in Bangladesh*, (1996) Dhaka, The University Press Limited at 94-95.

⁸⁶ Amnesty International, 'Bangladesh- Torture and Impunity' ASA 13/007/2000 <<http://www.asyl.net/Magazin/Docs/docs-17/L-28/L9343bgd.htm>> (14 October 2002).

⁸⁷ For example, during the period between 1996 and 2001, a total of 63 women have been raped by members of the enforcing agencies and 286 people have died in jail and thana (police station) custody. See 'Human Rights Violation' *The Daily Star* (29 July 2001).

⁸⁸ E S Buzawa and C G Buzawa (ed), *Domestic Violence-The Changing Criminal Justice Response*, (1992) London: Auburn House at 163, 181 and 204; see also, *Women's Forum* n 36.

efficiency in dealing with rape cases, or lacks the required sensitivity towards women.⁸⁹ The court, for example, in *Shima* (this case is considered in section 7.4.9.) categorically pointed out the weakness of the prosecution and its failure to produce adequate evidence.⁹⁰ It also identified collusion between the accused and the investigating officer ‘in destroying or obscuring necessary evidence.’⁹¹ By contrast, the defence lawyer questioned the rape victim in a humiliating manner wholly immaterial to the case. The *Evidence Act* 1872 (Act 1872) allows the cross examination of a rape victim with regard to her past sexual history.⁹² Section 155 (4) of the Act 1872 requires that ‘where a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.’ The implied sense of the provision might be that a woman with her past sexual experience is ‘less worthy of belief’ and is more likely to provoke the man to sexual advances compared to a woman of ‘good’ character, and for which the punishment should be decreased.⁹³ In sum, her past experience signals the probability of engaging in further sexual intimacy.⁹⁴ However, the Act 1872 does not specify to what extent the past history should be allowed to be questioned before the open court. Given the situation, lawyers may have ‘deliberately and recurrently twisted’ the issue to assassinate the character of the victim to prove that she has either consented to sex or is telling lies to damage the defendant’s reputation.⁹⁵ In this way, rape laws

⁸⁹ Khan 1997 n 77 at 41 (maintaining that ‘Judges very often complain that a great number of rape cases are dismissed only due to the inefficient, malafide and negligent handling by the public prosecutors’).

⁹⁰ See Amnesty International, ‘Bangladesh Institutional failures protect alleged rapists’ ASA 13/004/1997<<http://web.amnesty.org/ai.nsf/COUNTRIES/BANGLADESH?OpenView&expandall>>(8 October 2000).

⁹¹ Matin 2000 n 69 at 31.

⁹² *Evidence Act* 1872 ss 8-9 & 11.

⁹³ Ali 1995 n 66 at 32-33; see also, *People v Joaquin Barnes* (US) 42 Cal 3d 284 (1986) at 298-99 (discussing the traditional views on which the basic distrust about women’s testimony regarding sexual assault is grounded).

⁹⁴ *Regina v Ewanchuk* (Canada) (1999) 131 CCC (3d) 481 at 513.

⁹⁵ *Al-Amin v State* (Bangladesh) (1999) 51 DLR 154 at 177.

and trial proceedings ‘permit man to engage in rape and to rationalize and justify it after the event.’⁹⁶

In addition, the disclosure and deliberate repetition of the victim’s name during the trial undermine her dignity.⁹⁷ Therefore seeking judicial remedies produces much humiliation for the victim which is, on some occasions, even worse than the rape itself.⁹⁸ On the other hand, the accused has advantage of the full benefit of doubt under the adversarial system of trial. Honouring this system, the judges usually act as passive actors, refraining from making any observation on the indecent and irrelevant comments of the lawyers or of the accused regarding the victim’s character. For example, in the *Yasmin* and *Shima* the court neither redressed the victims’ emotional damage nor passed any recommendation for discouraging irrelevant and defamatory remarks made by the defence about their character.⁹⁹ As feminist legal theory argues, rape laws and the manner in which the trial is conducted serve to protect the male offender with little regard for the woman.¹⁰⁰ In this respect, MacKinnon maintains that the authoritative state reflects the male attitude towards women through the lens of its legal framework.¹⁰¹

⁹⁶ A W Burgess, *Rape and Sexual Assault II* (1988) London: Garland Publishing Inc at 203.

⁹⁷ D Kameshwari, ‘Child as a Victim of Rape’ (2001) 2 *Supreme Court Cases Journal* 27 at 27.

⁹⁸ F Hasan, ‘More Bangladeshi women become victims of rape’ *The Daily Star* <http://www.dailystarnews.com/law/200201/03/monitor.htm> (20 January 2002).

⁹⁹ As various reports suggest, in order to escape punishment, the defence falsely presented them as prostitutes. See for example, T Amir, ‘Demystification of Judicial /Safe Custody (tolerating a practice of illegal detention and inhuman and degrading treatment)’ paper presented at the National Seminar on Human Rights and Role of Lawyers, Bangladesh Bar Council, Dhaka 2002; Amnesty International 1997 n 90.

¹⁰⁰ See for example, C A MacKinnon, ‘Rape, Genocide, and Women’s Human Rights’ (1994) 17 *Harvard Women’s Law Journal* 5 at 15-16 (observing that rape is widely permitted under both domestic and international law. ‘Raped women are compelled to go to the state; men make the laws and decide if they will enforce them...’). See also, C A MacKinnon, *Feminism Unmodified: Discourse on Life and Law* (1987) Cambridge: Harvard University Press at 87-88; C A MacKinnon, *Towards A Feminist Theory of the State* (1991) Cambridge: Harvard University Press at 171-184.

¹⁰¹ MacKinnon 1991 id at 179-181.

Another embarrassing part of rape in Bangladesh is that it has become a common practice of the media to photograph rape victims and to follow up their pictures with details as main coverage. This works further to degrade those women.

In numerous common law jurisdictions, the rules of trial procedures have been modified by ‘rape shield’ legislation. It disallows information on the victim’s sexual history as admissible evidence in rape prosecution and restricts the ways of cross-examination in which the defence seeks to undermine the victim’s reputation.¹⁰² For example, the *Crimes Act* 1900 of Australia prohibits the defence from challenging the credibility of the complainant’s testimony on the basis of her past sexual reputation ‘except with the leave of the judge’.¹⁰³ In Canada, the *Forewords* of the Bill C-49¹⁰⁴ provides that in rape trials, evidence of past sexual history of the complainant is rarely relevant and therefore its admission ‘should be subject to particular scrutiny, bearing in mind the inherently prejudicial character of such evidence.’ To compensate for the situation, defence lawyers in the Canadian context sought access to the personal records of the complainants.¹⁰⁵ In response, section 278.5 of the Canadian *Criminal Code* provides that the judges may order the production of such records which are likely to be relevant to the trial and are necessary in the interests of justice. It also requires judges to consider the salutary and deleterious effects of ordering the production of records for review by

¹⁰² Bronitt 1997 n 79 at 259.

¹⁰³ *Crimes Act* 1900 s 409 (Victoria); see also, *Evidence Act* 1971 s 76G (Australian Capital Territory). Section 76G provides, *inter alia*:

‘(1) [in] prescribed sexual offence proceedings, evidence relating to the sexual reputation of the complainant is inadmissible[;]

(2) [no] evidence may be adduced and no question may be asked..., except with the leave of the judge, relating to any sexual experience of the complainant with a person other than the accused person[;]

(3) [the] Judge shall not give leave ...unless...

(b) the judge is satisfied that a refusal to allow the evidence to be adduced or the question to be asked would prejudice the fair trial of the accused person.’

¹⁰⁴ An Act to amend the Criminal Code 1992.

¹⁰⁵ A number of cases challenged the constitutionality of the ‘rape shield’ legislation, see for example, *R v Seaboyer* (Canada) [1991] 2 SCR (observing the rape shield infringes the accused’s fundamental right to a fair trial); for US, *Devis v Atkas* 415 US 308 (1974); *Stephens v Miller* 989 F 2d 264 (1993) (held that it deprived a defendant of his constitutional right to confront the witnesses against him).

the court.¹⁰⁶ However, it is argued that rape shield legislation is often ignored by the court and the defence devises alternative strategies to portray a rape victim as a ‘mad’ instead of a ‘bad’ woman through accessing her medical record (psychiatric history) to prove her statement as untrustworthy.¹⁰⁷ Nevertheless, numerous judicial decisions in those jurisdictions reflect positive impacts of the rape-shield that ultimately benefit women. The Supreme Court of Canada, for example, in many recent decisions denied the production of personal records where the intentions were to undermine the dignity and privacy of the complainant.¹⁰⁸ The Court in *R. v O’Connor* held:

What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered.¹⁰⁹

In *R v Mills* the Supreme Court held that ‘a reasonable search and seizure will be one that accommodates both the accused’s ability to make full answer and defence and the complainant’s privacy right.’¹¹⁰ The right to defence must not serve to distort the search for truth and the searching for the evidence of a complainant’s sexual experience does not fall within the ambit of the accused’s right.¹¹¹

In the US, evidence of past sexual history of the complainant, subject to a few exceptions,¹¹² is generally inadmissible in the Court.¹¹³ In *Sandoval v Acevedo* the issue

¹⁰⁶ RSC 1985 c C-46 (An Act to amend the Criminal Code (Production of Records in Sexual Offence Proceedings) 1997 s 278.5; J Koshan, ‘Disclosure and Production in Sexual Violence Cases: Situating Stinchcombe’ (2002) 40 *Alberta Law Review* 655 at 657.

¹⁰⁷ For details see, Bronitt 1997 n 79 at 262-265.

¹⁰⁸ See for example, *R. v Thompson* [2000] OJ 2900 (Sup Ct); *R v Hudson* [2001] OJ 5456 (sup Ct); *R v Tatchell* [2001] NJ 314 (SCTD); *R v S P* [2001] OJ 2898 (Sup Ct).

¹⁰⁹ (1995) 33 CRR (2d) (Canada) 1 (para 24).

¹¹⁰ (1999) 69 CRR (2d) 1 (Canada) at (paras 6-8).

¹¹¹ *Ibid.*

¹¹² Such exceptions are: *inter alia*, ‘(1) [evidence] of the sexual conduct of the complaining witness with the defendant to prove consent where consent is a defense to the alleged crime and the evidence is reasonably contemporaneous with the date of the alleged crime; or (2) [evidence] of specific instances of sexual activity showing alternative source or origin of semen, pregnancy or disease;’ see *Revised Statutes of the State of Missouri* 2003 s 491.015 1 (2) & (3).

¹¹³ See for example, *USCS* (United States Code Service) *Federal Rules of Evidence* 2003 R 412; 725 *Illinois Compiled Statutes Annotated* (US) 2003 5/115-7; *New Jersey Annotated Statutes* (US) 2003 s 2A: 84A-32.1; *Revised Statutes of the State of Missouri* (US) 2003 s 491.015 (making the evidence as to the

was whether the trial court erred in denying the appellant the opportunity to impeach the victim's testimony with regard to her past sexual history. The Court of Appeal confirmed the conviction since the exclusion of evidence regarding the victim's sexual intimacy with a male friend 'did not deprive the inmate of his constitutional rights'.¹¹⁴ In a similar situation, the Supreme Court of India held that the 'Court is second to none in upholding the decency and dignity of womanhood and ...[the] character, reputation or status of a raped victim is [not] a relevant factor for consideration by the court while awarding the sentence to a rapist.'¹¹⁵ In *Gurmit* the Court held:

A victim of rape, it must be remembered, has already undergone a traumatic experience and if she is made to repeat again and again in unfamiliar surroundings, what she had been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as "discrepancies and contradictions" in her evidence.¹¹⁶

India also introduced the in-camera trial for rape cases in 1983 through an amendment to the *Criminal Procedure Code* 1973 (CrPC 1973).¹¹⁷ Pursuant to section 327 of the CrPC 1973, the Court recommends that it is not an option but a compulsion for the court, unlike Bangladesh,¹¹⁸ to conduct an inquiry into, and trial of, every rape case invariably in-camera.

Having regard to the experience attached to the rape victim in the tradition-bound and non-permissive culture of Bangladesh, the discriminatory rule that relates to the sexual history of victims must be abolished as in other jurisdictions. It is discriminatory because the use of sexual history is not consistent with general rules of evidence.¹¹⁹

prior sexual history or reputation of the complainant inadmissible in the court except as evidence of such conduct with the accused).

¹¹⁴ (US) 996 F 2d 145 (1993) at 145.

¹¹⁵ *State of Haryana v Chand* (India) (1990) AIR SC 538 at 540.

¹¹⁶ *State of Punjab v Sing* (1996) AIR SC 1393 at 1405.

¹¹⁷ *Criminal Law (Amendment) Act*, Act no- 43 of 1983.

¹¹⁸ See *Sing* n 116 at 1395. The WCR Act 2000 for the first time in Bangladesh, provides that the Tribunal, if it thinks necessary, on an application by the parties of the suit, *may* conduct the cross-examination of a rape victim or witnesses in a camera. See *Women and Children Repression (Prevention) Act* 2000 s 6.

¹¹⁹ M J Anderson, "From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law" (2002) 70 *George Washington Law Review* 51 at 51 (observing that the 'victim's prior

Even the past sexual history of the accused instead of victims of other crimes is not considered to have any bearing on the trustworthiness of his/her statement.¹²⁰ Hence, section 155 (4) of the Act 1872 should be amended to incorporate a provision, to the effect that it shall not be permissible for the defence lawyer to make questions to the complainant in the cross examination as to her immoral or sexual character unless it is somehow relevant. There should also be a provision that the anonymity of the victim must be maintained in all sexual offence trials.¹²¹ In addition, taking the increasing acquittal rate of the accused into account, the past sexual history and conviction of the accused can be material factors, unless irrelevant, to the court. Although the significance of this consideration may not be effective in reducing the extent of rape in Bangladesh, it could undermine one of the established perceptions about the rape trial. The perception is that the rape trial is biased against the victim which places the entire focus of court proceedings on her with little or no account for the conduct or attitude of the accused.¹²²

While one of the goals of the criminal justice system is to provide full opportunity to the accused to defend the allegation, it must not be at the expense of the victim's fundamental right to privacy. Even a woman of easy virtue has every right to privacy and no one can undermine her privacy as and when he likes merely because she is a woman of easy virtue.¹²³ The court therefore should control the manner of the cross

sexual history with third parties when assessing her consent to sexual intercourse is not reasonable as a matter of law').

¹²⁰ J Temkin, 'Regulating Sexual History Evidence-The Limits of Discretionary Legislation (1984) 33 *International and Comparative Law Quarterly* 942 at 946.

¹²¹ In order to protect the privacy of the victim and to avoid retaliation by the offender, many developed countries use only initials of the victims of sexual offence. Even in India, numerous judicial decisions uphold this practice. See for example, *Gautam v Chakraborty* (1996) AIR SC 922 at 928 (held that in 'all rape trials anonymity of the victims must be maintained, as far as possible).

¹²² D Ellis, 'Toward a Consistent Recognition of the Forbidden Inference: The Illinois Rape Shield Statute' (1992) 83 *Journal of Criminal Law & Criminology* 395 at 396; see also, S J Schulhofer, *Unwanted Sex-The Culture of Intimidation and the Failure of Law* (1998) London: Harvard University Press at 18 & 257.

¹²³ *Madhuker* (India) (1991) AIR SC 207; Y Singh, 'Gender Justice: Women Rights- A Legal Panorama' (2002) 89 *All India Reports Journal* 163 at 172.

examination and must not allow the defence to use this as a means of harassment to humiliate the victim.¹²⁴

Given the negative and destructive experiences of the courtroom for the victim and the inefficiency of the prosecutor as revealed by the court on numerous occasions, the responsibilities of the prosecutor need to be redefined by the law and judicial decisions. Recognising the magnitude of corruption involved in filing cases and complainants' difficulties thereto, the prosecutor's responsibility in Bangladesh should also include, *inter alia*, providing victims with legal assistance and guidance at the police station. In this regard, the Supreme Court of India held that:

the role of the victim's advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind counseling or medical assistance.¹²⁵

Further, to discourage sexual offences in the country, the pictures (instead of victims) and misdeeds of the offenders, should be the focus of the media.

7.4.5. Presumption of Innocence

The adversarial system of trial in Bangladesh is founded on the presumption of innocence of the accused until he/she is found guilty beyond any reasonable doubt by the courts as referred to in Chapter 6. Faulty and inefficient investigations by police, along with evidentiary requirements that need to be satisfied almost exclusively by the victim under this system, allow the accused to escape punishment.¹²⁶ In *Akbar v State* the Court held that the presumption of complete innocence permits the accused the 'right to maintain complete silence at the time of investigation as well as of trial giving him chance to get the benefit of reasonable doubt about the veracity of the prosecution case [and] is being abused now by the accused in collusion with the police at the initial

¹²⁴ *Sing* n 116 at 1405.

stage of investigation of the case.’¹²⁷ The court in Bangladesh, in a series of cases, despite having consistent and uniform evidence about the occurrence, acquitted the accused on the basis of the slightest benefit of doubt. For example, in *Begum v Haque* a woman obtained judgment in the trial court. The Session Judge Court acquitted an accused on the grounds of the benefit of doubt.¹²⁸ In another case the High Court set aside the conviction order of the trial court and observed that ‘...the Courts trying such offences should remain alert to the menace of false charges and the accused should not be convicted unless the charge is proved by trustworthy evidence....’¹²⁹ By contrast, in a similar situation, the higher courts of India, in a series of decisions, set aside the acquittal order of the trial court and refused to place considerable weight on the slightest benefit of doubt. In *UP v Srivastava* the Supreme Court held that every hypothesis of innocence is capable of being negated on evidence. ‘But this is not to say that the prosecution must meet any and every hypothesis of innocence ...[nor] does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise.’¹³⁰ Further, in a case of an attempted rape the Court held that in acquitting the accused, the entire approach of the trial court lacked objectivity and the mere absence of penetration would not absolve the accused from the offence of rape.¹³¹

¹²⁵ *Women's Forum* n 36 at (para 15).

¹²⁶ *Human Rights in Bangladesh 1999* n 47 at 28.

¹²⁷ (1999) 51 DLR 264 (Bangladesh).

¹²⁸ See Complainant Case No-639 of 1982 under the *Dowry prohibition Act 1980*, unreported case, cited in B Agarwal (ed), *Structures of Patriarchy- State, Community and Household in Modernising Asia* (1988) London: Zed Books Ltd at 220.

¹²⁹ *Islam v State* (1998) 50 DLR 581 at 585.

¹³⁰ (1992) AIR SC 840 at 840 & 846-847; see also, *State of Andhra Pradesh v Raju* (2000) AIR SC 2854 at 2854-56; *State of Karnataka v Krishnappa* (2000) AIR SC 1470 at 1475 (in both cases the Court reversed the decisions of lesser sentence of the accused in rape cases by the trial courts and awarded prescribed punishment under the law).

¹³¹ *Lal v State of Jammu and Kashmir* (India) (1998) AIR SC 386 at 388.

- (ii) it is also noted earlier that after filing suits, threats on rape victims are significant. Victims are vulnerable to the often socio-economically powerful perpetrators. Even regardless of the socio-economic status of the perpetrators, rape victims have been traditionally in a disadvantageous position in the society compared to them. For example, after rape the perpetrator does not experience the same social stigma and humiliation as the victim;
- (iii) one of the most devastating experiences for the victim is when a rape results in the conception and birth of a child. It is the victim who alone has to bear the brunt throughout her life. The child becomes illegitimate and is not entitled to inherit property or other rights from the accused even though he acknowledges the child. Under Muslim Personal Law (remembering 88% of the population is Muslim), the paternity of a child can only be established through a certain number of valid grounds and acknowledgment of the father. In a leading judgment on the determination of paternity, the Court in *Rahman v Ali* held that the legitimacy of a child born out of illicit intercourse cannot be established through an acknowledgement of the father. This is because the existence of marriage is a must to apply the principle of acknowledgement pursuant to the Muslim law.¹³⁷ Only recently, the WCR Act 2000 provides that ‘a child born out of the rape will get inheritance right from the convict family until 21 years in case of a boy and until the marriage in case of a girl.’¹³⁸ Nonetheless, nothing could be done if the accused refuses to accept the child and in such a case, it is difficult to prove the paternity of the child, while only ‘giving birth’ is enough to establish maternity. On the other hand, an illicit child is regarded as a disgrace in Bengali society in terms of his/her parental identification and social status. Thus,

¹³⁷ *Rahman v Ali* (1922) PC 159 at 161.

¹³⁸ *Women and Children Repression (Prevention) Act 2000* s 13 (C).

with such a child (anyone born from the result of rape) it is the rape victim who alone pays the highest price and the accused is required to do nothing. As the Indian Court observed, ‘rape laws do not, unfortunately, take care of the social aspect of the matter and are inept in many respects’.¹³⁹

Hence, given the situation, one significant consideration that could be before the court is, which issues should deserve to be treated with more weight and emphasis, ‘the criminal or society; the law violator or the abider.’¹⁴⁰ With rape (apart from its violent aspect) being a serious threat to the victim’s modesty and honour, the court in addressing a rape case, is expected to show its utmost sensitivity as far as possible within its power. This is important for at least two reasons: (i) the guilty should not escape punishment and (ii) the victim of the crime can find satisfaction that ‘ultimately the Majesty of law has prevailed.’¹⁴¹ To borrow an important passage from *Coetzee* in which the Constitutional Court of South Africa observed:

‘...The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted..., massively outweighs the public interest in ensuring that a particular criminal is brought to book... Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the ensuring integrity and security of the legal system...’¹⁴²

7.4.6. Medical Examination

One of the most insulting but ignored aspect of the rape trial for the victim is to go through a medical examination. The victim of rape is required to be examined within a short period of time after the incident to get an accurate result to the effect that

¹³⁹ *Gautam* n 121 at 927.

¹⁴⁰ *Basu v State of West Bengal* (1997) AIR SC 610 at 618.

¹⁴¹ *Id* at 620, *Krishnappa* n 130 at 1475.

¹⁴² See *State v Coetzee* [1997] 2 LRC 593, cited in *R V Lambert* [2001] 3 All ER 577 at 588. In this regard, the Supreme Court of India also held that ‘[a] socially sensitized judge ...[provides] better statutory armor in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos.’ See *Krishnappa* n 130 at 1475.

penetration was committed.¹⁴³ In Bangladesh, formalities from the FIR (First Information Report) to the completion of the test, in most rape cases, destroy crucial evidence admissible in the court.¹⁴⁴ A number of factors contribute to this destruction. Firstly, the forensic facilities in Bangladesh are extremely limited and centralised in major cities which remain inaccessible to victims in rural areas; in the capital city, only one central laboratory exists directly administered by the Central Intelligence Department of Police. In addition, the Medical colleges and District hospitals are insufficiently staffed causing long delays in the completion and production of the test report to the court.¹⁴⁵ For example, in the Dhaka Medical College, only four doctors are authorised to examine rape victims with their major responsibilities being to teach and to conduct post-mortem examinations as well as to attend the court sometimes twice or three times in a week.¹⁴⁶ Secondly, if any rape is committed after office hours, victims are to stay the whole night in the police station with criminals. It takes two to three days to get an order from the court for a medical examination.¹⁴⁷ Khan contends that ‘[about] 90% of rape victims go to the hospital for a medical examination 7 or 8 days after the crime has been committed’.¹⁴⁸ By this time, the evidence may be totally washed away by the victim herself, or be otherwise erased.¹⁴⁹ Thereafter, if no evidence of rape is found in the test, there is unlikely to be any judicial remedy available. Thirdly, the biased and abusive attitudes of the doctors present another difficulty. Ms Asma, a victim of gang rape mentioned in section 7.4.3, received such treatment from the attending doctors ‘when she finally managed to reach a hospital’. She expressed her experience:

In the hospital, ... I heard that they [nurses] do not touch “rape cases” unless they are bribed handsomely. A male doctor checked me ... [and] asked me to go to a private

¹⁴³ *State of Karnataka v Manjanna* [2001] 4 LRI 731 at (para 19).

¹⁴⁴ Khan 2001 n 65 at 128.

¹⁴⁵ Matin 2000 n 69 at 87.

¹⁴⁶ Ibid.

¹⁴⁷ Khan 2001 n 65 at 128.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

doctor. ...A woman doctor checked me there and gave a prescription. When I went back to the police, I was told that I needed to be treated again tomorrow. The next day we went to the police station and from there to the medical college. This time they took me to the forensic department for yet another check-up. I started crying. How many times do I have to go through this painful experience? The doctor seemed very irritated and angry. "Why are you crying now? I know girls like you. You do this only to get money from the men. If you do not want it, how can it happen." The doctor was telling the nurse that there is no indication of any injury on my body. The reports confirmed the same later. What was the use of going through so many tests if nothing could be proved? ...I am told that the medical evidence is the most important, more than my own word...¹⁵⁰

Law must acknowledge this unique experience of rape victims in Bangladesh and provide room for enhancing forensic facilities in the general hospitals of major cities instead of only in the capital city. In order to expedite the medical examination of rape victims and ensure its accuracy, and to facilitate women's access to judicial remedies, such a provision is long overdue in Bangladesh. Some reserved positions for doctors in the hospitals could make this provision more effective. Accordingly, their primary responsibility will be to conduct the examination of rape victims on a priority basis and to produce the report to the court in due time. More importantly, to have the accurate result of rape, there should be a provision that victims can go directly for a medical examination without the permission of the court.

Medical examination should also deal with the emotional needs of the victim along with her physical condition.¹⁵¹ There must also be a provision that punitive actions will apply where medical officers fail to conduct the test and to present their reports within a scheduled period of time, unless there is a *bona fide* reason for the failure. It may be relevant to mention here that, in order to prevent manipulation of reports of all sexual offences, including custodial rape and custodial death, the National Human Rights Commission of India requires all states to video tape the postmortem examination and

¹⁵⁰ Matin 20 n 69 at 29-300.

¹⁵¹ See for details, McCombie 1980 n 84 at 60-61 & 66.

to send the cassettes to the Commission.¹⁵² Such a requirement by the Violence Cell in Bangladesh can produce some positive results.

7.4.7. Corroboration of Victim's Testimony

The criminal justice system in Bangladesh places the burden of proof on the victim as mentioned. For a number of reasons it becomes harder for a rape victim, unlike the victims of other offences such as robbery, terrorism and kidnapping, to prove the allegation. Firstly, the court atmosphere and the mode of cross examination as referred to often cause confusion and nervousness of the complainant. Secondly, as a rape victim she is often unwelcome by her family and the society. In such a depressed situation, she has to prove before the open trial that she has been raped. In that case, much crucial evidence may be missed or be inadequately presented.¹⁵³ On some occasions, the age of the victim and the culture limit the exposure of the gravity and depth of information to the court.¹⁵⁴ This situation is further exacerbated by the exceptional requirement of corroboration. This is exceptional because no corroboration is required for victims of other crimes to sustain a conviction.¹⁵⁵ Traditionally, two prime justifications for the distinct treatment of rape victims are: the possibility of false claim of rape and the difficulty for the defendant to disprove the allegation.¹⁵⁶ The former claims that a woman may deliberately make a false charge of rape to, *inter alia*, retaliate against an ex-lover.¹⁵⁷ The underlining assumption thus serves to distrust a victim's claim of

¹⁵² National Human Rights Commission, 'Letter to all Chief Secretaries on the reporting of custodial deaths within 24 hours' No 66/SG/NHRC/93, National Human Rights Commission, Sardar Patel Bhavan, New Delhi 14 December 1993 at 14.

¹⁵³ *Sing* n 116 at 1405.

¹⁵⁴ *Alfonso v Northern Territory* (Australia) (1999) 131 NTR 8 at (para 20).

¹⁵⁵ J Temkin (ed), *Rape and the Criminal Justice System* (1995) Sydney: Dartmouth at 240.

¹⁵⁶ *Id* at 229.

¹⁵⁷ Spohn 1992 n 54 at 24.

rape,¹⁵⁸ and reinforces the notion that ‘in a rape case it is the victim, not the defendant, who is on trial’.¹⁵⁹

There is no specific provision in the Evidence Act of Bangladesh requiring corroboration of a victim’s testimony. However, section 114 states that ‘an accomplice is unworthy of credit, unless he is corroborated in material particularities’, but it does not define an accomplice. The Oxford dictionary defines an accomplice as a helper or companion, especially in wrongdoing.¹⁶⁰ The Supreme Court of India in *State of Punjab v Sing* observed that the raped woman is not an accomplice to the crime but is a victim, and corroboration is not an essential component of judicial credence in all instances of rape.¹⁶¹ In a few cases, the Supreme Court of Bangladesh considered victim’s testimony sufficient for the conviction without independent corroboration.¹⁶² Nevertheless, in a large number of cases, the courts used to insist on the corroboration to provide accused with the benefit of doubt. For example, in *Islam v State* the Court held that, ‘[we] have noticed ...the provisions ...providing for higher punishments for the offence. ...the accused should not be convicted unless the charge is proved by trustworthy evidence.’¹⁶³ This requirement creates further difficulties for the victim to be supplemented by others to obtain a conviction. This is because in Bangladesh, as elsewhere in the world, rape is committed in isolated places conducive to keeping it

¹⁵⁸ T K Wills, ‘Book Review: R. Thornhill & C.T. Palmer, a Natural History of Rape: Biological Bases of Sexual Coercion’ (2001) 11 *Windsor Review of Legal and Social Issues* 101 at 107.

¹⁵⁹ A P Sealy and C M Wain, ‘Person Perception and Jurors’ Decisions’ (1980) 19 *B J Social and Clinical Psychology* 7 at 15; see also, Spohn n 54 at 17-27.

¹⁶⁰ A S Hornby, *Oxford Advanced Learner’s Dictionary* (2000) Oxford: University Press at 8.

¹⁶¹ *Sing* n 116 at 1394.

¹⁶² See for example, *Al- Amin* n 95 at 154-178; *Hossain v State* (1997) 49 DLR 630 at 630-636 (held that the medical evidence is not a must if the allegation can be proved otherwise, id at 635; see also *Siraj Mal v State* (1993) 45 DLR 688 at 688- 697.

¹⁶³ (1998) 50 DLR 581 at 585; see also, *Ananda v State* (1989) 41 DLR 533 at 533-538 (in this case, a girl was kidnapped and subsequently raped. The court acquitted an accomplice, observing that ‘[to] sustain a charge of abetment it is necessary that there must exist some evidence of an overt act or omission so as to suggest...’ a conviction. See id, 536; see also, *Enayet v State* (1996) 48 DLR 514 at 514-517; *Malaker v State* (1990) 42 DLR 349 at 349-357.

strictly secret.¹⁶⁴ In that case, the only eyewitness is the victim. This requirement of rape trial, unlike the trial of other crimes, is also unjustified because it has the capacity for contributing to offenders' acquittal from the rape charges.¹⁶⁵

Recent judicial efforts to improve rape laws and trials of foreign jurisdictions deny the requirement of the corroboration of victim's testimony by independent witnesses.¹⁶⁶ The Supreme Court of India, in a series of cases, refused to accept 'corroboration' as a requirement of law and granted remedies in victims' favour by giving due weight to their testimony. For example, in *Hazarika v State of Assam* the Court held that the 'prosecutrix of a sex offence is a victim of a crime and there is no requirement of law which requires that her testimony cannot be accepted unless corroborated.'¹⁶⁷ In another leading judgment on rape, the Court held that 'the Courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a Court just to make a humiliating statement against her honour such as is involved in the commission of rape on her.'¹⁶⁸ In *Kakkad* questions arose as to whether rape was committed and whether the victim's testimony was required to be corroborated by medical evidence. The Court denied giving regard to medical reports as a conclusive proof of corroborating victim's testimony. It observed that rape can be committed without producing

...semen or even an attempt at penetration is quite sufficient for the purpose of law.... In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape has been committed. Rape is a crime and not a medical condition.¹⁶⁹

¹⁶⁴ S M Solaiman, 'Parameters of Sexual Crimes in Bangladesh' (1999) 1 *Islamic University Studies* 1at 5.

¹⁶⁵ It is suggested that 'in states where a corroboration requirement is strictly enforced, the effect has been a comparatively low rate of conviction'. See Spohn 1992 n 54 at 25.

¹⁶⁶ Ibid; see for law, for example, RSC 1985 c C-46 s 274 (Canada).

¹⁶⁷ (1998) 8 SCC 635 at 637.

¹⁶⁸ *Sing* n 116 at 1400.

¹⁶⁹ *Kakkad v Dubey* (1992) 3 SCC 204 at 222.

In *USA v Rabbit* the US Court of Appeal also confirmed the appellant's conviction of rape considering the victim's testimony sufficient for supporting its verdict.¹⁷⁰

Given the fundamental importance of eliminating sexual violence against women and especially of the disadvantaged positions of victims in a rape trial in Bangladesh, the corroboration requirement should be abolished on a series of counts. Firstly, the testimony of victims in most other crimes is considered adequate to sustain a conviction.¹⁷¹ 'Rape charge does have some distinctive characteristics' such as the severity of its punishment and its damaging effects on defendant's reputation.¹⁷² Yet these alone cannot be a legal basis in view of other crimes for which corroboration has no relevance to credit. For example, the punishment for kidnapping or murder is also severe and that can damage the reputation of the accused in the same way.¹⁷³ Secondly, the apprehension or allegation of false rape claims made by women has 'never [been] tested empirically'.¹⁷⁴ Moreover, the trial and cross-examination provide ample opportunities to detect the accuracy of the allegation of the complainant. Thirdly, if any false allegation is presumed to be made by the complainant of rape, that may also be made by the complainant of other crimes.¹⁷⁵ Hence, to quote a claim that '[none] of the justifications for treating rape cases differently from other criminal charges stands on solid empirical or theoretical footing'.¹⁷⁶

The complainant of a rape case, as a human being, has every right to be treated with the same degree of care and importance as the victims of other crimes such as robbery and killing. Moreover, a rape victim deserves to be treated with more care and compassion, compared to the victims of other crimes, because a rape victim 'suffers [from] a

¹⁷⁰ US App *LEXIS* 31846 (1997).

¹⁷¹ Temkin 1982 n 50 at 417.

¹⁷² Temkin 1995 n 155 at 240.

¹⁷³ Ibid.

¹⁷⁴ Spohn 1992 n 54 at 24.

¹⁷⁵ Temkin 1982 n 50 at 417.

tremendous sense of shame'¹⁷⁷ and from a feeling of losing chastity which is thought to be more valuable than anything else to a Muslim woman.¹⁷⁸ Fourthly, a woman from a non-permissive society like Bangladesh is more unlikely to make such an allegation as it has the potential to produce severe and negative life-long consequences for her and for her family. One of the consequences, among many, is that she would face the risk of being unmarried and become a burden for her family regardless of her socio-economic status. No woman is thus expected to make a false charge of being raped at such a high price. By contrast, women have every reason to conceal the fact to escape the same trauma attached with the rape.¹⁷⁹ All of the above considerations thus disprove the traditional hypothesis of false allegation of rape by women.¹⁸⁰

Hence, the court should not regard an insignificant or minor contradiction as justified grounds to deny the complainant's claim where 'her testimony inspires confidence and is found to be reliable.'¹⁸¹ Convictions should not be denied either because of mere fact that the complainant's evidence could not be corroborated since rape in most cases occurs in an isolated place. Such an attempt will make justice a casualty and add insult to the injury of the victim instead of remedying her pain.¹⁸² Rather, significant consideration ought to be given to evaluating broader probabilities drawn from the facts and circumstances of the incident and from the testimony of the victim.¹⁸³ Even, the need for corroboration can further be refuted by referring to section 133 of the *Evidence Act* 1972 in Bangladesh. It provides that 'a conviction is not illegal even if it is based on the uncorroborated testimony of an accomplice.'

¹⁷⁶ Temkin 1995 n 155 at 246-47.

¹⁷⁷ *State of Maharashtra v Jain* (1990) AIR SC 658 at 660.

¹⁷⁸ Bangladesh is predominantly a Muslim (88%) country. See CEDAW Report n 82 at 5; see also, Healey 1995 n 10 at 350-51.

¹⁷⁹ *Jain* n 177 at 666.

¹⁸⁰ *Lal v State of Haryana* (1980) 3 SCC 159 at 159.

¹⁸¹ *Sing* n 116 at 1400.

¹⁸² *Jain* n 177 at 665.

¹⁸³ *Sing* n 116 at 1400.

7.4.8. Absence of Consent and Resistance as Required by Law to Establish Rape

Consent plays a central role in the rape trial. Under section 375 of the PC 1860, a victim of rape is required to prove resistance and the absence of consent on her part to get judicial remedies. However, the PC 1860 neither defines consent nor does it draw any distinction between consent and submission. In many situations, a woman may submit herself to rape because of her economic dependence or of threats directed to her relatives or her properties instead of only to her person.¹⁸⁴ For example, a woman may submit herself to her employer with a reasonable apprehension that her denial may cause her to lose her job or would disadvantage her in other respects for her employment.¹⁸⁵ In such a case, where the superior power abuses its position and assumes the victim's consent, an expectation of free consent (from her) by the law is a crude and unjustified requirement to be rebutted by the victim.¹⁸⁶ As Kasubhai argues: '[these] theories of consent are aligned with the general power web which perpetuates patriarchal control over women, relegates women to the private sphere, and preserves male sexual access'.¹⁸⁷

Section 375 of the PC 1860 neither addresses the situations where consent is obtained through fraud and misrepresentation of facts or from an intoxicated woman or from a woman of an unsound mind. On many occasions in Bangladesh, victims are given false promises of marriage in the near future if they have sexual intercourse with the defendants. For example, in *Abed Ali v State* the complainant was induced by such a

¹⁸⁴ S Prasad and J Mathew, 'Some Emerging Thoughts on Feminist Theory' in R Jethmalani (ed), *Kali's Yug-Empowerment, Law and Dowry Deaths* (1995) New Delhi: Har-Anand Publications at 131.

¹⁸⁵ Schulhofer 1998 n 122 at 254.

¹⁸⁶ M T Kasubhai, 'Destabilizing Power in Rape: Why Consent Theory in Rape Law is Turned on its Head' (1996) 11 *Wisconsin Women's Law Journal* 37 at 49.

promise. Consequently, when she became pregnant, the defendant denied bearing any responsibility. After giving birth to a child she sought justice. The court awarded punishment to the accused of five years imprisonment and a fine of TK 5000 (US\$ 83.33). Yet it was insignificant considering the socio-economic responsibilities involved in that incident.¹⁸⁸ In a similar incident, the *Fact Finding Committee of Jahangirnagar University Rape Case* revealed that more than 20 female students were raped and over 300 were sexually harassed by such promises.¹⁸⁹ This sort of false promise cannot be remedied by the court since the intent and object of making such an agreement are immoral. Under the *Contract Act* 1872, a deceived agreement for immoral purposes cannot be enforced.¹⁹⁰

Apart from these, as the proof of the complainant's consent is a basic requirement of securing an acquittal, the accused may legitimately argue in his defence that the rape was consented to or he honestly believed that the complainant consented to sex. In most cases, rape, due to its private nature, hardly generates any possibility of supporting the conviction by an individual witness other than the victim mentioned earlier. As a result, the accused can easily gain an 'excuse' under the 'honest but mistaken belief in consent'.¹⁹¹ Through this means, the rape law also denies women the right to a fair trial. By contrast, procedural norms provide a host of privileges to the accused of rape, unlike the accused of other crimes, by imposing further discriminatory 'resistance' requirement on the complainant.¹⁹²

¹⁸⁷ Id at 50; see also, F Olsen, 'Statutory Rape: A Feminist Critique of Rights Analysis' (1984) 63 *Texas Law Review* 387 at 405 (observing that statutory rape laws reinforce the sexual stereotype of men as aggressors and women as passive victims).

¹⁸⁸ See for details, Khan 2001 n 65 at 129.

¹⁸⁹ A Khan, 'JU expels five students for involvement in the incidents' *The Independent* (3 October 1998).

¹⁹⁰ *Contract Act* 1872 s 23.

¹⁹¹ *R. v O M* (Canada) (1999) ONCA C31662 at (paras 5-6).

7.4.8.1. Resistance

The court traditionally relies on a high degree of resistance to prove the victim's absence of consent.¹⁹³ Failure to show any visible physical injury resulting from the resistance is less likely to offer legal remedies. For example, in a case the complainant had consented to rape in the face of an attack with a knife. The accused was acquitted as the victim failed to show any injury to her private parts, even though she received a head injury when she tried to run away.¹⁹⁴ Therefore the requirements of 'absence of consent' and 'resistance' appear to claim something more than the word of the victim such as physical injuries to her body or her private parts. With regard to the injuries of the body of a rape victim, resistance in all cases may not be evidenced with a visible physical sign. This is because the mode and techniques of attempting to commit rape may leave no scope in all cases for resistance. For example, the attempt may be sudden and unexpected, when the victim did not even think of it or be mentally or physically prepared to resist the attempt. In that case, the offenders can easily overpower the victim. Further, sexual intercourse between adults may occur without carrying any visible injury to the private parts.¹⁹⁵ 'Resistance' becomes irrelevant in view of the explanation of section 375 of the PC 1860 in Bangladesh. This section requires only penetration, regardless of the degree of penetration, to constitute rape and in that case it is quite possible to commit rape without producing any injury to the private parts of the victim. More importantly, any sexual intercourse without the consent of the woman is sufficient to constitute rape under section 375. Thus, physical resistance coupled with

¹⁹² S P M Esq, 'Hawthorne and the Handmaid: An Examination of the Law's Use as a Tool of Oppression' (1998) 13 *Wisconsin Women's Law Journal* 45 at 49.

¹⁹³ Khan 2001 n 65 at 128.

¹⁹⁴ (1961) Gujrat Law Report 256.

¹⁹⁵ *Kakkad* n 169 at 222 .

injury is an excess and discriminatory requirement imposed by the court.¹⁹⁶ Further, such a requirement ignores the fact that rape is not only a physical assault, but constitutes a psychological violence against the victim. As Meenu maintains, rape ‘is the feeling of having been exploited and violated more than anything else which leaves lifelong scars on the mind of the victim.’¹⁹⁷

Numerous countries worldwide have attempted to address issues relating to consent through amendments to rape laws and judicial activism.¹⁹⁸ In India, the *Mathura Rape Case*¹⁹⁹ led to a series of amendments to rape laws.²⁰⁰ The amendment 1983 to the Criminal Code introduced a new section 114-A to the Indian Evidence Act. It provides that ‘...where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent’.²⁰¹ It also shifted the burden of proof on the accused from the victim to prove that he did not commit rape. Another amendment to the *Penal Code* of India incorporated clause 3 in section 375. Under this clause a man is said to have committed rape on a woman without her consent or with her consent ‘when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.’²⁰² The Supreme Court of India, in numerous cases, has refrained from dismissing an allegation of rape in the absence of physical injury. In *Zakir v State of Bihar* the

¹⁹⁶ See *Medical Soc v New Jersey Dept of Law & Pub Safety* (US) 120 NJ 18 (1990) at 26 (observing that no part of the statute should be assumed meaningless or should be construed to render it superfluous to frustrate the legislative intent).

¹⁹⁷ Meenu, ‘Rape- a Psychological Assault’ (2000) 2 *Supreme Court Cases Journal* 44 at 44.

¹⁹⁸ C M Tchen, ‘Rape Reform and a Statutory Consent Defense’ (1983) 74 *Journal of Criminal Law & Criminology* 1518 at 1529-47.

¹⁹⁹ In this case, the Court acquitted the accused as the circumstances of the case failed to demonstrate any existence of ‘fear’ in consent or, the ‘passive submission’ of the complainant. See for details, *Tukaram v State of Maharashtra* (1979) AIR SC 185 at 185-190.

²⁰⁰ I A Ansari, *Human Rights in India-Some Issues* (1998) New Delhi: Institute of Objective Studies at 106-107.

²⁰¹ *Evidence Act* 1872 s 114-A.

²⁰² *Penal Code* 1860 (India) s 375 (3).

Court held that the mere absence of injuries on the person of the complainant cannot, by itself, discredit her statement. The complainant being a hapless woman failed to offer serious physical resistance in the face of force and therefore she should not be disbelieved.²⁰³

In Australia, one of the examples of circumstances in which a person does not consent to an act is when a ‘person is asleep or unconscious, or is so affected by alcohol or another drug as to be incapable of consenting’.²⁰⁴ In Canada, the *Criminal Code Amendment* 1983 introduced ss 265 (3) and (4). Section 265 (3) provides that ‘no consent is obtained where the complainant submits or does not resist by reason of:

- (a) the application of force to the complainant or to a person other than the complainant;
- (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
- (c) fraud; or
- (d) the exercise of authority.

A further amendment to the CrPC of Canada was made in 1992 that added new sections relating to consent.²⁰⁵ Section 273.1 provides a narrower definition of consent, stating that no consent is obtained where the complainant, *inter alia*, is incapable of consenting to the activity or where the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority or the complainant expresses by words or conduct, a lack of agreement to engage in or to continue the activity.²⁰⁶ Section 273.2 restricts the ambit of defence by stating that the accused cannot presume the complainant’s consent when :

- ‘(a) the accused’s belief in consent arose from the accused’s

²⁰³ *Zakir v State of Bihar* (1983) 4 SCC 10; see also, *Hazarika* n 167 at 637.

²⁰⁴ *Criminal Code Act* 1995 ss 298.14 & 298. 19.

²⁰⁵ See the *Bill C-49- An Act to amend the Criminal Code (sexual assault)*, 3rd Session, 34th Parliament, The House of Commons of Canada, 1992.

- (b) self-induced intoxication, or
- (c) recklessness or wilful blindness ; or
- (d) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant consented.’

In dealing with the defence of mistake in consent, the Supreme Court of Canada held that there must be an “air of reality” to that mistake before it would be considered. In order to give it any air of reality, the defence argument must be supported by other sources beyond the mere assertion of belief in consent by the accused.²⁰⁷ In *Jobidon v The Queen* the Court recommended that, in assessing whether the defence has an air of reality, the scope of the consent required be carefully scrutinized taking the surrounding circumstances of the given case into account.²⁰⁸ The consent rule was best articulated in a landmark judgment on an attempted rape in Canada is *Ewanchuk*. The Court observed that it is the responsibility of the accused to ascertain the affirmative communication of the complainant when her consent is unclear. ‘A belief that silence, passivity or ambiguous conduct constitute consent provides no defence.’²⁰⁹ This case also addressed some of the myths that traditionally prevailed over the decades in rape discourse. For example, one of the myths has been that when a woman says ‘no’ in sexual intimacy she really means ‘yes’, ‘try again’ or ‘persuade me’.²¹⁰ The *Ewanchuk* affirmed this ‘no’ means ‘no’ as expressed by the words or conduct of the complainant and will be enough to be regarded as *prima facie* evidence of a lack of consent to any sexual advance.²¹¹

²⁰⁶ *Criminal Code* 1985 s 273.1 (2) (a) (b) (c) and (d).

²⁰⁷ *Pappajohn v The Queen* (Canada) (1980) 52 CCC (2d) 481 at 482; see also, *Regina v Cuerrier* (Canada) (1998) 127 CCC (3d) 1; *R v Hewitt* (Australia) (1997) 1 VR 301.

²⁰⁸ *Jobidon v The Queen* (Canada) (1991) 66 CCC (3d) 454 at 456.

²⁰⁹ *Ewanchuk* n 94 at 483.

²¹⁰ *Id* at 512.

²¹¹ *Id* at 512 & 484; P Fournier, ‘The Ghettoisation of Difference in Canada: “Rape by Culture” and the Danger of a “Cultural Defence” in Criminal Law Trials’ (2002) 29 *The Manitoba Law Journal* 81 at 113-115; see also, Mandhane 2001 n 63 at 209.

Similarly, the US Courts objected to the requirement of consent, observing that the focus of rape laws is improperly placed on the victim in a trial and detracts the judges' attention from the defendant's actions.²¹² The Supreme Court of New Jersey held that the defendant is required to ascertain the affirmative and freely-given permission of the complainant.²¹³ 'Any lesser form of consent renders the sexual penetration unlawful and cannot constitute a defence.'²¹⁴ In *Spicer v Gregoire* the US Court of Appeal held that the shift of the burden of proof onto the accused to ascertain that he was given an affirmative consent from the complainant did not violate his right to due process and affirmed his denial of *habeas* relief.²¹⁵

In summing up, it is not more the responsibility of the complainant of a rape case to prove that she did not consent, rather it is the responsibility of the defendant to prove that free consent of the complainant was confirmed to him before advancing in sexual activities with her.

The courts also criticised the 'resistance' requirement, arguing that it is not an essential element of rape and the reliance on victims' force to prove her lack of consent is misplaced.²¹⁶ The Supreme Court of Michigan held that 'physical force does not include the conduct ... when the proper focus ought to have been on whether the contact was unpermitted.'²¹⁷ Thus, using victims' force to measure her 'resistance' tends to distort the intent of the legislation.²¹⁸

In order to ease the burden of testifying for rape victims and to protect their interests, in Bangladesh the term 'consent' should be clarified in section 375 of the PC 1860. It should explain the situations as in Canada where a woman shall be deemed not to have

²¹² See for details Ellis 1992 n 122 at 396-397; Kasubhai 1996 n 186 at 67.

²¹³ *State of New Jersey* n 56.

²¹⁴ *Id* at 423.

²¹⁵ 194 F 3d 1006 (1999).

²¹⁶ See for example, *The People v Kusumoto* (US) 169 Cal App 3d 487 (1985) at 493 (recommending that the essential element of rape is the lack of consent but not the force).

consented. If the situations such as ‘no means no’, the extortionate threats and intoxicated situation of the complainant are clearly expressed in law, these can reduce the scope of mistaken belief in consent of the accused to evade punishment.²¹⁹ To this end, a new provision should also be incorporated in the ‘consent-rule’ that will seek the motive of the accused and his careful and honest assessment of the victim’s consent, instead of the lack of consent of the victim. Under this provision the burden should be placed on the accused, as in India and other common law jurisdictions, to prove that he obtained affirmed and free consent from the victim before engaging in sex. This ‘consent-rule’ would also provide definite guidelines for the court to apply the law. Further, given the private nature of rape and difficulties thereto to secure a conviction, evidentiary norms should be introduced in the *Evidence Act* 1872 in Bangladesh to presume the absence of consent of the victim when the sexual intercourse is proved.

The requirement of ‘resistance’ offered by the victim must also be kept away from judicial consideration in Bangladesh for a range of grounds. Firstly, this requirement unjustifiably focuses on the strength of the victim instead of the aggressive force and conduct of the accused.²²⁰ It is unjustified because resistance is not a proper indicator to determine the non-consent of the victim.²²¹ Judicial decisions of many countries have moved away, to a significant extent, from the traditional requirement of resistance.²²²

Secondly, the term ‘resistance’ is not mentioned in the statutory language as an essential

²¹⁷ *People v Patterson* (US) 410 NW 2d 733 (1987) at 747.

²¹⁸ *Id* at 748.

²¹⁹ S Estrich, *Real Rape* (1987).

²²⁰ Schwartz, ‘An Argument for the Elimination of the Resistance Requirement from the Definition of Forcible Rape’ (1983) 16 *Loyola of Los Angeles Law Review* 567 at 576-82; see also, C N Niarchos, ‘Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia’ (1995) 17 *Human Rights Quarterly* 649 at 685.

²²¹ C A Wicktom, ‘Focusing on the Offender’s Forceful Conduct: A Proposal for the Redefinition of Rape Laws’ (1988) 56 *George Washington Law Review* 399 at 404.

²²² See for example, *People v LaSalle* (US) 103 Cal App 3d 139 (1980) at 148-149 (observing that resistance is irrelevant where fear and threat of physical injury led the victim to submit. Supporting another judgement, it held that the Court will no longer require the ‘primitive rule that there must be resistance to the utmost’). See also, *State v Verdone* 337 A 2d 804 (1975) at 810 (held that in measuring

element of rape. Thirdly, it ignores the fact that the victim's resistance may increase the risk of a worsening situation like serious injury or even death.²²³ 'Some studies indicate that the incidence and degree of violence in a rape are heightened when the woman physically resists.'²²⁴ Fourthly, the shift of focus from the victim to the offender will provide legal recognition of women's perspectives in the law; that may be useful to increase the rate of conviction.

7.4.9. Rape in Police Custody

Custodial rape and death are common phenomena in Bangladesh. The rape incident of Shima by the police and her subsequent death, among numerous instances, testify the massive abuse of powers by police and the gross negligence of the government. Ms Shima Chowdhury, an 18-year old girl, was arrested by the police when she was walking with her friend on 8 October 1996.²²⁵ There was no legal basis for arresting her.²²⁶ After arrest she was not produced before the court within a period of 24 hours as required by the law.²²⁷ On 9 October, she was detained in the office of the Officer-in-Charge (OC). 'The OC claims that he had left at midnight, leaving his key with the duty officer ...and that three policemen entered the room after he left.'²²⁸ On that night Shima was forced to drink a glass of what she thought was "muddy water". 'She became dizzy, and in that state, the four policemen raped her.'²²⁹ On the following morning, she was found in an unconscious state. The medical examination confirmed that penetration was committed on her. Subsequently, on an application by the police, she was placed in a

victim's resistance, consideration should be given to the 'relative strength, the amount of force manifested by the assailant, the fear instilled in the victim, and all other relevant circumstances').

²²³ Mandhane 2001 n 63 at 219; see also, *Verdone* id.

²²⁴ Wicktom 1988 n 221 at 404.

²²⁵ Amir 2002 n 99.

²²⁶ Section 54 of the CrPC 1898 provides altogether nine grounds on which a person can be arrested without a warrant of the Court. In *Shima* incident, the police failed to make any allegation except for that she, being unmarried was walking with her boyfriend. However, s 54 does not mention this sort of conduct as a reason for arrest. See for details, *Criminal Procedure Code* 1898 s 54.

²²⁷ See the Constitution n 27 art 33 (2).

‘safe custody’²³⁰ by a judicial order. The impact of the incident throughout the country led to the immediate arrest of four police. Thereafter, as the report of Amnesty International revealed:

Shima remained in detention without access to a lawyer or visits by her friends and her mother. She had to sleep on the floor and was reportedly given no blanket in the cold months of winter to cover herself... Completely isolated from the world outside, kept in a jail where her rapists were also held pending trial, with no family or friends to give her support to cope with her trauma, she became very ill. As early as late October, her conditions were so serious that the jail officials sent her to the... hospital. She was diagnosed as having gastric ulcer and lung infection. But jail officials forced her back to the jail even in that condition of poor health.²³¹

In jail, she was denied necessary medication and any access to her family, lawyers, reporters and the human rights organizations.²³² Appeals from several Women’s Rights Groups to free her from the jail were also rejected by the court. After five months, on 7 February, in a very critical condition she was taken to the hospital in a pedal rickshaw instead of emergency ambulance where the attending doctor declared her dead. It is appalling to mention that in mysterious circumstances, immediately after her death, she was cremated instead of buried. She was a Muslim and the dead body of a Muslim should be buried under the religious dictate.²³³ On 1 March 1997, the trial court acquitted the four police officials for lack of evidence.²³⁴ The court observed that the government lawyers produced very weak evidence and poor witnesses. To justify the arrest and their crimes, police described Shima as a ‘floating prostitute’. Human Rights Organisations failed to find any record of her arrest and detention before her transfer to the safe custody.²³⁵ In another incident, a teenage girl was raped and murdered by the

²²⁸ Amnesty International 1997 n 90.

²²⁹ Ibid.

²³⁰ Under judicial order, victims of various forms of violence in Bangladesh are placed in an arrangement which aims to provide them with protection and safe shelter. Such an arrangement is regarded as a safe custody.

²³¹ Id at 3; Jahan 1997 n 64 at 15-16; Ain O Salish Kendra (ASK), *Human Rights in Bangladesh 1997* (1998) Dhaka: The University Press Limited at 22.

²³² Amnesty International 1997 n 90.

²³³ Ibid.

²³⁴ *Human Rights in Bangladesh 1998* n 47 at 31.

²³⁵ Amnesty International 1997 n 90.

patrol police in 1995 that resulted in a further seven people dead as the incident sparked violent protest across the nation. The trial court sentenced three police to death. However, the accused had not been punished eight years later.²³⁶

There is no strict legal sanction for ‘safe custody’ in Bangladesh but it has become a judicial practice to place the victims of gender-based crimes in such custody.²³⁷ Safe custody aims to provide protection and safety from further violence to the victims.²³⁸ However, in reality, it transforms into a place of perpetuating various forms of harassment including rape against women. As there is no separate arrangement for such victims, they usually stay with convicts and on-trial prisoners. On many occasions, victims are treated as convicts and are handcuffed or chained to their beds.²³⁹ According to a study conducted by the Bangladesh National Women Lawyers Association, approximately 1600 women and girls were detained in ‘safe custody’ during the period between 1990 and 1995 and in 1998, the number was 271.²⁴⁰ However, the recent intervention of the Women’s Rights Organisations released a number of victims from safe custody through public interest litigation.²⁴¹ In pursuance of these initiatives, section 31 of the WCR Act 2000 provides that the Tribunal, if it thinks fit, can make orders to place women victims or children in any other arrangements outside the jail. Despite this provision, the Amnesty International Report 2001 conveyed that ‘[over] a

²³⁶ Staff Correspondent, ‘Execution of verdict in Yasmin case demanded’ *The Daily Star* (25 August 2002).

²³⁷ S Z Khan, *Herds and Shepherds: The Issue of Safe Custody of Children in Bangladesh* (2000) UK: Save the Children at 14-15.

²³⁸ Khan 2001 n 65 at 131; Amir 2000 n 99.

²³⁹ Pakhy, a five-month pregnant woman after being gang raped was rushed to Dhaka Medical College Hospital in a serious condition on 1 May 1998. ‘During her hospital stay, her foot was chained to her bed for four days. On the fifth day, her leg was so swollen that the police replaced the chain with handcuffs. On 10 May, Pakhy was detained in safe custody by a court order at the Dhaka Central Jail where she was again handcuffed to her bed and had two constables guarding her. See for details, *Human Rights in Bangladesh 1998* n 47 at 145.

²⁴⁰ *Id* at 144.

²⁴¹ See for example, *Begum v the Government of Bangladesh* W P No 5816/97; (1998) 8 BLD at 410.

dozen women were sent to prison by magistrates under a practice known as “safe custody”.²⁴²

The absence of any positive precedent with stringent punishment against police, and some of the formalities of trial encourage them to commit crimes including custodial violence.²⁴³ In Bangladesh, investigations of crimes committed by the police are generally carried out by their own colleagues.²⁴⁴ There is abundant evidence to suggest that such an inter-linked process has often concealed real incidents and placed the blame on the innocent. For example, a nine-year old girl was raped in a room usually used by the police at court premises in Dhaka in 1998. ‘While media insisted that a police constable was responsible for raping the girl, police investigations finally charged a poor teenage hawker with the crime.’²⁴⁵ This incident merely illustrates the extent of manipulation of the investigation and associated difficulties to bring the police to book. This practice of inquiry also undermines one of the basic principles of natural justice that ‘none can be judge of his own cause’. Since custodial rape or death is perpetuated in the dark cells of the prison house, it negates the possibility of having any eye witness other than the police to prove the fact. The findings of a number of cases adhere to this view.²⁴⁶ For similar reasons, most cases of custodial rape do not come to light. Although the sensational cases hardly involve an independent judicial inquiry, its functions are constrained by terms and references. Moreover, it takes months to produce a single report and the report is not made public.²⁴⁷

²⁴² See, Amnesty International Report 2001 n 65; see also, The US Department of State, Bangladesh-Country Reports on Human Rights Practices 2002 (31 March 2003) at 4 & 18. The report is available on < file:///KARL/CLIENT_DATA/Asylum%20Law/dw%20work%20in... > (2 April 2003).

²⁴³ Agarwal 1988 n 128 at 223.

²⁴⁴ Khan 2001 n 65 at 131.

²⁴⁵ F Hasan, ‘More Bangladeshi women become victims of rape’ *The Daily Star* (20 January 2002).

²⁴⁶ See for example, *Islam v State* (1991) 43 DLR 336 (The Supreme Court held that it was not possible to prove the case of death in police custody because in that situation only the police can know that how a person died).

²⁴⁷ Khan 2001 n 65 at 131.

To minimise problems involved in an investigation of a rape case, provision should be made that where the police are a party to a custodial death, rape or torture, investigation must be carried out by an independent investigative body.²⁴⁸ All reports of investigations should be required to be made public to ensure justice. In addition, the indiscriminate abuse of section 54²⁴⁹ of the CrPC 1898 in arresting a woman such as Shima should be stopped through careful observation of the court. In this regard, a strong guideline for the police, especially developed by the court, like that in India,²⁵⁰ can provide some relief because the law is clear about the grounds of arrest. In India, the district magistrate and superintendents of police are obligated to report the incident of custodial rape and custodial death to the National Human Rights Commission within 24 hours of occurrence. The failure on their parts will lead to the presumption that ‘there was an attempt to suppress the incident.’²⁵¹ As such an independent Commission is yet to be established in Bangladesh, the local representatives (Chairman of Union Parishad and Mayor of City Corporation) should be responsible for reporting the incident to the Violence Cell under the Ministry of Women and Children Affairs within 24 hours of occurrence. Beyond these, a new provision must be inserted in the *Evidence Act* of Bangladesh to the effect that any custodial rape or death shall be presumed to be committed by police (under whose authority that incident has occurred) unless otherwise proved. Accordingly, the onus of proof should

²⁴⁸ To restrict the manipulation of investigation of cases to which police is a party, the Supreme Court of Bangladesh recently observed that the police cannot be present in a judicial inquiry. See for example, *Moni v Metropolitan Magistrate, Dhaka and Others*, Criminal Revision No 683 of 1999 and *Alena Khan v The State*, Criminal Revision No 680 of 2001.

²⁴⁹ See n 226.

²⁵⁰ The Supreme Court of India in a landmark judgment on custodial death issued 11-point directives to be followed by the police in all cases of arrest or detention. The failure to comply with those directives shall make the police concerned liable for departmental action as well as for contempt of Court. For details see, *Basu* n 140 at 623.

²⁵¹ National Human Rights Commission, India n 152 at 11.

lie on that police officer. Legislative reform proposals and judicial precedents support this provision.²⁵²

Nonetheless, while the law can be a strong basis for legal claim, it cannot ensure its compliance. The government should shoulder the primary responsibility to ensure its enforcement and be answerable for the acts and omissions of its public agents and private actors that obstruct the implementation of the law. The following section therefore explores how the government can be made accountable for its public and private actors.

7. 5. Due Diligence Standard

The recent development in state responsibility holds government accountable for the acts and omissions of its public and private actors.²⁵³ Under this responsibility states are obligated to take effective and reasonable measures to prevent human rights violations committed by its public agents such as police officers and state medical staff.²⁵⁴ States

²⁵² See for example, the 113th Report of the Law Commission of India (cited in *Basu* n 140 at 621); *State of M P v Trivedi* (1995) 4 SCC 262.

²⁵³ The state responsibility for omissions of state actors began with the decision of the *Corfu Channel Case* in 1949. In this case, Albania was held internationally liable by the International Court of Justice for the failure to warn the UK ships of the danger of mines near sealanes in Albanian Territorial waters. State responsibility for the protection of aliens (foreigners who are not subject of the country to which they live) now is extended to national individuals to cover their rights through different expansive interpretations of international human rights norms. See for example, T Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) Oxford: Clarendon Press at 155-222; N Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violation in International Law' (1990) 78 *California Law Review* 449; M T Kamminga, *Inter-State Accountability for Violations of Human Rights* (1992) Philadelphia: University of Pennsylvania Press at 127-186; how the international provisions of state responsibility have been developed to cover individual rights-see C Romany, 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' in R J Cook (ed) *Human Rights of Women National and International Perspectives* (hereinafter *Human Rights of Women*) (1994) Philadelphia: University of Pennsylvania Press at 96-106; G A Christenson, 'Attributing Acts of Omission to the State' (1990) 12 *Michigan Journal of International Law* 312 at 328; M Randall, 'Sex Discrimination, Accountability of Public Authorities and the Public/Private Divide in Tort Law: An Analysis of Doe v Metropolitan Toronto (Municipality) Commissioners of Police' (2001) 26 *Queen's Law Journal* 415 at 451-495; see also, *Corfu Channel Case (UK v Albania)* [1949] ICJ 4 (Judgment on Merits of April 4).

²⁵⁴ In international law this obligation is often split into three categories: 'respect, protect, fulfil.' 'The obligation to respect focuses directly on what the government does through its organs, agents and the structures of its law.' The duty to 'protect' requires states to ensure the enjoyment of rights by preventing violations by its agents. The duty to 'fulfil' obligates states to take necessary and effective measures to ensure rights 'recognised in the human rights instruments.' See 'Respect, protect, fulfil-Women's human Rights' <http://www2.amnesty.se/isext99.nsf/cff1d743503656e4412566ee00476b47/> (November 1 2001).

are also required to exercise due diligence to prevent and prosecute acts of violence committed by its private actors such as individual perpetrators.²⁵⁵ Due diligence is recognised as an international standard for measuring government's responsibility towards its own citizens.²⁵⁶ This recognition/standard legitimates international scrutiny of a state's conduct towards its nationals.²⁵⁷ The concept of due diligence signifies some legislative, administrative or judicial initiatives of the government through which its commitment and efforts to fulfil international obligations can be determined.²⁵⁸ It requires states to 'prevent, investigate, and in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.'²⁵⁹ The meaning and scope of 'due diligence' may vary within a particular context but it has two universally accepted components. These are notice and means.²⁶⁰ These two components refer respectively to, whether the government is aware of a specific violation of rights and whether the government has some measures to prevent these violations. When these two exist, state responsibility also arises for its failure to effectively enforce these means.²⁶¹ This is because state parties agreed to

²⁵⁵ See generally Randall 2001 n 253; N S Ravikant, 'Dowry Deaths: Proposing a Standard for Implementation of Domestic Legislation in Accordance with Human Rights Obligation' (2000) 6 *Michigan Journal of Gender & Law* 449 at part 2 (A).

²⁵⁶ Roht-Arriaza 1990 n 253 at 467-500 (explaining how the due diligence standard emerged in the international context to determine state responsibility); see also, Ravikant 2000 id.

²⁵⁷ R J Cook, 'State Responsibility for Violations of Women's Human Rights' (1994) 7 *Harvard Human Rights Journal* 125 at 137.

²⁵⁸ Shelton observed that '[due] diligence consists of the reasonable measures of prevention that a well-administered government could be expected to exercise under similar circumstances.'- see D Shelton, 'Private Violence, Public Wrongs, and the Responsibility of the State' (1989-1990) 13 *Fordham International Law Journal* 1 at 23.

²⁵⁹ See for example, General Recommendation of CEDAW provides that 'States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and to provide compensation.' See General Recommendation 19 U N GAOR, Committee on the Elimination of Discrimination Against Women, 11th Sess, at 1, UN Doc CEDAW/C/1992/L1/Add15 (1992) at 10; see also, *Declaration on the Elimination of Violence Against Women* 1993, G A Res 48/104, U N GAOR, 48th Sess, Agenda Item 111, U N Doc A/RES/48/104 (1994) art 4.

²⁶⁰ Ravikant 2000 n 255 at part 2 (A).

²⁶¹ S Y Lai and R E Ralph, 'Recent Development: Female Sexual Autonomy and Human Rights' (1995) 8 *Harvard Human Rights Journal* 201 at Part II (B).

undertake both the obligation of means and obligation to achieve results.²⁶² Similarly, '[when] state officers are inactive in the prevention, or prosecution of reasonably predictable or suspected human rights violations, state responsibility arises for the state's omission.'²⁶³

International law has construed state responsibility to encompass both affirmative and negative duties.²⁶⁴ It requires states to adopt 'reasonable and appropriate measures' to 'respect and ensure' the rights of women.²⁶⁵ Numerous judicial decisions²⁶⁶ interpreted these measures through applying due diligence measures to make government accountable for its public and private actors. However, the following discussion highlights primarily the findings of *Rodriguez*²⁶⁷ for one basic reason. The reason is that the *Rodriguez* has been considered one of the leading cases to well articulate the international due diligence standard in the national context.²⁶⁸

In determining the appropriateness of measures under international law, regard needs to be given to the particular socio-economic-political conditions of a country, 'but criteria of appropriateness are not within the state's exclusive control' as it voluntarily accepts the obligation to act in compliance with an international standard.²⁶⁹ Ravikant contends that 'reasonable measures consist of components' that help the law to achieve its

²⁶² Cook 1994 n 257 at 161.

²⁶³ Id at 145.

²⁶⁴ G K Miccio, 'With All Due Deliberate Care: Using International Law and the Federal Violence Against Women Act to Locate the Contours of State Responsibility for Violence Against Mothers in the Age of Deshaney' (1998) 29 *Columbia Human Rights Law Review* 641 at 682-84; see also, H Combrink, 'Positive State Duties to Protect Women from Violence: Recent South African Developments' (1998) 20.3 *Human Rights Quarterly* 666 at 666-689.

²⁶⁵ See for example, CEDAW n 8 arts 4 & 5.

²⁶⁶ For example, the European Court in a number of decisions, observed that 'duty to respect' requires affirmative acts of the state. See for example, *Airey v Ireland* (1980) 2 EHRR 305; *X and another v The Netherlands* (1986) 8 EHRR 235; *Marckx v Belgium* (1980) 2 EHRR 330; see also, *Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1990) 74 OR (2d) 225.

²⁶⁷ *Velasquez Rodriguez v Honduras*, Inter-American Court of Human Rights (judgment of 29 July 1988) reprinted in *International Legal Materials* (1989) 28 at 294-334.

²⁶⁸ Roht-Arriaza 1990 n 253 at 469.

²⁶⁹ Cook 1994 n 257 at 161.

objectives.²⁷⁰ Towards this end, article 2 (1) of the *International Covenant on Economic, Social and Cultural Rights*, for example, when it accounts for the maximum available resources of a state, provides for ‘achieving progressively the full realization of the rights’.²⁷¹ General Comment 3 regarding the nature of states’ obligations provides that ‘progressively’ as:

...foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content....It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures ...need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.²⁷²

The Inter-American Court of Human Rights in *Velasquez Rodriguez v Honduras* explained the due diligence standard on the basis of an analogical analysis of the American Convention with other international provisions. In this case the government of Honduras was held liable for the disappearance of Rodriguez, a student of the National Autonomous University of Honduras. Rodriguez was allegedly detained without a warrant and disappeared while held by the Armed Forces of Honduras. The Court held that this liability resulted not only for the act itself, but for the lack of exercise of due diligence on the part of the government to prevent the act as required by the Convention.²⁷³ The duty to prevent as recommended by the Court includes: (i) all those means of a legal, political, administrative and cultural nature that promote the protection of human rights; ‘and [ii] ensure that any violations...as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages’.²⁷⁴

²⁷⁰ Ravikant 2000 n 255 at part 2 (A).

²⁷¹ *International Covenant on Economic, Social and Cultural Rights* opened for signature Dec 16, 1966, 993 U N T S 3 art 2(1).

²⁷² *The nature of State parties obligations (Art 2, part 1): 14/12/90. CESCR General comment 3. (General Comments)* at (para 9).

²⁷³ *Rodriguez* n 267 at (para 172).

²⁷⁴ *Id* (para 175).

In other words, the effective legislative and administrative measures of the government to prevent violations of rights constitutes the first stage of due diligence. In case of an already violated act, this obligation requires the government to establish this violation as an illegal act through the punishment of the perpetrator and through proper compensation to the victim. The duty to investigate implies that every situation in a violation of rights must be investigated adequately and in a proper manner.²⁷⁵ ‘This obligation may entail training judges, police, doctors, social workers and others in the appropriate techniques for gathering information in cases of sexual assault and ...providing support services for criminal investigations.’²⁷⁶ These measures constitute the 2nd stage of due diligence.

Regarding the duty to punish, the Court held that if the state apparatus acts in such a way that helps the violation go unpunished and the victim’s rights are not restored as soon as possible, the state has failed to comply with its duty to ensure full enjoyment of those rights within its jurisdiction.²⁷⁷ With appropriate law, criminalising rape still may indicate the state’s failure when the conviction rate is lower than those of other crimes.²⁷⁸

Apart from punishment of the perpetrators, the duty to remedy requires the state to provide specific service; the state’s failure to provide such a service constitutes the violation of the state’s obligation under the international law.²⁷⁹ In this regard, the Court observed that the obligation to ‘ensure’ rights implies that the state will organise the governmental apparatus and all structures through which public power is exercised in such a manner that they are capable of ensuring free and full enjoyment of rights. ‘As a

²⁷⁵ Id (para 176).

²⁷⁶ A P Ewing, ‘Establishing State Responsibility for private Acts of Violence Against Women Under the American Convention on Human Rights’ (1995) 26 *Columbia Human Rights Law Review* 751 at 775.

²⁷⁷ *Rodriguez* n 267 (para 176).

²⁷⁸ Ewing 1995 n 276 at 776.

²⁷⁹ *Declaration on the Elimination of Violence against Women* n 252 art 4 (g).

consequence of this obligation, the States... attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation'.²⁸⁰

In the context of Bangladesh, the government's knowledge of the severity of rape and other crimes against women is evident from government-sponsored statistics.²⁸¹ The penal laws including the WCR Act 2000 and the *Evidence Act* 1872 constitute the means of the government. With these two components, whether Bangladesh meets the due diligence standard can be assessed from the discussion of the provision and practices in Bangladesh in the light of *Rodriguez*. The investigation of rape in Bangladesh, as revealed, has been plagued by the corruption and the lack of sensitivity of police. The delay and malpractice of medical officers in conducting the examination of rape victims were noted in the *Asma* incident. The lower rate of conviction proportionate to the acquittal and the increasing trend of rape in the country exemplify the prosecution's failure. The lack of skill and sincerity of prosecutors in handling rape cases were also well noted in many instances, especially in the *Shima*.²⁸² Judges' insensitivity towards women was observed in overturning decisions of lower courts for minor technicalities and in their traditional concepts of rape trials despite current international precedents to accommodate necessary changes. In numerous jurisdictions, even in India, it has become common practice to hold government liable for the acts of its agents.²⁸³ In Bangladesh, no such a liability is yet to be made against the state.

In all of these respects, the government should be held accountable for its tolerance of these practices. This accountability is not for the acts and omissions of its public officials such as police, medical officers and the prosecutors but for the failure of the

²⁸⁰ *Rodriguez* n 267 (para 166).

²⁸¹ See for example, CEDAW Report n 82; T Monsoor, *From Patriarchy to Gender Equity- Family Law and Its Impact on Women in Bangladesh* (1999) Dhaka: The University Press Limited at 236; see also, Khan 2001 n 65 at 130.

²⁸² See Amnesty International 2000 n 86 at 7.

government to discipline or punish those actors whose misconduct caused injury to women.²⁸⁴ With regard to the police's acts in Bangladesh, for example, the most common form of punishment against police is temporary suspension, transfer or demotion.²⁸⁵ The *Shima* demonstrates the extent of impunity of police notwithstanding their cruel and unlawful acts. Police corruption, the unjustified arrest and abusive practices in custody could be lessened if they attract stringent punishment. The Amnesty International Report reveals that custodial torture and rape continue to exist in Bangladesh because of the widespread impunity that the 'successive governments have effectively provided to law enforcement officials.'²⁸⁶ Instead, the government let its inaction against police work as a tool for maintaining its authoritative power.²⁸⁷

7.6. Summary and Conclusion

International recognition of rape, if committed in war, as a war crime is an important advancement towards women's rights to live with human dignity. Recent judgements of foreign jurisdictions have begun to acknowledge that rape causes the deprivation of the right to life. Legislative initiatives of some common law countries also have moved away, to a significant extent, from the traditional concept of rape and its trial proceedings. Despite these facts, rape laws and trial procedures in Bangladesh remain unchanged, and continue to subjugate women in the conservative culture. In this process, a rape victim has to face two traumatic crises; one is the rape itself and another

²⁸³ See for example, *Saheli v Commissioner of Police, Delhi* (1990) AIR SC 513 at 516; *Women's Forums* n 36 at (para 15-17); *Basu* n 140 at 627-628 (In all of these cases, the government was held liable for the acts of police and army officers).

²⁸⁴ R J Cook, State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women, in *Human Rights of Women* n 253 at 229 (observing that the state will bear responsibility where it tolerates, justifies and excuses private denials of women's rights or where it fails to control, correct or discipline such private actors).

²⁸⁵ Ain O Salish Kendra (ASK), *Human rights in Bangladesh 2001* (2002) Dhaka: ASK at 132.

²⁸⁶ Amnesty International 2000 n 86 at 16; see also, Amnesty International Annual Report 2002-Bangladesh <http://web.amnesty.org/web/ar2002.nsf/asa/bangladesh?Open> (28 July 2003).

²⁸⁷ Agarwal 1988 n 128 at 223.

is the subsequent trial which is in no way less insulting than the rape.²⁸⁸ Over the course of time, rape occurs in its multidimensional forms. Sexual assault cannot be properly addressed due to, *inter alia*, a narrower definition of rape. An act of assault that does not involve penetration may still violate ‘the sexual integrity of the victim’²⁸⁹ and is capable of producing a similar scar as the rape. A wider definition containing all forms of sexual violence in a single continuum will reduce, among other things, the difficulties that the court in Bangladesh has been experiencing in deciding cases as in the *Simi*. Such a definition will also recognise the violent aspect of rape along with its sexual context.

The second crisis of a rape victim begins with filing cases and sustains through the age-old biased criminal justice system. The central argument developed in this chapter is that rape laws and trials are in many ways unjustifiably prejudicial to women. In making the decision in a rape charge, the law’s almost exclusive emphasis on the victim creates undue skepticism about her claim and entitles court officials to use irrelevant evaluation of her conduct, character, past sexual history and relationship.²⁹⁰ Within this standard, a rape victim, unlike victims of other crimes, has to prove herself through resistance and her absence of consent and, through the support of other reliable witnesses.²⁹¹ The above discussions have identified a number of problems for which it becomes difficult for a rape victim to get an independent witness or to prove the incident. The major problems are: (i) the private nature of rape and the corruption involved in the investigations; (ii) the aggressive mode of cross-examination before the open trial; and (iii) the presumption of innocence of the accused. Corroboration is another discriminatory requirement that has been used to diminish the credibility of the victim’s statement and worked against women. Conversely, the rape trial, throughout its whole

²⁸⁸ Singh 2002 n 123 at 117.

²⁸⁹ Mandhane 2001 n 63 at 208.

²⁹⁰ Spohn 1992 n 54 at 18.

²⁹¹ Wills 2001 n 158 at 106.

proceeding, requires the accused to do nothing but to keep silent. This silence, on many occasions, helps them obtain acquittal.

Many countries have attempted to recognise these problems through rape-shield legislation and judicial innovation. Accordingly, the consent standard was modified by eliminating the corroboration and resistance requirements and by outlawing the evidence as to the past sexual history of rape victims. The ‘rape shield’ shifted the focus from the victim’s non-consent to ‘the objective elements of force perpetrated by the attacker.’²⁹² For numerous reasons, this chapter suggests that the existing evidentiary burden from the victim’s perspective should also be abolished in Bangladesh. The basic reasons are, to value the privacy and the future lives of rape victims in a tradition – bound society and to remove difficulties faced by them to prove the allegation under the adversarial trial system.

The Supreme Court of India maintained that a rape victim must receive the same degree of weight when testifying as the victims of other crimes.²⁹³ Trial requirements for the victim must not therefore be, higher in a case of rape than is expected from the victims of other crimes.²⁹⁴ Instead, given the lower rate of conviction, a new provision should be in place that will shift the focus of judicial inquiry from the victim to the accused’s aggressive acts, conduct and force as in other jurisdictions. Accordingly, in assessing the victim’s consent, the burden of proof must be imposed on the accused that he obtained her affirmed and free consent before advancing in sexual intimacy.

Lastly, statutory changes will take no effect until the state actors are sincere in ensuring their implementation. The above discussion shows that the lack of skill, integrity and sincerity of state actors involved in a rape prosecution diminish women’s chances of getting remedies even where strong evidence exists. The gross negligence and

²⁹² *Kasubhai* 1996 n 186 at 57.

²⁹³ *Jain* n 177 at 664.

corruption of the state's agents ranging from the police, the medical officer and the jailer were evident, *inter alia*, in the illegal arrest and tragic death of Shima. The failures of the court and the prosecutor were observed in prolonging Shima's stay in custody despite her serious illness and, in acquitting the accused. In all of these cases, the government failed to take any action against those responsible for the cruel incidents.

It has become a common practice in international law to hold the state liable for the acts and omissions of its public agents and private actors. This liability arises where the state fails to exercise due diligence to train, prosecute or punish the perpetrators and to provide victims with proper remedies. The above discussion conveys that the government of Bangladesh has failed to meet the due diligence standard. Hence, a recommendation can be made that the government of Bangladesh breaches international obligations and thus should be held accountable under international law.

To give effect to this obligation, a crucial campaign of this time needs to be directed nationally and internationally to compel the state to take responsibility for its public and private actors whose unjust acts or gross negligence of duties undermine women's rights. This is because legal reform will not work to benefit women by itself unless its compliance is ensured by the state. Thus, this chapter concludes that only a comprehensive effort, integrating modern laws on rape into the legal framework in Bangladesh, an innovative approach by the Judiciary, efficient and honest state actors such as police and prosecutors, and, above all, an accountable government, can redress the disadvantaged and discriminatory positions of victims in a traditional rape trial.

²⁹⁴ Id at 664.

Chapter 8

General Conclusions

8.1. Introduction

The promotion of women's status depends on their advancement with rights.¹ Law has been an effective instrument for legitimising these rights. As is evident in substantive chapters, while law operates to the disadvantage of women, at the same time it has been used as an efficient means of challenging discriminatory norms practised against women. Smart and Brophy argued that '[law], through its oppressive restrictions on women, served as a catalyst to a unified movement of resistance, but ironically it also appeared at that time to provide the major solutions to women's oppression'.² Drawing on this insight, this thesis submits to review and reconceptualise laws in Bangladesh to accommodate women's specific realities. In so doing, it surveys the legal literature and experience of some common law countries which are striving for developments in law and have generated volumes of case law to address contemporary problems that women experience in employment and politics, and in violence and rape trials. Upon this finding, this study seeks to uncover deficiencies and loopholes in existing legislation in Bangladesh, and examines the ways law works to subjugate women.

¹ Women, Law and Development International and Human Rights Watch Women's Rights Project, *Women's Human Rights Step by Step: A Practical Guide to Using International Human Rights Law and Mechanisms to Defend Women's Human Rights* (1997) United States: Women, Law & Development International and Human Rights Watch at preface.

² J Brophy and C Smart, *Women-In-Law: Explorations in law, family and sexuality* (1985) London: Routledge & Kegan Paul at 2.

The aim of this chapter is to summarise the major findings of the thesis and to formulate specific suggestions on the basis of recommendations made in the substantive chapters. In summing up the discussion, it also outlines in a nutshell the strengths and weaknesses of the legislative and enforcement measures in Bangladesh to deal with women's rights.

8.2. Major Findings in Conceptual and Descriptive Accounts

Chapter 1 developed conceptual issues regarding women's rights in Bangladesh. After introducing Bangladesh as an independent state and as a country of the common-law system, it considered the evolution of women's rights since the mid 1800s. It explained how social reformers abolished social evils such as *sati* and the prohibition on widow remarriage by enacting legislation and how women used law as a site for struggle to legitimise their claims ranging from political rights to bringing substantial changes in family law. The significance of women's activism is enormous in independent Bangladesh, particularly in framing the country's Constitution which provides women with equal civil and political rights. Successive governments of the country have recognised the increasing need and priority of women's rights by formulating a series of laws and formal plans. The governments' commitments to protect and promote women's rights are also reflected in undertaking international obligations through ratifying more than a dozen human rights instruments. Nevertheless, recent experience shows very little improvement in women's legal status. The discussion has provided extensive evidence of arrest, detention and cruelty in the face of fundamental rights to freedom from discrimination and from torture guaranteed by the Constitution.

Again, constitutional guarantees are distorted by the exercise of repressive laws. All government plans have largely failed to promote women's socio- economic conditions due

to the lack of proper assessment and firm commitments and coordination by the policy maker. Given the situation, this study suggests that if the plans are to be really used for the benefit of women, an accountable and transparent monitoring body should accompany these plans to determine their impact on women. The government must ensure and extend the huge volume of foreign aid to grassroots women for their advancement. Likewise, to effectuate constitutional guarantees, it is necessary to repeal all repressive laws that facilitate the violation of fundamental rights. Providing a right is meaningless if it is not allowed to be availed by women.

Chapter 2 concentrated on methodological and other relevant issues of the research. It provided the aims, scope and the limitation of the study and elaborated the means of collecting and treating information. Drawing a correlation between women's rights and the law, this Chapter affirmed one of the basic arguments of the thesis that women's rights are paramount to enhance their status, and law is essential to protect these rights. To establish this argument it identified the objective of the study and justified the rationale for the research.

Chapter 3 developed and substantiated its central claim that the socio-cultural atmosphere of the country and the government's attitude are not conducive to women's rights. It elucidated the contradiction between law and local settings and considered ways women's inferior status has become an accepted social norm in Bangladesh. The discussion showed that the patriarchal tradition upholds men's supremacy and depicts women as socially and economically unworthy of significance. The religious dictates issued under *fatwa* further reinforce women's subordinate status and undermine their dignity. On the other hand, state functionaries which have vital links with developing and ensuring rights are paralysed by inappropriate interventions of the all powerful Executive. The Constitution and other

institutional frameworks/capacities have often been manipulated to serve the Executive's goals. The lack of integrity and efficiency of the lower judiciary and the law enforcing agencies are also evident which facilitates further the unfettered exercise of state power by the Executive. A functionally independent judiciary and Human Rights Commission are essential elements of legal scrutiny over the Executive's action or inaction towards its citizens. These have not yet developed in Bangladesh. This Chapter also attempted to explore how all of these practices erode the respect for law and have had extensive and damaging impact on persons, including women, seeking to exercise legal rights. It further observed that Bangladesh is recognised as the worst in corruption among 133 countries and that the scale of corruption unduly diverts state's resources to a few people and thereby impairs the basic rights of the disadvantaged. The chapter concluded that a transparent and accountable government which is a *sine qua non* for the meaningful exercise of lawful rights, can largely be established in Bangladesh should the two organs of the government: the Parliament and the Judiciary, endeavour to achieve their independent authority as in India, instead of playing subservient roles. For example, the Supreme Court in India has been able to enhance its power to restrain undue authority of the Executive and to defend individual rights.³ To borrow an important comment from Madhava Menon: 'judicial review is a weapon to discipline abuse of executive power... Any institution with such vast powers can become a threat if it does not have judges of the highest integrity, sensitivity to constitutional values and great professional competence.'⁴

³ M Dakolias and K Thachuk, 'The Problem of Eradicating Corruption from the Judiciary: Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform' (2000) 18 *Wisconsin International Law Journal* 353 at 363.

⁴ Cited in Justice A S Anand, 'Justice N.D. Krishna Rao Memorial Lecture Protection of Human Rights- Judicial Obligation or Judicial Activism' (1997) 7 *Supreme Court Cases Journal* 11 at (para 65).

8.3. Major Findings and Recommendations of the Thesis

8.3.1. Employment

In considering women's employment rights, Chapter 4 demonstrated that the *de jure* 'equality of employment' as guaranteed by the Constitution, in many respects, fails to maintain international standards and to promote a sufficient basis for obtaining real equality. The discussion examined the dilemma between the promises of formal equality and the obvious unequal power relations in Bangladesh where women are far behind men in terms of resources, status and power. It revealed further that the implementation of constitutional provisions of equality has produced substantial inequality for women by excluding them from employment in major industries. As was evident, in the absence of any statutory definition or classification of discrimination and of a monitoring body to oversee the implementation of equality, women are experiencing glaring discrimination in the workplace. The findings also conveyed that employers could easily escape punishment for violating laws due to the flaws in, and the 'softness' of, the current liability provisions. On the other hand, to recognise women's special needs, laws impose certain restrictions on women's work such as limitation on work at night time and on the weight to be lifted by women and so on. This different treatment is justified on the grounds of 'protection' of women's biological roles, without making any alternative employment arrangements for them. This occupational restriction, in turn, reaffirms the exclusive childcare roles for women, while relieving men from this responsibility. Consequently, women alone are to bear the social cost of child bearing and rearing, and are not compensated for that. This legal mistreatment works to reduce women's employability by increasing employers'

eagerness for men. The actual situation of women in Bangladesh thus is observed to have challenged the rationale for the equality legislation.

As regards the regulation of the contemporary workplace, the discussion also canvassed that Bangladesh is yet to enact any law with an objective to investigate or conciliate discrimination against women. No legal policy of gender mainstreaming in the labor market has been developed either, which requires an employer to maintain a minimum ratio of women in the job, or to provide for preferential treatment, where they are under represented.⁵ In addition, the existing laws of Bangladesh were seen as ambiguous, and scattered in different statutes that resulted in complexity in their interpretations and applications. Even these laws lack proper implementation. For example, the Garment Industries (GIS) of Bangladesh were found to have operated a hire and fire system without complying with basic provisions.⁶ Existing literature also demonstrates numerous precedents for violation of labour laws, which causes disparity in employment opportunities for women and unexpected deaths of them in the fire incidents of the GIS.

Given the situation in Bangladesh, it is suggested that if the ‘equality provision’ and protective legislation are to really serve to the advantage of women, authorities /law must acknowledge women’s specific experiences and offer favourable solutions suitable to their practical circumstances. In that case, the findings of the chapter adhere to the substantive approach which upholds the concern for equality of result and recommends the affirmative use of law to suit women’s realities. It shifts the legal focus from the formal/different approaches to equality to the historic and systematic underprivileged condition of women in

⁵ Bangladesh Legal Aid and Services Trust, *Labour Code for Bangladesh: Perspective and Necessities*, (written in Bengali) (1999) Dhaka: BLAST at 41.

⁶ A K M Nuruzzaman, ‘Human Rights and Women in the Garments Industry in Bangladesh’, this paper was presented at the Sixth Women in Asia 2001 Conference, the Australian National University, Canberra, 23-26 September 2001 at 4.

a particular society. It also suggests that the extensive accommodation of women's differences into the law is the only way to achieve equality.⁷ Accordingly, a number of specific recommendations are advanced to achieve the outcome of equality of employment in Bangladesh. These are:

- (i) a law should be in place, which will define, clarify and outlaw the dynamics of discrimination. It should also address sexual harassment and provisions for preferential treatment for women where they are underrepresented;
- (ii) under this law, employers of all public and private industries should be liable to give effect to equal and special provisions seeking to improve women's positions in employment. Pursuant to this law, the onus of proof of discrimination should lie with the employer;
- (iii) failure to comply with these provisions should attract a fine of TK 50,000 (US\$ 833) on the employer;
- (iv) a constitutional amendment should be adopted requiring the government to establish educational institutions and special training programs at national and local levels exclusively for women, to promote their capacity and skill for contemporary needs of the workplace;
- (v) there must be an alternative employment arrangement for women to remedy the consequences of legal restrictions under which they are not 'permitted' to do certain types of jobs;
- (vi) a sound reconciliation policy aiming to develop anti-stereotype thinking of the employer and to balance household and paid works needs to be recognised in

⁷ How changes in the language of law can better address women's unequal positions in their practical lives—see generally J St Joan and A B McElhiney, *Beyond Portia: Women, Law and Literature in the United States*

employment policies and programs. Under this policy, employers should be required to provide parental leave and to encourage the shared parental responsibility of the spouse;

- (vii) to adopt a single labour code which can provide lawyers and judges with comfortable access to, and clear understanding of, the complex laws;
- (viii) to establish an independent Equality Commission with proper authority to monitor laws in public/private industries along with the power to hear complaints of discrimination and to raise awareness among all employees about women's work. The Commission should also be responsible for undertaking affirmative measures such as imparting special training and other relevant programs to support women acquiring skills for employment,
- (ix) a new and dynamic approach must be developed in the judicial culture as in foreign jurisdictions to deal with women's current problems in employment. Applying this approach, the Supreme Court of Bangladesh should, as in India, issue guidelines for obligating the government to establish institutions for women and for prohibiting employers from practising discrimination and sexual harassment in the workplace.

8.3.2. Political Participation

Two major findings of Chapter 5 were: (i) the electoral system makes a significant contribution to women's enhanced participation in the National Parliament; and (ii) the candidate's selection process, the level of occupational and educational status and a sound political environment are important elements of political empowerment. With regard to women's placement in elected offices, the discussion showed that the Proportional

(1997) Boston: Northeastern University Press; see also Brophy 1985 n 2.

Representation (PR) system in many countries resulted in a substantial increase of women in the National Parliaments. However, in Bangladesh, all of these variables were not found to be supportive of women's practical experiences, notwithstanding a series of legislative reforms undertaken over the three decades to promote their participation in politics. Indeed, the government's affirmative measure has made women MPs 'ornamental and passive beneficiaries' and is highly flawed in its objectives. It allows the government to manipulate its strength in the Parliament and has been proved to be ineffective for and degrading to women. In addition, the review of the existing literature and opinions of women interviewed confirmed that recently enacted Local Government Acts and Ordinances have failed to ensure their due participation in local elected offices. Women are constantly denied their equal rights and privileges in office for which the insensitive attitudes of the government and men have been observed to be primarily responsible. Law must combat these examples of women's disempowerment and provide a diverse approach suitable to the real context.⁸ Taking into account women's grossly uneven position in legislative offices, this diverse approach must encompass a number of specific modifications in the prevailing laws and policies of Bangladesh. These should be as follows:

- (i) a shift to the Proportional Representation (PR) system;
- (ii) a de-centralised mode of nomination process;
- (iii) the 30%-35% reserved positions for women within the party;
- (iv) one-third reserved seats of the Parliament for women and direct election for these seats;

⁸ A C Scales, 'The Emergence of Feminist Jurisprudence: An Essay' (1986) 95 *Yale Law Journal* 1373 at 1394.

- (v) an efficient education policy accompanied by a proper monitoring and evaluation process, given the very low rate of women's literacy, this policy must seek 25% reserved seats for women in all public universities and provide room for developing technical institutions exclusively for women;
- (vi) reservation of 35% nomination of the general seats in local governance and one-third positions of Chairman in the Union Parishad for women;
- (vii) the restoration of the four major functions of the City Corporations from which Women Commissioners have unjustifiably been deprived;
- (viii) a mandatory training program for males under the strict supervision of the government, which should address the constitutional principle of non-discrimination and its consequences, reflecting international practices.

Apart from structural reforms, other areas of politics in Bangladesh also need to be addressed by the law. It is well recognised that women's participation in politics is of little avail unless politics are made congenial to women.⁹ The political culture of Bangladesh is seen to have favoured the rich and entails immoral and corrupt practices. The excessive role of money gradually makes politics more difficult for women. This hostile situation could largely be remedied through introducing ID cards and other measures that relate to the election expenditure as mentioned in section 5.4.3. Needless to say, a stringent application of the suggested measures, along with all existing electoral laws, is imperative to eliminate political corruption and to improve women's participation in politics. Towards this end, the government should have a primary role to integrate those measures into women's lives¹⁰ and to ensure women's equal power in performing official duties through their proper

⁹ L Karvonen and P Selle, *Women in Nordic Politics- Closing the Gap* (1995) Sydney: Dartmouth at 3.

enforcement and monitoring. It is necessary for honouring the country's international obligations and for respecting women's equal rights and dignity. International human rights instruments, especially CEDAW, mandate that political equality is 'among the rights to which women are entitled by virtue of their being human.'¹¹ As a party to this Convention, the government, as in other jurisdictions, must undertake the above affirmative initiatives in favour of women to achieve their political emancipation. Although affirmative measures or a quota have some limitations,¹² these are necessary in Bangladesh to redress women's marginal positions in politics. As the precedents of numerous countries suggest, such legal provisions have profound significance in attaining a 'critical mass' in office, which will in turn, help women in Bangladesh to combat the supremacy of men.

The Election Commissioner should also have a major role in activating electoral laws for the benefit of women. A *suo motu* judicial intervention against political corruption or other illegal practices by NGOs or by the judiciary itself can generate relief in this regard.

8.3.3 Freedom from Torture

In analysing dowry as a form of domestic violence Chapter 5 endeavoured to overcome the conceptual constraints prevailing in international rights discourse and to provide dowry and other forms of domestic violence with equivalent legal weight with the fundamental right to freedom from torture. It substantiated that the recurrent cruelty involved in dowry satisfies the required standards for constituting 'torture'. In so analysing, the discussion evidenced

¹⁰ D Zalense, 'Sexual Harassment Law in the United States and South Africa: Facilitating the Transition from Legal Standards to Social Norms' (2002) 25 *Harvard Women's Law Journal* 143 at 216-217.

¹¹ S C Poe, D Wendel-Blunt and Karl Ho, 'Global Patterns in the Achievement of Women's Human Rights to Equality' (1997) 19 *Human Rights Quarterly* 813 at 817.

¹² 'The concept of quota is too much embedded with women's gender rather than their qualification'; '[it] leads countries to not develop a political culture whereby women are integrated into the political system.' See C Pintat, *Democracy Through Partnership: The Experience of the Inter-Parliamentary Union*, in International Institute for Democracy and Electoral Assistance (IDEA), *Women in Parliament Beyond Numbers* (1998) Stockholm: International IDEA < <http://www.idea.int> > (4 March 2003).

the pervasive existence of dowry in Bangladesh despite a series of legislative amendments to eliminate it. A substantial number of flaws in the *Dowry Prohibition Act* 1980 and in the enforcement measures were identified as one of the major causes of its persistence. Significant flaws were also noted in the liability provision for taking dowry. It provides courts with a wide discretion to ascertain the punishment, and even a monetary compensation is regarded as an equivalent of imprisonment. More importantly, in Bangladesh, in contrast to all jurisdictions referred to in the thesis, and even in many Asian countries such as Malaysia, there exists no law to address domestic violence *per se*.

To remedy the shortcomings in the *Dowry Act* 1980 (the Act) in Bangladesh, specific recommendations are:

- (i) to prevent diverse demands in marriage under the guise of ‘gifts’, the Indian phrase ‘in connection with marriage’ (under the *Dowry Act* 1961 of India) should be incorporated in section 2 of the Act in place of ‘as a consideration of marriage’ in the definition of dowry;
- (ii) under section 3 the discretionary power of the court should be removed;
- (iii) given the traditional disadvantageous position of the bride’s parents in a marriage, section 3 must be amended to penalise only the taker or abettors of dowry but not the giver;
- (iv) section 3 of the Act should incorporate a provision which will require all voluntary presents given in the event of marriage be listed and registered with the court;
- (v) the term ‘indirect demand’ under section 4 needs to be specifically clarified so that no demand can escape punishment due to the vagueness of the term;
- (vi) section 6 which was repealed by an amendment to the Act, should be restored to provide women with economic security at their matrimonial places.

In relation to the prosecution, India has advanced a number of positive measures to address difficulties that the courts have experienced in dealing with the domestic nature of dowry. Two important modifications are: (i) shifting the burden of proof onto the accused in some respects such as proving that he/she (the accused) did not commit dowry offence; and (ii) creating a provision for the presumption of death or suicide of a woman within seven years of her marriage. Accordingly, in respect of the latter, if a woman commits suicide (or is killed) within seven years of her marriage and if there is any evidence of cruelty or harassment towards her, the court should presume that the accused has caused the death due to dowry. In addition to these, a provision for presumption of cruelty and beating that are repeatedly inflicted on women to earn dowry in Bangladesh is suggested for incorporating into the *Dowry Act* 1980.

Polygamous marriage and divorce were observed to have active contribution to nurturing dowry, yet the existing law imposes minimal punishment for illegal polygamous marriages and for the failure of the husband to provide dower in the event of divorce. Given the increasing trend of dowry in Bangladesh, this study recommends stringent punishment of up to five years imprisonment or TK 20,000 (US\$333.3) fine in case of polygamous marriage and double that for the husband's failure to provide dower. The increased penalty should work as a deterrent.

Further, this chapter observed that frequent torture, killing and divorce are common phenomena in Bangladesh to earn dowry, while there is no shelter for dowry victims to escape to. There has also been a serious paucity of the Cell concerning victims of violence. Hence, it is submitted that the enactment of a new Act is needed to provide shelter and safety for victims, before violence results in death.

One of the significant findings of this chapter was that the mandatory arrest and prosecution policies in other jurisdictions have proved effective in combating violence against women. The insensitive attitude of police in taking up dowry cases in Bangladesh is a major barrier to women's access to justice. Due to the lack of any legal compulsion to arrest, they are often improperly driven by their self-interest in failing to arrest abusers, especially those who are powerful in terms of economic and political strength. Further, prosecutors in Bangladesh are not obligated to lodge a complaint or to continue the prosecution without the consent of the complainant. Nonetheless, the undue pressure of the often powerful accused and the expensive justice in Bangladesh have made women passive in resorting to judicial remedies. As a result, the accused go unpunished and encourage others' *mala fides* to practise and sustain the dowry. Taking all of these factors into account, mandatory arrest and prosecution policies are recommended for Bangladesh. The police and prosecutors are likely to be more sensitive and active in handling dowry cases if the law imposes a mandatory obligation to arrest and prosecute the offenders. At the same time, it will immensely help the vulnerable women in Bangladesh to overcome the threat of the accused in continuing dowry prosecution.

Beyond these, the existing case law in Bangladesh, subject to a few exceptions, exhibits restrictive findings of the court in dealing with dowry claims. The judiciary of Bangladesh, as has been seen in the chapter, failed to deliver any precedent in the last 33 years to impose an affirmative obligation on the government to minimise the underprivileged situation of women, or any strategy to solve the particular circumstances of women in trial. By contrast, the courts of several countries, including India, have become creditable institutions for remedying women's unique problems in proving violence allegation in an adversarial trial system. New thoughts and tests have also been developed in violence

prosecutions to cope with the exceptional experiences of women. Based on the findings as described in section 6.3.6.3, it is an urgent need for Bangladesh to introduce a mandatory training program for all concerned including the police, the prosecutor, and the judge in a dowry prosecution. It suggests a national training program for judges, highlighting the modern approach of trial and gender awareness¹³ in interpreting and developing human rights laws.¹⁴ The contemporary arguments relating to gender-biases of law and its adverse impact on women developed by feminist legal theorists can also provide some important insights into this process.

Finally, the chapter revealed that the dual and conflicting jurisdictions of the court in Bangladesh and the huge backlog of cases are important factors in frustrating women's judicial redress in dowry trials. The former can easily be overcome by transferring dowry cases to the jurisdiction of the Family Court. The latter can largely be remedied by the

¹³ For example, how the Australian Institute of Judicial Administration is engaged in improving the gender awareness among the judicial officers, registrars and counselors- see K Mack, 'Developments in Criminal Law and Criminal Justice: Gender Awareness in Australian Courts-Violence against Women' (1994) 5 *Criminal Law Forum* 788 at 797-800.

¹⁴ A number of judicial colloquiums were held worldwide to address the role of national judges in interpreting and applying international laws to protect human rights. These are designed to promote the integrity, quality, accountability of, and access to, the judiciary. The first colloquium held in 1988 in Bangalore, India, adopted the Bangalore Principles which called 'for the creative and consistent development of human rights jurisprudence throughout the Commonwealth.' One of the most important colloquiums was held again in Bangalore, India in 1998. 'In a Declaration entitled The Challenge of Bangalore: Making Human Rights a Practical Reality', it brought together more than 50 eminent judges from the Commonwealth countries to explore the development of human rights law 'as they were cited by judges and lawyers across the Commonwealth.' In addition, since 1994, some regional judicial colloquia have been organized across nations with special focus on the promotion of women's human rights through the judiciary. These were held, *inter alia*, in Zimbabwe in 1994 for Africa, Hong Kong in 1996 for Asia and South Pacific and Guyana in 1997 for the Caribbean region. See for details, 'Working Session on the Implementation of International Human Rights Protection' <<http://www.google.com.au/search?q=cach...nd+Bangalore+Principles&hl=en&ie=UTF-8>> (27 August 2003); Asia Pacific Forum on Women, Law and Development, 'The Challenge of Bangalore: Making Human Rights a Practical Reality' <<http://www.apwld.org/voll22-02.htm>> (27 August 2003); see also, *Judicial Colloquia Declarations and Strategies for Action on the Promotion of the Human Rights of Women and the Girl-Child through the Judiciary*, <http://www.thecommonwealth.org/gender/htm/whatwedo/activities/humanrights/regjudcoll.htm> (5 November 2002); *The Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women* 1994 <http://www.thecommonwealth.org/gender/whatwedo/activities/humanrights/africa.htm> (27 August 2003).

establishment of a special tribunal for the time being, since the provision for such a tribunal is already in place in Bangladesh to deal with crimes against women.

8.3.4. Rape Laws and Trial Proceedings

The primary argument developed in Chapter 7 is that rape laws and trial procedures (RLTP) in Bangladesh are unfair and discriminatory towards women. It explained that international law now recognises rape as a war crime when committed during armed conflict and as a breach of the fundamental right to life. Despite this recognition, the RLTP of Bangladesh remain traditional and some serious deficiencies were evident regarding conceptual and legal issues. It was further noted that judicial inquiry still almost exclusively targets rape victims, unlike the victims of other crimes, in trials which put emphasis on an irrelevant assessment of their conduct, character and past sexual history. To this end, women were found to bear the burden of proof of their lack of consent, and their resistance commensurate with visible physical scars, through the corroboration of the allegation by individual witnesses. Nevertheless, all statutory requirements have categorically been proved as unjustifiably prejudicial and discriminatory towards women compared to the legal treatment accorded to victims of other crimes.

The discussion also identified problems with rape prosecutions under which it becomes difficult for women in Bangladesh to prove the case. The basic difficulties are: (i) the private nature of rape; (ii) the lack of cooperation from the police, medical officers and even prosecutors; (iii) the reluctance of witnesses to provide evidence; and (iv) the humiliating modes of cross examination utilised in open court. Precedents suggest that the rape trial facilitates the accused's escape from punishment by imposing exacerbated burden of proof on rape victims. As a consequence, 95% of the total accused were acquitted from

the rape trial. Further, delays in the completion of the investigation help manipulate or conceal the fact that has been seen as a major obstacle to women in seeking judicial remedies. Nonetheless, a number of common law countries have responded to these problems by enacting progressive legislation which has been considered in detail in section 7.4. Against the backdrop of such a scenario, the study proceeds with a number of recommendations.

In order to properly recognise the violent aspect of rape, and to include all sexual offences in a single scope of law, the term ‘rape’ should be replaced with the term of ‘sexual assault’. Having regard to the growing trend of rape and the acquittal rate of the offenders, this study firmly recommends the abolition of the evidentiary burden upon victims. Instead, for similar reasons, it suggests that the concentration of the trial should be shifted to the aggressive conduct of the accused. Accordingly, the onus of proof in certain aspects must be placed on the accused as in other jurisdictions. For example, the rapist should be required to confirm the free consent of the complainant before engaging in sexual intimacy. In addition, to reduce the possibility of the manipulation of evidence, the investigation must be completed within 60 days.

Internationally, the due diligence test has become a legitimate standard for scrutinizing the government’s behaviour towards its citizens. States are expected to undertake obligations regarding the acts and omissions of its public agents and private actors. Such an obligation is also extended to where the government fails to prosecute and punish its public and private actors and fails to provide a remedy to the victim. On the basis of these findings, this study submits that these obligations be respected in Bangladesh.

8.4. Conclusion and Future Research

Law across nations provides solutions for particular problems experienced by women in the current workplace and in violence and rape prosecutions. All necessary reforms recommended in this study should be adopted in Bangladesh to improve women's legal rights and to remove gender-biases in law. While these reforms can bring significant change, they are not sufficient for, or comprehensive of, advancing women's overall rights in Bangladesh. The overall promotion of women's status inevitably warrants a scholarly and in-depth investigation into remaining state laws regulating other rights of women. A sophisticated legal analytical study needs to be conducted to ascertain the complex nature of laws and to determine whether there exist any other apparent or inherent gender bias in laws in Bangladesh.

Different human rights organisations and media reports show a dramatic increase in repression against women in Bangladesh.¹⁵ Among these, trafficking and acid throwing against women have taken an alarming shape,¹⁶ notwithstanding the *Immoral Trafficking Act* 1993 and the *Women and Children Repression (Prevention) Act* 2000, which outlaw these forms of violence. According to Odhikar, a human rights organisation in Bangladesh, altogether 310 women were reportedly victims of acid burn during the period of January to December in 2002, up from 38 reported incidents in 1995.¹⁷ Another report of the Centre for Women and Children (CWCS) revealed that 'on an average 50 women and 100 children

¹⁵ See for example, Staff Correspondent, 'Crimes on women, children rise high' *The Daily Star* (1 October 2002); Ain O Salish Kendra (ASK) *Human Rights in Bangladesh 2001* (2002) Dhaka: ASK at 232-237.

¹⁶ See for example, ASK 2002 id at 236-237; N D Franko, 'Changing Gender Relations and New Forms of Violence: Acid-Throwing against Women in Bangladesh and the NGO Response' IDS, University of Sussex, September 1999 at 6-34; 'One million women, children trafficked in 30 years' <<http://independent-bangladesh.com/news/jun/02/02062003cr.htm#A6> (2 June 2003).

¹⁷ Acid is usually thrown on girls or women in Bangladesh by men as revenge for, *inter alia*, the refusal of 'an offer of love/sexual relation' and 'for non-compliance with dowry demands.' See Ain O Salish Kendra

are being trafficked from Bangladesh every month. So far some 10 lack (1 million) women and girls have been trafficked since ...1971.’¹⁸ Particular studies should therefore be devised to inquire about whether serious flaws exist in laws and how these laws can best address such crimes against women.

Further, beyond the workplace, nearly all women in Bangladesh face teasing, obscene remarks, sexual comments and harassment everywhere, ‘while walking down in a street, in a crowd’ or in public places.¹⁹ For quite some time sexual harassment in public places has been acknowledged as actionable and compensatory discrimination in the US and many other countries.²⁰ India also has undertaken initiatives to address the problem.²¹ To this end, legal research is essential in and about Bangladesh, analysing the roles and impacts of those initiatives on women. Future studies should also be conducted to examine and provide ways in which women can be made aware of their rights and remedies under the laws in Bangladesh.

Furthermore, it may be worthy of mention here that judicial activism across nations makes a positive contribution to move forward women’s other rights such as nationality and citizenship with the domestic application of international human rights instruments, when the domestic legislation fails to provide adequate relief.²² In numerous judicial decisions,

(ASK), *Human Rights in Bangladesh 1998* (1999) Dhaka: The University Press Limited at 149; Ain O Salish Kendra (ASK), *Human Rights in Bangladesh 1999* (2000) Dhaka: ASK at 84.

¹⁸ M Chowdhury, ‘Battle against the plague of women and child trafficking’ *The Independent* (5 July 2002).

¹⁹ S Huda, ‘Acknowledging Sexual Harassment in Bangladesh: An Overview’, this paper was presented at a Workshop on Acknowledging Sexual Harassment in Bangladesh organised by the British Council, Dhaka 2-3 July 1998 at 15.

²⁰ B H Earle et al, ‘An International Perspective on Sexual Harassment Law’ (1993) 12 *Law and Inequality Journal* 43 at 46.

²¹ See for example, *Sexual Harassment of Women at their Workplace (Prevention) Act 2000*; *Domestic Violence Act 1999*; *Tamil Nadu Prohibition of Eve-Teasing Act 1998*; for judicial initiatives see for example, *Vishaka & Other v State of Rajasthan* (1997) AIR SC 3011-3017.

²² See for example, *The Attorney-General v Dow* (1992) *SACLR LEXIS* 7. In a landmark judgement the Court of Botswana declared the Citizenship Act of 1984 (Botswana) unconstitutional. Under this Act, ‘a child born of a marriage between a citizen mother and an alien father would not qualify for citizenship whereas

the Courts in Australia, Canada and India have referred to international provisions to deal with specific circumstances.²³ Likewise, CEDAW provides the judiciary with a powerful instruction in many foreign jurisdictions to remedy women's unequal status in all areas and has been an effective guide to repealing anti-discriminatory laws in some countries.²⁴ While these national and international initiatives have promoted women's rights to a significant extent, future study should therefore embark on how these positive experiences could be

citizenship was conferred on the child of a marriage between a citizen father and an alien mother.' In the absence of any specific reference to women in the Constitution regarding freedom from discrimination, the Court relied on CEDAW and held that the Act infringes the respondent's constitutional right to non-discrimination. See also, *Khawar and Others v Minister for Immigration and Multicultural Affairs* (1999) 168 ALR 190. In this case the Court favoured a woman who was Pakistani national, observing that '[the] applicant's claim to be a person to whom Australia owed protection obligations under the Convention relating to the Status of Refugees (the Convention) ...'; see also, *Teoh v Minister for Immigration* (1994) 121 ALR 436; *Occasional Papers from the Sex Discrimination Commissioner- Number 4: Ten Years of the Convention on the Elimination of All Forms of Discrimination Against Women*, Human Rights and Equal Opportunity Commission at 19-36.

²³ For example, see generally A Byrnes et al (ed), *Advancing the Human Rights of Women: Using International human Rights Standard in Domestic Litigation* (1997) New York: The Commonwealth Secretariat, and especially at 20-27, 101-114 and 148-154; see also, K Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 *Journal of International Law and Politics* 501 at 502-525; H H Koh, 'The 1998 Frankel Lecture: Bringing International Law Home' (1998) 35 *Houston Law Review* 623 at 632-680 and *Domestic Implementation Using International Law at the National Level*, Women's Human Rights Resources, http://eir.library.utoronto.ca/whrr/display_documentscfm?ID=29&sister=utl (9 December 2003).

²⁴ See for example, *Ephrohim v Pastory* [1990], decision of the High Court of Tanzania, Law Reports of the Commonwealth (Const) 757. In this case the High Court of Tanzania experienced difficulties in interpreting constitutional provisions with regard to the right to freedom from discrimination which did not make any particular reference to women. In that situation, the Court placed reliance on CEDAW provisions in deciding whether Haya customary law that prevents a woman, unlike a man, from selling clan land violated Pastory's constitutional right to freedom from discrimination. The Court held that '...Customary Law [was] unconstitutional and contravened the international conventions which Tanzania had ratified. Thus, the rights and restrictions around the sale of clan land are the same for women and men.' See 'Case law in Tanzania- High Court-Equal Employment Opportunities' <http://www.ilo.org/public/english/employment/gems/eoo/law/tanzania/cl_hc.htm> (23 October 2002). See also, *Longwe v International Hotel* [1993], decision of the High Court of Zambia, 4 Law Reports of the Commonwealth 221. In this case the Zambian High Court, relying on CEDAW declared the policy of the International Hotel discriminatory against women. The hotel policy had been denying women's entry to the hotel unless males accompanied them, which was not applicable to men. With regard to the incorporation of CEDAW into domestic legislation, see the examples of Colombia, Uganda, South Africa and Brazil. 'The Colombian constitution includes several provisions that reflect CEDAW's vision of equality. 'For example, article 13 of the Colombian constitution guarantees legal equality between women and men not merely by prohibiting discrimination, but also by obligating the government to actively promote the conditions needed to make legal equality real and effective'. See for details, UNIFEM, 'Bringing Equality Home: Implementing the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)' <<http://www.unifem.undp.org/resources/cedaw/index.html>> (22 October 2002); see also, the Text of the Constitution of Colombia 1991, Chapter I art 13; *The First CEDAW Impact Study: Final Report--Released During the Twenty- Third Session of the CEDAW Committee, New York, June 2000*, The Centre for Feminist Research, York University and the International Women's Rights Project at 12 & 163.

activated for the benefit of women in Bangladesh. Further study is also necessary to begin the process of interaction between international and domestic laws.

In addition, particular emphasis must be placed on how women can be integrated into the police and judicial services to better meet their concerns in the existing enforcement machinery in Bangladesh. Specific research should also concentrate on progressive and multi-faced strategies aiming to sensitize all officials involved in the enforcement of the law and to raise awareness among men about women's rights. Legal awareness can include a proper campaign of gender issues through the electronic and mass media and through the incorporation of these issues into the curricula of the secondary and higher secondary levels. All these issues should be subject matters of future research.

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