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Criminal Justice Response and Low Conviction Rate Under Nari-O-Shishu Nirjatan Daman Ain 2000 in Bangladesh

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ABSTRACT

In Bangladesh., the Nari-O-Shishu Nirjatan Dmamn Ain 2000 is a special law enacted aiming at the prevention of repression against children and women. The Act contains provisions providing punishment for the offences of abduction, throwing of corrosive substances, rape, murder for dowry and few others. It establishes a special tribunal for the trial of offences under the Act, called, Nari- O-Shishu Nirjatan Daman Tribunal.

However, since the enactment of the Nari-o-Shishu Nirjatan Daman Ain 2000 it has been facing criticisms for not being able to prevent the intended offences effectively. One of the major concerns has been the abysmally low rate of conviction in the cases filed under the provisions of the Nari-O-Shishu Nirjatan Daman Ain 2000 and in this paper low conviction rate under Nari-o-Shishu Nirjatan Daman Ain 2000 is evaluated.

Keywords*: Laws, Conviction, Offences, Nari-o-Shishu Nirjatan Daman Ain 2000.*

I. INTRODUCTION

It is elaborately discussed on how the discriminatory attitude towards women is formed and institutionalized in Bangladesh to affect women's rights at different aspects of their life. Woman experiences neglect and various forms of discrimination and violence from the very moment of birth. These practices are tacitly condoned and are legitimized through laws and customs in the name of cultural and religious practices that blatantly and systematically discriminate against women.[4] Gender inequality and its resolution in gender violence are embedded in the socioeconomic and political structures of Bangladesh. In many instances, not only is gender inequality practiced but also demonstrations of unequal power relations between sexes are encouraged in order to perpetuate the interest of the patriarchal order. Social attitudes regarding women's position and role have effectively contoured the space provided for the

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[4] Habiba Zaman, 'Violence against Women in Bangladesh: Issues and Response' (1999) 22 Women's Studies International Forum 37

implementation of women's rights. Constitutional guarantees of equality before the law and equal protection by the law are not applied in practice. Rather, the ideology that creates and sustains the subordinate position of women within the family continues to inform judicial understanding and is reflected both in criminal and family laws concerning violence against women.[5] As to its overall effect, it is observed that enactment of laws without an adequate understanding of patriarchy and the impact of laws in the prevailing milieu of social constructions are reinforcing rather than reducing gender hierarchy and subjugation.[6] Alarming increase of crime against women over the years indicates that the enforcement of laws that have been made to combat the cases have not been encouragingly effective in the past years.[7] In many instances of rape, molestation, abduction, and sexual harassment, technicalities and legal loopholes deprive women of justice, especially where the aggressors are in a dominant socio-economic position.[9] Jahan in other words, observes that women's socio-economic powerlessness and ignorance of legal rights limit the scope of legal protection. In addition, litigation does not always guarantee that the desired judgment will be received. So far, imperfect understanding and inadequate knowledge of this multidimensional problem has produced limited success in this area. In many cases, full enforcement and implementation of existing laws have not been achieved due to various factors, including lack of awareness of women's rights among law enforcement agencies. The scarcity of effective agencies offering supportive intervention and the excessive expenses and time consuming process involved in litigation also prevent many women, especially, the poor and uneducated ones from seeking redress through criminal proceedings.[10] Chowdhury identifies that although many laws exist in Bangladesh to address violence against women but because of ineffective implementation of these laws by the state and inherent conceptual defects in some of them, such laws fail to punish the perpetrators of violence against women. These laws are thus useless and therefore, nothing but the ornamental additions to the statute books.[11]. These laws are thus useless and therefore, nothing but the ornamental additions to the statute books.[8] The conviction rate in criminal cases depends on the legal system, magnitude of the case backlogs which may result in a higher level of the case dismissals at certain point throughput the criminal justice process, societal attitude toward sexual violence which exerts pressure on police and prosecutors to prioritize certain type of cases, the possibilities and mechanisms for cases to be withdrawn during the criminal

[5] Roushan Jahan, Family Violence and Bangladeshi Women: Some Observations, in Roushan Jahan and Latifa Akhanda (eds) Collected Articles, (Women for Women, 1983) 199.
[6] ibid
[7] ibid
[8] Elora Halim Chowdhury, 'Negotiating State and NGO Politics in Bangladesh: Women Mobilize against Acid Violence' (2007) 13 Violence against Women 857.

justice process.[9] The South African Law Commission Criminal Case Outcome Research Report notes that conviction rates are one way of telling us how well the criminal justice system is doing. It is particularly important for victims of violent crime that their attackers are convicted and appropriately punished. A criminal justice system that consistently fails to secure convictions has little credibility and there is a risk that victims may give up reporting crime and communities may instead resort to extra-legal, vigilante action.[10] However, approach to criminal justice on the part of the victims largely depends on the belief that they have on the concerned law-enforcing agencies. Felson and Pare here find that victims of sexual assaults are less likely to report the violence than the physical assaults to the police is due to (a) a belief that the police could not do anything about the crime, (b) a fear that they would not be believed, (c) a fear of reprisal from the suspect, and (d) feelings of shame or embarrassment.[11] A Report of the South Asia Regional Initiative and Equality Support Programme points out that to reduce the problem of low conviction in sexual assault cases, the Supreme Court of India categorically mentioned that the court (judge) should not be a silent spectator while the victim of the crime is being cross examined by the defense. The recording of evidence must be effectively controlled. Judges have gone ahead and provided support persons, in camera trials and other supportive measures to the victims to ensure that they do not continue to be persecuted during the trial process. The report then notes that despite all these, the conviction rate remains alarmingly low.[12] By examining the country studies on Bangladesh, India and Nepal, the Yearbook of the United Nations provides that the lack of implementation of laws aimed at ending violence against women was reflected in the low conviction rates for perpetrators of violent crimes against women.[13] In this context, an UNDP study finds that in Bangladesh, the rate of convictions for violence against women is much lower when compared to the average rate of convictions (70% of all cases in the country).[14] Based on the data from 1998-2007, a BRAC research report shows that that rape cases have the lowest conviction rate. Besides, it is the least reported case and has the highest number of pending cases among the cases.[15]

[9] Holly Johnson, Natalia Ollus and Sami Nevala, Violence against Women: An International Perspective(Springer, 2008).

[10] The South African Law Commission: Conviction Rates and other Outcomes of Crimes Reported in EightSouth African Police Areas, Research Paper 82,

[11] Richard B. Felson and Paul-Philippe Pare, 'The Reporting of Domestic Violence and Sexual Assault byNon strangers to the Police' (2005) 67 Journal of Marriage and Family 597.

[12] The South Asia Regional Initiative and Equality Support Programme: Landmark Judgments on Violenceagainst Women and Children in South Asia (2005)

[13] The South Asia Regional Initiative and Equality Support Programme: Landmark Judgments on Violenceagainst Women and Children in South Asia (2005)

[14] United Nations Development Programme (UNDP): Human Security in Bangladesh: In Search of Justice and Dignity (2002) .

[15] BRAC: The Legal Challenges on the Way to Judicial Remedy in Rape Cases: The Role of Human Rights andLegal services Programme of BRAC (2009) .

According to an UNDP report attributes that the lack of conviction is improper and ineffective investigations by the police.[16] Other reasons for the failure to punish rape are lack of awareness of the law and lack of resources to make use of the legal system.[17] The National Human Rights Commission of Bangladesh in its Baseline Survey on Human Rights in Bangladesh demonstrates that low conviction rate in the criminal justice system leads to the denial of justice for many victims of crime, especially, women and other marginalized groups. The report exemplifies this observation by noting one of the evidences from its household and qualitative surveys where all the interviewees in the focus group on violence against women stated that when they tried to lay charges against their husbands, they had been implicated in a false case. Even after they sought legal protection, their husbands managed to avoid justice by paying officials to buy their way out of the system.[18] This is also important to understand one of the factors of low conviction rate. Malik indicates the harshness of laws in limiting the discretionary power of the judges. Placing no option before the judges this may lead to the low rate of conviction. He cites the Indian context where it has been argued that harsher laws have created a negative reaction among the judiciary, because these provisions have gone against the broader trends in legal reform and liberal interpretation of fundamental rights.[19] He, therefore, contends that the fact that less than 10% of the cases under Nari-o-Sishu Nirjatan Daman (Biswes Bidhan) Ain, 1995 (earlier Act of Nari-o-Sishu Nirjatan Daman Ain 2000), are ending in conviction is a telling indication of the approach of the judiciary. The legislature in Bangladesh has responded to the cases with a set of rigorous and draconian laws based on the notion that harsh laws will automatically reduce the cases.

II. LEGISLATIVE INCONSISTENCY

The second issue addressed by this work is the inconsistencies in the Nari-o-Shishu Nirjatan Daman Ain 2000.

The justifiability and feasibility of work on this concept of legislative inconsistency may be illustrated by the following instances of substantive and procedural inconsistencies in the provisions relating to dowry contained in the Nari O Shishu Nirjatan Daman Ain 2000. Section 11 of the Nari-o-Shishu Nirjatan Daman Ain, 2000[20] rather penalizes the offences of attempt

[16] UNDP: Human Security in Bangladesh, Dhaka, September 2002, pp. 107-108.
[17] Human Rights Watch: Ravaging the Vulnerable, Abuses against persons at high risk of HIV Infection in Bangladesh (2003) .
[18] National Human Rights Commission of Bangladesh, Perceptions, Attitudes and Understanding: A Baseline Survey on Human Rights in Bangladesh (2011) .
[19] Flavia Agnes, 'Violence against Women: Review of Recent Enactments' in Swapna Mukhopadhay (ed), Inthe Name of Justice: Women and Law in Society, Delhi, (1998), at p. 80, cited in Malik, above n 3.
[20] Act No. 8 of 2000, s 11.

of causing death for dowry, causing death of any woman for dowry and causing grievous or simple hurt in the demand of dowry. The offences under the Nari-o-Shishu Nirjatan Daman Ain, 2000 are cognizable and bailable.[21] Bail shall not be given unless the Complainant is heard on the matter of bail.[22] The offences under this Act of 2000 are supposed to be tried by the special Nari-o-Shishu Nirjatan Daman Tribunals to be constituted under the provisions of this Act.[23] Therefore, for the similar and related offences concerning dowry, two legislations prescribe two different forums as well as they impose different characteristics on the offences regarding grant of bail and about being cognizable or non-cognizable. Thus, on the issue of dowry, Nari-o-Shishu Nirjatan Daman Ain, 2000 and the Dowry Prohibition Act, 1980 are inconsistent[24] though technically, this inconsistency may not be called as a 'contradiction'.[25] The Magistrate Court remains as the appropriate Court for granting interim-bail in GR Cases pending submission of Police Report. However, the Nari-o-Shishu Nirjatan Daman Tribunal takes cognizance of the case under section 19 of the said Act but cannot give bail before the Police Report is submitted.[26] In a previous High Court Division judgment reported in BLT (HCD) XVII 2009 (192) it was held that, by a harmonious reading of sections 19 and 27 of the Nari-o-Shishu Nirjatan Daman Ain, 2000, it is clear that before the nature of the case is determined by the Police Report, the Nari-o-Shishu Nirjatan Daman Tribunal cannot hear bail matters rather it may be heard by the Courts of Judicial Magistrates or Metropolitan Magistrates. If bail is not granted by the Magistrate's Court, appeal may be preferred to the Sessions Court under the provisions of the Code of Criminal Procedure 1898.[27] An opposite stance in this respect was taken by the High Court Division of Bangladesh Supreme Court in the cases reported in 56 DLR 279, 24 BLD 236, 13 BLT 302, 9 MLR 173, 24 BLD 205 and 11 BLC 436.[28] In these judgments, it is held that the Nari-o-Shishu Nirjatan Daman Tribunal can hear the bail matters even before the investigation is complete. Therefore, the Nari-o-Shishu Nirjatan Daman Ain 2000 apparently keeps open the scope of confusion in this regards. From the above discussion, it is clear that the issue of legislative inconsistency is required to

[21] Act No. 8 of 2000, s 19.
[22] Act No. 8 of 2000, s 19.
[23] Act No. 8 of 2000, s 20.
[24] The term, "inconsistency" is used in the sense that inconsistency that hinders harmonious or smooth operation giving rise to confusions.
[25] It was held by Appellate Division of the Supreme Court of Bangladesh in the Constitution 8th Amendment Case Judgment that, two things are said to be conflictive or contradictory when they cannot operate together simultaneously. For details see: The Constitution 8th Amendment Case Full Judgment by the Appellate Division reported in 1989 BLD (Spl.) 1.
[26] The Law Commission, Bangladesh: The Recommendations on Clarification of Jurisdiction of Courts to Grant Bail till Submission of Police Report in the cases filed under Nari-o-Shishu Nirjatan Daman Ain 2000 (2012)
[27] (2009) BLT (HCD) XVII 192.
[28] Ibid

be addressed from the perspectives of its probable impacts on the access and administration of justice as well as on the issue of case backlog.

III. CONCLUSION AND RECOMMENDATIONS

The conviction rate in the cases under the Nari-o-Sishu Nirjatan Daman Ain 2000 is extremely low. Over the years, this is exhibited thorough impropriety, legal infirmity, and lack of sound reasoning in the trial court's decision, excessive use of jurisdiction by the trail court, framing of wrong charge by the Tribunal, and inappropriate procedure of trial. Based on the suggestions of the justice sector agencies, and analysis of relevant judicial decisions and literatures, this research recommends as follows:

a) The key justice sector agencies who are entrusted with the duty to collect and present the evidence before the court, e.g., police officers, medical officers, and public prosecutors should be more concerned about the rights of the victims and their corresponding duties.

b) More senior, experienced and knowledgeable persons should be appointed as the Public Prosecutors of the Tribunals.

c) The public prosecutors should not be negligent and should be more cooperative to the victims.

d) There should be strict legal accountability mechanism for the public prosecutors.

e) To prevent the abuse of justice, harshness of the Nari-o-Sishu Nirjatan Daman Ain 2000 is suggested to be mitigated by the justice sector agencies.

f) To minimize the rate of filing of false cases, the trial court should be more cautious in taking cognizance of an offence and should take recourse to section 17 of the Nari-oSishu Nirjatan Daman Ain 2000 to punish anyone who files a false case.

g) It is found that although there is no provision for out of court settlement in the 2000 Act; judges allow it as the least bad option when in a case the victim herself is unwilling to continue the case. In this context, strict application of the Act can improve the current situation.

h) A coordinated effort among all the justice sector agencies, establishment of more Nari-o- Shishu Nirjatan Daman tribunals, and appointment of judge at the tribunal where there is no judge can reduce case backlog.

i) In addition to the suggestions made by the justice sector agencies during the field visits

of this research to curb the low rate of conviction, some of the judgments of the Supreme Court demonstrate that judges of the tribunal are expected to apply their judicial mind while dealing with the cases under the Nari-o-Sishu Nirjatan Daman Ain 2000.

j) The provisions of punishment in the Nari-o-Shishu Nirjatan Daman Ain 2000 should be revised. Harsher punishment cannot mitigate the offence rather may result into a low rate of conviction in the cases. Punishment for the offences should, therefore, be proportionate to the gravity of the offence.

k) The Nari-o-Shishu Nirjatan Daman Ain 2000 should provide for a wider space of discretion of the Judges for sentencing the offender.

l) Medical evidence collection process for the cases should be more women friendly and appointment of lady doctors for this purpose is strongly recommended.

m) Record keeping of the cases should be smarter. Recourse of modern technology may be taken. A paperless judiciary is highly recommended in this regard.

n) Creating awareness about legal aid should be emphasized.

It should however, be made clear that by identifying the level and reasons behind low conviction rate in the cases, this research in any way does not advocate for the conviction rate to be high, rather, it expects for a proper administration of justice that aims to uphold the rights of the poor and marginalized victims of the violence as envisioned in the Act of 2000.

A number of inconsistencies are identified in this work in the four specific legislations namely, the Nari-oShishu Nirjatan Daman Ain 2000. This work could not find any provision in these legislations to be directly contradictory to any other provision. However, a number of provisions are identified which require more clarification or little amendments so that they can operate harmoniously without creating confusions. There is overlapping in the subject matters dealt by these four specific legislations. Dowry related offences are partly dealt in the Nari-o-Shishu Nirjatan Daman Ain 2000 and partly dealt in the Dowry Prohibition Act 1980. Bail granting power in the GR cases till the completion of investigation under the Nari-o-Shishu Nirjatan Daman Ain 2000 should be expressly conferred by this Act. It is observed by the Supreme Court of Bangladesh in a number of cases that the special Tribunals constituted under the Nari-O-Shishu Nirjatan Daman Ain 2000 often goes beyond their jurisdiction in trying the cases. The Tribunals have been found committing misconstruction of law both procedural and substantive at several instances. Following are the recommendations to find out an effective solution to this problem-

(a) All the offences related to dowry should be dealt comprehensively by any single legislation either by the Nari-O-Shishu Nirjatan Daman Ain 2000 or by the Dowry Prohibition Act 1980.

(b) The definition of "Dowry" given in the Nari-O-Shishu Nirjatan Daman Ain 2000 and in the Dowry Prohibition Act 1980 should be made uniform. Currently, different terminologies are used in these two legislations to define "Dowry".

(c) The definition of "Child" given by the Nari-O-Shishu Nirjatan Daman Ain 2000 and the Domestic Violence Act 2010 should be made consistent. At present, these two legislations prescribe two different categories of age limits to define "Child".

(d) Bail related provisions in the Nari-O-Shishu Nirjatan Daman Ain 2000 should be made more clarified. The Nari-O-Shishu Nirjatan Daman Tribunals should be conferred with the bail granting power from the very beginning of the proceeding be it a Complaint Registered (CR) case or a General Registered (GR) case.

(e) Procedural provisions as to from which stage of the case, the Nari-o-Shishu Nirjatan Daman Tribunal takes cognizance of the case should be more clear and specific.

(f) The scope of applicability of the Code of Criminal Procedure 1898 to the Nari-oShishu Nirjatan Daman Ain 2000 should be clearly and specifically mentioned in the law.

(g) All the offences relating to the violence against women should be tried by one single Court or Tribunal.

(h) In several cases, it is found by the Supreme Court of Bangladesh that the Nari-oShishu Nirjatan Daman Tribunals often try the related offences under inappropriate sections of law. A strong inference, therefore, can be drawn that the definitions of offences under the Nari-o-Shishu Nirjatan Daman Ain 2000 are not clear and specific. This problem may be addressed by legislative amendments. For example, the definition of "Abduction" may be widened like that of the definition given in the Penal Code 1860.

(i) In a recent judgment given by the Appellate Division of Bangladesh Supreme Court in Shukkur Ali vs. State (Decision given on 5 May 2015, not reported yet) it is recommended that Section 11 of the Nari-O-Shishu Nirjatan Daman Ain 2000 dealing with "Dowry" should be reconsidered by the Government. The present research also supports this stance and recommends necessary actions.

(j) The provisions relating to "Custody of Child" in the Family Courts Ordinance 1985 and in the Domestic Violence Act 2010 should be made more clarified and specific as to which law will apply in which situation to avoid further confusion.

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(k) In Shukkur Ali vs. State, the Appellate Division of Bangladesh Supreme Court has annulled Section 34(2) of the Nari-o-Shishu Nirjatan Daman Ain 2000 finding it to be inconsistent with the Constitution of Bangladesh. Section 34 (2) of the Act of 2000 provided for the continuation of trial for murder after rape before coming into force of the Act of 2000 to be tried under the provisions of the Nari-o-Shishu Nirjatan Daman Bishesh Bidhan Ain 1995.

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