"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH ● dslawdesk@yahoo.co.uk

LAW INTERVIEW

Combatting rape: A more effective strategy is to properly enforce existing laws

Mitali Jahan is an Advocate at the Supreme Court of Bangladesh; she is currently working as the Programme Manager of Human Rights and Legal Aid Services (HRLS) Programme at BRAC. Previously, she worked as Project Coordinator of Bangladesh National Woman Lawyers Association (BNWLA). She has more than fourteen years of experiences of dealing with the issues of violence prevention, protection, law enforcement, policy/ law reforms and changing practices. She has delivered technical assistance to the government for drafting and amending several laws and policies i.e. Domestic Violence Prevention and Protection Act 2010, the Children Act, 2013, National Plan of Action on violence against women and children. Mitali is a member of different national & international rights-based networks. In light of the rise in rape cases in recent times and the subsequent enactment of an Ordinance increasing the punishment of rape to death, Tahseen Lubaba from Law Desk talks to her on the following issues.

LD: What, in your opinion, are the reasons of the recent surge in incidence of rape?

MJ: Rape culture is nothing new; it has always existed. In the present pandemic situation, the incidents have gone up. There is not one specific factor that has resulted in the rise. When rapes happen on a large scale, it means that our social institutions have failed. Our surroundings, families, schools etc. collectively create a system of impunity and are not playing their respective roles in preventing these incidents of violence. Our literacy rate is improving but our perceptions have not changed. Moreover, the criminal justice system is not sufficiently equipped - conviction rate of rape is extremely low. As a result, most accused walk free. It is true that an accused cannot be convicted unless the crime has been proved beyond reasonable doubt. However, the low rate of conviction is a result of legal and social factors. One such factor is that the victims are reluctant to come forward out of fear of stigmatisation, isolation and further violence. Even in the instances where cases are filed, it becomes challenging to collect proper evidence and the burden falls on the victim to prove that they are of 'good character'. Although the laws state that cases must be disposed of within 180 days, to the best of my knowledge, there are almost no instances where this has been implemented.

A culture of impunity results in repeated offence by perpetrators and also encourages others to engage in similar behaviour. The increase in rape is currently creating countrywide outrage, but it is important to remember that the advocacy cannot end here. We must continually challenge rape culture and this change must start from our families, schools and social institutions. These changes cannot be brought about overnight; advocacy must continue till necessary reforms are achieved. Political will of the government is crucial for the realisation of these reforms.

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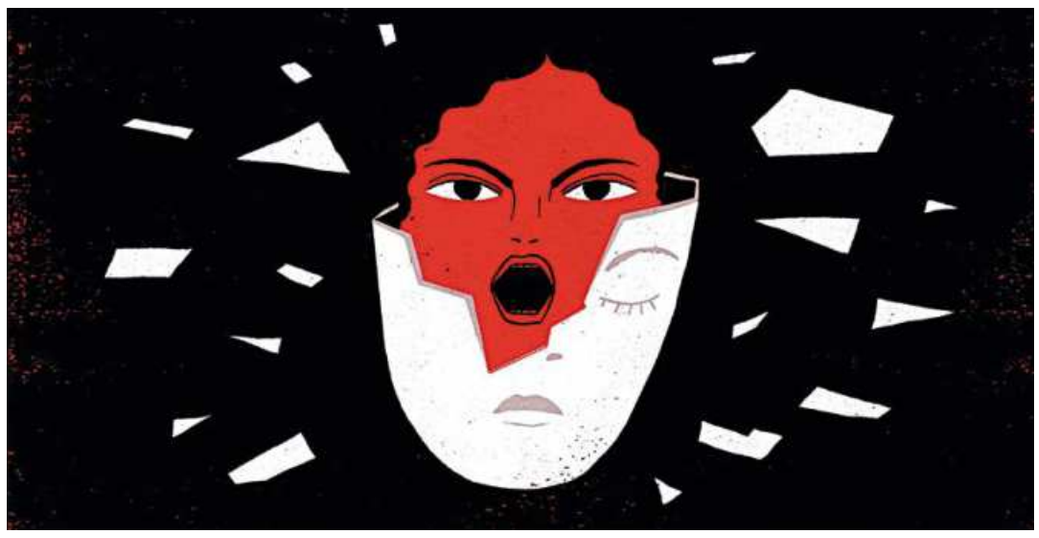


LD: What are the challenges of legal enforcement of the rights of rape victims?

MJ: Our laws are a continuation of the colonial legacy. Although the government has enacted the *Nari O Shishu Nirjatan Daman Ain* in 2000 with stringent punishments, there is still a need to change the definition of rape. The definition in its current form excludes cases of rape of transgender persons, rape of male persons or marital rape when the bride is not aged below 13 years. The Evidence Act 1872 allows for the admission of character evidence of the prosecutrix which works as a huge barrier in achieving convictions. NGOs and rights activists have been advocating for reforms in these areas. There have also been concerns raised regarding the need to train judges, prosecution, law enforcement etc. in order to facilitate gender-sensitivity in the justice system.

The national helpline for violence against women can be an effective first point of contact but a victim has to go through the existing justice system if they want to seek redress. We have seen that the national helpline as well as non-governmental legal aid services were open during the lockdown and incidence of violence had been reported. But we faced difficulties while providing them assistance. Moreover, the closing of the courts was also a challenge. Our court systems largely rely on physical presence; this has posed a lot of difficulties in accessing justice in recent times. To sum it up, the existing helpline and legal aid services should be appreciated for creating a response mechanism system but they have some limitations which must be evaluated.

LD: Do you think increasing the punishment of rape to death is an effective solution?

MJ: Arguments exist both in favour of and against the imposition of death penalty. On one hand, some countries have abolished death penalty and contrarily, a few countries have enforced death penalty for rape. However, to curb rape, it is important to ensure that the existing laws are being effectively implemented. The pre-existing provision of life sentence is in itself a harsh punishment but despite that, we have collectively failed to reduce the incidence of rape. Harsh punishments may or may not deter crimes, but they cannot be the solution. A more effective strategy is to properly enforce existing laws. Moreover, punishments are punitive and not restorative.

Compensation may be a remedial solution. Victims incur large expenses if they want to bring their cases before the court. Compensation may provide assistance in this regard. However, as the conviction rate itself is very low, many victims may not be able to benefit from the compensation unless it is provided independent of conviction. In India, there is a central rape victim compensation fund which supports the victims in accessing justice. Compensation may also help the victims in restoring their places in society.

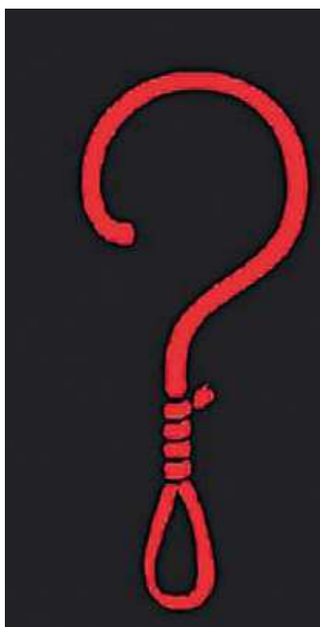
LD: What role do you think NGOs can play in facilitating access to justice for rape victims?

MJ: The NGOs are like the shadow of the government, in my opinion. NGOs can play an assisting role but the ultimate responsibility of bringing about positive changes remains with the government. NGOs have worked in individual capacities and in cooperation with each other to advocate for change and create community engagement at the grassroot levels. They play a vital role in bridging the gap between communities and the formal justice system. They also conduct research and make recommendations for reforms. In short, NGOs have a vital role in the fight for gender-justice.

LD: Thank you for your time.

MJ: You are welcome.

REVIEWING THE VIEWS



On 'Death Penalty' and the need for other reforms in rape laws

Barrister Sayeera Tashfia Awwal

The mistaken belief of patriarchal masculinity and the subjugation of women with the want of treating them as an object have spurred the number of rape cases in Bangladesh over the years. This article focuses on the significance of death penalty in rape cases and few other reforms that should be considered in the rape laws in Bangladesh for effective access to justice.

According to *Ain o Salish Kendra* (ASK), 975 women were raped, including 208 subjected to gang-rape, from January to September 30 this year. Of them, 45 were killed after rape and 12 others killed themselves. Besides, it said, 161 women were subjected to sexual harassment and 12 of them took their own lives during the period. While in the past years, 1,413 women fell victim to rape in 2019, 732 in 2018 and 818 in 2017 respectively, according to reports given by ASK.

With the upsurge in the number of rape victims, it has recently outgrown all its previous records during the COVID-19 pandemic. On the other hand, unreported incidents by victims due to obvious reasons of social and cultural impunity had given the perpetrators way more opportunities than before. Amongst the many cases, the most preponderant are the recent incidents of gang rape in Sylhet and sexual violence in Noakhali which have been wake up calls for the law and policy makers of the country. Bangladesh Cabinet on the 12th of October speedily approved a draft law to include death penalty as the highest punishment for rape. To this effect, the *Nari O Shishu Nirjaton Daman Ain* (Amendment) Ordinance, 2020 has also been promulgated without further delay.

Earlier, the rape laws in the country were dominated by the regressive laws passed in the British colonial era. The punishment for rape as stipulated in section 376 of Penal Code 1860 ranged from a term of ten years with a maximum life imprisonment and fine. Only in extreme cases where the victim died as a consequence of committing rape, the defendant would have been convicted with death penalty.

It is believed that imposing death penalty for rape defendants will drastically decrease the commission of crime due to the fear of extreme punishment. It should act as a preventive measure as well as serve the purpose of deterrence in the greater community. Therefore, it is a timely initiative for Bangladesh to walk in this line considering the uncontrollable rate at which rape is increasing.

However, there are also a number of other restraining reasons which as a whole are making the country unable to uproot this menace. These include questioning on the basis of character of the rape victim, lack of victim protection measures, reluctance of police officers to file the case, victim humiliation, political backing and of course a lengthy trial often resulting in the case being settled.

Section 155(4) of the Evidence Act 1872 allows questioning the character of rape victims to impeach her credibility. Hence if she can be proved to have a bad reputation or character in the court which is a very common scenario, the defendant can easily escape full liability. This is a recurring issue which needs amendment. Also, lack of victim protective measures precludes the victims from opening up about the incident in fear of threat and further injury. Section 14 and section 20 of the *Nari O Shishu Nirjaton Daman Ain* 2000 prohibits the disclosure of identity of the victim and encourages examination within closed door room by the judge. However, lack of implementation of these provisions still persists vastly.

Absence of any victim and witness protection laws in Bangladesh also exposes the victims and witnesses to unwanted danger leading to further social repression. Neighboring countries such as Pakistan has already enacted the Witness Protection, Security and Benefit Act 2017 while India is on its way with the approval of the Witness Protection Scheme 2018 by the Supreme Court of India.

To conclude, a holistic approach needs to be taken by the Government. Imposing death penalty as the maximum punishment for rape was much-awaited but this will not be enough to combat the crime if access to justice is not ensured in the coming days.

THE WRITER IS AN ASSOCIATE AT TASHMIA PRODHAN & ASSOCIATES.

BOOK REVIEW

Of Atrocities and Obligation: Accusing Pakistan for 'Double-Edged' Violation?

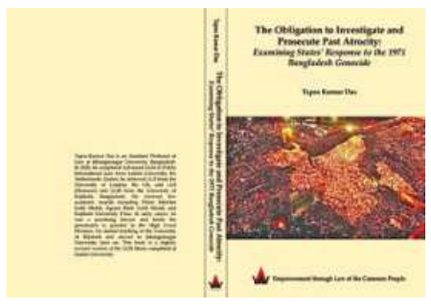
Lima Aktar

Unlike its domestic analogy, International Criminal Law (ICL) has refuted the principle of 'non-retrospectivity', establishing the trial-based justice for the *jus cogens crimes* (genocide, war crime, crime against humanity etc). Moreover, to emphasise the trial for international crimes, ICL is now embarking on the *erga omnes* principle by virtue of which any state assumes obligation to bring the perpetrators under investigation and prosecution. The failure or unwillingness to prosecute the perpetrators gives birth to another wrongful act (omission) of the state that it must cease immediately.

Considering this perspective, Tapos Kumar Das, Assistant Professor and Chairman, Department of Law, Jahangirnagar University, has undertaken a provocative study in his recently published book *The Obligation to Investigate and Prosecute Past Atrocity: Examining State's Response to the 1971 Bangladesh Genocide* (published by ELCOP, July 2020). The major intervention of this work lies in that he accused Pakistan of the violation of substantive and procedural obligation arising out of the atrocities committed by the Pakistani Army in 1971. The author argues for a "double-edged" breach by Pakistan; one is the violation of *jus cogens* norms by committing such atrocities itself and another is the unwillingness to bring perpetrators under judicial measures.

The author developed this argument by dividing the book into four interrelated parts. It begins with a powerful construction of how Bangladesh's factual existence as a 'state' should be taken into consideration for determining the 1971 liberation war as International Armed Conflict (IAC). In doing so, the author strongly stands against labeling the past atrocities as merely an 'internal disturbance' by Pakistan which, as he argues, is a misrepresentation of facts. To prove it as an International Armed Conflict (IAC), he sidesteps the self-determination criterion under the Additional Protocol II 1977 (as it was enacted after the 1971 atrocities) and argues for its basis in the Montevideo criteria.

The second part of the book discusses the legal basis of the crimes that took place in 1971's armed conflict arising out of the violations of relevant international laws. One pressing point that the author highlighted here is the pattern of 'partial and total' genocide committed against the Bengali and Bengali Hindus respectively. He argues that such an act of pulling down the Hindu religious group formed *'genocidal intention'* under the Genocide Convention while



claiming '[t]his geopolitical and religious enmity culminated in the Pakistani army's specific intention for the total annihilation of the Bengali Hindus in 1971'.

In the third part of the book, the author claims that the principle of *pacta sunt servanda* in article 26 of Vienna Convention on the Laws of Treaties, 1969 along with the *erga omnes* obligation binds Pakistan to undertake appropriate substantive and procedural measures for the violation of international laws. As a result, Pakistan's denial to the fulfillment of its obligations created a double-edged violation, not only for the crimes they committed but also for the omission not to undertake procedural obligations. To end the continuing wrongful act, he therefore demands that 'Pakistan needs to fulfill its procedural obligations… by pursuing appropriate investigative, prosecutorial, and remedial measures for the 1971 atrocities'.

The final part of the book reflects upon the response to the 1971-atrocities from different international organisations, states and the politics surrounding the two phases of post-war mechanism. He also focused on the formation of the International Crimes Tribunals Bangladesh as well as addressed some of the criticism regarding the tribunal's fairness and biasness. The author finally asked, albeit ambitiously, for minimal reparations as a form of 'apology'.

The aforementioned aspects make the book unique from many perspectives. However, there are some points that the author did not elaborate. For example, the author used the Montevideo criteria to prove the 1971-atrocity as an IAC but the relationship of these criteria with the IHL's purpose of defining IAC and NIAC has not been elaborated in the book. Further, the author discussed the external obstructions in initiating prosecution and the latter resumption mobilised by the people. But why these extra-legal factors are important in assessing the responsibility of any state to try such heinous crimes 'without excuse' are not addressed in the book.

It seems the author has to counterbalance the depth of the book with its breadth and the points as mentioned above are perhaps not elaborated for this constraint. In terms of its depth, the book is undeniably a masterful account of atrocities and obligations that may illuminate the readers interested in the study of crime and genocide across the discipline.

THE REVIEWER IS AN LLM STUDENT AT JAHANGIRNAGAR UNIVERSITY.

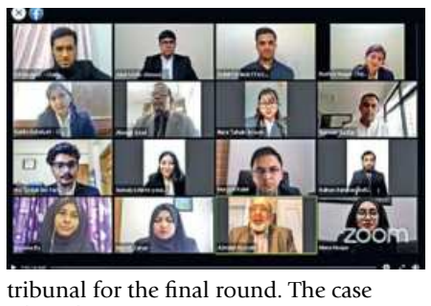
LAW EVENT

Dhaka University wins the BIAC Arbitration Contest

Ali Mashraf

Bangladesh International Arbitration Centre (BIAC), for the first time in the history of Bangladesh, organised an Inter University Arbitration Contest from September to October 2020. Due to the COVID-19 pandemic, the entire month-long competition took place virtually on Zoom. After two nail-biting preliminary rounds, the teams representing University of Dhaka and Bhuiyan Academy advanced to the final round. The final took place on Saturday, 17 October 2020.

Barrister Ajmalul Hossain QC, Senior Advocate, Supreme Court of Bangladesh, was the chairman of the tribunal, and Barrister Sameer Sattar and Barrister Margub Kabir, Advocates, Supreme Court of Bangladesh, were the members of the



tribunal for the final round. The case of the final addressed complex legal issues on contract law, international commercial arbitration law, international petroleum and energy law, international environmental law etc. After extensive arguments, examination and cross-examination of witnesses, production of evidence and summation, the arbitration panel adjudged University of Dhaka as the champion. The team consists of Ali Mashraf, Jalal Uddin Ahmed, Bushra Haque, Raihan Rahman, Sudipta Bhattacharjee and Nabila Rubaiyat. Jalal Uddin Ahmed also won the best participant award.

Mr. Muhammad A. (Rumee) Ali, CEO, BIAC, delivered the closing remarks after the final. He emphasised that BIAC organized this virtual mock arbitration contest for the first time in Bangladesh's history to get the students acquainted with the procedure of international arbitration and to provide them the practical experience of alternative dispute resolution (ADR).

THE WRITER IS A MEMBER OF THE CHAMPION TEAM.