LAW IN-DEPTH

Consent-less marriage! Marriage-less consent!

Urge for socio-legal vaccination

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BY nature, the Muslim marriage meets up its Quranic description as "mithaq" which means a "covenant" between the husband and the wife. Though the Quranic description highlights the contractual nature of marriage union, it does not, however, wither away the importance of spiritual stance shaping the heart of a Muslim marriage. Thus in the purely Islamic perspective, marriage remains not merely as a "civil contract", but a contract with something more -- with some sanctity in its core.

In legal parameter, the contractual nature of a marriage union is highly emphasised and established beyond controversy. Of course, such emphasis on its contractual nature (that is, to term it as a civil contract) presupposes the presence of "free consent" of the parties as an uncompromising requirement of marriage. On the other hand, the spiritual dimension of marriage recognises "the freedom of choice" between the parties to be taken as a supposedly valid condition of forming a lawful wedlock.

Indeed, the right to exercise the "freedom of choice" between the parties becomes an essential corollary to the concept of consent in Muslim marriage. The Islamic principle of "Huquq-wa-al-faraid", which echoes the ethics of personal liberty and individual responsibility, supports or rationalises the view that such freedom is available not to the men only but both to the men and women equally. Ironically, the ongoing conviction of our Muslim heartland fails to converge with this basic postulate of Islam, especially in recognising the women's individuality in contracting their marriage.

Compared to that of their male counterpart, the women notionally enjoy a little freedom in forming their marital wedlock. Our marriage-related practice, however, shows a total disregard to the requirement of women's consent in marriage, reflecting the gender-oriented focus engraved in the patriarchal pattern of our society. In this write-up, we will try to show the reasons and ramifications of such practice from a somewhat radical angle. In so doing, we will put concentration on the contemporary trend of our socio-cultural transformation affecting the basic fabric of marital institution.

The first part of the title of this writing concerns the cases where the marital wedlock is formed without complying with the basic condition of consent. Traditionally, the women have been the main victims of this malpractice. Being yielded to the socio-cultural milieu, the typical Bangladeshi women usually take it as their fate to agree to a match arranged by her family. By conducting an extensive research in this respect, Dr. Shahnaz Huda, a distinguished Law Professor from Dhaka University, has categorically commented that "[t]he socio-cultural and religious norms which demand seclusion of a woman are at odds with the requirement imposed by religious law of obtaining the consent of the women" (Dhaka University Law Journal: 2005).

This fact undoubtedly signifies the downtrodden or degraded status of the women in our society in one hand, and the socio-cultural distortion of the religious norms on the other. However, the most fatal consequence of such practice relates to our societal outlook of neglecting a clear religious ruling which requires the presence of consent of both the parties to a marital wedlock. Instead of adhering to the legal and religious requirement of obtaining consent, our society unreasonably goes for "validating an invalid marriage." In most of the cases, our society even does not bother about the backlash to such marriage coming predominantly from the female folk.

The malpractice of the so-called "consent-less marriage" (we use the term to mean all marriage union which lacks "free consent" of the parties, especially of woman) actually grows out of a doctrinal disagreement between the Hanafi and other Madhabs. While the Hanafi madhab believes in the strict adherence to fulfilling the requirement of wife's consent and the exercise of her freedom of choice in forming the wedlock, the other Madhabs (for example, the Hanbali or the Shafi) do not recognise any such requirements to be compulsorily observed.

Interestingly, though our personal laws, by and large, correspond with the ruling of Hanafi Madhab, in the particular field of woman's freedom to contract the marriage, it seems to follow the other Madhabs' view. This piecemeal observance of Hanbali or Shafi Madhab creates double standardisation of the legal norms by paradoxically pushing a Hanafi woman into the legal domain of the Non-Hanafi Madhabs. More pathetically, this deviation from Hanafi view facilitates the patriarchal force, giving it the opportunity of curbing down the women's individuality in contracting their marriage.

Another important reasons contributing to the continuance of this malpractice is the lack of any specific legal regulation regarding the requirement of consent to marriage. In this respect, the Contract Act of 1872 can be referred to as the only relevant legislation governing the incidents of a marriage contract. However, this Act of 1872 does not seem to provide effective redress for all the practical purposes because of the fact that mere declaration of a marriage contract to be null and void on the ground of lack of free consent is virtually irrelevant to the socially complex transaction like marriage. Once a marriage is solemnised, it remains a marriage, valid and effective, in the social eyes, thereby creating a web of consequences independent of its legal effect. Thus prevention of this kind of marriage has become more desirable than seeking redress of invalidating the union.

Probably, such kind of realisation led the 1956 Family Law Commission to reconsider the matter. With a view to ensuring that "marrying parties have freely consented to marry each other", the Commission recommended a standard form of nikah nama to be prescribed where both the parties will require to sign. In pursuance of this recommendation, Section 5 of the Muslim Family Laws Ordinance of 1961 prescribes such machinery. But we are yet to appreciate the success of this endeavor for the simple reason, as Maulana Ehtishamul-Huq rightly pointed out, that the signature in the nikah nama can be taken even when the parties are forced into the wedlock.

This being the case, the malpractice of "consent-less marriage" continues even at our age when women's edification and emancipation is getting momentum. The implication of the societal and legal tolerance towards such malpractice has not, however, been confined only to threatening the peaceful cohabitation of the couple concerned. Turning to the later part of the title of our writing, we will here try to see that as a reaction to such malpractice, how another "bad standard" becomes emergent as inevitable in the way of our socio-cultural transformation.

This contention can be justified with reference to the popular discourse of "the arranged and love marriage dichotomy". At present, the marriageable men and women are increasingly leaning to or involving into the so-called relation of love-affairs (which we term as "marriage-less consent" for present purpose). Standing at the other pole of arranged marriage, this practice creates a diametrically opposite standard which also seems to threaten the fabric of the society by other means. The most crucial tension regarding the trend of such relation is that though it meets up the fundamental facet of a lawful wedlock, namely the consent of the parties, it lacks some essential formalities like ceremony or registration of marriage.

Under the Hudud Ordinance of 1979, all relations other than a reported marriage have been defined as fornication in Pakistan (Anis Ahmed: Women and Social Justice, 1991). Though the MFLO and the Muslim Marriages and Divorces (Registration) Act of 1974 embody the rules for compulsory registration of marriage, the status of a non-reported marriage is still left vague in our country. The exposure and appreciation of such relation in the societal context further suggests that the status of such relation stand between fornication and a lawful wedlock.

The growing status and relevance of such relation seems to import some serious ramifications: (i) since no legal status is attached to such relation, the ongoing practice actually creates the scope of cheating and victimising the women, thereby facilitating another form of gender violence; (ii) in the end, it results in the encouragement of fornication, thereby leading the whole generation to an "enduring alienation"; and more importantly, (iii) by allowing excessive freedom to the teenagers, it increases the possibility of conflict between the guardian and parties to the marriage.

At this point, we will argue that our State's role in regulating both kinds of malpractice as we identified above has always been negligible. In the former case, it has failed to ensure the religiously imposed requirement of consent, especially by tolerating the suppression of women's freedom in contracting her marriage. On the other hand, by sponsoring the marginalisation of religious influence in the societal affairs, it has practically encouraged the practice of what we called as marriage-less consent.

It is now the demand of time that the state will come to develop an effective socio-legal mechanism to reconcile the conflict arising out of the consent issue. For the Iranian society, as Mutahhari passionately argues, the solution comes from a "conscious compromise", where the parties to the marriage are afforded with the opportunity of choosing the partners, but marriage is solemnised through the agency of guardians (Mutahhari: Women's Right in Islam). We can easily approach in this way even by following the rationale of Hanafi Madhab which allows the exercise of option of puberty in one hand, and recognises the rights of the guardian to dissolve an unequal union on the other.

True it is that law alone cannot combat the cross-cultural influences over the marital institution which involves a multitude of layers including the social and moral fabric of the community. A stepwise approach by socio-legal inoculation can thus be an effective way out of getting rid of such problem. Let's go for it right now, otherwise we will fail to stop the landslides of "anti-familism" coming towards us!

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LAW WATCH

Need a Cyber crime tribunal

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TODAY'S world is cyber world. Computer and internet have become an integral part of the daily life. The numbers of netizens are increased in every minute and at the same time it creates an opportunity to misuse the technology in the cyberspace which gave birth to cyber crimes at the domestic and international level. Though the word crime carries its general meaning as 'a legal wrong that can be followed by criminal proceedings which may result into punishment' Whereas cyber crime may be 'unlawful acts wherein the computer is either a tool or target or both'.

The world first computer specific law enacted in the year 1970 by the German State of hesse in the form of 'Data Protection Act' 1970 with the advancement of cyber technology with the emergence of technology. The misuse of technology has also expanded to its optimum level and then arises a need of strict statutory laws to regulate the criminal activities in the cyber world and to protect technological advancement system. It is under these circumstances Indian Parliament passed its 'Information Technology Act, 2000' to deal with the technology in the field of e-commerce, e-government, e-banking as well as penalties and punishment in the field of cyber crimes.

Although its little bit late, but still it sounds good as the parliament of Bangladesh enacted 'Information and Communication Technology (ICT) Act' in 2006. The Act mainly focused on digital signature, electronic record, types of offence and penalties. Section 68 of the said Act provides for the formation of cyber crime tribunal and cyber appellate tribunal. But unfortunately, such cyber crime tribunal has not yet been formed. More than six years has gone and so far Bangladesh has faced several cyber crime incidents. Several times threatening to the Prime Minister through email. In 2008, a Bangladeshi hacker named shahi mirza hacked RAB and Bangladesh Army website. Mahbub Saroar, an analyst of premium Bank Brokerage house, decayed the transaction report of Dhaka Stock Exchange through hacking. Even cyber criminals uploaded porno movies in the website of Bangladesh National Parliament and website of Jamate Islam

Bangladesh. Ex-boyfriend of a TV actress uploaded sex videos in the internet etc.

Most recently, skype conversation between the chairman of international crimes tribunal 1 and his friend has hacked and it published in the daily newspaper. Now it's high time to rethink and be aware about the cyber crime more seriously and it's becomes demand of time to set up cyber crime tribunal immediately. Because we need to realize such type of cyber crimes in Bangladesh still is in primary stage. Unlike the traditional criminals, cyber criminals are sufficiently educated and highly specialized in computer system and networking. In the close future, then can crack any individuals or companies bank account and make it empty, steal valuable data and information and even then can steal any national confidential plan or policy.

So far we don't have any statistics about cyber crimes regarding monetary loss due to cyber criminality but According to the US Internet Crime Complaint Center statistics, in 2001 the dollar loss of reported cyber crime was only $17.8 million dollars. But this amount, in 2009, reached at $559.7million dollars. Yet, it is a small portion of the actual loss of money as only 15 percent of cases of cyber fraud are being reported to crime control agencies.

To control the cyber criminals many police agencies set up special units across the world. Now virtual police stations are common in many countries. Recently our neighboring Indian state, west Bengal started the functioning of a cyber police station. Though computer is becoming a common household item and the number of Internet users has already crossed six millions, very few computer related offences are reported to the police. As our police have not been furnished with modern techniques and technology to investigate even traditional crimes, we cannot expect them to acquire the necessary skills to investigate the most complicated hi-tech computer related crimes.

Present ICT Act provides highest punishment for the cyber crime up to 10 years of imprisonment or a maximum fine of ten million Taka or with the both. But the legislation may not be sufficient to effectively fight cyber crime. For, the offences under this act are non-cognizable. That is, the police shall not arrest the alleged offenders without a warrant of arrest. The non-cognizability of an offence gives the perpetrators an upper hand over the victims.

Thus, despite the immediate formation of cyber crimes tribunal, to meet the upcoming cyber crimes situation we need to think about a more strengthen cyber crime law. Many of cyber crimes has not covered by the present law.

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