

# THE LACK OF DISSENT IN JUDGMENTS



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RIZWANUL ISLAM

**LAW OPINION**

**D**ESPITE our biological similarities, all of us are somehow unique; the same goes even for twins who would have something dissimilar distinguishing one from the other. One manifestation of our uniqueness is perhaps the way we may perceive the same thing differently. Hence, the disagreement between the closest of friends among us on one or the other issue is common. The argumentative trait of human beings is perhaps reflected in the words of Lyndon B. Johnson, a former President of the USA, when he said, 'If two men agree on everything, you may be sure that one of them is doing the thinking.' This perhaps explains why judges (particularly, the judges of higher courts) deciding the same dispute on the basis of identical words enacted by the Parliaments or same precedents, at times disagree with their peers in the Bench.

The trend of dissent among judges would be noticeable in many common law jurisdictions and also in many international courts and tribunals (possibly the most prominent in the International Court of Justice). Though there is no systemic study (at least, not to the knowledge of this author), anecdotal evidence would imply that this trend of dissenting judgments is not the norm in Bangladesh. Even more often than not there would be no concurring (but separate) judgments. This write-up would seek to explore possible factors

contributing to this and also to dispel a populist perception about dissenting judgments.

One explanation of this lack of dissenting judgments in our higher court may lie in our culture. We have a conformist culture or a culture of deference: deference to authority. From our childhood, we are generally taught to agree to elders, first in the family and then to teachers and then seniors in a working environment. This being the case, it may be surmised that such a culture in the society has a role in the minimisation of dissent on the Bench. The heavy case load on our courts may be another (although possibly much less cogent) explanation. While there is no way any insinuation that a judge would simply agree with her/his peer for reducing workload, the proposition of writing a dissenting or concurring but separate judgement can be a disincentive for a judge who is already confronted with far too many cases.

One particularly sad aspect about the dissenting judgments in this country specially when they impinge on politically sensitive issues is that the judgments and sometimes also the judges are unduly maligned. Though, critically engaging with judgments can be a healthy sign of interest in law and a functioning democracy but dissecting the judges on a linear political consideration or extra-legal considerations (unless there are very cogent and unavoidable reasons) is unfair. We should bear in mind that fair-minded persons can differ as to the meanings of words. And even if their conclusions may be the same, their reasoning to arrive at the conclusion may not be the same. Such a difference in the reasoning or

conclusions may be driven purely by academic and professional considerations and need not be driven by extra-legal considerations.

To reiterate, the purpose of this brief write-up is not in any way to imply that our judiciary is indolent or intellectually dilapidated but rather to surmise the factors contributing to a lack of a dissenting culture prevailing in our higher judiciary. Again dissent for dissent's sake can be ungainly or meaningless. Indeed, in some regimented professions such as the armed forces, argumentative culture may be quite a challenge. And often we, the academics are derided for differing with each other for quixotic reasons or simply to make ourselves stand apart from the rest. While such a labelling of academia is an oversimplification, it would be tough to say that the perception is always devoid of truth.

However, a healthy dosage of dissent is hardly a bad thing and may often help us to push the boundaries of our knowledge. And the same should hold true for the bench too. More importantly, the purpose of this write-up is to highlight that whenever there is a dissenting judgment rendered by the judges in our higher judiciary, it need be because of any subjective approach to law by the judges, rather can be driven purely by nuanced and objective engagement with the law. We may speculate on why there is a lack of a dissenting culture and perhaps this essay raises more questions than it answers, it would seem that there is a scope for undertaking in-depth studies on this.

**THE WRITER IS AN ASSOCIATE PROFESSOR AT DEPARTMENT OF LAW, NORTH SOUTH UNIVERSITY.**

## LAW LETTER

### Catalan independence referendum

Catalonia became the centre of attraction all over the globe when the Spanish region held a referendum on October 1 on the issue of becoming an independent state in the form of a Republic. The referendum was led by the Government of Catalonia and approved by the Catalan Parliament on September 6 this year.

Prior to the referendum, opinion polls showed that 71% of the population wanted the referendum to be held, but only 41% were likely to vote 'yes'. Additionally, a previous non-binding referendum, popularly known as Catalan Self-determination Referendum, held in 2014 had a maximum turnout of only 41.6% people of the Catalan government's initial data, of which 80.8% voted for Catalonia to become an independent state.

However, the provisional result revealed that a whopping majority of 91.6% of the voters wanted Catalonia to become an independent state in the form of a Republic. Nevertheless, there remains a lot to be done to implement the outcome of this referendum.

First and foremost, the Spanish Constitutional Court already declared the referendum illegal after it was challenged by Spain's central government. The Court cited the Constitution of 1978 which talks of the sovereignty of the Spanish people and the indissoluble unity of the Spanish nation in Articles 1 and 2 respectively. Moreover, this is not the first time Catalonia faced opposition from the judiciary. The Court, in 2010, discarded a change to the Constitution, that would have given the Catalan language, spoken by more than 75% of the Catalan population, a preferential status.

Furthermore, the Court also suspended Catalan parliament's session of Monday (October 9) where Catalan leaders were supposed to hint at declaring independence. But this order came after a challenge from Catalonia's Socialist Party that vehemently opposes separation from Spain, not the central government.



Additionally, the referendum in question has been accused of having a lot of irregularities. Provisional figures point out that there was a turnout of only 42.58% of the registered voters. The Catalan government, prior to the referendum, approved a law which stated that the result of the referendum would be binding with only a simple majority, without the requirement of a minimum turnout of voters. But the Catalan Statutes of Autonomy requires a two-third majority in the parliament for any change to Catalonia's status.

The ruling party pointed out to police brutality, arrests and seizure of ballot papers prior to the referendum as reasons for the low turnout of voters. However, with the opposition party and their supporters opposing this motion and the court ruling the referendum illegal, does Catalanian government have a way around? They have consistently maintained their stance that the referendum is their democratic right. The years of cultural and political subjugation under General Franco's regime and the current gap of 10 billion (almost 4% of Catalonia's GDP) between the amount the Catalans pay in taxes and what they receive in services in return from the central government are not unknown to all.

Nonetheless, the opposition party believes that a united Spain will make everyone better off economically. Besides, Catalonia's separation from Spain might also fuel other regions such as the Basques, from following suit, further threatening the autonomy of Spain. But even if the absolute majority wanted independence, how would they bypass the Constitutional Court's order?

In his paper titled 'Legality And The Referendum On Independence In Catalonia', Joan Vintró, Professor of Constitutional Law at University of Barcelona is of the opinion that currently, there are two mechanisms in the Constitution and the legislation under which the Catalan people can legally decide upon the question of creating an independent Republic: firstly, the referendum provided for in Article 92 of the Spanish Constitution; and secondly, the referendum on popular consultations recognised by the Catalan Act 4/2010.

But both of these are quite lengthy procedures and will require active participation of the Spanish and Catalan parliament, holding of dialogues between both the parties, full cooperation of the Constitutional Court and the support of the overwhelming majority of the Catalans, not a technical majority, to demand for an independent Republic.

On the face of present crisis, the best possible solution lies in honouring the democratic rights of the Catalans and their call for self determination in a peaceful manner, which will also serve as the best example for other states that may strive to gain independence in near future.

**Ali Mashraf**  
Student of Law, University of Dhaka

## BOOK REVIEW

### LAWS RELATING TO SEXUAL OFFENCES

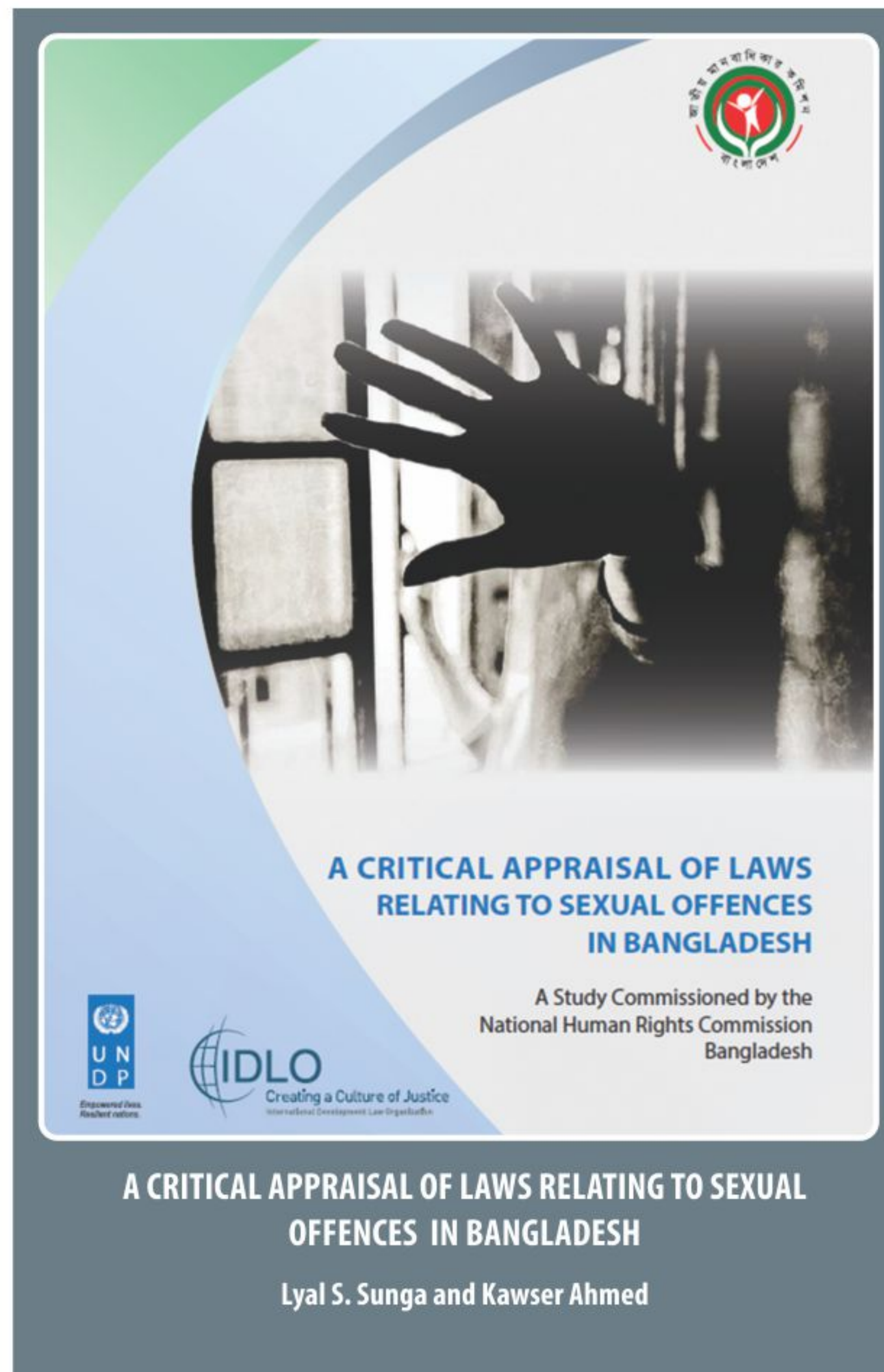
# NHRC study report advocates for reform

**EMRAAN AZAD**

**H**AVING noticed the high incidences of sexual violence in recent times, the National Human Rights Commission of Bangladesh (NHRC-BD) in 2015 published a Study Report titled, A Critical Appraisal of Laws Relating to Sexual Offences in Bangladesh (hereinafter 'the Study') jointly authored by Dr. Lyal S. Sunga, Special Advisor on Human Rights and Humanitarian Law, International Development Law Organization (IDLO), and Mr. Kawser Ahmed, Advocate, Supreme Court of Bangladesh. The Study mainly focuses on three fields of law, namely, the penal laws, the laws relating to medical examination and the law of evidence – all of which together form the mainstay of administration of criminal justice system relating to trial and punishment of sexual offences.

The Study attests a significant observation that sexual offences, according to the applicable penal laws in Bangladesh, mainly refers to rape which is understood as non-consensual penile cohabitation between male and female. As a result, the definitions of sexual offences in the penal laws are not only obsolete, but also too narrow in scope to address many other forms of sexual violence. The authors mark that this rigid approach has continued to be a dominant feature even in the recent laws of the country.

Besides definitional lacunae, the Study identifies 'medical examination' as the Achilles' heel of the entire legal regime concerning sexual offenses in Bangladesh. The Study reveals that despite being treated with high importance in many reported cases decided by the higher judiciary, there is almost no law that regulates medical examination procedure to be performed by the forensic experts. The Study unfailingly unveils that despite



much technological advancement with regard to medico-legal evidence, Bangladesh is yet to accommodate them in its legal framework.

As regards the laws of evidence, the Study argues that section 155 (4) of the Evidence Act, 1872 by allowing the accused to adduce evidence so as to prove immoral character of the victim has put the victim in an unequal position vis-à-vis the accused. The authors argue that the

matter in issue in such a situation should be the character of any alleged perpetrator, not that of the victim – because the allegation of rape relates not to the culpability of the woman, but to the perpetrator (p. 30). Another major feature of the Study is that it justifiably criticises the court's inclination to determine victim's 'consent' from 'injury marks' on her body.

That the existing penal provisions concerning sexual offences only recognise 'women' and 'children' as victims of sexual offences is also a noteworthy finding of the Study. The principal legislations, for instance, the Penal Code, 1860 and the Prevention of Cruelty to Women and Children Act, 2000 do not explicitly recognise transgender persons or hermaphrodites (commonly known as 'hijra' in Bengali) as possible victims of sexual offences. On the contrary, the worst aspect of the law is that these people can be prosecuted for sexual offences (e.g. sodomy under section 377 of the Penal Code). Apart from this, the Study could have shed light upon issues like rape leading to teen pregnancy or rape of disabled girls or women. It could have also discussed about the absence of legal provisions relating to reparations to the victims of sexual offences in Bangladesh.

The Study appends a list of cases decided by the higher judiciary – which will be immensely helpful for the researchers to work further in this area. In addition, the Study has recommended a number of reform proposals so as to address the lacunae of the prevailing laws relating to sexual offences in Bangladesh. It is hoped that the lawmakers of the country will pay due attention to these reform proposals.

**THE REVIEWER IS LECTURER IN LAW, BANGLADESH UNIVERSITY OF PROFESSIONALS (BUP).**