

# Does culture and tradition always undermine women's human rights?



**LAW OPINION**  
**MOHAMMAD GOLAM SARWAR**

THE (in)compatibility of women's human rights and custom, culture and tradition is one of the contested areas where women's rights have historically been and continue to be mediated through cultural practices. While some proponents argue that culture and tradition undermines women's rights, some others favour the culture and tradition that protects women's human rights. The association of women with culture and tradition is important because women are often associated more closely with the idealisations of cultural traditions than men in a given society. While women getting excluded from public spheres of work and politics, are found to be more traditional and home bound, men by virtue of employment opportunities and migration may abandon their traditional practices. So it is the societal structure and opportunities made and enjoyed by men that create a 'cultural' subordination of women undermining their rights. The cultural and traditional factors that perpetuate discrimination and hamper women's human rights are not only confined to traditional communities and societies rather the practice of patriarchal norms that are found everywhere including the western cultures. Throughout the world there are numbers of cultural practices mostly in the family, which are sanctioned by dominant ideologies and perpetuated by social and state structures, curtail and regulate the human rights of women. These harmful cultural and traditional practices successfully bypass the national and international scrutiny because they are justified in the name of 'tolerance' and 'respect' towards culture. The harmful

traditional and cultural practices include among others: female genital mutilation (FGM), honour killings, discriminatory marriage practices, son preference, widowhood rituals etc. Besides these practices there are also a good number of cultural practices that undermine the rights of women such as witch hunting or

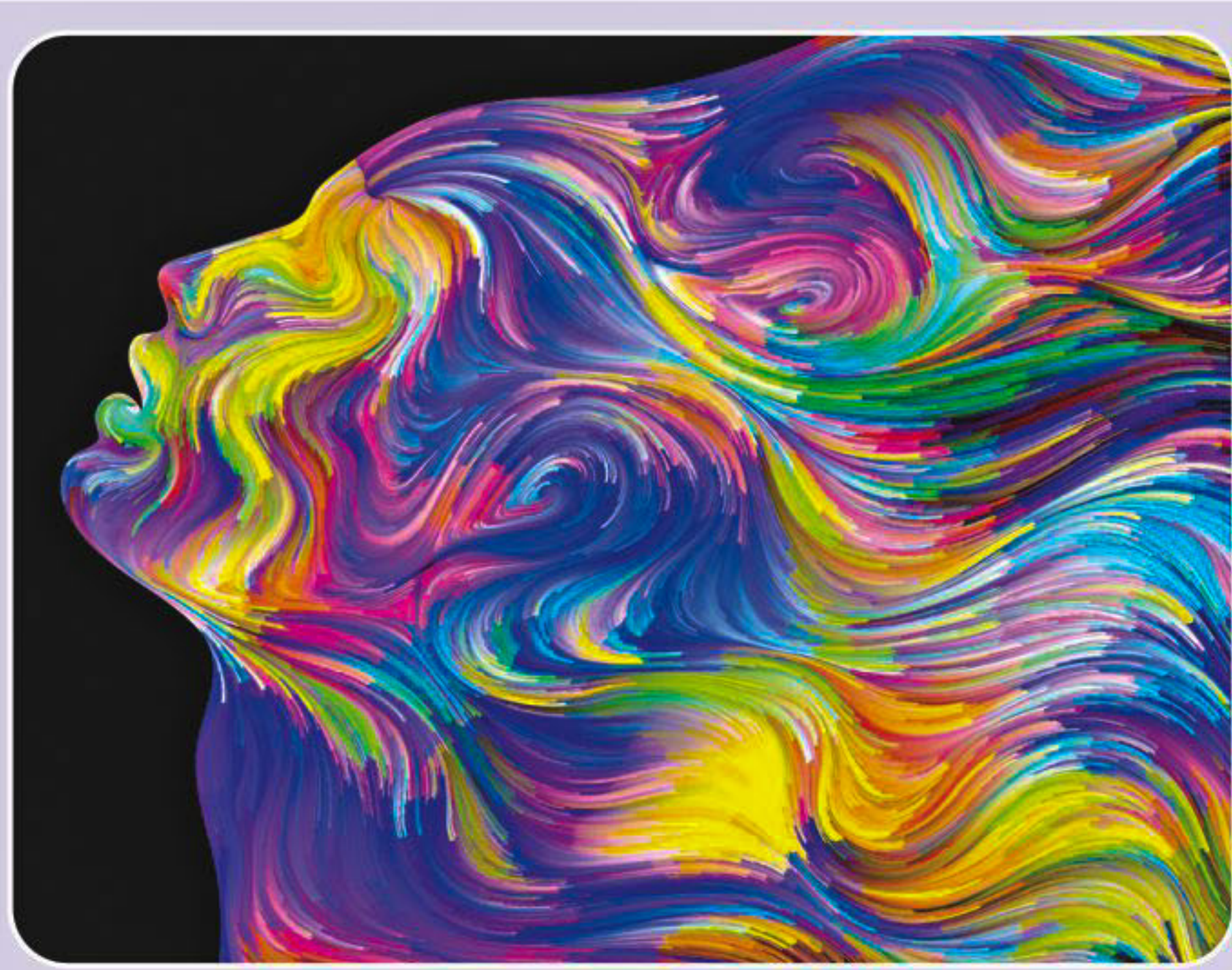
state to ensure enhanced participation of women in the formulation of cultural policies at all levels. While not condemning the culture, this provision recognises the potential of culture and its underlying necessity in order to ensure equal participation of women in the decision making.

been questioned. This opposing view of culture and rights indicates that with a view to realising women's rights, the moral codes and practices that they abide by have to be displaced first. This approach also implies the narrow interpretations of culture that assume the customs and traditions to be natural and unchangeable.

better tool to protect women from rape. Furthermore, the cultural concept of *cura personalis* (care for the person) is being used as an asset to address gender violence in various (*Jesuit*) colleges and universities in the United States. This cultural tradition is dedicated to provide students with a caring and supportive environment for the person and the community affected by gender violence. With a view to redressing the suffering of women in the aftermath of sexual assaults, this culture of caring reminds all the members of the community about their shared responsibility to care for each other particularly for the victims and survivors. It is worthy to mention that in the context of Bangladesh, Domestic Violence (Prevention and Protection) Act 2010 contains extensive provisions to ensure proper care and support for the victims of domestic violence.

It would be an exaggeration to conclude by saying that custom, culture and tradition 'always' undermines women's human rights, though it is undeniable that culture is often used as an excuse to justify the violation of rights of women. The polar opposition of culture and women's rights without leaving any common ground hampers both the discourses by perpetuating injustice against women in the name of culture on the one hand and diminishing the potentials of a positive culture on the other hand. Culture demands to be fashioned in a dynamic and unritualised way while examining the linkages between its positive elements and the emancipation of women. Culture and tradition, being abstract things, cannot go on its own way rather shaped by human agencies, who are responsible to construct and (re) interpret the plurality of a culture considering relevant socio-economic circumstances.

THE WRITER TEACHES LAW AT THE UNIVERSITY OF DHAKA.



*Culture contains potentials that can be used as emancipatory tool to improve the quality of women's lives and to expand the domain of rights as well. The importance of using culture as a tool for realising rights is expanding with the rapidly changing socio-economic lives of people.*

burning, caste, dowry, incest, and practices that violate women's reproductive rights.

While this is true that cultural practices and attitudes undermine the rights of women in most of the cases, it is also improper to deny the rights of women to live in a positive cultural context. In this regard, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the Maputo Protocol) contains a provision obliging the

The Maputo Protocol deserves significance on the ground that while the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) only refers the negative aspects of culture, the protocol contains both negative and positive aspects of culture. The reason behind the emphasis on positive culture is that if we see 'culture' and 'rights' as polar opposites, then there remains no possibility of common ground and this approach has

However, culture also contains potentials that can be used as emancipatory tool to improve the quality of women's lives and to expand the domain of rights as well. The importance of using culture as a tool for realising rights is expanding with the rapidly changing socio-economic lives of people. The customary practice called *bulubulu* in Fiji was being used to reconcile differences outside the courts and considered as a

**LAW INTERVIEW**

## Positive discrimination can ensure gender balance

Professor Dr. Shahnaz Huda has been teaching law at the University of Dhaka since 1989, specialising in personal and comparative family laws, gender and child rights issues. Professor Huda obtained her Doctorate from the University of East London, UK in 1996 and recently completed a post-doctoral research at the School of Oriental and African Studies (SOAS), University of London, UK as a Commonwealth Academic Fellow on family law in South Asia. Her one of the research works titled *Combating Gender Injustice: Hindu Law in Bangladesh (Dhaka: SAILS, 2011)* is referred to as the basic reading material in many law schools of the country. On International Women's Day 2019, Psmhe Wadud and Md Azhar Uddin Bhuiyan from Law Desk talk to her on the following issues:

**Law Desk (LD):** The theme for this year's women's day is 'Balance for Better'. Please share your thoughts on this.

**Shahnaz Huda (SH):** I think we have reached a point of time when it goes without saying that gender balance has been a crucial issue of the present world, specially in the case of Bangladesh where 50% of the population is the women and we have already seen that they are contributing to the economy of the country. Hundreds and thousands of women are working as domestic workers in the city and the sole responsibility of looking after their families lie with them. The religious laws that tend to favour men over women in most cases regarding inheritance are based on the presumption that men will maintain. This is, however, is not the case and that is why we are increasingly seeing women-headed households. Therefore there needs to be a balance in every sphere. For example, the law which was made for the maintenance of parents is uniform and secular and imposes responsibility to maintain parents on both children of both the sexes. But without changing law of inheritance, where you don't give women equal rights and portions in property, how can you expect them to maintain their parents? In this age, this should not even be an issue. Having said that, in our context there has to be a lot of proactive



These laws are so archaic in Bangladesh that we really need to rethink their efficacy in the changing social context. In essence, there is a two-fold wrong in the adultery provision as it appears in our penal law. One is the fact that only the husband can sue another man with whom the former's wife happens to be in an alleged illicit relationship. This means that the law implicitly is saying that a woman does not really have the sexual agency and also that the husband has the sole authority to sue the other man. There has to be a balance in this respect as well. This is not only

law will never be able to fulfil its purposes. Criminal justice is intertwined with numerous issues such as witness protection, procedural stringency, culture (or presumption at best) of political and economic impunity. Without addressing these root causes, making stringent laws cannot bring any fruitful result.

**LD:** In light of your extensive work on comparative family laws of South Asia, do you think the family laws of Bangladesh, as it stands today, can properly address the concerns of women in this modern world?

**SH:** I want to say there are people who want to follow the religious laws and I do not think we have reached a state in our country to have a uniform family code. India has directive principle in their Constitution to adopt and enact a uniform family code but they have still not been able to do it. I think in our context there should be an option where people can choose if they want to follow their own religious laws or if they want to go on following a secular code in place.

**LD:** Do you think time has come for Bangladesh to reconsider its reservation to the respective CEDAW provisions?

**SH:** Bangladesh has no reservation in many of the provisions of CEDAW which are not being followed, e.g. guardianship and custody, right to decide in family matters. Unfortunately we have reservations to one of the provisions of CEDAW which is intricately connected with the objective and purpose of the law, i.e. Article 2. But if you go through the provision, Bangladesh has already fulfilled its obligations regarding many of its elements, e.g. constitutional equality between man and woman (mindful of the fact that constitutionally there is also bar to equality in respect of personal laws). Unless we change the laws relating to dissolution of marriage, Bangladesh being a dualist country, removing reservations does not really imply anything substantial. Now we really need to slowly rethink some provisions governing personal matters. People are now accepting the fact that women can have the right of divorce through the *nikah-nama*. I think Article 28(2) of the Constitution may be interpreted in a way which does not confine equality to only public life and state.

**LD:** Thank you for your time.  
**SH:** Thank you.

**RIGHTS CORNER**

## MENSTRUATION HYGIENE MANAGEMENT

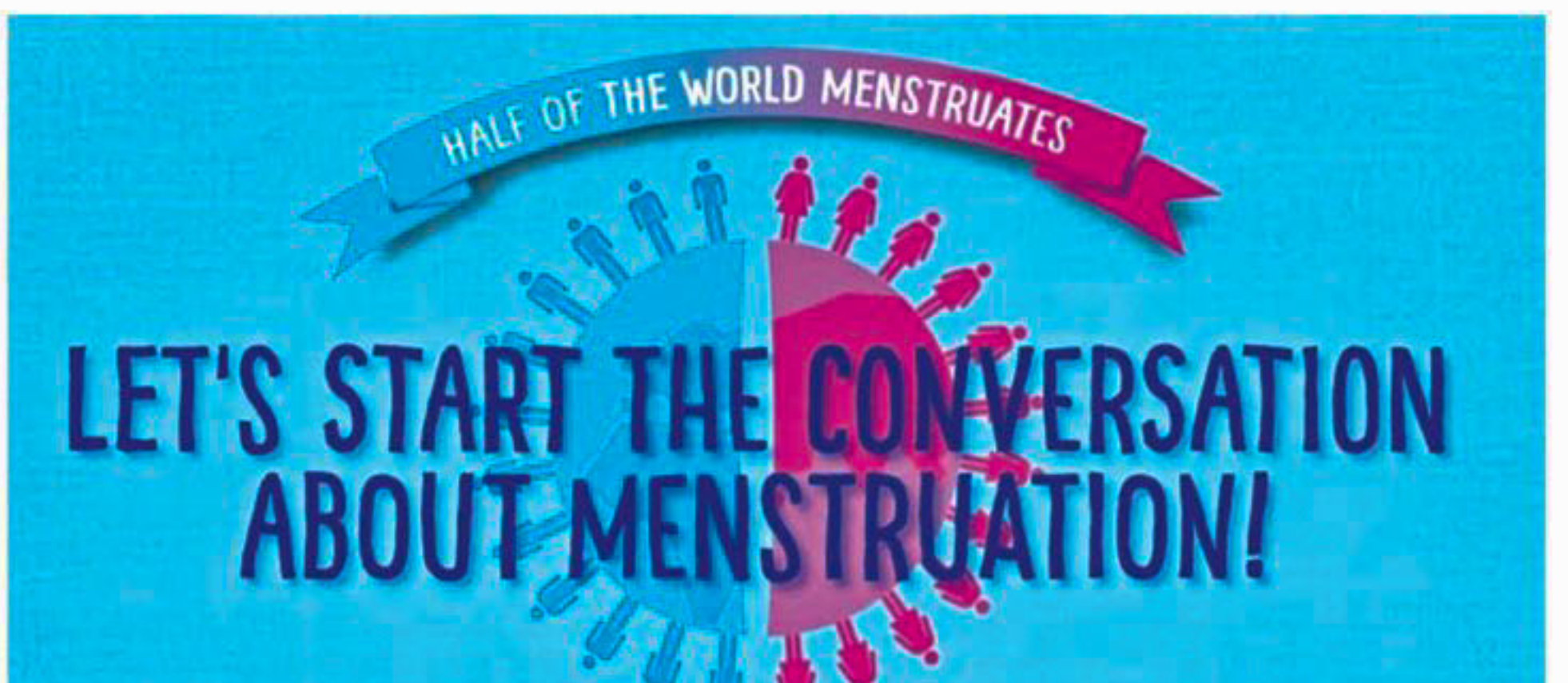
### How far a constitutional right?

SHAHRIMA TANJINA ARNI

**M**ENSTRUATION is painful, socially awkward, quite expensive and most of the time very problematic to manage for the girls and women who experience them. According to the WHO-UNICEF Joint Monitoring System, when people in menstruation are able to use sanitary materials to absorb menstrual blood, change and dispose of these materials in privacy as needed, and have access to soap and water to keep clean is known as menstrual hygiene management (MHM). Thus, there is a two-fold challenge to ensure proper MHM for girls and women around the globe. Firstly, the ability to buy sanitary products, specially in countries where menstruation itself is a taboo and a tool to stigmatise young girls and

sex is reflected in. Thus, when a girl is deprived of her right to education and work solely due to a basic biological process which is not naturally controllable by her and is particular to her gender only, it results into gross violation of her constitutional right to equality as well as her basic human rights as guaranteed under the Constitution of Bangladesh and the international instruments on Human Rights.

While adjudicating the rights as mentioned above we are mainly faced with three challenges. Firstly, such right requires the State to provide services as opposed to traditional negative obligation. Secondly, it is beyond what was contemplated by the makers of the Constitution and thirdly that it raises questions as to the extent up to which the State can be held accountable in the backdrop of implementation



as a result of which parents are not very likely to spend money over sanitary napkins and the girls are never vocal about it. Secondly, the lack of access to safe toilets with cleans water, soap and baskets where she can manage her menstruation with dignity and privacy. Already struggling with scarcity of sanitary products, girls are most likely to skip schools, colleges or universities during their menstrual cycle, directly affecting their right to education. This complex relationship between MHM and gender justice leads us to address the issue whether MHM is necessarily a feminine concern.

Article 26 of the Universal Declaration of Human Rights (UDHR) dictates that everyone has a right to education and similar goals have been reiterated in the Constitution of Bangladesh as a Fundamental Principle of State Policy (FPSP). Article 19(3) of the Constitution of Bangladesh positively obliges the State to ensure equal opportunities and participation for women in every sphere of national life. Thus, when 41% of the school going girls in Bangladesh do not attend classes during their menstruation and 73% women miss their work for an average 6 days a month for infection caused by unhygienic menstrual management, can the State be held responsible for failing to address and remove the barriers to equal participation of women in education and work?

Article 19 of the Constitution of Bangladesh, which provides realisable safeguards against gender-based discrimination, reflects its reliance on the Article 2 of the UDHR which provides that everyone is entitled to their rights without discrimination based on distinctions like one's

challenges. Recently, a somewhat middle ground, positively balancing the above challenges was envisaged by the Delhi High Court. The Delhi High Court issued notice in a public interest litigation which acknowledged that the State has violated the right to education by failing to address barriers to education that are particular to a gender.

But such a right being necessarily a FPSP as per the Constitution of Bangladesh, can the apex court in Bangladesh hold the State responsible? The answer can be drawn from South African constitutional concept of "minimum core" under the ICESCR. It recognises a minimum core obligation on part of the State for realisation of social and economic rights and exempts the State only if it can demonstrate that "every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations." Thus, it is high time the Bangladeshi courts determine and recognise whether MHM is a barrier in realisation of the right to equality and to live in dignity as women and in equal footing with their male counterparts and whether the right to MHM is necessary in realisation of the right to education as envisaged in the Constitution of Bangladesh as well as the international instruments on Human Rights. Such a step is undoubtedly required to be taken by the apex court which resulting into a concrete right of the citizens to positively bind the State.

THE WRITER IS A STUDENT OF LAW, UNIVERSITY OF DHAKA.



positive discrimination to ensure balance amongst genders.

**LD:** How do you see the provision on adultery appearing in the Penal Code of 1860? Can we call it discriminatory?

**SH:** The adultery provision in the Penal Code 1860 should be reconsidered just as section 377 should also be reconsidered. The Penal Code was drafted and enacted by the British and we need to see how they have developed their penal laws after that.

degrading for the woman involved, rather is discriminatory towards the other man as well.

**LD:** Despite having stringent laws in place, we do not see a hopeful conviction rate in rape cases. How do you evaluate this trend?

**SH:** The main purpose of a penal law is not properly served if they are not properly implemented. If the parliament makes stringent law but people believe that they will get away with any crime, the