What changes does the recent ordinance make to our law on violence against women?

'JUSTICE' IN PRACTICE

TAQBIR HUDA

ON 13 October 2020, our central law dealing with violence against women, i.e. Nari o Shishu Nirjatan Daman Ain 2000 (Women and Children Repression Prevention Act 2000) was amended for the second time since it was enacted, by an ordinance. There are five key changes that the ordinance makes to the 2000 Act that are worth discussing.

Firstly, it reintroduces the death penalty as the maximum punishment for single perpetrator rape. This has easily been the primary focus of the amendment in both parliament and public discourse. However, the nuance that this discussion was lacking is the recognition that death penalty was already prescribed for rape leading to death and gang rape under section 9 of the 2000 Act. So the one form of rape which did not have the death penalty as the maximum punishment under the 2000 Act i.e. single perpetrator rape, also has it now.

Secondly, and perhaps less discussed, the amendment also introduces the death penalty as the maximum punishment for even attempt to cause death or hurt after committing rape under section 9(4)(a) of the 2000 Act. Previously the only punishment for this offence, like single perpetrator rape, was life imprisonment.

Thirdly, it makes a small but significant linguistic correction to section 9(5) of the 2000 Act, which deals with custodial rape, by replacing the word "*dayi*" (responsible) with "*dayprapto*" (in charge). Before the amendment, section 9(5) read: "If while in the custody of the police any woman is raped, then those whose custody in which the rape took place, that individual or those individuals who were directly responsible (*dayi*) for the woman's [safe] custody, they or each of them, if not proved otherwise, for their failure in [ensuring safe] custody, shall be liable to imprisonment for a term not exceeding ten years, but not less than five years rigorous imprisonment, and a fine not exceeding ten thousand taka." The word "*dayi*" (responsible) has now been replaced with "*dayprapto*" (in charge).

Fourthly, it makes dowry violence leading to simple hurt a compoundable offence (meaning it can be settled out of court). This change is quite significant because this is the first time that an offence under the 2000 Act is being treated as compoundable. Typically petty crimes like theft and defamation are considered compoundable offences to allow victims the flexibility of settling the matter out of court, usually for a sum of money. The 2000 Act dealt with some of the most severe forms of violence against women and children which were initially thought to not be compoundable. Section 11 of the 2000 Act, which deals with dowry violence, categorises the offence into three, by the level of harm that has resulted: death, grievous hurt and simple hurt. The least severe form of harm i.e. simple hurt, is now going to be compoundable. Certain lawyers fear that this may mean that victims seeking justice for dowry violence which led to grievous hurt may be forced to settle the matter out of court with their injury being treated as simple hurt instead.

Fifthly, the ordinance brings focus to the importance of medically examining the accused, and not just the victim-survivor. To this end it introduces mandatory DNA testing of both the survivor and the accused according to the provisions of the DNA Act 2014. However, in doing so it states that this test may be done "with or without their consent", which appears to mean that even if a victim survivor refuses to a DNA test, they may still be compelled to undergo it. This of course raises important concerns about a victim-survivor's agency. Interestingly, consent is a prerequisite to DNA testing under the DNA Act 2014 itself. Section 6 of the 2014 Act, for instance, states that no DNA sample shall be collected (for investigation purposes) from any person under the Act, without obtaining the written consent in the presence of a minimum of two witnesses. The only two exceptions to this rule are: for those considered legally incapable of giving consent (e.g. minors), in which case their guardians would consent on their behalf and DNA testing through court order, where consent of the person would no longer be needed. Therefore, the amendment appears to bypass the general rule of consent being a prerequisite for any form of DNA testing.

The ordinance does not introduce a non-discriminatory definition of rape, which would also recognise male rape, rape of hijras and marital rape, as we needed it to. It does not introduce a survivor and witness protection system drafted by the Law Commission 14 years ago, as we it needed to. It does not prohibit defence lawyers from raising questions about a survivor's character in court by repealing section 155(4) of the Evidence Act 1872, as we needed it to. It does not allow judges to have sentencing discretion for rape so the basic principle of proportionality of punishment could have been ensured, as we needed it to. It does not grant rape survivors the right to seek compensation for harm, as a matter of right, from court and a state compensation fund, as we needed it to. It is not the reform we needed, but the one we ended up with.

Notably, since these changes were made by an ordinance and not an Act of Parliament (since parliament is not currently in session), Article 93 of our Constitution requires it to be laid before parliament at its first meeting following the promulgation of the ordinance. The ordinance will cease to have effect at the expiration of 30 days after it is so laid, or, if and when a resolution disapproving it is passed by parliament before the expiration period. Therefore, once the ordinance comes under parliamentary scrutiny, one may hope that it thinks to implement reforms which are actually necessary to end impunity for rape, as have been suggested by relevant experts for a while now.

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Milton Friedman versus stakeholder capitalism

JOMO KWAME SUNDARAM

MILTON Friedman was arguably the most influential economist of the second half of the 20th century, associated with promoting "neo-liberal", free-market, shareholder capitalism.

Friedman's monetarist economics is now widely considered irrelevant, if not wrong, especially with the low inflation associated with "unconventional" monetary policies following the 2008-2009 global financial crisis.

Friedman's doctrine challenged

Nevertheless, Friedman's "shareholder capitalism" doctrine remains influential in most financial markets, especially emerging ones in the developing world.

His doctrine, prioritising short-term profit maximisation, has long dominated Anglo-American corporate governance despite chatter about "stakeholder capitalism" and "corporate social responsibility" (CSR).

Chicago University's Raghuram Rajan claims that long-term share value maximisation can advance almost everybody's long-term interests.

But even Glenn Hubbard acknowledges that long-term shareholder-value maximisation cannot address many problems faced by firms, let alone societies. Having served George W Bush's conservative administration, he recognises the need for public policy interventions.

Friedman's shareholder primacy principle can also become absurd. Rajan's former co-author Luigi Zingales argues, "if you take Friedman to an extreme, I should sue a CEO who doesn't buy off all the members of Congress".

More importantly, Zingales points out that corporations have duties as public institutions with special privileges granted by the state such as "limited liability, especially with respect to tort claims, is an extraordinary privilege granted by the state", implying reciprocal obligations.

Friedman's manifesto insisted that companies focus on making money, leaving ethical matters to individuals and government. US law enshrines shareholder rights as owners able to challenge or replace boards whose members stray from their fiduciary duty.

Stakeholder capitalism?

Friedman vehemently opposed stakeholder capitalism, whose proponents argue that companies have responsibilities to all stakeholders, not only shareholders, but also employees, customers, society and even nature.

He argued that "stakeholders", typically ill-defined, will insulate directors from shareholders, reduce their accountability, and compromise corporate performance. This would allow executives to pursue their personal priorities or cover up their own failures.

A trader signals an offer in the Standard & Poors 500 stock index futures pit at the CME Group December 14, 2010 in Chicago City. PHOTO: SCOTT OLSON/AFP

Straying from Friedman's singular focus on profit maximisation would mean that corporate executives are no longer loyally and exclusively serving shareholders, worsening the "principal-agent" problem.

For Friedman, government and other stakeholders should not be allowed to interfere with shareholder corporate governance in any way, or worse, undermine incentives for investors to risk their capital. In his doctrine, profit alone should be corporations' sole motive.

Joseph Stiglitz has noted that US courts have ruled that firms are obliged to maximise profits and shareholder value, excluding all other objectives. Hence, "stakeholder capitalism" is not rooted in US law as corporate executives are not accountable by law to the communities in which they operate, or even to society at large, let alone to nature.

What a wonderful world?

Friedman also presumed market imperfections did not exist, or would be fully taken care of by regulation. However, the rule of law has never really been adequate to such challenges.

Thus, he effectively gave companies "moral cover" to be ruthless, free and unregulated to pursue their own interests, at the expense of the public good, while not worrying about society's larger interests.

Friedman also criticised business leaders for straying from maximising profits and worrying about their public image, the social good and public welfare.

While dismissing talk of stakeholders as attempts by company directors to be free to run companies as they like, and for public relations, Friedman approved of companies that "generate good will as a by-product of expenditures that are entirely justified in its own self-interest".

But he was conspicuously silent about business interests lobbying, rigging elections, making campaign contributions, compromising research and public discourse, while reputation laundering with philanthropy and public relations.

Friedman's world view is remarkably simplistic, typically ignoring broader, "longer term" consequences. For him, business efficiency—due to shareholder primacy, not undermined by company directors, managers, government taxes and regulations—can and will solve all problems.

Stakeholderism challenged

Friedman's neoliberal "doctrine" shaped major economic reforms the world over from the 1980s until the 2008-2009 global financial crisis. Lacklustre growth since then has given rise to various new challenges to shareholder capitalism, not least in the name of other stakeholders, and appeals for corporate governance reform and CSR.

Multi-millionaires, even some billionaires and chief executive officers (CEOs), have joined the dissent, whom influential businessman writer Andrew Ross Sorkin would have us believe represent the future.

To be sure, many have undoubtedly turned away from Friedman's thinking in recent years.

In 2019, the influential Business Roundtable, which had long advocated shareholder primacy, issued a pro-stakeholder statement. It replaced its Friedmanite Statement on the Purpose of a Corporation with "a fundamental commitment to all of our stakeholders".

A few months later, the World Economic Forum issued a similar 2020 Davos Manifesto, embracing stakeholder as well as environment, social and governance (ESG) principles.

Nevertheless, legendary investor Warren Buffett remains sceptical of "purpose-over-profit" stakeholder advocacy. "In representing your interests, business-savvy directors [will] seek managers whose goals include delighting their customers, cherishing their associates and acting as good citizens of both their communities and our country."

Meanwhile, most advocating a stakeholder approach to corporate governance argue that considering the interests of employees or other stakeholders is good for company profits and shareholders. Yet, they privately acknowledge that profits must come first, even if they feel constrained to say so in public.

Corporate social responsibility?

Some argue they are defending capitalist free enterprise in the long term by having a "social conscience" and taking responsibility for providing employment, avoiding pollution and pursuing other trendy CSR reforms, ostensibly in companies' "enlightened self-interest".

Others insist that many contemporary problems are too urgent for slowly meandering political processes. Instead, they argue, CSR "is a quicker and surer way to solve pressing current problems".

CSR is said to be a useful, if not necessary complement to government policy and regulation. Friedmanite critics object that CSR involves spending shareholder money for a typically vague public interest, reducing company returns and spending "other people's money".

Friedman warned that the doctrine of "social responsibility" would take over if not checked. But the converse is more true today as "greed is good" and the "short-termist" shareholder mentality is clearly hegemonic.

Others object that CSR involves the "socialist" view that political, not market mechanisms are better for allocating scarce resources to alternative uses. But CSR has also been invoked to justify wage curbs against trade union demands, ostensibly for some higher public purpose.

CSR has also been invoked when philanthropy and charity have been abused to minimise tax liability, and for public relations and marketing, e.g., by "greenwashing" products and services.

W(h)ither capitalism?

Embarrassingly, US corporations that signed the "stakeholder capitalism" statement have been more likely to lay off workers in response to the Covid-19 pandemic, and less likely to donate to relief efforts.

With growing opposition to neoliberal capitalism, "stakeholderism" and CSR have been invoked to save capitalism by offering a more sensitive "human" face.

As capitalism may well be the only "show in town" for some time to come, popular demands for more thoroughgoing reforms, checks and balances are likely to grow as the realities of stakeholder capitalism and CSR become increasingly apparent.

Jomo Kwame Sundaram, a former economics professor, was United Nations Assistant Secretary-General for Economic Development, and received the Wassily Leontief Prize for Advancing the Frontiers of Economic Thought.
Courtesy: Inter Press Service

ON THIS DAY IN HISTORY

NOVEMBER 8, 2013
Philippines struck by Super Typhoon Haiyan

On this day in 2013, the Philippines endured what many consider its worst natural disaster when the country was struck by Super Typhoon Haiyan, one of the most powerful cyclones ever recorded to strike land.

CROSSWORD BY THOMAS JOSEPH

ACROSS
1 "Little Caesar" role
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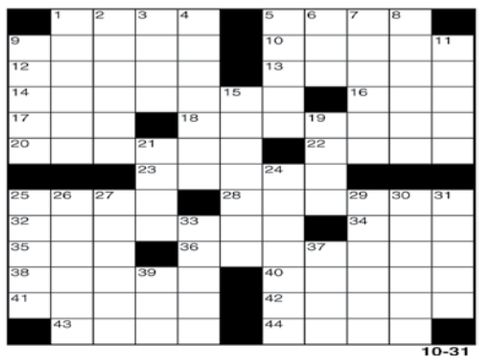

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YESTERDAY'S **ANSWERS**

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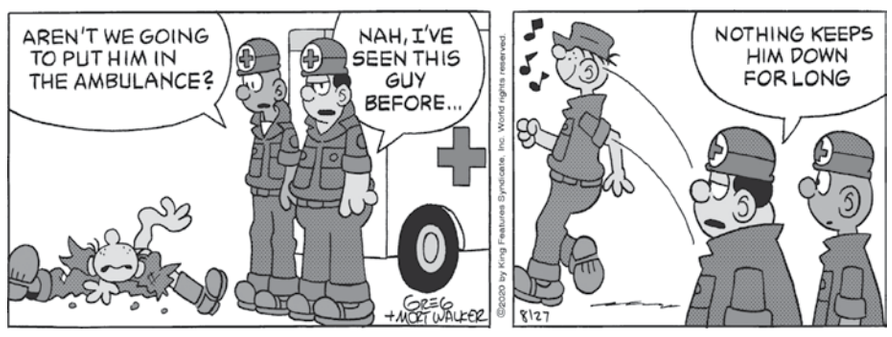

BABY BLUES BY KIRKMAN & SCOTT