

LAW INTERVIEW

Preventing domestic violence: Alongside laws, training and sensitisation of the duty bearers are equally important

Ms. Taslima Yasmin teaches at the Department of Law of the University of Dhaka and is a legal researcher on issues around gender and law. In the light of some recent incidents relating to violence and discrimination against women and to look back at 2020 and what it meant for gender equality, Law Desk talks to her on the following issues.

Law Desk (LD): How do you evaluate the recent judgment of the High Court Division declaring that women cannot act as Nikah Registrars?

Taslima Yasmin (TY): Registration of Muslim marriages is generally done as per the provisions of the Muslim Marriages and Divorces (Registration) Act 1974. This Act is applicable for the registration of the marriage and not for solemnisation of marriages. Section 5 of the Act read with the 2009

Neither the laws, nor the government notice upon which the applications to be Nikah Registrars were made, include any provision disqualifying women from performing the role of a Nikah Registrar. Our Constitution guarantees equality of opportunities and protection of law for all citizens and prohibits discrimination between genders.

observation that the main functions of the Nikah Registrar is to conduct marriage ceremony and register the same is not supported by the legal provisions on the matter.

Further, the High Court Division also stated that as most marriages are conducted in mosques, it will not be possible for women Nikah Registrars to enter the premises when they menstruate. Menstruation does not affect the task of registration of marriage as required from the nikah registrars under the law. If the nikah registrar chooses not to solemnise the marriage due to religious reasons, she can easily get the marriage solemnised through a local Mosque's imam or any of her office assistants. In practice, we also see that many a times, office assistants of a nikah registrar solemnises a marriage. Neither the laws, nor the government notice upon which the applications to be Nikah Registrars were made, include any provision disqualifying women from performing the role of a Nikah Registrar. Our Constitution guarantees equality of opportunities and protection of law for all citizens and prohibits discrimination between genders. It is expected that our apex Court will play their part in strengthening the

legal position against inequality and discrimination.

LD: Protecting the privacy of the victims of sexual violence remains a huge concern in the social landscape of Bangladesh. What are the causes and remedies for this?

TY: These days, the culture of analysing and sensationalising a case through social media platforms have become widespread. However, we must be careful about the extent to which this is done and the impact it may have on the legal proceedings as well as on the victims in question. In our society, matters like premarital sex are already stigmatised, as such in case of a victim of sexual violence, when uncontrolled deconstruction of the case is allowed in social and public media—these discourses often result in victim blaming. Also, public opinion may sometimes unfairly influence outcome of a case and as such it is important to understand when to draw the line when social media users or other media agencies publish news about any ongoing investigation.

The media, having the most significant role in forming public opinion, should exercise more caution when reporting instances of sexual violence. It is also crucial to keep in

mind that the complainant's right to privacy is respected – Section 14 of the Nari O Shishu Nirjatan Daman Ain 2000 states that media shall not publish the identity of the victim. However, the implementation of this provision is practically impossible as victims or their families are often not in the condition to make complaints against unlawful publication of news materials containing identity of the victims. The Bangladesh Press Council or other regulatory bodies should formulate guidelines on how to report these incidents while respecting the rights of the parties.

The concerned officials having the authority to investigate the matter should also act more responsibly when sharing sensitive information about an ongoing case. Information or statements made in public platforms by authorities may get wrongly interpreted, paving the way for further shaming and blaming of the victim and her family.

LD: Although incidence of domestic violence has gone up greatly in 2020, why do you think the laws have been ineffective?

TY: We do have a number of laws; however, enacting laws is not the ultimate solution, implementation of these laws needs greater attention. We need mechanisms to ensure proper monitoring and evaluation of the laws to understand how the law is working or the challenges the law is facing in terms of its enforcement. Moreover, allocation of proper funding is extremely crucial to implement these laws. When it comes to issues around violence against women, we have seen that the budget generally remains inadequate. Although the Domestic

Violence Act 2010 has some positive aspects in that it recognises the concern that victims do not always want to break off the marriage and want civil remedies aside the existing criminal remedies, the law is poorly enforced. The Act heavily relies on the proper functioning of various implementing agencies, but resources are scarce in terms of training of these implementing stakeholders. Without increased budget allocation, these laws may remain only on paper. The lack of state protection and shelter homes, together with lack of livelihood opportunities for victims of domestic violence perpetuate their victimization within homes, despite having protective laws. Alongside laws, training and sensitisation of the duty bearers are also equally important.

LD: How do you evaluate the overall efforts of involved stakeholders in tackling gender-based violence during the COVID-19 pandemic?

TY: To my understanding, in our national strategies and actions to tackle the crisis caused by the pandemic, there was a relatively low attention to issues of gender based violence and harassment. We must remember that in the post-COVID context, women will be disproportionately affected – women are more likely to lose jobs in the post-COVID economy and are also likely to face increased instances of domestic violence as more people lose their jobs and are confined within homes. Existing issues such as workplace harassment is likely to receive even lesser attention by the employers. These realities must be taken into consideration while we prepare ourselves to face the challenges of the post-COVID Bangladesh.

LD: Thank you for your time.
TY: You are welcome.



Rules make it clear that solemnising the marriage ceremony and registering the marriage are distinct functions – as such, the High Court Division's

LAW VISION

The need for a comprehensive definition of rape

M S SIDDIQUI

Bangladesh follows a 150-year-old definition of rape given in the Penal Code, 1860, which happens to be a colonial holdover. Section 375 of the Penal Code defines rape along this line: A man is said to commit 'rape' who, has sexual intercourse with a woman under circumstances falling under any of the five situations. The Code restrictively defines rape to mean only penile-vaginal penetration, even though rape, in real life, may include an array of violent actions, including, but not limited to penile-vaginal penetration.

The Penal Code also states that penetration is sufficient to constitute sexual intercourse which is a necessary element of the offence of rape. Nari O Shishu Nirjatan Daman Ain 2000 lays down that the definition of rape shall be what the Penal Code provides. Neither of the laws defines penetration or illustrates the concept of consent. In addition, rape of women and female children happen to be the only recognised form of rape under the governing laws. The definition does not encompass sexual violence against men, male children, and transgender persons. The concept of marital rape is entirely out of purview of the laws.

The jurisprudence of consent is not linear and has many complexities. For instance, when a man and a woman are romantically involved and have sexual intercourse, it happens with consent of both sides. However, it can also happen that there is consent at the beginning of the sexual relationship but later one of the partners revokes/withdraws consent to its continuation and nonetheless, the other one uses force and abuse. In this situation, what began as a consensual sexual activity, gets transformed into rape. In essence, there must be illustrations (if not a definition *per se*) that may render the concept of consent legally comprehensible.

The Rape Law Reform Coalition, a body comprised of 17 rights organisations, have tabled 10 demands, and the death penalty is not one of them. It aims to identify gaps in the legal and institutional framework that prevent justice for rape victims/survivors, and to formulate clear and specific reform proposals.

They are demanding a definition of rape to cover all forms of non-consensual penetration, irrespective of gender of the perpetrator or the victim/survivor. The definition of 'penetration' for the purposes of determining rape, is demanded to include penetration by use of 'objects' or any part of

the perpetrator's body.

They demand that the term 'child' under the Nari O Shishu Nirjatan Daman Ain 2000 include male children. They also demand that a Victim and Witness Protection Act according to the draft prepared by the Law Commission in 2006/2011, (for institutional protection, emergency shelter, livelihood support, psycho-social support, and protection of identity or relocation as required, of victims/witnesses) is put in place and that protection is continued until the victim's and witness's safety is no longer threatened.

The coalition also demands that the laws enable judges to exercise discretion in sentencing by taking into account both mitigating circumstances (such as the age or mental health of the accused) and aggravating circumstances (such as the use of weapon, force or violence and the ensuing permanent physical or mental impairment of the victim/survivor) and formulate necessary sentencing guidelines which can ensure proportionality of punishment.

An amendment is a must to be brought to Section 155(4) of the Evidence Act 1872 to abolish admissibility of character evidence

of complainants in rape trials. The manner of examination and cross-examination by defence lawyers about penetration and consent in most cases goes against the basic standards of criminal justice and

human rights. The lawyers try to prove the victim as 'characterless' or habituated in sexual relations. The defence lawyers should not ideally be allowed to ask humiliating or degrading questions during cross-examination of rape complainants. Unfortunately, the media and society also blame the victims encroaching indirectly on an array of rights of the victims/survivors in question.

Keeping all these gaps in law where they are and introducing death penalty can prove to be counterintuitive. Bangladesh needs, more than anything, a definition of rape encompassing coerced sexual intercourse, sexual assault, sexual violence to legally address rape. Instead of death penalty, Bangladesh therefore may consider to re-define rape to ensure that all forms of non-consensual penetration are covered by it, irrespective of gender of the perpetrator or the victim/survivor. The definition of rape should reflect that consent may be revoked at any point and that the absence of proof of force or physical resistance does not necessarily establish consent in any case.

THE WRITER IS A LEGAL ECONOMIST.

YOUR ADVOCATE

This week Your Advocate is Barrister Omar Khan Joy, Advocate, Supreme Court of Bangladesh. He is the head of the chambers of a renowned law firm, namely, 'Legal Counsel', which has expertise in commercial law, family law, employment law, land law, banking law, constitutional law, criminal law, and IPR.

Legal aspects of one person company

QUERY

I am a small businessman carrying out business as a sole proprietor with a trade license. I am considering forming a limited company. Recently I have come across that a law has been passed in Bangladesh that allows one person companies. I would like to know more about one person companies and how they may be beneficial in comparison with sole proprietorship so that I can take an informed decision.
Joynul Abedin
Dhaka

RESPONSE

Thank you for your valuable query. Previously, the ideal vehicle to take for a sole businessman in Bangladesh was to carry out business as a sole proprietor. However, recently an amendment to the existing Companies Act 1994 has been enacted, that now makes it possible for one person to form a company.

A one person company is defined in the Amendment as a company that has only one natural person as its shareholder. Such a company must include the words 'One Person Company' or 'OPC' at the end of its name. The Amendment further provides provisions regarding the registration and formation of this type of company. A natural person may form a one person company by subscribing into the memorandum of the company as the shareholder for any lawful objective. A natural person may form only a single one person company. The Amendment also provides that the memorandum of the one person company shall also contain the name and consent of a nominee who shall replace the shareholder of the company upon the shareholder's death or if the shareholder is unable to manage the company for any reason or if the shareholder becomes unnatural. The nominee may provide his or her consent by prescribed means. As such, the Amendment also empowers the nominee to withdraw his/her consent to be a nominee of the one person company. The nominee may also be replaced by the shareholder upon the nominee's death or incapacity.

The minimum paid up capital of such a company is BDT 2,500,000.00 (Twenty Five Lac) only while the maximum is BDT 5,00,00,000.00 (Five Crore) only. Such a company must show an annual turnover of minimum BDT 1,00,00,000.00 (One Crore) only and



maximum BDT 50,00,00,000.00 (Fifty Crore) only for the immediate previous fiscal year. Should the amounts of paid up capital and turnover exceed these brackets, the company shall have to be registered as a private or public limited company. With regards to registration of the company, the provisions regarding registration of private limited companies are to be followed. The shareholder of the one person company shall be its director and the shareholder may appoint the company's manager, secretary and other employees. The shareholder of the company shall carry out a Director's meeting at least once every half of a calendar year. Such a company's memorandum may be changed by passing a special resolution and by following the existing provisions of the Companies Act 1994 regarding the same. The shares of a one person company may be transferred to another natural person only. The balance sheet and the financial records, signed by the Director of the company, are to be submitted to the Registrar within 180 (One Hundred Eighty) days of the end of a financial year. The one person company may be wound up following the existing provisions of winding up in the Companies Act 1994.

A sole proprietorship, while has its advantages, also has its share of drawbacks in comparison with a limited company. Perhaps the most notable drawback is that a sole proprietor has unlimited liability, which essentially means if the business is in debt, the sole proprietor may be personally liable. The

introduction of a one person company has made carrying out business in more favorable terms for entrepreneurs. Now a person may solely incorporate a company and ensure that the company and the entrepreneur are separate legal entities. That way the entrepreneur's liability is limited to his shares of the company. In addition, switching to a one person company from a sole proprietorship may aid with expanding your business as banks may be keener in according credit facilities to companies than sole proprietors. Further, establishing and protecting your brand may be easier with a company as registering as a company ensures no other company shall be able to use the same name as your company. Furthermore, forming a company may strengthen business relationships, as having a legal presence may provide a sense of security to the stakeholders of a business. Additionally, with a low statutory paid up capital requirement, a one person company seems ideal for small businesses seeking the best legal protection.

I believe the decision as to whether or not you may shift from a sole proprietorship to a one person company depends on the extent to which you wish for your business to expand.

I hope that in light of the aforesaid discussion, you shall now have a better understanding of a one person company, the law regarding it and how it compares to a sole proprietorship and the same shall aid in your decision regarding forming a one person company.