

WOMEN AND LAW

Custody, Guardianship, and Adoption: Comparing Bangladesh and Malaysia



In their sensitive investigation, Monsoor and Thambapillay ably highlight the intersection of gender, law, and cultural values, which gives a very strong case for legal reform by respecting tradition and furthering the protection of women and children.

TASNUVA ANIKA
The book named *Impact of Gender on Custody, Guardianship, and Adoption* authored by Professor Dr. Taslima Monsoor and Dr. Sridevi Thambapillay is an important cross-country study. In this book, the authors undertake a careful comparative study on how gender influences the practice of family law within Bangladesh and Malaysia, under Islamic law, in particular. Chapter one introduces the readers to the historical, legal, and cultural frameworks governing custody, guardianship, and adoption in Bangladesh and Malaysia. Monsoor and Thambapillay present here a foundational description of Islamic family law, its varied interpretations, which introduce the basis for their comparative study. The

chapter provides a good overview of the ways in which gender norms are inscribed in and through legal systems, particularly concerning women's positions and rights within the family structures. In the second chapter, the authors contextualise custody arrangements and how gender roles influence the decisions in child custody cases. Thus, they show how courts in Bangladesh commonly favor fathers in custody disputes, reflecting traditional notions of paternal authority over the children. The authors go on to point out that Malaysia's stance, in spite of similar patriarchal institutions, offers more protection for mothers under the tenets of Islamic law. Thus, this chapter identifies the call for an articulate approach with regard to custody rights in considering child's welfare over strict

adherence to gender norms. Chapter three discusses the guardianship laws and the challenges faced by women in assuming the legally defined *gender* roles. It is here that Monsoor and Thambapillay debate how Malaysia enjoys partial flexibility within its Sharia framework in terms of allowing women to assume various guardianship roles compared to Bangladesh's more rigid legal framework. The authors claim that broadening women's roles will on one hand protect children's rights better and on the support women's legal autonomy within the family structure. The fourth chapter probes into the adoption norms and practices that reflect the deep-seated cultural and legal divides. In Malaysia, the Islamic concept of *kafala* provides a system of adoption that the authors think has the potential to balance adherence to Islamic law with the interests of child welfare. In the fifth chapter, the authors provide a comparative review of legal frameworks regulating family law in the two countries. They address how reliance on Islamic jurisprudence in both countries affects judicial decisions concerning custody, guardianship, and adoption, with Bangladesh's being more inflexible and Malaysia's more open to adaptability. They argue for a combination of Sharia principles and modern judicial methods that may serve the needs of gender equity and the welfare of the children more adequately. The final chapter has clear recommendations for policy-legal reform. The authors conclude that both countries will benefit from revisiting family law so that it conforms to both cultural and international standards concerning child welfare and gender equality. They call for reforms that will uphold religious principles but also advance the rights of women and children. This, they think, may be realised by learning from both the systems and replicating what is useful in each. *Impact of Gender on Custody, Guardianship, and Adoption* undoubtedly constitutes a welcome addition not only to the corpus of gender studies but also to the studies of family law and Islamic jurisprudence. In their sensitive investigation, Monsoor and Thambapillay ably highlight the intersection of gender, law, and cultural values, which gives a very strong case for legal reform by respecting tradition and furthering the protection of women and children. This volume is a must-read for those who are interested in how Islamic law intersects with modern social challenges, especially regarding family law.

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LAW AND SOCIETY

A multidimensional analysis of rape

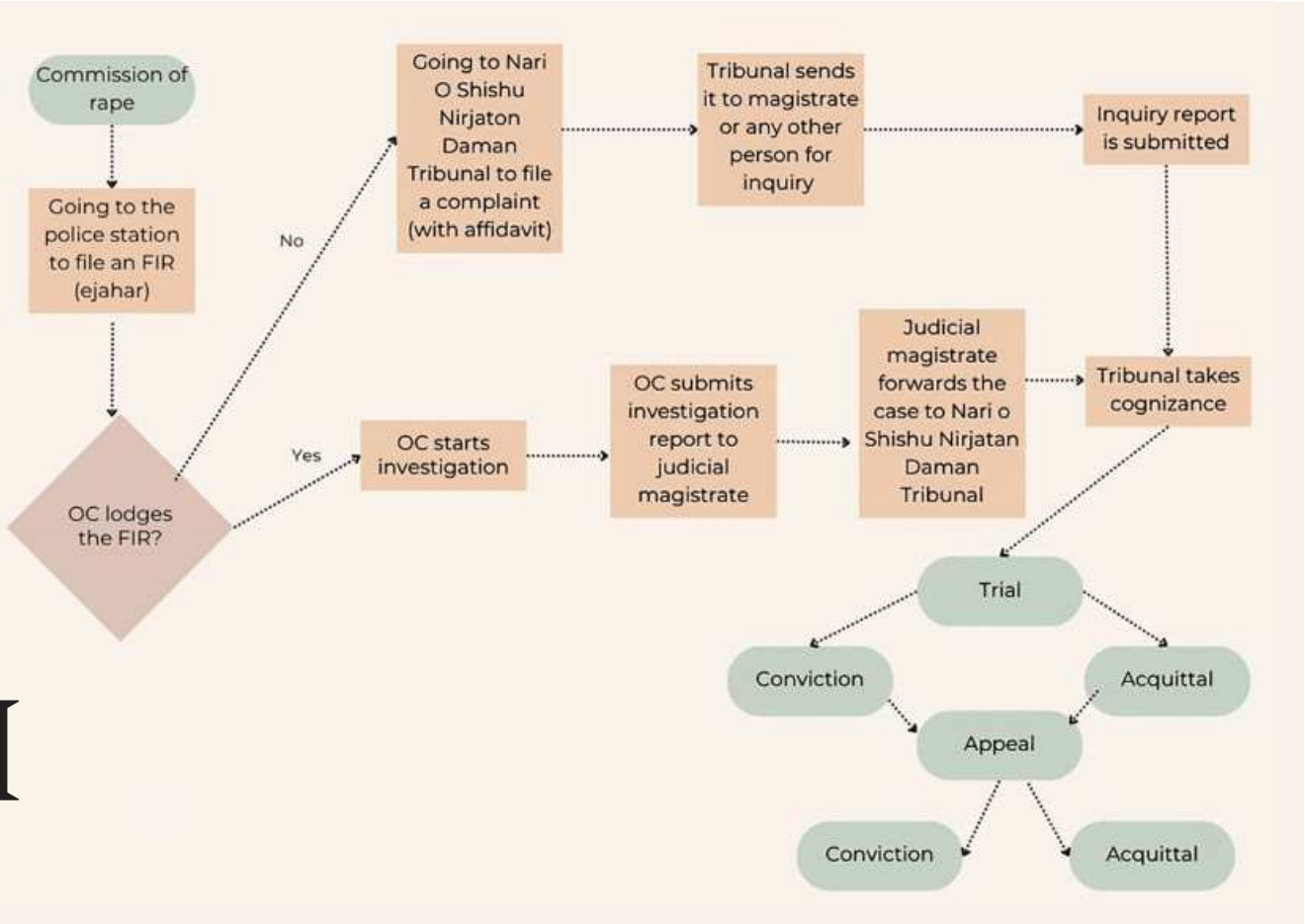
DISHA TANANZE EKRAM
Rape and other sexual crimes are largely misunderstood because people refuse to understand or fail to understand why they are crimes in the first place. From time immemorial, rape is vilified for robbing a woman of her 'honour', 'dignity' or worse 'chastity'. Section 375 of the Penal Code 1860, introduced during British rule, forms the basis of rape laws in Bangladesh. It lacks a clear definition of consent and fails to address the crime's impacts on the victims. Despite four amendments by three different governments, the latest in 2022 added the death penalty for gang rape or rape resulting in the victim's death, alongside life imprisonment or up to 10 years in prison. According to a report by Oleos Justice, Monash University, Anti-Death Penalty Asia Network (ADPAN) and the SAME Network, *A Deadly Distraction: Why the Death Penalty is Not the Answer to Rape in South Asia*, many rape victims are assaulted by people they know which is why laws that provide for death penalty, discourage victims from reporting the crime (especially in cases where it could result in a family member's execution). Thus, the death penalty for rape risks further decreasing the already low reporting rates of this crime. Furthermore, according to recent studies reveal how death penalty fails to be an effective deterrent. This is because convictions increase when the punishment is of life imprisonment. In fact, death penalty diverts resources from more effective measures that could actually treat the root causes of the crime. Furthermore, a study by Equality Now and Dignity Alliance International in 2021 found that rape survivors value a justice system that includes speedy trials, certain convictions, sensitivity, accountability, and societal change, rather than the death penalty. They seek to reclaim their dignity and honor in a society that otherwise stigmatises and further victimises them. It is not harsh penalty (be it death or imprisonment for life) but a fair process that helps the victims feel vindicated, is needed. The underlying factors driving crimes



against women remain inadequately studied and appreciated due to societal discomfort in discussing gender-based violence, but general crime literature suggests that economic, educational, social factors all play a role in shaping the context within which rape happens. Although the law imposes a hefty price (punishment) for the rapist, most rape cases are settled out of court upon providing 'compensation' to the complainant. The amount is set by society, based apparently on the socioeconomic background of the victim. The value of harming a woman, or as Simone De'bauvoir would call the "second sex", is again determined by the men. This is in fact the economic factor that steers the aftermath of the offence of rape and our policy-legal landscape has nothing to offer women so that they feel confident in pursuing the due process of law, instead of out-of-court settlement. The earliest educational models suggested that crimes and works were substitutes of one another meaning increasing availability of jobs and better wages had a disproportional effect on the occurrence of crime. Lochner argued that higher levels of education reduce crime by increasing earning potential and fostering moral development. Indeed, education has a sort of "civilizational effect" which improves a person's moral stance and thus reducing crime. All our advocacy-activism work in isolation. Our advocacy strategies to curb employment for instance do not really engage with those directed at addressing gender-based violence. Also, our educational system as a whole does not mainstream or institutionalise gender-based violence or sensitivity towards women. Lack of an overarching approach to deal with gender-based violence through education, social attitude towards the women remain the same. Rape's gravity lies not in the patriarchal notion of a woman losing her chastity but in the severe violation of an individual's bodily and mental autonomy and integrity. Such violations extend beyond forced sexual penetration and represent a broader assault on personal dignity, freedom and identity. Indeed, justice is not a rapist getting hung by the neck, it is girls going on public transport without having the constant fear that they are going to be harassed, it is women being able to walk alone at night and having liberty. Justice is a mother waiting for her daughter late at night without the worry that her child may get raped. Justice is women walking to the police station without fear and choosing to pursue legal process instead of a compromise.

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PROCEDURAL LAW
LEGAL STEPS FOR A RAPE VICTIM



LAW DESK
A very brief discussion of the possible legal steps to be taken by a rape victim are discussed in this piece. An informer (does not necessarily have to be the victim) needs to first go to a police station to inform the Officer in Charge (OC) about the commission of the rape. The OC is under an obligation to lodge the FIR and start an investigation right away since rape is a cognizable offence. After the completion of the investigation, the OC will submit an investigation report to the nearest judicial magistrate. If the police find evidence against the accused, a charge sheet will be filed, otherwise, there will be a police report explaining the lack of guilt on part of the accused. The Magistrate is not bound to follow findings of the police and may forward the accused to the Tribunal. Since there is a special law for rape (i.e., the Nari O Shishu Nirjatan Daman Ain 2010) it is tried by the

Tribunal for speedy and efficacious trials and not by the usual trial courts. Now, had the OC not lodged the FIR initially, the course of action would have been slightly different. Then the informer could go to the Tribunal directly to file a complaint with an affidavit mentioning that the OC refused to lodge the FIR. Upon receiving the complaint, the Tribunal will send the same to a magistrate or any other person for an inquiry and upon receiving inquiry report, will take cognizance. The accused will be tried in the Tribunal as per the 2010 Ain. After the completion of the trial, an accused may either be convicted or acquitted. Either way, there is the option to appeal the decision. The Appellate Court may either concur with the Tribunal or reverse its judgment. The Victim should consult a lawyer from the initial stages to ensure that all the steps are complied with properly. Different NGOs provide assistance in such matters.

