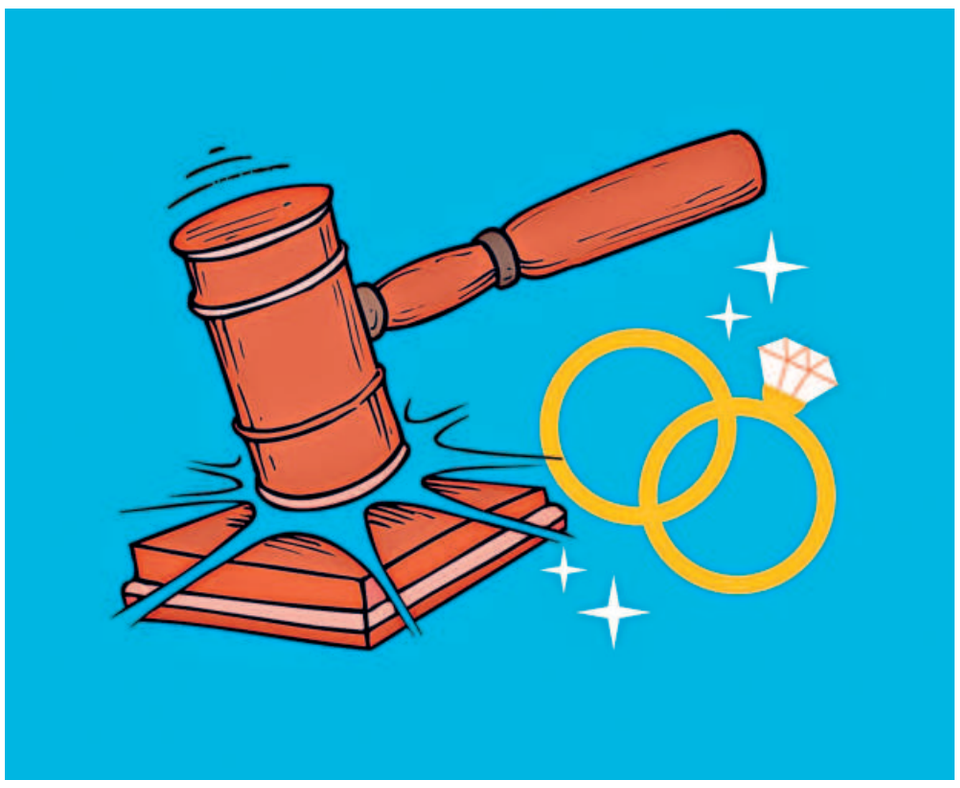
LAW OPINION

Pre-nuptial agreements and protection of marital rights

Courts and legal commentators in Bangladesh have repeatedly recognised that a clear set of conditions written in the kabin-nama carries contractual weight, and the family courts have repeatedly relied on kabin-nama entries (including Clause 17) when deciding on contentious issues.

APARAJITA DEBNATH



Marriage is a promise and a legal relationship that creates rights and obligations between a couple. While months are spent on wedding planning, little consideration is given into planning the legal and financial obligations of the partners. As part of planning a happy conjugal life, a couple can sign a pre-nuptial agreement ('pre-nup' in short), where they may agree on specific terms beyond the mandatory requirements set by their respective religion/s. These terms may include maintenance arrangements, residence, work or education rights for the wife, restrictions on second marriage, delegation of divorce, property arrangements, or other mutually agreed upon obligations. Yet many couples shy away from finding the base conditions and making a pre-nup before marriage out of embarrassment, fear of upsetting family dynamics, or the mistaken belief that pre-nup is tantamount to pre-planning for divorce.

In Bangladesh, this hesitation is even more prominent. Couples, especially the young ones, feel uncomfortable discussing money, property, maintenance, or responsibilities before marriage. Families often discourage conversations on such serious matters out of fear that they will harm the relationship before it begins, identifying them as pessimistic thoughts. But the truth is, this silence breeds the very conflicts they fear. Absence of clarity in such matters often creates serious problems and even leads to divorce in the worst-case scenario. Disputes over maintenance, deferred dower, or residence may escalate into hostile litigation, often accompanied by harassment or false claims. By contrast, clearly drafted, lawful, and registered terms provide both spouses with certainty and help mitigate opportunistic claims.

Marriage under Islamic law is not merely a religious commitment but also a contract recognised by the statutory and Shariah law. A muslim couple, hesitant to sign a pre-nup, can take advantage of the kabin-nama itself, which functions as evidence of the marriage contract, recording core obligations such as the dower or mahr. The kabin-nama is not just a religious formality; it is a legal document recognised under the Muslim Marriages and Divorces (Registration) Act 1974 and the corresponding Rules made in 2009, and enforceable in the family courts under the Family Courts Act 2023. Uniquely, it also provides a column for special conditions mentioned in Clause 17, where spouses may record the special conditions that are lawful and unambiguous. It is this clause which may have functions similar to a pre-nuptial agreement.

Courts and legal commentators in Bangladesh have repeatedly recognised that a clear set of conditions written in the kabin-nama carries contractual weight, and the family courts have repeatedly relied on kabin-nama entries (including Clause 17) when deciding on contentious issues.

Across the subcontinent, courts have upheld similar contractual promises. The Jammu & Kashmir High Court in Mohd. Khan v Mst. Shahmali (1972) enforced a pre-marital condition promising a sum be paid to the wife if the husband leaves her father's house. The judgment emphasised on the validity of such pre-nuptial agreements as long as they do not violate Muslim law or public policy. In Pakistan, the 2024 Supreme Court decision in Muhammad Yousaf v. Huma Saeed reaffirmed that terms written in the nikahnama are not merely cermonial rather binding, and that the 'special conditions' column must be interpreted in favour of the wife where ambiguity exists.

South Asian courts thus do accept pre-marital agreements and marriage-contract conditions as legally significant. Couples are therefore encouraged to discuss and record their intentions in Clause 17 regarding deferred and prompt dower, maintenance during and after marriage, residence arrangements, rights to work or study, remarriage by the husband, and delegation or limitation of divorce rights. Drafting should be clear and specific, avoiding vague phrasing, and the kabin-nama must be properly signed, witnessed, and registered to strengthen enforceability.

Unfortunately, this significant tool is available only to Muslim marriages only. In cases of Hindu, Christian or any other religious marriages in Bangladesh, there is no direct statutory provision equivalent to Clause 17 that records special pre-marital conditions.

Nevertheless, couples are not without options. A thoughtfully drafted pre-nuptial agreement under the statutory Contract Law 1872 may serve people of all religions, including the couples getting married under the Special Marriage Act 1872, ensuring all benefit from having their expectations recorded. With a pre-nup, they can prevent the marriage from becoming a source of unnecessary conflict and hardship in case it ends in divorce or separation. It encourages transparency before marriage, allows both parties to enter the union with dignity and knowledge, and ensures that neither is left vulnerable to emotional or financial coercion in the worst scenario. Finally, it ensures that even if love fades, respect persists.

The writer is Advocate at the Dhaka Judge Court.

CHILD RIGHTS

Child custody and the best interests of children

ALPH IMRAN CHOWDHURY

The question of who will get the custody of a child after a divorce or separation is not merely a family concern in Bangladesh, but also a question of justice, welfare, and rights. One of the primary goals of a legal system is to ensure that every decision that concerns custody is taken in the best interest of the child.

In Bangladesh, personal laws govern child custody-related matters, and they vary depending on the religious affiliations of the parties. For the Muslims, the relevant laws are the Guardians and Wards Act of 1890, the Muslim Family Laws Ordinance of 1961, and the traditional Islamic law jurisprudence. In the cases of Hindus and Christians, the relevant considerations can be found in the framework of their personal laws, and the Guardians and Wards Act. Despite such differences, in my view, the primary concern of every system is the same, the well-being, nurture, and welfare-based upbringing of the child.

That the best interests of children must be given utmost importance in any undertakings involving children, is confirmed by the United Nations Convention on the Rights of the Child (UNCRC) to which Bangladesh is also a party. However, there is still inadequate enforcement of this standard in the country.

Traditional Muslim law of hizanat (custody) allows mothers to care for small children up to a certain age, ie, for sons, up to the age of seven, and for daughters, up to the age of puberty. Fathers, on their part, retain the authority of wilayah, the legal authority to make decisions on behalf of the child. However, these traditional rules have changed in practice, with courts leaning towards a more child-centric approach.

This principle was restated by the Bangladesh Supreme Court in various landmark cases. In their decision, the courts have stated that the right to custody is not vested absolutely in either of the parents but rather needs to be decided taking into account the best interest of the child. For instance, the Appellate Division in the case of Md Abu Baker Siddique v S M A Bakar found that the welfare of the child is of the utmost priority. This liberal approach focuses on the fact that the happiness, comfort, and security of the child outweigh what the traditional interpretation says.

However, there are still a few challenges in ensuring the best interest of the child in child custody cases. These problems usually arise due to protracted court cases and lack of specialised child psychological assessments. Another major problem, that most mothers face while seeking custody, is due largely to their social and economic disadvantages, particularly those who do not have an independent income.

The observation that the best interests of children must be given utmost importance in any undertakings that involve children, is confirmed by the United Nations Convention on the Rights of the Child (UNCRC) to which Bangladesh is also a party. However, there is still inadequate enforcement of this standard in the country. Bangladesh has failed to implement a child custody and welfare legislation that integrates international principles. Such a law could help reconcile the contradictory provisions of personal laws and provide a uniform standard to guide the decision in custody, guardianship and visitation related cases.

The other significant factor is to have gender-neutral custody policies. The decision concerning custody should be made based on the individual skills and devotion of the parents, and not on the stereotypical gender roles. In this respect, many jurisdictions have recognised the importance of joint custody and shared parenting, eg, the UK, and India.

Lastly, the focus of custody laws needs to extend beyond the interest of the parent and focus more directly on the general well-being of the child. Legal reforms in line with this spirit will help Bangladesh accomplish its constitutional and international legal duty to protect the rights of children.

The writer is law student, University of London.

LAW ANALYSIS

Our inherently anti-poor vagrancy laws

Since antiquity, vagrancy laws have always been used as a pretext for arresting people based merely on suspicions, often as a pre-emptive measure. Another peculiarity is that the laws allow the arrest of a person for their status, instead of the acts they have committed.

KHALID KHAN

During the colonial times, vagrancy laws were widely enacted in many European colonies, including the British Raj. In the erstwhile Bengal, the Raj enacted the Vagrancy Act, 1943 (Bengal Act), which specifically dealt with the issue of begging as an issue of vagrancy. Interestingly, it was also enacted at a time when Bengal was experiencing a devastating famine. Notably, since antiquity, vagrancy laws have always been used as a pretext for arresting people based merely on suspicions, often as a pre-emptive measure. Another peculiarity is that the laws allow the arrest of a person for their status, instead of the acts they have committed. Thus, it penalises the poor, marginalised and the 'other' people of our society, who cannot afford a home and lead an iterant life. The arrest and detention of persons because they are poor stems from the stereotypical views held by society towards poverty as a source of criminality. In effect, it limits the freedom of movement of the itinerant workers, and the fear of detention forces them to find work even at lower wages by reducing their bargaining capabilities, while the rich never has to face similar treatment under the law.

Again, the fakirs, sadhus, sanyasis and darvesh have a long tradition of living an itinerant life, inspired by their spirituality and beliefs. These laws, besides penalising the labour class, also operate to suppress the people who do not conform to the mainstream society and thus undermine the cultural and religious diversity of particular regions. Hence, the laws do not merely have an 'anti-poor' character, but also an intersectionally harmful dimension.

In our jurisdiction, the two most-cited laws used to arrest or detain the vagrants are (i) the Code of Criminal Procedure, 1898 (CrPC) and (ii) the Vagrants and Shelterless People (Rehabilitation) Act, 2011 (VSPR). Section 55(b) of CrPC defines a 'vagabond' as someone 'who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself' and allows the officer-in-charge of a police station to arrest or cause him/her to be arrested within the limits of such station. The provision specifies that the arrest may be made in the same manner as in section 54, i.e. without a warrant or an order from the Magistrate. Thus, it places the offence of vagrancy in the same category as a cognisable offence as in section 54. Moreover, it also gives to the police broad powers to arrest a person.

On the other hand, the VSPR Act provides a broad definition of vagrants, terming them as 'person who has no fixed place or space for living or overnight stay or creates public disturbance by wandering around aimlessly or engages in begging from own or being induced by others; but does not include any person who collects and utilises money, food or aid for charitable, religious or publicly beneficial causes.' The definition, besides being overly broad, is vague as well and fails to contemplate the peculiar circumstances a person may be in. An internally displaced person, for example, who has lost homes due to natural disasters or social, political or economic reasons may be considered a vagrant and thus be subjected to detention under this Act. Furthermore, the provision arbitrarily excludes the people who collect money for charitable, religious and publicly beneficial purposes, but includes people engaged in begging in general, however poor they may be. Hence, despite the use of the term 'rehabilitation' in the title of the law, the law in effect operates as a deterrent against the poor and homeless class.

Now, these laws have serious human rights implications, in relation to both the civil and political rights, and the economic, social and cultural rights. Apart from making arbitrary arrests and detention, these laws not only restrict a person's freedom of movement (per Article 12, Covenant on Civil and Political Rights or CCPR) but also make it harder to enjoy fair wages and remuneration (per Article 7, Covenant on Economic, Social, and Cultural Rights or CESCR) due to loss of bargaining power. In the worst case, it forces them to do jobs they do not freely choose, thereby violating their right to work (per Article 6, CESR). Again, per Article 26 of the CCPR, effective protection against discrimination on any ground, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status must be guaranteed by the State. It requires equality before the law and equal treatment of law for all. However, selective penalisation by the vagrancy laws of people based on their economic condition, the poor in particular, reveals its discriminatory and disproportionate nature, and violates the principles of equality and non-discrimination.

To conclude, the vagrants and homeless should be given a chance to find work and lead a dignified life, rather than arbitrary arresting them or penalising them for their socioeconomic status. Displacing them arbitrarily does not eradicate the root cause of the problem, it conceals the responsibility of the State towards the poor. Instead, a more humane and compassionate approach is necessary for their integration into the society.

The writer works at Law & Our Rights, The Daily Star.