

An Appraisal on Prostitution under Islamic Law and CEDAW in the Perspective of Bangladesh

Dr. Sayeeda Anju*

1. Introduction

Bangladesh enacted some special laws to upgrade women's status, protecting them from violence and ensuring their respectability as citizens. Beside these, the country ratified some International treaties to safeguard the rights of women as human beings. On 18 December 1979, the United Nations General Assembly adopted the Convention on the Elimination of All Forms of Discriminations Against Women (CEDAW). It has been a major instrument for women's rights. It was entered into force on 3 September 1981.

Bangladesh ratified CEDAW on 6 November 1984. The ratification of CEDAW was the most significant step towards establishing equality of women, as it is the only human rights treaty that exclusively deals with women's rights as well as obligates government to translate the provision of the Convention into reality.¹ Bangladesh primarily ratified it with reservation on Articles 2, 13 (a), 16.1(c) and (f). Later Bangladesh withdrew its reservation on article 13(a) and 16.1(f) at the time of submission of the 3rd and 4th periodic reports on 24 July 1997.²

At present, Bangladesh Government still has a reservation on article 2 and 16 .1 (c). Article 2 obligates the State to accept the liability to take vigorous steps in terms of policy making and measures to eliminate discrimination against women. On the other hand, article 16.1(c) declares the same rights and responsibilities during marriage and at its dissolution. The reason of reservation was explained by the Government as being a Muslim country; these articles are against the Muslim

* Assistant Professor, Department of Law and Justice, University of Rajshahi.

¹ Khan, Salma 2003, "Human Rights and Strengthening the Decision Making Role of Women" in Salma Khan (ed) : *Role of NGO in Effective Implementation of PFA and CEDAW in Bangladesh*, Dhaka: NGO Coalition on Beijing Plus Five Bangladesh (NCBP), Women For Women, pp. 35-50 at p. 47.

² *Combined Third and Fourth Periodic Report* submitted to the UN CEDAW Committee in accordance with article 18 of the Convention on the Elimination of all Forms of Discrimination Against Women. March 1997, Revised June 1997 p.19. The report is available at: <http://www.un.org/esa/gopherdata/ga/cedaw/17/country/Bangladesh/c-BGD3-4EN> accessed on 12.12.2007.

sentiment. It was said that these articles are in conflict with *Sharia* law based on the Holy Quran and *Sunnah*.³ Surprisingly Bangladesh Government has ratified the provision on prostitution though Islam and Bangladeshi society at large are both against prostitution.

The Government had to face a lot of protest for CEDAW reservations. The reservations, did not justify with sufficient particularity as to which part of *Sharia* constitutes an insuperable obstacle to implementing reserved provisions but has agreed that reservation can be abolished through reforms but preferred to wait till public opinion is created for social receiving of these reforms. However till now no question arose about the accepted articles of CEDAW by Bangladesh. The present paper aims to investigate that whether the received article on prostitution contained in article 6 of CEDAW document is compatible to *Sharia*. It also projects a clear picture of the position of Bangladesh in this regard.

Prostitution is not religiously and socially supported in Bangladesh. One of the consequences of trafficking is prostitution⁴ and the trade is run by non-trafficked individuals. Most of the prostitutes, especially adolescent girls are in the trade not by choice⁵, rather a number of women have entered the profession voluntarily, for earning money or for other reasons. Women and adolescents are blamed when they are raped and when they eventually become prostitutes.⁶ Besides brothel prostitution is now common at the local residential neighbourhoods and hotels. In addition, there are street prostitutions in our country which is a great problem. The floating sex workers are dispersed over riverside, cinema halls, railway station, parks, beauty parlours and various places of a city.⁷ Female textile and garment workers may also supplement their low wages by occasional sex work.⁸ Sometimes prostitutes are

³ Id.

⁴ Siddiqi, Najma. 2003. "Trafficking in Women and Children: A Violation of Human Rights -Bangladesh Perspective", in Salma Khan (ed.): *PFA and NAP Implementation in Bangladesh, Role of NGO, Nari 2003*, Dhaka: NGO Coalition on Beijing Plus Five Bangladesh (NCBP), Women For Women, pp.1-18, at p. 4.

⁵ See, part 3.3 below.

⁶ Sarwar, Salima. 2004. *Adolescent Prostitute Commercial Sexual Exploitation of Children*, Rajshahi : Association for Community Development (ACD), p. 60.

⁷ Ibid, p. 54.

⁸ Habib, Shah Ehsan. 2004. " AIDS, Sex Work and Gender : Researching Female Sex Workers in Bangladesh", in Hossain Kaji Tobarak, Imam Muhammad Hasan, and Habib Shah Ehsan (eds), *Women Gender and Discrimination*, Higher Education Link Programme, Department of Sociology, University of Rajshahi, Bangladesh,

supplied from different tourist agencies and from educational institutions. Not too long ago news headlines covered the news of Eden College, a girl's college in Dhaka where students were forced into unsocial activities against their will by political gangsters.⁹ This brings us to the issues of prostitution in a new outlook. The poor implementation of existing laws, widespread corruption of law enforcing agencies and providing easy earning through prostitution by lending them to a group of so called VIPs rendered strong support to prostitution. One ILO report¹⁰ highlights that the strong economic incentives compel women to enter the sector, despite the social stigma and danger attached to the work. Prostitutes are often better paid than most of the other options available to women who are uneducated. The report also highlights that many vested economic interests receive benefit from the works rather than the prostitutes; actually prostitutes are commercially sexually exploited. CEDAW wishes to protect prostitutes from exploitation whereas Islam strongly takes stand against this situation.

2. Prostitution in CEDAW and Islamic Law

Besides personal affairs, CEDAW also puts emphasis on other issues related to women. It prohibits trafficking of women as it is a black custom and prohibits exploitations of prostitution. It does not disallow prostitution but only forbids exploitation of prostitution. Article 6 of CEDAW states,

State Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

The article obligates the State parties to suppress all types of trafficking and exploitation of prostitution of women. The article also urges to adopt necessary measures including enacting relevant laws to stop trafficking and exploitation of prostitution.

The right against trafficking is an inalienable human right.¹¹ Article 6 of CEDAW neither defines the concept of 'trafficking' nor 'prostitution'.¹² But it specifies that

pp.155-170 at p.164.

⁹ Available at: <http://www.youtube.com/watch?v=nwT6nhVDIjo> last accessed on, 09 January 2011.

¹⁰ Lim, Lin Lean (ed). 1998. *The Sex Sector: The Economic and Social bases of Prostitution in Southeast Asia*. Geneva: International Labour Office, available at: <http://www.ilo.org/global/about-the-ilo/press-and-media-centre/press-releases/WCMS-007999/land-en/index.htm>, accessed on 7 April 2009.

¹¹ Human Trafficking is a cosmic issue which needs a separate discussion.

¹² Das, Uttam Kumar 2004. "Human Rights Violation in Women Trafficking: Bangladesh

States are required to suppress exploitation of prostitution of women. Therefore CEDAW utters that prostitutions should be free from exploitation. In that sense it recognized prostitution which is against our Constitution and also against Islamic principle. Islam considers sexuality as an absolutely normal and natural urge of every human being.¹³ But Islam totally prohibits prostitution. Islam prohibits and condemns illicit sexual relations, extra marital affairs, pre-marriage sex, adultery, prostitution, homosexuality, pornography and promiscuity. Prostitution under Islamic law is an evil, illegal, clear adultery and a sin.¹⁴ The spouses have a foremost duty under Islamic law that is to protect their faithfulness and chastity between each other.¹⁵

Al-Quran states,

"sexual relationship without marriage even after spending money is prohibited." (Al-Quran 4:24)

"---And do not go anywhere near adultery: it is an outrage, and an evil path. (Al-Quran 17:32)

"Punish the two who are involved in adultery with a hundred lashes. Then if they repent and amend' exempt them, Allah is forgiving, merciful." (Al-Quran 4:16, 24:2)

"---But force not your maids to prostitution when they desire chastity ---". (Al-Quran 24: 33)

"Those who guard their sexual organs except with their spouses or those whom their right hands possess, for (with regard to them) they are without blame. But those who crave something beyond that are transgressors." (Al-Quran 23: 5-7)

Perspective" Vol. XXVII, *Journal of the Institute of Bangladesh Studies*, p. 9.

- ¹³ Schild, Maarten. 1992. "Islam", in Arno Schmitt, Joheda Sofer (eds.): *Sexuality and Eroticism among Males in Moslem Societies*. New York: Routledge, p. 179, available at:http://books.google.com/books?id=Kw_BVSVmNsUC&pg=PR7&source=gbs_selected_pages&cad=3#v=onepage&q&f=false, accessed on 1 January 2011.
- ¹⁴ Quddus, Mohammad Mozharul. 2005. *Some Practical Lessons from the Quran*, Bangladesh: Islamic Foundation, p. 62.
- ¹⁵ Nasir, Jamal J. 1986. *The Islamic Law of Personal Status*, London: Graham & Tortman Ltd, p. 73.

Famous hadith of the Prophet (sm) says,

Narrated 'Abdullah': We were with the Prophet(sm) while we were young and had no wealth. So Allah's Messenger (sm) said, "O young people! Whoever among you can marry, should marry, because it helps him lower his gaze and guard his modesty (i.e. his private parts from committing illegal sexual intercourse etc.), and whoever is not able to marry, should fast, as fasting diminishes his sexual power." ¹⁶

Narrated Abu Mas'ud Al-Ansari:

Allah's Messenger forbade taking the price of a dog, money earned by prostitution and the earnings of a soothsayer. ¹⁷

Narrated Aun bin Abu Juhaifa:

I saw my father buying a slave whose profession was cupping, and ordered that his instruments (of cupping) be broken. I asked him the reason for doing so. He replied, "Allah's Messenger prohibited taking money for blood, the price of a dog, and the earnings of a slave-girl by prostitution; he cursed her who tattoos and her who gets tattooed, the eater of Riba (usury), and also the one who gives it, and maker of pictures." ¹⁸

Narrated 'Abdullah bin 'Umar:

The Jews brought to the Prophet (sm) a man and a woman from amongst them who have committed (adultery) illegal sexual intercourse. He ordered both of them to be stoned (to death), near the place of offering the funeral prayers beside the mosque." ¹⁹

In Islam marriage is the only legal and acceptable way of meeting up sexual desire and it is the only precondition of survival of mankind.²⁰ There is a misconception regarding *muta* marriage and legalization of prostitution, because some argued that prostitution is legalized in Islam through *muta* marriage. But it is erroneous because Prophet (sm) forbade *muta* marriage and it is *haram* (unlawful).²¹ *Muta* marriage

¹⁶ Khan, Muhammad Muhsin. 1984 (re.1987). *The Translation of the Meanings of Sahih Al-Bukhari*, New Delhi: Kitab Bhavan, Vol. VII, Book 62, Hadith no. 4, p. 4.

¹⁷ *Ibid*, Volume III, Book 34, Hadith no.439, p. 241.

¹⁸ *Ibid*, Volume III, Book 34, Hadith no.440, p.242.

¹⁹ *Ibid*, Volume II, Book 23, Hadith no.413, pp. 231-232.

²⁰ Rizvi, Sayyid Saeed Akhtar. 1980. *The Family Life of Islam*, Tehran, Iran: World Organisation for Islamic Services, p. 71.

²¹ Mebah, Maulana Abu Taher (translated). 2000. *Al Hedaya (A Commentary on Islamic Laws)* Volume 2, Bangladesh: Islamic Foundation at p.15 also see, Shamshur, Gazi et al (Editor). 1995. *Bidibaddah Islami Ain (Codified Islamic Laws)*, Volume 1, Part 1,

means to enter into a contract of marriage for a limited or certain period, which may be for a term of a year, a month, a day or even part of a day. And after the expiration of the term the marriage will dissolve by itself.²² Wilson defines it as so called marriage²³ and Coulson placed it as a distinct and individual legal institution.²⁴ *Muta* marriage was allowed in the early formative period of Islam with some conditions but after the *Shariah* of Islam reached its completion, it was made *haram*.²⁵ Therefore there is no place of prostitution in Islam. But the Shia *Ithna-Ashari* group allows *muta* marriage²⁶ which is *haram* by all means and mere practice however does not make it permissible.

Islam keeps away peoples from overt or covert adultery and indecency.²⁷ Adultery is *haram* in the eye of Islam.²⁸ Adultery is like a poisonous moth that destroys the moral fabric of personal character and that of family and social bondage. Allah does

Bangladesh: Islamic Foundation at p. 534, also see, *Islami Bishwakosh* (The Encyclopedia of Islam in Bengali) Volume 19 Bangladesh: Islamic Foundation 1995, at p. 729, also see, Rahim, Maulana Muhammad Abdur (translated). 1988. *Ahkamul Quran* (The Law in the Holy Quran) (written by Abu Bakr Ahmed Ibn Ali Ar-Razi Al-Jassas Al-Hanafi in Arabic), Bangladesh: Islamic Foundation, at pp. 599-620 also see, Huq, Maulana Obaidul et al (Editor). 2001. *Fatwa-O-Masail* Volume 5 Bangladesh: Islamic Foundation at p.78. Doi, Abdur Rahman I.1984. *Shariah the Islamic Law*, London, United Kingdom: Ta Ha Publishers, p.155.

²² Rashid, Syed Khalid. 2004 (4th ed). *Muslim Law*, Lucknow: Eastern Book Company, p. 61.

²³ Wilson, Sir Roland Knyvet. 1928. *Anglo-Muhammadan Law A Digest*, Lahore: Law Publishing Company, p. 443.

²⁴ Coulson, N.J. 1964. *A History of Islamic Law*, Edinburgh: Edinburgh University Press, p. 111.

²⁵ *Muta* marriage was allowed in the early days of Islam in case of necessity, but the Prophet (sm) finally prohibited it forever. Narrated 'Ali (R): I said to Ibn 'Abbas, "During the battle of Khaibar the Prophet (sm) forbade (Nikah) Al- Mut'a and the eating of donkey's meat." Khan, Muhammad Muhsin. 1984 (re.1987). *The Translation of the Meanings of Sahih Al-Bukhari*, New Delhi: Kitab Bhavan, Vol. VII, Hadith no. 50, p. 36.

²⁶ See further Coulson (1964), above note 24, p. 110.

²⁷ See further Rahman, Gazi Shamshur et al (Editor). (1995), above note 21, at p. 325.

²⁸ Mannan, Maulana Abdul et al (Editor). 2004. *Dainandin Jibone Islam* (Islam in Daily Life), Bangladesh: Islamic Foundation p. 395 also see, *Fatwa-E-Alamgiree* (A Commentary on the Islamic Laws Edited by Badshah Abul Muzaffar Muhammad Maheeuiddin Awrongzeb Alamgeer (Rh) in Arabic, translated and edited by a board Islamic Foundation Bangladesh (Volume 3) p. 378.

not enjoin indecency. Allah has prohibited all types of indecencies in public and in private (Al-Quran 6:115, 7:28, 33). Rigorous awareness campaign in the society in the light of Quranic revelation is necessary to avert this noxious evil from the society.

Islam emphasizes marital life, it offers divine reward for sex within marriage.²⁹ And Islam pressed not to go near obscenity or adultery that breeds sexually transmitted diseases (STD's), spoils healthy growth of generation and destroys peaceful environment of family.³⁰ So in case of Islamic law there is no place of prostitution. It is *haram* or prohibited. Islam upholds family life. Family is the unit of a society. In fact, prostitution is a threat to family life. In Islam there is no place for extra marital affairs therefore prostitution is not acceptable. In Bangladesh, it has been found that sizeable numbers of prostitutes wear *burkhas*, the local costume of seclusion, to hide their face.³¹ They are aware of their non acceptability in the society for which they wear *burkhas* and dishonor the Islamic symbol of seclusion for immoral purposes.

CEDAW and Islam are not in same position regarding the prostitution issue. In effect CEDAW contradicts itself by promoting family life in one hand, extra marital affairs and prostitution on the other. CEDAW allows prostitution but free from exploitation whereas there is no place of prostitution in Islamic law thus both are totally opposite to each other.

Although not acceptable in Islam, Muslims may get involved in activities which are considered *haram*. There are stories and books showing meticulous investigation into the often subtle exhibitions of sexuality, unacceptable in Islam, in multiple time periods and locations.³² These episodes even if true remains prohibited, mere practice does not make it legal.

²⁹ A narration reported from Prophet (sm): In the sexual act of each of you there is a *sadaqah* (charity or gift)." The Companions replied: "O Messenger of God! When one of us fulfils his sexual desire, will he be given a reward for that?" And he said, "Do you not think that where he to act upon it unlawfully, he would be sinning? Likewise, if he acts upon it lawfully he will be rewarded. (Muslim) available at: <http://www.ymsite.com/books/tmmg/chapter-nine.htm> accessed on 1 December, 2010.

³⁰ See further Quddus (2005), above note 14, p.45.

³¹ Ahmed, Javed. 2011. 'Rise of Social Ills in Absence of Islam', available at: <http://www.news from Bangladesh / 19/05/ 2010/ / PM BDT ISSN 1563-9304 | last accessed on, 09 January 2011>.

³² Babayan Kathryn, Najmabadi Afsaneh (Eds). 2008. *Islamic Sexualities: Translations Across Temporal Geographies of Desire*. Havard University Center for Middle Eastern Studies, Radcliffe Institute for Advanced Study, review of the book available at: http://books.google.com/book?id=w3v2w8vjEnlc&pg=PRurce=gabs_selected_Page_s &Cad=3#v=onepage&q&f=false accessed on 5 June 2009; also Whitaker Brian. 2006. *Unspeakable Love: Gay and Lesbian life in the Middle East*, University of

3. Prostitution in Bangladeshi Law

The Constitution of Bangladesh in its Fundamental Principles of State Policy states that 'the State shall adopt effective measures to prevent prostitution and gambling'.³³ CEDAW imposes restriction only on exploitation of prostitution, thus is contradictory with Bangladesh Constitution. Still then Bangladesh ratified article 6 of CEDAW without any reservation.

Penal Code 1860 contains provisions against forcing anyone into prostitution or into "immoral acts" in sections 366A, 372 and 373.³⁴ It is also crime under the Suppression of Immoral Traffic Act (SITA), 1933 and different Metropolitan Ordinances of the country.³⁵ However these laws do not clearly prohibit prostitution

California Press. Review of the book is available at: <http://www.ucpress.edu/book.php?isbn=9780520250178>.

³³ Section 18 (2) of Constitution of Bangladesh.

³⁴ *Penal Code*, 1860-

366A. Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.

372. Whoever sells, lets to hire, or otherwise disposes of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

373. Whoever buys, hires or otherwise obtains possession of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

³⁵ Section 74 of *The Dhaka Metropolitan Police Ordinance*, 1976; section 76 of *The Chittagong Metropolitan Police Ordinance*, 1978; section 77 of *The Khulna Metropolitan Police Ordinance*, 1985; section 77 of *The Rajshahi Metropolitan Police Act*, 1992; section 77 of *The Borisal Metropolitan Ordinance*, 2006 and Section 77 of *The Sylhet Metropolitan Ordinance*, 2006 etc.

inside the country. There is no law to protect a woman of 18 years old or above engaging in sexual activity in exchange for money. According to the Constitution, every individual is entitled to choose his/her own profession. Conventionally, a prostitute produces an affidavit delivered by a magistrate stating that she is 18 or more, fit for the occupation for her not to be arrested.³⁶ Sometimes taking advantage of the vulnerability of the poverty stricken women, the flesh traders make them execute affidavits in front of a magistrate or sometimes under aged girls are made to submit false papers claiming themselves to be over 18 years of age.³⁷ In absence of a proper birth registration system it is difficult to determine the actual age and the prostitutes can manage the permission easily in the country. Prostitution is therefore technically neither legal nor illegal³⁸ but presents as a gap in the law.³⁹

The purpose of enactment of SITA 1933 was to abolish commercialized vice of the traffic in women and girls for the purpose of prostitution as an organized means of living. The Act has failed to achieve its object and its implementation against the social evil and moral degradation except for the two cases of Kandupatti and Nimtali brothel.⁴⁰ It appears from various news reports that the eviction of those two brothels were not the conscious application of SITA 1933.

The aim of SITA seems not to abolish prostitute or prostitution totally because the provisions contain some unavoidable major contradictions and ambiguities. It does not make prostitution a criminal offence nor punishes a prostitute for indulging in the trade of prostitution. The Act only restricts the prostitutes to carry on their immoral business in vicinity of certain public places (section 7). The provisions of the Act do not consider 'prostitution' as a punishable offence. Although it is not compatible with our Constitution or with the social and religious perspectives, yet the law is not properly amended. SITA 1933 prohibits importing females for the purpose of prostitution (section 10) but unfortunately it is not properly implemented. Conversely our neighboring country India had changed the law with some addition and deduction and made the new law strong.⁴¹ India has done this in consequence of

³⁶ See further *Combined Third and Fourth Periodic Report*, above note 2, p. 31.

³⁷ Rahman, Zabunnessa. Ali, Salma. and Hasan, Shafiqul. (eds). 1999. *A Research on Prostitution: An Unsolved social issue due to incomprehensive nature of Suppression of Immoral Traffic Act- 1933*. Dhaka: BNWLA, p. 24.

³⁸ Begum, Hannana. (2008). *CEDAW and Bangladesh*, Dhaka: Bangladesh Economic Society, p. 9.

³⁹ Ameen, Nusrat. 2006. *Convention on the Elimination of All Forms of Discrimination Against Women: Observation on Bangladesh Situation*, Presented in Seminar on UNCEDAW Day, Organised by Mohila Porishad, p. 19.

⁴⁰ See, part 4 below.

⁴¹ The Immoral Traffic (Prevention) Act, 1956, [Act No. 104 of 1956, dated 30th December, 1956] An Act to provide in pursuance of the International Convention signed at New York on the 9th day of May, 1950, for the prevention of immoral traffic.

ratification of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950.⁴² The Bangladesh Government has accessed the Convention of 1950 in 1985⁴³ soon after the ratification of CEDAW in 1984. As a party to the Convention Bangladesh agrees to take or to encourage, through their public and private educational, health, social, economic and other related services, measures for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution and of the offences referred to in the Convention.⁴⁴ But to date Bangladesh Government has not taken any initiative to amend SITA, 1933 or enact a new law like India.

3.1. Prostitution and Laws in Practice

Although laws relating to violence against women, including rape, are applicable to prostitutes, in practice they are discriminated in Bangladesh. They are classified as "habituated" to sexual intercourse and evidence will be considered to be tough to present. As citizens they can demand the same fundamental rights, such as the right to protection and security, the right to shelter and to basic facilities. In reality prostitutes are often subjected to harassment from the law enforcing agencies who are theoretically supposed to protect their rights.⁴⁵

Generally prostitutes are treated as vagrants by the police personnel which creates confusion about the application of Vagrancy Act 1943. According to the Act 'vagrant' means a person found asking for alms in any public place, or wandering about or remaining in any public place in such a condition or manner as makes it likely that such person exists by asking for alms. The law however is not very clear that who would be termed as a vagrant. The procedure is defined in the Act in section 6 which says that a police officer needs to get clearance from a Special Magistrate about anyone's vagrancy. And often police brings street or roaming

⁴² Signed on 21 March 1950, Lake Success, New York, approved by United Nations General Assembly Resolution 317 (IV) of 2 December 1949 and entered into force on 25 July 1951, in accordance with Article 24 of the Convention.

⁴³ Bangladesh became the party to the Convention by accession on 11 January 1985 see, Khan, Borhan Uddin.1998. *Fifty years of the Universal Declaration of Human Rights*. Dhaka: IDHRB, Ministry of Law, Justice and Parliamentary Affairs, Bangladesh at p. 623. Also see, <http://treaties.un.org/doc/publication/mtdsg/volume%20i/chapter%20vii/vii-11-a.en.pdf> last accessed on 16 January 2011.

⁴⁴ Article 16 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950.

⁴⁵ See further Rahman, Zabunnessa (1999), above note 37, p.24.

prostitutes before the Magistrate and consequently they are placed in Vagrant Homes.

The government established some vagrant homes as rehabilitation centers⁴⁶ but some NGOs are found to move the High Court against such rehabilitation.⁴⁷ These homes are overcrowded, do not have the necessary amenities and do not have enough staff or space to provide enough rehabilitation in terms of either psychological counselling or even vocational training for reemployment.

3.2. Prostitution in Regional and International Perspective

Bangladesh is a source and transit country for men, women, and children trafficked for the purposes of forced labor and commercial sexual mistreatment. A huge number of young women and children are smuggled out of Bangladesh every month and extensive numbers of Bangladeshi women are working as sex workers in Pakistan and Kolkata (India) brothels.⁴⁸ Women and Children Repression Prevention Act 2000 of Bangladesh includes death punishments for the persons who are engaged in sex trades, fetches women from abroad or sends them for prostitution or sale, buy or rent a woman.⁴⁹

Trafficking of women as well as sex workers takes place by private connivance and involvement of regional gangs through network spread over whole of South Asia and even outside. Government of Bangladesh and other South Asian countries are seen concerned at the trafficking of women and children for sexual exploitation. The issue was brought at the South Asian Association for Regional Co-operation (SAARC) Summits. The SAARC Convention on 'Preventing and Combating Trafficking in Women and Children for Prostitution' was signed in Kathmandu, Nepal in January 2002.⁵⁰ In 2000 the United Nations General Assembly adopted *United Nations Convention against Transnational Organized Crime* (UNTOC) and

⁴⁶ Fifth Periodic Report of State Parties, Bangladesh (0276190) Consideration of reports submitted by State parties under article 18 of the Convention on the Elimination of all Forms of Discrimination Against Women, CEDAW/C/BGD/5, 3 January 2003, p. 19.

⁴⁷ See, part 5 below.

⁴⁸ Rahman Shaheen, Kirk Liz (ed). 2002. *CEDAW and Bangladesh Constitution, Law & National Initiatives: A Comparative Study*, Dhaka: Steps Towards Development, p. 47.

⁴⁹ Section 5 of Women and Children Repression Prevention Act 2000 states, "Whoever fetches from abroad or dispatches or sends abroad for prostitution or, to engage a woman in illicit immoral act or sale or buy or, for the purpose of torturing her in rent or otherwise or, keeps a woman in his possession, custody or security for such purpose, he shall be punished with death or transportation for life or with rigorous imprisonment of either description which may extend to twenty years but not less than ten years and also with fine".

⁵⁰ See further *Fifth Periodic Report*, above note 46, p. 18.

the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, which was entered into force in 2003. United Nations Office of Drug and Crime (UNODC), as guardian of the UNTOC and the Protocols thereto, assist States in their efforts to implement the Protocol. UNODC offers practical help to party states, not only helping to draft laws and create comprehensive national anti-trafficking strategies but also assisting with resources to implement them. To date, more than 110 States have signed and ratified the Protocol but Bangladesh is not yet a party to the Protocol.⁵¹ Bangladesh needs to eventually ratify the UNTOC and its Protocol and be part of this international, standard legal framework to participate in the global fight on Trafficking in Persons which in turn will reduce commercial sexual domination.

3.3. Prostitution and Transmitted Diseases

Muslim women have high standard of sexual and reproductive rights and they are entitled to sexuality free of coercion, discrimination and violence.⁵² Prostitution is one of the root causes of human immunodeficiency virus (HIV) / acquired immune deficiency syndrome (AIDS) and of course family disturbance. Unsafe sex or unprotected sex usually cannot protect sexually transmitted infections.⁵³ Sex work exists at significant levels in Bangladesh, and condom use is low here.⁵⁴ Generally brothels do not provide condoms and if they insist on using protection they lose customers and if any customer complaints to the pimp, they would face trouble.⁵⁵ HIV/AIDS prevalence among women in prostitution is a seriously underestimated women's health rights and human rights crisis. Therefore prostitution never brings happiness to human beings and women's rights are violated in the name of protecting exploitation against prostitution.

⁵¹ India had signed the Protocol on 12 December 2002. However, India did not ratify the instrument.

⁵² Rauf, Muhammad Abdul. "Relationship between Husband and Wife in Islam", in *Islamic Marriage Articles*, <http://www.zawaj.com/articles.htm> accessed on 16 January 2011.

⁵³ <http://www.nowpublic.com/health/derivation-grounds-hiv-aids-bangladesh> accessed on 7 January 2010.

⁵⁴ Alam, Mohammad Khairul. 'HIV/AIDS in Bangladesh', available at: <http://www.internationalpeaceandconflict.org/profiles/blogs/street-sex-workers-are-vulnerable>, accessed on 7 June 2010.

⁵⁵ http://humantrafficking.change.org/blog/view/prostitution_and_hiv_aids_a_dead_y_marriage, accessed on 7 January 2011.

Adolescent are most often coerced and forced into prostitution to support themselves and their family economically.⁵⁶ Sexually abused girls are discriminated in society and have to carry a heavy load of guilt, as they are considered as unable to protect their chastity.⁵⁷ Many of them are the victims of trafficking. Bangladesh has enacted

Human Trafficking (Prevention and Curb) Act 2011 to penalize human traffickers.⁵⁸ It is important that the Government should also move towards preparing a comprehensive law to restrain prostitution in Bangladesh. This issue has not been seriously addressed by the Government or the judiciary of Bangladesh till now.

4. Bangladesh High Court Division Rule Regarding Exploitation of Prostitution

In the judgment of the case of *Bangladesh Society for the Enforcement of Human Rights (BSEHR) and others vs. Government of Bangladesh and others*⁵⁹ the High Court Division addressed a broad spectrum of issues including the fundamental rights of life and personal liberty and the rehabilitation of sex workers. The right of sex workers as an occupation, as a residence compatible with the worth and dignity of a human being and their rehabilitation has been viewed from a sensitive perspective in the judgment.

A rule was issued calling upon the respondents to show cause as to why the lifting of the sex workers from their residence at Tanbazar and Nimali, Narayanganj and dislodging them and taking some of them to the Kashimpur Vagrant Home in the name of rehabilitation should not be declared to be done in violation of the fundamental rights as to residence, profession, trade, etc. And why their confinement in Vagrant Centre should not be declared illegal directing that the sex workers in custody be brought before the court for satisfying that they are not being held in custody without lawful authority or in an unlawful manner. The petitioners⁶⁰ addressed the issue for protection of fundamental rights of prostitutions.

⁵⁶ See, part I above.

⁵⁷ See further Sarwar, Salima (2004), above note 6, p. 60.

⁵⁸ The cabinet approved the draft on 11 July 2011. 'Human Trafficking: Cabinet for death penalty' Tuesday, 12 July 2011, available at: <http://www.thedailystar.net/newDesign/news-details.php?nid=193887> accessed on 12 July 2011. Bangladesh Ministry of Home Affairs introduced, drafted and submitted to cabinet on 21 December 2010. Palma, Porimol. 2010. 'Tough anti-trafficking law in the offing, Draft suggests speedy trial tribunal, considering the offences non-bailable', available at: <http://www.thedailystar.net/law/2010/12/20/index.htm>, last accessed on 13 January 2010.

⁵⁹ *Bangladesh Society for the Enforcement of Human Rights (BSEHR) and others vs. Government of Bangladesh and others* (2001) 53 DLR (HCD), p.1.

⁶⁰ The petitioners are the Bangladesh Society for the Enforcement of Human Rights (BSEHR), Naripokkho, Bangladesh National Women Lawyers Association (BNWLA),

“The petitioners have alleged that the Government of Bangladesh is regularly taking measures to harass the women in prostitution and their children and to treat them as unwanted in the society hounding them from their peaceful occupation of house/rooms rented by them from the owners of the buildings. They regularly pay rent to the landlords as well as a large amount of money to different authorities including the law enforcing agencies and contribute to the development of the area, even by constructing mosque, schools, roads, etc. The petitioners have further alleged that the respondents continuously pick up the prostitutes from their residence, physically and verbally abuse them and without any cause illegally push them into vagrant homes violating their right to live and living and livelihood as protected under the law and the Constitution. Such putting in the vagrant homes is being done contrary to the provision of law ignoring the broad fact that the prostitutes are above the age of 18 years and in the camouflage calling the guardians and handing to them that they illegally abused the provision of law under the Act of 1950 (sic Vagrancy Act 1943).

The respondents raided while the area was asleep and barged into their rooms and abused them and pushed them and their children into the waiting buses using filthy language. There was no female police personnel in the matter of carrying out the wholesale eviction of the prostitutes of Tanbazar and Nimtali.”

The rule has been contested by respondents denying allegations stating that prostitution is not permitted under Article 18(2) of the Constitution. Furthermore section 366(a), 372, 373 of the Penal Code and section 41 of the Children Act, 1974 discourage child prostitution and all the activities relating to prostitution are punishable by law. The respondents argued that the petitioners should not indulge in illegal and unconstitutional activities. The brothels are the root of spreading HIV, AIDS and other STD's and various kinds of crimes. The Government being aware of the health hazards took up schemes for rehabilitation of the sex workers and has taken different appropriate steps to eradicate prostitution from the society by rehabilitating them phase by phase. In addition, the Deputy Attorney General (DAG) informed the court that a sex worker was brutally killed by a customer and the law and order situation was deteriorated there.

Bangladesh Manabdhikar Sangbadik Forum, Ain- O- Shalish Kendra (ASK). All the petitioners asserted themselves to be non-profit making voluntary organizations doing social welfare activities and represent 54 other organizations with like aims and objects, are engaged in protecting the vulnerable groups of people including those women involved in prostitution.

On the other hand, the petitioners argued that prostitutes are engaged in earning livelihood so they must not be included in the definition of vagrants. The action of the respondents about the forced eviction of women and children from their lawful residence is not lawful under the purview of the Vagrancy Act. The petitioners argued in accordance with article 11, 27, 28, 31 and 32 of the Constitution and stated that women engaged in prostitution also enjoy the same right and obligation as of the ordinary citizen of the country and could not be evicted without due process of law.

The petitioners analysed article 18(2) of the Constitution in the light of articles 11, 27, 28, 31 and 32 of the Constitution. They argued that on the plea of article 18(2) of the State Policy, wholesale eviction of prostitutes is against their right to life and free livelihood. However the petitioners kept silent regarding any murder in the brothel.

However the DAG in favour of the respondents denied the entire allegation and informed the court that the respondents in order to fulfil constitutional obligation to prevent prostitution supplied questionnaire among the inmates of Tanbazar and Nimtali with the help of the UNDP (United Nations Development Programme). He informed that over an incident of killing a sex worker in the brothel most of the sex workers had chosen to leave the area which rendered almost all of them vagrant roaming around the said area for which police administration with the help of women police apprehended them and the attending Magistrate declared some of them vagrant and sent them to vagrant home in accordance with law. The learned DAG has further submitted that the respondents did not deploy any police force in evicting the sex workers from their home. Thus both the statements of the petitioners and respondents led to a disputed question of fact.

After a long argument and counter arguments on various points, the court observed that despite of the provisions of SITA 1933, whereby prostitutes maintain their livelihood which in the absence of any prohibitory legislation, the State has a duty to protect and enforce rights of a citizen enshrined in Articles 31 and 32 of the Constitution. The court also discussed the Indian case of *Olga Tillis vs Bombay Municipal Corporation* reported in AIR 1986 (SC) 180 for highlighting that right to live includes right to livelihood. The court observed that the inmates of Tanbazar and Nimtali upon their wholesale eviction have as well been deprived of their livelihood which amounts to deprivation of their right to life. Thus the respondent's action was unconstitutional and illegal. From the observation of the court it seems that the court is keen to grant legitimacy to prostitution as an occupation whereas Bangladesh Bureau of Statistics defines them as 'destitute' and does not recognize prostitution as an occupation.⁶¹

⁶¹ See further Ameen, Nusrat (2006) above note 39, p. 19.

The court however appreciated the moves of the Government towards rehabilitation of the prostitutes who are engaged in unethical and immoral profession opposed to religious injunction particularly of Islam but the court felt that the eviction did not follow the due process of law. The court stated,

“---on the face of allegations in the writ petition and the manner the inmates of Nimtali and Tanbazar were illegally evicted from their home and hearth within the brothels and nothing has been produced before us to show that either any step under the Suppression of Immoral Traffic Act or any appropriate procedure under the Vagrancy Act, was adopted for treating them as vagrants, the inmates of Tanbazar and Nimtali at the moment put in the Kashimpur Vagrant Home do not fairly and squarely come within the mischief of the definition of vagrants and we have no hesitation to hold that their confinement in the vagrant home in the name of rehabilitation has no sanction of law. We cannot also be oblivious of the fact that their evictions from their homes within the brothels carried out in the manner as alleged have not been done in due process of law.”

And finally the court avowed that all the respondents should co-ordinate themselves with UNDP or other connected organizations formulating and adopting a durable rehabilitation scheme to start with a pilot scheme for the purpose of the sex-workers of the country with a sense of security and then the Government should come out with legislation prohibiting prostitution and soliciting prostitution and strictly enforce the laws in solemn observance of the constitutional obligation adopting effective measures to prevent prostitution.

The court also declared that 'the court being the upholder/protector of the rights of the citizen has a duty to see that the rights including the fundamental rights of any citizen are not being violated by any means'. But unfortunately the court didn't prescribe any guidelines or timeframe for the Government to ensure the completion of fundamental policy under the Constitution. The court rather created a precedent which made the eviction and rehabilitation of the prostitution of a brothel based sex workers difficult. Prostitution and prostitutes are often forced into the sex trade or slavery which is against Article 34 of our Constitution but the court did not make any statement in this regard.

As a result the court ruled that prostitution as a livelihood is not illegal. On the basis of this judgment BBC reported that, 'Bangladesh says prostitution is legal'⁶² which has created much ambiguity. On the other hand the US State Department report on

⁶² BBC News online, Tuesday, 14 March, 2000, accessed on 7 January 2011.

human rights stated that prostitution is legal for women over the age of 18 with Government certification in Bangladesh.⁶³ It seems that the whole world was waiting about the apex court's declaration regarding prostitution issue in Bangladesh.

In this case both the parties argued their own point of view. And finally the Judges directed the respondents to release the sex workers from the vagrant home so as to enable them to go to their own place of abode according to their choice which is their fundamental right guaranteed under the Constitution. The Court asked the Government to frame suitable legislation to stop prostitution. On appeal the Appellate Court did not interfere in the case.⁶⁴ The provisions in the Constitution, Penal Code, Suppression of Immoral Traffic Act and different Metropolitan Ordinances manifest the intention to restrict prostitution but there was no clear law to stop it for which the court said that preventive legislation is necessary to stop prostitution. Since the Constitution requires for preventing of prostitution, a sincere amendment of laws and a judicial edict could also easily remove the shortcomings of law related to prostitution. It may not be possible to change the primitive custom of prostitution which is an ancient trade. It is not easy to alter it from the society at a time or by a declaration but enlightenment of men and women in the society by making those aware of Islamic and statutory laws will gradually help to restrict prostitution. Better public awareness is needed regarding women's rights prescribed in Islam which only can change the customs.

Earlier in *Sultana Nahar Advocate vs. Bangladesh, represented by the Secretary, Ministry of Home Affairs, Government of the People's Republic of Bangladesh and others*,⁶⁵ an advocate filed a writ petition against the concerned authority that about 600 sex workers were evicted from one of the oldest brothels of the country at Kandupatti. The petitioners alleged that their basic human rights under the Constitution, irrespective of the nature and character of trade and profession, have been violated, and it is a gross violation of fundamental rights of a particular group. The petition was dismissed by the learned judges of the High Court upon taking the view that the fact stated in the writ petition were vague and unspecified particularly relating to the numbers of sex workers, house and holding numbers wherein the sex workers were said to have been staying and following their profession. On appeal,⁶⁶ the Appellate Division stated that the writ petition was based on vague and contradictory statements and discharged the appeal. Recurrent appeals through writ

⁶³ <http://www.dol.gov/ILAB/media/reports/iclp/tda2003/bangladesh.htm>, accessed on 9 November 2010.

⁶⁴ *The Secretary Ministry of Home Affairs vs. BSEHR* (2005) 2 ADC p.357.

⁶⁵ *Sultana Nahar Advocate vs. Bangladesh, represented by the Secretary, Ministry of Home Affairs, Government of the People's Republic of Bangladesh and others* (1998) 3 BLC HD p.277; also see in 18 BLD HD 1998, p.363.

⁶⁶ *Sultana Nahar vs. Bangladesh and ors* (2002) 7 BLC AD, p.89; also see in 10 BLT 2002 AD, p.47.

petitions were made to the Judges for the protection of the sex workers. The Judges also responded favorably by ordering their release from vagrant homes, but simultaneously, they also urged for a slow uprooting of prostitution in accordance with the constitutional provision. The provisions in different laws against prostitution are not clear to prohibit it. Since Constitution contains provision to prevent prostitution thus the Judges suggested for a further preventive legislation. It seems that due to the absence of any prohibitory legislation the court found it difficult to stop prostitution.

The SITA indirectly allows prostitution of women above 18 years of age since it only prohibits prostitution of minor girls below the age of 18 years. A new comprehensive law as well as a clear judicial interpretation of the existing laws is absolutely necessary to reconcile with the Constitutional provision of prostitution.

5. Prostitution under the Asylum of NGOs

It has been found that both the cases relating to prostitution are filed by the NGOs in Bangladesh. The judges are seen comparatively much vocal in 2001 in *BSEHR* case. While in 1998 they were seen to be less interested in the case of prostitution as they discharged the case on technical grounds. M Reza Chowdhury, Md. Gholam Rabbani and Md. Ruhul Amin, judges of the Supreme Court found that the rule discharged by the High Court Division was quite legal and they were in favor of uprooting prostitution by non interference in the case. Although the highest court urged to enact prohibiting legislation long ago but to date the country does not have a comprehensive law which totally prohibits prostitution. The sex workers are not encouraged to adopt different profession instead of sex trade. No exemplary punishment is seen for the infringement of the existing laws. We found in *Masdar Hossain case*⁶⁷ support for implementation of fundamental policy and consequently we achieved independence of judiciary but till now no case is found to implement Article 18(2).⁶⁸ The court did not direct the Government to implement the policy neither the Government itself seems to have any concern to prevent prostitution. Rather it is found that the court left the duty of making prohibitory law onto the Parliament and Parliamentarians never engaged themselves in these discussions. Law enforcing agencies are found to exploit prostitutes and NGOs provide support to exploitation against prostitution. For lenient attitude of all concerned prostitution as a trade subsists in the country randomly. It seems that there is a social process

⁶⁷ *Secretary, Ministry of Finance vs. MD. Masdar Hossain*, (2002) 20 BLD, AD.

⁶⁸ See, part 3 above.

through which female sexuality has been incorporated as labor⁶⁹ though unrecognized.

There are a number of membership organizations of sex workers, including, Ulka; Durjoy; (street based prostitutes in Dhaka); Nari Mukti Sangho (in Tangail); Mukti Mohila Samita (MMS in Daulotdia); Akshoy (consisting of evicted Tanbazar and Nimtali prostitutes); Shonghoti (consisting of 86 human rights NGOs, including 4 sex workers' organizations).⁷⁰ These are the registered NGOs in Bangladesh. Since the Government has given them permission to register as an NGO with their agendas to promote prostitution, it appears that the Government is not loyal in implementing constitutional provision mentioned in Article 18(2) under the title of fundamental policy.

6. Conclusion

Women of Bangladesh neither can powerfully exercise their rights ensured by religion nor can they properly enjoy their rights which are embodied in CEDAW. Although Bangladesh is a Muslim majority country and ratified CEDAW document, both the provisions of Islamic law and CEDAW are not practiced here frequently.

Prostitution is a national problem, it is against Islam and Bangladesh Constitution promises to eliminate prostitution gradually and the High Court recommended enacting preventive laws to stop prostitution to fulfil the constitutional obligation. The provision of article 6 of CEDAW about exploitation of free prostitution is therefore contradictory with Islam and Bangladeshi law. Since Bangladesh ratified article 6 of CEDAW without any reservation, it creates anomaly between the laws of the country.

At the same time the Government ratified the provisions of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950. Both CEDAW and the said convention with regard to exploitation free prostitution are against Bangladesh Constitution. Till today the Government has not taken any step to implement the Constitutional obligation rather it is seen that different NGOs relating to prostitution are registered in the country frequently. The existing statutory laws did not prove to be effective to combat prostitution. The

⁶⁹ Truong, Thanh-Dam. 1990. *Sex, Money, and Morality: Prostitution and Tourism in Southeast Asia*, Zed Books, available at: <http://www.amazon.com/sex-money-morality+Prostitution-Southeast/dp/086232937#> accessed on 1 December 2010.

⁷⁰ Rahim, Mia Abdur. 2006. "Sexual Exploitation of Children: A Critical Analysis with reference to Bangladeshi Law", Vol. 03 *Rajshahi University Law Journal*, pp. 157-178 at p.93.

health ministry of the Government of Bangladesh has made extensive publicity to prevent STDs in the society. Unfortunately the campaign in media and elsewhere encourages unlawful or illegal relationship by openly proposing to use devices to prevent STDs. The High Court recommended enactment of further preventive legislation to stop prostitution. Strong preventive legislation should be adopted for removing prostitution from the country. Complete abolition of prostitution from the society is not possible, but restriction on the process of prostitution by gradual efforts of Government may bring positive results. Marking or dictating clients or customers as well as brokers and related law enforcing agents in front of the community may be an effective step which in turn will be beneficial in restricting prostitution.

The Government seems to be in a dilemma to recognize or eradicate prostitution. On one hand various steps of the Government with regard to non enactment of legislation, practicing of relevant laws by law enforcing agencies and media campaign, show its implied consent towards prostitution. On the other hand, constitutional provision to prevent prostitution and non acknowledgement of prostitution as a profession by the Government, manifest its express concern against prostitution. Prostitution is at vogue in Bangladesh. Prostitutes with the aid of different national and international NGOs demand recognition of their female sexuality as part of profession. The High Court Division recognizes prostitution in one hand and recommends to stop it by enacting preventive legislation. The existing legislations are also halfway of the problem. Government is nowhere near implementation of the Constitutional provisions. In the administration, VIPs are supplied with consorts from educational institutions. With regard to international conventions the Government takes a u turn as against the constitutional provision with regard to prostitution; whereas, the Government reserved certain articles of CEDAW with the argument to uphold Islamic values. All these not only manifest the ridiculous position of the Government but also show absence of any social policy. Therefore it is the demand of the time to sketch a clear cut provision regarding the matter of prostitution in Bangladesh.