

# **Violation of the Rights of Rape Victims: Response of Criminal Justice System of Bangladesh**

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## **1. Introduction**

Bangladesh is a patriarchal society where gender inequality is a norm. Discrimination of women is usually not considered by the society as a wrong, immoral or even illegal. Women are often treated cruelty at home and by the family, in the workplace and at the societal and national level. As a consequence of such treatment, aggrieved women are supposed to seek relief from the Criminal Justice System (CJS), but non friendly CJS atmosphere often prevents them from proceeding for a formal solution. The criminal process include everything that is required to be done from the moment a woman comes into contact with the CJS and at every stage, although woman have rights but often these rights are violated. After rapes have been committed, women victims repeatedly are heard to complain that they not only suffer loss, injury and emotional trauma, but are poorly treated by the agencies of criminal justice. They are victimized doubly: by the criminal and by the system.<sup>1</sup> Criminal justice is based on different activities of the court proceedings, functions of police and prosecutions such as filing of a case, investigations, framing of charge, trial, conviction or acquittal etc.<sup>2</sup> Responses of any constituent of CJS i.e. police, prosecutors, Judges and doctors may affect the criminal proceedings. Police inefficiency, corruption, gender insensitivity are responsible for violating the rights of rape victims. Most of the victims are disappointed at the obstructive role of the police. The judiciary is not sympathetic to women's cause. Gender insensitivity of lawyers, doctors and sometimes Judges affect rape victims. There are some discriminatory laws in Bangladesh which fails to provide equal rights and status to women as against men. Moreover, structural difficulties of CJS also limit rape victims' enjoyment of rights. As a result, rape victims remain in a state of despair from seeking justice. This article examines the practical role of different constituents of the CJS and structural difficulties of the CJS, for which the rights of rape victims are violated and it also concludes with recommendations to overcome this problem.

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<sup>1</sup> George F Cole, *The American System of Criminal Justice* (Monetary, California, New York, Brooks/Cole Publishing Company 1935)132.

<sup>2</sup> Robert D Pursley, *Introduction to Criminal Justice*, (New York, Macmillan Publishing Company, 1987) 29; M Abdul Hannan, *Human Rights of the Accused in the Criminal Process*, (Gurgaon, India, Madhav Books, 2009)1; M Faiz Ud-Din and M Abdul Hannan, 'Protection of Human Rights in Criminal Justice: Bangladesh Perspective' (Research Project 1998, Rajshahi University, Bangladesh) 1; Shaheen Akhter Munir, 'Violence Against Women in Bangladesh' (An Annual Research Report BNWLA, Dhaka 2005) 77.

## 2. Causes behind Unwillingness of Rape Victims to take Legal Action

Unwillingness to take legal remedy is itself a violation of women's rights, because it creates mental pressure and limits rape victims to seek justice against the perpetrators. Rape<sup>3</sup> is a frequent occurrence in Bangladesh. In most cases, the victims or their family members remain silent due to social stigma or in fear of the rapist.<sup>4</sup> The patriarchal tradition in Bangladesh almost always places the burden on the rape victims to file a case. For fear of more harassment from police, doctors and advocates, most of the victims do not want to file a case. Most of the guardians of the victims hide the incidents or do not want to file the case for fear of culprit's pressure or for honour of the family in the patriarchal society, or, to ensure a good marriage of victims.<sup>5</sup> There is also reluctance of the victims to report because of the shame of public admission and insensitive environment in the police station. There is also a lack of police response and the slow process of bringing the guilty to book. However, even when these formidable barriers are crossed, the rate of arrest, prosecution and conviction of perpetrators are insignificant. One reason for the low rate of conviction may be the limitation of the police to produce a charge sheet, a necessary step to pursue a case against the offender.<sup>6</sup> Some women are even afraid of filing cases, as they believe it is impossible to conduct a case without offering bribe to some vested groups at various stages of proceedings.<sup>7</sup> Illiteracy, poverty and family pressures also play a vital role, as these women have virtually no access to the courts. When the victims are illiterate or unaware, they innocently destroy signs of rape. Mina Begum (22), a victim of rape case,<sup>8</sup> said that she had been raped one year earlier and after rape this matter was settled with the condition that rapist would marry her. She filed a case later when the rapist refused to marry her. By that time the signs of rape were destroyed and she could not produce sufficient evidence to prove her case. Again many rape victims do not have the financial resources to take the matter to court and therefore remain silent.<sup>9</sup> The expenses involved in seeking legal redress, such as, doctor's fees, lawyers' fees, court fees, and other incidental expenses,

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<sup>3</sup> *The Penal Code, 1860* ss 375, 376.

<sup>4</sup> Sima Moslem, *Dharshan Chitra: Analysis of Rape Victims in Bangladesh (2002-2004)*, (Dhaka, Bangladesh Mahila Parishad, 2004) 25.

<sup>5</sup> ASK, 'State Response to Gender Violence', *Rights and Realities* ( Dhaka, Ain O Salish Kendra, 1997)133; UNDP, *Human Security in Bangladesh, In Search of Justice and Dignity* (Dhaka, United Nations Development Program (UNDP), 2002) 101.

<sup>6</sup> *Ibid* 133

<sup>7</sup> Mohammad Yusuf Ali, 'Easy access to justice: Overcoming the Problems', *The Daily Star* (online), September 15, 2007  
<<http://archive.thedailystar.net/law/2007/09/03/hra.htm>>

<sup>8</sup> Case No- 216 /1999, *Nari O Shishu Nirjaton Damon Tribunal*, Rajshahi.

<sup>9</sup> Shelby Quast (ed) , *Justice Reform and Gender* (Geneva Centre for the Democratic Control of Armed Forces, Geneva, 2009)

make it very hard for poor victims. Since most of the people in Bangladesh live overwhelmingly in rural areas,<sup>10</sup> travel costs pose an additional burden for them, especially for poor rape victims. Sometimes police takes money from the culprits and in addition, local elites threaten the victim from seeking assistance from the local police.<sup>11</sup> Sometimes, local elites take money from the perpetrators and persuade the victim's husband to declare his wife as bad character.<sup>12</sup> Many women have small children to care for and it can be difficult for them to arrange childcare during the court case period.<sup>13</sup> The elaborate legal proceedings often discourage women from taking legal action. The harassment and complexities involved in court procedures make rape victims accept out of court settlements. Political or any other form of backing from influential people obviously makes the process much more difficult to seek justice against the guilty parties.<sup>14</sup> The bribe that victims have to pay to the court officials, and even to the opposing lawyer, often becomes a deciding factor in the ultimate settlement before filling a case.<sup>15</sup> In some cases, parents of the victim mutually settle the matter in exchange of monetary compensation from the culprits. Rape victims suffer severe physical and psychological damages.<sup>16</sup> The sudden shock of humiliation makes the victim almost numb and inactive and such a reaction followed by fear and shame of social ostracism prevent her from taking any initiative.<sup>17</sup> A woman who is raped undergoes a traumatic experience on at least two occasions - first when she is raped and second during the subsequent trial.<sup>18</sup> Another drawback is that rape cases are not heard in camera and the victim has to face humiliation of repeating her ordeal and answering embarrassing questions in front of an eager and unscrupulous court audience.<sup>19</sup> Thus the victims do not come forward in order to save

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<sup>10</sup> A country populated over 14.4 million, 80% of whom live in village communities that means 8 out of 10 Bangladeshi live in country side. See, more details, 'World Development Report, 2004', available at <<http://econ.worldbank.org/files/30042select> pdf, last accessed on 4 May 2005.

<sup>11</sup> Moslem, above note 4,70

<sup>12</sup> *Ibid*

<sup>13</sup> Quast, above note 9.

<sup>14</sup> Faiz Ud-Din and Hannan above note 2, 147

<sup>15</sup> M. Shamsul Haque, 'Anti-corruption mechanisms in Bangladesh', <<http://www.article2.org/mainfile.php/0901/371>> last accessed on 4 January 2011.

<sup>16</sup> Cole, above note 1, 89.

<sup>17</sup> Yasmin Akhtar, Sharmeen Afroza Farouk, Rizwana Akhter, *A research on rape and burden of proof: a study on procedural inadequacy* (Dhaka, Bangladesh National Women Lawyers Association, 1999) 91.

<sup>18</sup> Taslima Monsoor, *Management of Gender Relations: Violence against Women and Criminal Justice System of Bangladesh* (Dhaka, British Council, EWLRL, 2008) 25.

<sup>19</sup> Murlidhar C Bhandare (ed) *The World of Gender Justice* (New Delhi, Har-Anand Publications Private Ltd, 1999) 36.

themselves from embarrassment and, in turn save the family from shame.<sup>20</sup> It is humiliating for a rape victim to be questioned on her sexual history who, in addition to the trauma and indignity of describing her ordeal, must also bear the humiliation of revealing her sexual history during the trial.<sup>21</sup> There is also an overwhelming tendency in Bangladesh towards settling rape cases through local arbitration or *shalish*. Under such practices, the highest penalties of the rapist were found to be ranging from monetary penalty to a verdict to marry the victim. In case of rape related pregnancies, many Bangladeshi girls are forced to marry their rapists.<sup>22</sup> Later the husband forces her to have an abortion and denies all allegations.<sup>23</sup> Considering social stigma, the victims also agree to marry the men who raped them. If a rape victim is forced to marry the rapist and the marriage is broken thereafter, it becomes very difficult to bring about remedy. In that case, the rape victim and divorced woman cannot file a rape case and the rapists go unpunished. In fact, the rapists take the marriage as a strategy to avoid court case and punishment. According to Bangladesh Human Rights Commission, in 2010 the number of incidents of rape violence was 677 and only 374 cases were filed.<sup>24</sup> Even if they are reported, the unscrupulous officers in the police stations show negligence to register the cases. Even if the case is registered and an investigation starts, the female victims mostly feel shy and embarrassed to answer delicate questions posed by male investigating officers; as a result, the truth is not revealed.<sup>25</sup> For these above reasons, many rape victims do not want to file cases against the perpetrators. In this context, it is not surprising that most rape cases go unreported. The perpetrators of rape continue to go free despite the law because of three major reasons; the social stigma attached to rape, the accused often being the more powerful party and the legal loopholes in the system.<sup>26</sup>

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<sup>20</sup> Salma Sobhan 'Bangladesh: Women and the Law--A Case Study' (2001) 1(2) *Human Development Review* 189.

<sup>21</sup> Monsoor, above note 18, 25; Cole, above n 1, 89.

<sup>22</sup> Farhana Akhter, 'Marriage with rapist!', *The Daily Star* (online), 4 July 2003 <<http://archive.thedailystar.net/law/200307/04/fact.htm>>

<sup>23</sup> Moslem, above note 4, 72.

<sup>24</sup> Bangladesh Human Rights Commission Report, 2010.

<sup>25</sup> Motiur Rahman, 'Human Rights in Bangladesh: Women Perspective' in Khaleda Salahuddin, Roushan Jahan, and Latifa Akanda (eds), *State of Human Rights in Bangladesh: Women's Perspective (Dhaka: Women for Women, 2002)* 27.

<sup>26</sup> Nilufar Matin, 'Women's Rights: Freedom of Participation and Freedom of Violence' in Ain O Salish Kendra(ed), *Human Rights in Banladesh*, (Dhaka, 2001) 236.

**Rape Violence in Bangladesh from January, 2001 to September 2012<sup>27</sup>**

Year	Number of Incidents	Cases Filed
2001	778	297
2002	1412	709
2003	1381	640
2004	977	443
2005	835	334
2006	741	227
2007	634	298
2008	263	157
2009	446	244
2010	626	323
2011	939	529
2012	913	477
Total	9945	4744

According to this table, from January 2001 to September 2012, only 47.70% cases were filed out of 9945 reported cases in the whole of Bangladesh and 52.30% cases were not filed. It is evident from the chart that victims are unwilling to bring in forefront their ill fate.

**3. Response of Rape Related Laws**

Laws are made in order to reduce crime.<sup>28</sup> But the reality does not give any positive picture in the case of the offence of rape. The legal provisions of most protective laws for women suffer from various loopholes or shortcomings.<sup>29</sup> Existing statutory laws of Bangladesh relating to women are hardly enforced or are misused. These laws have proven largely

<sup>27</sup> Chart Prepared by Researcher from Documentation Unit, *Ain O Salish Kendra*, Dhaka

<sup>28</sup> Taslima Monsoor, 'Justice delayed is justice denied: Women and Violence in Bangladesh', *The Daily Star* (online), 2 March 2006  
<<http://archive.thedailystar.net/law/2006/03/02/index.htm>>

<sup>29</sup> Afroza Begum, *Protection of Women Rights in Bangladesh: A Legal Study in an International and Comparative Perspective* (Thesis submitted to the Faculty of Law, University of Wollongong, Australia, 2004) 1

ineffective in promoting women's positions.<sup>30</sup> Since women form the most vulnerable group in the society, they repeatedly suffer from the existing discriminatory justice system established by these laws. The provision of section 155 (4)<sup>31</sup> of the *Evidence Act*, 1872 affects victims of rape. In rape cases, evidence about the victim's past sexual experiences is presumed. 'Want of consent' is often very difficult to prove in the court, almost never are there any eye witnesses, the evidence is unavoidably circumstantial.<sup>32</sup> Marks of resistance on the body of the victim are one such set of circumstances that form the evidence. But there may be situations in which there may be no such marks of physical injury i.e the women may be too weak or too dazed to resist, and the number of men may make resistance futile and may even cause more harm than passive submission.<sup>33</sup> Under these circumstances the lack of injury cannot lead to an inference of consent by the women. As stated above, the section is wide enough to apply, not only where rape is charged under the category of 'want of consent', but also where it is charged under some other head--- for example, where the offence is committed in respect of a girl below the statutory age. The fact that the prosecutrix is a person of 'generally immoral character' cannot have any significance whatsoever, where the prosecution is not based on the want of consent. As regards the credibility of woman as a witness, there does not seem to be any reason why the law should contain a rule discriminating against women. If 'generally immoral character' is regarded as discrediting the prosecutrix, then the same principle should also be applied for discrediting the character of the male accused. Rape followed by murder can not be tried under the *Nari O Shishu Nirjatan Damon Ain*, 2000 (NSNDA), if the incident of rape is not proved, because NSNDA is quite silent about this matter.<sup>34</sup> Under such circumstance, the case will have to be restarted under the *Penal Code*, 1860 (PC). Naturally, defence counsel would try to convert rape and try to dub cases of rape followed by murder as 'murder case' so as to immune the accused from the purview of the special law.<sup>35</sup> It should be included in the definition of rape in the Act of 2000. Rape is not only a physical

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<sup>30</sup> The prime reasons for this are: the shortcomings and ineffectiveness of laws, women's inability to access legal proceedings, the traditional and cultural negative views about women's rights, the expensive and time consuming judicial process, the lack of efficient judiciary, and other socio economic reasons. See for more details, 'Domestic Violence: In Search of a Legal framework', *The Daily Star*, 11 March 2005, 27.

<sup>31</sup> Section 155 (4) of the *Evidence Act 1872* states, When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

<sup>32</sup> Murlidhar C. Bhandare (ed), *The World of Gender Justice* (New Delhi, Har-Anand Publications Private Ltd, 1999) 36.

<sup>33</sup> BNWLA. above note 17, 50.

<sup>34</sup> *The Nari O Shishu Nirjatan Damon Ain 2000* s 9; BNWLA, *Violence against Women in Bangladesh* (Dhaka, BNWLA, 2002) 75.

<sup>35</sup> Ibid

torture but also a mental torture. So, mental torture should be brought into the definition of rape.<sup>36</sup> In fact, the definition of rape mentioned in section 375 of *Penal Code*, 1860 (PC) or section 2(e) of NSNDA, 2000 is neither complete nor updated according to the laws of Bangladesh. Rape is an intercourse committed forcibly and against the will of the victim.<sup>37</sup>

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<sup>36</sup> *Penal Code 1860 s 375*

"A man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:

Firstly, Against her will; Secondly, Without her consent; Thirdly, With her consent, when her consent has been obtained by putting her in fear of death, or of hurt; Fourthly, With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married; and Fifthly, With or without her consent, when she is under fourteen years of age.

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception: Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape.'

According to the *Nari O Shishu Nirjaton Damon Ain 2000* (amended in 2003),

'Rape' means rape stated under section 375 of the Penal Code 1860 subject to section 9 under this Act.

Section 9 of Act of 2000 is reproduced here: If any person commits rape with a woman or a child, shall be punished with rigorous imprisonment for life and with fine.

Explanation: Whoever has sexual intercourse without lawful marriage with a woman not being under sixteen years of age, against her will or with her consent obtained, by putting her in fear or by fraud, or with a woman not being above sixteen years of age with or without her consent, he shall be said to commit rape; ii. If in consequence of rape or any act by him after rape, the woman or the child so raped, died later, the man shall be punished with death or with transportation for life and also with fine not exceeding one lac taka; iii. If more than one man rape a woman or a child and that woman or child dies or is injured in consequences of that rape, each of the gang shall be punished with death or rigorous imprisonment for life and also with fine not exceeding one lac taka; iv. Whoever attempts on a woman or a child-

a) To cause death or hurt after rape, he shall be punished with rigorous imprisonment for life and also with fine.

b) To commit rape, he shall be punished with imprisonment for either description, which may extend to ten years but not less than five years rigorous imprisonment and also with fine.

v. If a woman is raped in the police custody, each and every person, under whose custody the rape was committed and they all were directly responsible for safety of that woman, shall be punished for failure to provide safety, unless otherwise proved, with imprisonment for either description which may extend to ten years but not less than five years of rigorous imprisonment and also with fine.

<sup>37</sup> Naima Huq, 'Reflections on the Perception of "Consent" in Rape Cases' (2005) 16(2) *Dhaka University Law Journal* 72

The definition provided in these two laws poses more questions than solutions. The NSNDA is silent on the issue of women's committing suicide to escape violence of rape. In such cases, the people who force a woman to commit suicide can't be brought under the special law.<sup>38</sup> Even if a woman commits suicide for getting relief from repression such as rape or dowry related violence, that suicide is not triable under the NSNDA.<sup>39</sup> There is again a lot of confusion regarding the provision relating to child born as a consequence of rape. The person committing rape shall bear the responsibility of maintenance of the child born out of rape and the tribunal will decide what amount of expense the rapist shall pay.<sup>40</sup> There is anomaly in the NSNDA since it does not address a situation whereby the rapist has no property at all or where there are more than one rapist, from whose estate money shall be recovered for maintenance and who will be the father of the child.<sup>41</sup> The NSNDA also assumes that a woman must bear the burden of continuing a forced pregnancy. The NSNDA is silent as to what would happen to the child who is born if her mother fails to prove case against its rapist father? According to the personal laws, mother is the primary guardian of a child born out of marriage or any other sexual intercourse (rape inclusive). Therefore, it is very natural that the child born as a sequel to rape will be reared up by the woman.<sup>42</sup> The innocent child will have to face immense sufferings in her/his life.<sup>43</sup> Due to rape and illegitimacy question, rights of that child are seriously hampered in Bangladesh.<sup>44</sup> Through an amendment in 2003, the words 'fourteen years' appearing twice in the section 9 of NSNDA have been substituted by the words 'sixteen years' which implies that any man who forcefully engages in sexual intercourse with his wife (who is over sixteen years of age), shall not be liable for committing rape. The issue of marital rape has thus been overlooked under the law.

### 3.1 Burden of Proof

It is a pity that the rape victim herself has to prove that she has been raped. According to the *Law of Evidence, 1872*, the burden of proof lies on the victim, especially in rape cases. Moreover, a rape victim has to satisfy the court that she did not consent to such sexual act and she was forced into the act. She also has to produce the physical signs of struggle which may be extremely difficult for her. Whether the victim is an infant or child

<sup>38</sup> BNWLA, above n 34, 76

<sup>39</sup> Ibid

<sup>40</sup> *The Nari O Shishu Nirjaton Damon Ain 2000*, s 13

<sup>41</sup> BNWLA, *Violence against Women in Bangladesh 2008-2009* (Dhaka, BNWLA, 2010) 45.

<sup>42</sup> BNWLA, *Violence against Women in Bangladesh*, (Dhaka, BNWLA, 2002) 79.

<sup>43</sup> Ibid

<sup>44</sup> Ibid



under 14 years, the law remains the same. A child with no knowledge about sex has to describe her experience to the police and to the court. The innocence of the accused need not be proved by the defence because the court begins the trial treating the accused as innocent.<sup>45</sup> No accused can be punished for any allegation of committing offence unless the allegations are proved beyond doubt. It is also impossible to witness a rape incident by a person except the abettor of the rapists. One rape victim, named Rafia Khatun said to a researcher that she had been raped in a dark place and she identified the culprits but without any eye witness the case was dismissed whereas the incident truly happened.<sup>46</sup> Another rape victim named Latifa Khatun said, she could not produce witnesses in court, because nobody had seen this incident.<sup>47</sup> Thus in all cases the court has to depend on circumstantial evidence. However, where the witnesses are available, sometimes they cannot narrate ins and outs of the fact accurately during the examination into the court.<sup>48</sup> When the victims are illiterate or unaware, they innocently destroy signs of rape. When a woman is raped, she must convince the police, then be subjected to a medical examination and finally undergo an embarrassing and humiliating cross-examination in the court, which mentally devastate the victim.<sup>49</sup> In most cases, police, opponent lawyers do not hesitate to humiliate her by asking irrelevant and scandalous questions.<sup>50</sup> Thus a rape victim is abused at various stages---while seeking help from the police, going for the medical test to doctor, and finally in the court.<sup>51</sup> Regrettably, the offenders do not face such uncomfortable situations. It is also found that some victims or parents of the victim withdraw the pending cases or mutually settle the matters in exchange of money.<sup>52</sup> This also causes psychological sufferings to the victim. Most often, insensitivity to women's issues and corruption of police, doctors, and advocates becomes barriers to prove the case. For these above reasons, it is impossible for a victim to prove rape.

#### 4. Responses of Criminal Proceedings

Responses of any constituent of the CJS i.e. police, doctors, prosecutors and Judges may affect the criminal proceedings and the rights of rape victims may be violated.

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<sup>45</sup> AIR 1931 ALL 356.

<sup>46</sup> *State vs. Mahar Ali and Others* (2003), Case no-755/2004, GR No- 486/2003, Nari O Shishu Nirjaton Damon Tribunal, Rajshahi.

<sup>47</sup> *State vs. Moksed* (2006), Case No-73/2006, Nari O Shishu Nirjaton Damon Tribunal, Rajshahi.

<sup>48</sup> BNWLA, note 17, 91

<sup>49</sup> See <<http://nation.ittefaq.com/issues/2008/04/10/news0045.htm>, last accessed on 20 March 2011

<sup>50</sup> Moslem, above n 4, 77.

<sup>51</sup> Monsoor, above note 18, 25

<sup>52</sup> Moslem, above n 4, 83

#### 4.1 Role of Police

The police is the first institution where a woman comes into contact with the CJS.<sup>53</sup> According to the *Code of Criminal Procedure, 1898 (Cr.PC)*, the complainant of any case may go to the court or *thana* for seeking justice. The victim, if admitted into hospital after checkup, can file a suit in the *thana* with medical report. Again if the victim or complainant sues in *thana* in case of violence, she is sent to the hospital for check up by doctor. The complainant may seek justice from the court directly. In cognizable cases, the court sends the complaint to the *thana* for filing the case and orders police to investigate the matter. At the police station where most rape victims come into contact with police they are often disappointed with their lack of sensitivity.<sup>54</sup> As rape is a cognizable offence, the officer in charge of the *thana* takes the First Information Report (FIR) under section 154 of the Cr.PC. FIR is the foundation of a prosecution case and investigation can be termed as its pillar.<sup>55</sup> It is the duty of the police to record the information and send the victim for medical examination and later for the court proceeding. In case of a rape, the complaint must be made to the police concerned within twenty four hours of the incident. In the majority of cases the police are not prompt in recording the complaint and as such the evidence is lost and the case loses its standing or importance.<sup>56</sup> The police sometimes ask the victim or her representatives to collect the medical report and then file the FIR or sometimes send the victim to the court without filing out the FIR completely, which delays the investigation.<sup>57</sup> Furthermore most police stations do not have women staff to whom the victims can express themselves and confide actual facts.<sup>58</sup> According to the 'Odhikar' report, nobody can file a complaint at the police station without paying money.<sup>59</sup> When a rape victim comes to a police station to file a case, generally the male police officers interrogate her.<sup>60</sup> *A woman who has been raped undergoes two crises, one the rape and the other the subsequent investigation and trial.*<sup>61</sup> In almost all the cases the police do not act in time and the whole process is delayed. The police unduly influence the

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<sup>53</sup> Shaheen Akhter Munir, *An Annual Research Report on Violence Against Women in Bangladesh 2005* (Dhaka, BNWLA, 2006) 135.

<sup>54</sup> Duxita Mistry, 'Victims and the Criminal Justice System in South Africa' (Paper presented at the Centre for the Study of Violence and Reconciliation, Johannesburg, South Africa, 29 October 1997)

<sup>55</sup> BNWLA, above n 17, 94.

<sup>56</sup> Naripokkho, Bangladesh Mahila Parishad and IRAW Asia Pacific, '*Baseline Report on Violence Against Women in Bangladesh*' 47

<sup>57</sup> BNWLA above n 17, 84.

<sup>58</sup> Naripokkho, Bangladesh Mahila Parishad and IRAW Asia Pacific, 47.

<sup>59</sup> Odhikar, '*Human Rights in Police Custody*', (Dhaka, 2004) 11.

<sup>60</sup> BNWLA, note 17, 53.

<sup>61</sup> Monsoor, above note 28, 22.

process of filing the FIR.<sup>62</sup> In most of the cases, victims do not want to be checked by a male doctor.<sup>63</sup> Female doctors are not available in *thana* health complexes. When a rape case is reported to a police station, often the police show negligence and delay in having the victim medically checked up.<sup>64</sup> During investigation, the officer examines the witnesses, visits the place of occurrence, seizes necessary documents, and makes a map and arrests the perpetrator, if necessary.<sup>65</sup> In case of rape, police often do not properly examine and evaluate the marks on the victims. Garments of rape victims are seldom seized and specimens are not collected at the scene of the crime.<sup>66</sup> Sometimes the police makes the two parties reach a settlement before going to court by explaining social consequences the victim would have to face and forcing the victim to a 'mutual settlement'.<sup>67</sup> As the accused parties are usually more solvent financially, they can "purchase" the statement of the victim and force them to come to a solution, which is profitable for them.<sup>68</sup> The police are also reluctant to file cases because compromise after filing of a case is a common phenomenon. A research conducted by Bangladesh National Women Lawyers Association (BNWLA) argued that the police investigation is very poor and only 20% police cases are reported to end in conviction.<sup>69</sup> But it is true that acquittals are given mainly due to lack of corroborative evidence and other defects, for which accused gets benefit of doubt.<sup>70</sup> In 90 percent of rape cases the victims do not get justice for benefit of doubt in favour of the accused.<sup>71</sup> To a large extent, improper investigation by the police is responsible for lack of convictions. Failure of police, in particular the investigation officers, in preparing the FIR, case docket and investigation report properly and in conducting thorough investigation or in producing witness to the court dilute a case substantially or delay the hearing of a case for an indefinite period.<sup>72</sup> In most cases, statements of material witnesses are almost never recorded at the relevant time and sometimes police do not properly examine and evaluate the marks on the

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<sup>62</sup> Baseline Report, above n 56, 47.

<sup>63</sup> BNWLA, above n 17, 52.

<sup>64</sup> Ibid

<sup>65</sup> *The Code of Criminal Procedure*, 1898 s 156

<sup>66</sup> A.T.R. Rahman and D. Solongo, *Human Security in Bangladesh: In Search of Justice and Dignity* (United Nations Development Program, Bangladesh, 2002) 108.

<sup>67</sup> Asma Akhter Jahan, *Women Violence in Bangladesh and Legal Framework: Role of Law Implementing Institutions* (Dhaka, FOWSIA, 2005) 51

<sup>68</sup> Rahman and Solongo, above n 66, 109.

<sup>69</sup> BNWLA, above n 17, 94

<sup>70</sup> Justice Md. Hamidul Haque, 'Trial of Criminal Cases: Loopholes and Deficiencies in the Existing Laws' 58 *DLR* (2006) 9.

<sup>71</sup> Kajalie Shehreen Islam, 'How Rapists Go Free', *The Daily Star*(Magazine), 2 October 2009.

<sup>72</sup> Asif Nazrul, 'Malpractices Relating to Bail' *The Daily Star*, 4 March 2006, 18.

victims in cases of rape and other torture.<sup>73</sup> Lack of medical experts to corroborate reports tips the prosecution in favour of the accused; post-mortems conducted by non-professionals often produce erroneous results so that the court rules in favour of the accused.<sup>74</sup> The absence of allegations of violence against a specific offender hinders the legal process and encourages quick acquittals. Sometimes the investigating officer deliberately, being influenced by the accused, makes unnecessary delay in starting the investigation and recording statements of the witnesses. The use of bribes and other pressure has a direct effect on police responsiveness, which only sets the stage for such persuasion tactics to continue.<sup>75</sup> Though it is the duty of police to produce witnesses before the court, police often does not take any proper step due to corruption or negligence and as a result, many cases run on for years. Furthermore, poor women are often pressured by police to withdraw their complaints.<sup>76</sup> Where the perpetrator of violence is an agent of a law enforcement agency, the police generally do not take necessary care to prepare the charge sheet and tend to treat the agent favorably. There are many cases where the police neither investigate nor arrest the accused. It was found from the judgment of the Seema Choudhury rape case<sup>77</sup> that the investigation was not done in a proper way. The complainant of this case was a police officer, the accused and investigation officer were also police personnel. In the judgment, the Judge opined that in this case the government party tried to make a false story without collecting necessary information and witnesses before the court. So, it cannot be proved. Efficient and timely investigation is one of the prerequisites to get fair justice in rape cases.<sup>78</sup> When women are raped followed by murder, if the investigating officer does not submit a well prepared charge sheet, then the whole case becomes complex and weak.<sup>79</sup> As a natural consequence of the political interference, many of the police officers find themselves dragged into the whole business.<sup>80</sup> Sometimes, police do not investigate properly due to the influence of some powerful local people or political people.<sup>81</sup> Sometimes police falsely implicate innocent people and make false investigation report

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<sup>73</sup> M Abdul Hannan, Nazrul Islam Mondol and Shahidul Islam, 'Human Rights of Accused Women in Criminal Justice in Bangladesh', *Middle East Journal of Family Medicine* (2007) 5(7)

<sup>74</sup> Ibid.

<sup>75</sup> *Human Security Report*, UNDP, September 2002, Dhaka, Bangladesh.

<sup>76</sup> Ibid

<sup>77</sup> *State vs Uttam Kumar and Others*, Case no-21/97, Raozan Thana; BNWLA(1999), *Op.cit*, p. 123-128.

<sup>78</sup> Shaheen Akhter Munir, *An Annual Research Report on Violence Against Women in Bangladesh 2005*, (Dhaka, BNWLA, 2006) 137

<sup>79</sup> Baseline Report, above n 56, 49.

<sup>80</sup> Faiz Ud-din and Hannan, 102.

<sup>81</sup> Masood Alam Ragib Ahsan, 'Police Impunity: Lessons learnt', in 'Investigation, Research and Publication of Human rights Violation' (Dhaka, Odhikar, 2003) 101.

to protect criminals.<sup>82</sup> Moreover, punishment of the criminal and justice of the victims depends on their unbiased, factual reports.<sup>83</sup> In a study it is found that police are seen to be a major problem in the process for justice.<sup>84</sup> Inefficiency of the police in preparing factual charge sheet is common.<sup>85</sup> Many police have informers who are criminal themselves or are paid off by local powerful people.<sup>86</sup> When rape victims are brought into police station or even to file a complaint, they are generally subjected to indecent questions, harassment and abuse, which reflects police attitude.<sup>87</sup> In certain cases, police do not want to file a case if the victim does not satisfy them by giving bribes.<sup>88</sup> Women unwilling to pay become victims and the police have also a negative approach towards women.<sup>89</sup> A victim of rape, named Asma,<sup>90</sup> commented that police behaved rudely with women kept in safe custody. According to her, when a victim of rape goes to the police to complain, the first impression the police have of her is that she is a woman of ill repute or a prostitute. The women are often treated rudely, with suspicion and as if the rape was due to some fault of theirs.

#### 4.2 Role of Doctor

In case of rape, the medical examination should be completed as soon as possible after the occurrence.<sup>91</sup> When the rape victim appears before the doctor, the doctor is supposed to give report and certificate about the occurrence.<sup>92</sup> Doctors like the police also consider victims as 'bad' and many of them think that the majority victims are habituated to sexual relations.<sup>93</sup> In the court proceedings, the certificate given by the doctor is strong evidence of the incidence.<sup>94</sup> Sometimes doctors give false certificate

<sup>82</sup> BLAST, *Seeking Effective Remedies: Prevention of Arbitrary Arrest and Freedom from Torture and Custodial Violence*, Dhaka, Bangladesh Legal Aid and Services Trust (BLAST, 2005) 5.

<sup>83</sup> Baseline Report, note 56, 49.

<sup>84</sup> Odhikar, *'Human Rights and Police: Bangladesh Perspectives'*, (Odhikar, Dhaka, 2002).

<sup>85</sup> Jahan, above n 67, 51.

<sup>86</sup> Odhikar, *Human Rights and Police Custody: Dhaka Metropolitan Police* (Dhaka, Odhikar, 2004) 14

<sup>87</sup> Hameeda Hossain, *'Accounting for Justice', Rights and Realities* (Dhaka, Ain- O-Salish Kendra, 1997) 127; Motiur Rahman, *'Human Rights in Bangladesh: Women Perspective'*, in *'State of Human Rights in Bangladesh: Women's Perspectives'*, (Dhaka, Women For Women, 2002) 29.

<sup>88</sup> BNWLA above n 34, 89.

<sup>89</sup> Rahman, above n 87, 28-29.

<sup>90</sup> Case No-250/2004, *Nari O Shishu Nirjaton Damon Tribunal*, Rajshahi.

<sup>91</sup> *The Nari O Shishu Nirjaton Damon Ain, 2000*, s 32(i).

<sup>92</sup> *The Acid Crime Prevention Act 2002*, s 29

<sup>93</sup> At an interview with a Woman Victim.

<sup>94</sup> *The Nari O Shishu Nirjaton Damon Ain 2000*, s 23. *The Acid Crime Control Act 2002*, s 20.

in favour of the accused.<sup>95</sup> Police and criminals have a tendency to influence medical reports to fabricate those in their favour to cover up their misdeeds.<sup>96</sup> In the forensic test the doctors do not agree to touch the patient without the permission of the Magistrate. Most of the rape victims do not allow male doctors to do the test.<sup>97</sup> Most of the victims of rape cases are not interested to do test due to the lack of specialist doctors. Sometimes doctors are rude to their victims. According to a rape victim,<sup>98</sup> medical report of a doctor in case of criminal case means monetary corruption of a doctor. She also added that her incident was true, but doctor gave certificate that there was no *alamat* for rape. A research conducted by 'FOWSLA'<sup>99</sup> shows that among 86 cases, 70% patients are tested by male doctors and 30% cases by female doctor.<sup>100</sup> Due to shortage of female doctors, some victims of such crimes are have to be tested by male doctors for filing the case, but most of the victims avoid them for which they are once again victimized under the CJS. The presence of the male doctor as an examiner is itself a trauma for the victim, especially in a country where social values and religion play an important role in their lives. According to one doctor,<sup>101</sup> female doctors are not interested to come to the forensic department. As a result male doctors have to be there to perform this duty in presence of either a nurse or *aya* (Nurse Assistant). There are many incidents in Bangladesh where the perpetrators guilt could not be proved due to false or defective medical report. Medical evidence is a crucial piece of information, which is required for establishing the case of rape in a court of law. It has been observed that doctors in government hospitals in many cases hesitate to give frank medical opinion in rape cases for fear of appearing as a prosecution witness and being subjected to embarrassing cross-examinations. The report of the medical examination is often cursory or is not sent in time. Therefore rape victims are being deprived of justice

### **4.3 Role of Lawyer**

During examination and cross-examination, almost all rape victims face scandalous and attacking questions of lawyers.<sup>102</sup> In court, indecent questions are asked and gestures are made in the open courtroom that

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<sup>95</sup> Shaheen Akhter Munir, *Annual Research Report on Violence Against Women in Bangladesh 2005* ( Dhaka, BNWLA, 2006) 68

<sup>96</sup> Jahan above n 67, 66.

<sup>97</sup> BNWLA, above n 34, 91.

<sup>98</sup> Interview with a rape victim, named Zaheda Khatun, Case no-486/2003, *Nari O Shishu Nirjaton Damon Tribunal*, Rajshahi.

<sup>99</sup> Forum on Women in Security and International Affairs.

<sup>100</sup> Jahan, above n 67, 66.

<sup>101</sup> Interview with Dr. Rosy Ara Khatun, Medical Officer, Medical Sub-dipo, Divisional Office, Rajshahi.

<sup>102</sup> See <<http://nation.ittefaq.com/issues/2008/04/10/news0045.htm>, last accessed on 20 March 2011

mentally devastates a rape victim. In most cases, defence counsels intentionally ask obscene questions to get some sort of pleasure.<sup>103</sup> They also try to prove the victims as characterless by diverting the cases. Since the cross-examinations take place in front of many people, victims feel humiliated and get demoralized.<sup>104</sup> In court, efforts are made by the defence lawyer to find the sexual history of the complainant. To win the case, the defence lawyer asks irrelevant questions one after another.<sup>105</sup> The raped woman is asked how many men raped her, if she tried to resist at that time and if she got any pleasure. In reply to the cross-examination, asked by the defence lawyer, the witnesses feel nervous and miserably fail to give correct answers. In many cases, many victims withdraw their cases to avoid this type of unwarranted situation.<sup>106</sup> This is how the woman is re-raped by the court. This type of harassment in the trial proceedings is the reflection of gender insensitiveness and perversion of all concerned.<sup>107</sup> The defence lawyers take advantage of the situation and indulge in character assassination and comment on personal intimate matters with the approval of the court. As a result, real evidence is often suppressed.<sup>108</sup> The Public Prosecutors (PP) and Assistant Public Prosecutors (APP) are appointed politically; they may follow party interests and are not accountable towards the victims.<sup>109</sup> They may unnecessarily delay proceedings. Sometimes, the PP does not produce witnesses before the court, because he has been bribed by the accused and creates an opportunity to grant bail to the accused. Often he demands money from both the parties. Though the victims and witnesses can get opportunity to express themselves freely in camera trial under the NSNDA but this is not in practice.

#### 4.4 Role of Judges

Judges are not only the leaders of the courtroom but also administrators of the criminal process.<sup>110</sup> At the trial court, Judges must ensure that the prosecution and investigation are not lax. Victims expect that they will get empathy from the courts. The process of getting justice on the ground is

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<sup>103</sup> Ibid

<sup>104</sup> M Shamsul Haque, 'Anti-corruption mechanisms in Bangladesh', available at <<http://www.article2.org/mainfile.php/0901/371>> last accessed on 4 January 2011

<sup>105</sup> BNWLA, above n 17, 116.

<sup>106</sup> See <<http://nation.ittefaq.com/issues/2008/04/10/news0045.htm>>, Last accessed on 20 March 2011

<sup>107</sup> Snigdha Madhuri 'Cross-examination of rape victims: A mental torture', *The Daily Star*, 29 March 2008, 23.

<sup>108</sup> Roushan Jahan, Mahmuda Islam, *Violence against Women in Bangladesh: Analysis and Action* (Women For Women and South Asian Association For Women's Fund Dhaka, 1997) 43.

<sup>109</sup> Faiz Ud-Din and Hannan, above n 2, 148.

<sup>110</sup> Cole, above n 1, 403

long and cumbersome. NSNDA tribunals are overloaded with huge number of cases. An average of 60 cases is fixed for trial in each tribunal every day. It is impossible to make hearings of these huge cases or complete the trial process within 180 days.<sup>111</sup> Most of the Judges are still predominantly men and typically conservative.<sup>112</sup> This is reflected in judicial decisions.<sup>113</sup> If the Judge does not fix the next date of a case, with the permission of the Judge, *peshkar* is allowed to fix the date. In such case, it gives an opportunity to some *peshkars* to take bribe from the party for fixing the date. If complainant does not give him bribe, he may not summon witnesses; on the other hand by taking bribe from the accused party, he may abstain from sending summons to witnesses. Much of the time there is a lack of reliable witnesses, lack of eyewitnesses, lack of proper investigation, lack of proper collection of evidence and lack of submission of proper reports by experts. Due to these factors, as well as inefficiency, lack of accountability, intimidation of witnesses and complaints and so on, Judges often have no option but to acquit the accused, many of whom are actually guilty.<sup>114</sup> There are some cases where insensitiveness of Judges was detected. In one case<sup>115</sup>, the Judge failed to take into account the hostile environment both in the society and in the court in which a woman has to testify against the accused for 'illicit sexual intercourse' or abduction. In another case<sup>116</sup>, the Judge did not have the ability or the willingness to consider 'unusual' events and all the 'improbable' circumstances in which rape occurs. In another case<sup>117</sup>, the victim's absence from the court appeared to be the principal reason for acquittal of the accused, where the court could consider the written testimony of victim. It is not merely the settlement of a dispute between two parties, but a crime against a person that was being determined. In another case<sup>118</sup>, the Judge appeared to have given greater consideration to the concern for social legitimacy of the child than to the more technical issue of age of consent; and the accused was rewarded. In another case<sup>119</sup>, the judgment revealed that the court never addressed the question of why Seema, the victim was detained in the first place, especially as her mother's house is located close to the outpost. The investigating officer has commented

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<sup>111</sup> *The Nari O Shishu Nirjatan Damon Ain 2000*, s 20

<sup>112</sup> Jahan and Islam, above n 108, 43.

<sup>113</sup> Ibid

<sup>114</sup> *State vs Nur Muhammad* 38 DLR (1986) 349; UNDP 'Human Security in Bangladesh: In Search of Justice and Dignity', (Dhaka, United Nations Development Program, Bangladesh, 2002) 101.

<sup>115</sup> *State vs Israfil*, Case no. 58/95, Cantonment Thana, Dhaka; See, for details, Naripokkho, 'Gender and Judges: A Pilot Study in Bangladesh', Naripokkho, Dhaka, 1997.

<sup>116</sup> *State vs Imrat and Abul Hussain*, Case No. 86/89, Motijhil P S, Dhaka.

<sup>117</sup> *State vs. Badiuzzaman*, Case No. 10/85, Tejgaon P S, Dhaka.

<sup>118</sup> *State vs Mithu Kazi and Zakir Hussain*, Case No. 175/95, Sabujbag P S, Dhaka.

<sup>119</sup> *State vs. Uttam Kumar and Others*, Case No-21/97, Raozan P S, Dhaka;



during his testimony that the police investigation of Seema's antecedents had revealed that Seema is 'clever, precocious and a floating prostitute'. The Judge never questioned the truthfulness, relevance and appropriateness of such a comment. Seema's status as an adult claimed by the detaining police was never questioned nor was any medical examination ordered to determine her age although Seema herself claimed that she was a minor. The Judge did not question or bring to notice why she did not complain and or whether she was unable to complain. He simply highlighted the fact that Seema herself was not the complainant, when it was totally irrelevant to the case itself. The Judge concluded in his judgment that the weakness of the case lies in the fact that the complainant, accused and investigating officials are all police implying that there would be an inherent tendency to protect fellow workers and colleagues.

#### 4.5 Response to Corruption

The bribe that parties have to pay to the court officials, to Judges, and even to the opposing lawyer, often becomes a deciding factor in the ultimate settlement of a case.<sup>120</sup> Lawyers in collusion with court officials often charge exorbitant fees from the clients or demand money from the clients for persuading court officials to change the hearing dates of cases or to seek other undue privileges from them. Amnesty International reported that corruption<sup>121</sup> among the police and lower judiciary results in the violation of human rights and impedes justice for those without money and political influence.<sup>122</sup> According to a survey on the judiciary conducted

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<sup>120</sup> M. Shamsul Haque, 'Anti-corruption mechanisms in Bangladesh', available at <<http://www.article2.org/mainfile.php/0901/371>>, last accessed on 4 January 2011

<sup>121</sup> In general, Corruption means giving or obtaining advantage which are illegitimate, immoral, and/or inconsistent with one's duty or the rights of others. See more at <<http://www.businessdictionary.com/definition/corruption.html>>, last accessed on 15 March 2011; An act done with an intent to give some advantage inconsistent with official duty and the rights of others. It includes bribery, but is more comprehensive; because an act may be corruptly done, though the advantage to be derived from it be not offered by another. Sometimes corruption is understood as something against law; such as, a contract by which the borrower agreed to pay the lender usurious interest. It is said, in such case, that it was corruptly agreed, etc. See also for more details at <<http://www.leclaw.com/def/c314.htm>>, last accessed on 15 March 2011, but in this thesis 'corruption' has been basically treated as bribery.

<sup>122</sup> See also, Amnesty International Press Release AI Index: ASA 13/013/2003 (public), News Service No. 120; 16 May 2003, Bangladesh: 'Time for action to protect human right' available at <<http://web.amnesty.org/library/index/ENGASA130132003?open=ENG-BGD>> last accessed on 4 June 2009. The 'Higher Judiciary is not itself free from allegation of corruption'. See, for details, M R Islam and S M. Solaiman 'Public Confidence Crisis in the Judiciary and Judicial Accountability in Bangladesh' (2003) 13 *Journal of Judicial Administration* 29-50.

by Transparency International,<sup>123</sup> judiciary in Bangladesh ranks in the top position in terms of corruption. The findings of Transparency International indicate that the judiciary has overtaken the law enforcement agencies as the most corrupt institution in the service sector.<sup>124</sup> The survey report, '*Corruption in Service Sector: National Household Survey 2010*', which was released, says about 88% of people who turned to the judiciary were victims of corruption one way or the other. Corruption, according to the report, runs through the entire judicial system—68.9 per cent had to pay bribes at Magistrates' courts, 58.4 per cent Judges' court and 73.6 per cent the High Court. Annual Report 2002 of Transparency International revealed that in Bangladesh police has obtained first position in respect of corruption. According to the report:<sup>125</sup>

'Ordinary people cannot submit FIR without giving money to police; almost 80% cases are filed by giving money and the amount of money may range from Tk. 500.00 to Tk. 50000.00'

An empirical study which explored monetary corruption of different entities of Bangladeshi criminal justice system shows:<sup>126</sup>

'80% women victims gave bribe to police and only 20% were free from such type of corruption. 52% victims confessed that PP and APP demanded and took bribe from them, 08% victims said that PP and APP demanded bribe but victims did not give, and only 40% victims said that PP and APP did not demand bribe. 45% victims confessed that doctor demanded and took bribe from them, only 12% victims said that doctor demanded bribe from them and gave biased report for not getting it. 32% victims gave bribes to court official, 52% replied that court official did not demand any money, and 16% claimed that court official demanded money but did not take.'

<sup>123</sup> A Survey conducted by Transparency International on the 'Corruption in South Asia: Insights and Benchmarks from citizen feedback' in five countries including Bangladesh. In Bangladesh, the survey was conducted on 3030 respondents, 2305 rural and 725 urban in December 2002,23, available at <<http://www.transparency.org/pressreleasesarchive/2002/dnld/southasiarepot.pdf>>, last accessed on 13 March 2010.

'Judiciary dwarfs police in TIB graft report', available at

<<http://www.sananews.net/english/2010/12/25/judiciary-dwarfs-police-in-tib-graft-report>>, last accessed on 4 January 2011; 'TIB puts judiciary on top of corruption list', available at

<[http://newstoday.com.bd/index.php?option=details&news\\_id=15591&date=2010-12-24](http://newstoday.com.bd/index.php?option=details&news_id=15591&date=2010-12-24)>, last accessed on 4 January 2011; 'TIB findings must have shaken people's faith in judiciary', available at

<<http://www.savebd.com/articles/tib-findings-must-have-shaken-people%E2%80%99s-faith-in-judiciary>>, accessed on 4 January 2011; 'Judiciary most corrupt: TIB' available at <<http://www.defence.pk/forums/bangladesh-defence/85935-judiciary-most-corrupt-tib.html>>, accessed on 4 January 2011.

<sup>125</sup> *The Weekly Khobor Kagoj*, 7 April 2004.

<sup>126</sup> Md. Abdur Rahim Mia, *The Rights of Women in the Criminal Justice System of Bangladesh* (An Unpublished PhD thesis, Department of Law and Justice, Rajshahi University, Bangladesh. 2011)

A rape victim, named Shapla Khatun said that she had to give 300 taka to the PP for everyday hearing and without it no hearing were held.<sup>127</sup> Mukta Begum (32), a victim of rape said during interview that money was a necessary element to know the next hearing date from court officials.<sup>128</sup> There are several laws<sup>129</sup> still in force to prevent corruption. Not only are these laws in force but also there are some special courts and tribunals to try corruption cases. Corruption however continues to a common phenomenon, which hinders women's access to justice in Bangladesh.

### 5. Response to Safe Custody

Until 2000, there was no law directly providing for safe custody. It obtained legal status from judicial pronouncement. The concept was directed towards protecting the best interest and the welfare of victims' girl and women. When a rape victim suffered from insecurity, the state could ensure her security by providing a 'safe custody' in jail.<sup>130</sup> There was a practice in Bangladesh of placing women, juveniles and children in 'safe custody' in jails or prisons under certain circumstances before 2000.<sup>131</sup> In Bangladesh every year hundreds of women and girls were kept in prison under 'safe custody'. Although the law prohibits women in safe custody from being housed with criminals, in practice, no separate facilities existed in jail. After a FIR had been made and the medical examination concluded, the investigating officer produced the victim of rape before the court, then the Magistrate sent her to the jail without taking her consent. Human rights groups argued that there was no basis in law for safe custody and women were sent in jail solely on the discretionary power of the judge, on application from the police, for their safety.<sup>132</sup> For several years, human rights activists had been trying to have the practice abolished.<sup>133</sup> Following the rape and subsequent death of teenager Shima Chowdhury in safe custody at Chittagong jail in 1997, opposition to the practice increased.

<sup>127</sup> Case No 117/2010, *Nari O Shishu Nirjaton Damon Tribunal*, Rajshahi.

<sup>128</sup> Case No-56/2010, *Nari O Shishu Nirjaton Damon Tribunal*, Rajshahi.

<sup>129</sup> *Anti-Corruption Commission Act, 2004; Money Laundering Act, 2002; Bangladesh Government Servants (Conduct) Rules, 1979; Criminal Law Amendment Act, 1958; Prevention of Corruption Act, 1947; some sections of the Income Tax Ordinance, 1984 and some sections of the Penal Code.*

<sup>130</sup> A 1997 report revealed that there are 269 persons in safe custody in 54 jails of the country; Source: *The*

*Daily Bhorer Kagoj* (A Bengali Daily), Dhaka, 5 April 1997

<sup>131</sup> Coordinating Council for Human Rights in Bangladesh (CCHRB) *State of Human Rights in Bangladesh* (Dhaka, CCHRB, 1997) 55-57; available at <<http://www.derechos.org/omct/>>, last accessed on 1 January 1998

<sup>132</sup> *The Daily Star*, 11 November 1997. 'Safe Custody' in Jail Lacks Legal Basis: ASK', available at <<http://www.dailystarnews.com>>, last accessed on 25 June 1998; *Bangladesh Observer* [Dhaka] "Safe Custody: Legal Notice on Home Secy, IG, Police, Prison.' 10

<sup>133</sup> Amnesty International (AI), *Bangladesh: Institutional Failures Protect Alleged Rapists* (Index: ASA 13/04/97, London: Amnesty International)

In February 1997 three human rights groups of Bangladesh - Ain O Shalish Kendra (ASK), Bangladesh Legal Aid and Services Trust (BLAST) and the National Legal Aid Network (NLAN) - filed a notice calling upon the home affairs secretary, the law and parliamentary affairs secretary, and the inspector generals of police and prisons to review cases of women and girls in jail for safe custody.<sup>134</sup> The organizations asserted that the practice was a violation of fundamental rights to liberty and equality guaranteed in the constitution. In October 1997, ASK successfully petitioned the government for the release of three girls from safe custody.<sup>135</sup> At a press conference in Dhaka in November 1997, ASK representatives issued a written statement again asserting that the concept of safe custody has no legal basis, as 'such a provision does not exist either in the Code of Criminal Procedure or in the Jail Code'.<sup>136</sup>

Before 2000, there was no term known as "safe-custody" in the wide variety of 'black and white' legal texts of Bangladesh. The term was first used in section 31 of the *Nari O Shishu Nirjatan Daman Ain, 2000* (NSNDA) which makes it mandatory on the part of the court, if it ever decides on the need of providing "safe-custody", to keep the innocent female victims somewhere outside the ordinary prisons.<sup>137</sup> However, these provisions have been criticised by human rights groups on the grounds that they have merely changed the location of where women and children may be detained, from prisons to Government or approved Non-Governmental Organisation (NGO) shelters, and have 'not changed the basic paternalistic assumption that it was for the state to determine the question of a woman's safety, irrespective of her age'.<sup>138</sup> The High Court Division, in *Jesmin Nahar vs. the State and another*,<sup>139</sup> held that keeping the victim-petitioner in judicial custody against her will was illegal. In this case, the petitioner Jesmin Nahar, a young girl of 18 years, was kept in judicial custody according to an order passed by the Magistrate under the NSNDA, 2000. This judgment not only ended the illegal detention of one particular victim, but also revealed the fact that judicial custody is a place where the detainee becomes more vulnerable and lives in a hostile environment for an indefinite period. It is a precedent, which lays down that the

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<sup>134</sup> *Bangladesh Observer* 'Safe Custody: Legal Notice on Home Secy, IG, Police, Prison' 21 February 1997, 10

<sup>135</sup> Amnesty International, *Children in South Asia: Securing Their Rights* (AI Index: ASA 04/01/98) (London: Amnesty International, 17)

<sup>136</sup> *The Daily Star* 'Safe Custody' in Jail Lacks Legal Basis: ASK' (11 November 1997) available at <<http://www.dailystarnews.com>>, last accessed on 25 June 1998

<sup>137</sup> Barrister Tureen Afroz, 'CEDAW and the Women's Rights in Bangladesh - a promised Silver Lining', available at <<http://www.worldnewsbank.com/tureen-seminar.html>>, accessed on 12 August 2012

<sup>138</sup> 'The death penalty features in 13 out of 28 provisions', ASK (2001), "Human Rights in Bangladesh", Dhaka (2001) 131

<sup>139</sup> Criminal Miscellaneous Case No. 7782 of 2000, HCD. Judgment delivered on 27 March 2001, and published in the *Daily Star* on 26 August 2001.

indiscriminate exercise of granting judicial custody without the consent of the victim is illegal. The provision of safe custody has been included in the NSNDA, giving absolute authority to the NSNDA tribunal to decide when and whom to keep under safe custody.<sup>140</sup> It was protested by women's group on the issue of consent.<sup>141</sup> For these reasons, in 2003, Section 20(8) of NSNDA was included.

According to section 20(8) of NSNDA, 2000 (Amended in 2003),

'During the trial of an offence under this Act, if the Tribunal thinks that any woman or child is needed to be kept in safe custody, the Tribunal shall take their consent in this regard.'

The Department of Social Service under the Ministry of Social Welfare of Bangladesh established seven divisional safe custody homes for women and children survivors of violence and witnesses; each home has a capacity to shelter 50 persons and provides food, shelter, health care and legal aid. Information regarding these Seven Safe Custody Homes are given below:

#### Particulars of Safe Custody Homes

Division	Location	Capacity
Dhaka	Mirpur, Dhaka.	50
Dhaka	Tapakhola, Faridpur	50
Chittagong	Farhadabad, Chittagong	50
Rajshahi	Baya, Rajshahi	50
Khulna	Pachadighirpar, Bagerhat	50
Barisal	Sagardi, Barisal	50
Sylhet	Bagbari, Sylhet	50

At present, there are 7 government-run and 13 privately run large shelter homes available for use by women who are victims of violence. Many women and girls in rape and abduction cases are forced to stay at local jails in the name of 'safe custody' until the commencement of the trial without any medical treatment or counselling. The government on 16 January 2008 released a nine-year old rape victim imprisoned for six months in the name of safe shelter, and transferred her to the adolescent development centre at Konabari in Gazipur. *The Daily Star* in its editorial

<sup>140</sup> According to section 31 of NSNDA, 2000, 'During trial of the case, if the Tribunal is of the opinion that any woman needs to be kept in safe custody, it may order that such woman be taken out of the prison and be kept in safe custody home designated by the government or in consideration by the Tribunal be handed over to any organization or person in this regard.'

<sup>141</sup> Sultana Kamal, 'Laws to Stop Violence Against Women: Attempts Without Vision', in *Gender Equality in Bangladesh* (Ain O Salish Kendra, Dhaka, 134)

page said, 'It really sounds ironical that the girl had to be kept in custody when she needed great care and psychological support from her family, after the highly traumatic experience, or a girl of that age should have been in a shelter home. Besides, one would expect only the rapist to end up in jail, not the victim'.<sup>142</sup> The practice of sending rape victims to Safe Custody Homes has started. There are three rape victims in the Safe Custody Home, Baya, Rajshahi. During their interview, they all said that Magistrate sent them after taking their consent.

## 7. Suggestion and Conclusion

Loopholes of rape related laws discussed in this article affect women's right under the CJS. In Bangladesh, laws are not implemented properly due to corruption, poor investigation, lack of evidence and lack of resources.<sup>143</sup> Other factors include ignorance of the law, the inability to go to the police station to complain due to threats by the perpetrator, inability to continue court appearance due to financial or social reasons, and inefficient legal representation.<sup>144</sup> All the difficulties of laws should be removed in order to protect victim's rights. There is an urgency to reform some of the sections of the NSNDA, 2000. The Cr.PC must be amended to avoid lengthy procedure. Victim and witness protection Act should be enacted. The complicated court procedure, delay in disposal of cases, exorbitant costs, insincerity of the Judges, threats of offenders, exploitation by *dalals* or *touts* etc. create a negative impact in the mind of the victims and as a result they decline to seek remedy. The number of rape victims coming forward to demand justice is very low when compared to the total number of victims. The concept of 'child rape' under section 375 of PC and trial process of death after rape under NSNDA should be reviewed. The provision of section 155 (4)<sup>145</sup> of the *Evidence Act, 1872* is grossly misused to help the culprits. Section 155(4) of the *Evidence Act* is contrary to the basic rule of evidence that bad character of parties is not relevant. This section needs amendment. The onus of proof should be vested on the police officer in custodial death cases. The police, the lawyers and the Judges' share a great portion of the blame for the inefficient implementation of the existing laws. Each of them is responsible in their own way for the docket explosion of crimes and judicial delays. In case of investigation process, there are many obstacle, such as, lack of staff, lack of materials, corruption, influence of political or influential people, lack of knowledge about law and procedure, negligence of Investigation Officer (IO), biasness etc violate the rights of rape victims. Rape victims, who had gotten involved into the legal process but have left it half way through, confided that it is very difficult to prove the charges in a court. High cost of litigation, cause of delays and corruption is a very disturbing feature. Corruption has been identified in every entity of the CJS and as it makes the law ineffective, it has a very demoralizing effect on women. To suppress corruption the *Durniti Domon Commission* (Anti

<sup>142</sup> '9 yr old freed from jail after news reports', *The Daily Star*, 17 January 2008

<sup>143</sup> Salma Khan, *The Fifty Percent- Women in Development and Policy in Bangladesh* (Dhaka, the University Press Limited, 1993) 21.

<sup>144</sup> Saira Rahman Khan 'the more laws, the less justice: When it comes to women', *The Daily Star* 4 November 2010, 23.

<sup>145</sup> *Evidence Act 1872*, s 155 (4)

Corruption Commission)<sup>146</sup> should be strengthened and made independent from the government. The shadow whip of the opposition should be made chairman of the Commission and other members should also be from the opposition party. This will help balance the political bias of both ruling and opposition parties thus gradually rooting out corruption from the society. A serious problem that unfolds during the conduct of criminal cases, particularly rape cases, is that in most cases male doctors medically examine women. The reality is that the majority of women feel shy and reluctant to be examined by male doctors. They can not be free to speak out the exact condition of their incident to a male doctor, even after being violated or repressed.<sup>147</sup> Consequently, the merit of litigation is destroyed during the medical tests.<sup>148</sup> Worse, many women do not go for medical examination only due to absence of a female doctor in the clinic or the government hospitals. Sometimes doctors do not give the certificates at the right time and sometimes they do not give correct certificates and for this the investigation is hampered. Doctors are often lured by the greed of making money through providing false and fabricated medical certificates confirming allegations of causing simple or grievous hurt.<sup>149</sup> Sometimes the doctors show their reluctance to give medical certificates, as they have to face much harassment to give testimony at the court. Sometimes PPs do not provide proper legal support if they do not get money from the victims and there are also accusations that some of public prosecutors take money from the accused and work against the victims. Law should be made to specify the role of public prosecutors. An independent investigation agency should be made to investigate crimes against women. The law should include provisions to ensure security of witnesses. In rape cases, the victim's testimony should be considered as sufficient evidence to criminalize the perpetrators. Law should be enacted by making provisions to take disciplinary and punitive action against the doctors who are liable for delay in filing medical report and also for filing false medical report. Doctor's statement in rape case should be made relevant and admissible. The medical examination should be permitted without the recommendations from the Magistrate. The report of the medical officer should be treated as proof. There should be summary, time bound trial of such cases. The provision of camera trial should be implemented in all rape cases strictly.

A women's cell should be established in every police station to deal with crime against women. It is suggested that once a rape case is registered under this head it must be carried to its logical end. Even if the victim is not willing to testify, her previous statement and the circumstantial evidence must be fully utilized to establish the guilt of the accused and to punish him. A greater number of women police investigating officers, specialized in area of investigating crimes against women should be appointed. This will definitely restore the lost confidence of the women, by

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<sup>146</sup> Anti Corruption Commission was created in 2004 to prevent and check the corruption from the administration and the society.

<sup>147</sup> BNWLA, above n 34, 91.

<sup>148</sup> BNWLA, above n 17, 52.

<sup>149</sup> BNWLA, *Violence against Women in Bangladesh 2008-2009* (Dhaka, BNWLA, 2010) 44.

solving their cases. Each and every police station must have a women police officer to attend to the rape victims. Women police should be present to record complaints made by women. In most rape incidents, it becomes extremely difficult to prove the case in the courts.<sup>150</sup> Therefore, a separate and well-equipped investigation department needs to be set up. If there is a complaint against the police, it should be seriously investigated. There should be a judicial enquiry on its own motion. A post of administrator should be created in court under the Ministry of Law and Justice. He will supervise over bench assistant's work and take necessary action against the corruption of *sherestader* or *peshkar*. He will also supervise whether summon has been properly issued or not. The court should exercise its discretion to prohibit scandalous and attacking questions. The number of female Judges, Magistrates, and advocates should be increased. Separate Public Prosecutor Service should be set up under the Director of Public Prosecution and the PP should be appointed only on the basis of merit. Government should appoint at least one female doctor to look after women repression cases in every governmental hospital. Safe custody must be outside of the jail in a place where adequate living standard facilities will be available for the victims. 'Safe homes' or 'Shelter homes' should be set up in every district and it must be located outside the prison.

Women in Bangladesh remain in a subordinate position in society. The rape victims have to undergo severe mental and social problems. Strong social stigmas and lack of means to obtain legal assistance frequently kept women from seeking redress in the courts. Though rape is a crime of perpetrator, Bangladeshi society construes it to be the victim's crime and the survivor undergoes a humiliating and strenuous trauma while various steps such as police interrogation, medical test, court proceedings etc. go on. After being raped, a woman develops a number of psychological problems along with physical problems. She loses her confidence all together. She is embarrassed when she is asked filthy questions in court. In such a situation, a victim may even try to commit suicide. The effects of rape are not limited to the victims only; rather it is the entire family of the victim that endures the consequences of the physical and psychological complexity of the victim. There is a rising trend in rape related violence incidents in Bangladesh. It should be stopped. If the mentioned steps are taken seriously in order to protect victims' rights, justice is sure to be served.