



A CRITICAL APPRAISAL OF LAWS RELATING TO SEXUAL OFFENCES IN BANGLADESH

A Study Commissioned by the
National Human Rights Commission
Bangladesh



Empowered lives.
Resilient nations.



Creating a Culture of Justice
International Development Law Organization



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FOREWORD

In all countries, women and girls remain vulnerable to sexual harassment, sexual assault, rape and other forms of gender-based violence. Unfortunately, Bangladesh is no exception. Traditional values lend strength and identity to many communities across the country, but they can also perpetuate subordinate gender-defined roles that leave women and girls, and also sexual minorities, particularly vulnerable to sexual exploitation and abuse. Weak or outdated investigation and prosecution procedures severely reduce the efficacy of criminal law enforcement to prosecute, prevent and deter sexual offenses.

The Government has taken many very positive strides towards tackling the high incidence of sexual offenses in Bangladesh, for example, adopting the Domestic Violence Act, 2010, establishing a national violence against women database, guiding police to carry out their duties in a more gender sensitive manner, introducing a special violence against women investigations unit and victims support centre. Despite these important steps however, gender-based violence continues to rise in Bangladesh owing to the poor status of women and girls in a traditional society and a general lack of empowerment and access to justice.

To eradicate sexual offenses, whether committed against girls, women, sexual minorities, or anyone else, it is essential to analyse critically Bangladesh's current criminal law and procedure.

That is precisely why the NHRC commissioned the present study which evaluates the legal definitions of sexual offenses, highlights key issues in the collection, handling and use of medical evidence in criminal prosecution, examines certain problematic trial procedures in sexual offence cases, and makes clear, detailed and specific recommendations with a view to remedying these issues.

Professor Dr. Mizanur Rahman

Chairman, National Human Rights Commission, Bangladesh

Dhaka, November 2015

PREFACE

The Penal Code, 1860 does not include the category of 'sexual offence'. Rape, the most heinous of all categories of sexual offences has been placed under the broad category "Of Offences Affecting the Human Body". Although a number of specific laws for the purpose of dealing with violence against women were subsequently enacted, for the most part, these specific laws adopted definitions of sexual offences that were already provided for in the Penal Code. Broadly speaking, these specific laws did not advance the law beyond the definition set out in the Penal Code. Meanwhile however, public attitudes towards sexual offences have changed. There have also been many advances in forensic medicine that have improved accurate identification of possible perpetrators, crime scene reconstruction of events, surrounding circumstances of the alleged offence, and other evidentiary matters, that have run far ahead of the law. It is therefore timely to propose thoroughgoing law reform in Bangladesh relating to the prosecution of sexual offences in the interests of modernizing the relevant laws and procedures and to improve their fairness and effectiveness.

The present study focuses on a number of issues that fall under various categories of law which are innately connected with fair and effective trial and punishment of sexual offences. Firstly, the present study critically examines penal laws relating to sexual offences and points out that while the definitions of sexual offences in the penal laws are quite archaic, there has been too much emphasis on rape to the exclusion of other sexual offences. Secondly, the study underscores the importance of medical examination, on the one hand, and lacunae in law, on the other hand. Thirdly, the study evaluates the law of evidence and shows the victim's unequal position vis-à-vis the accused in relation to adduction of evidence and its adjudged probative value in court in sexual offence cases. The study concludes with a number of specific proposals for legal reform relating to the investigation and prosecution of sexual offences.

This study on reform of laws relating to sexual offences in Bangladesh is intended to address certain key jurisprudential issues that can be resolved without recourse to the kind of broader public consultations that would be useful for a more comprehensive exercise. For example, this study does not address the offence of adultery (section no. 497 of the Penal Code, 1860) because such offences reflect deep-seated moral values of the community rather than sexual violence and the study also does not generally deal with wider penological or criminal procedure issues more broadly connected with sexual offence trials unless the context so requires.

Notwithstanding the limited scope of the study, it is hoped that it will contribute towards legal reform in Bangladesh.

Lyal S. Sunga
Kawser Ahmed

List of abbreviations

BCR	Bangladesh Case Reports
BLD	Bangladesh Legal Decisions
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CrLJ	Criminal Law Journal
DLR	Dhaka Law Report
DNA	Deoxyribonucleic Acid
p./pp.	Page/Pages
para./paras.	Paragraph/Paragraphs
s./ss.	Section/Sections
WP	West Pakistan

List of legislation

1. The Prevention of Cruelty to Women and Children Act, 2000
[নারী ও শিশু নির্যাতন দমন আইন, ২০০০]
2. The Prevention of Cruelty to Women and Children Act, 1995
[নারী ও শিশু নির্যাতন দমন আইন, ১৯৯৫]
3. The Evidence Act, 1872
4. The Code of Criminal Procedure, 1898
5. The Penal Code, 1860
6. The Cruelty to Women Ordinance, 1983
7. The Prevention of Cruelty to Women (Special Provisions) Act, 1995
8. The Majority Act, 1875
9. The Deoxyribonucleic Acid Act, 2014
[ডিঅক্সিরাইবোনিউক্লিক এসিড (ডিএনএ) আইন, ২০১৪]

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1. *Habibur Rahman & Others v. The Crown* [1954] 6 DLR (AD) 361
2. *Muhammad Abdul Khalaque & Others v. The State* [1960] 12 DLR 166
3. *Muhammad Ali v. State* [1960] 12 DLR 827
4. *Samsundar Khan v. The State* [1963] 15 DLR 116
5. *Saleh Muhammed v. The State* [1966] 18 DLR 80
6. *Mumtaz Ahmed Khan v. The State* [1967] 19 DLR 260
7. *Al Md. v. State* [1970] 22 DLR (WP) 153
8. *Jahangir Hossain v. The State* [1986] 1 MLR 226
9. *Nur Mohammad v. State* [1989] 41 DLR 301
10. *Nur Mohammad alias Bog Master v. State* [1989] BLD 314
11. *Brother John Antony v. State* [1992] CrLJ 1352 (Mad)
12. *Md. Abdul Aziz and Others v. The State* [1997] 2 MLR 369
13. *Tofazzal Hossain Khan v. The State* [1997] 2 MLR 329
14. *Shorbesh Ali & Other v. Mrs. Jarina Begum & Another* [1997] 2 MLR (AD) 597
15. *Dulal and Another v. The State* [1999] 4 MLR 134
16. *Shamsul Haq (md) v. State* [2000] 52 DLR 255
17. *Abu Taher alias Taher Mia v. The State* [2001] 6 MLR (AD) 77
18. *Alam (md) & Another v. State* [2002] 54 DLR 298
19. *Shibu Pada Acharjee v. The State* [2003] 8 MLR 287
20. *Masud Mia v. The State* [2004] 9 MLR 28
21. *Md. Moinul Haque v. The State* [2004] 24 BLD (AD) 128
22. *Md. Wasim Mia and Other v. The State* [2004] 9 MLR 162
23. *Md. Sobuj v. The State* [2006] 11 MLR 284
24. *Md. Abdul Kader v. The State* [2006] 11 MLR 196
25. *Fatema Begum v. Aminur Rahman and Others* [2006] 11 MLR 23
26. *Firoz Chokder v. The State* [2006] 11 MLR 115
27. *State v. Shahidul Islam alias Shahid and Others* [2006] 58 DLR 545
28. *Md. Khairul v. The State* [2007] 12 MLR 409
29. *Zitu Ahsan v. State* [2007] 59 DLR 532
30. *Safazuddin and Another v. The State* [2007] 27 BLD 321
31. *State v. Md. Liton Miah* [2008] 13 MLR (AD) 60
32. *Sree Pinto Pal v. The State* [2010] 30 BLD 220
33. *Nazmul Islam alias Nazu v. State* [2011] 63 DLR 464
34. *State & Others v. Noor Islam* [2011] 16 MLR 141
35. *Rehana Begum and other v. The State* [2011] 16 MLR 75
36. *Ghulam Ahmed v. State* [2012] 64 DLR 95
37. *The State v. Md Jahurul Haque* [2012] 32 BLD 583
38. *Bablu v. State* [1982] 2 BCR 11

Introduction

1. This study focuses on the status and content of laws, regulations and procedures in Bangladesh relating to sexual offences with a view to identifying gaps in the law and the practical implications for fair and effective criminal prosecution of such offences with full regard to victims. In some instances, the criminal law prohibits certain acts which society increasingly has come to regard as outside the proper purview of criminal law, such as certain private sexual acts between consenting adults. In other instances, the law is too narrowly focused and prohibits and punishes sexual violence committed only against certain persons, for example, women and girls, rather than covering the commission of these offences against any other individual.
2. The present study reviews the procedural framework for the criminal investigation and prosecution of sexual offences, including the extent and nature of judicial oversight of the criminal process, rules and prevailing practices relating to the collection, handling and adduction of evidence at criminal trial, as well as the issue of its probative value, and it makes concrete and specific recommendations for legal reform.
3. It is hoped that the present study will be useful for a fresh review of the laws and practices relating to criminal prosecution of sexual offences in Bangladesh in order to bring them up to date with current community values and into closer conformity with best practices as reflected in international human rights law.

*A critical appraisal of laws
relating to sexual offences in
Bangladesh*

A study commissioned by the
National Human Rights
Commission, Bangladesh

Overview of laws relating to sexual offences in Bangladesh

4. The current legal regime relating to trial and punishment of sexual offences mainly comprises: (1) the Penal Code, 1860 (2) the Prevention of Cruelty to Women and Children Act, 2000 (3) The Evidence Act, 1872, and (4) the Code of Criminal Procedure, 1898. Of the laws currently in force in Bangladesh, the Penal Code, 1860 ('the Penal Code') is the earliest piece of legislation that provides for the definitions of and punishment for sexual offences including rape. The Cruelty to Women Ordinance, 1983 ('the Ordinance of 1983') was enacted with the purpose of according greater protection to women against a number of criminal offences including certain sexual offences.¹ The Ordinance of 1983 adopted the definition of rape as provided in the Penal Code. Later, in the face of an increasing number of incidents of violence against women, the Prevention of Cruelty to Women (Special Provisions) Act, 1995 ('the Act of 1995') was passed,

¹ See the Preamble of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983.

repealing the Ordinance of 1983. The Act of 1995 also adopted the definition of rape as provided in the Penal Code. Finally, the Parliament enacted the Prevention of Cruelty to Women and Children Act, 2000 repealing the Act of 1995. The Prevention of Cruelty to Women and Children Act, 2000 ('the Act of 2000'), although it adopted the definition of rape as incorporated in the Penal Code, modified a few provisions relating thereto. The Act of 2000, in addition to providing for greater punishment for rape, incorporated provisions relating to medical examination of the victims and special rules of evidence in cases relating to sexual offences.

5. Rape is the highest degree of sexual offence in Bangladesh. According to the Penal Code, sexual intercourse with a female against her will or without her consent constitutes the basic factual element of the offence of rape. The laws enacted subsequent to the Penal Code adopted the definition of rape in the Penal Code with or without modification. For example, although the Prevention of Cruelty to Women and Children Act, 2000 adopted the definition of rape as provided for in the Penal Code, it modified the position of the Penal Code as regards the minimum age for sexual intercourse. For example, the Act of 2000 provides that sexual intercourse with a girl under the age of 16 with or without consent constitutes rape, whereas according to the Penal Code, the threshold age is 14.² However, the Act of 2000 does not seem to be applicable to a married girl under the age of 16 because the Penal Code provides that sexual intercourse by a man with his own wife who is of thirteen years of

² The Penal Code, 1860; s. 375. Section 375 of the Penal Code provides, 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. 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.

age or above will not constitute rape.³ In this context it is pertinent to mention that the UN Convention on the Rights of Child which provides that a child is defined as anyone of age less than 18 years. Article 16(1)(b) of the same Convention also provides that “States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women... [t]he same right freely to choose a spouse and to enter into marriage only with their free and full consent”. Arguably, the marriage of anyone under the age of 18 in effect constitutes a form of marriage between a child and an adult, or between two children, as the case may be, who are not yet capable of consent, which in turn implies that it is a form of forced marriage. Although the UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1964, by Article 2 obliges State Parties only to specify a minimum age for marriage, without itself setting a minimum age, this Convention, which was adopted in 1964, has to be read in the light of the more recent and up-to-date UN Convention on the Rights of the Child, 1989.

6. In addition to rape, the Penal Code has incorporated provisions relating to a few other types of sexual offences. Section 377 of the Penal Code provides that whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal will be liable for the crime of ‘unnatural offence’.⁴ Section 493 of the Penal Code provides that whoever by deceit cohabits with a woman by inducing her to believe that she is lawfully married to him will be punished with imprisonment up to ten years and is also liable to be fined. Section 509 of the Penal Code provides that insulting the modesty of any woman by means of utterance, or making sound or gesture, or exhibition of any objects will be punished with simple imprisonment for a term up to one year, or with fine, or with both.

³ *Ibid.* The Penal Code, 1860 defines rape as sexual intercourse with a girl child under the age of 14 with or without consent. The Penal Code further provides that in case of married woman, the age of wife should be below 13 years to constitute marital rape.

⁴ See *Muhammad Ali v. State* [1960] 12 DLR 827; *Nur Mohammad v. State* [1989] 41 DLR 301; *Nur Mohammad alias Bog Master v. State* [1989] BLD 314; *Bablu v. State* [1982] 2 BCR 114; *Al Md. v. State* [1970] 22 DLR (WP) 153.

7. Section 10 of the Prevention of Cruelty against Women and Children Act, 2000 provides that if any person, in furtherance of his sexual desire, touches the sexual organ or other organs of a woman or a child with any of his organs of his body or with any substance, or he outrages the modesty of a woman, he will be said to have committed sexual assault. In addition, Section 354 of the Penal Code provides that whoever assaults or uses criminal force against any woman, intending to outrage or knowing that it would likely outrage her modesty, commits an offence of assault with intent to outrage her modesty.
8. According to the Penal Code, the maximum punishment for committing rape is imprisonment for life, and the minimum punishment is imprisonment of not less than 10 years and persons found guilty can in addition be liable to a fine. The Act of 2000 provides that the punishment for committing rape is imprisonment for life in any case. If the victim of rape dies as a result of rape or gang rape, the punishment will be death sentence or imprisonment for life and with fine. If anyone attempts to kill or hurt the victim by committing rape, he will be punished with imprisonment for life and with fine. The punishment for attempting to commit rape is rigorous imprisonment for 5-10 years.⁵ Sexual oppression of a woman or child under section 10 of the Act of 2000 has been made punishable with rigorous imprisonment up to 10 years but not less than three years in any case and also with fine.⁶
9. Section 32 of the Act of 2000 provides for medical examination of the victim of sexual offences at a government hospital or a hospital certified by the government for that purpose. The doctor who is authorized to conduct a medical examination of the victim is under an obligation to issue a certificate and to inform the local police station. Delay in conducting a medical examination on account of the negligence of the doctor in charge makes him or her liable to disciplinary measures according to the applicable rules of service.⁷ The Act of 2000 does not

⁵ The Prevention of Cruelty to Women and Children Act, 2000; s. 9.

⁶ *Ibid*, s. 10.

⁷ The Prevention of Cruelty against Women and Children Act, 2000; s. 32.

however specifically lay down the procedure to be followed by a doctor in cases of examination of rape victims and moreover, it provides only for the medical test of the victim rather than of the suspected perpetrator or perpetrators.

10. The Ministry of Health and Family Welfare, in furtherance of section 32 of the Act of 2000, issued a circular dated 16 September 2002, providing that if a victim of rape approaches, without any police reference, any physician on duty at a government medical hospital/establishment or at a government recognized health centre, the physician on duty (at least a medical officer) will have to conduct a medical examination of the purported victim as per the usual procedure. In addition, the Ministry of Health and Family Welfare later issued a 'Form' prescribing the procedures to be followed by the doctor concerned for conducting medical examinations of rape victims.
11. According to the Evidence Act, 1872, expert opinion constitutes relevant evidence.⁸ The Supreme Court has held that the opinion of a doctor is admissible as expert evidence in sexual offence cases. Section 23 of the Act of 2000 provides that a medical report will be admissible even if the doctor or medical officer who performed the medical examination is not available to make a deposition in person before the court. The said provision also provides that the court will not convict an accused on the basis of the medical report only.
12. The burden of proof according to the Evidence Act, 1872 lies on the prosecution in line with the presumption of innocence in criminal cases.⁹ The Evidence Act also provides that where a man is prosecuted for rape or an attempt to ravish, it may be shown that the alleged victim was generally of an immoral character.¹⁰

⁸ The Evidence Act, 1872; s. 45.

⁹ *Ibid*, s. 101.

¹⁰ *Ibid*, s. 155 (4).

Definitions of sexual offences : A critical appraisal

13. According to the Penal Code, sexual intercourse with a woman by a male or group of males, against her will or without her consent, or consent obtained by way of fraud or otherwise, constitutes the offence of rape. The Act of 2000 adopted the definition of rape as provided in the Penal Code. According to the definition, there are two basic elements of rape. They are: (i) sexual intercourse between a male and a female; and (ii) lack of consent or will on the part of the female. While sexual intercourse is one of the key elements of the actus reus of rape, consent constitutes the psychological element or is related to the state of mind of the victim and if proven, negates the mens rea or criminal intent of the perpetrator. In addition, the Act of 2000 provides that sexual intercourse with a girl under the age of 16 with or without consent constitutes rape because any purported consent would be invalid on account that the victim had not been of sufficient age as to make a free and informed decision.

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ELEMENTS OF RAPE

14. Although sexual intercourse is the primary element of rape, no scientific definition of sexual intercourse has been provided in any of the laws, except section 375 of the Penal Code, which states that penetration is sufficient to constitute sexual intercourse. As per this definition, sexual intercourse has been made synonymous with penetration. No evidence of emission is required to prove penetration and penetration can only be committed by insertion of the male reproductive organ into the female genitals. This definition of rape is narrow and it seems not to include unconsented penetration of a woman or child's, or for that matter a man's, sexual organs with other parts of the body or with an object.
15. Purported consent to sexual intercourse obtained by means of force, such as putting the alleged victim in fear of death or bodily injury, constitutes a lack of consent. Lack of consent may be inferred from use of excessive force by the accused and resistance on part of the victim. Crying, shouting, biting, beating and scratching by the victim on the accused may evidence resistance. Signs of resistance can be crucial in determining rape since it can be inferred from medical the report. The court may also take into account any romantic relationship between the accused and the victim or the fact that the victim is a sex worker or of such immoral character as to give in to such intercourse. This consideration opens the door in criminal proceedings in effect to undermining the credibility of the victim on the basis of highly subjective interpretations as to her supposed character and it invites the Defense to shift attention from the perpetrator to the victim to 'prove her innocence'. It also seems to nullify any recognition that sex workers in fact should have equal rights to everyone else and that a person who commits rape against a sex worker is every bit as culpable as any other rapist.
16. According to section 375 of the Penal Code, one circumstance in which rape can be adjudged to have been committed is where consent to engage in sexual intercourse has been obtained by way of fraud, for example where the accused makes the victim believe that he is the person to whom she is lawfully married. It is interesting to note that a similar penal provision is found in section 493 of the Penal Code, although the same has not been counted as rape. Section 375 relates to the case where a married woman is the victim

of deceitful cohabitation, but section 493 relates to the case of a woman who is not married to anyone. However, the distinction between a married and unmarried woman for the purpose of prosecuting rape should be immaterial.

17. According to the Act of 2000, having sexual intercourse with a girl under the age of 16 constitutes rape. In such cases, any purported consent of the victim remains immaterial. Although this has been made punishable under the law, there is an important exception provided in section 375 of the Penal Code, 1860 which states that sexual intercourse by a man with his own wife who is above thirteen years of age does not constitute rape, which as argued above, violates Bangladesh's obligations under the UN Convention on the Rights of the Child not to mention Bangladesh's own legal notions of the minimum age of legal capacity and the right to enter into contractual relations.

ELEMENTS OF OTHER FORMS OF SEXUAL OFFENCES

18. According to laws currently in force in Bangladesh, sexual offences other than rape include outraging modesty of a woman by assault or criminal force;¹¹ or the commission of an 'unnatural offence' meaning anal intercourse or bestiality under section 377 of the Penal Code.¹² In India, sexual acts such as cunnilingus and fellatio also have been tried under this provision.¹³ The most noticeable defect of section 377 of the Penal Code is that it fails to distinguish between consensual and non-consensual sexual acts.

19. Section 10 of the Act of 2000 purports to penalize certain illegal sexual acts as punishable offences which are not included under the purview of rape. It appears that it was the intention of the legislature to bring all other sexually offensive acts except rape under this provision. However, criminal acts such as forced nudity, forced masturbation, forced sterilization or mutilating a person's genitals, would be difficult to be placed within the legal category of sexual offences in Bangladesh.

¹¹ Supra note 2, s. 354.

¹² Ratanlal Ranchhoddas and Dhirajlal K. Thakore, *The Indian Penal Code*, 28th edition, Reprint 2000, at p. 530.

¹³ *Brother John Antony v. State*, [1992] CrLJ 1352 (Mad).

MISSING FACTORS IN THE DEFINITION OF RAPE/ SEXUAL OFFENCES

20. As discussed above, the definitions of rape and other types of sexual offences enunciated in the laws currently in force in Bangladesh, leave out factors which should have been included.
21. As mentioned above, the concept of sexual intercourse in terms of penetration by a male reproductive organ into the female genital is too narrow to cover all the situations of sexual offences that warrant the highest degree of penal sanction as for rape. According to the legal definition, for example, penetration of the female genitals by means of an inanimate object or any organ other than the male genitals does not constitute rape. Similarly, non-consensual anal intercourse performed on a female by a male does not amount to rape, although it is no less heinous than 'rape' per se.
22. According to the laws currently in force in Bangladesh, non-penetrative sexual acts such as cunnilingus, fellatio or anilingus performed on a female by a male do not count as heinous as rape.
23. The laws on sexual offences also do not include in the definition of rape the act of non-consensual homosexual activity between members of the same sex or gender. For example, non-consensual penetrative sexual acts such as anal intercourse or digital penetration performed between members of the same sex or genders do not constitute rape. Besides, non-consensual penetration by means of inanimate objects between members of the same sex or genders as the case may be also does not constitute rape.
24. Likewise, non-consensual and non-penetrative homosexual acts such as fellatio, cunnilingus or anilingus performed between members of the same sex or genders as the case may be do not attract the same level of punishment as applicable for rape and they are, therefore, not seen as serious as classical rape.
25. It is apparent from the foregoing that non-consensual penetrative sexual acts such as anal intercourse and penetration by any inanimate objects or any organ other than the male genital as well as

non-consensual and non-penetrative sexual acts like fellatio, cunnilingus or anilingus, whether performed between either members of the same sex or members of different sex, are not treated on a par with rape by the penal laws in Bangladesh. The provision of unnatural offence under section 377 of the Penal Code includes anal intercourse as a punishable offence. Sexual acts such as fellatio, cunnilingus or anilingus would be covered by section 10 of the Act of 2000.

26. The consent and will of a woman has not been defined either in the Penal Code or in the Act of 2000. The laws are also silent about the issue of consent in cases of sexual intercourse with adults suffering from mental illness or incapacity.
27. The position of the Act of 2000 that sexual intercourse with a girl under the age of 16 with or without consent constitutes rape has been severely weakened by the Penal Code's position that sexual intercourse by a man with his own wife who is not below thirteen years of age does not constitute rape. The provision of the Penal Code has the effect of allowing sex with a child under the guise of 'marriage'. This particular position of the Penal Code is extremely problematic. For example, according to the Majority Act, 1875, the legal age of majority is 18 and a person cannot enter into a contract unless she is 18 years of age. It seems logically indefensible to assume that a minor girl is capable of giving consent to marriage or sexual intercourse long before she legally possesses the capacity to enter into a contract, particularly since marriage is a form of contract.
28. One of the gray areas in existing laws on sexual offences is that, on a plain reading of the relevant provisions, they only recognize women and children as victims of sexual offences. The Penal Code as well as the Act of 2000 does not expressly recognize transgender persons or hermaphrodites (generally known as 'hijra' in Bengali) as potential victims of sexual offences.¹⁴ At the same time, under the same laws, transgender persons or hermaphrodites can be prosecuted for sexual offences. Therefore, prosecutions for sexual offences committed

¹⁴ 'Hijra' is a Bengali expression to denote the transgender or hermaphrodites persons. On 11 November 2013, the Government of Bangladesh officially decided to address these people as Hijra.

against adult transgender persons or hermaphrodites would be difficult to pursue because no one, except women and children could be considered under the law as victims of sexual offences in accordance with the literal meaning of the laws concerned. Section 377 of the Penal Code, which criminalizes sodomy, does not even envisage adult transgender persons or hermaphrodites as victims.

29. In 2010 the Law Commission prepared a report on sexual harassment. The report includes a draft Bill that proposes amendment of section 509 of the Penal Code in line with the Declaration on Elimination of Violence Against Women.¹⁵ The Law Commission in its report has pointed out that the notion of 'insulting modesty of women' as embodied in the aforesaid provision of the Penal Code has not been adequately clarified and as such does not capture all forms of sexual harassment. The Law Commission has also noted that the incidences of sexual harassment as well as suicide in consequence of sexual harassment are increasing. The Law Commission, therefore, has recommended substitution of the existing section 509 of the Penal Code with a new provision more clearly defining the meaning of 'insulting modesty of women' as well as insertion of a new section, namely, section 509A of the Penal Code providing punishment for suicide committed in consequence of any act of sexual harassment.¹⁶ In the same year, the Law Commission prepared another report on the issue of sexual harassment in educational institutions. The said report also includes a draft Bill which elaborates on the definition of sexual harassment, clarified key concepts, and provides for a complaint procedure, administrative measures for the prevention of sexual harassment, and initiatives to build awareness against sexual harassment.¹⁷

¹⁵ UN Doc. A/RES/48/104 dated 20 December 1993.

¹⁶ The Law Commission, A Report on the Amendment of the Prevailing Law Relating to Sexual Harassment, Report No. 101, available at

<http://www.lawcommissionbangladesh.org/reports/98.pdf> last visited on 19 October 2015.

¹⁷ The Law Commission, A Report on the Draft Law for the Prevention of Sexual Harassment in the Educational Institution and Workplace, Report No. 101, available at

<http://www.lawcommissionbangladesh.org/reports/97.pdf> last visited on 19 October 2015.

PUNISHMENT FOR SEXUAL OFFENCES

30. The Act of 2000 provides for the highest level of punishment for committing 'rape' among all other forms of sexual offences. Apart from rape, punishment for anal intercourse will come under section 377 of the Penal Code which provides for punishment with imprisonment for life or 10 years and with fine. In practice, the court has been seen to award substantially lesser degree punishment under this provision let alone the punishment applicable for 'rape'. Sexual offences such as fellatio, cunnilingus or anilingus fall within the ambit of section 10 of the Act of 2000 for which punishment of imprisonment can be given up to ten years but not less than three years. Therefore, sexual offences which are similar to 'rape' or as heinous as 'rape' have been made liable to lesser punishment under the law, which is an obvious inconsistency that should be remedied.

IV

Importance of medical evidence in cases relating to sexual offences

31. The importance of medical evidence in cases relating to sexual offences cannot be overemphasized. Especially in rape cases, the victim generally remains the sole witness. In the absence of the availability of corroborating witnesses, expert opinion and circumstantial evidence tend to be accorded greater evidentiary weight in rape cases. Moreover, ascertainment of the most important fact in issue in a rape case, which is sexual intercourse, requires medical examination of the victim. Determination of other relevant factors such as the age of the victim and the physical capacity of the accused, also cannot be achieved definitively through mere oral or cursory visual contact testimony. For these reasons, it has been made mandatory to conduct medical examinations of the victims of sexual offences.

*A critical appraisal of laws
relating to sexual offences in
Bangladesh*

A study commissioned by the
National Human Rights
Commission, Bangladesh

THE NECESSITY FOR MEDICAL EXAMINATION OF THE VICTIMS OF SEXUAL OFFENCES

32. The nature of the offence has made it indispensable to have a medical examination of the victim at the earliest opportunity. The medical examination of the victim is necessary to prove or disprove facts in issue as well as other facts relevant¹⁸ to prove the commission of the offence of rape. For instance, in rape cases, a proper medical examination of the victim can ascertain following elements, namely: (i) rupture of the hymen (ii) marks of violence on the genitals of the victims (iii) the presence of semen or blood in the vagina (iv) other indications of penetration (v) venereal disease and (vi) age of the victim.¹⁹ In addition, medical examination of the accused can also help ascertain certain important factors, such as marks of injury on the accused person caused by the victim's struggle.

DETERMINING SEXUAL INTERCOURSE

33. In determining sexual intercourse, evidence of penetration by the reproductive organ of a male (complete or partial) within the labia majora or of the vulva or of the pudenda of the female victim is a requirement. These facts can be ascertained only by means of medical test, which can possibly determine irritation, inflammation, injury to the victim's genital area or the presence of semen in the vagina, rupturing of the hymen or other vaginal tissue.

DETERMINING THE VICTIM'S CONSENT

34. In addition to sexual intercourse, absence of consent on the part of the victim often becomes a key factual element in issue in rape cases. The following are some of the situations where the court may presume lack of consent on the part of the victim: (i) evidence of struggle between the accused and the victim, (ii) marks of injury on the body of the accused,

¹⁸ Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places. *Supra note 8*, s. 6.

¹⁹ K Mathiharan & Amrit K Patnik (eds), *Modi's Medical Jurisprudence and Toxicology*, 23th Edition, Lexis Nexis, 2007, at p. 923.

and (iii) marks of violence on the body of victim. The aforesaid factors are often considered as strong corroborative evidence that helps prove that the alleged sexual intercourse was committed against the victim's will or consent. According to medical forensic science, the following factors often are taken into consideration to determine resistance on the part of the victim:(i) presence of blood or seminal stains, scratches, abrasions and bruises on forearms, wrist, face, breasts, chest, lower part of abdomen inner aspect of thigh and back of the victim as sign of marks of violence;²⁰ and (ii) in many cases of struggle, the victim may have scratched the assailant which can be evidenced by broken nails and the accused's skin cells or pieces of flesh lodged under the nail which can show up upon careful examination.

35. As has been observed, there has been a clear trend on the part of the judiciary to presume the existence of consent or willingness of the victim to the alleged sexual intercourse where the medical report does not give any account of marks of violence or struggle or injury on the body of either the victim or the accused. This can be criticized as a retrograde approach because many victims may be overpowered by their assailant or might have wisely chosen not to resist too violently in order to avoid further violence as their attacker seeks to overpower them, or simply to avoid being murdered. Nonetheless, the reality has been that a lack of a medical examination of the victim or a medical report which does not contain the above-mentioned features (i.e. marks of violence or struggle or injury) often weakens the plea of submission of the victim that she had given no consent to the alleged sexual intercourse. The risk is that the evidentiary burden improperly shifts to the victim in effect to prove that she was compelled to submit to threat, coercion, or suffered from intoxication or other mental condition that made her consent impossible.

EXISTING PROCEDURES FOR MEDICAL EXAMINATION

36. The Act of 2000 provides that medical examination of the victim of rape

²⁰ C. A. Franklin (ed), *Modi's Textbook of Medical Jurisprudence and Toxicology*, 21st Edition, N. M. Tripathi Private Limited, at p. 374.

should be made as soon as the allegation of rape has been made. Although the said Act has incorporated provisions prescribing medical examination of the victim of rape, the said Act remains silent as to the procedures to be followed in such medical examinations. The Ministry of Health and Family Welfare issued a general circular in 2002 providing that the usual procedure is to be performed while examining a victim.²¹ The said circular, moreover, is not limited to the medical examination of rape victims only and purports to address a wide range of offences involving physical injury of women. As a result, the procedures to be performed during medical examination of rape victims have been determined by the responsible doctor or forensic expert and carried out according to their usual medical procedure, whatever those are. The Ministry of Health and Family Welfare has also issued a 'Form' setting out what information must be included in such a medical report. However, the said form does not appear to be solely applicable for the medical examination of the rape victims, but for all offences under the Act of 2000.

37. It should be mentioned here that the so-called 'two-finger test' or virginity test used to be one of the usual procedures in medical examinations of rape victims in Bangladesh. The purpose of the test has been to determine sexual experience and frequency of the victims of sexual offences. When it was challenged by way of lawsuit by several NGOs on the grounds of having no evidential or scientific merit, the Supreme Court of Bangladesh issued a directive to the Government to form a committee so as to develop "a comprehensive guideline for police, physicians, and judges or a *Nari O Shishu Nirjaton Domon Tribunal* on the examination and treatment of women and girls subjected to rape and sexual violence".²² Following the court's order, the Ministry of Health and Family Welfare formed a committee for that purpose.

²¹ See Annex-I to this report.

²² The writ petition (Writ Petition No. 10663 of 2013) was filed by Bangladesh Legal Aid and Services Trust (BLAST), its partners in the Growing Up Safe & Healthy (SAFE) Project, and other major human rights organizations in Bangladesh including Ain O Salish Kendro (ASK), BRAC Human Rights & Legal Services, Bangladesh Mahila Parishad, Manusher Jonno Foundation and Naripokkho.

MEDICAL EXAMINATION OF THE VICTIM

38. The prescribed Medical Examination Form of the Ministry of Health and Family Welfare contains the formal part (sections 1 to 6) to be filled with general information about the victim and her consent to medical examination. The physical characteristics of the victim have to be described next (sections 8 to 9). The only pertinent part of the Form that directly relates to the medical examination of the rape victim is found in sections 16-17. One of the limitations of this part is that it enquires only into the physical condition of the victim at the time the examination. As a result, information such as bathing, use of sanitary napkin, urination or defecation, changing of cloth, eating or drinking, use of tooth paste, mouth wash, drugs, date of recent coitus (in applicable cases), and use of contraceptives, that in some cases could strengthen the Prosecution's case, routinely is left uncollected. Failure to collect such information in many instances has weakened the Prosecution's case.

39. In case of physical examination of rape victim, the doctor/forensic expert should perform certain tests to determine the possibility of forceful sexual intercourse. These tests, inter alia, include: (i) examination of genital trauma (perineum, hymen, vulva, vagina, cervix or anus), (ii) extra genital trauma to any area (marks of violence), (iii) foreign materials on the body (stains, hair, dirt, and twigs) (iii) sample of assailant's semen and blood, taken from cervix, vagina, rectum, mouth, and thighs, and (iv) hair samples, collecting sample of blood, urine, saliva of the victim. In addition, the doctor/forensic expert also should collect data, samples and specimens to establish the condition of clothing (damaged, stained, intact etc.), and to collect and preserve fingernail clippings and scrapings. Examination for genital trauma is covered briefly in sections 16 and 17 of the Form. However, as to examination of extra-genital trauma or collection of foreign elements etc are missing from the prescribed form.

40. After completion of physical examination, the collection of samples, i.e. blood, semen, saliva, hair, urine etc. is indispensable in conducting the entire medical examination process. However, the Form does not include any section from which it may be known whether such samples have been collected or not nor does it provide for their careful preservation and chain of custody to avoid tampering, loss or destruction prior to trial.
41. Another of the Form's major limitations is that it fails to include all applicable types of laboratory tests. For example, it lacks some of the more recent laboratory tests required to ascertain different medico-legal factors in rape cases.

MEDICAL EXAMINATION OF THE ACCUSED

42. Determining the identity of the perpetrator may require medical examination of not only the victim, but also of the alleged perpetrator himself, because in many cases, sole examination of the victim might not be sufficient for evidentiary purposes. In some instances, even where it has been established that a sexual offence has been committed against a woman, the evidence may be insufficient to prove a particular alleged perpetrator's culpability owing to a lack of other corroborating evidence. Therefore, medical examination of the accused person is necessary in cases relating to sexual offences. Generally, medical examination reports of an accused include: physical capability to perform a sexual act, possible injury incurred during the occurrence of rape, genital test for collecting semen, and the identification as to whether the accused suffers from any sexually transmitted disease. The medical examination report, together with the report on the victim often facilitates the court's findings of fact on the basis of the available science. Unfortunately, the Prevention of Cruelty to Women Act, 2000 has no express provision providing for medical examination of the accused person, which is a serious gap in Bangladesh's medical examination procedures for cases relating to sexual offences.

LIMITATIONS OF MEDICAL EVIDENCE

43. If the medical examination of the victim has not been carried out soon after commission of the alleged offence, it may be very difficult or practically impossible to determine whether sexual intercourse has taken place and whether it was forced or not.
44. Although the victim's willingness to engage in sexual intercourse could be inferred from the presence or absence of signs of violence on the victim's body or marks of injury on the assailant, the fact is that in many cases, there may still have been coercion, but no marks on the victim's body indicating violence from the assailant. Similarly, the accused's body may not show any signs of violent struggle.
45. Numerous studies have shown that rape victims tend to wash themselves immediately after suffering the assault in order to cleanse themselves of the insult, but this unfortunately destroys much evidence, such as the DNA of the perpetrator, which can get easily washed away.
46. While there have been many cases where prosecutions for rape have been successful without the adduction of a medical report into evidence, it is also true that courts have relied heavily on medical evidence. Particularly in rape cases, conviction can be based on the sole testimony of the victim if her testimony is found reliable. In practice, however, medical evidence is often accorded higher probative value, and may be preferred in instances even where it contradicts the testimony of the victim. Certain elements of the Prosecution's case, such as establishment of the fact of sexual intercourse, often cannot be proved to the satisfaction of the court without corroborating medical evidence.
47. A look at the case law reveals that in many reported cases, judges accord high value to medical evidence in ruling on the statutory factual elements (e.g. sexual intercourse, penetration, consent, age of victims, and physical capability of the accused). Excessive reliance on such medical evidence however, risks undervaluing victims' sole testimony and circumstantial evidence, which in turn could reduce the chance of successful prosecution in many instances.



Analysis of laws relating to evidence and procedure

THE 'CHARACTER' OF THE VICTIM IN RAPE CASES

48. Although the Evidence Act, 1872 provides that the court should forbid any indecent or scandalous questions being put to the witness (unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed)²³, it appears that the said Act makes an exception to the above rule in cases involving allegation of rape. Section 155(4) of the Evidence Act provides that when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.²⁴ It may be pointed out that the said Act does not allow the character of the alleged assailant to be examined unless the matter has been put in issue.²⁵
49. It is apparent that the underlying idea of section 155(4) of the Evidence Act, 1872 is to assume that there exists some

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²³ *Supra note 8*, s. 151.

²⁴ *Ibid*, s. 155(4).

²⁵ *Ibid*, s. 54.

correlation between immoral character and consent to sexual intercourse or the likelihood of a false allegation of rape. However, this is an utterly outdated approach that should not find any expression in modern criminal jurisprudence, simply because the definition of rape relates to sexual violence perpetrated by the accused, and has no logical connection to the character of whomever he may have assaulted, nor does it relate to the issue of consent. That a woman may be considered to be of immoral character does nothing at all to establish whether or not her allegations are true, or whether she consented to the sexual intercourse in question. It should be the character of the alleged perpetrator in issue, not that of the victim because the allegation of rape relates not to the culpability of the woman, but to the perpetrator. A failure to recognize this basic point however prevails in cultures that tend to stigmatize victims of sexual violence and fail to take criminal responsibility for rape seriously enough. Thus, it is starkly unfair that while the Evidence Act does not attach any evidentiary value to the bad character of the accused, it allows the accused to lead evidence proving the bad character of the complainant. On the other hand, in practice this provision allows the defence to pose embarrassing questions to the victims in open court. In Bangladesh, such questions often prevent victims from continuing with her case, and it acts as a powerful deterrent on victims from bringing allegations of rape in the first place. Generally, the defence counsel takes advantage of section 155(4) to deny that the accused had any sexual intercourse with the victim. From both a moral and legal point of view, it makes no sense for the law to allow the accused to impeach the character of a woman without first having admitted having had sexual intercourse with her. It is suggested that if section 155(4) of the Evidence Act, 1872 has any permissible application, it should only be allowed only where the accused first admits to having had sexual intercourse with the victim. In case such admittance is made by the accused, the court would still need to determine whether the said sexual intercourse actually occurred and whether it occurred with or without the consent of the victim. A better solution would be the complete repeal of section 155(4).

BURDEN OF PROOF IN CASES RELATING TO SEXUAL OFFENCES

50. The Evidence Act, 1872 in general provides that the burden of proof lies on the person who desires the court to give judgment in his/her favour as to any legal right or liability, or who wishes the court to believe the existence of particular facts (unless it is provided by any law that the proof of that fact shall lie on any particular person).²⁶ Accordingly, the burden of proof lies on the prosecution in cases of sexual offences.
51. Moreover, in Bangladesh, the law requires the prosecution to prove the case beyond a reasonable doubt in order to guard the presumption of innocence of the accused. The accused has no legal obligation to prove his innocence and the accused must be acquitted if the prosecution fails to prove its case. There is no presumption of culpability even if the prosecution has established strong prima facie case based on evidence like positive medical examinations (with DNA test) report.
52. A difficult facet of rape trials is that in many if not most of the rape cases, the complainant is both the victim and often the main or even only witness to the crime. The prosecution often has to build its case on the testimony of the victim and the medical examination report. In many instances, victim's testimony supported by an exhaustive medical examinations report can establish a strong prosecution case that can make it difficult for the accused to rebut, especially since DNA testing has become more accurate and more freely available as a reliable means by which to help prove the perpetrator's identity.

²⁶ *Ibid*, ss. 101 - 102.

Reforms needed for existing laws and practices related to sexual offences

RECAPITULATING THE PREVIOUS DISCUSSION

53. Although rape is the highest form of sexual offence, the definition of rape as incorporated in section 375 of the Penal Code 1860 fails to elaborate or define certain key concepts, including the precise meaning of sexual intercourse, the consent or will of the victim, among others. Moreover, the said definition conceptualizes rape in a very narrow sense and leaves out many other acts that should qualify as crimes of sexual violence.
54. In many rape cases, the court has inferred consent of the victim where the medical report does not record marks of violence or resistance from victims or on the basis of previous sexual relations between accused and victim. However, as discussed above, the purported 'consent' may have been extorted through fraud, threat, blackmail, administering of an intoxicant, or through other means that leave no physical trace.

55. The laws on sexual assault presume lack of consent for all cases of sexual intercourse involving a female victim of less than 16 years of age, except in relation to sexual intercourse between a husband and his wife where she has attained the age of 13 as provided for in the Penal Code 1860. In effect, by modern day standards, the Penal Code 1860 allows for the lawful rape of a child above the age of 13 where she is married to her attacker. Moreover, Bangladesh's laws do not adequately recognize the crime of marital rape, i.e. forced sexual intercourse between a man and his wife.
56. In rape cases, medical evidence plays a very important role. However, the existing procedures for the medical examination of rape victims remain very much out-of-date which seriously prejudices the rights of victims by gravely weakening the prosecution's case. Moreover, the existing laws make no provision for medical examination of the accused. In addition, current rules of evidence fail to give adequate guidance to the court as to the proper evidentiary weight to attach to medical reports in finding the facts in rape cases. In absence of legal directives, the court, as a matter of practice, has developed an unfortunate tendency to decide rape cases almost entirely on the basis of the medical report which focuses only on certain aspects of the victim and ignores the accused. Prosecution authorities therefore often face serious difficulties to prove their case against the accused where the medical report is weak, incomplete or contradicts the direct testimony of the victim.
57. Finally, the Law Commission's finding that the alarmingly increasing number of incidents of sexual harassment, as well as suicides, following from sexual harassment, is attributable to a largely inadequate legal framework that deserves immediate remedial attention. To address the situation, there is no alternative to reforming the law currently in force.

INTERNATIONAL STANDARDS AND GUIDELINES ON THE PROSECUTION OF SEXUAL ASSAULT CASES

58. In 2009, the United Nations Department of Economic and Social Affairs Division for the Advancement of Women published the “Handbook for Legislation on Violence against Women”²⁷ which recommended the following:

“Legislation should:

- define sexual assault as a violation of bodily integrity and sexual autonomy;
- replace existing offences of rape and “indecent” assault with a broad offence of sexual assault graded based on harm;
- provide for aggravating circumstances including, but not limited to, the age of the survivor, the relationship of the perpetrator and survivor, the use or threat of violence, the presence of multiple perpetrators, and grave physical or mental consequences of the attack on the victim;
- remove any requirement that sexual assault be committed by force or violence, and any requirement of proof of penetration, and minimize secondary victimization of the complainant/survivor in proceedings by enacting a definition of sexual assault that either:
 - requires the existence of “unequivocal and voluntary agreement” and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting; or
 - requires that the act take place in “coercive circumstances” and includes a broad range of coercive circumstances; and

²⁷ See the United Nations, Handbook for Legislation on Violence against Women, United Nations Publication, New York, 2010.

VII

- specifically criminalize sexual assault within a relationship (i.e., “marital rape”), either by:
 - providing that sexual assault provisions apply “irrespective of the nature of the relationship” between the perpetrator and complainant; or
 - stating that “no marriage or other relationship shall constitute a defence to a charge of sexual assault under the legislation.”

Reform proposals

Reform Proposals relating to Definition of Sexual Assault:

- a) The term ‘rape’ has become recognized as outdated because it focuses too narrowly on sexual intercourse and ignores the various other forms of sexual violence. The legislative references to ‘rape’ should be replaced with the term ‘sexual assault.’
- b) The definition of sexual assault (rape) under the Penal Code 1860 should be brought up-to-date with more comprehensive and modern jurisprudence relating to the range of sexual offences.

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- c) The definition of sexual assault should apply to male, female and transgender ('hijra'). Moreover, it should also cover any non-consensual interference by one or more individual against another of a sexual nature, whether that involves penetration or not.
- d) The Government should consider positively the draft Bills proposed by the Law Commission for enactment for combating incidents of sexual harassment.

Reform Proposals relating to Elements of Sexual Assault (Rape):

- e) The explanation of the term sexual intercourse under section 375 of the Penal Code 1860 shall be revised to include all forms of non-consensual sexual acts such as fellatio and cunnilingus, regardless as to whether it involved penetration of any sort or not.
- f) Sexual assault should also encompass penetration of a sexual organ by any object without consent.
- g) Sexual assault within a revised section 377 of the Penal Code, 1860 should also include non-consensual anal intercourse.
- h) Non-consensual homosexual activity between members of the same sex or gender should be included within the definition of 'sexual assault', or in a broadened definition of 'rape' as the case may be. Homosexual activity between consenting adults should not constitute a crime.
- i) Section 375 of the Penal Code 1860 and 'the Explanation' of the Prevention of Cruelty against Women and Children Act 2000 that makes legal sexual intercourse with a 'married child above age of thirteen' should be repealed immediately. Moreover, sexual assault between a man and a woman in such cases should be considered criminal offences regardless as to whether they are married, living together, romantically involved or have any other kind of relationship or not.

Reform Proposals relating to Sexual Oppression:

- j) The range of punishment for sexual offences should be made commensurate with the range of offences according to gravity.

Reform Proposals relating to Medical Examinations in Sexual Offence:

- k) Section 32 of the Prevention of Cruelty against Women and Children Act 2000 should include mandatory medical examinations of the accused person.
- l) The said law should provide clear and specific procedures for the conducting of medical examination of victim and accused and for ensuring the integrity of all physical and documentary evidence through establishment of a secure chain of custody to ensure their admissibility into evidence at trial.
- m) The Ministry of Health and Family Welfare provide a specialized 'Medical Examination Form' as per the requirement of Section 33 of the Prevention of Cruelty against Women and Children Act 2000.
- n) Alternatively, the existing 'Medical Examination Form' provided by the Ministry of Health and Family Welfare should be improved to bring it up-to-date with state-of-the-art forensic medical examinations for sexual offences.
- o) The so-called two-finger test should be immediately prohibited.
- p) DNA testing should be made compulsory in medical examination of the victim as well as the accused in all sexual assault trials.
- q) The Deoxyribonucleic Act, 2014 (hereinafter referred as the DNA Law 2014) should be made immediately enforceable.
- r) As per the requirement of the DNA Law 2014, the Government should immediately establish a professional, specialized deoxyribonucleic laboratory capable of expert forensic analysis in relation to sexual assault cases.

Reform Proposals relating to Investigation and Trial of Sexual Offences:

- s) The investigating authority should be required to collect meticulously alternative evidence that may be used in a court in cases where medical evidence is not available.

- t) Since sexual assault is an offence that includes both legal and scientific elements, the court should be staffed with judges and investigation officers having adequate knowledge of sexual offence and of related medical jurisprudence.
- u) The Court should remain cautious when having to decide cases based solely on reports of medical examinations, particularly, in cases where the medical report cannot clearly ascertain commission of the offence. In such cases, the court should make every effort to make its determination of the facts on the totality of evidence available to it including statements from the victim, of witnesses and medical reports).
- v) When a medical report has indicated non-existence of an alleged sexual assault, in such cases, the court should not dispose of the case straightaway, but broaden out its perspective to ensure that it takes into full consideration all relevant testimony from the victim, the testimony of witnesses and circumstantial evidence.

Reform Proposals in the Laws of Evidence:

- w) The Evidence Act 1872 should include a provision explicitly allowing for the admissibility of medical evidence in sexual assault cases.
- x) In conformity with Sections 38 and 39 of the DNA Law 2014, the Evidence Act 1872 shall acknowledge the DNA test report as evidence in sexual offences.
- y) Character evidence of the victim under section- 155(4) of the Evidence Act 1872 should only become possibly relevant where the accused first admits that he had sexual intercourse with the alleged victim.
- z) All other laws, regulations and procedures in Bangladesh that relate to the investigation and prosecution of sexual offences should be brought into conformity with the relevant international norms and standards.

**ANNEX – I : Form Prescribed for Medical Examination of the Victim
of Sexual Offence (Unofficial English Translation)**

The Peoples' Republic of Bangladesh
Ministry of Health and Family Welfare

Medical Examination Report of the Victim (Prescribed)

Ref No :

Date :



**1. Name and Address of the Place where Medical Examination is conducted/
Treatment is Given :**

2. Identity of the Victim:

- a) Name:
- b) Age (as mentioned) c) Sex :
- d) Religion : e) Occupation :
- f) Name of Father/Mother/Husband :
- g) Address :

3. Name and Address of the Identifier/Accompanying Person :

4. Declaration of Consent : Knowing the medical test report may go against me I am giving/ not giving consent to conducting test along with the private parts of my body.

Witness:

- 1.
- 2.

Signature/Thumb Impression of the Victim

5. Time and Date of Conducting Test :

6. Name and Address of the Present Woman Assistant :

7. Summary of the Incident (As mentioned by the Victim) :

- a) Place of Occurrence:.....
- b) Time and Date of Occurrence:.....
- c) Description of Occurrence:.....

8. Description of Physical Examination :

- a) Physical Structure:..... b) Height:.....
- c) Weight..... d) Teeth:.....
- Total:.....

9. Marks of Identification : a)..... b).....

ANNEX – II : Selected Judicial Decisions Relating to Sexual Offences

Citation	Law(s) Relevant to the Case	Medical Evidence	Decision of the Court	Paragraph(s)
Ghulam Ahmed v. The State 64 DLR (HCD) 2012	Section 9(1) of the Prevention of Cruelty to Women and Children Act, 2000.	It was admitted that the accused and the victim lived together as husband and wife for six years. It also appeared to the court that the consent of the victim was not obtained by fraud.		para. 9
Nazmul Islam alias Nazu v. The State 63 DLR (HCD) 2011	Section 9(1) of the Prevention of Cruelty to Women and Children Act, 2000.	It appeared to the court that the accused-appellant had regular sexual intercourse with the victim with her consent.	The allegation of rape did not sustain.	paras. 28, 29
Zitu Ahsan v. The State 59 DLR (HCD) 2007	Section 9(1) of the Prevention of Cruelty to Women and Children Act, 2000.	In this case, evidence of forcible sexual intercourse or injury to the victim was absent. The victim and the accused were husband and wife and the alleged sexual intercourse took place with her consent.	The allegation of rape did not sustain.	para. 21
Mumtaz Ahmed Khan v. The State 19 DLR (SC) 1967	Section 376 of Penal Code, 1860.	The doctor testified that when the victim was first examined, no semen was found inside her vagina and there was no evidence of any recent sexual intercourse.	The allegation of rape did not sustain.	paras. 2, 3, 10
Muhammad Abdul Khalaque & Others v. The State 12 DLR (SC) (1960)	Section 376 of the Penal Code, 1860.	In this case, the doctor found evidence of a bite injury on the victim's left cheek, a number of fingernail scratches on the right cheek, a bruise on her left breast and a number of scratches on the back of her body.	The allegation of rape did not sustain.	paras. 1, 5

Citation	Law(s) Relevant to the Case	Medical Evidence	Decision of the Court	Paragraph(s)
		There was congestion in her genital. No stains of semen were detected either on her dress or body (due to washing). In the opinion of the doctor the women was pregnant for 7 months. From the testimony of the victim as well as from circumstantial evidences the Court was of the opinion that the alleged sexual intercourse took place with her consent		
Samsundar Khan v. The State 15 DLR (WP) 1966	Section 376 of the Penal Code, 1860.	The victim testified that she had been forced to engage in prostitution against her will. When she had been forced to work as a sex worker, she had had sexual intercourse with the accused. She alleged that the aforesaid sexual intercourse with the accused constituted rape. The court ruled that mere allegation of rape without any corroborative evidence as regards lack of victim's consent would not be sufficient to prove her case.	The allegation of rape did not sustain	para. 4
Saleh Muhammed v. The State 18 DLR (WP) 1966	Section 376 of the Penal Code, 1860.	The court observed that absence of sperm (semen) in the vagina did not disprove the allegation of rape. The court further observed that evidence of injury to the victim constituted strong circumstantial evidence in proving the allegation of rape.	The allegation of rape sustained.	paras. 14, 16

Citation	Law(s) Relevant to the Case	Medical Evidence	Decision of the Court	Paragraph(s)
Habibur Rahman & Others v. The Crown 6 DLR (AD) 1954	Section 376 of the Penal Code, 1860.	In this case, the Appellate Division upheld conviction passed by the Sessions Court on the basis of medical report and other circumstantial evidence, although the Sessions Court did not examine the doctor who performed the medical examination.	The allegation of rape sustained.	p. 361
Md. Abdul Aziz and others v. The State 2 MLR (HCD) 1997	Section 376 of the Penal Code, 1860.	The doctor who examined the victim did not find any evidence of injury to the victim or forcible sexual intercourse.	The convicts were acquitted.	paras. 11, 12
Tofazzal Hossain Khan v. The State 2 MLR (HCD) 1997	Section 376 of the Penal Code, 1860.	Medical examination discovered evidence of injury and forcible sexual intercourse with the victim.	The conviction and sentence passed by the trial court was affirmed.	paras. 4, 20.
Dulal and Another v. The State 4 MLR (HCD) 1999	Section 4(c) of the Cruelty of Women (Deterrent & Punishment) Ordinance, 1983.	In this case, the High Court Division found inconsistencies between the victim's allegation and the report of the Medical Officer who examined her within forty-eight hours of the alleged commission of rape. There had been no eyewitness to support the prosecution case.	The conviction and sentence passed by the trial court was reversed.	paras. 14, 17
Abu Taher alias Taher Mia v. The State 6 MLR (AD) 2001	Section 376 of the Penal Code, 1860.	The doctor did not find any evidence of forcible sexual intercourse. The court noticed that the doctor examined the victim after 7 days of the alleged commission of rape and was of the opinion that the outcome of the medical report could be attributed to	The criminal petition for leave to appeal was dismissed.	para. 4

Citation	Law(s) Relevant to the Case	Medical Evidence	Decision of the Court	Paragraph(s)
		such delay in conducting medical examination of the victim. There was no reason to disbelieve the testimony of the victim and accordingly the Appellate Division dismissed the criminal petition for leave to appeal against conviction of the accused.		
Masud Mia (Md.) v. The State 9 MLR (HCD) 2004	Section 376 of the Penal Code, 1860.	The court ruled that testimony of the victim should be carefully assessed when she was the only witness as well as there was no circumstantial evidence or corroboration by impartial witness to prove the prosecution case. Absence of any evidence of injury to the victim would make the prosecution case weak.	The convict was acquitted.	paras. 16, 17, 22
Md. Sobuj v. The State 11 MLR (HCD) 2006	Section 6 (1) of the Prevention of Cruelty to Women and Children Act, 2000.	The victim neither underwent any medical examination, nor had there occurred any injury to her as a result of putting up resistance. The evidence on record fell below the standard required to prove the prosecution case.	The convict was acquitted of the charge of rape.	paras. 21- 24 28, 29
Md. Abdul Kader v. The State 11 MLR (HCD) 2006	Section 9(1) of the Prevention of Cruelty to Women and Children Act, 2000.	The victim was not medically examined. The court also found that the victim had allowed the accused to have sexual intercourse with her on a number of occasions. She did have consent in the alleged sexual intercourses.	The convict was acquitted of the charge of rape.	paras. 22, 23

Citation	Law(s) Relevant to the Case	Medical Evidence	Decision of the Court	Paragraph(s)
Md. Khairul v. The State 12 MLR (HCD) 2007	Section 9(1) of the Prevention of Cruelty to Women and Children Act, 2000.	The court reasoned that the victim was a mature woman having a husband and children. Her allegation of rape needed corroboration by impartial witness in absence of a favourable medical report.	The convict was acquitted.	paras. 16, 23 24, 34, 47
Sree Pinto Pal v. The State 30 BLD (HCD) 2010	Section 9(1) of the Prevention of Cruelty to Women and Children Act, 2000.	In this case, medical report did not support the allegation of rape. There was no eyewitness as well. The apparels of the victim were not examined. The doctor was of the opinion that no sign of recent sexual intercourse was detected. As well as other relevant evidences such as the absence of scratches and bruises in face, breasts, abdomen, limbs and back also did not support the allegation of rape.	The allegation of rape did not sustain mainly because of lack of corroborating medical evidence.	paras. 37, 38 39, 40
The State v. Md Jahurul Haque 32 BLD (HCD) 2012	Section 375/376 of the Penal Code, 1860	The court in this case, among others, relied on the post mortem report and concluded that the victim had been raped before she was murdered.	The allegation of rape sustained.	para. 35
Safazuddin and another v. The State 27 BLD (HCD) 2007	Section 375/376 of the Penal Code, 1860 / Section 9(1) of the Prevention of Cruelty to Women and Children Act, 2000.	The medical report which was submitted long after 34 days of the examination of the victim was not relied on by the court.	The allegation of rape in this case did not sustain.	paras. 46, 47

Citation	Law(s) Relevant to the Case	Medical Evidence	Decision of the Court	Paragraph(s)
Md. Moinul Haque v. The State 24 BLD (AD) 2004	Section 375/376 of the Penal Code, 1860	According to medical report the victim girl had been raped before she was strangled to death. The victim girl had various marks of violence on her shoulder which clearly showed that she had been subjected to sexual intercourse against her will and without consent.	The allegation of rape sustained.	paras. 4, 9 and 16
State & others v. Noor Islam 16 MLR (HCD) 2011	Section 9(3) of the Prevention of Cruelty to Women and Children Act, 2000.	Besides confessional statements of the accused, the post mortem report stated that the victim had been gang-raped before she was murdered.	The allegation of rape sustained.	paras. 23, 24, 25, 30, 32 and 33
Rehana Begum and other v. The State 16 MLR (HCD) 2011	Section 9(3) of the Prevention of Cruelty to Women and Children Act, 2000.	From the autopsy report it appeared that the victim had been subjected to gang rape. The victim committed suicide afterwards.	The allegation of rape sustained.	paras. 34, 37
Fatema Begum v. Aminur Rahman and others 11 MLR (HCD) 2006	Section 9(1) of the Prevention of Cruelty to Women and Children Act, 2000.	The High Court Division affirmed conviction of the accused of rape although the medical examination did not ascertain recent and involuntary sexual intercourse.	The allegation of rape sustained.	paras. 43, 49
Shibu Pada Acharjee v. The State 8 MLR (HCD) 2003	Section 375/376 of the Penal Code, 1860	The victim conceived and gave birth to a child as a result of rape. The allegation of rape was lodged almost after 10 months of the alleged offence.	The allegation of rape in this case sustained although there was no corroborating medical evidence.	para. 63

Citation	Law(s) Relevant to the Case	Medical Evidence	Decision of the Court	Paragraph(s)
Shorbesh Ali & other v. Mrs. Jarina Begum & another 2 MLR (AD) 1997	Section 375/376 of the Penal Code, 1860	Medical report was held admissible by the court even though the doctor who examined the victim girl was not available for making deposition.	The allegation of rape sustained.	paras. 2, 3
Md. Wasim Mia and other v. The State 9 MLR (HCD) 2004	Section 9(1) of the Prevention of Cruelty to Women and Children Act, 2000.	The doctor found no sign of injury on the private organs of the victim as she was examined after one month and two days. However, according to medical examination Hymen of the victim was found ruptured.	The allegation of rape sustained although there was no medical report clearly corroborating the allegation of rape.	paras. 6, 12 28 and 44
Jahangir Hossain v. The State 1 MLR (HCD) 1986	Section 375/376 of the Penal Code, 1860	The doctor who examined the victim deposed that there was sign of sexual intercourse.	The allegation of rape sustained.	para. 22
Firoz Chokder v. The State 11 MLR (HCD) 2006	Section 9(1) of the Prevention of Cruelty to Women and Children Act, 2000.	The victim was aged about 16/17 years. There was no sign of rape at the time medical examination and she was found habituated to sexual intercourse.	The allegation of rape did not sustain.	para. 5
The State v. Shahidul Islam alias Shahid and others 58 DLR (HCD) 2006	Section 376 of the Penal Code, 1860	Forensic report about the deceased victim was as follows- uterus small and empty. Vagina congested abrasion present right and left lateral wall of Vagina Labia Majora congested and bruised(both). Hymen ruptured. High vaginal swab examination. No sp. (sperm) seen. RM (Rigor Mortis) Present. The doctor was of the opinion that that the victim's death was caused from	The High Court Division affirmed conviction and sentence of all of the accused persons except one.	paras. 60 61, 62

Citation	Law(s) Relevant to the Case	Medical Evidence	Decision of the Court	Paragraph(s)
		hemorrhage and shock as a result of above-mentioned injuries and she was raped before homicide.		
Alam (Md) & another v. The State 54 DLR (HCD) 2002	Section 2(d) & 9(b) & (c) of the Prevention of Cruelty to Women and Children Act, 1995.	The trial court found the accused-husband guilty of abduction for the purpose of forced marriage and sexual intercourse. Contrarily, the High Court Division found that the victim eloped with the accused. The Prosecution claimed the victim was about 12 years old whereas according to medical examination she was about 16 years old. The High Court Division held the trial court inappropriately held the victim was 15 years old and for that reason she was not legally competent to get married until attaining the age of 18.	The High Court Division set aside the convictions and sentences passed by the trial court and acquitted the accused-appellants of all charges.	paras. 31, 33 34, 35
Shamsul Haque (Md) v. The State 52 DLR (HCD) 2000	Section 376 of the Penal Code, 1860	Medical examination of the victim was conducted after 10 days of the alleged occurrence of rape. The hymen was found ruptured, but no sign of violence or injury was detected. The victim was of 12 years of age, but no definite opinion as to whether the victim was raped. Non-examination of victim in due time was considered by the court a vital omission.	The allegation of rape did not sustain.	paras. 18, 27



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