COMBATING VIOLENCE AGAINST WOMEN: A CRITICAL ASSESSMENT OF LEGAL FRAMEWORK

Sharmin Jahan Tania*

Introduction:

'Violence against women', which has a detrimental impact on women's lives, liberty and security, has now become a burning issue due to the consciousness of women's activist forum**,** media as well as progressive minded men. This social evil is also a predicament for Bangladesh where women constitute half of the total population of the country, despite a number of constitutional commitments for upholding women's rights and position.[1] The legislature of Bangladesh has responded to this problem with a set of rigorous and draconian laws which, in turn, leave ample scope for their abuse at the expense of the innocent. Believing in the notion that harsh laws will automatically reduce the crimes against women by its deterrent effect, the government has taken the policy of thrusting some draconian laws where practically no differentiation in punishments has been made on the basis of the magnitude of offence. On the one hand, these laws are being misused to serve proprietary and other personal interest and, on the other, the real victims of the offences cannot get their redress under the existing system and the offenders often remain outside the clutches of law. Against this backdrop, I shall endeavour to address the issue under the following heads:

1. Overview of violence against women, where I shall try to depict the existing forms and trends of 'violence against women' following the standard definition of 'violence against women' drawn up by the United Nations General Assembly. This part will also focus on the entrenched reasons behind the violence.
2. Legal framework for combating violence, which will analyse the special laws enacted for the purpose, namely, the Dowry Prohibition Act, 1980, the Cruelty to Women (Deterrent Punishment) Ordinance, 1983, Nari O

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* Sharmin Jahan Tania,

1 Article 28(1) of the Constitution of Bangladesh states, "the State shall not discriminate against any citizen on the grounds of religion, race, caste, sex or place of birth."

Article 28(2) states, "Women shall have equal rights with men in all spheres of the state and of public life."

Article 28(4) provides, "Nothing shall prevent the State from making special provisions in favour of women or for the advancement of any backward section of the population."

Shishu (Bishesh Bidhan Ain), 1995, Nari O Shishu Nirjaton Daman Ain, 2000 (as amended in 2003), the Acid Control Act, 2002 and the Acid Crime Control Act, 2002.

3. Flaws in existing laws and comparison with the Penal Code of 1860, which will underscore the major deficiencies of these laws and argue that these laws are serious setbacks, in comparisons to the Penal Code of 1860. This part will also discuss on objectives and justification of punishment, proportionality of punishment, arguments against severe punishment.
4. This part will summarise the arguments, provide some recommendations followed by conclusion.

1. Overview of violence against women

Violence against women is a very common phenomenon all over the world. Following the language of the United Nations General Assembly, it can be said that in recognition of the urgent need for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human beings and in affirmation that violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms, the UN General Assembly adopted the 1993 Declaration on the Elimination of Violence against Women, which is the first international human rights declaration addressing this issue.[2]

First internationally accepted definition of 'Violence against women' is given in the Declaration which connotes such violence as 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'.

Article 2 gives a non-exhaustive list of the violence against women:

'(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and

[2] The UN Declaration on the Elimination of Violence against Women was adopted by the General Assembly Resolution 48/104 of 20 December 1993.

intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.'

Scholars have classified violence against women in different ways. Nigam has divided the atrocities committed on women into various groups:

'Physical violence may include assault, battery, serious injuries or burns etc.

Sexual violence, which includes a wide range of acts from indecent behaviour to extreme form of rape.

Verbal violence, which means indecency or use of abusive and filthy language against a woman or her near and dear ones.

Social violence, which includes demeaning, disparaging and humiliating a woman or her parental relatives and friends.

Emotional violence, leading to internal deprivation of love and affection, concern, sympathy and care, it also includes depriving her custody of children.

Financial violence, which means depriving her of financial means and bare necessities of daily life, it also includes taking away the assets, which a woman possesses or earns.

Intellectual violence, means denial or rights to take part in decision making and discussion for pressing issues.

Other forms of violence, which may include denial of education, access to health facilities, reproductive rights, etc. [3]

The classification is not flawless since most of them are overlapping and it is not possible for penal law to give redress for emotional, intellectual and other forms of violence.

Again, violence against women has also been broadly divided into domestic violence and public acts of violence. Domestic violence includes wife battering, dowry related offences and polygamy while public acts of violence includes rape, trafficking, forced prostitution, kidnapping, abduction, sexual harassment, violence in the workplace, victimization by fatwa, lack of reproductive choices and consequential maternal mortality etc. [4]

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[3] Nigam, S, 'Silent Enemy in the Home', (2002) 49(4) Social Welfare 8, cited in Sharma, BR., Gupta, M, 'Gender Based Violence in India – A Never-ending Phenomenon', (2004) 6(1) Journal of International Women's Studies 114 at pp. 114-5.

[4] Khan, S R, *The Socio-Legal Status of Bangali Women in Bangladesh:Implications for Development, (*Dhaka: The University Press Ltd 2001), at pp. 121-148.

Like other South Asian countries, violence against women is a significant social problem in Bangladesh. Women face diverse forms of discrimination and are victim of oppression in their family and public life due to a number of social and cultural norms and deeply entrenched patriarchy where women are treated as objects and commodity. Daily news reports are filled with atrocities including physical and psychological torture, rape, sexual harassment, dowry related violence, acid violence, trafficking, kidnapping, abduction, forced prostitution, coerced suicide and murder. The rate of reported violence against women has arisen consistently and at an alarming rate, especially since the early 1990's.[5] Nevertheless, most of the incidences of violence against women, particularly domestic violence are still unreported or substantially underreported.

Much has been discussed by the scholars on the social reasons behind this malpractice. Let us underscore some major reasons behind violence against women:

- Traditional gender stereotyping which enables men to control and repress the sexuality of women. The complexities of gender relations that encourage male privilege over female most often lend to secure their submission to male authority. [6]
- Patriarchal notions of ownership over women's bodies, sexuality, labour, reproductive rights, mobility and level of autonomy. [7]
- Customary and religious dogma, poverty, unemployment, migration and debt crises. [8]
- Effort to test manliness by sexual conquests of women 'belonging' to other men by means of heinous offences like rape and sexual abuse which in many

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5 Sharmeen A. Farouk, 'Violence against women: a statistical overview, challenges and gaps in data collection and methodology and approaches for overcoming them'; Paper prepared for the Expert Group Meeting organized by: UN Division for the Advancement of Women in collaboration with Economic Commission for Europe (ECE) and World Health Organization (WHO), 11-14 April, 2005 Geneva Switzerland.

6 Khair, S, 'Violence against Women: Idelogies in Law and Society', (1999) 3(2) Bangladesh Journal of Law 1, at p. 1,2

7 Sharma, BR; Harish, D, Sharma V, 'Epidemiology of poisoning – an Indian Viewpoint', (2002) 19(2) Journal of Forensic Medicine Toxicology 5, cited in Sharma, BR., Gupta, M, 'Gender Based Violence in India – A Never-ending Phenomenon', (2004) 6(1) Journal of International Women's Studies 114 at pp. 117.

8 Khair, S, violence against women. 117.

cases lead to exploitation and murder of women, and if not to that extent, at least it reduces the victim's self-esteem and sense of worth.[9]

- Satisfying the vengeance against women by acid throwing for a number of reasons ranging from refusal to provide dowry to marry an ardent admirer. This results in the physical damage and deformity of the victim as well as immeasurable misery and mental trauma for the rest of their lives.[10]
- Women's emancipation in the market and economy has, unfortunately, increased the violence against them both in domestic and public sphere. [11] Participation of women in labour market and economy has ensured them economic empowerment but it has also exposed them to sexual harassment in the streets and workplace. [12]

2. Legal framework for Combating Violence:

2.1: Laws adopted till date:

Our legislature took resort to special laws for combating crimes of violence against women. It is to be mentioned that the almost two centuries old Penal Code of 1860 covers most of the crimes against women, such as murder, rape, criminal force, assault, hurt, kidnapping, abduction, slavery, prostitution and offences relating to marriage. Prostitution and trafficking was separately addressed by a law enacted in the British regime, namely, the Suppression of Immoral Traffic Act, 1933. To face the increased criminal acts against women, special laws were enacted dealing with almost the same offences in a stringent fashion with an attitude that enacting of harsh criminal laws will solve the problems that are deep-rooted in the society. Special laws that have been enacted to date on this subject area are:

1. The Children's Act, 1974.
2. The Dowry Prohibition Act, 1980
1. The Cruelty to Women (Deterrent Punishment) Ordinance, 1983
2. Nari O Shishu (Bishesh Bidhan) Ain, 1995
3. Nari O Shishu Nirjaton Daman Ain, 2000 (as amended in 2003)
4. The Acid Control Act, 2002 and
5. The Acid Crime Control Act, 2002.

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9 Khair, S, violence against women, p. 147

10 Khair, S, violence against women, p. 150

11 Khan, S R, *The Socio-Legal Status of Bangali Women in Bangladesh:Implications for Development, (*Dhaka: The University Press Ltd 2001)

12 Khair, S, 'Understanding Sexual Harassment in Bangladesh: Dynamics of Male Control and Female Subordination', (1998) IX(1) Journal of Faculty of Law 87, at p. 87.

Nari O Shishu Nirjaton Daman Ain, 2000 repealed Nari O Shishu (Bishesh Bidhan) Ain, 1995 which, in turn, had repealed the earlier Cruelty to Women (Deterrent Punishment) Ordinance, 1983.[13] The justifications for enacting new laws included imperfect definitions of crime, improper punishment and faulty mechanisms and the demand of women's forum for recognizing new crimes, taking into consideration of the rise in the types and dimensions of crimes.[14] Due to the increased incidents of acid throwing, the Acid Crime Control Act, 2002 was enacted which applies to any person irrespective of sex.

2.2 Special Courts and Tribunals:

The 1995, 2000 and 2002 Acts have set up special courts, popularly known as Nari O Shishu Tribunals and Acid Tribunals, for trial and punishment of criminals accused of committing crimes defined by these laws. For the 1995 Act, upto 11 Special Tribunals were created. The number of special tribunals for trial of cases under the current Nari O Shishu Nirjaton Daman Ain, 2000 (as amended in 2003) is on the increase and around 30 such tribunals with, usually, the Additional District Judge as the presiding Special Judge have so far been established in various districts of the country.[15] Again the Acid Crime Control Act 2002 also provides for the establishment of Acid Crime Control Tribunal for trial and punishment of offences committed under this law. The tribunal is constituted of a District Judge or Session Judge as special judge of the tribunal. Currently there are 61 Acid Crime Tribunal in the country.

2.3 Crimes dealt with under special laws:

I would like to start discussion on this topic with the Suppression of Immoral Act, 1933. Provisions of Penal Code on crimes against women and children will be narrated later to show the overlapping of offences.

3. The Suppression of Immoral Traffic Act, 1933

This Act provides penalties for the detention of any female under the age of 18 years for prostitution in brothels. The Act also provides for

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13 Section 34 of the Nari O Shishu Nirjaton Domon Ain, 2000 repealed the earlier Nari O shishu (Bishesh Bidhan) Ain, 1995. Section 29(1) of the Nari O Shishu (Bishesh Bidhan) Ain, 1995 had earlier repealed the Cruelty to Women (Deterrent Punishment) Ordinance, 1983.

14 Report of the Law Commission on amendment of certain sections of the Naro O Shishu Nirjaton Daman Ain, 2000.

15 Malik, S, *Nari O Shishu Ain and Special Tribunals: Looking at Law and its Implementation,* Draft Report for Naripakkha, May 2004.

punishment for causing or encouraging or abetting the seduction or prostitution of any girl.

The Children's Act, 1974

This Act provides punishment for keeping or allowing a child under 14 years in a brothel and encouraging any person other than the husband to indulge in sexual intercourse with a girl under 16 years. It also penalizes anyone who secures a child apparently for employment in a factory but practically exploits and exposes the child to seduction, sodomy, prostitution or other immoral conditions.

2.3.3 The Dowry Prohibition Act, 1980

To curb the increasing social evil of dowry demands as part of a marriage transaction the Dowry Prohibition Act, 1980 was enacted which defines dowry and provides for punishment for demanding dowry for marriages. Without concerning itself with violence relating to dowry this Act provides for punishment of maximum five years and minimum one year for demanding, giving and taking dowry in the form of money and other valuable property.[16]

Cruelty to Women (Deterrent punishment) Ordinance, 1983

The Ordinance, now repealed by the Nari O Shishu (Bishesh Bishan) Ain, 1995, provided deterrent punishment for the offence of cruelty to women, such as, kidnapping, abduction, rape, trafficking, causing death for dowry etc. Offences under this Ordinance were triable by the Special Tribunals created under the Special Powers Act, 1974.

2.3.4 Nari of Shishu (Bishesh Bidhan) Ain 1995

This law was enacted to provide for special provisions for certain heinous offences against women and children.[17] For the convenience of building arguments in the latter part of this article, I have divided the offences punishable under this Act under two heading: crimes and attempt to commit crimes.

Crimes punishable under the Act with mandatory death penalty:

(a) Causing death by burning, corrosive and poisonous substances [section 4]

(b) Murder after rape or by rape [section 6(2)]

(c) Murder after or by gang rape [section 6(4)]

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16 Section 3 and 4 of the Dowry Prohibition Act, 1980.

17 Preamble of the Nari O Shishu Nirjaton (Bishesh Bidhan) Ain, 1995.

(d) Causing death for dowry [section 10(1)] [18]

Crimes punishable under the Act with death sentence or life imprisonment:

(a) Causing grievous hurt by burning, corrosive and poisonous substances if the sight of both eyes are permanently damaged or if head or face is permanently damaged or deformed. [Section 5] [19]

(b) Rape [section 6(1)]

(c) Gang rape [section 6(3)]

(d) Trafficking of children (buying, selling or taking in possession for buying and selling of children) [section 12]

Crimes punishable under the Act with life imprisonment or other rigorous imprisonment and fine:

(a) Causing grievous hurt by burning, corrosive and poisonous substances in case of any damage mentioned in section 5.

(b) Trafficking of women and children for prostitution, illegal cohabitation, engaging in illegal or immoral activities [section 8(1)]

(c) Taking possession or having custody of women and children for above purposes [section 8(2)]

(d) Abduction for prostitution, illegal or immoral activities [section 9]

(e) Causing grievous hurt for dowry [section 11]

(f) Kidnapping or confining any children for taking ransoms [section 13]

This Act provides punishment for abetment for committing any of the above offences with the same punishment for the offence if the crime is committed thereby [section 14]

Attempt to commit crimes:

(a) Death sentence of life imprisonment for attempt to cause death or hurt by rape [Section 7] [20]

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[18] Among 511 sections of the Penal Code, only 2 sections provided for compulsory death sentence. These are section 303 (murder by life convicts) and section 307 (attempt to murder by life convict, if hurt is caused thereby).

[19] Section 5 of the 1995 Act compartmentalized human body for the purpose of variation in punishment: such as losing sight of one eye, both eyes, one year, both ears, face, reproductive organs etc.

[20] No distinction has been made between simple or grievous hurt. From the section which reads 'if any person attempts to cause death of or hurt any women or children by rape….' it is not clear whether it requires rape to be committed or not. If not, then a person can be punished with death sentence only for attempting to commit rape. If rape is required, then the section is unneeded since section 6 provides for the punishment for the same offence.

(b) Life imprisonment for attempt to cause death for dowry [Section10(2)]

Nari O Shishu Nirjaton Daman Ain 2000 (as amended in 2003)

Following the previous Nari O Shishu (Bishesh Bidhan) Ain, 1995 this Act was also enacted to provide for necessary provisions for strictly suppressing the oppression against women and children.[21] This Act is applicable in respect of all women and children.[22] Here also I have divided the offences under two heads: Crimes and attempt to commit crime.

Crimes punishable under the Act with mandatory death sentence and fine:

Causing death for dowry [section 11(ka)]

Crimes punishable under the Act with death sentence or life imprisonment and fine:

(a) Causing death by burning, corrosive and poisonous substances. [23] [section 4(1)]

(b) Causing grievous hurt by the above substances if eyesight or hearing capacity or face or breast or reproductive organs are damaged [section 4(2)(ka)]

(c) Trafficking of women for prostitution, illegal and immoral acts [Section 5]

(d) Trafficking of children for illegal and immoral acts. [24] [section 6(1)]

(e) Stealing of newborn baby from hospital, nursing home etc.[25][section 6(2)]

(f) Confinement of any woman or child for taking ransom [section 8]

(g) Causing death of any woman or child due to rape or any activities of the offender after rape [section 9(2)]

(h) Causing death or hurt by gang rape [section 9(3)]

(i) Mutilation of any limbs of child for the purpose of begging or selling limbs [section 12]

Crimes punishable under the Act with life imprisonment or lesser terms of rigorous imprisonment and fine:

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21 Preamble of the Nari O Shishu Nirjaton Daman Ain, 2000 or which is known in English as 'The Law relating to Suppression of Oppression against Women and Children, 2000'.

22 Child has been defined in Section 2(ta) as 'a person who is below 16 years of age'.

23 A 2007 report of the Law Commission relating to the amendment of Nari O Shishu Nirjaton Daman Ain 2000 recommended to include the words 'or any other burning substance or materials' after 'corrosive or poisonous substance' taking into account the fact of torture on the domestic help with hot water, utensils etc.

24 Trafficking of children for prostitution is not included in section 5 or 6. Is it deemed to be included in 'immoral and illegal acts'?

25 Newborn baby has been define in section 2 (Cha) as a baby of not more than 40 days.

(a) Causing grievous hurt by burning, corrosive and poisonous substances in case of any damage to any part of the body other than those mentioned in section 4(2)(ka) [section 4(2)(kha)]

(b) Throwing any burning, corrosive and poisonous substance even though the concerned woman or child does not suffer from any physical or mental harm [section 4(3)]

(c) Kidnapping or abduction of any woman or child for any purpose other than those mentioned in section 5 [section 7]

(d) Rape [section 9(1)]

(e) Failing to provide safety to any woman who has been raped in police custody. [26] [section 9(5)]

(f) Abetting any woman to commit suicide. [27] [section 9(ka)]

(g) Sexual harassment. [28] [section 10] [29]

(h) Causing grievous hurt for dowry [section 11 (kha)]

(i) Causing simple hurt for dowry [section 11(ga)]

(j) Publicity of the identity of any woman or child victim in newspapers [section 14]

Attempt to commit crimes punishable under the Act:

(a) Attempt to cause death by burning, corrosive and poisonous substances for which punishment is death sentence or life imprisonment and fine [section 4(1)]

(b) Attempt to throw burning, corrosive and poisonous substance even though the concerned woman or child does not suffer from any physical or mental harm for which maximum 7 years of imprisonment and fine have been imposed [section 4(3)]

(c) Attempt to cause death for dowry [section 11(ka)]

(d) Attempt to cause death or hurt by rape [section 9(4)(ka)]. Life imprisonment and fine have been imposed in case of both (c) and (d).

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[26] 'Child' is not included here.

[27] Again the term 'child' is omitted here. This provision was included by the Amendment Act of 2003. This provision was inserted due to several incident of suicide committed by some women and children in fear of losing chastity.

[28] Second part of the section omits the word 'child'. The Law Commission 2007 report recommended to include the word 'child' after 'woman'. In fact this is not the only provision where this omission occurred. Hence, a careful scrutiny of the Act is needed to prevent amendment again and again.

[29] Section 10 was amended by the Amendment Act of 2003 which omitted the second part of section 10 providing for maximum 7 and minimum 2 years of imprisonment for making indecent gesture towards any woman for satisfying sexual desire.

(e) Attempt to rape for which punishment is maximum 10 years imprisonment [section 9(4) (Kha)]

(f) Attempt to cause simple hurt for dowry [section 11(kha)]

(g) Attempt to cause grievous hurt for dowry [section 11(ga)]

The Act provides for the same punishment provided for offence as well as attempt to commit any offence for abetment to commit any offence under this Act if the offence is committed or if attempt is made towards the commission of the offence [section 30]

The Acid Crime Control Act, 2002

The Act which was enacted to suppress sternly the offences committed by acid[30] has made certain acts and attempts punishable offences.

Crimes punishable under the Act with death sentence or life imprisonment and fine:

(a) Causing death by acid [section 4]

(b) Causing hurt by acid in such a way which totally or partially destroys eye-sight, hearing capacity or defacing or destroying face, breasts or reproductive organ [section 5(ka)]

Crimes punishable under the Act with rigorous imprisonment and fine:

(a) Causing hurt by acid in any part of body other than those mentioned in section 5(ka) [section 5(kha)].

(b) Throwing acid on anybody although no physical, mental or any other harm has been caused [section 6]

Attempts to commit crimes:

Attempt to throw acid on anybody although no physical, mental or any other harm has been caused for which punishment is maximum 7 years and minimum 3 years of rigorous imprisonment and fine [section 7]

For abetment to commit crime and abetment in making attempt to commit crime, punishment is same for the offence and attempt under this Act [section 7]

2.3.6 The Acid Control Act 2002

Acid violence has been escalating during the last few decades for acid is cheap and easily available and at the same time it can be used to cause irreparable damage to person. This Act was enacted to control the import, production, transportation, hoarding, sale and use of acid to prevent the

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30 Preamble of the Acid Crime Control Act, 2002.

misuse of acid as a corrosive substance and for the purpose of treatment and rehabilitation of acid victims and to provide legal support to them.[31]

2.4 Provisions of the Penal Code dealing with offences against women:

It is to be noted that the Penal Code, 1860 which is the primary criminal law of the country contains several provisions regarding crimes of violence committed against women and children. Needless to say, some crimes of violence which could be committed both against men and women - such as murder, grievous hurt, assault, etc, - were defined in general terms without any specific reference to male or female victims. These crimes were defined and punishmentwere provided for under the following classifications:

- Offences affecting life Murder, culpable homicide, causing death by negligence, abetment of suicide, attempt to murder, etc) [Ss. 299-308];
- Hurt and grievous hurt (to extort money or property, act endangering life or safety of others, etc) [Ss. 319-338A];
- Wrongful restraint and wrongful confinement [Ss. 339-348];
- Criminal force and assault [Ss. 349-358].

Amongst crimes which are specially committed against women and children and as such defined specifically in the Penal Code, 1860 were

- Miscarriage (causing miscarriage, act to prevent child being born, exposure or abandonment of child, etc.) [Ss. 312-317];
- Kidnapping, abduction, slavery and forced labour (including kidnapping or abduction for murder, kidnapping and abduction of minor, kidnapping and abduction of women to compel her to marriage, procuration of minor girl, selling minor for purposes of prostitution, etc.) [Ss. 359-374];
- Rape [Ss 375-376];
- Unnatural offence [S.377];
- Criminal Force and Assault (including assault or criminal force on women to outrage her modesty, to dishonour her) [Ss. 354, 355];
- Offences relating to marriage (cohabitation caused by deceitfully inducing a belief of lawful marriage, marrying again during the lifetime of husband or wife, marriage ceremony fraudulently gone through without lawful marriage, adultery, enticing or taking away or detaining with criminal intent a married woman, etc.).[Ss. 493-498][32]

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31 Preamble of the Acid Control Act, 2002.

32 Shahdeen Malik, *op.cit*

From the above list of the offences under the Penal Code, it needs to be mentioned that Penal Code contains a number of crimes, which are committed against women and children and apart from a few offences like offences relating to marriage, miscarriage and unnatural offences, most of the above crimes were again declared crime in the special laws providing for more severe punishments.

3. Flaws in existing special laws:

Of late there has been a growing concern on the effectiveness of the special pro-women criminal laws consisting of harsh punishment. Objections have been raised against these laws on the ground that 'these laws themselves are engendering a culture of violence (by ascribing death sentence almost indiscriminately) and subverting the authority of laws in general'[33] I shall endeavour to make a critical analysis of the present legal framework on violence against women justifying my arguments by the cardinal principles of criminal jurisprudence

3.1 Proliferation of Laws:

At present, we have, what can be called more appropriately, proliferation of statutes as well as courts and tribunals dealing with same class of offence since the legislators interpreted offences narrowly, each with statute relating to a specific criminal act rather than a species of crime. A few illustrations will make my point clear.

Acid violence against girls and young women is a recent phenomena but this is not something for which existing laws did not provide for any measure. The Penal Code of 1860 does have provisions for voluntarily causing hurt and grievous hurt by means of any poison or any corrosive substance the punishment for causing hurt being maximum three years and grievous hurt being life imprisonment.[34] Again it also imposes death penalty or life imprisonment for permanent privation of both eyes and permanent disfiguration of face or head by means of any corrosive substance.[35] Nari O Shishu (Bishesh Bidhan) Ain, 1995 and Nari O Shishu Nirjaton Daman Ain, 2000 provide for punishment for causing death, grievous hurt, even for trying to throw any burning, corrosive or poisonous substance on any woman or child.[36] Although 'acid' has not been

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33 Malik, S, Naripakkha, at p. 15.

34 Section 324 and 326 of the Penal Code, 1860.

35 Section 326A of the Penal Code, 1860 which was inserted by Ordinance No. LXIX of 1984.

36 Section 5 of the Nari O Shishu (Bishesh Bidhan) Ain, 1995 and Section 4 of the Nari O Shishu Nirjaton Daman Ain, 2000.

specifically mentioned in the above laws, the definition of 'acid' in Acid Control Act, 2002 and Acid Crime Control Act, 2002 includes corrosive substance. Hence, we see that even after having all these provisions which have included acid violence, a separate law Acid Crime Control Act, 2002 was passed which exclusively mentions the word 'acid' and which also provides for establishment of special tribunal to deal with such acid violence. It is to be noted that among these laws, Nari O Shishu Ain of 1995 and 2000 are applicable where the victim is woman or child while the Penal Code and the Acid Crime Control Act are not gender specific.

The Acts of 2000 and 2002 being special law will get priority over the Penal Code, 1860.[37] Hence, what appears from the reading of the provisions of law is that if the substance is acid, the crime will be triable under the Acid Crime Control Act, 2002 and in the special tribunal under it and if it is any other corrosive substance and offence is in respect of women and children, it will be triable under the Nari O Shishu Ain and in the special tribunal established under it, thus making the whole situation quite confusing.

Trafficking of women and children is addressed by the Suppression of Immoral Traffic Act, 1933, Nari O Shishu Nirjaton Daman Ain, 2000 as well as the Penal Code, 1860. Child prostitution is dealt with by the Children Act, 1974, Nari O Shishu Nirjaton Daman Ain, 2000 and the Penal Code, 1860.

As it was mentioned earlier, rape, murder, sexual harassment, assault, abetment of suicide, causing hurt and grievous hurt (irrespective of any reason; whether dowry or anything else) – all these crimes have been amply defined and enumerated in our general criminal law, i.e. the Penal Code. If the lawgivers were motivated for providing effective control of these crimes by providing for harsher punishment, that could also be done by amendments of the Penal Code, the way our neighbouring country India is combating violence against women. Indeed creating similar crimes under special laws makes deployment of well-known legal skills and expertise problematic since the Judges face scarcity of judicial precedents under these newly created laws, thus undermining the task of prevention and punishment of newly created crimes by these laws.[38]

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37 Section 3 of the Nari O Shishu Nirjaton Daman Ain, 2000 and The Acid Crime Control Act, 2002.

38 Shahdeen Malik, 'Human Security in Bangladesh: Recent Trends and Response', CPD: Human Security in Bangladesh (2003).

3.2 Blanked definition of offences:

"The principle is simply this; uniformity when you can have it; diversity when you must have it; but in all cases certainty."[39]

The Penal Code, originally named as The Indian Penal Code, 1860 which has made its way through one and half centuries governing 1680 million people of Bangladesh, India and Pakistan is based on the above principle. In 1887, Whitley Stokes, a Member of the Indian Law Commission, wrote that Macaulay's Code reflected precisely the form of code Bentham himself would have written for India.[40]He identified the following Benthamine practices that found their way into this Code:

> 'the use of various chapters for various classes of offences, numbered paragraphs, precise definition of terms, followed by the consistent use of those terms to the exclusion of any others, the allocation of separate paragraphs for each distinct idea or proposition, and the use of the third person masculine singular to denote either sex or number of persons.'[41]

The Code is magnificent both in respect of structure and substantive law. Well-defined terms, Illustrations, and notes naturally assist a judge in a murder trial; however, the definition of murder is certainly the starting point. One must know if omitting to act under certain circumstances amounts to murder, negligence, or no offence at all.[42]

So against this milieu of the excellence of the Penal Code, I am making an effort to crticise the special laws for combating violence against women which have defined offences in such a broad and loose manner that a whole range of innocuous actions can be termed as crime and any person can be tried and punished for such acts. A thorough criticism of each and every offence is outside the scope of the present study; however, a few example will reflect the ambiguity of these laws.

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39 Thomas Babington Macaulay, 'Complete Works of Thomas Babington Macaulay' (London: Longmans, Green and Co., 1898), XI, p. 579. Cited as the 'Government of India Speech', Macaulay made this statement to the house of Commons on 10 July 1833. Cited in David Skuy, 'Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century', Vol. 32, 3 (1998), *Modern Asian Studies,* pp. 513-557, 1998 Cambridge University Press, UK.

40 Whitley Stokes, 'Anglo-Indian Codes, vol.1 (Oxford Clarendon Press, 1887), pp. xxiii, referred in David Skuy, *ibid,* p. 524.

41 Eric Stokes, 'The English Utilitarians and India' (Oxford Clarendon Press, 1959), pp. 68-9, referred in David Skuy, *ibid.*

42 David Skuy, p. 541.

Lets start with the definition of 'abetment of suicide' under section 9 (ka) of the Nari O Shishu Nirjaton Daman Ain, 2000 which was an addition of 2003 Amendment Act. Translation of the Bengali version reads: 'If a person by any willful act and without consent and will of the woman outrages the modesty of that woman for the direct consequence of which if she commits suicide, the man will be an offender for abetment of suicide and shall be punished with…….'. Now what actually amounts to '**outraging modesty/ shombromhani'** is not made clear in the Act (i.e. does it amount to rape or sexual harassment) nor how it can be determined that the woman has committed suicide for which particular act of 'abetment'.

Again, a person can be sentenced to death, or life imprisonment or imprisonment of up to 20 years but not less than 10 years for bringing a woman into the country or sending her out of the country for the purpose of engaging the woman for improper task (*nitibihirgoto kono kaje*). Practically, any one can be accused that the purpose for which one has arranged travel of a woman is *nitiboirgoto*, since the law does not require actual performance of the *nitibohirgoto kaaj,* neither defines nor indicates what is a *nitibohirgoto kaaj*.[43]

All these special laws created a series of new offences in the fashion of 'attempt' and imposed punishment, including death sentence and life imprisonment for attempt to commit any offence without properly defining what amounts to an 'attempt' such as, 'attempt to commit rape'[44], 'attempt to cause hurt for dowry'[45] etc. What acts or attitudes will amount to attempt to rape and attempt to cause hurt has not been mentioned in the Act thus leaving the law absolutely vague. Again the offence of 'attempt to cause hurt by rape'[46] seems to be really confusing since anyone will naturally be hurt by rape. Even the requirement of the Penal Code, 1860 of 'doing any act towards the commission of the offence in such attempt' is also missing from these provisions of special laws.[47]

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43 Shahdeen malik, Naripokkha, op.cit., p. 33. The term 'immoral acts' was defined in the case-laws. In State v Abdur Rashid and others [BLD Vol-XIX. Page 307], it was defined as "non-consistent", "not conforming to moral law or requirement", " opposed to or violating morality", "morally evil or impure", "unprincipled", "vicious", "dissolute", "indecent". It, however, needs to be remembered that 'morality' per se can hardly be regulated by the Penal provisions, for 'morality' is the most variable notion.

44 Section 9 (4) (kha) of the Nari O shishu Nirjaton Daman Ain, 2000.

45 Section 11, ibid.

46 Section 9 (4) (ka)

47 Section 511 of the Penal Code, 1860 states, 'whoever attempt to commit an offence punishable by this Code with ……or to cause such an offence to be

Besides, some acts have been made offence without providing for any punishment for those. Attempt to cause hurt for dowry is an offence under the Act but the pertinent section does not provide for any punishment for it.[48] But from a careful reading of the section it appeared to me that the legislators intended to impose the same punishment provided for causing hurt and grievous hurt for dowry but they have omitted to include the words 'attempt to cause….' mistakenly.

Furthermore, there is a lack of uniformity in the definition of certain terms in different laws. For instance, Dowry Prohibition Act, 1980 defines dowry as 'anything given or agreed to be given at the time of marriage or before or after marriage in consideration of marriage'[49], while the Nari O Shishu Nirjaton Daman Ain, 2000 defines dowry as 'anything demanded at the time of marriage or before or during the continuance of marital relation in consideration of keeping the marriage'[50]. Again acid has been defined under the Acid Control Act as 'any kind of thick, fluid or mixed ingredients of sulphuric acid, hydrochloric acid, nitric acid, phosphoric acid, carbolic acid, battery fluid (acid), chromic acid and aqua-regia and other corrosive items determined as acid by the government'[51] whereas the Acid Crime Control Act, 2002 instead of defining acid includes 'any burning, corrosive and poisonous chemical'[52]. For certainty of application of law, the terms need to be defined uniformly.

Very often crimes have been formulated in such a fashion that it creates additional burden on the prosecutor to prove the guilt which, in turn, leads to failure of conviction. For example, section 9 (2) of the Nari O Shishu Ain, 2000 provides that if death is caused as a result of rape or post-rape acts, the sentence is death or life imprisonment. The problem with such formulation of the crime is that the prosecution has to prove two inter-connected crimes, i.e., rape and death as a consequence of the rape or rape related acts. The prosecution may prove these two crimes separately, i.e., rape and murder, but this section imposes the additional burden of proving that rape and/or other acts directly caused the death, making the task of conviction more problematic. Under the Penal Code,

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committed, and in such attempt does an act towards the commission of the offence, shall, be punished with…..' [emphasis added]

48 Section 11(kha) and (ga) of the Nari O shishu Nirjaton Daman Ain, 2000.

49 Section 2 of the Dowry Prohibition Act, 1980.

50 Section 2 of the Nari O shishu Nirjaton Daman Ain, 2000.

51 Section 2 (b) of the Acid Control Act, 2002.

52 Section 2(kha) of the Acid Crime Control Act, 2002.

these two are separate crimes, conviction for any one of which suffice for punishment which would not be the case under this section. Hence, any charge under this section is more difficult to prove and establish than a charge under section 302 (murder) or 376 (rape) of the Penal Code.[53]

The importance of comprehensible and unambiguous language of laws was maintained in, as early as, 1764 by the great Italian jurist of 18th century Cesare Beccaria in his "Essay on Crime and Punishment". He declared that laws, penal and otherwise, must be written in a language so as to render them completely understandable to the people. Obscurantism in the law paves the way for interpretation and despotism.[54] He continued, "The more widely known and widely understood is a code of laws the lesser the number of crimes, because, and undoubtedly, ignorance of the laws facilitates the expression of human passions."[55]

Hence, lack of clarity and ambiguity of expression in legal texts lead to protracted controversies, which results, on the one hand, in denial of protection to women, [56] on the other, in harassment of innocent persons. Although expressed in the context of declaring the Public Safety (Special Provision) Act, 2000 *ultra vires,* the following paragraph of the case of ***Afzalul Abedin vs. Bangladesh***[57] is very pertinent to our present context:

> 'If the legislature undertakes to define by statute a new offence and to provide for its punishment, it should express its will in language that will not deceive the common mind, every man being entitled to know that certainty when he has committed a crime.'[58]

In support of the above contention Dr Kamal Hossain referred a case of the ***US i.e., 92 US 214 United States vs. Reese ET Al,*** where the Supreme Court of US held:

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53 Malik, S, ibid, at p. 13.

54 Beccaria, C, *Dei Delitti E Delle Pene* (Sixth Edition), (Harlem; 1776*), An Essay on Crime and Punishments* (Translated from the Italian with the commentary by Voltaire) (Fifth Edition), (London: 1804); referred in Elio Monachesi, 'Pioneers in Criminology. IX. Cesare Beccaria (1738-1794), *The Journal of Criminal Law, Criminology, and Police Science*. . (Nov. – Dec., 1955) 46, (4) at p. 444.

55 Beccaria, Cesare, op.cit., p. 28, cited in Elio Monachesi, ibid.

56 Khair, S, 'Violence against Women', p. 152.

57 8 BLC (2003) 601

58 8 BLC (2003) 601 at p. 623.

'it would be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightly detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.'[59]

3.3 Absence of proportionate punishment:

Crime against women and children are heinous offences for which the criminal deserves severe punishment. But there is variation in the magnitude of the offences. All of these offences are not causing damage to the same extent. Therefore, punishment provided for these offences must fit to the magnitude of the offences and this conforms to the cardinal principle of retributive theory of punishment which is 'severity in punishment must be proportional to the gravity of the offence'.[60] This proportionality between punishments and offences have been totally discarded in our special laws for combating violence against women.

This topic will be discussed from three standpoints:

Firstly, excessive harsh punishment even in respect of minor offences.

Secondly, recurrent imposition of capital punishment.

Secondly, treating attempt to commit crime and successful crime equally by imposing equal punishment.

3.3.1 Severe punishments:

To start with my first point, majority of the crimes under these special laws are punishable with life imprisonment, though a very few provides for shorter terms of imprisonment such as upto 14 years or less. For example, any attempt to throw acid/any burning, corrosive or poisonous substance and even if any of these has not been actually thrown and no injury or damage is suffered , may be punished with imprisonment of upto 7 years, but not less than 3 years.[61]

Similarly, under section 8 of the 2000 Act, confining any woman or child for demanding ransom is punishable with death or life imprisonment. Section 7 of the Act imposes life imprisonment and maximum 14 years of imprisonment for kidnapping or abduction of any woman or child for any purpose apart from those mentioned in section 5 which includes 'prostitution, illegal or immoral activities'. This section can be easily abused

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59 8 BLC (2003) 601 at p. 623.

60 Punishemnt, p. 11

61 Section 4 (3) of the Nari O Shishu Act, 2000 and section 6 of the Acid Crime Control Act, 2002.

by the guardians of a girl if she elopes from home to marry her loved one. They can accuse the person for abduction of the girl.

One of the glaring example for providing similar punishment for two crimes which are very different in their magnitude is section 9 (4) (ka) of the 2000 Act which provides for life imprisonment for both 'attempt to cause death by rape' and 'attempt to cause hurt by rape', thus equaling death and simple hurt.

Bentham has cautioned against infliction of great punishment for small offences because the power of increasing them in proportion to the magnitude of the offence is thereby lost.[62]

3.3.2 Capital Punishment:

In total 12 offences are punishable with death sentence under the Nari O Shishu Nirjaton Daman Ain, 2000 among which 2 are simply attempt.[63] The 2002 Acid Act provides for death sentence for 3 offences.[64] Under the previous Nari O Shishu Ain, 1995, mandatory capital punishment was imposed for 4 offences.[65] Interestingly under the 2000 Act, mandatory death sentence has been provided for (or at least from a plain reading of the section it appears to have been provided for) only 1 offence and that is causing death for dowry.[66] One positive approach taken in the Acid Control Act, 2002 is that it has not imposed any mandatory capital punishment. Contrasting this scenario, the Penal Code, 1860 consisting of 511 sections imposes death penalty only for eight crimes which are as follows:

- 121 (war against the country)
- 132 (mutiny in the army)
- 194 (for false witness resulting in conviction and execution)
- 302 (murder)

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62 http://www.la.utexas.edu/labyrinth/rp.html, Bentham, J, *The Rational of Punishment*, Book I, Chapter IV: Measure of Punishment. The text was digitalized from the edition published in 1830 by Robert Hewart, Wellington Street, That Stand, London. Downloaded on 10/30/2007.

63 Sections 4(1), 4 (2)(a), 5(1), 5(2), 5(30, 6(1), 6(2), 8, 9(2), 11(a) and 12 of the Nari O Shishu Act, 2000.

64 Section 4, 5 and 7 of the Acid Crime Control Act, 2002.

65 Ss. 4, 6(2), 6(4) and 10(1) of the Nari O Shishu Ain of 1995

66 Section 11 (ka) of the Nari O Shishu Ain, 2000. It is to be mentioned that the 1995 Act imposed mandatory death penalty for a number of offences.

- 303 (murder by convict already sentenced to death)
- 307 (attempt to commit murder by a life convict)
- 364A (kidnapping a minor for murder or slavery)
- 396 (murder in course of dacoity)

Macaulay's reasoning for not imposing sentence of death, written almost two hundred years ago, is still relevant, particularly in view of the unusual fondness for death by our elected legislators and military regimes alike.[67] Macaulay's statement has been produced below for its instructive value:

> 'We are not apprehensive that we shall be thought by many persons to have resorted too frequently to capital punishment. But we think it probable that many even of those who condemn the English statute book as sanguinary may think that out Code errs on the other side. They may be of the opinion that gang-robbery, the cruel mutilation of the person, and possibly rape, ought to be punished with death. These are doubtless offences which, if we looked on at their enormity, at the evil they produce, at the terror which they spread through society, at the depravity which they cannot, as it appears to us, be placed in the same class with murder. To the great majority of mankind nothing is so dear as life.And we are of the opinion that to put robbers, ravisher, and mutilators on the same footing with murders is an arrangement which diminishes the security of life.
>
> There is in practice a close connection between murder and most of those offences which come nearest to murder in enormity. Those offences are almost always committed under such circumstances that the offender has it in his power to add murder to his guilt. They are often committed under such circumstances that the offender has a temptation to add murder to his guilt. The same opportunities, the same superiority of force, which enabled a man to rob, to manage, or to ravish, will enable him to go further and dispatch his victim. As he has always the power to murder, he will often have a strong motive to murder, inasmuch as by murder he may often hope to remove the only witness of the crime which he has already committed. If the punishment of the crime which he has already committed be exactly the same with the punishment of murder, he will have restraining motive. A law which imprisons for rape and robbery, and hangs for murder, holds out to ravishers and robbers a strong inducement to spare the lives of those whom they have injured.'[68]

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67 Dr. Shahdeen Malik, Naripakkha, op.cit., p. 28.

68 Notes and comments, though attributed to all the members of the Indian Law Commission (T.B. Macaulay, J.M. Macleod, G.W.Anderson, and F. Millet), but generally attributed to Lord T.B. Macaulay, in A Penal Code, prepared by the Indian Law Commission and published by Command of the Governor General of India in Council, London, 1836, reprinted by the Lawbook Exchange Ltd, New Jersey, USA, 2002, at p. 69; referred in Dr. Shahdeen Malik, Naripakkha, ibid., pp. 28-9

Macaulay seems to have been inspired by Rule III of Bentham's "Measure of Punishment" which reads:

> '*When two offences come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less*…….Two offences may be said to be in competition, when it is in the power of an individual to commit both. When thieves break into a house, they may execute their purpose in different manners; by simply stealing, by theft accompanied with bodily injury, or murder, or incendiarism.If the punishment is the same for simple thefts as for theft and murder, you give the thieves a motive for committing murder, because this crime adds to the facility of committing the former, and the chance of impunity when it is committed.'[69]

3.3.3 Similar punishment for attempt and consummated crime:

One significant characteristics of the special laws combating violence against women and children is that they often impose similar punishment for a crime and attempt to commit a crime or impose very severe punishment for attempt. If we look back to the list of the crimes and attempt to commit crimes above, we can find that Nari O Shushu Ain, 2000 in three places and the Acid Crime Control Act, 2002 in one place make no distinction between attempt to commit and accomplished crime.[70] Such similar punishments for attempt and crime is not even consistent with section 511 of the Penal Code of 1860 which imposes maximum of one-half of the longest term of imprisonment provided for the offence for any attempt to commit that offence.

Now I shall review some legal literature to justify the proposition that attempt to commit crime must be punished less severely than the accomplished crime.

There is no denying the fact that attempt is a crime because it causes either (1) damage or (2) the danger of damage. While it is true

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69 http://www.la.utexas.edu/labyrinth/rp.html, Bentham, J, *The Rational of Punishment,* Book I, Chapter IV: Measure of Punishment. The text was digitalized from the edition published in 1830 by Robert Hewart, Wellington Street, That Stand, London. Downloaded on 10/30/2007.

70 'Causing or attempt to cause death by burning, corrosive or poisonous substance' under section 4 (1) and 'Throwing or attempt to throw burning, corrosive or poisonous substance although no harm has been caused' under section 4 (3) of the Nari O Shishu Nirjaton Daman Ain, 2000. 'Abetment to commit any offence under this Act where offence is committed or attempt is made' under Section 30 of the Act, 2000 'Throwing or attempt to throw acid although no harm has been caused' under section 6 of the Acid Crime Control Act, 2002.

that actual damage is not necessary, the danger must be actual and not merely apparent.[71]

The first requisite of a criminal attempt is the intent to commit a specific crime.[72]

Although the law as to what amounts to an attempt is of necessity vague, it has been argued by jurists that there must be some physical act which helps in a sufficient proximate degree towards carrying out the crime contemplated.[73]

I shall make an effort to identify the essential ingredients of 'attempt to commit a crime' in the following way:

(1) an intention to commit a specific crime

(2) an overt act which is sufficiently close to the commission of the offence.

(3) for some reason it is impossible to complete the intended crime.

In every crime, there is first an intention to commit it; secondly, preparation to commit it; thirdly, attempt to commit it. If the third stage, i.e. the attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete but the law punishes the person attempting the act. An 'attempt' is made punishable, because every attempt, although it fails of success, must create alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded.[74]

Reversely, it is serious injustice to punish attempts as severely as we punish complete crimes because attempts deserve less punishment.[75]

If attempts deserve less punishment than the corresponding completed crime, it seems to follow that any state which in fact punished an attempt as severely as the corresponding complete crime would risk having the sentence overturned as unconstitutional because the punishment for the attempt was out of proportion to the crime.[76]

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71 Keedy, R, 'Criminal Attempts at Common Law', (1954)102, University of Pennsylvania Law Review 466.

72 Regina v. Doody, 6 Cox C.C. 463 (1854). Referred in Keedy, R, ibid., p. 466.

73 Edwin R. Keedy, ibid., 475.

74 Ratanlal Ranchhoddas and Dhirajlal Keshavlal Thakore, 'The Indian Penal Code', 28th Edition (1999), p. 718.

75 Davis, M, 'Why Attempts Deserve Less Punishment than Complete Crimes', (1986) 5(1) Law and Philosophy. 2.

76 Davis, M, ibid., p. 3. The author drew this conclusion from the decision of the Supreme Court of the USA in ***Herman Solem, Warden vs Jerry Buckley Helm***, 51 LW 5019 (1983), where the Court held that that life imprisonment without

Attempts, because they are incomplete or failed crimes, cannot involve the same harm that the completed crime does.[77]

A completed crime ordinarily consists on: (1) a state of affairs the law is supposed to prevent, the "*actus reus*" (for example, the involuntary death at the hands of another); (2) some state of mind, the so-called "*mens rea*" (for example, the intent to do great bodily harm or a failure to exercise reasonable care); and (3) a certain connection between *mens rea* and *actus reus* (for example, a death that is a natural and probable outcome of what the actor knew himself to be doing). [78]

What makes an act a mere attempt is that the *actus reus* of the complete crime never occurs. The actor fails in his attempt. For example, the would-be bank robber is arrested before the teller hands him the money. Nothing of value is taken. The harm characteristics of robbery, forced deprivation of one's valued property, does not occur, even for an instant.[79] If we take an example from our Nari O Shishu Ain, 2000, 'attempt to cause hurt for dowry' may only cause mental agony of the victim in the absence of the harm characteristics, i.e., the bodily injury. Should the act of 'causing hurt' and 'attempt to cause hurt' be punished similarly?

The presence or absence of such harm characteristics seems to be crucial to the distinction between attempt and complete crime. What makes an act an attempt is that the harm characteristics of the complete crime is not done.[80]

There are also certain 'attempt' that do have their own harm characteristics of lesser offences. For example, assault is often thought of as an attempt to commit battery. The 'assaulter' intends 'an unlawful touching' but fails and that is why he is guilty of assault rather than attempt to battery.[81] Similarly 'attempt to rape', appears to me, to include a harm characteristics of its own and it can be termed as a lesser offence of 'sexual

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parole for passing a bogus check constituted a disproportionate punishment, which the Eighth Amendment prohibits. In ***Weemsv. United States, (1910)*** the Supreme Court opposed a disproportionate sentence issued by the lower court where a defendant received a 15-year sentence to hard labour for falsifying a public document. Cited in Davis, M, 'How to Make the Punishment Fit the Crime', (1983) 93(4) Ethics 726, at p.

77 Michael Davis, ibid., p. 4.

78 Ibid., p. 15

79 Ibid., p. 16.

80 Ibid

81 Ibid., p. 17

harassment'. This seems to be much more logical to me rather than creating a vague offence of 'attempt to rape'.

Someone who attempts a crime but fails to do it, deserves punishment for risking that harm because even risking such harm is an advantage the law abiding do not take.[82] He deservers less punishment for the attempt than he would for the complete crime because being able to risk doing harm is not as great an advantage as being able to do it.[83]

3.3.4 Object and purpose of Punishment:

Punishment under law has been defined as, 'the authorized imposition of deprivation—of freedom or privacy or other goods to which the person otherwise has a right, or the imposition of special burdens – because the person has been found guilty of some criminal violation, typically (though not invariably) involving harm to the innocent'.[84]

According to Beccaria, The basis of punishment lies in the necessity to restrain men from encroaching upon the freedom of one another defined and established by the terms (laws) of a social contract.[85]

Following Montesquieu, Beccaria warns that every punishment which is not founded upon absolute necessity is tyrannical.[86]

To Beccaria, the primary purpose of purpose of punishment is to ensure the continued existence of society. The amount and nature of punishment inflicted against transgressors should vary in proportion to the degree to which an act of an individual endangers the existence of society. The only measure of the seriousness of crime is the amount of harm done to society.[87]

It is the strength of the association of crime and punishment that Beccaria believes to be the most effective deterrent. It is not the severity of punishment but rather its certainty that leaves a lasting impression on the minds of men.

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82 'Doing what the law forbids while others abide by the law will generally be taking unfair advantage. See Michael Davis, p. 12.

83 Machael Davis., pp. 28-29.

84 Punishment (Standford Encyclopedia of Philosophy), first published Fri Jun 13, 2003; substantive revision Fri Jul 8, 2005, downloaded from http://plato.stanford.edu/entries/punishment/, on 10/27/2007

85 Cesare Beccaria, op.cit., in Elio Monachesi, op.cit., p. 443.

86 Ibid.

87 Ibid., p. 445.

Punishments that are severe, cruel and inhuman do not prevent crime. As a matter of fact he argues that extremely severe penalties actually encourage persons to commit crimes. Thus, he states, "The certainty of punishment, even though it (punishment) be moderate will always make a stronger impression, than fear of one more severe it is accompanied by the hope that one may escape that punishment, because men are more frightened by an evil which inevitable even though minor in nature."[88]

He suggests that history indicates the existence of an association between inhuman and violent punishments and the most atrocious and bloody of crimes, for the legislators and offenders were both motivated by the same ferocious spirit.

"As punishment become morecruel and more severe, the minds of men….grow more hardened and calloused.....In order to ensure that a penalty will produce the desired effect it is sufficient to provide that the evil attendant the penalty exceeds the good expected of the crime."[89]

Sir Jeremy Bentham, the proponent of Utilitarian theory of law, in the 'Chapter III: Of the Ends of Punishment' of his work 'The Rational of Punishment' gave two objectives of punishment: *Particular prevention* and *General prevention.*

General prevention which, according to Bentham, ought to be the chief end of punishment, presents to every one an example of what he himself will have to suffer if he is guilty of the same offence.

Particular prevention has three objects: incapacitation, reformation, and intimidation. If the crime which the delinquent has committed is of a very mischievous one, then it is necessary to incapacitate him from committing the same crime again. If the punishment is less dangerous, then it is proper that the punishment possess the qualities calculated to reform or to intimidate him.[90]

The four cardinal principle of liberal justification of punishments are:

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88 Cesare Beccaria, op.cit., p. 113 in Elio Monachesi, op.cit., 446.

89 Cesare Beccaria, op.cit., p. 114 in Elio Monachesi, ibid.

90 http://www.la.utexas.edu/labyrinth/rp.html, Bentham, J, *The Rational of Punishment*, Book I, Chapter III: Of the Ends of Punishment. The text was digitalized fronm the edition published in 1830 by Robert Hewart, Wellington Street, That Stand, London. Downloaded on 10/30/2007.

1. Punishment must not be so severe as to be inhuman or (in the familiar language of the Bill of Rights) "cruel and unusual."[91]
2. Punishments may not be imposed in ways that violate the rights of accused and convicted offenders ("due process of law" and "equal protection of laws").
3. Punitive severity must accord with the principle of proportionality: The graver the crime, the more severe the deserved punishment.
4. Punitive severity is also subject to the principle of minimalisation (less is better), that is, given any two punishments not ruled out by any of the prior principles and roughly equal in retributive and preventive effects for a given offense and class of offenders, the less severe punishment is to be preferred to the more severe.[92]

3.3.5 Measuring Appropriate and Proportional Punishment:

Though the necessity of establishing proportion between crimes and punishments has been advocated by Montesquieu, Beccaria and many others, it was Bentham who formulated rules by which it may be determined that a certain measure of punishment ought to be applied to a certain crime. All in all 13 rules have been laid down to mark the maximum and minimum punishment of which some deserve to be mentioned:

- Value of punishment must be more than the profit of the offence.
- When two offences are in competition, one of them must be provided with greater punishment to induce a man to prefer the less harmful one.
- Punishment must not be more than necessary.
- Punishment must be certain and proximate.[93]

According to Michael Davis, the only acceptable reason for punishing a person is that he has committed a crime and only acceptable reason for

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91 Article X of the American Bill of Rights states: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted'.

92 Punishment (Standford Encyclopedia of Philosophy), first published Fri Jun 13, 2003; substantive revision Fri Jul 8, 2005, downloaded from http://plato.stanford.edu/entries/punishment/, on 10/27/2007

93 It is necessary that the punishment should be as near, in point of time, to the crime as possible; because its impression upon the minds of men is weakened by distance and the distance creates uncertainty to its infliction . http://www.la.utexas.edu/labyrinth/rp.html, Bentham, J, *The Rational of Punishment*, Book I, Chapter IV: Measure of Punishment. The text was digitalized fronm the edition published in 1830 by Robert Hewart, Wellington Street, That Stand, London. Downloaded on 10/30/2007.

punishing a person with certain severity is that the punishment fits the crime.[94] He has formulated seven easy steps of making the punishment fit the crime:

1. Preparing a list of penalties consisting of those evils (a) which no rational person would risk except for some substantial benefit and (b) which may be inflicted through the procedure of the criminal law.
2. Striking from the list all inhuman penalties.
3. Typing the remaining penalties, ranking them within each type, and then combining rankings into a scale.
4. Listing all crimes.
5. Typing the crimes, ranking them within each type, and then combining rankings into a scale.
6. Connecting the greatest penalty with the greatest crime, the least penalty with the list crime, and the rest accordingly.
7. Typing and grading new penalties as in step 2 and new crimes as in step 4, and then proceeding as above

This paper is not arguing in favour of any of the above process of making the punishment proportional with the crime, it is only making a recommendation for our legislature for providing such penalties which will correspond to the severity of the offence rather than imposing unreasonable punishment.

3.3.6 Punitive Justice versus Restorative Justice:

A liberal justification of punishment would proceed by showing that society needs the threat and the practice of punishment, because the goal of social order cannot be achieved otherwise and because it is unfair to expect victims of criminal aggression to bear the cost of their victimization.[95]

It is unfair to the law-abiding for law-breakers to incur no socially approved cost for their misconduct since it would create a class of harmful free riders in the society.[96]

Through the punishment system, all are given fair warning that they put their own rights at risk if they intentionally engage in certain kinds of harmful conduct.[97]

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94 Davis, M,'How to Make the Punishment Fit the Crime', (1983) 93(4) Ethics 726, at p. 727.

95 Punishment, p. 1

96 Punishment, p. 14

97 Hart, L.A., *Punishment and Responsibilit,* (Oxford: Oxford University Press, 1959), pp. 1-27, cited in Punishment

Proponents of the punitive justice totally discard the value of restorative just on the ground of inefficiency.

Against the above objectives of punitive justice I would like to mention some of the arguments put forward by the proponents of restorative justice. Barbara Hudson has categorically addressed the issue of sexual and domestic violence. Her view has been paraphrased below:

Restorative justice has emerged as a positive alternative to retributive criminal justice. Abolitionists who are in support of the establishment of restorative justice in the society argues that punishment does nothing to prevent crime and that social policy rather than the penal policy is needed to reduce pressures on people to turn to illegal means to secure their wants and necessities. The overall purpose of restorative justice is not to inflict punishment in proportion to the magnitude of the offence, or to incapacitate offenders so that they pose no further risk to the public, but restoration in the same communities of victims and offenders who have resolved their conflicts. It provides for a balance between the needs and rights of both offenders and victims. Under this system justice would be more closely approached than the punitive system since it would recognize the perpetrator and the victim in their individuality rather than approximating the crime to a general legal category. But application of this justice would be difficult in respect of persons who pose clear danger to others; persons who will not agree to offer redress or to refrain from similar behaviour in future. These problems are posed more acutely if the punitive justice is to be replaced by restorative justice where the behaviour concerned is violence against women and children. [98]

Again it has been proved that punitive justice with zero-tolerance and strict punishment of the offenders has also failed to provide justice to the victim because it takes way attention from the victim and offers very little protection to the victim. It is also suspected that penal toughness towards sexual and domestic violence will only be inflicted upon the poor while the powerful will continue to perpetrate their misogynist behaviour behind closed doors. Penal toughness will lead to 'rich getting counseling and poor getting prison. [99]

Sexual and domestic violence will only be diminished by reducing the economic, social and sexual inequalities in power between man and woman that exists in present societies but women and children cannot be asked to wait for their protection and compensation until the achievement of wholesale social reformation.

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98 Hudson, B,

99 Hudson, B,

Instead of coming into a concrete conclusion the author suggested for a balance between both restorative and punitive justice where

> 'Guilt and responsibility must be firmly and unequivocally attached to the perpetrator; Protection and compensation must be effected for the victim; The extent and seriousness of sexualized violence must not be made invisible. [100]

In conclusion Barbara has proposed a concept of 'guaranteeism' whereby role will play a role as protector of the minimum rights of both the victim and the offender which cannot be overridden by any consensus. It will protect offender's right against a vengeful community and victim's rights against a community which did not take the harm seriously. [101]

Accommodating this concept 'guaranteeism' in our special laws certain offences against women and children can be made compoundable so that there is a scope of an agreement between the parties whereby rights of both of them will be secured, victim will receive appropriate compensation from the offender and the guilt of the offender will also be acknowledged by the community.

3.3.7 Arguments against death Penalty:

Beccaria argues that death penalty is neither legitimate nor necessary. He proposes that men in forming the social compact did not deposit with the Sovereign their right to life. …Life is the greatest of all human good and no man willingly gives to another man the authority to deprive him of his life.

If only reasonable basis of punishment is its effectiveness as a deterrent of crime then the death penalty must be considered useless. ..Penalties which are continued over a period of time and which are known to be continuous one are much more effective than the capital punishment which is momentary leaving no enduring impression upon those who witness the execution.

Another score on which he regarded death penalty as unreasonable is its barbarian and violent character though its execution is authorized by law. Its infliction is no more than homicide even though it is in repayment of homicide. It constitutes an act of ferocity intended to curb ferocity. [102]

Although in his 1775 essay, Bentham wrote that if a society or its legislature is 'determined to preserve the punishment of death', then it should use this

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[100] Finstad, L, 'Sexual Offenders Out of Prison: Principles for a Realistic Utopia' (1990) 18 International journal of the Sociology of Law 157, referred in Hudson, B, 'Restorative Justice: The Challenge of Sexual and Racial Violence' (1998) 25(2) Journal of Law and Society 237, at p. 244.

[101] Hudson, B, p.

[102] Ibid., pp. 446-447.

penalty only for those 'offenses which in the highest degree shock the public feeling – for murders, accompanied with circumstances of aggravation..', at the end of his life, in his 1831 essay, he answered categorically: 'The Punishment of death – shall it be abolished? I answer – *Yes*. Shall there be any exception to this rule? I answer, so far as regards substantial offences, *No*'. [103]

3.3.8 Whether threat of punishment can reduce crime:

General deterrence-the aim of threatening punishment to reduce the rate of criminal behaviour among potential criminals –has long been a primary motive of the criminal law. The great **Italian** criminologist Enrico Ferri pointed to the incidence of widespread law violation as evidence that "criminal phenomena are independent of penal laws." [104]

Escalating punishment for rape did not appear to have been an impact on the rate of rape in Philadelphia. [105]

Threat of severe punishment does not have any impact on the offenders if they know that they are not likely to be apprehended.

3.4 Denial of right to bail:

Bail is a very important procedural safeguard. The object of bail prior to trial is to ensure "the presence of the accused when required without the hardship of incarceration before guilt has been proved and while the presumption of innocence is to be given effect. [106] Following trial, bail serves to "secure the due attendance of the party accused….to submit to a trial, and the judgment of the court thereon." [107]

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[103] Bentham, J, *The Rationale of Punishment,* (1830) cited in Bedau, HA, 'Bentham's Utilitarian Critique of the Death Penalty' (1983) 74(3) The journal of Criminal Law & Criminology 1033. at pp. 1035-6.

[104] Enrico Ferri, *Criminal Sociology* (1884; translated by Kelley and Lisle, 1917), p. 218, referred in Franklin E. Zimring, 'Threat Of Punishment as an Instrument of Crime Control', *Proceedings of the American Philosophical Society*, Vol. 118, No.3 (Jun. 7, 1974), pp. 231.

[105] Barry Schwartz, 'The Effect in Philadelphia of Pennsylvania's Increased Penalties for Rape and Attempted Rape.', *Journal of Criminal Law, Criminology and Police Science* 59 (1968), p. 509; referred in Franklin E. Zimring, op.cit., p. 232.

[106] United States ex rel. Rubinstein v Mulcahy, (2d Cir. 1946) 155 F. (2d) 1002 at 1004, referred in Robert L. Sandblom, 'Constitutional Law: Right to Bail', *Michigan Law Review*, Vol. 51, No. 3. (Jan., 1953), p. 393.

[107] Ex parte Milburn, 9 Pet. (34 U.S.) 704 at 710 (1835), referred in Robert L. Sandblom, ibid.

Our special laws for the protection of women and children invariably denies the right to bail declaring all the offences non-bailable.[108] It is true that the Code of Criminal Procedure, 1898 (CrPC) provides for non-bailable offence but the grounds for granting bail in non-bailable offence under the CrPC and the special laws (2000 and 2002 Act) are clearly different. The provisions relating to bail in both the Nari O Shishu Nirjaton Daman Ain, 2000 and Acid Crime Control Act, 2002 bears almost similar language which can be read as follows:

Any person accused of committing any offence under this Act *shall not be released on bail* if-

(1) the state/prosecutor or the complainant is not given any opportunity of being heard

on bail petition for the release of the accused person;

(2) If the tribunal is satisfied that there are logical grounds of the accused being convicted in trial; and

(3) If the accused person is a woman, child, sick or infirm person and the tribunal is satisfied that justice will not be defeated if the accused is released;

The Act of 2000 provides for granting bail to any accused other than those mentioned above if the Tribunal is satisfied after recording the reasons for such satisfaction. The Act of 2002 includes provision for releasing any person if the Tribunal is satisfied from the investigation report after the completion of trial or if the Appellate Court is satisfied that there are logical grounds to believe that the accused person is not involved in the crime.[109]

Section 497 of the CrPC reads as follows:

'(1) When any person accused of any non-bailable offence is arrested or detained …or appears or is brought before the court, he *may be released on bail*, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence *punishable with death or imprisonment for life*.' [emphasis added]

From the reading of the above texts it can be concluded that:

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[108] Non-baibable offence means an offence for which bail cannot be demanded as a matter of right and leaves it upon the discretion of the court to grant it or not. In case of bailable offence the accused can demand bail as a matter of right.

[109] Section 19 of the Nari O Shishu Nirjaton Daman Ain, 2000 and section 15 of The Acid Crime Control Act, 2002

- In case of the special laws literal formation of sentences is for the refusal of bail generally while section 497 of the CrPC is more fabourable for granting bail.
- Under special laws, bail will not be granted if there is possibility of conviction under any offence under those laws (it can be an offence of causing simple hurt for dowry which is punishable with maximum three years of imprisonment), while under the CrPC bail will be refused only when there is possibility of conviction under any offence punishable with death or life imprisonment.
- In case of Acid Crime Control Act of 2002, the accused can be released on bail only after the completion of investigation (which is 90 days under the Acid Act of 2002) if the Tribunal or the appellate court is satisfied that the accused has not committed the offence and under the Nari O Shishu Ain of 2000 if the trial is not completed with 180 days of the receiving of the case for trial. Conversely, the accused can be released on bail under Section 497 of the CrPC at any stage of investigation, inquiry or trial.

Being drafted in an ambiguous language, these laws basically ordains for denial of bail before 90 days or 180 days, as the case may be.

Bailable and non-bailable offence was specifically listed for the first time in the Statute of Westminster of 1275. In 1789, only one offence was made non-bailable in the United States by the Judiciary Act of 1789 and that is any offence punishable with death. [110]

Our special laws, however, even do not maintain the delicate balance made between bailable and non-bailable offences under the Code of Criminal Procedure of 1898 [111]. Thus offences of 'attempt to hurt for dowry' and 'murder by rape' have been treated equally for the purpose of granting bail.

The offences which has been made bailable under the Code of Criminal Procedure and non-bailable under the special laws are:

- Wrongful restraint and wrongful confinement of any person.
- Assault or use of criminal force to a women with intent to outrage her modesty.

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[110] The Judiciary Act of 1789 states: "upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offense, and of the evidence, and the usages of law." Referred in Robert L. Sandblom, op. cit., p. 391

[111] The Code of Criminal Procedure of 1898 divides all the offences of the Penal Code between bailable and non-bailable offence.

- Kidnapping
- Rape in case of sexual intercourse by a man with his own wife not being under 12 years of age and being under 12 years of age.

Apart from the above list, other offences under the special laws were also made non-bailable under the CrPC, though the meaning of non-bailable offence under the two context are precisely different.

Legislative denial of bail raises the troubling question regarding one of the fundamental principle of criminal jurisprudence, namely, the presumption of innocence, i.e., a person is presumed innocent until proven guilty. Mandatory denial of bail of an accused, who may not be convicted in the subsequent trial, is tantamount to imposition of punishment on an innocent person.[112]If innocent persons or supposed guilty persons are punished by the State in order to deter others from committing such crimes, it will break down all trust and respect for law.[113]

The consequence is, these laws are often abused by filing false cases taking the opportunity of the non-bailable nature of the offences dealt with under these laws. The 2007 Law Commission Report also recognized the fact that Nari O Shishu Ain 2000 are often misused by falsely implicating the relatives of the husband even in absence of any offence relating to dowry and they have to stay in prison till the completion of investigation. Against this backdrop, the Law Commission Report recommended for the amendment of law so that the relatives of the husband cannot be arrested if there is no prima facie case against them.[114]

It was submitted by the counsel of the petitioner in ***Afjalul Abedin vs. Bangladesh***[115] that section 16 of the Public Safety (Special Provision) Act, 2000 which prohibits the granting of bail during investigation, violates the principles of rule of law, separation of powers in a democracy, independence of judiciary and Article 32 and 33 of the Constitution.[116] Same can be argued in respect of the provision of bail of the 2000 and 2002 Act. It was also contended by the counsel that, 'even if it be found that the law is not arbitrary, it is, as such, susceptible to be challenged on

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112 Malik, S, CPD, p. 11.

113 William Lyons, 'Deterrent Theory and Punishment of the Innocent', *Ethics*, Vol. 84, no. 4 (Jul., 1974), p. 346.

114 Report on amendments of certain sections of the Nari O Shishu Nirjaton Daman Ain, 2000 (Act No. VIII of 2000), Sl No. 77, Final Report submitted on 22-04-07.

115 8 BLC (2003) 601

116 8 BLC (2003) 601, at p. 642, para 169.

the ground itself capable of being administered in a discriminatory manner'.[117] Same can be argued in respect of the provision of bail of the 2000 and 2002 Act which are also capable of being administered in arbitrary manner.

Under the present legal framework on violence against women, magistrate will automatically order detention by refusing bail irrespective of the merit of the case which amounts to a pretrial conviction.

3.5 Abuse of law by filing false cases:

Despite the imposition of strict penalties for filing false cases under these laws knowingly[118] it has been substantiated by empirical evidence that most of the cases filed under these laws are false, fabricated[119] and are filed to take revenge out of personal enmity or to satisfy proprietary interest or to get redress for other grievances against the accused. Sometimes law enforcing agency, particularly, the investigating officer is involved in filing false cases. Acknowledging that innocent persons are trapped and brought in with ulterior motive, it was observed in ***State vs. Abdur Rashid and other***[120] that the court has an arduous duty to separate innocent persons from the offenders and for this the court is to deal with such cases with circumspection, scrutinize evidence and materials on record with utmost care.

3.6 Laws on violence against women in India:

India has, very recently, enacted a law on domestic violence, namely the Domestic Violence Act, 2005,[121] thereby divided the law on violence against women in two categories: domestic violence and public violence. Public violence which includes rape, kidnapping, abduction, criminal force, assault, forced prostitution are dealt with under the Penal Code. Instead of enacting special law to curb such offences against women, the legislature has amended the Penal Code, 1860 from time to time in order to include new offences such as Ss. 376B, 376C, 376D which make inducement or seduction of any women for sexual intercourse by public servant, superintendent or manager of jail, remand home, manager or staff of any

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117 8 BLC (2003) 601, at p. 658, para 193

118 Section 17 of the Nari O Shishu Ain, 2000 and section 8 of the Acid Crime Control Act, 2002 provide for maximum 7 years of rigorous imprisonment and fine for filing false cases under these Laws with the knowledge that there are no reasons for filing such cases or complaints.

119 Malik, S, Naripakkha.

120 19 BLD (1998) 307

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hospital taking advantage of his position a punishable offence. Trafficking for prostitution is punished by the Immoral Traffic prevention Act, 1986. Significant change has been brought by the pro-women legislation Domestic Violence Act, 2005. Domestic violence has been define to include physical, sexual, verbal and economic violence of any woman by man (and his relatives) with whom she has shared the same household. This is not confined to marital relations. This Act also covers children who are being abused in home. A number of institutions, such as Service Providers, Shelter Homes, Protection Officer have been set up under this law to protect the women who takes recourse against the abuser. [122] The abused woman can apply for a protection order, monitory relief, custody order, free legal services and also file a complain under section 498A of the Indian Penal Code which was added by an amendment of 1983. [123]

Conclusion:

The draconian laws may not only punish but also seriously reduce the procedural safeguards. Frequent changes in laws on violence against women from 1983 onwards indicate shifting position of legislature. Such frequent change has a detrimental impact on the whole legal system. Our legislature has clearly opted for imposing severe punishment. Several procedural safeguards of the accused have been diluted. These clearly failed to bring the expected result i.e., reduction of violence against women. Rate of conviction under these laws is very low but thousands of false cases are being initiated resulting thousands of under trial prisoners languishing in the jail. As our analysis indicates these laws lead to (a) drastic deviation from the accepted principle of criminal law and (b) tremendous misuse and

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[122] http://www.vakilno1.com/bareacts/Domestic-Violence/Domestic-Violence-Act-2005.htm

[123] http://www.vakilno1.com/bareacts/IndianPenalCode/S498A.htm
Section 498A reads as follows: "Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation-For the purpose of this section, "cruelty" means-

(a) Any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health whether mental or physical) of the woman; or

(b) Harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her meet such demand."

abuse of it. Quarter century after the first law on violence against women and children has been enacted, it is time to rethink.

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