



# Modern law, traditional 'Salish' and civil society activism in Bangladesh

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## Abstract

One of the challenges of modernisation in Bangladesh is played out in the confrontation between the institutionalisation of modern law and the practice of traditional arbitration, known as *Salish*. Often this traditional, informal or semi-formal adjudication process which survives in the rural society deals with issues related to social and cultural norms and practices. Though not confined to, the bulk of 'salish or informal adjudication involves women and their various 'infringements' of moral behaviours. The proposed paper deals with the efforts of civil society organisations in Bangladesh in general with specific focus on the Ain Salish Kendro (ASK), a legal aid organisation and an important member of the civil society organisations in Bangladesh to flesh out the confrontations between formal law and informal law, rationalisation of public life, and the interface between state and civil society on the one hand and civil society and the traditional rural society on the other. The paper will shed light on the challenges and promises of effective implementation of law as well as the problems of indigenisation of the adjudication process without sacrificing the ideals of justice, i.e., neutrality, fairness and equality that enshrine modern juridical process.

## Introduction

While problems of economic, political, and social modernisation in Bangladesh, a low-income country with a population 160 million receive a great deal of

attention and have been studied from various points of view and theoretical orientations, modernisation of the legal sphere remains a neglected field. The field of women's studies in Bangladesh has also grown in volume and diversity (Women for Women, 1975; Alamgir, 1977; Chaudhury and Ahmed, 1978; Chen, 1986; Kabeer, 2001; White, 1992). Yet, despite a host of problems related to the administration of law, the institutionalisation of modern legal systems, the cultural acceptance and respect for the rule of law in general and specially with reference to the women of Bangladesh remain unstudied. One area which is of immediate interest to our paper is reforms, and when necessary, replacement of the traditional systems of arbitration based on customary laws deserves more attention than it has received so far. In this paper, I am interested in examining the role of civil society activism in spreading the ethos of rights, especially the rights to protection of law against arbitrary adjudications and arbitrations. These arbitrations are based on age-old traditions known locally as 'salish'. Much of the 'salish' or localised arbitrations administered by rural elders often follow religious edicts or 'fatwa' or some rough interpretation of religious codes to arbitrate disputes. When these disputes, especially if they involved infringement of moral norms, sexual conducts, or any such behaviors involving the relationship between members of the opposite sex, the judgments are invariably biased against women. Sentencing in such cases is harsh, often barbaric, and the staging of such unconscionable punishments are public to inflict maximum humiliation.

At the same time, Bangladesh has made significant progress in the human development indicators, especially pertaining to women's literacy, reduction of maternal mortality, thus meeting some of the goals of the Millennium development goals. Yet, a large number of women are exposed to systematic exploitation, domination and humiliation on a day to day basis. Despite tangible improvements in the overall conditions and status of women as evidenced in the UN data, paradoxically, a large number of rural women remain vulnerable to the stranglehold of patriarchal institutions of which the traditional arbitration or 'salish' is, perhaps, the worst. By monopolising the domain of administration of justice, this practice ensures control over women's bodies and lives. Newspapers and reports put out by various research and non-governmental organisations bring to light countless cases of violations of women's rights and their continued vulnerability.

One of the positive developments in Bangladesh has been the rise of a civil society, albeit, urban based and led by English educated middle and upper classes of Bangladesh society. Many of these NGOs have achieved some degree of penetration into the rural society. The non-governmental organisations, in recent years, have proliferated in Bangladesh. One of the reasons for the proliferation of NGOs is the absence of government effectiveness. Some of the NGOs such as BRAC or Grameen Bank (it is sometimes disputed as to whether Grameen Bank is an NGO or just a bank with a social agenda [a social business, perhaps] or a business house), which began as an NGO, has grown very big. BRAC is regarded as the largest NGO in the world in terms of its budget and personnel. Skeptics regard it as a government within the government or a parallel government. There is a plethora of critique against the NGOs in Bangladesh. Some of the critiques from the left denounce the NGOs as either agents of capitalism or western cultural imperialism. Critics from the religious right portray NGOs as missionary agents for conversion of poor Bangladeshi Muslims into Christianity. In fact, in recent years several Islamic NGOs have flourished. Elsewhere, I have suggested that broadly, the NGOs in Bangladesh can be divided into two types: money driven and con-

sciousness driven. Some of the consciousness-driven NGOs or civil society groups such as Ain o Salish Kendro (ASK) or Nijera Kori have been very active in raising consciousness of the women in Bangladesh, providing them legal assistance in times of need, etc. In addition to ASK, there are number of legal aid organisations in Bangladesh in the NGO sector. In fact, law has become a vehicle for social activism in Bangladesh. As Sheldrick suggests, 'Law, with its language of justice, fairness and equity, seems well suited to advancing claims for social justice...social movements frequently employ the strategies and tactics centered around the concept of rights' (Sheldrick, 2004:10).

In this paper, I examine the role of ASK in promoting the rights of the women and making them aware of their rights as guaranteed in the constitution of the People's Republic of Bangladesh. ASK, since its formation in 1986, has made significant contribution to the protection of the rights of women in rural Bangladesh. After a brief discussion of the evolution of modern legal systems in Bangladesh, I present a number of cases where rural women of various ages were subjected to tortures, dreadful abuse, and death under the cover of 'salish', the so-called traditional adjudication and then discuss the role of the civil society organisations, Ain-O-Salish Kendro in particular, in fighting this menace.

## Development of Modern Law in Bangladesh

Bangladesh, as part of the historically defined Indian sub-continent, has been exposed to the forces of global modernity since the colonial days dating back to the late eighteenth century. One of the markers of institutional modernisation was the introduction of the colonial legal system.

Henry Maine's distinction between status based societies to contract based society may be somewhat overdrawn but it presents an ideal-typical polar types. In most societies, legal codes are embedded in traditional customs, social norms, and broader cultural boundaries. Bangladesh is no exception. In rural Bangladesh, where the reaches of the state law are

limited or have had very little penetration, customary laws administered by the local headman, (*morol* in local parlance), dominate. The practice of 'salish' has a long history in the context of Bangladesh. The forces of modern laws and the ancillary institutions have had little impact in the everyday lives of the people of Bangladesh. A society, where respect for elders, especially older male figures, who happen to be part of the landed elites in rural Bangladesh (and before the nation came into existence, Bengal). These practices are deeply entrenched.

Since modern laws could not replace the traditional customary practices of arbitration and sentencing, it came to coexist with the practices of 'salish'. In the framework of legal pluralism such coexistence of the two streams of laws may seem to be a pragmatic compromise, but in reality, it often makes a mockery of justice. A reformed system of 'salish' constituted by people with knowledge of laws, and ensuring protection of the rights of the defendant (if need be, by means of providing a system of legal consul) may contribute to the enhancement of administration of justice at the grassroots level.

'Salish' covers a wide range of rule violations and 'inappropriate' (according to whom?) behaviours in the rural context. The force of traditional, i.e. patriarchal customary laws on the body and behaviours of women, present a classic example of Foucauldian discourse, and of governmentality. Women's bodies are under constant surveillance, their moral behaviours monitored and scrutinised, and are under constant surveillance to the extent that even a slightest infringement would have met with sharp reactions and rapid adjudication followed by harsh punishment.

As women in traditional Bengal were not aware, let alone fight for their rights, the practice of 'salish' went unchallenged and remained part of a tradition that most people accepted. Conformity, rather than rebellion or protest, was the norm. With growing concern with human rights in general and women's rights in particular, women started questioning the dominance of the traditional practices of 'salish'.

For illustrative purposes, one can draw some parallels between rural Bangladesh with medieval Europe. In late medieval Europe, private relations were gov-

erned, by and large, by socially accepted and popular customs. In the west, in the first half of the twentieth century the relations of the legal order with the wider social order became established beyond question as a central (perhaps the central) juristic and jurisprudential concern. Attention was increasingly directed to the effects of law upon 'the complex of human attitudes, behaviour, organisation, environment, skills and powers involved in the maintenance of particular societies, or kinds of societies; and conversely on the effects of these upon the particular social order' (Stone, 1966:3).

The history of laws in India goes back to the Hindu religious texts, Vedas and Upanishads and Manu is considered the first law giver. But these were, in fact, religious injunctions that people had to obey. Laws outside of religion or secular laws began with the Maurya period, which remains a paradigmatic case of secular tradition in India, lasted from Mauryas (321-185 BCE) and the Mughals (16<sup>th</sup> – 19<sup>th</sup> centuries) with the latter giving way to the current common law system.

The East India Company was granted charter by King George I in 1726 to establish 'Mayor's Courts' in Madras, Bombay and Calcutta (now Chennai, Mumbai and Kolkata respectively) (The Bar Council of India). This was the introduction of modern law in Bangladesh since Calcutta was the major urban center in the province of Bengal.

Codification of law in India 'began with the forming of the first Law Commission. Under the stewardship of its chairman, Thomas Babington Macaulay, the Indian Penal Code was drafted, enacted and brought into force by 1862. The Code of Criminal Procedure was also drafted by the same commission. Host of other statutes and codes like Evidence Act (1872) and Contracts Act (1872)' (The Bar Council of India).

Modern laws came to India with the rule of the East India Company in the latter half of the eighteenth century. The legal systems began to spread from city to city, even after the formal incorporation of India into the British empire in the middle of the nineteenth century, in the wake of the failed revolt – now known and labeled as 'the first war of independence'. The company law was metamor-

phosed into a state-wide legal system. The British common law tradition thus came to what is now Bangladesh.

The legal system in Bangladesh is over-burdened with a large number of cases with limited availability of judges and able prosecutors. Legal system is part of a larger social system in Bangladesh characterised by inefficiency and incompetence. A relatively weak administration of justice is not unique by any means; it is part of a general deficit of governance.

The imposition of modern laws never tried to replace traditional practices of 'salish'. Informal 'salish' has some role in adjudicating interpersonal or familial conflicts. Such arbitrations are often accepted by the feuding parties. However, what is unacceptable is the unlawful authority of the local elders to impose brutal sentencing on the alleged offenders. The impositions of punishments, which are often public, humiliate the victims of this system to the extent that many of them commit suicide. Despite the rulings of the High Court, a number of cases of 'salish'-driven sentencing have taken place in Bangladesh.

Trial by 'salish' is clearly unconstitutional. Article 35 clause 3 specifically mentions 'court or tribunal established by law'. The implication here is law of the country. According to clause 35 of the Bangladesh Constitution:

35. Protection in respect of trial and punishment.

(1) No person shall be convicted to any offence except for violation of al law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law.

Bangladesh does not lack necessary laws. In fact, a number of laws exist to protect the rights of women and children in Bangladesh. Nari O Shishu Nirjaton Domon Ain 2000 (prevention of torture against

women and children act). Besides, there is the Penal Code to protect physical and mental violence. On May 14, 2009 the High Court Division of the supreme court of Bangladesh expanded the definition of violence to include 'sexual harassment', apart from the Constitution of the Republic which provides equal legal protection regardless of gender, ethnicity and religion.

Article 31 of the Constitution states unambiguously,

31. To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

Constitutionally, there is no gender inequality in Bangladesh. In fact, Article 19 of the Constitution ensures promotion of gender equality in Bangladesh.

19. Equality of opportunity.

The State shall endeavor to ensure equality of opportunity to all citizens.

The State shall adopt effective measures to remove social and economic inequality between man and man and to ensure the equitable distribution of wealth among citizens, and of opportunities in order to attain a uniform level of economic development throughout the Republic.

Article 19 recognises the political rights of women by clearly enunciating that no discrimination on the basis of sex shall be permitted as it states in clause 1. Articles 27 and 28 of the Constitution relate to the topic of equality and discrimination. Article 27 states categorically, "All citizens are equal before the law, and are entitled to equal protection by the Law".

Article 28

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.

(2) Women shall have equal rights with men in all spheres of the State and of public life." (Bangladesh

Constitution, 1972). No such assurance was given outside these spheres (Sobhan, 1978:5).

Despite the constitutional guarantee of equal rights and protection, such egalitarian and democratic ideals remain eclipsed by the shadow of a society that remains under the grip of religious obscurantism.

## The Eclipse

In 1995, following one of the most barbaric cases of 'Salish' judgment where a couple was subjected to stoning for their alleged 'adultery', a documentary film was made. The film was based on interviews of cross-sections of people in Bangladesh. On January 10, 1993 in Sylhet, a northeastern district of Bangladesh, a couple was accused of cohabitation and thus unlawful sexual relationship. Although the couple claimed they were married and as in the case of rural Bangladesh they did not have papers (certificates) to prove their marriage as such, the local 'salish' did not recognise their marriage. Even the parents of the 23 year-old woman, Nurjahan, were punished. The couple was punished for committing adultery or *zina* according to the so-called Islamic laws of the Middle Ages. Nurjahan and her husband Mutalib were buried in a waist-deep pit and were pelted with 101 stones. Both of them survived the punishment. But overcome with humiliation, later that day Nurjahan committed suicide. This horrific violation of fundamental rights was picked up by the media and became a talking point for the entire nation.

A report published by Ain Salish Kendro (ASK) recorded the various aspects of social life in Bangladesh against which *fatwas* were declared in the period between 1992 and 1995.

### 1. Against use of contraceptives:

June 1993: 35 women in village in Serajgonj were ostracized because they used contraceptives.

November 1993: Two imams were suspended from their mosque duties because their wives used contraceptives.

### 2. Against education:

January 1995: Children deterred from going to BRAC schools. Imams refused to perform burial rites for children in BRAC schools.

February 1995: Schools were burnt following fatwas.

### 3. Against women's development:

January 1994: 600 mulberry trees cultivated by women were cut down by Madrassah students.

March 1994: 10 women were divorced for working with NGOs and ostracised for working outside the home which is against Islam.

### 4. Against freedom of speech:

May and June 1994: Religious extremists attacked or committed arson in several daily Bangla newspaper offices such as Bhorer Kagoj, Aajker Kagoj, and Jonokontho. In June 1991: case filed charging editors of Jonokontho under section 295(c) with malicious and deliberate intent of hurting religious sentiment of the people. Warrants of arrests issued against editors.

### 5. Blasphemy Law:

June 1992: Jamaat-i-Islami tables a bill in Parliament to make blasphemy punishable by death.

In the words of Dr Hameeda Hossain, Chairman of ASK and a founding member of the organization: 'As a legal aid and human rights centre, Ain O Salish Kendra (ASK) has been concerned with the recent surfacing of intolerance by religious extremists manifested in an increasing violence and violation of human rights both in the region and within the country. The chronology of violations of legal and human rights committed in the name of religion in the last two years, in particular, illustrates the threats to civil society. The attacks have been directed against women, in particular, but also against other progressive groups' (WLUML, 1996).

In a recent survey it has been seen that from 01 January 2005 to 28 February 2011, 1257 women were killed, 348 were ill-treated and 243 committed

suicide due to dowry related violence; 526 women were victims of acid violence; and 1876 women and 1598 girl children were victims of rape. The same source also shows that in 2010, 216 girls and women were victims of harassment (Saleheen, 2012).

The following are some of the recent incidents of violence and cruelty against women as results of 'salish':

#### Kashiganj, Rangpur

'Hafiza Begum Happy and Saheda Begum of Kashiganj village under Badarganj upazila were tortured after a 'salish' (arbitration). Sources said, ignoring husband's advice Happy in the last UP election worked in favour of UP member candidate Ilyias Ali. Saheda also worked in favor of Ilyias Ali. Happy's husband Hashem Ali committed suicide on June 25 allegedly as she did not comply with his advice. Later, a number of influential people including newly elected UP chairman Aynal Haque and UP member Abdul Kader held a 'salish' on June 26 and gave verdict against the two women' (July 20, 2011 The Daily Star).

In August, 2011 Ferdausi Begum, 32, wife of an expatriate Bangladeshi worker fell foul with a self-appointed bunch of rural arbitrators in Habiganj. On charges of relationship with another man, Ferdausi Negum was publicly whipped and ostracised from the community. Haunted by the pain and shame of torture, she jumped along with her four children before a running train. She and her two children died instantaneously, leaving the other two critically injured. Her husband Jilon Mia, worked as an expatriate worker in Saudi Arabia.

Shirin Akhter, a teenaged madrasah student took her life by hanging from a ceiling fan in Madaripur. The tragedy originated in a small tiff centering on an allegation of a goat chewing up grass into the so-called complainant's land. She was declared guilty in the local 'salish'. The public humiliation she suffered on being caned and forced to touch the feet of the complainant was simply too much for the teenager to bear.

Many of the informal trials in rural Bangladesh are conducted in light of the *fatwa*, declared by the religious leaders. The High Court in a verdict in July 2010 declared all kinds of extrajudicial punishment including those made in the name of *fatwa* in local arbitration illegal. This was an important decision but fell short of banning *fatwa*.

The court, however, directed the authorities concerned to take punitive action against the people involved in enforcing *fatwa* against women. Anyone involved, present, or taking part in or assisting any such conviction or execution would come under purview of the offences under the penal code and be subject to punishment, the court observed. It also observed infliction of brutal punishment including caning, whipping and beating in local 'salish' (arbitration) by persons devoid of judicial authority constitutes violation of the constitutional rights. The court said the people's rights to life and equal protection have to be treated in accordance with the law.

As per the rules of the Constitution, the citizens will not be subject to cruel, inhumane and degrading treatment or punishment, the High Court said in its ruling.

The civil society organisations filed a writ in 2009 and the lawyers filed two separate writs in 2010 with the High Court seeking necessary directives from the court to stop extrajudicial punishment in the name of *fatwa*. The petitions were filed following several newspaper reports and investigations by the petitioners into violence inflicted on women in the name of *fatwa* by local religious leaders and powerful corners. The petitions were filed by rights organisations – Bangladesh Legal Aid and Services Trust (BLAST), Ain o Salish Kendra (ASK), Bangladesh Mahila Parishad, BRAC Human Rights and Legal Services, and Nijera Kori, and four Supreme Court lawyers – Advocate Salahuddin Dolon, Barrister Mahbub Shafique, Advocate AKM Hafizul Alam and Barrister Iman-ul Hye.

It was alleged in the petitions that a number of deaths, suicides and incidents of grievous hurt of women were reported arising from punishment given in 'salish', but the law-enforcement agencies took no action to prevent those unlawful actions. Such kinds of conviction and punishment were clearly

extra-judicial. The petitioners referred to international obligation under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 and the Convention on the Elimination of All Forms of Discrimination Against Women, 1979.

Earlier on August 25, 2009, the High Court directed the secretary to Ministry of Local Government and Rural Development, officials of the law-enforcement agencies and the chairmen of union *parishads* and municipalities to take immediate measures against extrajudicial penalties in 'salish'. It also issued a rule asking them to show cause as to why their failure to prevent such illegal acts in compliance with their statutory obligations should not be declared illegal.

The High Court bench of Justice Mohammad Gholam Rabbani in 2001 in another verdict declared *fatwa* illegal, although an appeal is pending with the Appellate Division in this regard. The verdict of 2010 was wider than that of 2001 in scope having declared all kinds of extrajudicial punishment illegal. The verdict of July 2010 also asked the law enforcers to remain vigilant against extrajudicial punishment and report to the court about such incidents (The Daily Star, July 9, 2010).

In the name of traditional justice, rural women in Bangladesh, irrespective of their, religion, ethnic background and, sometimes, social status, continue to suffer because the hands of the modern laws fail to reach them. In sustaining the traditional, localised arbitration system dominant religion also plays a role. Interpretation, or misinterpretation of Islam in Bangladesh plays a role in it because few would dare criticise a practice for which some – even tenuous or just dubious support can be found in some *hadith* or *sunna* (traditions of the prophet). The following two cases illustrate the points well:

On January 23, 2011, fourteen-year old Hena Akhter was raped by her married cousin, 40-year-old Mahbub from the same village. Next day, a *fatwa* was announced at a village arbitration that she must be given 100 lashes. Her family was forced to accept village arbitration which imposed physical punishment in the name of religion on the victim, who was denied of immediate medical treatment. She fell unconscious

after nearly 80 lashes. Fatally injured Hena was rushed to Naria health complex where she succumbed to her injuries.

The death of 14-year-old Hena of Chamta village in Shariatpur district after she was forced to suffer arbitrary punishment at the hands of self-styled adjudicators provides a glaring example of how vulnerable women still are in Bangladesh society. The victim was raped by one of her relatives who probably she trusted.

Contrary to showing any sympathy for the grievous wrong done to her, the local elders in a 'salish' blamed the victim and sentenced her to one hundred lashes following a *fatwa* issued by the prayer leader of the village mosque. The victim, already traumatised by the rape, had to suffer the lashes. 'The word cruel is not enough to describe the mental state of those who perpetrated the monstrosity', wrote one analyst in a national newspaper.

'It was too much for the hapless girl from a poor household to bear. The parents, being too afraid to protest, had nothing to do but helplessly watch the tragic end of their beloved daughter at the local Upazila Health Complex as she succumbed to the physical and mental wounds she was compelled to suffer. And thus was a girl's right to live and see justice was denied by some so-called village guardians. Unfortunately, the vile drama of the murder of the girl by a hurriedly constituted "village arbitration court" was staged despite the existence of a High Court (HC) order that declares all kinds of extrajudicial trial, including those by *fatwa*, illegal and anti-constitutional. The said HC rule further provides that the executors, accomplices or even those present at the scene of such trial would come under the purview of offence according to the penal code'.

Nevertheless, the murder of the girl, Hena, in the name of a so-called trial could prick the conscience of the whole nation after it was reported in the media. And that, too, was possible only after the bereaved father of the girl, out of desperation, lodged a case against the culprits involved with the local police station, defying the intimidation of the powerful quarters of the village.

The case of Hena provides yet another illustration of the local level arbitrations, where it is mostly the poor and the vulnerable who are at the receiving end. And the so-called trials through 'salish' (village arbi-

tration) are often run by the powerful quarters of the locality while the half-literate village adjudicators and *fatwa* issuing *mollahs* are in cahoots with the local elite.

According to Ain o Salish Kendra's (ASK) estimate given in July 2010, some 10 to 12 such *fatwa*-based village trials took place the year before. As indicated in the foregoing, the reported number of such trials is just the tip of the iceberg. More studies and in-depth researches are necessary to determine the actual extent of the crimes being thus committed in the villages unknown to the civilised world (Alim, 2011).

In another incident, another girl, Serafina Mardi, a Christian girl died from burn injuries on February 21, 2011. She had set herself ablaze in disgust as she did not get any justice since she was gang raped by nine men of her village on April 4, 2010. Bypassing the legal system of the country, Serafina too was forced to accept 'salish', or community arbitration that promised her monetary compensation from the rapists and marriage to one of them. Failing to get justice, the young girl finally committed suicide.

In both cases, one Christian and the other Muslim, the local community bypassed the existing law of the land and used a version of religion to impose so-called traditional justice on these unfortunate girls. Unlike Hena, Serafina's family was able to file a rape case, but, community leaders along with the Shurshunipara Catholic Church, in an attempt to save the unity of the community forced the victim's family to withdraw the case. On April 23, 2010 they arranged arbitration and imposed an out-of court-settlement with the victim while the rape case was still under trial. The disturbing question in both the cases was how the existing system of law was totally ignored and the victims were forced to accept arbitration judgment by local community leaders. Referring to the arbitrations that took place in Hena and Serafina's case, Nina Gowsami, lawyer of Ain O Salish Kendra, a legal aid and human rights organisation, commented: 'Such arbitration has no validity. There should be no arbitration for rape case as it is completely non-compoundable'. Citing the above cases, the Human Rights lawyer added that the victims' families never voluntarily went for arbitration; rather, they were

forced to accept the judgment imposed on them because of the muscle power of the perpetrators.

In both cases, the local community leaders sought help of religion to carry out their abominable act. While the *Imam* of the local mosque Hafez Mafiz endorsed Hena's *dorra* (lashes), Reverend Bernard Tudu considered as the guardian of the parish, did not intervene while arbitration went on in the church's premise, which was an injustice on Serafina. Islamic scholar and academician Dr. Shamsheer Ali commented to the press: 'There is an established system of law in this country for rape cases. Other than cases like marriage and inheritance, we do not apply Islamic law for social mishaps like rape'. He further added that although there was specific punishment mentioned in the Quran for cases of adultery, nothing for rape was stated. Referring to Hena's case he said: 'As we are not governed by *Shariah* Council, such village arbitration has no basis at all. When anybody uses religion to dictate such justice, religion itself is being maligned'.

Father Advocate Albert Rozerio, Secretary General, Episcopal Commission for Justice and Peace in Bangladesh and Legal Advisor, Dhaka Catholic Archdiocese, defended the action of Reverend Bernard Tudu, saying: 'The initiative for the arbitration was not taken by the Father. As Fathers we always want peace and since our Christian religion preaches peace, Father Tudu must have supported the arbitration thinking it as a good step towards peace and settlement'. In reply to whether Church had the authority to carry out arbitration and deal with crimes like rape, Father Albert said: 'Each religious community or parish is under one or more parish priest. To assist him, a parish council looks after the education, health, social justice and legal arbitration of the community. The president of the parish is a Father and there is an understanding that to maintain the peace of the parish they are allowed to take any decision. But this does not have any legal basis. It can work only as a support to the existing law of the land but has no legal power'. Father Albert added: 'We have Canon Laws to govern a congregation, but for crimes like rape, murder, robbery the law of the state has to be followed'.



Although rape, its trial and judgment are not specifically mentioned in the Holy books, the Quran and the Bible, yet rape victims and their families were forced to accept judgment by illegal arbitration because of the lengthy and complicated legal framework of the country. 'Families often look for prompt remedy so they bypass the legal system. Although there is a time frame for the trials under the Nari-O-Shishu Nirjatan Daman Ain 2000, but it is hardly followed because of non-participation of public prosecution as well as police. Since police has more cases than they can handle they often request for time extension for investigation. Meanwhile, the perpetrators are released on bail and they frequently harass and threaten the victim and her family. This also gives them time to call local arbitration and impose out-of court settlements'.

Besides local community and religious leaders, the entire legal process played an inexplicable role in dealing with the rape cases of Hena and Serafina. In Hena's case, the investigation officer and police inspector wrongly filed the case and the civil surgeon and doctors of Shariatpur Sadar Hospital came up with a false post-mortem report. In Serafina's case the public prosecutor and the lower judiciary did not question Serafina's statement when she said she had filed a false case of rape, even when her medical report clearly showed she had been gang raped. The court informally knew about the illegal out-of-court settlement and acquitted the nine rapists. Nina says, 'Government was the plaintiff in this case. As long as the government does not withdraw the case, trial can still be held even if the victim withdraws and witnesses do not cooperate. The trial of Serafina's case could have been carried out using the medical report and other documents. Unlike Hena's case where High Court has taken up the initiative, interest of the lower judiciary in Serafina's case is not perceivable'.

Apart from being members of the weaker sex, both these girls – Hena Akhter and Serafina Mardi – were born to poor families. 'As a result, the worth of their life could easily be traded for the larger good of their respective communities – to the extent of protecting their rapists. As long as society's attitude towards rape and the victims do not change, and the legal system

continues to fail in delivering quick and exemplary punishment to rapists, girls like Hena and Serafina will continue to make the headlines for the wrong reason and the vulnerability of women irrespective of their religion, race and social status will continue to amplify' (Khan, 2011).

In another case, a woman in Srimongal was lashed 101 times for speaking to a man from a different community while a woman in Sirajganj was caned 100 times with fines for showing the audacity to file a complaint of rape with the court, and another woman of the same district was whipped in public after refusing a relative's sexual advances.

A writ petition, jointly filed by five organizations – Bangladesh Legal Aid and Services Trust, Bangladesh Mahila Parishad, Ain O Salish Kendra, BRAC and Nijera Kori in view of a series of reports on extra-judicial punishments, including whipping and caning, at village arbitrations ('salish'). The petition pointed out a number of incidents of extra judicial punishments. In one case, a woman and a man were lashed 101 times following orders given by village elders in Nobiganj of Habiganj district at a village arbitration in presence of a chairman. In response, the High Court directed the authorities concerned to investigate into the incidents of extra-judicial punishments by beating and lashing people in the name of arbitration or conciliation, and to take action against those responsible (The Daily Star, August 26, 2009).

The High Court ordered district officials in Shariatpur to explain why they failed to protect 14-year-old rape victim Hena from being whipped to death as per a *fatwa* on Monday. The deputy commissioner, the superintendent of police of Shariatpur and the thana nirbahi officer of Naria upazila – where the incident took place – will have to report to the HC in 15 days how it happened although the High Court had eight months ago declared *fatwa* illegal and a punishable offence. In a suo moto rule, the High Court directed them also to report what steps they have taken in this regard.

A High Court bench comprising Justice AHM Shamsuddin Chowdhury Manik and Justice Sheikh Md Zakir Hossain issued the rule following press reports on the killing of Hena. The bench headed by

Justice Syed Mahmud Hossain on July 8, 2010 delivered the verdict declaring illegal all kinds of extra-judicial punishment including those in the name of *fatwa* at local arbitrations.

Following three writ petitions, the court directed the authorities concerned to take punitive action against people involved in enforcing *fatwa* against women. It also observed that infliction of brutal punishment including caning, whipping and beating at local 'salish' (arbitration) by persons devoid of judicial authority constitutes violation of the constitutional rights.

Barristers Rabia Bhuiyan, Sara Hossain and Mahbub Shafique, and advocate KM Hafizul Alam, lawyers for the writ petitioners, placed the judgement to the bench following the incident involving Hena. Ain O Salish Kendra (ASK), a human rights watchdog, expressed deep concern and shock at the killing of teenage rape victim Hena. It demanded punitive action against those who enforced *fatwa* concerning her. The ASK called upon the government to take effective steps to stop recurrence of such incidents (February 3, 2011, *The Daily Star*).

Not that all such cases of abuse go unnoticed as the following case indicates:

When an 11-year-old girl was physically assaulted by village arbitrators and hospitalised, a national outcry followed. Though the girl was a victim of harassment by two local youths at Ghaura village on September 11, 2011 the arbitrators accused her of sexually alluring one of the two and beat her severely following a 'Salish'.

Following a case filed by her father with the local Police Station, accusing 10 people on September 12, police arrested seven of them the same day. The arrestees are stalkers Iqbal Matabbar, 35 and Taher Matabbar, and arbitrators Rafiq Matabbar, 55, Yunus Matabbar, 50, Sharif Munshi, 30, Jalal Matabbar, 30, and Ershad Sheikh, 25. Police quoted the victim's family as saying that Iqbal Matabbar had been stalking the girl, a class four student of a local primary school at Ghaura village, on her way to and from the school for over a month. According to case statement, Iqbal and his accomplice Taher Matabbar tried to take the girl to a house beside a road while she was returning home

from her relative's house at around 8:00am on September 11. As she cried for help, locals rescued her. Iqbal and Taher managed to flee the scene.

Hearing the news, Alamgir Matabbar, 50, former chairman of Ghaura union, called a 'salish' (arbitration) at his house at Ghaura village at around 8:00pm on September 11. At the arbitration, Taher, one of the two youths and also an accused in the case, blamed the girl for the incident, saying that she talked to Iqbal over the cellphone and requested him to come to the scene. On Taher's statement, arbitrator Alamgir Matabbar and others accused the girl of sexually alluring Iqbal and beat her unconscious. Later she was admitted to Bhanga Upazila Health Complex, police quoting locals said.

Hasina Mosharraf, a leader of Bangladesh Mohila Parishad Faridpur unit, demanded exemplary punishment to the accused and immediate arrest of the main arbitrator. She said, 'Although the women of the country advanced a lot but outlook of the society has not changed yet. Whenever women tried to stand on their own feet, a section of the society turned violent against them. Happy and Saheda Begum are the example of such cruelty' (*The Daily Star*, September 16, 2011).

### Civil Society Activism

There are nearly 6,000 NGOs of various sizes and strengths operating in Bangladesh. Some of the leading NGOs are like BRAC, Proshika, ASA, etc. (Chowdhury, 1989). Ain-o-Salish Kendro is a relatively small NGOs in Bangladesh. Since September 20 of 1986, Ain Salish Kendro (ASK) has been providing legal aid, when required, to the victims of human rights violation and earned national and international recognition. ASK remains vocal against repression on women and children, *fatwa* (religious edict), extra-judicial killing, custodial torture, minority repression, deprivation of indigenous people of their rights and repression on workers. Legal steps taken by ASK resulted in high court directives on a number of issues including ban on slum eviction without rehabilitation, custodial torture and corporal punishment at educational institutions.

Ain O Salish Kendra (ASK) has been fighting for

the rights of the common people for the last 25 years. In particular, they have worked for the betterment of women in Bangladesh, who are often victims of domestic violence and discriminatory laws that deprive them of basic rights. Many of these women are not even aware of what their rights are. ASK has worked relentlessly to establish the basic rights of those who do not have the resources to fight for their own rights.

Initially, ASK was more involved in solving family conflicts through 'salish' (informal interventions) and trying to reach an acceptable solution of problems; however, the increasing number of people taking legal aid from ASK compelled it to expand its activities. In the mid-eighties as military rule came under heavy pressure from populist movements that demanded a return to a representative structure of governance, ASK was born in a climate of pro-democracy movement. Gender justice was the main issue for ASK. It was recognised that without the active citizens' participation, state institutions and authoritarian traditions of family and community will not change.

Five of the founding members came from a legal background, while the rest of them had vast experience of development work. ASK, in addition to legal issues, was able to take a more holistic support system on behalf of the disempowered women, workers, minorities and others similarly deprived. ASK was founded by Abdul Khaleque, Aminul Haq (Late), Amirul Islam, Fazle Hasan Abed, Hameeda Hossain, Khursheed Erfan Ahmed, K M Subhan (Late), Salma Sobhan (Late) and Taherunnessa Abdullah. Salma Sobhan, a Cambridge-educated lawyer was the first executive director. She served ASK in that capacity until her retirement in 2001.

While legal aid was often limited to a band aid approach, the experience they gained in addressing individual disputes led the members of ASK to make more strategic interventions to address the social and political causes of conflict in Bangladesh. In the 1980s and 1990s, when there was a growing wave of Islamic extremism, ASK became a pace setting catalyst, addressing inequalities through legal intervention, building solidarity amongst human rights defenders around concepts of human rights, gender and social justice, campaigning in national and international forums –

challenging the state.

Currently, the organisation operates 17 units with around 240 activists. ASK continues to provide legal support to the deprived masses. While working on women's rights issues, ASK discovered that children were also a highly vulnerable group. ASK decided to single out the rights of the working street children. ASK believes that poverty is the worst form of human rights' violation. Thus, economic empowerment, especially for women deprived of their rights and livelihoods under a patriarchal society, became the prime focus of ASK. ASK began to work on women's property rights. ASK has seven Legal Aid Clinics working in the capital. In the case of human rights violation, ASK send its activists out of Dhaka as well to provide immediate help. In addition, ASK plays a major role in monitoring the human rights situation in the country, especially in the areas of civil and political rights, economic, social and cultural rights, women rights and labor rights. ASK publishes a quarterly bulletin, human rights and annual report and special publications and articles. Its other programs include advocacy initiatives, child rights, community activism, human rights awareness, and legal aid.

Talking about the philosophy of the organisation, Sultana Kamal says that ASK's philosophy is to establish connection among people. The communication among citizens and the communication between the government and citizens is a must for establishing social justice. 'The whole effort often faces different challenges. It is a very small organisation that cannot reach every citizen. We can have a concern on a particular issue and recommend some probable solution of the problem but we cannot always make people listen to us,' says Sultana Kamal.

Since its inception in 1986, ASK, with its team of dedicated individuals, has been instrumental in helping the marginalised people in society to raise their voice. ASK has brought different rights issues under the limelight and made the government rethink about many of its policies. In a recent interview the Executive Director of the organisation stated: 'Social justice and equality must be gained. We hope that more people will be involved with our struggle for gaining human rights. We hope to establish a healthy practice

of democracy where citizens and the rulers never go for confrontation rather co-exist with mutual respect and cooperation. We are fighting against all the process of disempowerment of people and the fight will continue' (Urmee, 2011). ASK has been a brave and relentless champion of human rights in Bangladesh.

'Salish', a village-level traditional justice mechanism mainly conducted in informal manner, which is able to resolve a good number of disputes at grassroots levels, can be turned into a formal nature which would protect human rights, they added. The speakers said this at the roundtable on 'The role of "Salish" in resolving local argument: The problems and possibilities' by Nagorik Udyog, an NGO, at Cirdap auditorium in the city (February 24, 2010) *The Daily star*.

'Positivist legal theory', according to Nobles and Schiff, 'operates on the assumption that the legal system can insulate itself from other kinds of communication and thereby maintain its autonomy, provided that it can take communications from other systems into itself only at those points where it runs out of good reasons for deciding issues using materials already identified by authoritative sources' (Nobles and Schiff, 2006:82). Such ambitions notwithstanding, legal systems in most societies are characterised by plurality of perspectives and traditions. Carol Smart points out that '...law constitutes a plurality of principles, knowledges, and events, yet it claims a unity through the common usage of the term "law"' (Smart, 1989: 4).

Bangladesh follows some degree of legal pluralism which was introduced by the British who applied a combination of civil law and religion specific personal law for the Muslims and the Hindus respectively. In addition to the inheritance of the British law and the Common Law traditions, Muslims Personal laws govern property rights, marriage, divorce, alimony and custody of children (Chaudhury and Ahmed, 1980:18). These laws are, by and large, discriminatory against women. A reform of the legal system to correct these gender-biases is desirable but politically not feasible. In 2008, when a Caretaker government wanted to implement a set of rules removing such inequities,

there was a sharp reaction from the conservative sections of the society. The reactions led the administration to retract. In order for the legal reforms to be sustainable, there has to be a movement from the below to make the public conscious of their responsibilities and duties to build a truly democratic and equitable society.

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