

BEYOND CRIMINAL JUSTICE: TOWARDS TORT LIABILITY FOR SEXUAL VIOLENCE AGAINST WOMEN

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ABSTRACT

Contrasting the increasing rates of rape, sexual assault and sexual harassment of women with the decreasing rate of convictions evinces the inefficacy of the criminal justice system in curbing the sexual violence epidemic in Bangladesh and the need to search for an alternate remedy. It is in this context that I propose it is imperative for victims of sexual violence to have a tenable recourse in civil law, more specifically an action for damages in tort against both: the perpetrator and relevant third parties. While there have been some judicial and legislative attempts to compensate victims of sexual violence monetarily, these have tended to restrict themselves to the realm of criminal law. As such, the central argument of this article is that the move towards compensating and redressing victims of sexual violence has to shift away from the periphery of criminal law to remedies under tort law since the latter is arguably more apt in responding to the diverse harms and losses faced by sexual violence victims.

I. INTRODUCTION

Contrasting the increasing rates of rape, sexual assault and sexual harassment of women with the decreasing rate of convictions evinces the inefficacy of the criminal justice system in curbing the sexual violence epidemic in Bangladesh and the need to search for an alternate remedy.¹ It is in this context that I propose it is imperative for victims of sexual violence to have a tenable recourse in civil law, more specifically an action for damages in tort against both: the perpetrator and relevant third parties. While there have been some judicial and legislative attempts to compensate victims of sexual violence monetarily, these have tended to restrict themselves to the realm of criminal law. As such, the central argument of this article is that the move towards compensating and redressing victims of sexual violence has to shift away from the periphery of criminal law to remedies under tort law since the latter is

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¹ For the purposes of brevity and convenience, the term 'sexual violence' will henceforth be used as a shorthand for the incidences of rape, sexual assault and sexual harassment.

arguably more apt in responding to the diverse harms and losses faced by sexual violence victims.

The first half of this article will assess the efficacy (or lack thereof) of existing provisions pertaining to compensation for victims of sexual violence that exist in criminal law (namely in the Nari-O-Shishu Nirjatan Daman Ain 2000 and Code of Criminal Procedure 1898) and argue that they are wholly inadequate in compensating sexual violence victims. The second half of this article will seek to conceptualise acts of sexual violence as actionable torts by arguing that rape, sexual assault and sexual harassment, undoubtedly constitute common law torts of trespass to the person and can also give rise to third party liability in the tort of negligence or through the doctrine of vicarious liability. This is followed by a discussion on the pending yet potentially landmark case of *Begum Shamsun Nabar vs. British American Tobacco Bangladesh (BATB)*², which presents the only attempt by a victim of sexual violence (namely sexual harassment) to establish a judicial precedent that would allow such victims in Bangladesh to sue for damages. Then it will be shown just why a claim for compensation in tort, rather than criminal law, is more empowering to victims of sexual violence, namely because of the lower evidential threshold, absence of anti-women laws and most crucially, the ability to impose vicarious liability and duty of care on third parties (such as employers and occupiers). The final part of the article assesses the steps that need to be taken to move forward in establishing tort liability for sexual violence against women, especially given the underdevelopment of tort law in Bangladesh.

II. INADEQUACY OF EXISTING PROVISIONS

A. Compensation under Nari O Shishu Nirjatan Daman Ain 2000

The Nari O Shishu Nirjatan Daman Ain 2000, translated as the Women and Children Repression Prevention Act 2000 (henceforth '2000 Act') is the cardinal and overriding legislation pertaining to violence against women (including sexual violence), section 3 of which asserts the supremacy of the Act as a 'special law' in this regard. Therefore, when a particular act (e.g. rape) is covered by both the 2000 Act and another statute (e.g. Penal Code), the former will prevail.³ Sections 15 and 16 of the 2000 Act specifically contain provisions pertaining to monetary compensation for victims of sexual violence.

² 66 DLR (AD) (2014) 80. Henceforth referred to as simply 'the *BATB* case'.

³ *Afzalul Abedin and Others v Government of Bangladesh and Others*, 10 BLT (HCD) (2002) 490; *Kamruzzaman v The State*, 10 BLD (AD) (1990) 190; See also: Rahman, M. M., *Nari-O-Shishu Nirjatan Ain* (Prevention of Women and Children Repression Act), New Warsi Book Corporation, 2011 at pp. 33-35.

The need for a compensatory mechanism for rape victim was strongly emphasised before the 2000 Act was enacted. Writing in relation to the predecessor to the 2000 Act, Nari-o-Shishu Nirjatan (Bidesh Bidhan) Ain, 1995 ('1995 Act'), Late A.K. Badrul Huq J, as he then was, stressed the need for compensating rape victims and recommended inserting a specific provision to this effect in the 1995 Act in the case of *Al Amin vs. State*⁴ where a girl was gang raped and photographed:⁵

Rape is a breach of the victim's fundamental right to life. It is the violation of human dignity of the victim. Rape is an indictable crime. Mere punishment of the offenders of sexual assault cannot give much solace to the victim and her family members. Adequate monetary compensation upon the offenders may redress the wrong and damage caused to the victims and the family members...A permanent mode of compensation has to be worked out. The Government may consider the matters under observations. (Emphasis laid)

Notably, Huq J also made some specific points in relation to the calculation of compensation:⁶

In the assessment of compensation, the emphasis has to be on the compensatory rather than the punitive element. The quantum of compensation will depend upon the peculiar facts of each and every case. No rigid formula may be evolved. **This compensation has to be awarded independently having no nexus with the provision of imposition of fine** embodied in the Penal Code and the same has to be inserted in the Ain itself. (Emphasis mine)

One year after the judgment, the 2000 Act was enacted with specific provisions relating to compensation. Section 15 of the Act, states that the court 'may consider the fine if it thinks necessary' which is imposed for offences under sections 4 to 12 of the Act (which include, inter alia, rape, gang rape and sexual assault/oppression etc.) as damages to the victim or an aggrieved person.⁷ Further, it allows this fine to be realised from any future inheritable property where the convict is unable to pay the fine from his existing property. Section 16 of the Act lays down the procedure for realising the fine or the fine as damages (i.e. through auction sale and attachment).

While the insertion of provisions pertaining to compensation in the 2000 Act was indeed a welcome change and may, on the surface, seem quite adequate

⁴ (1999) 19 BLD (HCD) 307.

⁵ *ibid* at para. 110.

⁶ *ibid*.

⁷ Rahman *supra* note 3 at p. 251.